IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLINE BEHREND, ET AL.,	)	
	)	
Plaintiffs,	)	No. 03-6604
	)	The Honorable John R. Padova
	)	
v.	)	
	)	
COMCAST CORPORATION, ET AL.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Dated: November 9, 2006

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Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") respectfully submit this memorandum of law in opposition to Plaintiffs' Motion for Certification of the Philadelphia Class dated September 21, 2006.[1] Comcast respectfully requests oral argument and a full evidentiary hearing, which counsel estimate will take two days, on the motion.

PRELIMINARY STATEMENT

Class certification fails here for three reasons. First, common issues do not predominate among the two million members of the putative class. Second, the named Plaintiffs are inadequate class representatives. Third, certain members of the class are subject to enforceable arbitration agreements and cannot pursue their claims here.

Lack of Common Issues. Plaintiffs allege that the common issues here include (i) whether the transactions in question violated the antitrust laws, and (ii) whether prices are higher as a result of the transactions. These highly generalized statements only beg the issue. A showing that the transactions violated the antitrust laws and had adverse effects on Plaintiffs will require evidence concerning the different competitive circumstances affecting different Plaintiffs. That proof cannot be made on a common basis for the class.

Plaintiffs did not experience the competition they claim was eliminated, or the effects of the claimed violation, in any common way. Throughout the seven-year class period, the class of subscribers Plaintiffs have delineated lived in almost 500 different cable franchise areas in 16

[1] As part of its opposition to Plaintiffs' motion, Comcast also submits (i) the Declaration of Stanley Besen, a former co-Director of the FCC, dated November 9, 2006 ("Besen Decl."); (ii) the Declaration of Richard Palmer, a Senior Vice President (Finance and Administration) of Comcast, dated November 8, 2006 ("Palmer Decl."); (iii) the Declaration of Mary Kane, in-house counsel for Comcast, dated November 9, 2006 ("Kane Decl."); and (iv) the Declaration of James T. Cain, dated November 9, 2006 ("Cain Decl.").

different counties in three different states. The complained-of conduct involved seven different transactions among six different franchised wireline cable providers over the course of more than 30 months. Prior to the transactions, those cable operators provided service to different subscribers who lived in different franchise areas. Plaintiffs' theory of elimination of potential competition necessarily requires proof that a second wireline cable provider was likely to enter into a franchised wireline incumbent's area. Such a showing can only be made on a franchise-by-franchise basis. Given the wide variety of communities across the broad territory included in Plaintiffs' Complaint, and differences in the cable operators adjacent to each such communities, Plaintiffs' proof will necessarily vary widely from franchise to franchise, provider to provider, and subscriber to subscriber. It will also vary across time and the 500 franchise areas, as the competitive circumstances affecting potential entry in each of those areas differ. No common proof can be made as to those matters; individualized proof will predominate.

That common issues are not sufficiently present is also evidenced by the inability of Plaintiffs and their "expert" to articulate a common damages methodology for the class. In setting forth his proposed methodology, Plaintiffs' expert makes wholly untenable assumptions, and then disavows them.

Inadequate Class Representation. The two named Plaintiffs are inadequate class representatives, for reasons that underscore the deficiencies of the class definition.

Because of where they live, the named Plaintiffs have the incentive to argue that the threat of potential competition from one franchised wireline cable provider to another was strongest where the two providers were physically proximate or had adjacent cable systems. The majority of class members are geographically situated very differently from the two named Plaintiffs. These class members have no incentive (in fact, they have a disincentive) to argue

what for the named Plaintiffs is their best argument—that potential competition arises from physical proximity or actual adjacency of different wireline cable providers. These class members will want to rely on a wholly different theory. The named Plaintiffs are thus not adequate to represent the class, as their interests are antagonistic to those of other members of the class.

Additionally, the named Plaintiffs cannot show injury. Their prices as Comcast subscribers have gone up at a percentage rate lower than the national average. Inasmuch as they have no claims, they are inadequate to represent the class.

Arbitration Agreements. Finally, certain class members are subject to enforceable arbitration provisions and cannot have their claims adjudicated in this forum.

BACKGROUND AND FACTS

Plaintiffs seek to certify the following class:

> All cable television customers who subscribe or subscribed at any time since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

(Plaintiffs' Third Amended Complaint ("Compl.") ¶ 31.b(1).)[2]

Plaintiffs define "Comcast's Philadelphia cluster" to mean the areas covered by 486 Comcast cable franchises in sixteen counties in Pennsylvania, Delaware and New Jersey. (Compl. ¶ 31(a)(2)). Plaintiffs allege that the proposed class consists of approximately two million current Comcast subscribers. (Compl. ¶ 32)

[2] Plaintiffs do not at this time seek to certify the putative Chicago cluster class described in the Complaint. (Compl. ¶ 31(b)(2); Pl. Br. at 2).

Lack Of Commonality

The two million putative class members live in almost 500 different franchise areas, 16 different counties and three different states. (See Palmer Decl. ¶ 3.) Although they are now all Comcast subscribers—a fact which by itself does not give rise to or in any way support an antitrust claim—prior to the Transactions they were not. (See Besen Decl., Exs. 3-10.) Instead, each subscriber received service from one—and only one—of the seven cable providers involved in the Transactions. The table below identifies the transactions of which Plaintiffs complain (the "Transactions").

Date	***Systems Acquired***	***Area(s)***	***# of Subs.***
April 1, 1998	Marcus Cable Company LLC ("Marcus Cable")	DE	27,000
June 1999	Greater Philadelphia Cablevision ("GPC")	Philadelphia area	79,000
Jan. 18, 2000	Lenfest Communications ("Lenfest")	PA, DE, & NJ	1,100,000
Jan. 18, 2000	Garden State Cablevision ("GSC")	NJ	216,000
Dec. 31, 2000 & April 20, 2001	AT&T (the "AT&T Swap")	PA & NJ	1,365,000
Jan. 1, 2001	Adelphia (the "Adelphia Swap")	Phil. area & NJ	460,000

The table demonstrates that the "class" in fact consists of subscribers dispersed geographically. But the table alone does not do the matter justice. Maps attached to the report of Comcast's expert, Dr. Stanley Besen, show how geographically dispersed and unconnected the class members were prior to the transactions. Even subscribers of the same provider were dispersed and have nothing relevant in common. Thus, for example:

- Almost without exception, each lived in a community in which service was available from only one wireline provider.

- AT&T had two large groups of subscribers, one at the extreme north end (rural Pennsylvania) and one at the extreme south end (coastal New Jersey) of what is now called the "cluster."
- Marcus Cable's 27,000 subscribers were distributed among tiny franchise areas in Delaware, whereas Greater Media's 79,000 subscribers were located only in Philadelphia.
- Hundreds of thousands of Lenfest subscribers lived directly in the middle of the Lenfest "cluster," whereas others lived right on the Lenfest/Comcast "border."

Geography is not by any means the sole difference among the class members. As the table above shows, different groups of class members became Comcast subscribers at different times pursuant to the Transactions. For example, Marcus Cable's 27,000 Delaware subscribers became Comcast subscribers in April 1998, whereas Adelphia's City of Philadelphia and rural New Jersey subscribers became Comcast subscribers almost three years later, in January 2001.

