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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

PLAINTIFF UNITED STATES' CORRECTED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Hearing Date:	March 13, 2017
Time:	10:00 AM
Place:	Courtroom 5A
Judge:	Hon. Michael W. Fitzgerald

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I. INTRODUCTION

This antitrust enforcement action rests on a few simple propositions: that rival distributors of television programming compete for subscribers as much through the channels they carry as through the prices they charge; that senior executives at those distributors can more easily resist competitive pressure to carry a channel if they agree to tell each other what they are planning; and that this corruption of competition harms consumers and is condemned under the antitrust laws.

Defendants' motion to dismiss should be denied because the Complaint plausibly alleges that DIRECTV orchestrated a series of agreements with its rivals to exchange confidential, forward-looking, strategic information about whether or not they would carry the Dodgers Channel and that these agreements harmed competition. The companies that shared strategic information with DIRECTV—Cox, Charter and AT&T—directly compete with DIRECTV for customers. Keeping each other updated on the status of their negotiations and their plans for carrying the Dodgers Channel reduced the competitive pressure they otherwise would have felt to carry it and made it more likely that the channel would be blacked out for customers unlucky enough to live in the Cox, Charter and AT&T Los Angeles service areas.

The Complaint alleges that DIRECTV orchestrated agreements to exchange information with its competitors that materially influenced each company's decision whether to carry the Dodgers Channel. Specifically, the Complaint alleges:

- Dan York, DIRECTV's Chief Content Officer, agreed with his Cox rival to give each other a "heads-up" "before it was public knowledge" if either company was going to launch the channel. Compl. ¶¶ 48, 74.
- Charter's senior content executive and Mr. York discussed their Dodgers Channel negotiations while they were ongoing. The executive also 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." *Id.* ¶¶ 14, 48, 81, 83, 86.

- A rival executive at AT&T sent Mr. York a coded text message with Time Warner Cable's latest asking price and Mr. York responded that he would not want AT&T to accept that offer. *Id.* ¶¶ 13, 48, 99.
- The conspirators had a total of 32 communications during the period where each company formed its strategy and negotiated for the Dodgers Channel, including eighteen calls, eight texts, four voicemails, and two in-person meetings. *Id.* ¶¶ 10, 12-14, 48, 51, 67-68, 72, 74-75, 78-82, 84, 86, 91, 94, 96, 99.
- The circumstances make it reasonable to infer that during these communications the rival executives agreed to share, and did share, information about whether to carry the Dodgers Channel. *Id.* ¶¶ 7, 10, 12-15, 48, 51, 53-54, 58-59, 67-68, 72-75, 78, 81-82, 84, 86, 94, 96-97, 99.
- These information-sharing agreements harmed competition. Each company's Dodgers Channel strategy depended in large part on the decisions of its rivals. The information they shared made it less likely the conspiring distributors would carry the Dodgers Channel and corrupted the competitive process. *Id.* ¶¶ 8, 9, 15-16, 46, 48, 53, 57-58, 60, 74-75, 81-83, 85, 86, 93, 95, 97.

The United States brought this case to stop senior executives at some of the country's biggest and best-known video distributors from sharing competitively sensitive information during simultaneous negotiations with a common supplier. Defendants attempt to minimize these strategic information exchanges between direct competitors as nothing more than "industry chatter." Defs. Mem. at 13. But the United States has alleged far more than that, and the Court should not accept Defendants' blithe suggestion that this behavior is benign.

When construed in the light most favorable to the United States, and when all reasonable inferences are drawn in its favor, the Complaint's voluminous, detailed allegations are more than sufficient to plausibly allege that DIRECTV violated the antitrust laws. Accordingly, Defendants' motion to dismiss should be denied.

II. BACKGROUND

SportsNet LA (the "Dodgers Channel") is a regional sports network owned by Time Warner Cable ("TWC"). Since its launch in 2014, the Dodgers Channel has been the exclusive source of almost all live telecasts of Dodgers games in the L.A. area. Compl. ¶¶ 3, 44. The Complaint alleges that Defendant DIRECTV orchestrated agreements with three of its direct competitors—Cox, Charter, and AT&T—through which they shared information about their plans for the Dodgers Channel and their ongoing negotiations with TWC for its carriage. These agreements made it less likely that any of the conspirators would carry the channel and deprived L.A.-area consumers of a competitive process that was fully responsive to their demand for the Dodgers Channel. *See, e.g.*, *id.* ¶¶ 1-5, 16.

DIRECTV and its rivals are pay television providers, also known as multichannel video programming distributors ("MVPDs"). *Id.* ¶ 3 n.1. They acquire the rights to carry video content from programmers and then sell packages of video content to subscribers. *Id.* ¶ 102. MVPDs compete for subscribers on the basis of both price and content, with live, local sports content like the Dodgers Channel being particularly desirable to many consumers. *Id.* ¶¶ 3, 103-104. At the time of the 2014 Dodgers Channel negotiations, the MVPD industry in L.A. was highly concentrated; most consumers had access to service from just three or four MVPDs. *Id.* ¶¶ 107-09, 114-20.

