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

Caroline Behrend, Stanford Glaberson, Michael Kellman, Lawrence Rudman, Joan Evanchuk-Kind and Eric Brislawn, Plaintiffs, v. Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC, Defendants.	)	No. 03-6604 The Honorable John R. Padova

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Defendants do not challenge Plaintiffs' demonstration of numerosity, that Plaintiffs' counsel are experienced and well-qualified to conduct this litigation, or that a class action is the superior method for the fair and efficient adjudication of this antitrust case. *See* Defs.' Br. Defendants contest class certification on only two grounds: (1) whether common questions predominate over questions affecting individual members of the proposed class, and (2) whether the named Plaintiffs are adequate representatives. Defs.' Br. at 1-3. Both arguments are severely flawed and hence, without merit: the gravamen of Defendants' commonality arguments is based on a blatant misinterpretation of the assumptions underlying the conclusions reached by Plaintiffs' expert, economist Dr. John Beyer, who has opined on, *inter alia*, the common impact of Defendants' conduct on class members. Furthermore, in order to concoct purported differences between class members, Defendants' and their expert, Dr. Besen, ignore several salient facts relating to Defendants' supra-competitive pricing that has impacted all class members. Defendants' attack on Plaintiffs' adequacy is equally flawed, resting, as it does, on wholly irrelevant factors, such as Plaintiffs' geographic location, and provides no basis for denying class certification.

Finally, and in direct contravention of the Court's April 12, 2006 Order, Defendants contend that certain members of the proposed class were sent an arbitration notice as a bill stuffer with their monthly cable bills between April and June of 2004, which required those subscribers to arbitrate their claims on a non-class basis and, therefore, subscribers who did not "opt-out" of that notice should be excluded from a certified Philadelphia area class. Defs.' Br. at 25-27.

Defendants' arguments lack merit and pose no grounds for denying class certification or for excluding any subscribers from a certified class. Plaintiffs have met their burden of demonstrating that each of the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied. The Philadelphia class should be certified.

II. PLAINTIFFS' CLAIMS ARE ALL SUBJECT TO COMMON PROOF, AND THE DECLARATION OF DEFENDANTS' EXPERT, DR. BESEN, PROVIDES NO SUPPORT FOR DEFENDANTS' ARGUMENT TO THE CONTRARY.

Plaintiffs have established that common questions predominate in this case, that the members of the proposed class have all experienced common impact as a result of Defendants' alleged anticompetitive practices, and that accepted methodologies exist for computing damages on both a classwide and an individual basis. Plaintiffs' class certification expert, Dr. Beyer, has testified that:

> Based on the information I have seen to date, I have concluded that the alleged antitrust violations would have impacted all members of the proposed Classes through the payment of higher prices for subscription cable programming services than would have otherwise prevailed in the marketplace. This conclusion is based on the following economic considerations:
>
> (a) The product supplied is essentially the same for all Class members within each cluster area:
> - All members of the proposed Classes have purchased a package of cable TV programming from Comcast which must include at least Comcast's "expanded basic" tier of television channels.
> - Comcast's "expanded basic" tier of television channels is fundamentally the same for all subscribers in each of the market areas, Philadelphia and Chicago.
> - All members of the proposed Classes are subscribers to Comcast cable systems that are part of Comcast's Philadelphia or Chicago cluster of cable systems.
>
> (b) Comcast has market power in the Philadelphia and Chicago market areas as a consequence of:
> - Comcast's building of the Philadelphia and Chicago clusters of cable systems has increased its monopoly power, and raised entry barriers for potential competitors, including multiple cable system operators, cable companies who previously competed in the Philadelphia and Chicago markets, but were removed from and did not reenter those markets as a result of Comcast's conduct alleged in the complaint, other cable companies, and overbuilders, in those market areas.

- Comcast does not face competition sufficient to constrain prices in the Philadelphia and Chicago clusters. Competition from Direct Broadcast Satellite (DBS) providers is not sufficient to constrain Comcast's prices and existing and potential competition from overbuild cable operators is not sufficient to constrain Comcast's prices.
- Purchasers of Comcast's services are not able to avoid Comcast's exercise of market power, and therefore, to the extent that Plaintiffs' allegations are true, prices for Comcast's services in the Philadelphia and Chicago cluster areas would be lower absent Comcast's alleged antitrust violations, and all members of the proposed Classes have been impacted.

(c) Class members in each cluster are all impacted by Comcast's pricing decisions:
- Comcast subscribers generally pay exactly or nearly the same price for the "expanded basic" tier of cable service across all systems in each cluster.
- The price that subscribers pay for "expanded basic" service has become common under Comcast ownership.
- The price that subscribers pay for "expanded basic" service has increased as a consequence of Comcast's increased market power in each cluster area.

(d) Comcast's price increases for "expanded basic" service have been exactly or nearly the same across all systems in each cluster.

(e) Comcast's subscribers in the Philadelphia and Chicago clusters would all benefit from effective competition in each market area. Such competition would result in lower prices for Comcast's subscribers in those market areas.

Updated Decl. of John C. Beyer, Ph.D., Regarding Class Certification at ¶ 7 ("Beyer Updated Decl.").

In a conventional attempt to create superficial complexity, Defendants emphasize non-existent differences among class members. In particular, Defendants contend that the class members' claims are not subject to common proof because they (1) became Comcast subscribers at different times and locations pursuant to the swap and acquisition agreements challenged in the Complaint; (2) live in various communities; and (3) pay different prices for different channel lineups. *See* Defs.' Br. at 1-2, 4-6. "Antitrust defendants resisting class certification routinely argue that the complexity of their particular industry makes it impossible for common proofs to predominate on the issue of antitrust impact." *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 187 (D.N.J. 2003); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 484-85 (W.D. Pa.

1999) ("[C]ontentions of infinite diversity of product, marketing practices, and pricing have been made in numerous [antitrust] cases and rejected.").

Arguments such as Defendants' are viewed by the courts "as 'a redherring.'" *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 526 (M.D.Ala. 1992). In fact, "[c]ontentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected. Courts have consistently found the [antitrust] conspiracy issue the overriding predominant question." *In re Rubber Chemicals Antitrust Litig*, No. C 04-1648 MJJ, 2005 WL 2649292, at *5 (N.D. Cal. Oct. 6, 2005).

Further, Defendants' arguments are based exclusively on the declaration of their expert, Dr. Stanley M. Besen, who misinterprets and misrepresents the testimony of Plaintiffs' class certification expert. As more fully summarized and explained in Dr. Beyer's rebuttal declaration, Dr. Besen's analysis is fundamentally flawed:

(1) Initially, Dr. Besen has both misunderstood and mischaracterized Dr. Beyer's analysis and testimony regarding common impact by concluding that, but for Comcast's anticompetitive swapping, acquisition, and other anticompetitive conduct, the entire Philadelphia Cluster would have been overbuilt. By focusing his analysis on this mistaken overbuilding assumption, Dr. Besen ignores the relevant question for demonstrating common impact – whether members of the proposed class have paid higher prices for their cable services than they would have absent Defendants' alleged unlawful conduct.

(2) Dr. Besen incorrectly concludes that all members of the proposed class must have paid the same price, for the same services, experienced the same price-per-channel increases and had the exact same experiences regarding their cable

services. This analysis ignores the fact that all class members are paying higher prices than they would have absent Comcast's unlawful conduct.

(3) Dr. Besen's analysis and conclusions are based on an inappropriate and incorrectly calculated "price per channel" measure. The price-per-channel measure is inappropriate because cable subscribers do not choose their cable service on a per channel basis, but rather subscribe to a single "expanded basic" tier of service. Further, cable subscribers do not value channels equally. Dr. Besen's price-per-channel measure is Dr. Besen's own creation and is not employed by Comcast, other cable operators, or third party cable industry observers.

(4) Dr. Besen uses an inappropriate benchmark, the Cable & Satellite CPI published by the Bureau of Labor Statistics, even though, unlike Dr. Besen's own price-per-channel measure, the Cable & Satellite CPI also includes additional charges such as charges for premium channels, equipment, and installation, as Dr. Besen admitted at this deposition.

See Beyer Rebuttal Decl. ¶ 3.

Finally, much of Dr. Besen's declaration, and Comcast's arguments, prematurely and inappropriately attempt to address the merits of this action and are irrelevant at the class certification stage of the litigation.[1]

[1] Plaintiffs submit with this Reply (i) the Declaration of John C. Beyer, Ph.D. in Response to Expert Report of Dr. Stanley M. Besen Regarding Class Certification, with exhibits ("Beyer Rebuttal Decl."); and (ii) the Declaration of Jessica N. Servais in Support of Plaintiffs' Motion for Class Certification dated 12/04/2006, with exhibits ("Servais Decl.").

A. Dr. Besen's Analysis Mischaracterizes Dr. Beyer's Analysis and Incorrectly Considers Only Overbuilding as a Single Factor in Evaluating Class Members' Damages.

In his declarations and deposition testimony, Plaintiffs' expert, Dr. Beyer, has concluded that:

(i) "the alleged antitrust violations would have impacted all members of the proposed Classes [Philadelphia and Chicago] through the payment of higher prices for subscription cable programming services than would have otherwise prevailed"; and
(ii) "there are accepted methodologies available, which are common to all members of the proposed Classes, to quantify damages related to the defendants' antitrust violations, and that damages can be feasibly calculated on a class-wide [and individual] basis."

Beyer Updated Decl. at ¶¶ 7-8; *see also* Beyer Rebuttal Decl. at ¶ 4; Beyer Dep. at 215-17.

In contesting these conclusions, Dr. Besen misapprehends and misrepresents Dr. Beyer's testimony and Plaintiffs' economic theory of the case. Dr. Besen's analysis focuses entirely on overbuilding and the effect that a diminution in overbuilding would have on Comcast's prices, and therefore class members' damages, in the Philadelphia Cluster. In particular, Dr. Besen misrepresents Dr. Beyer's testimony by incorrectly contending that Plaintiffs posit that, in the absence of the challenged transactions, the Philadelphia Cluster would have been overbuilt by 100% and that the challenged transactions excluded overbuilding by 100%. *See* Besen Decl. at ¶¶ 74-75; Defs.' Br. at 19.

This mischaracterization of Dr. Beyer's analysis constitutes the heart of Comcast's challenge to class certification and pervades both its opposition memorandum and Dr. Besen's report. Comcast is flat wrong. As Dr. Beyer has again made clear: "My analysis and conclusions are not based on any such presumption of overbuilding." Beyer Rebuttal Decl. ¶3(i).

Based on his mistaken interpretation of Dr. Beyer's testimony and analysis, Dr. Besen argues that, because each franchise or cable system was not subject to the same threat of

overbuilding, the Philadelphia area class members would not have been impacted in the same way and, further, that Comcast's subscribers have not suffered damages because Comcast's Philadelphia area market has not been, and purportedly will not be, overbuilt. *See* Beyer Rebuttal Decl. at ¶ 10. Dr. Beyer, in his Rebuttal Declaration, describes Dr. Besen's misrepresentation of Plaintiffs' and Dr. Beyer's economic theory as Dr. Besen's "overbuild strawman" which Dr. Besen first builds for the specific purpose of then tearing it down. *Id.* ¶¶ 11-12, 14.[2]

Contrary to Comcast's and Dr. Besen's misrepresentations, Plaintiffs and Dr. Beyer make no such contention regarding overbuilding. As Dr. Beyer describes it, "[t]he relevant issue for common impact to all members of the proposed Class is not, as Dr. Besen's analysis and conclusions imply, whether all of the cable systems in the Philadelphia Cluster would have been overbuilt (or had the same probability of being overbuilt) but for Comcast's swapping and other allegedly anticompetitive behavior, but rather, whether that behavior eliminated and reduced potential competition leading to increased market power for the Philadelphia Cluster and increased prices for all proposed Class members." Beyer Rebuttal Decl. at ¶ 10 (emphasis added).[3]

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[2] In Section IV.A. of his declaration, Dr. Besen builds yet another "strawman," by relying on the economic theory of "contestable markets." Dr. Beyer in his declarations never relies on the theory of "contestable markets." *See generally* Beyer Updated Decl.; Beyer Rebuttal Decl. at ¶¶ 14-16. Further, as Dr. Beyer describes in his Rebuttal Declaration, markets are rarely " 'perfectly contestable' because of a variety of entry barriers that may exist, and that, nevertheless, the threat of potential entry and competition does affect the behavior and pricing of incumbent firms." Beyer Rebuttal Decl. at ¶ 15. Further, as Dr. Besen concedes, overbuilding has occurred in the cable TV industry, including the Philadelphia Cluster. *Id.* ¶ 16.

[3] Despite Dr. Besen's devotion to constructing his overbuild strawman, he admits that the relevant issue for demonstrating common impact is not the probability of overbuilding, but rather, whether all members of the proposed class have been impacted by paying higher prices than they would have absent Comcast's alleged unlawful conduct. *See* Besen Dep. at 131-134. Further, Dr. Besen recognizes quite late in his declaration that Dr. Beyer's conclusions do not depend on the presence or absence of overbuilding in the Philadelphia cluster. He states, "Dr. Beyer might also be arguing that even if clustering does not prevent actual competition, it might limit potential competition, and thus lead to higher prices." Besen Decl. at ¶ 76. This is actually one of Dr. Beyer's main conclusions. Beyer Rebuttal Decl. at ¶ 12. Yet it is ignored and otherwise overlooked in Dr. Besen's declaration, almost all of which is devoted to addressing a presumption (overbuilding) that Dr. Beyer never makes.