There are further significant differences among the class members. Their channel lineups vary meaningfully. (See Besen Decl. ¶ 56.) So does their pricing. (Id. ¶¶ 55, 59-60.) These differences present enormous methodological challenges in proving injury and damages. As we show below and more fully in the Besen report, Plaintiffs and their expert have simply ignored these differences, and have not taken up the methodological issues they present. [3]

[3] Comcast is aware that, on a class certification motion, the Court will not be disposed to try to determine whose expert is right and whose is wrong. Comcast has submitted a responsive expert report not to show that Dr. Beyer is wrong - although he most certainly is, consistent with his reputation among judges (see infra at 15, 20)—but rather that Dr. Beyer's assumptions simply ignore reality and render his benchmarks and methodological framework useless, as he himself admitted in his deposition. (See Cain Decl. Ex. A (Transcript of Deposition of John C. Beyer, dated Oct. 11, 2006 ("Beyer Tr.") at 182-83.) and infra at 13-17, 19-20.

The differences among the class members matter. Plaintiffs claim that the Transactions eliminated potential wireline competitors to Comcast. (See Compl. ¶ 54.) Each of the Transaction parties was a franchised, incumbent wireline cable provider in particular franchise areas. In order to compete with one another or Comcast, one or more of these franchised providers would have had to become a second entrant in a specific franchise area. This can only be done by taking certain specific, expensive and time-consuming measures. Unlike direct broadcast satellite ("DBS"), wireline cable providers cannot just blanket an area with their signals. The would-be entrant must apply for and obtain a franchise, must purchase the necessary equipment and must install cable, block by block, trench by trench. (See Palmer Decl., ¶ 27.) This entails enormous up-front costs which are essentially unrecoverable. Any proof that a Transaction eliminated a potential wireline cable competitor to Comcast will have to show when, where and how that cable operator could have become a second entrant in a particular franchise area where Comcast was the franchised incumbent or was perceived by Comcast as being such an entrant. That proof cannot be made on a common basis; individual and local issues will predominate for subscribers living in different franchise areas.

Inadequate Class Representation

Perhaps one reason why Plaintiffs have not considered the disparities and lack of commonality among the putative class members is that the named Plaintiffs are situated so differently from most of them. Named Plaintiffs Glaberson and Behrend live in close geographic proximity to each other, the first in a legacy Comcast franchise area, the second in a former Lenfest franchise area. (See Besen Decl., ¶¶ 35, 68, Ex. 10.) (The broad areas denoted as the Comcast and Lenfest areas on the referenced maps each consist of numerous separate franchise areas.) As the referenced map shows, Glaberson and Behrend not only live near each other, but

each lives near the Comcast/Lenfest "border." The map also shows that the vast majority of putative class members do not live near the border of any cable provider's "territory," and do not live in close proximity to one another. (See Besen Decl. Ex. 10.)

Simply stated, the named Plaintiffs have an interest in arguing the importance of geographic proximity of one cable provider to another. Other class members do not.

We note that, in addition to their Transactions-based Section 1 and Section 2 claims, Plaintiffs further allege that Comcast violated Section 2 of the Sherman Act through conduct directed at an overbuilder, RCN Telecom Services, Inc. ("RCN"). (See Compl. ¶ 86.) Plaintiffs still have not supported this causal hypothesis with any facts. RCN is an overbuilder that entered the Folcroft market. Plaintiffs do not explain how a class of two million subscribers across the broad geography included in the Philadelphia Cluster can assert a claim based on conduct allegedly directed at RCN in a single community. Plaintiffs' class cannot be certified as to this claim.

ARGUMENT

I.

STANDARDS APPLICABLE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

A court evaluating a motion for class certification must undertake a "rigorous analysis" to determine whether each prerequisite of FRCP Rule 23 is satisfied. See Gen. Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 161 (1982); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001) ("A class certification decision requires a thorough examination of the factual and legal allegations"). Plaintiffs bear the burden of showing that each prerequisite

has been satisfied. See Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp., 149 F.R.D. 65, 73 (D.N.J. 1993).

Rule 23(a) requires Plaintiffs to show:

> (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical ... of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613 (1997) (citing Fed. R. Civ. P. 23(a)).

Rule 23(b)(3) requires Plaintiffs to show that "[(1)] [c]ommon questions ... 'predominate over any questions affecting only individual members'; and [(2)] class resolution [is] 'superior to other available methods for the fair and efficient adjudication of the controversy.'" Id. at 615 (quoting Fed. R. Civ. P. 23(b)(3)).[4]

The Third Circuit has directed "a preliminary inquiry into the merits" where "necessary to determine whether the alleged claims can be properly resolved as a class action." Newton, 259 F.3d at 168; accord Beck v. Maximus, 457 F.3d 291, 297 (3d Cir. 2006) ("'courts may delve beyond the pleadings to determine whether the requirements for class certification are satisfied.'"); Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005) (class certification "may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case."); Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1188 (11th Cir. 2003) ("at the class certification stage, the trial court can and should consider the merits of the plaintiffs' claim to the degree necessary to determine whether the requirements of Rule 23 will be satisfied."); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675-76 (7th Cir. 2001) ("Before deciding whether to allow a case to proceed as a class action ... a judge should

[4] Plaintiffs have not sought class certification under Rule 23(b)(1) or (2). (See Pl. Br. at 14.)

make whatever factual and legal inquiries are necessary under Rule 23."); 5 Moore's Fed. Practice § 23.46[4] (2006) ("[B]ecause the determination of a certification request invariably involves some examination of factual and legal issues underlying the plaintiffs' cause of action, a court may consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take.").[5]

Plaintiffs' allegations and submissions fail to satisfy the requirements of either Rule 23(a) or 23(b)(3), and the motion for class certification must be denied. See Szczubelek v. Cendant Mortgage Corp., 215 F.R.D. 107, 115 (D.N.J. 2002) ("the plaintiff must allege facts demonstrating that all of the requirements for bringing a class action are fulfilled.... Failure to satisfy any of the requirements is fatal, and class certification must be denied.").

II.

LOCAL AND INDIVIDUAL QUESTIONS PREDOMINATE OVER COMMON QUESTIONS

It is well-settled that, "[i]n an antitrust class action, Plaintiff, on behalf of the class, must show that common or generalized proof will predominate with respect to each element of the antitrust claim: violation of the antitrust laws; antitrust injury; and the amount of damages

[5] Plaintiffs cite Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) for the proposition that a court should not conduct a preliminary inquiry into the merits. (See Pl. Br. at 3.) The Third Circuit addressed Eisen in Newton, finding that later cases had ultimately resulted in the Supreme Court's clarification in Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. at 160, that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." See Newton, 259 F.3d at 167. The decisions cited in text are consistent with this Court's observation that the court need not decide the merits at the class certification stage. See Bradburn Parent/Teacher Store, Inc. v. 3M, No. Civ. A. 02-7676, 2004 WL 1842987, at *2 (E.D. Pa. Aug. 18, 2004) (cited at Pl. Br. at 3). Plaintiffs' other cases are silent as to the court's ability to probe behind the pleadings in order to determine whether the requirements of Rule 23 have been satisfied. See Thomas v. SmithKline Beecham Corp., 201 F.R.D. 386, 393 (E.D. Pa. 2001); Cullen v. Whitman Corp., 188 F.R.D. 226, 228 (E.D. Pa. 1999).

sustained." Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136, 141 (D. N.J. 2002), aff'd, 84 Fed. Appx. 257 (3d Cir. 2004); see Fed. R. Civ. P. 23(b)(3).[6]

Applying this standard here, class certification must be denied.