DIRECTV was naturally the ringleader of these anticompetitive agreements. *Id.* ¶ 7. As a satellite provider, DIRECTV competes with every other MVPD in the area—unlike cable companies, such as Cox and Charter, which serve discrete geographic areas and do not compete with each other for subscribers, and legacy telephone companies, such as AT&T, which also serve limited territories and compete with the cable companies but not with each other. *Id.* ¶¶ 7, 105. This meant that if DIRECTV did not carry the Dodgers Channel, it risked losing subscribers to any MVPD in L.A. that did carry; conversely, if DIRECTV did carry the Dodgers Channel, it stood to gain

subscribers from any MVPD that did not. *Id.* ¶¶ 7-8. Cox, Charter, and AT&T understood that if DIRECTV decided to carry the Dodgers Channel, competitive pressure could force them to carry it too—even if it meant paying more than their financial analyses suggested they should. *Id.* ¶¶ 8, 46. DIRECTV also recognized that it would lose leverage with TWC and risk losing subscribers each time any other MVPD chose to carry the channel. *Id.* ¶¶ 9, 45.

Just two years earlier, in 2012, these competitive dynamics induced DIRECTV to carry the similar Lakers Channel at a higher price than DIRECTV had wanted. *Id.* ¶¶ 37-39. In those negotiations, TWC incentivized the smaller MVPDs to launch first by offering early movers a most favored nation clause that would give them the benefit of better deals larger MVPDs might strike later. *Id.* ¶¶ 30, 38. It worked. Charter and AT&T launched before the season began, which pressured first Cox and then DIRECTV to sign shortly thereafter. *Id.* ¶¶ 32-37. DIRECTV was "losing hundreds of customers per week" to its competitors that had launched the network. *Id.* ¶ 37. DIRECTV ultimately paid TWC's initial asking price—the same price as the smaller MVPDs, and "almost 50% more" than its financial analysis had suggested the Lakers Channel was worth. *Id.* ¶¶ 30, 37. By losing the race to carry the Lakers Channel, DIRECTV had exposed itself to significant subscriber losses and had lost out on the price and other concessions from TWC it generally would have been able to command by virtue of its ability to reach more subscribers than its MVPD rivals. *Id.* ¶¶ 30-31, 38-39. DIRECTV approached the Dodgers Channel negotiations determined not to allow TWC to successfully pit the MVPDs against each other again. *Id.* ¶ 39.

In January 2013, TWC acquired rights to telecast Dodgers games starting with the 2014 season. *Id.* ¶¶ 3, 40. 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 April 2014 start of the baseball season. *Id.* ¶¶ 41, 50, 52, 62-63, 69, 74-75, 84-86, 92, 98. 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. These exchanges disrupted the competitive process and made it less likely that the co-conspirators would launch the Dodgers Channel. The reason for this is straightforward: an MVPD need not worry about losing subscribers to a competitor over content if it has learned the competitor will not carry that content. *Id.* ¶ 8.

Emboldened by their communications, the co-conspirators could comfortably resist TWC's offers, which they had been unable to do with the Lakers Channel. *Id.* ¶¶ 5, 8, 14-16, 36, 70, 74, 82-83, 85, 96-97. TWC tried to reach a deal with DIRECTV, significantly improved its offer to DIRECTV as the April 2014 start of the baseball season approached, *id.* ¶ 62, and even offered to enter into binding arbitration with any MVPD when none of them had carried by August 2014, *id.* ¶ 63. None of it worked.[1] TWC and its affiliates (now including Charter) remain the only L.A.-area MVPDs to carry the Dodgers Channel—leaving hundreds of thousands without access to telecasts of live Dodgers games—as the result of a process corrupted by DIRECTV's unlawful information-sharing agreements. *Id.* ¶¶ 43-44.[2]

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[1] Among many inappropriate factual contentions, Defendants claim that the co-conspirators decided not to carry the Dodgers Channel solely because of TWC's high asking price. Defs. Mem. at 2, 6, 10. These factual questions cannot be resolved on a motion to dismiss. And despite making numerous factual claims, Defendants do not claim any procompetitive benefit or justification for DIRECTV's scheme to share competitively sensitive information with its direct competitors.

[2] Defendants cite to various news articles and other sources which are extraneous to, and not referenced by, the Complaint. Defendants did not move for judicial notice and the Court should disregard the materials in their entirety. *See Hendricks v. Wells Fargo Bank, N.A.*, No. CV-15-01299, 2015 WL 4916785, at *1 (C.D. Cal. Aug. 17, 2015) ("As a general rule, a district court may not consider any material beyond the pleadings in ruling on a 12(b)(6) motion to dismiss for failure to state a claim." (citing *Skilstaf v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012))). Defendants' assertions that the Lakers Channel performed poorly, Defs. Mem. at 2, 5-6, and that Charter had decided to divest its L.A.-area cable operations, *id.* at 5, lack any citation and should be disregarded for the same reasons.

III. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Such a statement need not include "detailed factual allegations" but must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation omitted). When evaluating a complaint's sufficiency, "[a]ll allegations of material fact are taken as true and are construed in the light most favorable to [the plaintiff]." *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 501 (9th Cir. 2010). A court must also "draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir. 1987).

To survive a motion to dismiss, a plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S at 570. "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also ICANN*, 611 F.3d at 499, 509 (reversing dismissal where facts alleged were enough to "nudge" Sherman Act claims "across the line from conceivable to plausible"). Moreover, "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011).