Dr. Beyer's conclusions, unlike those of Dr. Besen, are grounded in his observation and assessment that Comcast's swaps and acquisitions of incumbent cable systems and other anticompetitive conduct in Comcast's cluster regions, including Comcast's Philadelphia area cluster, have eliminated actual and potential competition from those cable companies who have exited that region, and that Comcast's anticompetitive conduct increased market share and market power in the Philadelphia area and raised entry barriers for other potential competitors, thereby further reducing the threat of competition. Those factors, together, have enabled Comcast to charge even higher supra-competitive prices to its subscribers. Beyer Rebuttal Decl. at ¶ 5; Beyer Updated Decl. at ¶ 7(b). Dr. Beyer testifies that:

> My conclusion that the alleged violations would have adversely impacted all members of the proposed Classes was based upon the observation and assessment that Comcast's swapping with and acquisition of other incumbent cable systems in the cluster regions has eliminated actual and potential competition from those cable companies who have exited the cluster region. Comcast's clustering and increased market power in the cluster regions have raised entry barriers for other potential competitors, thereby further reducing the threat of competition.
>
> Together, the elimination of potential incumbent cable competitors from the cluster regions and the reduced threat of potential competition from other potential entrants have increased Comcast's market power in the cluster regions, enabling the further increase of already supra-competitive prices to higher levels than would have prevailed otherwise.
>
> Consequently, all members of the proposed classes would have been adversely impacted by Comcast's alleged anticompetitive behavior. The price constraining effect of potential competition, and the increase in market power and resulting increase in prices arising from the reduced threat of potential competition, are concepts that are commonly understood and accepted by economists and are well supported in the professional literature, as discussed later in this report.

Beyer Rebuttal Decl. at ¶ 5; *see also* Beyer Updated Decl. at ¶ 7(b).

Based on his flawed interpretation of Dr. Beyer's analysis, Dr. Besen also incorrectly concludes that "if an increase in clustering has only a small effect on actual competition, its effect on potential competition is likely to be small as well," and that "the estimates of the

magnitude of the competitive overcharge that Dr. Beyer proposes to use are based on the effect of *actual overbuilding* and thus do not measure the effect of a change in the extent of *potential competition.*" Besen Decl. at ¶ 76 (emphasis in original). Again, these conclusions are unfounded and bear no relation to Dr. Beyer's actual testimony and analysis, as Dr. Beyer explains:

> First, the threat of potential competition does constrain incumbent firm pricing, even where there may be no actual competitors. This is a fundamental economic concept that is commonly taught and accepted among economists. Second, in my prior Declarations I identified methods for estimating two components of damage: first, the price increases or overcharges incurred by Comcast's Philadelphia Cluster subscribers that were not incurred by other, non-clustered cable customers elsewhere; and second, the pre-existing overcharge, attributable to the lack of effective overbuild competition, which was protected and maintained by Comcast's swapping, acquisitions and other allegedly unlawful conduct. Only the second of these two components measures the effect of actual overbuilding, and even this measure does not assume that overbuilding would occur, but rather that the existing monopoly power has been protected and maintained by Comcast's allegedly anticompetitive conduct.

Beyer Rebuttal Decl. at ¶ 13 (emphasis added).

Further, Dr. Besen attempts to make much of the efficiencies that clustering purportedly achieves, such as creating economies of scale, consolidating overhead expenses, and consolidating operations. *See* Besen Decl. at ¶¶ 48-50. Not only is Dr. Besen's contention an inappropriate attempt to address the merits of Plaintiffs' claims, but it also ignores the fact that, "when the firm realizing the efficiencies has sufficient market power, these asserted cost and marketing efficiencies may not be passed through to customers in the form of lower prices." Beyer Rebuttal Decl. at ¶ 19. In fact, as Dr. Beyer has described in his prior declarations, a 2001 FCC study analyzed the effect of clustering to determine whether the practice and its supposed resulting economies of scale positively effected consumers in the form of lower cable prices. *Id.* at ¶ 19. The FCC study, in fact, found that clustering actually had the opposite effect and

increased average monthly cable rates. *Id.*; Beyer Updated Decl. at ¶ 29 (citing FCC Report on Cable Industry Prices, FCC 01-49 at 31).

The FCC's conclusions, that clustering actually increases monthly cable rates, are reflected in the fact that cable subscribers in the Philadelphia Cluster have paid more, not less, than national cable price increases reported by FCC studies, as reflected in Exhibit 1 to Dr. Beyer's Rebuttal Declaration. Exhibit 1 demonstrates that Comcast's Philadelphia Cluster subscribers' monthly charges for expanded basic services increased by 89.3% from 1999 to 2004 (from $24.94 to $47.22). In contrast, the average monthly charge for all U.S. cable systems increased by only 39.6% from 1999 to 2004. Beyer Rebuttal Decl. ¶ 20, Ex. 1.

Comcast's attempt to disprove Plaintiffs' showing of common impact is based on a blatant mischaracterization of Dr. Beyer's conclusions and must be rejected.

B. Dr. Besen Erroneously Concludes that Class Members Must Have Paid Exactly the Same Cable Prices for Exactly the Same Cable Services.

Dr. Besen also erroneously concludes that in order for all members of the proposed class to have experienced common impact, they must have experienced the exact same price per channel increases. Beyer Rebuttal Decl. at ¶ 22; Besen Decl. at ¶¶ 66-71. This is simply incorrect as a matter of law. "[F]actual differences among the claims of the putative class members do not defeat certification." *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994).

Significantly, Dr. Besen's analysis ignores the fact that Plaintiffs have demonstrated that all members of the proposed class pay higher prices than they would have but for Defendants' alleged misconduct, even though those prices may be somewhat different in certain Comcast Cluster cable systems. Beyer Rebuttal Decl. ¶¶ 22-23, 3(ii); Beyer Updated Decl. ¶ 7(b). Further, contrary to Comcast's representation, Dr. Beyer never contends that the class members

paid exactly the same supra-competitive prices, but rather, that Plaintiffs and class members have generally paid exactly or nearly the same price for extended basic cable services:

> Class members in each cluster are all impacted by Comcast's pricing decisions:
> -Comcast subscribers generally pay exactly or nearly the same price for the "expanded basic" tier of cable service across all systems in each cluster.
> - The price that subscribers pay for "expanded basic" service has become common under Comcast ownership.
> -The price that subscribers pay for "expanded basic" service has increased as a consequence of Comcast's increased market power in each cluster area.

Beyer Updated Decl. at ¶ 7(c); *see also id.* at ¶¶ 35-36.

Dr. Beyer's conclusions are further represented by Exhibit 2 to his Rebuttal Declaration. Exhibit 2 shows the 1999 and 2006 price for expanded basic programming paid by each Philadelphia Cluster cable system based on available price information for 1999 and 2006. Beyer Rebuttal Decl. at ¶ 23. As depicted by the top of each bar in Exhibit 2, currently many of the systems in the Philadelphia Cluster have exactly the same price for expanded basic and many have nearly the same price. In contrast, the lower segment of each bar depicts the 1999 price for each system, and demonstrates the variability of prices that existed in 1999, prior to most of Comcast's swapping, acquisition and other anticompetitive conduct. *Id.* Over time, that variability has reached more consistent levels as Comcast has tightened its chokehold on the Philadelphia area cable market. *See id.;* Beyer Updated Decl. at ¶¶ 35-36.

Further, Dr. Besen also does not contest that class members in each cluster are all impacted by Comcast's pricing decisions.[4] Dr. Besen mentions various irrelevant operational

[4] Comcast's argument (Defs.' Br. at 18) that Plaintiffs' claims will require particular proof because class members reside in different geographic markets is an improper attempt to reargue the sufficiency of Plaintiffs' alleged relevant geographic market. This Court has already ruled that Plaintiffs have sufficiently alleged a relevant geographic market at this stage in the proceedings. *See* Order denying Defs.' Mot. to Dismiss dated 8/31/2006 at 22-24. Further, Plaintiffs have not alleged that an antitrust conspiracy has occurred on a franchise-by-franchise basis. Rather, Plaintiffs and their expert have shown that all Comcast subscribers within the relevant geographic market of the Philadelphia Cluster have been impacted by Defendants' anticompetitive conduct through the payment of higher prices and that all members of the proposed class are subject to Comcast's pricing decisions. *See* Pls.' Suppl. Mem.; Beyer Updated Decl. at ¶¶ 7, 35- 36; Beyer Rebuttal Decl. at ¶ 5.

decisions related to Comcast's business which are decided on a regional basis. Besen Decl. ¶ 46. Significantly, Dr. Besen does not assert, and Comcast does not contend, that the only relevant operating decision for purposes of class certification – Comcast's pricing decisions – is decided on the franchise level. *Id*. (relying on Palmer Declaration)[5].

Moreover, to the extent that Comcast challenges common proof by arguing that class members' damages must be individually determined, Comcast's argument fails. It is settled law that class members do not have to suffer the exact same amount of damages to satisfy Rule 23(b)(3)(1)'s requirement with respect to predominance. *Bogosian v. Gulf Oil Corp*., 561 F.2d 434, 456 (3d Cir. 1977) ("it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, (W.D.Pa. 1999) ("[T]he need to determine the amount of damage sustained by each plaintiff is an insufficient basis for which to decline class certification."); *Midwestern Machinery v. Northwest Airlines*, 211 F.R.D. 562, 570 (D. Minn. 2001) (concluding that although "each [class] member may not have sustained equal damage, having paid different prices at different times, . . . [n]onetheless, Plaintiffs contend and the court is persuaded that the alleged damages have been uniformly sustained by the named Plaintiffs and the remainder of the class . . . .").

Comcast and Dr. Besen are simply incorrect on this point. Members of the proposed class do not need to have paid exactly the same prices to have suffered a common impact.

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[5] Comcast submits the declaration of Richard N. Palmer, which discusses various purported features of the cable industry. Mr. Palmer's declaration inappropriately addresses merits-related issues not relevant to class certification. Further, Mr. Palmer's declaration, like Dr. Besen's declaration, conspicuously never claims that Comcast's pricing is decided on franchise level as opposed to by Comcast itself. *See* Palmer Decl. at ¶ 18. The other factors that Mr. Palmer describes as being unique to the cable industry have no relevance to class certification and appear intended only to address merits issues or create a "red-herring" facade of complexity for proposes of challenging Plaintiffs' motion. *See* cases cited *supra* at 3-4.

C. Dr. Besen Relies on an Inappropriate and Erroneously Calculated Price Per Channel Measure in Reaching his Conclusions.

Dr. Besen also relies upon an inappropriate and erroneously calculated measure of price increase in reaching his conclusions – the increase in "price per channel" measure. Beyer Rebuttal Decl. at ¶ 24; Besen Decl. ¶ 52-54; Ex. 18. In doing so, Dr. Besen has built yet another "strawman" to be torn down. The price per channel measure is inappropriate because (1) Comcast does prices and sell its expanded basic service as a package and not on a per channel or à-la-carte basis, as Dr. Besen admitted at his deposition; and (2) subscribers do not value each channel equally, as Dr. Besen also admitted at his deposition. Besen Dep.[6] at 38-39; 41-42; 140; Beyer Rebuttal Decl. at ¶ 26.[7]

Moreover, Dr. Besen has erroneously calculated his irrelevant "price per channel" measure by failing to include public, educational, government and leased access (PEG) channels. Beyer Rebuttal Decl. at ¶ 24, n.34. By deliberately omitting the PEG channels in his price per channel analysis, Dr. Besen distorts and incorrectly minimizes the price increases Comcast has charged to its subscribers in the Philadelphia area. *See id.*

Further, the price per channel measure (even if correctly calculated) is not a methodology accepted by third party cable industry observers. Beyer Rebuttal Decl. at ¶ 25. For example, the TV & Cable Factbook, a commonly used cable industry reference employed by both Dr. Beyer and Dr. Besen, does not use it. *Id.* Moreover, monthly prices for expanded basic programming services, not prices per channel, are commonly reported to the FCC, the GAO and other third party cable industry observers for the purpose of examining changes in cable prices and factors

[6] Servais Decl., Ex. A.
[7] Dr. Besen concluded that for the last ten years, no cable company has offered its customers the opportunity to purchase cable channels on a per channel basis. Besen Dep. 140-41.

affecting those changes. *Id*. The FCC's periodic studies of cable TV prices also report the average rates (or prices charged) for expanded basic service. *Id.*

Tellingly, Comcast charges exactly the same $50.40 per month for expanded basic programming in 14 cable systems in the Philadelphia cluster – despite differences among those systems in the selection and number of channels included in the expanded basic program. Beyer Rebuttal Decl. at ¶ 27, Appendix A.[8]

Dr. Besen's price per channel measure is inappropriate, unaccepted and erroneously calculated.

D. Comcast's Expert Also Uses an Incorrect Benchmark, the Cable & Satellite CPI, For Determining Increases in Prices Paid for Expanded Basic Cable Service.