A. Plaintiffs Have Made No Showing Of Common Issues As To Antitrust Violation Or Injury

Plaintiffs allege that the Transactions violated the antitrust laws. (See, e.g., Compl. ¶¶ 6, 10-11, 73-74, 89.) To show this, Plaintiffs will have to show that the Transactions eliminated competition that Comcast otherwise would have faced, and that they suffered antitrust injury by virtue of the Transactions. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990) ("[t]he antitrust injury requirement ensures that a plaintiff can recover only if [its] loss stems from [the] competition-reducing aspect or effect of the defendant's behavior."); Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001) ("We have consistently held [that] an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market.") (emphasis added).

The requirement of showing antitrust injury through common proof is particularly critical. See Alabama v. Blue Bird Body Co., 573 F.2d 309, 320 (5th Cir. 1978) ("In making the

[6] Plaintiffs cite cases for the proposition that Third Circuit courts "have repeatedly certified classes in antitrust actions." (See Pl. Br. at 4 & n.5). Conversely, courts here and elsewhere have declined to certify antitrust classes where, as here, the plaintiffs fail to satisfy one or more of the requirements of Rule 23. See, e.g., Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136 (D.N.J. 2002), aff'd, 84 Fed. Appx. 257, 2004 U.S. App. LEXIS 277 (3d Cir. Jan. 9, 2004); Bradburn Parent/Teacher Store, Inc. v. 3M, No. Civ. A. 02-7676, 2004 WL 414047 (E.D. Pa. Mar. 1, 2004) (Padova, J.); Heerwagen v. Clear Channel Commc'ns Inc., 435 F.3d 219 (2d Cir. 2006); Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005); Freeland v. AT&T Corp., No. 04 Civ. 8653, 2006 U.S. Dist. LEXIS 57394 (S.D.N.Y. Aug. 17, 2006); In re NCAA I-A Walk On Football Players Litig., No. C04-1254C, 2006 U.S. Dist. LEXIS 28824 (W.D. Wash. May 3, 2006); In re Med. Waste Serv. Antitrust Litig., No. 2:03MD1546, 2006 U.S. Dist. LEXIS 19793 (D. Utah Mar. 3, 2006); In re Agric. Chems. Antitrust Litig., No. 94-40216-MMP, 1995 U.S. Dist. LEXIS 21075 (N.D. Fla. Oct. 23, 1995); In re Beef Indus. Antitrust Litig., No. MDL-248, 1986 U.S. Dist. LEXIS 24731 (S.D. Tex. June 3, 1986).

determination as to predominance, of utmost importance is whether 'impact' should be considered an issue common to the class and subject to generalized proof, or whether it is instead an issue unique to each class member, and thus the type of question [that] might defeat the predominance requirement of Rule 23(b)(3)."); see Newton, 259 F.3d at 180 n.21 (denying class certification where common proof could not show that all plaintiffs in the putative class had lost money as a result of the allegedly unlawful acts); Weisfeld, 210 F.R.D. at 143 (denying class certification where plaintiffs could not show by common proof "that 'some damage to each individual' actually occurred."); In re NCAA I-A Walk On Football Players Litig., 2006 U.S. Dist. LEXIS 28824, at *38 (denying class certification where "[e]ven if 'antitrust injury' can be proven to some degree [by common proof (i.e., some consumers were hurt)], antitrust injury as to each member of the class (proof of which [will ultimately] be required...) cannot be proven without consideration of the facts surrounding each class member.").

Plaintiffs cannot make the required showing.

The Transactions involved seven different cable providers who operated in different franchise areas and served different subscribers. There was no overlap among the franchise areas of these cable companies—it is undisputed that they did not compete head-to-head with each other.[7] The proof that Plaintiffs must make to establish that the Transactions violated the antitrust laws will have to be made transaction-by-transaction and franchise-by-franchise.

Plaintiffs' own theory makes it so. Plaintiffs allege that the cable providers whose businesses or assets were acquired by Comcast were potential competitors to Comcast (in fact

[7] It is not disputed between the parties that none of the Transactions reduced any subscriber's existing choice among cable providers. (Beyer Tr. at 58 (conceding that the counterparties to the Transactions did not service the same households); see also Besen Decl., Ex. 10 (illustrating service areas of parties to the Transactions).) In other words, none of the transactions eliminated a provider that was actually offering services to subscribers in head-to-head competition with Comcast.

were the only potential competitors to Comcast—DBS providers do not count, according to the Complaint). Given that each of the companies involved in the Transactions was a franchised wireline cable provider, they could only have competed with another or Comcast by entering (as a second entrant) a franchise area serviced by such other incumbent wireline cable franchisee. A wireline cable provider wishing to compete with another by becoming a second cable franchisee in the incumbent franchisee's franchise area must take certain specific steps to do so. (See Palmer Decl., ¶ 27; Besen Decl., ¶ 17.) Those steps are described in the Palmer Declaration, but can be summarized as applying for and obtaining franchise approval, purchasing the necessary plant and equipment and installing it (block by block, trench by trench—the process is a slow, grinding one). (See Palmer Decl. ¶ 27.) The steps required for a second wireline cable provider to enter a franchise area where there is a franchised wireline incumbent explain why 98.7% of cable subscribers do not have a second entrant in their franchise area. (See Compl. ¶ 44.)

These facts are indisputable—they are the simple realities of wireline cable competition, and while they can arguably be ignored on a motion to dismiss, there is neither reason nor justification to ignore them on a class certification motion. Given these facts, it is simply not possible for Plaintiffs to show by common proof across nearly 500 franchise areas and the two million class members distributed among them that the Transactions restricted competition and resulted in antitrust injury. Common proof cannot establish whether any Transaction counterparty could or would have entered a specific franchise area, and was perceived by Comcast as a threat to do so. Moreover, even if such a competitive entry had taken place, there is no conceivable way a competitor (or multiple competitors) could have obtained franchises,

built a cable system from scratch, and begun competing in 486 communities simultaneously. Thus, common proof cannot be used to establish either an antitrust violation or antitrust injury.[8]

For their showing that common issues predominate as to the existence and effect of the alleged agreements (the violation and the injury), Plaintiffs proffer the expert opinion of Dr. Beyer. (See generally Beyer Decl.) Dr. Beyer, however, does not support Plaintiffs' theory that there are common issues among the two million class members—he merely assumes it. (See Beyer Decl. ¶ 4.) Dr. Beyer assumes that the Transactions eliminated potential wireline cable competitors. (Beyer Decl. ¶ 8; Cain Decl. Ex. A (Beyer Tr. at 217.)) Such assumptions, however, are simply not sufficient to support a class certification motion. What is required, as the authorities above demonstrate, is a showing of common issues susceptible of common proof across the class. Here, no such showing has been made, and none is possible.