IV. ARGUMENT

Section 1 of the Sherman Act outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. The Supreme Court has interpreted this language to mandate two separate inquiries: whether the defendant engaged in "concerted action" and whether this action was anticompetitive. *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190-91

(2010). To determine whether an agreement is anticompetitive, courts examine "the nature of the restraint and its effect, actual or probable." *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). Here, the United States alleges that DIRECTV agreed with its rivals to exchange confidential, forward-looking, strategic information about each company's Dodgers Channel negotiations. The Supreme Court first held almost a century ago that agreements to exchange information may violate the antitrust laws. *See, e.g., United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 389-90 (1923); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 411-12 (1921). Although information exchanges are sometimes used as evidence of an agreement to fix prices, "[t]here is a closely related but analytically distinct type of claim, also based on § 1 of the Sherman Act, where the violation lies in the information exchange itself." *Todd v. Exxon Corp.*, 275 F.3d 191, 198-99 (2d Cir. 2001) (Sotomayor, J.); *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 447 n.13 (9th Cir. 1990).

The Complaint plausibly alleges both that DIRECTV engaged in concerted action by agreeing with its rivals to exchange strategic information, and that these agreements harmed competition by making it less likely that the conspirators would carry the Dodgers Channel and by disrupting the competitive process. These allegations are sufficient to plead a violation of the Sherman Act.

A. The Complaint Plausibly Alleges that DIRECTV Agreed to Exchange Confidential, Forward-Looking, Strategic Information About its Carriage Plans with Each of Cox, Charter, and AT&T

The Complaint alleges that DIRECTV's top content executive, Mr. York, exchanged strategic information about the Dodgers Channel with rival executives at Cox, Charter, and AT&T. That is sufficient to plausibly allege concerted action between DIRECTV and its rivals.

Section 1 outlaws agreements in restraint of trade "whether express or implicit, whether by formal agreement or otherwise." *Cal. ex rel. Harris v. Safeway, Inc.*, 651

F.3d 1118, 1132 (9th Cir. 2011). In the context of agreements to exchange information, horizontal competitors engage in concerted action through the simple reciprocal act of sharing material information. In *United States v. Container Corp. of America*, 393 U.S. 333 (1969), for example, the Court condemned an "informal" agreement characterized by "an infrequency and irregularity of price exchanges" between competitors. *Id.* at 335-38. "[A]ll that was present was a request by each defendant of its competitor" for recent price information and that the competitor "usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it." *Id.* at 335. The Court found this informal exchange sufficient to establish concerted action under Section 1. *Id.*

The Court emphasized that sharing information creates an expectation of reciprocity: "when a defendant requested and received price information, it was affirming its willingness to furnish such information in return." *Id.* Similarly, Professors Areeda and Hovenkamp, in "their leading treatise on antitrust law,"[3] explain that "[n]othing more" than a simple conversation is needed to prove concerted action: "[t]he respondent forms an agreement to give information to its interrogator when it answers the question." VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1406f, at 36 (3d ed. 2010); *see also In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 902 (N.D. Cal. 2008) ("[T]he exchange of price information alone can be 'sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act.'" (quoting *Container Corp.*, 393 U.S. at 335)).

The Complaint alleges that Mr. York requested and received strategic information about the Dodgers Channel from senior executives at Cox, Charter, and AT&T. It also alleges extensive additional communications between Mr. York and these same rivals, the surrounding circumstances of which make it reasonable to infer

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[3] *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 906 (9th Cir. 2007).

they were about the Dodgers Channel. And the Complaint alleges that the MVPDs had a powerful motive to exchange such information. As explained above, Mr. York's agreements helped the MVPDs resist carrying the Dodgers Channel, secure in the knowledge that their competitors would not launch and therefore they would not face subscriber losses. *See City of Long Beach v. Standard Oil Co. of Cal.*, 872 F.2d 1401, 1407 (9th Cir. 1989) (holding that evidence showing defendants "had substantial incentives to conspire" could support "an inference of agreement," which presented fact issue for trial).

The Complaint alleges three bilateral agreements. Each agreement involved one common participant—Mr. York—and each agreement involved exchanging the same type of information during the same time period. Given these similarities, the allegations of each individual agreement strengthen the inference of the others. *See In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1116 (N.D. Cal. 2012) (using evidence of one bilateral agreement to support another where the agreements were "identical" and involved the same executives); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 402-03 (3d Cir. 2015) (explaining evidence of one conspiracy can support the inference of another "if two markets are sufficiently similar or adjacent and the relevant activities therein are sufficiently linked or tied in some way, e.g., the people involved in the conspiracies are the same or overlapping"). The allegations relating to these information-sharing agreements are further supported by the allegations that Mr. York and his rival at Charter had a pattern of sharing information with each other during content negotiations. *See* Compl. ¶¶ 79-80.

Thus, contrary to Defendants' argument, Defs. Mem. at 10, the Complaint does not allege parallel conduct alone. Defendants' reliance on parallel conduct cases is misplaced because the Complaint alleges specific instances when defendants shared information. *See Container Corp.*, 393 U.S. at 335 n.2 (noting that case where defendants reciprocally exchanged information was "obviously quite different" from case of purely parallel business conduct); *cf. Twombly*, 550 U.S. at 564-66 (approving

dismissal of complaint where it alleged no facts to support conspiracy allegation). Antitrust plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1064 (N.D. Cal. 2015) (denying a motion to dismiss "after considering, as it must, the [plaintiff's] complaint as a whole"). Taken as a whole, the United States' allegations are more than sufficient to survive a motion to dismiss.