In addition to using an incorrect and erroneously calculated price per channel measure, Dr. Besen also uses an inappropriate benchmark for assessing the price increases of Comcast's cable systems. First, Dr. Besen compares the change in the price per channel for Comcast's expanded basic services to the Cable & Satellite CPI ("CPI") published by the Bureau of Labor Statistics. Besen Decl. at ¶ 63, n.76. The CPI measure, however, includes the composition of and charges for premium channels, such as HBO and Showtime, premium tiers of sports channels, on-demand channels, and equipment and installation charges, which are not included in Besen's own "price per channel" measure. Beyer Rebuttal Decl. at ¶ 28. In fact, Dr. Besen admits that the CPI measure includes charges for additional items beyond prices of cable services. Besen Dep. at 130-31; Besen Decl. at ¶ 63, n.76.

[8] For example, in both Hamburg and Holland, Pennsylvania, expanded basic cable programming costs $50.40 per month despite the fact that the Hamburg cable system offers 75 channels while the Holland cable system offers only 41 channels. Beyer Rebuttal Decl. at ¶ 27. As such, "[u]sing a price per channel measure, as Dr. Besen has done, creates irrelevant, misleading differences in price. In this example, the price per channel of the Holland, PA system is $1.23, nearly double the $0.67 price per channel of the Hamburg, PA system. These irrelevant differences in the price per channel further distort differences in measures of the change in price per channel." *Id.*

Further, Dr. Besen's benchmark, the CPI measure, is not accepted by the FCC. In its most recent study of cable price changes, the FCC makes reference to the CPI. However, it notes that "because it covers a different mix of services, the cable CPI cannot be compared directly with the results of our survey [the FCC's measure of changes in monthly prices paid for basic and expanded basic cable]." Beyer Rebuttal Decl. at ¶ 29 (citing FCC 05- 12, February 4, 2005, Report on Cable Industry Prices at 4, ¶ 9).[9] Moreover, "although the C&S CPI does take into account the number of channels, it does not simply divide consumer expenditures for the basket of cable services by the number of channels to get a price per channel measure." *Id.* Indeed, "the C&S CPI is not a price per channel measure, rather it measures changes in the price paid for a package of cable services, like the package of expanded basic channels." *Id.* at ¶ 32.

Dr. Besen also simply ignores the FCC's cable price studies, which Dr. Beyer uses and which provide a more appropriate and relevant benchmark for calculating prices paid for cable services. *Id.* at ¶ 30. As Dr. Beyer demonstrates, the FCC studies indicate that, on average, the price cable subscribers paid for expanded basic programming increased by 39.6% from 1999 to 2004 (the latest year with data available). *See* Beyer Rebuttal Decl. at ¶ 30, Ex. 1. Significantly, reflecting Comcast's supra-competitive prices, the average price Comcast's Philadelphia area subscribers paid for expanded basic programming increased by 89.3% between 1999 and 2004. *Id.* The Philadelphia Cluster's cable price increases are more than double the percentage increase reported by the FCC for all U.S. cable systems. *Id.*

Further, employing, for the sake of argument, Dr. Besen's use of the CPI benchmark, Dr. Beyer demonstrates how Dr. Besen's use of the CPI benchmark produces incorrect results:

[9] Dr. Besen attempts to justify his use of the CPI based on Dr. Beyer's reference to it in his Declarations and because the CPI considers the number of channels. Beyer Rebuttal Decl. at ¶ 29. As Dr. Beyer explains in his Rebuttal Declaration, his reference to the CPI was simply an acknowledgment of its existence, much like the FCC's reference to the CPI. *Id.*

> As Exhibit 1 shows, even though the number of channels offered on average by the cable systems in the Philadelphia Cluster has increased (on a percentage change basis) more than the U.S. average for all cable systems, the price per channel has increased much more rapidly. The price per channel has increased by 34.5% in the Philadelphia Cluster, while the U.S. average price per channel increased only 4.0%. Consequently, Dr. Besen's conclusion that 47% of the subscribers in the Philadelphia Cluster (including the named Plaintiffs) have not been adversely impacted because the percent change in the price per channel that they have experienced is less than the percent change in the C&S CPI is wrong, not only because it is based on the use of an inappropriate benchmark, but more importantly, because it ignores totally the relevant issue – whether all subscribers (including the named Plaintiffs) have paid higher prices than would otherwise have prevailed.

Beyer Rebuttal Decl. at ¶ 31 (emphasis added); Ex. 1.

Dr. Besen's CPI measure provides an inappropriate benchmark for his price per channel measure.

E. Comcast's and Dr. Besen's Focus on Purported Differences in Subscribers' Prices Per Channel, Time and Place of Subscription, and Regional Experiences Have No Bearing on Common Impact.

Finally, because Dr. Besen's conclusions are based on an inappropriate and incorrectly calculated price per channel measure, his and Comcast's emphasis on superficial alleged variables – the prices Comcast's subscribers have paid, the geographical location and time at which they have subscribed to Comcast, and their alleged differing experiences – are meaningless. Beyer Rebuttal Decl. at ¶ 33. According to Dr. Beyer's unrefuted testimony, all subscribers paid essentially the same prices for extended basic services. *See, e.g., id.*; Beyer Updated Decl. at ¶ 7(c).

Prices. Dr. Besen posits that common impact cannot be shown because cable subscribers in the Comcast cluster have paid different prices. However, as discussed extensively *supra*, this has no bearing on the issue of common impact. The relevant question for purposes of Rule 23 (b) is whether all subscribers paid higher prices than they would have absent Comcast's alleged

anticompetitive conduct. Moreover, Dr. Beyer has demonstrated, as illustrated again in Exhibit 2 to his latest declaration, that since 1999, as a result of Comcast's pricing decisions, "many more cable systems and subscribers in the Philadelphia Cluster now have the same price or nearly the same price for expanded basic service." Beyer Rebuttal Decl. at ¶ 34; *see also* Beyer Updated Decl. at ¶¶ 7(c), 35-36.

Location and Timing. Likewise, Dr. Besen's assertions that there is no common impact because members of the proposed class became Comcast subscribers at different locations and times based on the timing of Comcast's swaps with and acquisitions of various cable systems are also baseless and irrelevant. Beyer Rebuttal Decl. at ¶ 35. Again, Dr. Beyer's "conclusions concerning common impact and Class-wide damages do not depend upon the assumption (or probability) of overbuilding, but rather on the fact that Comcast's swapping and other allegedly anticompetitive behavior has enabled Comcast to increase prices more than would otherwise have occurred, for all subscribers in the Philadelphia Cluster. Consequently, it makes no difference when and where a cable system was added to the Cluster, but rather that the swapping and other allegedly unlawful conduct enabled larger price increases for all members of the proposed Class." *Id.; see also id.* at ¶ 36. Additionally, any insubstantial variations in the prices paid by Plaintiffs or class members based on when they began receiving cable services clearly goes to damages computations at a later stage and has no bearing on common impact.

Regions. Finally, Dr. Besen's assertion that the cable systems in the Philadelphia cluster belong to different functional regions within Comcast, its subscribers had different experiences and received different offers is of no relevance. As noted previously, Dr. Besen never asserts that pricing decisions were among the factors determined on a franchise basis. Beyer Rebuttal

Decl. at ¶ 37. Comcast's emphasis on superficial purported differences among subscribers is meaningless and has no bearing on the common issues that predominate in this case.

F. Dr. Beyer Has Set Forth An Accepted Methodology For Assessing Damages on Both a Class-wide and Individual Basis

Dr. Beyer proposes using two "yard-stick" benchmarks, as suggested by the FCC and other cable price studies, which can be used to estimate the economic damages attributable to Comcast's alleged anticompetitive behavior, on both a class-wide and an individual basis. Beyer Updated Decl. at ¶¶ 8, 38-43; Beyer Rebuttal Decl. at ¶¶ 38-40.

Comcast incorrectly argues that Dr. Beyer only assumes that he will be able to provide a future methodology for determining damages. Defs.' Br. at 21. To the contrary, Dr. Beyer offers two accepted benchmark methods for purposes of determining damages on a class-wide and individual basis. Beyer Updated Decl. at ¶¶ 39-43; Beyer Rebuttal Decl. at ¶¶ 38-40.

One benchmark, the change in the price charged for expanded basic programming by other [non-cluster] cable systems, can be used to estimate one component of economic damages – the supra-competitive price increase charged by Comcast's Philadelphia Cluster systems as a consequence of Comcast's swapping, acquisition and other anticompetitive conduct. For example, the FCC's reported 39.6 % average increase in the monthly charge for expanded basic programming across all cable systems in the U.S. can be used as a benchmark against which to compare the 89.3% average increase in the charge for expanded basic in the Comcast Philadelphia Cluster. *See* Beyer Updated Decl. at ¶¶ 8, 40; Beyer Rebuttal Decl. at ¶¶ 39 - 40, Ex. 5.

Dr. Beyer's second benchmark, the 15% to 20% price differential between cable systems that do not face overbuild competition and cable systems that do face cable competition that has been reported by the FCC, GAO and other cable price studies, can be used to estimate a second

component of economic injury—the already established, supra-competitive overcharge (i.e. the existing monopoly that non-overbuilt cable companies possess) that Comcast has protected, maintained and increased as a consequence of its anticompetitive behavior. Dr. Beyer has testified that these benchmarks are appropriate for calculating damages on a class-wide basis. Beyer Updated Decl. at ¶¶ 8, 41; Beyer Rebuttal Decl. at ¶¶ 39-40, Ex. 5. Further, Dr. Beyer has testified that these benchmarks can be employed for determining damages on an individual basis. Beyer Updated Decl. at ¶ 42; Beyer Rebuttal Decl. at ¶¶ 38-40.

Exhibit 5 to Dr. Beyer's Rebuttal Declaration illustrates estimates for both components of damages, both on average for the Philadelphia Cluster, and individually for specific systems. Beyer Rebuttal Decl. at ¶ 40, Ex. 5. The top segment of each bar in Exhibit 5 represents an estimate of the overcharge attributable to the first component of damages – the larger price increase due to swapping and other anticompetitive conduct (in this example the difference between the actual 89.3% increase observed in the Philadelphia Cluster from 1999 to 2004 and the 39.6% increase reported by the FCC for all U.S. cable systems). The middle segment of each bar represents an estimate of the pre-existing overcharge that Comcast has protected and maintained, (in this example a 15% price differential attributable to not having effective overbuild competition). As Exhibit 5 demonstrates, either the first component of damages by itself, or both components, can be estimated, on either a class-wide basis or by individual cable system, using methodologies that are common to all members of the proposed class. *Id.*

The fact that Dr. Beyer's methodologies will be implemented based on additional data that will be gathered during merits discovery does not, contrary to Defendants' argument, mean that he is only assuming that he will have a method for calculating damages in this case. As one court aptly stated in disposing of a similar argument:

> Defendants argue that . . . Plaintiffs have not developed a formula that can be applied at the present time, but rather have merely presented evidence that they intend to do so. However, Plaintiffs' expert has explained in detail how a benchmark is developed and described various ways in which one could be developed that would calculate the minimum loss suffered by Plaintiffs. The benchmark cannot be further developed until the completion of merits discovery. The court notes that similar methodology has been used in a number of antitrust cases; Beyer has not conjured up some fanciful formula that will never be applicable when the time comes.

Deloach v. Philip Morris Cos., Inc., 206 F.R.D. 551, 564-65 (M.D.N.C. 2002); *see also Midwestern Machinery v. Northwest Airlines, Inc.*, 2001 WL 34049897, at *566 (D.Minn. 2001) ("A party and its experts should not be expected to have fully evaluated all data at the preliminary stage of class certification.").

Dr. Beyer's methodologies establish that Plaintiffs can determine damages on both a class-wide and individual basis in this case.

G. Dr. Beyer's Expertise, Opinions and Methodologies Have Been Repeatedly Accepted by the Courts.

Contrary to Comcast's assertion (Defs.' Br. at 20), Dr. Beyer brings to this Court established expertise in the field of economics and extensive experience in assisting courts through expert opinions on class certification in a large number of antitrust cases. Courts throughout the country, including the Third Circuit, have accepted Dr. Beyer's opinions on common impact and the feasibility of assessing damages on a classwide basis. For example, in *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153-55 (3d Cir. 2002), the Third Circuit noted that Dr. Beyer "presented two possible means of assessing impact on a class-wide basis – multiple regression analysis, and benchmark or yardstick approach" and that plaintiffs' expert witnesses, including Dr. Beyer, "effectively utilized supporting data, including charts and exhibits, to authenticate their professional opinions that all class members would incur such damages." The Third Circuit reviewed the bases for Dr. Beyer's conclusion of common impact and stated, "We deem his

conclusion to be significant because it was supported by charts and studies." *Id.* at 153. In *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486-87 (W.D. Pa. 1999), the court discussed Dr. Beyer's expert testimony and determined that "plaintiffs have presented a viable method for proving class-wide impact….". In *In re Domestic Air Transportation Antitrust Litig.*, 137 F.R.D. 677, 690-91, n.16 (N.D. Ga. 1991), the court "found Dr. Beyer's testimony highly credible and convincing" (*id.* at 690 n.16), determined that "Dr. Beyer's economic analysis evidences common impact and permits, with reasonable certainty, formulaic calculation of damages" and concluded that "plaintiffs have presented a well-qualified economic expert who, after review of the industry, has presented valid statistical methodologies for proving that each class member was, in fact, injured." Similarly, in *In re Carbon Black Antitrust Litig.*, No. Civ. A. 03-10191-DPW, 2005 WL 102966 at *21 (D. Mass. 2005), the court accepted Dr. Beyer's benchmark price damages methodology, noting that "[t]here is no requirement that the plaintiffs choose one method now, as long as they offer a methodology that is generally accepted." In *Midwestern Machinery v. Northwest Airlines, Inc.*, 211 F.R.D. 562 (D. Minn. 2001), the court reviewed Dr. Beyer's proposed damages methodology of calculating a percentage overcharge by looking at identified possible benchmarks, and concluded:

> [T]he court finds that Dr. Beyer's report is admissible. Dr. Beyer possesses extensive education and experience in the field of economics. Moreover, his proposed methodology, namely regression analysis, and antitrust principles are widely recognized within the field of economics and have been accepted by courts.