Dr. Beyer's assumption is not sufficient. The potential competition theory on which Dr. Beyer relies recognizes that not all firms that have the theoretical capability to enter a market in fact exert effective economic pressure on incumbents because firms may face investment barriers that render entry unattractive, may face regulatory barriers that impede entry, may view the profit opportunities as less attractive than alternatives, or may prefer to concentrate limited managerial energy on existing operations. See United States v. Falstaff Brewing Corp., 410 U.S. 526, 533-34 (1973) (holding that courts must "[appraise] the economic facts about [the alleged potential competitor] and [the relevant market] in order to determine whether in any realistic sense [the

[8] For the same reasons, Plaintiffs will eventually fail to satisfy their burden of establishing a geographic market. the Third Circuit has recognized that "in § 2 cases identification of the relevant ... market is a matter of analyzing competition," and the relevant "geographic market [thus] encompasses the area in which the defendant effectively competes with other ... businesses for the distribution of the relevant product." Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307, 311 (3d Cir. 1982). Here, competition (be it actual or potential) can only be addressed on a franchise-by-franchise basis, and Plaintiffs' gerrymandered geographic market of nearly 500 franchises drawn randomly around Philadelphia cannot be countenanced.

company] could be said to be a potential competitor on the fringe of the market with likely influence on existing competition"). Because not all firms with necessary experience, skills, and assets for entry will in fact enter a market, it is incorrect as a matter of economics simply to presume such firms to be "potential competitors" that have a real economic effect. Instead, for a firm to provide economically meaningful (as opposed to purely theoretical) potential competition, there must be a genuine likelihood of market entry. See id.; see also United States v. Marine Bancorporation, Inc., 418 U.S. 602, 639-40 (1974) (concluding that, in light of regulatory barriers faced by commercial banks, it was "improbable" that the acquiring bank "exerts any meaningful procompetitive influence over Spokane banks by 'standing in the wings.'").

The Supreme Court has recognized that ease of market entry and ease of market exit are important factors in determining the likelihood that an outside firm will enter a given market. See Marine Bancorporation, 418 U.S. at 628 (holding that "ease of entry on part of the acquiring firm is a central premise of the potential-competition doctrine"). Accordingly, this Court and others that have confronted a theory of "potential competition" have recognized the importance of evidence that a firm has actually taken steps to enter a market before concluding that the firm is in fact a potential competitor. See, e.g., Brotech Corp. v. White Eagle Int'l Tech. Group, Inc., 2004 WL 1427136, at *5 (E.D. Pa. June 21, 2004) (Padova, J.) (requiring evidence of "intent and preparedness"); Hecht v. Pro Football, Inc., 570 F.2d 982, 994 (D.C. Cir. 1977) (requiring evidence of "actual and substantial affirmative steps toward entry"); Tenneco v. FTC, 689 F.2d 346, 352 (2d Cir. 1982) (requiring a showing that the firm at issue "would likely have entered the market in the near future"). The mere appearance of a firm standing on a market's edge does not

by itself support an inference that the firm will enter or otherwise discipline the market's performance. See Falstaff, 410 U.S. at 533-34.

Here, Dr. Beyer admits that none of the counterparties to the Transactions have ever entered a franchised cable provider's franchise area as a second entrant. (See Cain Decl. Ex. A (Beyer Tr. at 65).) Dr. Beyer further admits that he is aware of no evidence that any of these counterparties had any intention to do so. (Id. at 64-65.) In short, Dr. Beyer's opinion that the counterparties to the Transactions were "competitors" waiting in the wings to enter Comcast's territory is a theoretical fabrication (nowhere present in his Declaration, but invented for the first time at his deposition) that is divorced from the reality of this particular business and is of no use here. See Weisfeld, 2004 U.S. App. LEXIS 277, at * 13 (clarifying that a court may properly disregard the unsupported conclusions of an expert on class certification). Therefore, Dr. Beyer's assumption of competition cannot operate as a substitute to Plaintiffs' failure to show competition on a franchise by franchise basis.

In other cases, similar assumptions made by Dr. Beyer have been rejected.[9] In one such case, the court denied class certification where "[t]he facts indicate that the competition Dr. Beyer postulates could not have taken place across this nationwide class." In re Agric. Chems. Antitrust Litig., No. 94-40216, 1995 U.S. Dist. LEXIS 21075, at *26 (N.D. Fla. Oct. 23, 1995) (emphasis added); see also Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1025 (10th Cir. 2002) (finding that Dr. Beyer's testimony "lacked foundation, was unreliable, and should be excluded in its entirety"); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinics, 152 F.3d 588,

[9] Another district court recently rejected class certification where the plaintiff's expert—like Dr. Beyer—merely assumed that a source of competition had been eliminated for all class members. Sorensen v. Stericycle (In re Med. Waste Serv. Antitrust Litig.), 2006 U.S. Dist. LEXIS 19793, at *22-24 (D. Utah Mar. 3, 2006). The court found that "[r]egarding the issue of common impact, Plaintiff's expert merely assumed what needed to be demonstrated to establish the propriety of class certification ... [T]he court cannot 'assume,' much less conclude that there will be class-wide impact, particularly in light of the evidence submitted ... which demonstrates that such a presumption would be improper.").

593 (7th Cir. 1998) (Judge Posner referring to Dr. Beyer as a "hired gun" with "no semblance of objectivity" whose testimony was "worthless").[10]

The Agricultural Chemical court's words apply with equal force and but one small change here—"[t]he facts indicate that the competition Dr. Beyer postulates could not have taken place across this nationwide [here, cluster-wide] class." In re Agric. Chems. Antitrust Litig., 1995 U.S. Dist. LEXIS 21075, at *26.

Rather than make common proof of injury across the class, Plaintiffs will need to make individualized showings as to individual or small groups of class members. For example:

Geographic Differences. Because the proposed class members live in nearly 500 communities in three states, they are spread over a wide geography. A fundamental premise of Dr. Beyer's theory, however, is that Transactions involving cable systems in close proximity to each other are likely to have the greatest anticompetitive effect. (See Cain Decl. Ex. A (Beyer Tr. at 74-75, 119-20); see also Besen Decl. ¶ 47.) As discussed supra, few subscribers lived in franchise areas in close proximity to franchise areas operated by different cable providers. Common proof cannot be made across the class as to this issue.