1. The Complaint Alleges that Cox and Charter Admitted to Engaging in Concerted Action with DIRECTV

Cox's senior content executive admitted that he discussed ongoing negotiations for the Dodgers Channel with Mr. York on two separate occasions. On one occasion, he and Mr. York agreed to "give each other a heads-up if their respective MVPDs were going to launch" the Dodgers Channel "before it was public knowledge." Compl. ¶¶ 48, 74. And 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. *Id.* ¶¶ 48, 75. 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." *Id.* ¶¶ 7, 103.

Likewise, Charter's senior content executive admitted that he and Mr. York shared their respective assessments of the Dodgers Channel while their negotiations with TWC were ongoing. He admitted that he 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." *Id.* ¶¶ 14, 86. It is reasonable to infer that Mr. York and the

Charter executive were signaling that their respective companies did not intend to carry the channel. This inference is further supported because the conversation was held in private, away from both their consumers and TWC. *See In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 989 (N.D. Ohio 2015) (finding inference of concerted action stronger where defendants' communications took place "in private" at suspicious time periods); Areeda & Hovenkamp, *supra*, ¶ 1406f, at 36 ("Telephone calls among rivals are not inevitable and are not inherent in doing business. This is extra-market behavior involving consensual and collaborative activity.").

These admissions are sufficient to establish that DIRECTV engaged in concerted action with both Cox and Charter. *Container Corp.*, 393 U.S. at 335; *see also Capacitors*, 106 F. Supp. 3d at 1067 (denying motion to dismiss where plaintiffs alleged that two defendants "conducted an exchange of competitively sensitive information" and "agreed to make such exchanges in the future" (emphasis omitted)). And these admissions provide a useful lens through which the Court should view the Complaint's other allegations of concerted action, which plausibly suggest that Mr. York's agreements went further than the Cox and Charter executives admitted and also plausibly implicate AT&T.

2. The Complaint Plausibly Alleges that DIRECTV's Information Exchange Agreements with Cox, Charter, and AT&T Went Beyond Those Admitted

Defendants fail to grapple with the Complaint's extensive allegations that DIRECTV's agreements to exchange strategic information with Cox, Charter, and AT&T during the Dodgers Channel negotiations went beyond what the executives admitted.

Cox: Apart from their admitted agreement, Mr. York and his Cox rival also spoke at least ten times between March and July 2014 as the companies' Dodgers Channel carriage negotiations continued, Compl. ¶ 72, and at least once about the Dodgers Channel in fall 2013, *id.* ¶ 67. Based on the existence of their admitted agreement and the frequency of their communications during key moments in their

companies' Dodgers Channel negotiations, some of which were admittedly about the Dodgers Channel, it is reasonable to infer that DIRECTV and Cox also shared information about their negotiations on other occasions. *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 173-76 (D. Conn. 2009) (relying in part on evidence that "defendants' executives often communicated immediately before or after an EPDM price increase" to deny defendants' motion for summary judgment).

Charter: Beyond the admitted discussion of their companies' assessments of the Dodgers opportunity, Mr. York and his rival at Charter also spoke at key points as Charter assessed the channel and both companies negotiated with TWC. For example, Mr. York spoke to the Charter executive the day before he recommended that Charter's CEO wait on the Dodgers Channel until after DIRECTV launched. Compl. ¶ 81. He later used his knowledge of DIRECTV's plans, telling a colleague at Charter that "I think Direct will not be there at launch." *Id.* ¶ 83. The Charter executive tried to speak with Mr. York again the day Charter set its content budget for the 2014 fiscal year. *Id.* ¶ 82. They checked in after each company had received TWC's offer, *id.* ¶ 84, and as negotiations continued, the Charter executive maintained to TWC that Charter would not carry the channel unless DIRECTV launched first, *id.* ¶ 85. These allegations plausibly suggest that Mr. York's agreement with Charter went beyond the Charter executive's admissions.

AT&T: The Complaint plausibly alleges that Mr. York also agreed to exchange confidential Dodgers Channel information with the senior content executive at AT&T. Mr. York and this rival executive exchanged suspicious text messages that appear to discuss the price of the Dodgers Channel. The day after TWC told AT&T it was unlikely to move off of its $[#.##] offer, the AT&T executive texted Mr. York: "Forgot to tell you but we got a [##] mph pitch yesterday," then, "Consistent with what you got?" *Id.* ¶¶ 98-99; *see id.* ¶ 99 n.5 (explaining redactions). The number in the text matched the cents in TWC's offer to AT&T, and the executive has described content

offers as "pitches." Mr. York replied: "Hope u hit it out!" *Id.* ¶ 99. It is reasonable to infer from the "[##] mph pitch" text that the AT&T executive was sharing the terms of TWC's offer and asking if DIRECTV's offer was the same. It is also reasonable to infer that simply by responding Mr. York was agreeing to respond to such requests, and that by telling his competitor how he would have wanted him to respond, Mr. York was signaling he would respond to the same offer the same way. The question itself also supports the existence of an agreement. *See SRAM*, 580 F. Supp. 2d at 901-03 (holding that an email from an employee at one competitor to another asking "[a]re you willing to exchange product roadmaps again?" supported an inference of conspiracy).