Id. (citations omitted.)[10]

[10] *See also Deloach v. Philip Morris Co., Inc.*, 206 F.R.D. 551, 563 (M.D.N.C. 2002) ("based on Beyer's background, experience, and the information on which he based his report, the court finds that Plaintiffs have submitted a feasible means of proving impact and damages"); *In re Monosodium Glutamate Antitrust Litig.*, No. Civ- 00-MDL-1328 (PAM), 2003 WL 244729, at *2 (D. Minn. 2003), (rejecting *Daubert* challenge to Dr. Beyer's testimony and finding that "Dr. Beyer's methods are tested and accepted" and "his analysis is relevant and . . . is also reliable."); *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. Civ. 02-6030 (WHW), 2006 WL 891362, at * 11 (D.N.J. 2006) (noting that Dr. Beyer states that "he can show class-wide impact and damages through the use of multiple regression and benchmark (also known as yardstick) methodologies", that "[b]oth

The real question here, however, is not how Dr. Beyer's opinions have fared in other cases involving their particular facts. Rather, the question here is whether Dr. Beyer's well supported opinions provide a plausible theory demonstrating that class wide impact may be shown through evidence common to the class and whether he has presented feasible methods for determining damages. *See In re Northwest Airlines Corp. Antitrust Litig.*, 197 F.Supp.2d 908, 914 n.6 (E.D. Mich. 2002) ("In their briefs, the parties direct the Court's attention to prior cases in which Dr. Beyer's expert testimony was either rejected or cited with approval. Plainly, however, the admissibility or exclusion of Dr. Beyer's expert testimony in other cases has no bearing whatsoever on the Court's inquiry in the present case . . ."). As demonstrated earlier, in his extensive, detailed three declarations, supported by numerous exhibits and cited studies, Dr. Beyer has clearly done so here.

Comcast also criticizes Dr. Beyer based on a complete mischaracterization of this testimony. Comcast argues 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 wire line provider in 100% of cases" and that "Dr. Beyer admits this." Defs.' Br. at 19 (emphasis in original). Incredibly, Comcast cites page 219 of Dr. Beyer's deposition transcript in support of its patent misrepresentation of Dr. Beyer's testimony. None of the testimony at transcript page 219 has anything to do with the cited proposition, nor is there an admission anywhere else in Dr. Beyer's deposition testimony supporting Comcast's mischaracterization. Indeed, Dr. Beyer's deposition testimony is exactly contrary to Comcast's representation.[11]

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benchmark analysis and multiple regression analysis have been approved by the Third Circuit," and finding that "plaintiffs have adduced sufficient evidence and a plausible theory to convince it that class-wide impact may be shown through generalized evidence common to the plaintiffs' case.")

[11] For example, in response to Comcast's counsel's questioning, Dr. Beyer testified as follows:

Q. Well, doesn't it mean that you are assuming that but for the transactions, the area would be overbuilt?

In another distortion of Dr. Beyer's actual testimony, Comcast represents to this Court that "Dr. Beyer testified that his benchmarks . . . were 'wrong.'" Defs.' Br. at 19. Plaintiffs urge the Court to look at the testimony cited by Comcast in support of this blatant mischaracterization. Even a cursory review of the transcript makes quite clear that Comcast's counsel was unsuccessfully attempting to commit Dr. Beyer to accepting the FCC's definition of "effective competition" and that Dr. Beyer's isolated remark, "it's wrong," simply indicated that Dr. Beyer was using studies reflecting the FCC "effective competition" definition as one illustration, and that it would be wrong to take that as anything other than an illustration.[12] At no point in his deposition did Dr. Beyer, as misrepresented by Comcast, ever admit that his benchmarks were "wrong."

A. No, because effective competition – I think it's a limited view by the FCC as an economist, but effective competition is defined by more than an overbuilder.

Cain Decl., Ex. A, Beyer Tr. at 191. Dr. Beyer provided the same response in answering a subsequent question from Plaintiffs' counsel:

Q. And, Dr. Beyer, what's your opinion on whether actual overbuilding by these companies that exited – what's the significance of the presence or absence of overbuilding, actual overbuilding by the companies that exited?

MR. KORPUS: Objection.

THE WITNESS: The significance is this. Actual overbuilding is not a requirement for there to be a constraining influence on the actual prices in a cluster if potential competitors, who would be able to enter, have been – if that opportunity has been taken away from them.

Id. at 218.

[12] Q. Okay. And isn't the but-for price that you look at is a but-for price in areas that have effective competition as defined by the FCC?

A. Yes and no. The illustration – underline illustration – that I used is based on accepting the rate of increase in effected areas of communities, franchise areas of effective competition as defined by the FCC and compared it to actual rates of increase and that is – and I've used that as an illustration of how one aspect of this methodology could be used.

. . .

Q. No, but what you say is that the way you would do it is you would compare the prices in the cluster to those areas where there is effective competition; isn't that what you say in your report?

A. Well, if I do say it, then other than for purposes of illustration -

Q. Yes?

A. - it's wrong.

. . .

THE WITNESS: It is a comparison of the rate of increase of actual prices in the Philadelphia and Chicago cluster in the final estimation process and the prices – the rate of price increase that would have prevailed but for the anticompetitive behavior alleged by the defendants. As an illustration, the rate of price increase in these communities that the FCC defines as having effective competition is used as a proxy for the but-for price.

Cain Decl., Ex. A, Beyer Tr. 182-84.

Comcast's unfounded criticisms of Dr. Beyer and its false characterizations of his testimony provide no basis for challenging his well-qualified and extensively supported opinions.[13]

III. CLASS CERTIFICATION IS NOT THE STAGE FOR THE COURT TO RESOLVE DUELING OF THE PARTIES' EXPERTS.

A "battle of the experts" need not be resolved at the class certification stage. *In re Bulk [Extruded] Graphite Prods. Antitrust Litigation*, 2006 WL 891362 (D.N.J. Apr. 4, 2006) (stating that, "the Court is not in a position at the class certification stage to weigh the arguments of the plaintiffs' expert and the defendants' expert." (quotation omitted)); *Deloach v. Philip Morris Cos., Inc.*, 206 F.R.D. 551, 560 (M.D.N.C. 2002) ("it is not the court's function to weigh this evidence for its truth but merely to ascertain whether it is of a type suitable for classwide use"(quotation omitted)); *see also* Defs.' Br. at 5, n.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"). At class certification, "[t]he court will not choose a winner in the battle of the experts." *Deloach*, 206 F.R.D. at 560.

"The operative question here is not whether the plaintiffs can establish class-wide impact, but whether class-wide impact may be proven by evidence common to all class members. The

[13] Additionally, Comcast criticizes Dr. Beyer on the basis of cases discussing the likelihood of market entry when determining whether another firm is a potential competitor. Defs.' Br. 13-15. Comcast's cited cases are inapposite and do not help Comcast. Rather, such case law recognizes the potential competition theory, while making clear that the application of the doctrine is fact intensive and clearly a merits issue to be resolved on a full factual record. *See, e.g., United States v. Flastaff Brewing Corp.*, 410 U.S. 526 (1973) (reversing judgment entered following trial on the merits since district court should have considered whether brewer was a potential competitor such that its acquisition of a major local brewery in the relevant market may have violated the Clayton Act); *United States v. Marine Bankcorporation, Inc.*, 418 U.S. 602 (1974) (recognizing potential competition doctrine but finding it inapplicable due to federal and state law barriers to entry in the banking industry and therefore affirming judgment entered after a week long trial on the merits); *Tenneco, Inc. v. F.T.C.*, 698 F.2d 346 (7th Cir. 1982) (recognizing potential competition doctrine, but determining it inapplicable under the facts established before the FTC in administrative proceedings). These cases make clear that application of the potential competition doctrine is fact-intensive and appropriate for resolution on the merits, certainly not at the class certification stage. *See Flastaff Brewing Corp.*, 410 U.S. at 573 ("The question of who is an 'actual potential competitor' is entirely factual. In deciding questions of fact, it is the province of the trier to weigh all of the evidence.") (Rehnquist, J., dissenting).

plaintiffs do not need to establish at this time that they have in hand all of the common evidence necessary to establish class-wide impact." *In re Bulk [Extruded] Graphite Prods.*, 2006 WL 891362, at *10 (citing *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 190 (D.N.J. 2003)). As the Third Circuit stated in *In re Linerboard Antitrust Litig*., 305 F.3d 145, 152 (3d Cir. 2002), "the court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve common issues of fact and law." *Id*.

These fundamental Rule 23 principles apply with particularity here where Dr. Beyer has submitted a well-reasoned economic analysis demonstrating that common impact exists in this case on a class-wide basis. Dr. Beyer bases his conclusions on specific economic factors, government and other studies, and applies them to his observations of Defendants' swap and acquisition conduct. Beyer Updated Decl. at ¶ 6; Beyer Rebuttal Decl. at ¶ 7. Dr. Beyer's analysis is also supported by numerous cited studies, and is illustrated in the exhibits accompanying his declarations. *See In re Linerboard*, 305 F.3d at 153-55 (affirming class certification decision and noting that plaintiffs' experts had "effectively utilized supporting data, including charts and exhibits, to authenticate their professional opinion that all class members would incur such damages"). As previously noted, Dr. Beyer's benchmark methodologies have been accepted by the courts and the Third Circuit in particular. Benchmark methodologies such as Dr. Beyer's are also employed by third party cable industry observers such as the FCC in analyzing the cable industry, Beyer Rebuttal Decl. at ¶ 8, and are well-recognized in the economics literature. Beyer Updated Decl. at ¶ 39 and n.38. The fact that Comcast and its expert, Dr. Besen, disagree provides no basis for withholding certification of Plaintiffs' claims.[14]

[14] *See, e.g., In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 565 (S.D.N.Y. 2004) ("While Defendants take issue with Plaintiffs' methodology, this Court need not evaluate whether Plaintiffs' theories are

Plaintiffs have demonstrated a completely reasonable and accepted method for purposes of Rule 23(b)(3). *In re Bulk [Extruded] Graphite Prods.*, 2006 WL 891362, at * 14 ("defendants' arguments are insufficient to defeat the plaintiffs' motion for class certification. Plaintiffs have satisfied the threshold of showing predominance of common issues with respect to antitrust injury."); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 487 (W.D. Pa. 1999) ("At this point of the proceedings, it would be improper to make a determination as to the likely success of using [plaintiffs' economic] analysis. Rather, we need only concern ourselves with whether plaintiffs have identified a valid method for determining damages, which they have.").

Dr. Beyer's economic analysis fully supports Plaintiffs' claims of classwide impact under Rule 23(b), and the existence of feasible, well recognized methods for assessing impact on a class and individual basis.

IV. COMCAST'S ADEQUACY OF REPRESENTATION ARGUMENT IS BASELESS.

In an odd challenge to class certification, Comcast argues that Plaintiffs Glaberson and Behrend are inadequate representatives because they both reside near each other and at what Comcast describes as the "Comcast/Lenfest" border. Comcast asserts that because they live near the border of the Philadelphia cluster they are closer to competitor cable systems, and so, have an interest in arguing that a competitor cable system could more easily enter the area where they reside than could class members who live in the middle of the cluster. Defs.' Br. at 23-25.

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likely to prevail at trial.") (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 138 (2d Cir. 2001)); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 267-68 (D.D.C. 2002) (refusing to weigh the testimony of plaintiffs' expert against that of defendants' expert at class certification stage of the proceedings.); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) (stating that parties' experts' " 'statistical dueling' is not relevant to the certification determination."). As one court concluded:

> Based on Beyer's background, experience, and the information on which he based his report, the court finds that Plaintiffs have submitted a feasible means of proving impact and damages. Defendants submitted the expert report and rebuttal report of Sheffman to refute every opinion and method used by Beyer. . . . [T]he court will not consider the merits of each party's position except to determine that Plaintiffs have shown a reasonable method of satisfying Rule 23(b)(3).

Deloach, 206 F.R.D. at 563.

Comcast provides absolutely no support for this proposition which it weaves of whole cloth. *Id.* *In re Warfarin Sodium Antitrust*, 391 F.3d 516, 533 (3d Cir. 2004) (affirming class certification and rejecting appellants' argument that named representatives' interests were not aligned with the rest of the class where "Appellants have only asserted, rather than established an inherent conflict" among class members).

The adequacy prong involves only two inquiries. "It considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class." *In re Community Bank of Northern Va.*, 418 F.3d 277, 303 (3d Cir. 2005) (quoting *In re G.M. Pick-up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d, 768, 800 (3d Cir. 1995)). Necessarily,"[t]o defeat class certification, a defendant must show some degree of likelihood a unique defense will play a significant role at trial. If a court determines an asserted unique defense has no merit the defense will not preclude class certification." *Beck v. Maximus, Inc.*, 457 F.3d 291, 300 (3d Cir. 2006). "Indeed, courts are generally skeptical of defenses to class certification based on conflicts between the proposed class members." *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. Civ. 02-6030, 2006 WL 891362, at *8 (D.N.J. Apr. 4, 2006) (citing *Hedges Enters., Inc. v. Cont'l Group, Inc.*, 81 F.R.D. 461, 466 (E.D. Pa. 1979) (stating "[t]he mere fact that a representative plaintiff stands in a different factual posture is not sufficient to refuse certification.. . [T]he atypicality or conflict must be clear and must be such that the interests of the class are placed in significant jeopardy.")).