Digital v. Analog. The principal academic study on which Dr. Beyer relies (Dr. Beyer certainly undertook no study, academic or otherwise) is that of Dr. Hal J. Singer. Singer clearly shows that entry by a second wireline cable provider into the franchise area of an incumbent provider never occurs where the incumbent cable operator's cable system has been upgraded to

[10] At his deposition, Dr. Beyer referenced the court's decision in In re Microcrystalline Cellulose Antitrust Litig., 218 F.R.D. 79, 91 (E.D. Pa. 2003) (cited at Pl. Br. at 18) as an example of a case where the potential competition doctrine was used to support class certification. (See Cain Decl. Ex. A (Beyer Tr. at 99-100).) In that case, however, the court found that "plaintiffs make a strong argument that they will be able to prove that Asahi would have competed for all of FMC's customers during the class period had it been allowed to do so." Id. at 91 (finding, based on the expert testimony, that "influential competition from Asahi would not have been so difficult to establish"). Here, Plaintiffs have made no showing that any acquired company would or could have competed for any, let alone all, Comcast subscribers.

provide digital service. (See Besen Decl. ¶ 24.) Thus, even under the Plaintiffs' theory, the acquisition of another cable system would have no anticompetitive effect on areas that had already been upgraded to digital cable. (Id. ¶ 46) This further undercuts the notion that proof of the violation and the injury can be made on a common basis across digital and analog franchise areas.[11]

Timing. Members of the proposed class became part of the alleged Comcast "cluster" at different times. (See Transaction table, supra, at 4) Of the six Philadelphia-area transactions described in the Complaint, two took place before the start of the proposed class period (Marcus & GPC), two closed one month after the start of the proposed class period (Lenfest & GSC), one closed 12 months after the start of the proposed class period (the AT&T swap), one closed 13 months after the start of the proposed class period (the Adelphia swap), and one closed 17 months after the start of the proposed class period (the final phase of the AT&T swap). (See Compl. ¶¶ 52, 55; Besen Decl., ¶ 39; Palmer Aff., ¶ 6-10) Therefore, the members of the class would have been differently impacted, at a minimum, because they joined the class at different periods of time. (Besen Decl. ¶ 39)

* * *

All of these differences, and others, factor significantly into Plaintiffs' core theory—potential second entry in a franchise area by a wireline cable provider that has franchises in other areas. The circumstances in each franchise area as they bear upon the potential for such entry are critical in this case.

[11] Exhibit 12 to the Besen Declaration shows the launch dates for digital cable across Comcast operations in the Philadelphia cluster. Based on the number of subscribers associated with each acquisition and on Dr. Singer's findings (upon which Plaintiffs' experts relies) concerning digital cable and competition from overbuilders, Dr. Besen estimates that on this basis alone, the transactions at issue are likely to have had no deterrent effect on overbuilding for approximately 73% of the subscribers in the proposed class. (Besen Decl. ¶ 42.)

Courts routinely decline to certify classes where it is clear that particular proof, specific to individual members of the putative class who reside in different geographic markets, will be required. See, e.g., Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219 (2d Cir. 2006) (rejecting plaintiff's efforts to certify a nationwide class of persons who had purchased concert tickets from defendants at allegedly inflated prices where the relevant market for concert tickets was local, rather than national); Rodney v. N.W. Airlines, Inc., 146 Fed. Appx. 783, 2005 U.S. App. LEXIS 18242, at *790-91 (6th Cir. Aug. 22, 2005) (finding that individual questions predominated on the issue of market definition for consumers who allegedly purchased airline tickets at supra-competitive prices because defendant "would likely be forced to rebut Plaintiff's claims with evidence that competing carriers chose not to enter particular routes for ... any number of reasons... and these reasons would likely be different from one route to the next"); Sorensen v. Stericycle (In re Med. Waste Serv. Antitrust Litig.), 2006 U.S. Dist. LEXIS at * 22-23 (rejecting class certification because "[p]laintiffs cannot prove their case without an exhaustive market-by-market, customer-by-customer, product-by-product, time period-by-time period inquiry. Analyses will have to be conducted of local markets, concentration in those markets, entry and conditions for entry in those markets, and efficiencies in those markets."); Columbia Health Serv. of El Paso, Inc. v. Columbia/HCA Healthcare Corp., No. EP-96-CA-022-F, 1996 U.S. Dist. LEXIS 20632, at *10 (W.D. Tex. Dec. 23, 1996) (denying class certification where plaintiffs sought to use state as relevant geographic area rather than individual markets related to each health care facility because the health care provider market "is a local one.... Hospitals in Houston do not compete with hospitals in El Paso for patients.").

B. Plaintiffs Have Made No Showing Of Common Issues Or Methodology As To Damages

Before granting class certification, the court must examine whether the expert proffered by the class proponent "has identified a generally accepted methodology for determining impact which is applicable to the class, whether this methodology uses evidence common to all class members, and whether his opinion has probative value." Nichols v. SmithKline Beecham Corp., Civ. A. No. 00-6222, 2003 U.S. Dist. LEXIS 2049, at *13 (E.D. Pa. Jan. 29, 2003) (Padova, J.). While Plaintiffs are not required to choose among multiple methods for calculating damages (see In re Linerboard, 305 F.3d 145, 155 (3d Cir. 2002)), they must show that there is at least one viable methodology. Bradburn Parent/Teacher Stores v. 3M, 2004 U.S. Dist. LEXIS 16193, at *24 n.5. (E.D. Pa. Aug. 17, 2004) ("a plaintiff must still present a credible theory of damages which will demonstrate impact upon all class members through the use of common proof.") (emphasis added). Plaintiffs have not made such a showing here.

Dr. Beyer's Declaration posits two purported "benchmarks" for estimating on a class-wide basis the "supra-competitive overcharge" and/or the "supra-competitive rate of price increase" in this case. Both of those benchmarks rely on an "average price for equivalent cable TV programming across all cable TV systems in the United States" where there is "effective competition." (Beyer Decl. ¶¶ 8, 40.) However, such "effective competition" as defined by Plaintiffs and Dr. Beyer takes place only in 2% of franchise areas nationwide. (See Compl. ¶ 44.) Given that, it is methodologically unsound to assume, as Dr. Beyer does, that but for the Transactions, the franchise areas in the cluster would have experienced entry by a second wireline provider in 100% of cases. Dr. Beyer admits this. (See Cain Decl., Ex. A. (Beyer Tr. at 219); see also Besen Decl., ¶¶ 38, 42.) Indeed, Dr. Beyer testified that his benchmarks were only "illustrative" and admitted they were "wrong." (See Cain Decl. Ex. A (Beyer Tr. at 183).)

Because the central assumption of Dr. Beyer's analysis is patently invalid, his proposed methodology cannot be found to weigh in support of class certification here. See In re NCAA I-A Walk-On Football Players Litig., 2006 U.S. Dist. LEXIS 28824, at * 27 (denying class certification because the plaintiffs' expert offered no method for determining each plaintiff's "particular piece of the damages pie"); In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 87 (D. Mass. 2005) (denying class certification motion because "it is not permissible to use methods such as averaging damages to sweep individual issues under the judicial rug").

Dr. Beyer has a rather checkered record with the courts. For example, another court denied class certification where Dr. Beyer "offer[ed] no systematic way of determining, on any class-wide basis, the price each member would have paid in the absence of the alleged conspiracy." In re Agric. Chems., 1995 U.S. Dist LEXIS 21075, at *25.