The Complaint also alleges multiple communications between Mr. York and the rival AT&T executive that coincide with key events in AT&T's Dodgers Channel negotiations. *See Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 904-07 (N.D. Cal. 2009) (finding, on summary judgment, that inference of conspiracy was reasonable based on the volume of contacts and communications, some of which "track[ed] alleged coordinated production cuts and price increases" and some of which involved admitted co-conspirators). For example, 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. Compl. ¶ 96. 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." *Id.* 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. *Id.* ¶ 97.

* * *

The Complaint bolsters these allegations with DIRECTV's own statements. For example, in May 2014 CEO Mike White told investors that distributors 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." Compl. ¶¶ 9, 58. At the time, the baseball season had just begun and Dodgers Channel negotiations were

ongoing at DIRECTV, Cox, Charter, and AT&T. *Id.* Mr. White's statement suggests that DIRECTV and its competitors were "stand[ing] together" in their negotiations—that is, they were engaged in concerted action.

Further, the Complaint alleges that 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. *Id.* ¶¶ 48, 68, 84, 94. He ultimately connected with each of them. *Id.* After those conversations, Mr. York wrote that none of DIRECTV's competitors "appear[ed] in a rush to do a deal," even though it was early in the negotiations and none of the distributors had made public statements about their plans. *Id.* ¶ 48. It is reasonable to infer that Mr. York learned that information from his competitors. Defendants address neither Mr. White's statement nor this sequence of events at the start of the negotiations. Defendants also ignore the allegation that during the negotiations, DIRECTV received an anonymous complaint that Mr. York had been speaking with competitors "about NOT carrying the Dodgers on DIRECTV." *Id.* ¶ 59.

Defendants do not address the Complaint's allegations that many communications coincided with key events in the Dodgers Channel negotiations, instead dismissing them altogether as speculative or as alleging a mere "opportunity to conspire." Defs. Mem. at 14-16. This argument overlooks the fact that two MVPDs admitted to exchanging information with DIRECTV, as well as the strength of the other evidence suggesting that those agreements went further than the executives were willing to admit. And it ignores specific examples of these executives displaying knowledge of their competitors' Dodgers Channel plans before any MVPD had made public statements about the Dodgers Channel. Compl. ¶¶ 54, 74, 83. Viewing these allegations as a whole, the Complaint plausibly alleges that DIRECTV agreed to exchange strategic information with three of its horizontal competitors about their negotiations with a common supplier and their mutual intention not to offer a product to the consumers for whom they were competing.

B. The Complaint Plausibly Alleges that DIRECTV's Agreements to Exchange Information Harmed Competition

Agreements to exchange information are evaluated under the rule of reason. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). This inquiry directs courts to "look to the particular facts of the case to determine whether a challenged restraint is likely to enhance or harm competition." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1150 (9th Cir. 2003). The "classic formulation" of the rule of reason "requires courts to consider "the nature of the restraint and its effect, actual *or probable*." *Am. Needle*, 560 U.S. at 203 n.10 (emphasis added) (citing *Bd. of Trade*, 246 U.S. at 238); *see also* Areeda & Hovenkamp, *supra*, ¶ 1407b(1), at 38 (explaining that the anticompetitive vice of a "facilitating practice," such as an agreement to share information, is "its anticompetitive *tendency* in the circumstances rather than a proved anticompetitive *result* in the particular case").

Here, the Complaint plausibly alleges that Defendants' information-sharing agreements had actual or probable anticompetitive effects. The Complaint alleges that the information obtained through DIRECTV's unlawful agreements was a material factor in each conspiring MVPD's decision not to carry the channel. Compl. ¶¶ 127-29. Thus, these illegal agreements harmed competition both by making it less likely the conspiring MVPDs would launch the Dodgers Channel, likely leading to reduced output and reduced quality of programming for thousands of consumers, and depriving those consumers of a competitive process for determining carriage of the Dodgers Channel. This harm is appropriately assessed in the product and geographic markets alleged.

1. The Complaint Plausibly Alleges that DIRECTV's Agreements to Exchange Information Made It Less Likely the Conspiring MVPDs Would Carry the Dodgers Channel

The information obtained through the illegal agreements played a significant role in each company's assessment of and negotiations for the Dodgers Channel. When

assessing whether it made sense to carry the Dodgers Channel, each MVPD considered the possibility that their subscribers would switch to a competitor that offered the Dodgers. Compl. ¶¶ 45-46. For the smaller MVPDs, knowing that DIRECTV was not planning to launch the channel gave them comfort that their subscribers would not be able to switch to a competitor that carried it. *Id.* ¶¶ 5, 8. The same was true for DIRECTV. It calculated that its "anticipated loss" from not carrying "would be reduced by approximately 40% if none of DIRECTV's competitors (other than TWC) carried the Dodgers Channel." *Id.* ¶ 45. And DIRECTV recognized that it would have "more leverage" with TWC if the MVPDs were to "stick together." *Id.* ¶¶ 9, 57.

The Complaint alleges—citing specific examples—that the conspiring MVPDs actually relied on this information about their competitors' plans in deciding not to launch the Dodgers themselves; it was a "material factor" in each company's decision not to carry. *Id.* ¶¶ 127-29.