Comcast has not shown any unique defense with respect to Plaintiffs Glaberson and Behrend, nor has Comcast provided any cognizable basis for concluding that their interests are not aligned with those of the members of the proposed class. As Plaintiffs have already

established, all class members are impacted by Comcast's alleged antitrust violations. *See* Beyer Updated Decl. at ¶ 7; Beyer Rebuttal Decl. at ¶ 5. Dr. Beyer has testified,

> "the relevant issue is whether all members of the proposed class have paid higher prices. It is irrelevant where a cable system is located within the Philadelphia cluster, and it is irrelevant whether a subscriber (or the named Plaintiffs) live in close proximity to or distant from other legacy, swapped or acquired cable systems."

Beyer Rebuttal Decl. at ¶ 36. Because Comcast has unlawfully acquired and maintained a monopoly within the Philadelphia area market, it is able to charge supra-competitive prices to all of its subscribers, regardless of whether they live at the cluster's border or in the center of the cluster. *See id.* There is simply no support in any fact of record for Comcast's invented "conflict" based on where the named Plaintiffs reside within the Philadelphia Cluster.[15]

The Third Circuit and other courts faced with challenges to class certification based on the location of the named plaintiffs with respect to other class members typically reject such arguments. For example, in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977), the Third Circuit vacated and remanded the district court's denial of class certification in an antitrust action and held, *inter alia*, that two locally located gasoline dealers were adequate named representatives for a class of gasoline dealers comprising sixteen companies at locations throughout the United States. Likewise, in *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 209-11(E.D. Pa. 2001), the court rejected defendants' argument that regionally located "plaintiffs ha[d] no reason to press claims on behalf of purchasers in other areas of the country" and certified a nationwide antitrust class action in which the named plaintiffs were located in only five states. *See also Hill v. Galaxy Telecom, L.P.*, 184 F.R.D. 82, 86-87 (N.D. Miss. 1999) (holding in action brought by a single named plaintiff on behalf of a class of cable consumers

[15] Further, in making its argument, Comcast conveniently omits to consider that Plaintiff Glaberson also receives cable services at his seasonal home in Ventnor City, New Jersey, which Comcast does not contend is a part of the "Comcast/Lenfest" border.

against a cable television provider, with regard to defendants' criticisms of "the diversity of a named plaintiff" that "as long as the substance of the claim is the same as it would be for other class members, then the claims of [the] named plaintiff is not atypical."); *Alemendares v. Palmer*, 222 F.R.D. 324, 333 (N.D. Ohio 2004) (rejecting defendants' argument "that plaintiffs are not adequate representatives of a class consisting of persons residing in [eighty-seven] other counties because the named representatives all lived in Lucas County, stating "there is nothing to suggest that the interests of prospective class members outside of Lucas County differ at all, much less significantly from those of the named plaintiffs.")[16]

Moreover, Comcast's assertion that Plaintiff Glaberson experienced cable price increases at less than the national average and that Plaintiff Behrend experienced a decrease in her cable prices is not only an inappropriate merits issue, but also is completely unsupported. These conclusions are based on Dr. Besen's erroneous price per channel analysis. *See* Besen Decl. ¶¶ 8, 63-65 (basing his findings on a price per channel analysis, not Dr. Beyer's benchmark methodology). Comcast has shown absolutely no basis for its unfounded claim that the named

[16] Comcast argues in the introduction to its opposition that the plaintiffs cannot represent Plaintiffs' allegations regarding Comcast's illustrative anticompetitive conduct in the community of Folcroft, Pennsylvania. Defs.' Br. at 7. Perhaps not surprisingly, Comcast never pursues this baseless argument in the body of its opposition. This Court has already concluded that the named Plaintiffs have standing to pursue these claims, irrespective of where they reside. *See* Order dated 8/31/2006 at 11-15 and n.5. Regardless, the claims of the named plaintiffs do not need to be identical to those of the class members so long as they are based on the defendants' alleged anticompetitive scheme. *See Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) ("Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice."). Nor must all class members' claims be exactly the same. *Id.* at 56 ("[F]actual differences among the claims of the putative class members do not defeat certification.").

Further, contrary to Comcast's frequent allusions, the Philadelphia area class is geographically neither too large nor too diverse. The U.S. Supreme Court has upheld designations of even very geographically diverse classes. *See Califano v. Yamasaki*, 442 U.S. 682, 689, 701-03 (1979) (upholding certification of two nationwide classes [one represented by 3 and the other by 5 named plaintiffs] and concluding that,"[n]othing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule."). In contrast to the vast geographic area represented in *Califano*, here, all named plaintiffs and class members reside within the same Philadelphia geographic area served by Comcast. *See, e.g., AxelRod v. Saks & Co.*, 77 F.R.D. 441, 444 and n.2 (E.D. Pa. 1978) (certifying a "Pennsylvania Metropolitan Area" class "composed of Bucks, Chester, Delaware, Montgomery, and Philadelphia counties in the Commonwealth of Pennsylvania, Burlington, Camden, and Gloucester counties in the state of New Jersey, and the state of Delaware" in an antitrust case brought by 2 named plaintiffs on behalf of consumers challenging defendant's alleged Section 1 violations).

plaintiffs "may prejudice" the claims of other class members. Defs.' Br. at 25. Plaintiffs Behrend and Glaberson assert the same claim, based on the same legal theories and seek recovery of overcharges inflicted on them and all class members. Their interests are precisely aligned with those of other class members.

V. COMCAST'S 2004 ARBITRATION NOTICE PROVIDES NO BASIS FOR EXCLUDING ANY SUBSCRIBERS FROM A CERTIFIED PHILADELPHIA AREA CLASS.

In an attempt to minimize the number of class members comprising a certified Philadelphia area class,[17] and in contravention of the parties' agreed upon stipulation and this Court's April 12, 2006 Order, Comcast claims that certain cable subscribers within Comcast's Philadelphia Cluster are subject to a 2004 arbitration clause entitled "Arbitration Notice" (hereinafter, "2004 Arbitration Notice" or "Notice"). The Notice contains an "opt-out" provision that purports to allow subscribers the opportunity to not be bound by the Notice by affirmatively contacting Comcast in writing giving the subscriber's account number and expressing, in a clear statement, the desire to not arbitrate claims with Comcast. Defs.' Br. at 25- 27; Kane Decl., Ex. 1, ¶ C. The 2004 Arbitration Notice's core feature is a class action ban which the Notice states cannot be severed from the rest of the Notice if it is found to be unenforceable. Defs.' Br. at 27; Kane Decl., Ex. 1, ¶¶ F 1-2; I.

Comcast states that it did not send the Notice to its subscribers in the Philadelphia Cluster in the following communities: (i) Philadelphia, Philadelphia County, Pennsylvania; (ii) Newtown, Bucks County, Pennsylvania; (iii) Holland, Bucks County, Pennsylvania; and (iv) Montgomery County, Pennsylvania (with the exception of Willow Grove and Lower Merion

[17] Comcast does not contend that the 2004 Arbitration Notice serves as a basis for denying class certification, only that an undetermined number of subscribers are subject to the Notice and so should be excluded from the class. Defs.' Br. at 25; Kane Decl. at ¶ 5 (approximating number of subscribers to whom Comcast claims it sent the 2004 Arbitration Notice).

townships). Defs. Br. at 25; Ex. 2; Kane Decl. at ¶ 3; Kane Dep.[18] at 185-188. In particular, Comcast's Rule 30(b)(6) witness, Mary Kane, testified that the Notice was not sent to any "legacy Comcast" communities or "legacy AT&T Broadband" communities, which she defined as communities where subscribers received either Comcast or AT&T Broadband cable services prior to Comcast's merger with AT&T Broadband in 2002. *See* Kane Dep. at 181, 185; Kane Decl., Ex.2. Comcast purports to have sent the 2004 Arbitration Notice to subscribers in only certain communities in the Philadelphia Cluster,[19] only estimates the number of subscribers purportedly bound by the Notice, and does not identify which of those subscribers received the expanded basic tier of cable programming services. *See* Kane Decl. ¶ 5; Kane Dep. at 77-78.

Further, Comcast admits to sending the Notice to certain subscribers only once – sometime between April and June of 2004[20] – after this class action lawsuit was filed and before Comcast entered into a stipulation, resulting in the Court's April 12, 2006 Order stating that "Comcast shall not for any purpose in this action, including class certification, allege that an arbitration agreement . . . applies to plaintiff Glaberson, plaintiff Cutler, or to those cable television customers of Comcast in the Philadelphia cluster . . . who are similarly situated to plaintiff Glaberson and/or plaintiff Cutler . . ." April 12, 2006 Order. Comcast's purported 2004 Arbitration Notice forms absolutely no basis for limiting membership in the Philadelphia area class for numerous reasons. Indeed, the beginning and the end of Comcast's argument is that it is precluded from enforcing the Notice because all class members are similarly situated to Plaintiffs Glaberson or Behrend.

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[18] Servais Decl., Ex. B.

[19] Those communities include Kent County and New Castle County, Delaware; Atlantic County, Cumberland County, Burlington County, Camden County, Cape May County, Gloucester County, Mercer County, and Salem County, New Jersey; Bucks County, Chester County, Delaware County, and Willow Grove and Merion Township, Montgomery County, Pennsylvania. Kane Decl. ¶ 5.

[20] Comcast's brief states that the Arbitration Notice was sent to certain cable subscribers between March and June of 2004. Defs.' Br. at 25. However, Ms. Kane's declaration states that the Notice was sent between April and June of 2004. Kane Decl. at ¶ 3.

A. All Proposed Class Members Are Similarly Situated to Plaintiffs Glaberson and/or Behrend.

The Court's April 12, 2006 Order disposes of Comcast's argument in its entirety. Comcast has stipulated, and the Court has ordered, that Comcast will not use an arbitration agreement to oppose class certification with respect to persons similarly situated to Plaintiff Glaberson and/or Plaintiff Cutler.[21] Comcast is foreclosed from using its 2004 Arbitration Notice to limit class certification because all proposed class members are similarly situated to Plaintiffs Glaberson and Behrend. Even accepting Comcast's argument that it sent the 2004 Arbitration Notice to its subscribers in certain communities in the Philadelphia Cluster, all class members are unquestionably similarly situated to Plaintiff Glaberson and/or Behrend in that they are either:

- Not subject to an arbitration clause containing a class action ban but not an opt-out provision, in which case they are similarly situated to Plaintiff Glaberson. (*See* Order dated 2/21/2006, Docket No. 104, denying Comcast's Amended Motion to Compel Arbitration and holding that Plaintiff Glaberson was not subject to the arbitration agreements Comcast sought to enforce against him);

- Subject to an arbitration clause containing a class action ban but not an opt-out provision, in which case they are similarly situated to Plaintiff Behrend. (*See* Order dated 12/27/2005; Docket No. 73, finding Plaintiff Behrend subject to an arbitration clause);

- Not subject to the 2004 Arbitration Notice containing a class action ban and an opt-out provision, in which case they are similarly situated to Plaintiff Behrend. (*See* Defs.' Br. at 25; Behrend Dep.[22] at 8-9; 52-53

[21] The Order states:

> All claims asserted in this action of plaintiffs Cutler, Glaberson, and all other persons who are included in a class that may be certified in this action, shall be resolved in court in this action and not through arbitration. Additionally, Comcast shall not for any purpose in this action, including class certification, allege that an arbitration agreement, or any provision of an arbitration agreement, applies to plaintiff Glaberson, plaintiff Cutler, or to those cable television customers of Comcast in the Philadelphia cluster as defined in Plaintiffs' Second Amended Class Action Complaint, Docket #6, who are similarly situated to plaintiff Glaberson and/or plaintiff Cutler, nor file a motion to compel arbitration with respect to any such person.

Id.

[22] Servais Decl., Ex. C.

stating that she resides and receives Comcast services in Newtown, Pennsylvania; Kane Decl. at ¶ 3, ¶ 7 stating that Comcast did not send the 2004 Arbitration Notice to Newton, Pennsylvania, and that Plaintiff Behrend does not reside in one of the communities where the Notice was sent); or are

- Subject to the 2004 Arbitration Notice containing a class action ban and an opt-out provision, in which case they are similarly situated to Plaintiff Glaberson who receives cable services at his seasonal home in Ventnor City, Atlantic County, New Jersey and, according to Comcast, would have been mailed the 2004 Arbitration Notice and, according to Comcast's argument, are bound by its terms unless they affirmatively opted out. (*See* Glaberson Deps.[23] dated 1/25/2006 at 74-75 and dated 10/18/2006 at 7-9 discussing his cable services at his home in Ventnor City, New Jersey; Kane Decl. at ¶ 5 listing Atlantic County, New Jersey as one of the counties in the Philadelphia Cluster in which subscribers were mailed the 2004 Arbitration Notice).