This case is not like the price-fixing cases (cited at Pl. Br. at 22) where courts have found that Dr. Beyer would be able to compare the prices charged before and after a particular conspiracy to determine the "but-for price."[12] Rather, this case is like In re Agricultural Chems Antitrust Litig., 1995 U.S. Dist. LEXIS 21075, at *18, where the court rejected class certification because Dr. Beyer failed to do any empirical study of whether impact could be proven on a class-wide basis. Importantly, the court found that:

[12] See In re Linerboard Antitrust Litig., 305 F.3d 145, 154 (3d Cir. 2002) (Dr. Beyer "suggested as a potential benchmark, the potential prices charged for linerboard during a competitive period when there would be no effects of the conspiracy. He explained that the necessary data was available to do the analysis and describe the types of data he would use") (emphasis added); In re Bulk [Extruded] Graphite Prods. Antitrust Litig., 2006 U.S. Dist. LEXIS 16619 at *40 n.6 (D. N.J. Apr. 4, 2006) (proposed benchmark prices would determine prices "before and after the conspiracy and compare[] them to prices during the conspiracy"); In re Carbon Black Antitrust Litig., 2005 U.S. Dist. LEXIS 660, at *79 (D. Mass. Jan. 18, 2005) (Dr. Beyer's benchmark methodology involved "calculating a 'benchmark' price drawn from 'the period before, after, or both before and after the conspiracy period,' which is then compared to prices during the conspiracy period to come to the 'percentage overcharge.'"). An off-the-rack "but-for" price simply does not work in this case.

> [N]owhere does Dr. Beyer ever demonstrate what even plaintiffs acknowledge is the sine qua non of class-wide proof of impact: 'damage to each class member' because the prices charged by Zeneca's distributors were higher than the range which would have existed under competitive conditions.... Rather Dr. Beyer merely assumes that such an overcharge took place. Simply put, Dr. Beyer assumed the answer to this critical issue and Plaintiffs, in turn, have asked the Court to rely on this 'conclusion' as support for class certification. The Court cannot do so here.

Id.. The court therefore found that "Dr. Beyer had no basis on which to conclude—one way or the other—whether the suggested price or reported price was an overcharge, and therefore no basis on which to conclude that there had been 'impact' on the specific transactions he did examine—let alone, class-wide impact." Id. at *20. To the contrary, the court found that "the impact issue here necessarily will present a 'highly individualized and complex' inquiry into whether an overcharge has occurred." Id. at *15.

Conceding the inadequacy of his current report, Dr. Beyer promises that he—or someone else—will refine his methodology in the future. (See Cain Decl. Ex. A (Beyer Tr. at 190-97).) Courts faced with such promises, however, have repeatedly held that assurances of future solutions are not enough. See Sorensen v. Stericycle, 2006 U.S. Dist. LEXIS 19793, at *26 ("It is simply not enough that Plaintiffs merely promise to develop in the future some unspecified workable damage formula. A concrete, workable formula must be described before certification is granted"); Law v. NCAA, 167 F.R.D. 178, 185 (D. Kan. 1996) ("Naked assurances that a manageable method of dealing with individual issues will be found and presented at trial are not sufficient to meet the burden" of proof at class certification); In re Beef Indus. Antitrust Litig., MDL No. 248, 1986 U.S. Dist. LEXIS, at *7 (declining to certify class where plaintiffs claimed that "[t]he precise procedure to determine the amount of damages suffered by the proposed class... cannot be finalized at this time."); Wilcox Dev. Co. v. First Interstate Bank of Or., 97 F.R.D. 440, 447 (D. Or. 1983) ("Plaintiffs do not ... offer a suitable mathematical formula for

computing damages; they claim they expect to develop this formula. 'Where the court finds ... that there are serious problems now appearing it should not certify the class merely on assurances of counsel that some solution will be found.'") (quoting Windham v. Am. Brands, Inc., 565 F.2d 59, 70 (4th Cir. 1977)).

Dr. Beyer's report makes other fundamental mistakes. For example:

1. Dr. Beyer erroneously assumes that all members of the proposed class received essentially the same services during the proposed class period. (Beyer Decl., ¶ 7(a).) They did not. (See Besen Decl., ¶¶ 55-62.) This further undermines the value of his work. See Freeland v. AT&T Corp., No. 04 Civ. 8653, 2006 U.S. Dist. LEXIS 57394, at *57 (S.D.N.Y. Aug. 17, 2006) (methodology insufficient to support class certification where expert relied on "averages that include prices for different products").

2. Dr. Beyer assumes that all class members have paid "essentially the same" price for preferred basic service during the proposed class period, but his own data shows they did not. (See Besen Decl., ¶¶ 55-60.) These variations strongly suggest that some class members experienced no harm and make clear, at a minimum, that an individualized inquiry into the prices paid by each class member will be required to establish harm. See Bogosian v. Gulf Oil Corp., 561 F.2d 435, 454 (3d Cir. 1977) (class certification is inappropriate in the absence of proof that the allegedly illegal conduct harmed the entire class) (emphasis added).

* * *

Plaintiffs have failed to make any showing, let alone the required showing, that common issues predominate in this case. Their own theory of the case—elimination of a specific kind of competition that can only be undertaken in a specific way in a specific place—undercuts any

notion of class-wide and cluster-wide proof. Their expert offers nothing valuable in support of their class certification motion. Class certification must be denied. See Sorensen v. Stericycle (In re Med. Waste Serv. Antitrust Litig.), 2006 U.S. Dist. LEXIS 19793, at *20-21 ("Plaintiffs—and their expert — ... offer nothing more than conclusory allegations, assumptions of liability and impact, and assurances of future solutions regarding damages. They simply have not met their strict burden of proof that all the requirements of FRCP 23—specifically Rule 23(b)(3)—are clearly met"); Sample v. Monsanto Co., 218 F.R.D. 644, 650 (E.D. Mo. 2003) ("Simply put, plaintiffs [and their expert] presume class-wide impact without any consideration of whether the markets or the alleged conspiracy at issue here actually operated in such a manner so as to justify that presumption.... I cannot 'presume' or 'assume' much less 'conclude' class-wide impact here because the evidence submitted during the class certification hearing demonstrates that such a presumption would be improper."), aff'd sub nom., Blades v. Monsanto, 400 F.3d 562 (8th Cir. 2005).

III.

THE NAMED PLAINTIFFS ARE NOT ADEQUATE OR TYPICAL REPRESENTATIVES

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

To satisfy the adequacy requirement, "'a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" Bradburn Parent/Teacher Stores, 2004 U.S. Dist. LEXIS 16193, at *12 (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)).

Here, far from being similarly situated, Plaintiffs Glaberson and Behrend actually have interests that are antagonistic to others in the proposed class. As described above, Plaintiffs assert that Comcast's prices were constrained by the presence of other wireline cable operators in the alleged cluster prior to the complained-of transactions. As shown on Exhibit 10 to the Besen Declaration, the two named plaintiffs live in very close proximity to each other and to the Comcast/Lenfest "border." The named Plaintiffs, therefore, have an incentive to argue (i) that Comcast is liable for eliminating a physically proximate cable system, and (ii) that subscribers with proximity to a border between two systems were injured to a greater extent and are entitled to a greater recovery. Put another way, the named Plaintiffs will want to emphasize the proximity argument whereas the class members not located near a border will not. These diverging interests show both that the class as proposed is just too big and that the named plaintiffs cannot adequately represent all of its members.

Although Comcast disagrees with Plaintiffs' proximity theory, if we take the theory on its own terms it is not difficult to see why proximity could matter. A subscriber of one provider who lives near the border of another provider's franchise area presumably will have an easier time than a subscriber who lives in a franchise area that is in the middle of a provider's large "cluster" in arguing that the presence of the second provider has a constraining effect on the subscriber's prices. This argument is available to the named Plaintiffs. It is not available to the hundreds of thousands of class members who do not and never did live in close proximity to the border of another subscriber.