- At DIRECTV, Mr. York edited his team's presentation to CEO Mike White to recommend against carriage—before any other MVPD had made public statements about their plans, but after he had spoken privately with his co-conspirators—because "[n]o other MVPD appears to be in a rush to do the Dodgers deal." *Id.* ¶¶ 15, 48, 53-55, 70. Mr. White relied on this information in deciding to decline TWC's initial offer. *Id.* ¶ 56.
- At Cox, when TWC called to pressure its senior content executive to launch, the executive called Mr. York to ask about DIRECTV's plans. *Id.* ¶¶ 48, 73-74.
- At Charter, after speaking with Mr. York, Charter's senior content executive told Charter's CEO to delay launching the Dodgers Channel "until at least if and when Direct does a deal." *Id.* ¶¶ 14, 46, 81. Later, that executive rejected a colleague's suggestion to obtain favorable deal terms by launching early because "I think Direct will not be there at launch" so there would be "nowhere to get the games in our markets." *Id.* ¶¶ 14-15, 82.
- At AT&T, whether or not DIRECTV would carry the Dodgers Channel was a

"risk factor" for AT&T's own carriage decision. *Id.* ¶ 46, 97. Sharing this information made each co-conspirator less likely to reach a deal with TWC for Dodgers Channel carriage. *Id.* ¶¶ 16, 126-30.

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the Supreme Court directed courts to consider two factors "most prominently" in determining the likely effects of an information-sharing agreement: "the structure of the industry involved and the nature of the information exchanged." *Id.* at 441 n.16. Here, both factors lead to the conclusion that DIRECTV's illegal agreements to exchange information are of the type to harm competition: they were entered into by senior executives with decision-making authority, concerned forward-looking competitive information, and occurred in a highly concentrated market.

The Complaint alleges that DIRECTV's illegal agreements occurred between horizontal competitors in a highly concentrated industry with a "history of interdependent price and output." Compl. ¶¶ 7, 114-20. This is the type of industry in which "the possibility of anticompetitive collusive practices is most realistic." *Todd*, 275 F.3d at 208-09; *see also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 138 (3d Cir. 1999) (recognizing that "highly concentrated" baby food industry, dominated by three companies, "could facilitate" anticompetitive conduct).

Further, the information DIRECTV and its competitors exchanged was of the type most likely to be anticompetitive. They discussed "strategic information about current and forward-looking plans" for content carriage, which, "[l]ike price . . . is a crucial aspect of competition between video programming distributors." Compl. ¶¶ 121-22. Exchanges of current and future strategic information have the "greatest potential for generating anticompetitive effects and . . . have consistently been held to violate the Sherman Act." *Gypsum*, 438 U.S. at 441 n.16; *see also Am. Column*, 257 U.S. at 398-99 (finding Section 1 violation where information exchange concerned future prices and production). The executives implicated in these agreements had "direct authority" over content carriage negotiations and could influence their

companies' carriage decisions. Compl. ¶ 124. *See In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004) (finding evidence of agreement sufficient to go to a jury where the employees sharing information "'had an impact on pricing decisions'" (quoting *Baby Food*, 166 F.3d at 125)).

It also makes economic sense that the volume of communications identified in the Complaint was sufficient to cause this harm: unlike a commodities market where prices can fluctuate rapidly and information might need to be exchanged daily to stabilize prices, whether to carry the Dodgers Channel when it launched was a one-off decision. This meant fewer communications would be needed to reassure these competitors they could maintain the status quo and sit out the negotiations, particularly when the communications were subsequently affirmed by public statements. Compl. ¶¶ 58, 60-61, 95.

The Complaint thus plausibly alleges that DIRECTV's illegal agreements made it less likely that each conspiring MVPD would launch the Dodgers Channel. Such allegations are sufficient to survive a motion to dismiss. *See*, *e.g.*, *Todd*, 275 F.3d at 211 (reversing dismissal where allegations suggested information exchange had "anticompetitive potential" under *Gypsum* framework); *see also Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1051-52 (9th Cir. 2008) (reversing dismissal where plaintiff had raised "factual question[s]" about nature and impact of restraint).

2. The Complaint Plausibly Alleges that DIRECTV's Agreements to Exchange Information Harmed the Competitive Process

Defendants' illegal agreements also harmed competition by "depriv[ing] L.A. area Dodgers fans of a competitive process that took into full account market demand" for Dodgers games. Compl. ¶ 126. The conspiring MVPDs should have decided independently whether or not to carry the Dodgers Channel, based on their own separate analyses of market conditions. In an uncorrupted market, those conditions would have included the fear that subscribers who wanted access to the Dodgers Channel would switch to a competitor that offered the content. Instead, secure in the

knowledge that their competitors did not plan to launch, the conspirators decided whether or not to carry without being constrained by this competitive pressure and without being fully responsive to consumer demand for the Dodgers.