Comcast claims to have sent the Notice to all of its subscribers in Atlantic County, New Jersey. *See* Kane Decl. at ¶ 3 (stating that Comcast sent its Notice "to all customers within the Philadelphia Cluster" in certain communities); *id*. at ¶ 5 (claiming that Comcast sent the Notice to subscribers in Atlantic County, New Jersey); *see also* Kane Dep. at 57. Comcast, however, cleverly attempts to evade the fact that, pursuant to its own argument, it would have sent the Notice to Plaintiff Glaberson for his Ventnor City, New Jersey address.[24] *See* Defs.' Br. at 25 (stating only that, "[n]otably, both Plaintiff Glaberson and Plaintiff Behrend (née Cutler) reside

[23] Servais Decl., Ex. D.

[24] Comcast previously found Plaintiff Glaberson's home in Ventnor City, New Jersey to be of great significance and sought to supplement its amended motion to compel arbitration in order to assert, days before a trial on that motion with respect to Plaintiff Glaberson, that Glaberson was subject to an arbitration provision which Comcast claimed to have mailed to its subscribers in New Jersey, including Atlantic County, New Jersey. *See* Defs.' Mot. to Supplement First Am. Mot. to Compel Arbitration, Docket No. 91. Comcast argued:

> At his deposition dated January 25, 2006, Mr. Glaberson testified that he has subscribed to cable services from Comcast at his beach home in Ventnor, New Jersey for at least ten years. Ventnor, New Jersey is also located in Atlantic County. On December 17, 2002, in accordance with Comcast's regular practice, Comcast mailed to all current subscribers, including Mr. Glaberson a notice of 'Terms and Conditions' of service which would become effective February 1, 2003. Evidence of this mailing, as well as the Terms and Conditions, will be offered at trial.

Id. at 4. (citing Glaberson Dep. dated 1/25/2006 at 74-75; emphasis omitted).

The Court denied Comcast's Motion to Supplement. *See* Order dated 2/ 21/ 2006 (Docket No. 103). Comcast then appealed the Court's decision to the Third Circuit Court of Appeals. *See* Notice of Appeal (Docket No. 113). Ultimately, Comcast withdrew its Notice of Appeal pursuant to the parties' agreement and the Court's April 12, 2006 Order. *See* USCA notice of withdrawal of appeal (Docket No. 122).

in areas that were specifically excluded from the mailing," not that they receive cable services in areas that were specifically excluded from the mailing (emphasis added)); Kane Decl. ¶ 7 (stating that the named plaintiffs reside in the communities excluded from Comcast's mailing of the 2004 Arbitration Notice).

By its own stipulation, Comcast agreed not to raise any such arbitration-based argument in this litigation "for any purpose." This Court so ordered. Plaintiffs, this Court and the Third Circuit spent over two years and expended substantial time and resources in litigating and adjudicating Comcast's attempt to impose arbitration on its subscribers. That chapter closed with this Court's April 12, 2006 Order, agreed to by Comcast. Now Comcast attempts to re-open that firmly shut door by invoking a "bells and whistles" arbitration provision that it concedes was sent prior to the April 12, 2006 determinative Order. How many times must Plaintiffs and this Court address Comcast's arbitration based contentions? Now? Again in a month or six months when Comcast might adopt yet another version of its class action ban in the form of an again revised arbitration clause? The Court's April 12, 2006 Order provides a binding, final answer as to the named Plaintiffs and all similarly situated class members. Enough is enough.

Although the April 12, 2006 Order completely defeats Comcast's attempt to exclude any class members from a certified Philadelphia area class, Plaintiffs will briefly discuss the multiple alternative reasons that Comcast's arbitration argument fails.

B. Comcast Has Failed to Demonstrate a "Meeting of the Minds" Between It and Its Subscribers With Respect to the 2004 Arbitration Notice.

Comcast claims that it "sent out" its 2004 Arbitration Notice as a bill stuffer "to certain existing cable subscribers within the Philadelphia Cluster between April and July of 2004." Defs.' Br. at 25 (citing Kane Decl., Ex. 2). Comcast does not explain how, but rather presumes,

that its mailing of the Notice was sufficient to confer a binding agreement to arbitrate on its subscribers who did not either opt-out of the agreement or immediately cancel their Comcast cable service. *See* Defs.' Br. at 25-27.

Comcast's Notice states that it will amend Comcast's preexisting subscriber agreement within 30 days after the notice is mailed unless the subscriber "either (1) opt[s] out of arbitration in the manner indicated. . . or (2) immediately notif[ies] Comcast" that the subscriber is terminating his or her subscriber agreement. Kane Decl., Ex. 1.[25] Significantly, the Notice also includes a class action ban.[26]

Nowhere in the opt-out provision, the class action ban, nor the whole of the Notice, does Comcast advise its Philadelphia area subscribers that they are members of a proposed class in this class action lawsuit, filed on December 3, 2003. *See* Kane Decl., Ex. 1, Kane Dep. at 117-125.

Comcast has the burden of demonstrating that a binding agreement to arbitrate actually exists.[27] The Third Circuit has held that "[b]efore a party to a lawsuit can be ordered to arbitrate

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[25] The "opt-out" provision of the 2004 Arbitration Notice appears and states as follows:

> 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 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 ARBITATION WILL HAVE NO ADVERSE EFFECT ON YOUR RELATIONSHIP WITH COMCAST OR THE QUALITY OF SERVICES PROVIDED TO YOU BY COMCAST.

Kane Decl., Ex. 1.

[26] F. **RESTRICTION**S: . . .

> 2. ALL PARTIES TO THE ARBITRATION MUST BE INDIVIDUALLY NAMED. THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED OR LITIGATED ON A CLASS-ACTION OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS SIMILARLY SITUATED.

Kane Decl., Ex. 1.

[27] Because "arbitration is a matter of contract" a party cannot "be required to submit to arbitration any dispute which [it has] not agreed so to submit." *AT&T Tech., Inc. v. Comm. Workers of Am.*, 475 U.S. 643 (1986); *see also Goldstein v. Depository Trust*, 717 A.2d 1063, 1067 (Pa. Super. 1998) (stating that the proponent of arbitration has "the burden of demonstrating that a valid agreement to arbitrate exists between the parties. . .").

and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980) (emphasis added); *see also Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999**)** ("Arbitration is strictly a matter of contract. If a party has not agreed to arbitrate, the courts have no authority to mandate that he do so."). When determining whether parties have agreed to arbitration, courts should apply "ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Pennsylvania, New Jersey and Delaware law all require a "meeting of the minds" in order to form an enforceable agreement.[28]

Comcast has failed to demonstrate a meeting of the minds with its subscribers because it gave them no notice that this class action lawsuit was pending and that by not "opting out" of the Notice, they were relinquishing their right to participate in this suit. Kane Decl., Ex. 1; Kane Dep. at 117-125. By hiding that crucial legal fact, Comcast ensured that its subscribers did not know what legal rights they were agreeing to relinquish. *See, e.g., Long v. Fidelity Water Sys., Inc*., No. C-97-20118 RMW, 2000 WL 989914 (N.D. Cal. May 26, 2000) (concluding that arbitration clause was unenforceable where it was sent to putative class member without notice of the pending class action suit, stating that plaintiffs' status as a member of a proposed class

[28] *Lal v. Ameriquest Mortg. Co*., 858 A.2d 119, 123 (Pa. Super. 2004) ("It is well settled that in order for an enforceable [contract] to exist, there must be a 'meeting of the minds' whereby both parties mutually assent to the same thing, as evidenced by an offer and its acceptance." (quotation omitted)); *NLH-ShortHills, Ltd., Inc. v. Trump Taj Mahal Assocs*. 2006 WL 3025505, at *2 (N.J. Super. A.D. Oct. 26, 2006) ("an enforceable bilateral agreement requires an offer, an acceptance, consideration, and a meeting of the minds upon all essential terms of the contract." (citing *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992)); *Bouchard Margules and Friedlander v. Gaylord*, 2006 WL 2660043, at *5 (Del. Super. Aug. 31, 2005) ("in order for a contract to be enforceable in Delaware, there must be a meeting of the minds." (citation omitted)). Further, each party must understand what it is agreeing to and a party cannot hide its intentions from the counter party. *See, e.g., Noto v. Skylands Comm. Bank*, 2005 WL 2362491, at *5 (N.J. Super. A.D. Sep. 28, 2005) (stating that for there to be a meeting of the minds, "both parties must understand what each is agreeing to do or not to do. The contract cannot be based upon the secret or hidden intention or understanding of one party" (citation omitted)).

"weakens any argument that he knowingly and voluntarily entered into an arbitration agreement.").

Comcast has also not demonstrated that it knows the exact number, and therefore the exact subscribers, who were mailed the Notice. *See* Kane Decl. at ¶ 5 and n.1 (only estimating the number of subscribers who were purportedly sent the Notice and stating that Comcast's records are incomplete regarding the number of subscribers who were mailed the Notice.) Comcast also has not demonstrated that the mailing of the Notice was a regular Comcast practice or that the subscribers actually received the Notice. *See generally* Kane Decl. As such, Comcast has not shown that there was any agreement reached between it and its subscribers with respect to the Notice. *See, e.g., Martin v. Comcast of California/Colorado/Florida/Oregon, Inc.*, ---P.3d---, 2006 WL 3086188, at *8-9 (Or. App. Nov. 1, 2006) (recently denying Comcast's motion to compel arbitration where Comcast's officer averred that Comcast had mailed the arbitration clause at issue as a bill stuffer to subscribers, concluding that "there is nothing in the record" demonstrating that the subscribers had "accepted" the notice and that, "without an objectively manifested meeting of the minds, no contract existed."). Comcast has not shown a valid agreement with the subscribers it purports to have bound to arbitrate by mailing the 2004 Arbitration Notice.

C. Comcast's 2004 Arbitration Notice's Class Action Ban and Therefore, the Entire Notice, are Unenforceable Because they Preclude the Vindication of the Proposed Class Members' Statutory Rights.

Comcast's 2004 Arbitration Notice explicitly precludes arbitration on a class basis. Kane Decl., Ex. 1 ¶ F-2. In *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006), the First Circuit Court of Appeals invalidated a class action ban in Comcast's arbitration clauses in antitrust cases that are nearly identical to the one at issue here. In an exhaustive decision, the

First Circuit in *Kristian* held that, "[if] the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law and plaintiffs will be unable to vindicate their statutory rights." *Id*. In reaching that conclusion, the *Kristian* court relied on expert declarations submitted by the plaintiffs which are substantively identical to the expert declarations that Plaintiffs have submitted in this case in opposing Comcast's Amended Motion to Compel Arbitration. Those expert declarations indicate that (1) prosecution of Plaintiffs' antitrust claims will necessarily cost millions of dollars in expenses and fees while an individual Plaintiff will only be able to recover damages that are a mere fraction of that cost; and (2) as a result, no reasonable litigant or attorney would seek to vindicate the statutory claims involved in this case unless they could be pursued as part of a class action. *See* Beyer Decl. dated June 25, 2004 ¶¶ 6-8, Todd Decl. ¶ 6; Sedran Decl. ¶ 9; *See also* Woodward Decl. ¶ 2.[29] As the *Kristian* court concluded, "Plaintiffs have provided uncontested and unopposed expert affidavits demonstrating that without some form of class mechanism. . . the consumer antitrust plaintiffs will not sue at all." *Id*. at 58.

Comcast argues that the class action ban at issue in *Kristian* is different from the one at issue here because the arbitration clause in *Kristian* also contained a ban on the recovery of treble damages and attorney's fees and costs. Defs.' Br. at 28. However, the First Circuit in

[29] Comcast previously moved to strike the Todd and Sedran Declarations as legal conclusions. Comcast's argument is without merit. The Todd and Sedran Declarations are based on the declarant's personal knowledge regarding the practical difficulties of Plaintiffs' statutory antitrust claims being vindicated through arbitration on an individual basis and do not state any legal conclusions regarding the claims themselves. *See, e.g., First Nat'l State Bank of N.J. v. Reliance Elec. Co.*, 668 F.2d 725, 731 (3d Cir. 1981) (admitting expert's testimony on area of law so long as he did not "give his opinion as to the legal duties arising therefrom.") *See* Pls.' Opp. to Mot. to Strike.

Kristian specifically rejected the argument that the recovery of attorney's fees and costs could change the unlawful effect of the class action ban.[30] The First Circuit concluded:

> Antitrust cases by their nature are difficult and uncertain. In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court. (For example, using the figures of Plaintiffs' expert witnesses, the recovery for an individual plaintiff in this case would, at most, be in the thousands of dollars whereas attorney time could escalate into the millions of dollars).

Kristian, 446 F.3d at 59 n.21.

The same argument holds with respect to the availability of treble damages. Even if treble damages, attorney's fees and costs could be recovered, it would remain inconceivable that an attorney would be willing to expend the millions of dollars required to prosecute this case with the likelihood of recovering, at most, a few thousand dollars for an individual plaintiff. Indeed, the *Kristian* court specifically invalidated Comcast's class action ban after it had already invalidated the arbitration clauses' unenforceable provisions restricting the recovery of attorney's fees and costs and treble damages. *Kristian*, 446 F.3d at 59.