Moreover, it is evident that Plaintiffs Glaberson and Behrend have not suffered the types of injuries Plaintiffs claim that other members of the class have suffered.[13] Dr. Beyer admits that

[13] Therefore, this case is unlike Meijer, Inc. v. 3M, 2006 WL 2382718, at *6 (E.D. Pa. 2006) (Padova, J.) (relied on by Plaintiffs at Pl. Br. 15) where this Court found that "[b]oth Meijer and all Settlement Class

prices may have been supra-competitive in the legacy Comcast and Lenfest areas (where the named Plaintiffs reside) prior to the Transactions. Therefore, the named Plaintiffs' theory of antitrust impact is likely to be—indeed, will have to be—different from those Plaintiffs who will argue that they paid competitive prices prior to the Transactions.

In addition, the data do not suggest that Plaintiffs Behrend and Glaberson were actually overcharged. Plaintiff Glaberson experienced smaller increases in prices per channel than subscribers in the United States as a whole, and Plaintiff Behrend actually experienced a decrease. (See Besen Decl. ¶¶ 8(d), 64-65; see also id. Ex. 18.) Accordingly, assuming for the moment the validity of Plaintiffs' claims, Ms. Behrend and Mr. Glaberson may prejudice claims of other class members that may have paid supra-competitive prices.

IV.

SUBSCRIBERS WHO HAVE NOT EXERCISED THEIR RIGHT TO OPT-OUT SHOULD BE EXCLUDED FROM THE CLASS

Between March and June 2004, Comcast sent out an arbitration notice to all existing subscribers to video services within all systems owned by Comcast prior to the merger with AT&T Broadband (the "Arbitration Notice"). (See Kane Decl. ¶ 3.) The Arbitration Notice was received by customers in the Philadelphia cluster except those subscribers residing in: (i) Philadelphia, Philadelphia County, Pennsylvania; (ii) Newtown, Bucks County, Pennsylvania; (iii) Holland, Bucks County, Pennsylvania; (iv) and Montgomery County, Pennsylvania with the exception of Willow Grove and Lower Merion. (See id., Ex. 2.) Notably, both Plaintiff

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Members allegedly have been injured by the same anti-competitive conduct of 3M, and purportedly suffered overcharges as a result.").

Glaberson and Plaintiff Behrend (née Cutler) reside in areas that were specifically excluded from the mailing.[14] (See id.)

The Arbitration Notice was enclosed in a regular envelope containing the respective customer's monthly statement. (See Kane Decl. ¶ 4.) The introductory paragraph of the Arbitration Notice reads, in capitalized and bolded letters:

> **NOTICE FROM COMCAST REGARDING ARBITRATION**
>
> **THIS NOTICE CONTAINS AN IMPORTANT CHANGE TO YOUR SUBSCRIBER AGREEMENT WITH COMCAST (THE "AGREEMENT"). PLEASE NOTE THAT THIS CHANGE TO THE AGREEMENT AS SET FORTH BELOW RESTATES AND SUPERSEDES ANY PREEXISTING PROVISION IN THE AGREEMENT CONCERNING ARBITRATION AND TAKES EFFECT THIRTY (30) DAYS AFTER THIS NOTICE WAS MAILED TO YOU (THE "EFFECTIVE DATE") UNLESS YOU EITHER (1) OPT OUT OF ARBITRATION IN THE MANNER INDICATED BELOW OR (2) IMMEDIATELY NOTIFY COMCAST THAT YOU ARE TERMINATING YOUR AGREEMENT. YOUR CONTINUED USE OF COMCAST'S SERVICE AFTER THE EFFECTIVE DATE SHALL BE DEEMED TO BE YOUR ACCEPTANCE OF THIS CHANGE. THIS CHANGE MAY HAVE A SUBSTANTIAL IMPACT ON THE WAY IN WHICH YOU OR COMCAST WILL RESOLVE ANY DISPUTE WITH ONE ANOTHER.**

(See id., Ex. 1.)

Paragraph C of the Arbitration Notice containing the opt-out provision reads, in capital letters:

> **C. Right to Opt Out:** IF YOU DO NOT WISH TO BE BOUND BY THIS ARBITRATION PROVISION, YOU MUST NOTIFY COMCAST IN WRITING AT 1500 MARKET STREET, PHILADELPHIA, PA 19102, ATTN LEGAL DEPARTMENT - ARBITRATION, WITHIN 30 DAYS OF THE DATE THIS NOTICE WAS MAILED TO YOU. YOUR WRITTEN NOTIFICATION TO

[14] In the stipulated order dated April 12, 2006, the parties agreed that Defendants would not allege for any purpose in this action, including class certification, that an arbitration agreement, or any provision thereof, applies to Plaintiff Glaberson, Plaintiff Behrend, or to those cable television customers in the Philadelphia cluster who are similarly situated to Plaintiff Glaberson and/or Behrend. Consequently, the Order does not preclude Comcast from alleging the existence of an arbitration agreement with respect to those subscribers in the Philadelphia Cluster who are situated differently from Plaintiffs Glaberson and Behrend.

> COMCAST MUST INCLUDE YOUR NAME, ADDRESS AND COMCAST ACCOUNT NUMBER AS WELL AS A CLEAR STATEMENT THAT YOU DO NOT WISH TO RESOLVE DISPUTES WITH COMCAST THROUGH ARBITRATION. YOUR DECISION TO OPT OUT OF THIS ARBITRATION PROVISION WILL HAVE NO ADVERSE EFFECT ON YOUR RELATIONSHIP WITH COMCAST OR THE QUALITY OF SERVICES PROVIDED TO YOU BY COMCAST.

(Id.)

Paragraph I of the Arbitration Notice containing the provision on severability provides, in relevant part:

> If any clause within this Arbitration Provision (other than the class action waiver clause identified in paragraph F(2) above) is found to be illegal or unenforceable, that clause will be severed from the Arbitration Provision, and the remainder of the Arbitration Provision will be given full force and effect. If the class action waiver is found to be illegal or unenforceable, the entire Arbitration Provision will be unenforceable.

(Id.)

By the end of the opt-out period, Comcast had received approximately 2,800 letters from subscribers who had exercised their right to opt out of arbitration, among them, approximately 480 subscribers within the Philadelphia Cluster. (See id., ¶ 6.)

A. Parties May Waive Their Right To Class-Wide Proceedings

It is widely acknowledged that parties may contract away their right to participate in class proceedings by agreeing to arbitration on an individual, non-class basis. In Johnson v. W. Suburban Bank, 225 F. 3d 366, 374-75 (3d Cir. 2000), the Third Circuit noted that even though "pursuing individual claims in arbitration may well be less attractive than pursuing class action in the courts, we do not agree that compelling arbitration of the claim of a prospective class action plaintiff irreconcilably conflicts with TILA's goal of encouraging private actions to deter violations of the Act. Whatever benefits of class actions, the FAA 'requires piecemeal resolution when necessary to give effect to an arbitration agreement.'" Id. at 374-75. (Emphasis in

original). See also In re American Express Merchants Litig., No. 03 CV 9592, 2006 WL 662341, at *6 (S.D.N.Y. March 16, 2006) (finding that "arbitration agreements containing class action waivers are not inherently unenforceable as anti-competitive" and that issue of enforceability of "collective action waivers" was one for the arbitrators to decide); Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting a borrower's argument that "the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages").