The Supreme Court has long held that "[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with" the antitrust law's goal of protecting consumer welfare. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984). For this reason, restraints that impede or disrupt the competitive marketplace violate Section 1. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), for example, the Supreme Court affirmed an injunction and a finding of a Section 1 violation where competitors had agreed not "to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer." *Id.* at 692. The Court condemned the policy because it "*impede[d]* the ordinary give and take of the market place" without requiring proof the restraints changed the outcome of any particular bid. *Id.* (emphasis added). Likewise, the Supreme Court reversed the Seventh Circuit in ruling that a dental federation's policy of withholding dental x-rays from insurers unreasonably restrained trade. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986). The Court rejected the argument that the plaintiff was required to show that the policy had actually increased the costs of dental services and explained that the policy was "*likely enough to disrupt* the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence." *Id.* at 461-62 (emphasis added) (citing *Prof'l Eng'rs*, 435 U.S. 679).[4]

Similarly, when a district court dismissed a complaint challenging a contract term that prohibited competitive bidding for contract renewals in the future because it

[4] *See also Cascade*, 515 F.3d at 901 (noting the Supreme Court's "long and consistent adherence to the principle that the antitrust laws protect the process of competition").

saw the allegations as "conclusory and speculative," the Ninth Circuit reversed. *ICANN*, 611 F.3d at 502. The Court explained that plaintiff's allegations "that competition itself has been eliminated as a result of defendants' and ICANN's conspiratorial conduct" were sufficient to state a claim even though plaintiff had not identified a particular instance of harm occurring. *Id.* at 502-03; *see also SRAM*, 580 F. Supp. 2d at 902-03 (finding allegations sufficient to defeat motion to dismiss where exchange of information led to "interference" with independent price setting). And in a case assessing the effects of agreements to "split" films between competing movie theaters, the district court focused on whether the splits "restrict[ed] the free play of market forces from determining price" and found, on summary judgment, that they did. *Gen. Cinema Corp. v. Buena Vista Dist. Co.*, 532 F. Supp. 1244, 1262, 1279 (C.D. Cal. 1982) (quotation omitted).[5]

Condemning restraints that harm the competitive process is particularly important in the context of agreements to exchange information. Forcing a plaintiff to establish precisely how an information exchange affected a given decision on price or quality would impose an "insurmountable standard of proof," meaning that:

> a plaintiff seemingly could never prevail . . . based on a theory of information sharing, because even if a group of competitors shared all of their confidential business data in making wage (or price) decisions—or, indeed, convened in the same conference room and reached their decisions at the same time—the plaintiff still would be left to somehow identify and separate out the particular aspects of this information-sharing arrangement

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[5] Defendants imply that DIRECTV's anticompetitive conduct was justified to the extent that it resulted in lower prices for consumers. *See* Defs. Mem. at 1-2. This factual argument is inappropriate on a motion to dismiss and, in any event, is untenable as a matter of antitrust law. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (rejecting defendants' argument that "their boycott is permissible because the price it seeks to set is reasonable").

> that were unlawful, and then prove that these decisions would have been different if the competitors had engaged in only a 'permissible' exchange of data.

Cason-Merenda v. Detroit Med. Ctr., 862 F. Supp. 2d 603, 646-47 (E.D. Mich. 2012).[6] Thus, Defendants are wrong to assert that the United States must allege more specific "causation" in its Complaint. Defs. Mem. at 23-24.[7] DIRECTV's agreements to exchange information should be analyzed under the traditional rule of reason framework to determine "whether the challenged agreement is one that promotes competition or one that suppresses competition." *Prof'l Eng'rs*, 435 U.S. at 690. This holistic inquiry should address a "variety of factors," including economic context and the "history, nature, and effect" of the restraint. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *see also Bd. of Trade*, 246 U.S. at 238.[8] The Complaint meets this standard: it

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[6] *See also Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 164-65 (N.D.N.Y. 2010) (relying on expert testimony that exchange of wage information had "soften[ed] competition" to deny defendants' motion for summary judgment); *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 167 (D.D.C. 2004) (denying motion to dismiss where plaintiffs alleged that knowledge of competitors' wage levels would influence defendants' own wage levels); *cf. Am. Linseed Oil*, 262 U.S. at 389-90 (ordering entry of injunctive relief when defendants shared "intimate knowledge" of their business affairs because such practice "destroy[s] the kind of competition to which the public has long looked for protection").

[7] In particular, *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192 (9th Cir. 2012) does not impose the requirement Defendants claim here. There, the Ninth Circuit held that merely alleging tying agreements did not sufficiently allege injury to competition, and that plaintiffs failed to "also allege facts showing that an injury to competition flows from" these vertical arrangements. *Id.* at 1201; s*ee also id.* at 1203 (noting that plaintiffs had not alleged horizontal collusion). Here the United States *has* alleged facts showing that these horizontal information-sharing agreements harmed competition.

[8] The Defendants also fail to distinguish between private damages actions and a government action seeking only injunctive relief. The United States need not allege antitrust injury, which is an element of standing. *See* IIA Phillip E. Areeda et al., *supra*, ¶ 335a, at 76-77 (4th ed. 2014); *see also* Areeda & Hovenkamp, *supra*, ¶ 1407b(2), at 38-39 (explaining that "proven causation of an anticompetitive result is

plausibly alleges that as a result of their illegal agreements, the conspiring MVPDs enjoyed reduced competitive pressure to carry the Dodgers Channel and deprived consumers of a fair competitive process. These allegations establish harm under Section 1.

3. The Competitive Harm Caused By DIRECTV's Conduct Can Be Assessed in the Product and Geographic Markets Alleged

The Complaint meets the traditional requirements for alleging both market power within a relevant market and harm in that market. The Complaint describes a product market of "video distribution services" and distinguishes it from other forms of entertainment. Compl. ¶¶ 102-04. It details the existence of several relevant geographic markets corresponding to the distinct competitive contours in different locales serviced by various MVPDs in the L.A. area. *Id.* ¶¶ 105-09. It alleges that DIRECTV and its co-conspirators have market power (and a collective share upwards of 50-75%) in those markets. *Id.* ¶¶ 110-19.