The Notice itself further exacerbates the unlawful effect of the class action ban. Comcast unconvincingly describes its Notice as "consumer-friendly."[31] Defs.' Br. at 19. Far from

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[30] Multiple courts have recognized the importance of the class action mechanism, even in cases where attorney's fees, costs, and even treble damages were statutorily available. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 162 (1974) (claims under the Sherman Act); *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 534 (3d Cir. 2004) (same); *Carnegie* v. *Household Int'l*., 376 F.3d 656, 661(7th Cir. 2004) (claims under RICO); *Ingle v. Circuit City Stores, Inc*., 328 F.3d 1165, 1175 (9th Cir. 2003) (claims under Title VII).

[31] The "consumer-friendly"Notice includes an illegal class action ban and does not inform subscribers of their rights with respect to this class action suit. Further, the opt-out provision requires subscribers to affirmatively – through writing in "a clear statement" and the provision of the subscriber's account number and address – opt out of the Notice. Kane Decl., Ex. 1. Numerous subscribers who actually did take the time and effort to affirmatively opt-out of the Notice, complained in their written statements to Comcast that the Notice was specifically not consumer friendly in that it, for example, required affirmative action from them, did not provide a call-in number to opt-out or a tear-off portion that could be mailed back to Comcast, should have contained an "opt-in" instead of an "opt-out" provision, was full of legalese, and would likely not be read or understood by most subscribers. *See* Kane Dep., Ex. 7 (attaching a sampling of subscriber opt-outs). Further, Ms. Kane's deposition testimony indicates that Comcast

consumer-friendly, the Notice omits to provide notice to Comcast subscribers of this class action suit, and, therefore, precludes subscribers from making a meaningful choice to opt-out and preserve their rights to proceed as class members. Moreover, the Notice, like all of Comcast's prior arbitration clauses, is in essence a class action ban cloaked as an arbitration agreement. This simple truth has been evidenced time and again by Comcast's repeated willingness to walk away from its arbitration provisions whenever their class action bans have been threatened or invalidated.[32]

Comcast also erroneously argues that under *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2004) and *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002), the Notice, and implicitly, its class action ban, are enforceable. The *Kristian* decision disposes of that argument. In an extensive analysis, the *Kristian* court explained that the rationales employed in *Johnson* (and *Snowden*) in enforcing class action bans in the TILA context are inapplicable to the antitrust context. *Kristian*, 446 F.3d at 57-59 (holding that "the complexity of an antitrust case generally, and the complexity and cost required to prosecute a

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did not respond, and, in fact, had no mechanism or policy in place for responding to subscribers' objections regarding the Notice. Kane Dep. at 225-237.

[32] *See* (i) April 12, 2006 Order withdrawing Comcast's motion to compel arbitration with respect to the Philadelphia plaintiffs and ordering that Comcast would not allege that an arbitration agreement applies "for any purpose in this action, including class certification . . ." to the plaintiffs or similarly situated Comcast cable customers in the Philadelphia Cluster when the validity of Comcast's class action ban contained in its arbitration provisions was subject to Plaintiffs' motion for reconsideration; (ii) Stipulation and Order entered November 20, 2006 ordering that Comcast's motion to compel arbitration regarding the Chicago named plaintiffs is withdrawn, that plaintiffs' claims and those of the proposed Chicago class will proceed in court and not in arbitration, and that Comcast would not use an arbitration agreement for any purpose in this action, including class certification with respect to the named Chicago plaintiffs "or any other putative member of a class that is proposed or may be certified in this action," following the Illinois Supreme Court's decision in *Kinkel v. Cingular Wireless, LLC*, which invalidated a class action ban as unconscionable under Illinois contract law for precluding vindication of plaintiffs' statutory rights; and (iii) Agreed Order dated May 18, 2006 in the related cases of *Kristian v. Comcast Corp.* and *Rogers v. Comcast Corp.*, Civ. Action Nos. 03-12466-EFH, 04-10142-EFH (D.Mass.), withdrawing Comcast's motion to compel arbitration of the plaintiffs and agreeing that all claims of the plaintiffs and the proposed class would be pursued in court and not in arbitration, following the First Circuit's decision in *Kristian v. Comcast Corp.* 446 F.3d 25, 59, 64 (1st Cir. 2006), invalidating Comcast's class action ban contained in its arbitration clause and ordering that plaintiffs' claims would "proceed in arbitration on a class or consolidated basis." Servais Decl., Ex. E.

case against Comcast specifically, undermine the *Johnson* court's rationales for supporting a bar to class arbitration.")

Further, unlike *Kristian*, the vindication of statutory rights was not at issue in *Johnson*, or the other cases Comcast cites. *See Johnson*, 225 F.3d at 373-75 and n.2 ("Johnson does not argue that the arbitral forum selected in his agreement is somehow inadequate to vindicate his rights under the TILA or that arbitrators would be unable to afford any relief that he could individually obtain in a court proceeding"; and acknowledging that, "of course if . . . the [arbitral] forum otherwise presented barriers to plaintiff's assertion of his or her rights we would have a different case.")

Significantly, numerous courts have found class action bans unenforceable either pursuant to a federal analysis, as in *Kristian*,[33] or pursuant to state law unconscionability principles, where plaintiffs have demonstrated that they will be unable to vindicate their statutory rights in arbitration on an individual basis.[34] *Johnson* and other cases in which courts have

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[33] Comcast incorrectly represents that the *Kristian* decision was decided on state law unconscionability grounds. *See* Defs.' Br. at 28. To the contrary, *Kristian* was decided based on "a vindication of statutory rights analysis, which draws on the federal substantive law of arbitrability." *Kristian*, 446 F.3d at 63. As the *Kristian* court described it, "Plaintiffs' 'vindication of statutory rights' arguments reflect 'the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights." *Id.* at 37 (citing *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 14 (1st Cir. 1999); *Mitsubishi Motors Corp. v. Soerl Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

[34] *See, e.g.*, *McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1273 (Pa.Super.2004), *appeal denied*, 578 Pa. 709, 853 A.2d 362 (Pa. 2004), *cert. denied*, 125 S.Ct. 667 (U.S. Dec. 6, 2004); *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 666-69 (Pa. Super. 2002); *Thibodeau v. Comcast Corp.* and *Afrolian v. AT&T Wireless*, No. 4526; No. 0469, 2006 WL 416863 (Pa. Com. Pl. Jan. 27, 2006); *Kinkel v. Cingular Wireless, LLC*, --N.E.2d--, No. 100925, 2006 WL2828664 (Ill. Oct. 5, 2006); *Muhammad v. County Bank of Rehoboth Beach, Delaware*, ----A.2d----, 2006 WL 2273448 (N.J. Aug. 9, 2006); *Doerhoff v . Gen. Growth Props., Inc.*, No. 06-04099-CV-C-SOW, 2006 WL 3210502 (W.D. Mo. Nov. 6, 2006); *Wong v. T-Mobile U.S.A., Inc.*, No. 05-73922, 2006 WL 2042512 (E.D. Mich. July 20, 2006); *Tamayo v. Brainstorm*, U.S.A., No. 02-15724, 2005 WL 2293493 (9th Cir. 2005); *Ramsdell v. Lenscrafters, Inc.*, 135 Fed. Appx. 130 (9th Cir. 2005); *Siordia v. Circuit City Stores*, 2005 WL 1368083 (9th Cir. 2005); *Al-Safin v. Circuit City Stores*, 394 F.3d 1254 (9th Cir. 2004); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1176-77 and n.13 (9th Cir. 2002); *Ting v. AT&T*, 182 F.Supp.2d 902, 931 (N.D.Cal. 2002), *aff'd in relevant part, rev'd in part on other grounds*, 319 F.3d 1126 (9th Cir. 2003); *Luna v. Household Fin. Corp.*, 236 F.Supp.2d 1166 (W.D. Wa. 2002); *ACORN v. Household Int'l, Inc.*, 211 F.Supp.2d 1160, 1170 (N.D. Cal. 2002); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1105 (W.D. Mich. 2000); *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005); *Leonard v. Terminix Int'l. Co., L.P.*, 854 So.2d 529, 538, 539 (Ala. 2003); *State of West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279 (W.Va. 2002); *Whitney v. Alltel Comm.*, 173 S.W.3d 300, 314 (Mo. Ct. App.

enforced class action prohibitions are distinct from cases such as this one. As one court explained, "in those cases, the court either did not consider the separate issue of whether the plaintiff's statutory rights could be adequately vindicated in the arbitral forum or found that the record established that the plaintiff's rights could be vindicated through arbitration under the contractual provisions and factual circumstances involved in that case." *Whitney v. Alltel Comm.*, 173 S.W.3d 300, 313, n.9-10 (Mo. Ct. App. 2005) (distinguishing *Johnson* and other cases).

Indeed, Comcast admits, by not contesting Plaintiffs' affirmative showing under Rule 23(b)(3)(2), that a class action is the superior mechanism for pursuing Plaintiffs' claims in this action, and pursuant to numerous cases, including *Kristian*, the only way that Plaintiffs and members of the proposed class will be able to vindicate their statutory rights. *See* Pls.' Supp. Mem. in Supp. of Class Cert. at 22-23. *See generally* Defs.' Br. The necessity of the class action mechanism is simply uncontrovertible under the facts of record and established case law. *See* Pls.' Suppl. Mem. at 22-28.

Further, the 2004 Arbitration Notice's opt-out provision provides no reason to enforce the class action ban.[35] The analysis in *Kristian* did not turn on the presence or absence of an opt-out provision. Nor do Plaintiffs' unopposed expert affidavits. Moreover, the subscribers to whom Comcast purports to have sent the Notice were never given a meaningful choice to "opt-out" of

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2005); *Discover Bank v. Shea*, 827 A.2d 358, 366 (N.J. Super. 2001); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. Dist. Ct. App. 1999).

[35] The cases Comcast cites for support are inapposite in that all were, *inter alia*, decided on state law unconscionability grounds, did not address the plaintiffs' vindication of statutory rights; a class action ban's preclusion of the vindication of statutory rights; or arbitration agreements imposed on proposed class members after a lawsuit was already pending. In fact, in *Providean Nat'l Bank v. Screws*, 894 So.2d 625, 628 (Ala. 2003), cited by Defendants, the arbitration agreement containing an opt-out provision expressly excluded pending claims from arbitration.

the Notice.[36] Indeed, multiple courts have found opt-out provisions to have no redeeming import at all when it came to altering the legal rights of consumers. *See, e.g., Perry v. FleetBoston Fin. Corp.*, 2004 WL 1508518 (E.D. Pa. July 6, 2004); *Stone v. Wexler & Sarnese, P.C.*, 341 F.Supp.2d 189, 196 (S.D.N.Y. 2004); *Long v. Fidelity Water Sys., Inc.*, No. C-97-20118 RMW, 2000 WL 989914 (N.D. Cal. May 26, 2000).

The 2004 Arbitration Notice, on its face (Kane Decl., Ex. 1 ¶ I), and by Comcast's own argument, cannot be severed from the Notice. Defs.' Br. at ¶ 27, 31 and n.16. Therefore, because the Notice's class action ban is unenforceable, the entire Notice is invalid and serves no basis for omitting any subscribers from a certified Philadelphia area class.

D. The 2004 Arbitration Notice Cannot Be Applied to the Proposed Class Members' Claims.

The 2004 Arbitration Notice improperly misleads subscribers into changing their legal rights with respect to this lawsuit. The Eastern District of Pennsylvania and other courts have refused to enforce arbitration provisions where a party has sought to apply them to a pending lawsuit. *See, e.g., McCord v. Am. Gen. Life and Accident Ins. Co.*, No. 98-5911, 1999 WL 179758, at *5 (E.D. Pa. 1999) (concluding that even if plaintiff had agreed to defendants' alternative dispute program, it would not have applied to her where "[i]t is undisputed that plaintiff already had a claim pending before the PHRC when the Dispute Resolution Program was enacted."); *Wetzel v. Baldwin Hardware Corp.*, No. Civ. 98-3257, 1999 WL 54563, at *5 (E.D. Pa. Jan. 29, 1999) (refusing to retroactively apply defendant's new arbitration clause adopted after plaintiff had filed a claim, noting that "while the timing of the [arbitration clauses]'s implementation may have been just a coincidence, we cannot help but think that unfair practices could arise if employers were permitted to routinely implement mandatory arbitration

[36] *See* Defs.' Br. at 28 (claiming that the courts enforce arbitration agreements where a party is given a meaningful choice to not accept arbitration).

policies in response to employee charges filed []"); *Kresock v. Bankers Trust Co.*, 21 F.3d 176 (7th Cir. 1994) (refusing to apply new amendment to NASD rules requiring arbitration of plaintiff's pending claim, stating, "[i]t would be absurd to apply these amendments to [the employee's] claim. The incentive created by such a result would be this: after commencement of litigation an organization such as the NASD could simply amend its rules to force one or both parties to do something (like arbitrate) that one or both never agreed to do. Such a situation is unacceptable."). Here, as in those cases, Comcast's attempt to alter the legal rights of the plaintiffs and members of the proposed class after this lawsuit was filed cannot be tolerated.[37]

Courts have also refused to apply new arbitration clauses to already pending class actions, particularly where no notice is given to the class members regarding the status of the class action suit. For example, the court in *Long v. Fidelity Water Sys., Inc.*, No. C-97-20118 RMW, 2000 WL 989914 (N.D. Cal. May 26, 2000), as an alternative basis for holding that plaintiff was not subject to defendants' new arbitration clause containing an "opt-out provision," held that plaintiff's status as "a putative class member at the time defendants communicated with him also weakens any argument that he knowingly and voluntarily entered into an arbitration agreement." *Id.* at *3. The *Long* court concluded:

> Defendants gave no notice to the [plaintiff] that if he opted for the arbitration provision, he could not participate in the pending class action. Defendants failed to notify [plaintiff] of the pending class action, yet specifically stated in the arbitration clause that "[c]lass actions are not permitted unless the parties agree otherwise."