While it is true that a limited number of courts have refused to enforce arbitration clauses containing a waiver of class-wide proceedings, none of these decisions involved disputes in which the party opposing arbitration had been given the opportunity to opt out of arbitration. Moreover, in all these cases additional factors—not present here—lead to the conclusion that the arbitration clauses in question were unconscionable. These factors included (i) a lack of mutuality, (ii) a requirement to arbitrate at the place where the party with superior bargaining power was located, (iii) the costs of commencing arbitration constituting a *de facto* barrier, and (iv) a limitation of recoverable damages.[15]

[15] See, e.g., Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006), another action brought against Comcast for alleged antitrust violations. Not only did the arbitration provision in Kristian not provide customers with to opportunity to opt-out of arbitration, it also sought to exclude liability for punitive and treble damages and prohibited the recovery of attorneys fees and costs. See also Ting v. AT&T, 319 F.3d 1126, 1150-52 (9th Cir. 2003) (finding AT&T's arbitration clause substantively unconscionable because it required subscribers to split the arbitrator's fees with AT&T and required arbitration proceedings to remain confidential); Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1100, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 4th Dist. 2002) (finding the arbitration provision containing a ban on class-wide proceedings procedurally unconscionable because it was provided to cardholders on a "take it or leave it" basis, and the only option cardholders had if they did not wish to accept the amendment was to close their account); Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1190 (S.D. Cal. 2005) (finding an arbitration clause containing a class-action waiver to be unconscionable, in part, because it was "non-negotiable, presenting the consumer with only a take-it-or-leave-it option").

Here, the Arbitration Notice is strikingly consumer-friendly in that it: (i) provides for arbitration at a location convenient to the subscriber in the area where the subscriber receives service from Comcast; (ii) provides that Comcast will advance all arbitration filing fees and arbitrator's costs and expenses upon the subscriber's written request; (iii) gives the subscriber a choice of three arbitration institutions and provides that arbitration shall be conducted under the appropriate rules for consumer claims of those institutions; (iv) contains no limitation whatsoever on the type of recovery that a plaintiff may request and obtain; and (v) provides that notwithstanding anything to the contrary in the Arbitration Notice, Comcast will pay all fees and costs which it is required by law to pay.

B. Subscribers Were Given A Meaningful Choice Not To Be Bound By The Arbitration Notice

Federal and state courts alike have enforced arbitration agreements in cases in which the party sought to be bound to arbitration was given a meaningful choice not to accept arbitration. This is especially true where, as here, the party's choice to opt out of arbitration has no adverse effect on its relationship with the party seeking to implement the arbitration clause. See, e.g., Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002) ("[T]he arbitration agreement at issue in this case allowed employees a meaningful choice not to participate in the program. We find this difference—the genuine possibility to opt-out of the arbitration program—to be dispositive . . . ."); Fernandez v. Citibank (S.D.), N.A., 3-05-CV-1137-1, 2005 U.S. Dist. LEXIS 26517 (N.D. Tex. Nov. 3, 2005) (enforcing an arbitration provision contained in a notice of change of terms and conditions to a credit-card agreement and sent to the card-holder four years after he had opened his account, because the card holder had the opportunity but failed to opt out of arbitration); Providian Nat'l Bank v. Screws, 894 So.2d 625, 628-29 (Ala .Sup. Ct. 2003) (upholding an arbitration provisions enclosed in a monthly billing statement

which stated that the arbitration provision would become effective within 45 days unless the defendant bank received prior to then a letter from the customer stating that they do not want the arbitration provision to become part of their agreement, and which further stated that the status of the customer's account would remain unaffected by the customer exercising such opt-out).

Even the Illinois Supreme Court in its October 5, 2006 decision in Kinkel v. Cingular Wireless LLC, No. 100925, 2006 WL 2828664, at *12, 19 (Oct. 5, 2006), which was submitted to the Court by Plaintiffs' counsel on the same date, recognized that contracts of adhesion containing arbitration clauses and class action waivers have become "a fact of modern life," and that none of the decisions involving such arbitration clauses have held "class action waivers to be *per se* unconscionable." Further, and importantly, the court found that if there was a fact pattern in all those cases it was this: "a class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner." Id. at *20 (emphasis added).

C. The Arbitration Notice Applies Retroactively

Pursuant to Paragraph B of the Arbitration Notice, the Arbitration Notice applies to both future disputes and claims between subscribers and Comcast as well as to disputes and claims in existence at the time the Arbitration Notice went into effect. There is no doubt that arbitration clauses may apply retroactively to cover disputes and claims that have arisen before the effective date of the arbitration clause. In addition, a number of courts have enforced retroactive arbitration clauses in the context of class action lawsuits and excluded from the class those putative class members that were subject to the arbitration clause. See, e.g., Dienese v.

McKenzie Check Adv. of Wis., LLC, Case No. 99-C-50, 2000 WL 34511333 (E.D. Wis. Dec. 11, 2000) (excluding from the certified class those borrowers of single-payment cash loans who placed their initials on an arbitration agreement which was implemented after the putative class action was initiated); Burden v. McKenzie Check Advance of Ky., Inc., No. 98-173 (E.D. Ky. Mar. 28, 2001) (granting motion to modify the class definition of an already certified class to exclude persons who, after the class action lawsuit was filed, had entered into arbitration agreements which applied to claims that predated the effective date of the arbitration agreement and were encompassed by the class action lawsuit); Bellizan v. Easy Money of La., Inc., No. Civ. 00-2949, 2002 WL 1066750, at *3-6 (E.D. La. May 29, 2002) (applying an arbitration agreement retroactively to cover a past dispute which was the subject of a class action lawsuit pending on the effective date of the arbitration agreement) rev'd on other grounds, 2002 WL 1611648 (E.D. La. July 19, 2002). Therefore, this Arbitration Notice governs the rights of those subscribers who received it, and those subscribers must arbitrate their claims on an individual basis.[16]

[16] Should the Court disagree and find the class action waiver in the Arbitration Notice to be unenforceable notwithstanding the opt-out provision and contrary to the decision in Kinkel and the other cases mentioned above, the Court cannot order class arbitration: unlike the arbitration provision governing in Kristian or the arbitration clauses considered by the Court on Defendants' motion to compel, the Arbitration Notice provides that the class action waiver cannot be severed, and "[i]f the class action waiver clause is found to be illegal or unenforceable, the entire Arbitration Provision will be unenforceable." (See Kane Decl. ¶ 3, Ex. 1.)

CONCLUSION

For the foregoing reasons, Comcast respectfully requests that Plaintiffs' motion for class certification be denied.

Dated: November 9, 2006

Respectfully submitted,

/s/ Darryl J. May

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that, on this date, the foregoing Memorandum of Law in Opposition to Plaintiffs' Motion For Class Certification was electronically filed and is available for downloading and review for the following counsel who are to be notified via the ECF system:

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