Defendants do not challenge these allegations. Instead, they claim to see a "logical mismatch" between the product market harmed by its misconduct and the supposedly separate market in which that misconduct took place. This argument is misplaced.[9] First, antitrust allegations regarding market definition and market power are "factual inquiries" that should proceed unless they are "facially unsustainable." *Newcal Indus.*, 513 F.3d at 1045. And where more than one market is relevant, a complaint may allege harm in any or all of them. *See, e.g.*, *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988) (holding that it is "entirely unnecessary" to

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not a prerequisite to identifying or condemning a facilitating practice" like information-sharing "in a government action" that does not seek damages).

[9] Besides redefining the relevant product and geographic markets, DIRECTV also rewrites the United States' legal theory by suggesting the Complaint alleges a group purchasing violation. *See, e.g.*, Defs. Mem. at 21-22. This is not the violation alleged by the Complaint. *See supra* Sections IV.B.1-2.

choose between two potentially harmed markets, and that where the alleged harm "potentially affected both markets," they are "both . . . relevant to the search for competitive harm").

Second, Defendants fail to muster a single example in which any court has dismissed an antitrust claim, at any stage, due to a "logical mismatch." In *Newcal*, for instance, the Ninth Circuit *reversed* the dismissal of a complaint alleging that amendments to equipment leases were "part of the separate and derivative [downstream] aftermarket," even though the original leases were procured in a related upstream market for copier equipment leases. *Newcal*, 513 F.3d at 1049-50. To the extent it applies, *Newcal* therefore supports, rather than undercuts, the sufficiency of the Complaint's allegations of harm. Defendants also find no support in *Todd*, since there the Second Circuit reversed dismissal of the complaint because the district court had failed to recognize that the harm alleged *matched* the alleged unlawful conduct. *Todd*, 275 F.3d at 201-02, 214 (petrochemical companies' sharing of salary information plausibly led to reduced salaries for plaintiff petrochemical employees).[10]

Moreover, several cases have imposed Section 1 liability where the illegal conduct upstream resulted in consumer harm downstream. *See, e.g.*, *Ind. Fed'n of Dentists*, 476 U.S. at 459 (determining relevant inquiry was harm to dental patients where alleged conduct, withholding dental x-rays from insurers, occurred upstream);

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[10] The other cases Defendants cite do not support their "logical mismatch" argument. In *Twin City v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 2002), the Ninth Circuit held (after trial) that a market encompassing concessionaire franchise purchases only from baseball teams was too narrow as a matter of cross-elasticity of demand—not due to upstream-downstream mismatch—and should have included non-baseball venues too. *Id.* at 1272-74. And in *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002), the plaintiff alleged harm to consumers in a downstream PC consumer market, but left the court no way to determine market power because it failed to allege the market shares for several key participants. *Id.* at 207-11. By contrast, the Complaint alleges the relevant market shares and other indicia of market power in the market where it alleges harm. *See* Compl. ¶¶ 105-09.

Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 341-42 (1982) (holding illegal agreements between physicians to cap fees they could claim from insurers where harm alleged was that agreements stabilized or raised physicians' fees which in turn raised insurance premiums); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-20 (1940) (holding that oil companies' conspiracy to remove some supply from the wholesale market, which led to higher retail prices for consumers buying gasoline, was per se unlawful); *United States v. Apple, Inc.*, 791 F.3d 290, 327 (2d Cir. 2015) ("[T]he Publisher Defendant's primary objective in expressly colluding to shift the entire ebook industry to an agency model" in the supplier market "was to eliminate Amazon's $9.99 pricing for new releases and bestsellers" in the retail market.).

Finally, as a factual matter, there is no mismatch here between the nature of the information shared and the resulting consumer harm. Although DIRECTV and its co-conspirators also exchanged information about the price TWC was asking, at bottom what they were telling each other was whether or not each would offer the Dodgers Channel in the areas where they compete. There is no more of a mismatch between information sharing on carriage decisions that leads to coordination on carriage than there is between information sharing on price that leads to coordination on price. Indeed, the Complaint shows that the MVPD executives expressly *recognized* the impact their discussions would have on consumers. *See, e.g.*, Compl. ¶ 15, 83 (Charter executive who admitted discussing the Dodgers Channel with Mr. York recommended delaying launch, because there would be "nowhere [for customers] to get the games in [Charter's] markets"); *id.* at ¶ 16 ("[K]ey competing executives knew they were safer . . . because they had reason to believe that they would not lose subscribers to other MVPDs."). Even if Defendants' "logical mismatch" argument had any legal foundation, there simply is no mismatch between the unlawful sharing of information on whether they would carry the Dodgers Channel and the resulting harm—the Dodgers Channel blackout for consumers in the areas in which DIRECTV and its co-conspirators compete.

Thus, the Complaint plausibly alleges that DIRECTV's information-sharing agreements harmed consumers in the markets alleged by making it less likely each MVPD would offer the Dodgers Channel to its customers and by corrupting the competitive process.

V. CONCLUSION

For all of these reasons, Defendants' motion to dismiss should be denied.

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Respectfully submitted,
PLAINTIFF UNITED STATES OF AMERICA

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