[37] Further, under the facts here, it appears unlikely that Comcast's dissemination of the 2004 Arbitration Notice was a mere coincidence. Rather, the Notice, which was adopted shortly after this lawsuit was filed and was sent only to certain communities within the Philadelphia Cluster (Kane Decl. ¶ 3, ¶ 5, Ex. 2), appears to have been implemented for the specific purpose of limiting the number of subscribers in a certified Philadelphia area class.

Id. Here, as in *Long*, Comcast never notified the proposed class members that this action was pending against it, yet the Notice explicitly precludes class action lawsuits if plaintiffs do not affirmatively opt-out of the agreement.[38]

E. Comcast's Use of the 2004 Arbitration Notice to Change the Legal Rights of Proposed Class Members After the 2003 Filing of this Lawsuit Is Prohibited by Rule 23(d).

Pursuant to Fed. R. Civ. P. 23(d), "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*., 452 U.S. 89, 100 (1981); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989) ("We have recognized that a trial court has a substantial interest in communications that are mailed for single actions involving multiple parties.") In applying Rule 23(d), the Third Circuit has emphasized that "[m]isleading communications to class members concerning the litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally." *In re School Asbestos Litig*., 842 F.2d 671, 680 (3d Cir. 1988). Further, it is settled

[38] Ironically, Comcast cites *Dienese v. McKenzie Check Advance of WI, LLC*, 2000 WL 3451133 (E.D. Wisc., Dec. 11, 2000), to support its argument that the Notice should be applied to the already pending claims in this action. Tellingly, the court in *Dienese* applied an arbitration clause to the proposed class members' pending claims in light of the fact that, *inter alia*, the arbitration agreement "identifie[d] the [class action] litigation pending in this district." *Id*. Comcast's Notice contains no such disclosure that could even arguably provide Comcast's subscribers with notice of their rights with respect to this lawsuit. *Id.* Comcast also cites the unpublished decision of *Burden v. McKenzie Check Advance of Ky., Inc*., No. 98-173 (E.D. Ky. Mar. 28, 2001). In *Burden*, the defendant only moved to modify the class definition to exclude class members who had actually "signed" an arbitration agreement. *Id*. at 1. Further, in that case, the plaintiffs did not contest that an enforceable arbitration agreement existed or the propriety of imposing an arbitration agreement on members of a proposed class. Further, the court in *Burden* had decided in an earlier decision that defendant's purported arbitration agreement would impact the case "only if plaintiffs' motion for certification of a class action was granted." *Id.* at 4. Significantly, should the Court here decide that the 2004 Arbitration Notice only impacts the case after a class is certified, then the Notice is a nullity with respect to members of the proposed class and this litigation for the additional reason that the April 12, 2006 stipulated Order states: "All claims asserted in this action of Plaintiffs Cutler, Glaberson, and all other persons who are included in a class that may be certified in this action, shall be resolved in court in this action and not through arbitration." *Id.* Finally, in *Bellizan v. Easy Money of La., Inc.*, No. Civ.A. 00-2949, 2002 WL 1066750 (E.D.La. May 29, 2000), the Court only found that the named plaintiff, not proposed class members, was required to arbitrate her claims. The named plaintiff had actually signed an arbitration agreement, and did not contest the validity of the arbitration agreement or the propriety of it being imposed on a plaintiff in a pending class action suit. *Id.* at *3-5.

law that Rule 23's authority governs a defendant's communications with members of a proposed class before the class is certified.[39]

Comcast claims to have mailed the 2004 Arbitration Notice to members of the proposed class just months after this class action lawsuit was filed. Further, the Notice does not give any notice whatsoever to members of the proposed Philadelphia class that, by omitting to "opt-out" of the Notice, they will relinquish their legal rights with respect to this class action lawsuit. Kane Decl., Ex. 1. Comcast's Rule 30(b)(6) deponent, Mary Kane, confirmed in her deposition that no such notice was provided by Comcast in connection with the "opt-out" notice. Kane Dep. 116-125.

In the case of *In re Currency Conversion Fee Antitrust Litigation*, 244 F.R.D. 555, 569-70 (S.D.N.Y. 2004), the court used its power and authority under Rule 23(d) to "regulate communications that threaten the choice of remedies available to class members" by refusing to enforce arbitration agreements added to the credit cardholder agreements of putative class members after an antitrust class action lawsuit was filed. The court reasoned that "[r]egardless of the cardholders' knowledge of this action, Defendants' communication with putative class members was improper because they sought to alter the status of this litigation and the available remedies." *Id*. at 570; *In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp.2d 237, 253 (S.D.N.Y. 2005) (reaffirming earlier refusal to enforce arbitration agreements entered after class action lawsuit had been filed); *see also Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d at 1199, 1206 (11th Cir. 1985) (finding Rule 23(d) empowered district court to void "opt-outs" by class

[39] *See, e.g., Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ.*, 115 F.R.D. 506, 512 (E.D. Pa. 1987) (invoking Rule 23(d) to prohibit communications to discourage putative class members from meeting with class counsel); *Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.*, 238 F.Supp.2d 151,154 (D.D.C. 2002) ("[T]he Court rejects defendants' position that it has no authority [under Rule 23(d)] to limit communications between litigants and putative class members prior to class certification."); *Ralph Oldsmobile Inc. v. Gen. Motors* Corp., No. 99 Civ. 4567(AGS), 2001 WL 1035132, at *2 (S.D.N.Y. Sept. 7, 2001) ("[A] court's power [under Rule 23(d)] to restrict communications between parties and potential class members appl[ies] even before a class is certified.").

members that stemmed from defendant's improper communications with putative class members).

The rationale described by the court in *In re Currency Conversion Fee* applies with full force to Defendants' equally egregious attempt to alter the rights of proposed class members in this case and to alter the status of this litigation and the available remedies. Accordingly, the Court should employ its powers under Rule 23(d) to refuse to enforce the 2004 Arbitration Notice.

F. Comcast's Use of the 2004 Arbitration Notice to Change the Legal Rights of Proposed Class Members After the 2003 Filing of this Lawsuit Violates Rule 4.2 of the Model Rules of Professional Conduct.

Comcast's communication with members of the proposed class regarding their legal rights, through the mailing of the Notice, also constitutes a violation of Rule 4.2 of the Model Rules of Professional Conduct and its analogous ethical rules in the states of Pennsylvania, New Jersey and Delaware. Rule 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." ABA Model R. Prof. Conduct 4.2.[40] The Rule was designed to prevent undue influence over laypersons by attorneys representing adverse parties. *See, e.g., Parks v. Eastwood Ins. Servs., Inc.*, 235 F.Supp. 2d 1082, 1083 (C.D. Cal. 2002) (citation omitted).

The Eastern District of Pennsylvania has held in *Dondore v. NGK Metals Corp.*, 152 F.Supp.2d 662, 666 (2001), Nos. CIV A 00-1966, CIV A 00-2441, 2001 WL 516635, at *2-3

[40] Rule 4.2 of the Pennsylvania Rules of Professional Conduct is identical to the model rule, except that it deletes the words "by law or a court order." *See* Pennsylvania Rules of Professional Conduct, Rule 4.2. Rule 4.2 of the Delaware Lawyer's Rules of Professional Conduct is identical to the model rule. Rule 4.2 of the New Jersey Rules of Professional Conduct contains a similar prohibition.

(E.D. Pa. May 16, 2001), that class counsel represent putative class members prior to certification. The *Dondore* court relied on Pennsylvania state court decisions holding that "putative class members are 'properly characterized as parties to the action.'" *Id*. at 666 (quotations and citations omitted). The court held that proposed class members, as parties represented by counsel, are entitled to "certain rights and protections including, we believe, the protections contained in Rule 4.2 of the Rules of Professional Conduct. . .", 2001 WL 516635, at *2-3, and reasoned that, otherwise, defense counsel could take advantage of "often unsophisticated" clients and "the benefits of class action litigation could be seriously undermined." *Id.*

The same rationale applies to Comcast's dissemination of its Notice. As such, the Court should refuse to enforce the 2004 Arbitration Notice.

VI. COMCAST'S REQUEST FOR A FULL EVIDENTIARY HEARING SHOULD BE DENIED.

In its opposition memorandum, Comcast in a single sentence requested a two-day "full evidentiary hearing" on class certification. Defs.' Br. at 1. Comcast offered no reason for the request. Its counsel wrote to the Court on November 13, 2006, reiterating that request. Plaintiffs' counsel opposed Comcast's request in a letter to the Court dated November 14, 2006.[41] Comcast's request is unwarranted and should be denied.

Plaintiffs' motion for class certification has now been fully briefed. Both parties have submitted expert reports. Each party's expert has been deposed. Plaintiffs were also deposed.[42]

[41] In a November 17 letter to the Court, Comcast's counsel asked for an opportunity to address the issue further in a letter response to be submitted by December 7th, following Comcast's review of Plaintiffs' reply memorandum. This court should not abide such tactics. Comcast made the request for an evidentiary hearing without supporting that request. If it had reasons to support it, Comcast should have provided them. The Court should deny Comcast's transparent effort to have the last word on its unsupported request for a completely unnecessary evidentiary hearing.

[42] Comcast deposed Plaintiff Behrend for 2 hours, 19 minutes on October 30, 2006. Plaintiff Caroline Behrend is seven months pregnant. Her deposition began at 4:00 p.m. so as not to interfere with her employment as a public school teacher. Comcast deposed Plaintiff Glaberson for 3 hours, 40 minutes on October 18, 2006. Comcast

Comcast has submitted the transcript of Dr. Beyer's deposition. Plaintiffs have submitted on the record the deposition testimony of Dr. Besen and of Mary Kane, Comcast's Rule 30(b)(6) designee. *See* Servais Decl., Exs. A-B.

The Court has before it all the information and extensive materials required for determining class certification. Comcast fails to explain or proffer what additional evidence it hopes to elicit through an evidentiary hearing. Comcast has not provided a single reason warranting the tremendous waste of time and inconvenience to the Court, the parties, and the witnesses that a duplicative evidentiary hearing would entail. An evidentiary hearing would only cause delay and undue burden, contrary to the very purpose of the Federal Rules of Civil Procedure.

Numerous federal courts have stated that an evidentiary hearing is unnecessary where the record contains sufficient bases to rule on a class certification motion. *See, e.g., Brown v. Philadelphia Housing Authority*, No. 06-cv-1495, 2006 WL 1737212, at *2 (E.D. Pa. June 22, 2006); *Mehl v. Canadian Pac. Ry. Ltd.*, 227 F.R.D. 505, 508 (D.N.D. 2005) (quoting *Int'l Woodworkers of Am. v. Georgia-Pacific Corp.*, 568 F.2d 64, 67 (8th Cir. 1977)); *Barone v. Safway Steel Products, Inc.*, No. CV-03-4258(FB), 2005 WL 2009882, at *2 (E.D.N.Y. Aug. 23, 2005); *Quarles v. General Investment & Development Co.*, 260 F. Supp. 2d 1, 7 (D.D.C. 2003); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 670 (N.D. Ga. 2003); *Cooper v. Southern Co.*, 205 F.R.D. 596, 597 (N.D. Ga. 2001); *Karen L. ex rel. Jane L. v. Physicians Health Services, Inc.*, 202 F.R.D. 94, 99 (D. Conn. 2001); *Shepherd v. Babcock & Wilcox of Ohio*, No. C-3-98-391, 2000 WL 987830, at *1 n.5 (S.D. Ohio March 3, 2000). *See also Deloach v. Phillip Morris Co., Inc.*, 206 F.R.D. 551, 553, n.2 (M.D.N.C. 2002) ("An evidentiary

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previously deposed Mr. Glaberson for 1 hour, 32 minutes on January 25, 2006, with respect to arbitration issues. Comcast questioned Dr. Beyer for 7 hours at his October 11, 2006 deposition.

hearing on class certification is unnecessary as both parties thoroughly briefed their positions"); 7AA Wright, Miller & Kane, Federal Practice and Procedure § 1785 (3d ed. 2000) ("courts generally agree that there is no absolute requirement that a preliminary hearing [on class certification] be held (citing cases)).

The Court has before it more than sufficient sworn testimony and materials, submitted by both parties, for resolving Plaintiffs' motion for class certification. Comcast's request for an entirely unnecessary and wasteful evidentiary hearing should be denied.

CONCLUSION

Plaintiffs have affirmatively satisfied all of the elements of Rule 23(a) and (b)(3). Comcast's purported 2004 Arbitration Notice forms no basis for excluding a single member from a certified Philadelphia class. Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Class Certification.

Dated: December 4, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 4th day of December, 2006, he caused to be served, via U.S. Mail and e-mail (and ECF where indicated), copies of **Plaintiffs' Reply in Support of Plaintiffs' Motion for Class Certification; Declaration of Jessica N. Servais in Support of Plaintiffs' Motion for Class Certification and Exhibits; and Declaration of John C. Beyer, Ph.D., in Response to Expert Report of Dr. Stanley M. Besen Regarding Class Certification and Exhibits** upon the following counsel:

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The undersigned attorney further certifies that the foregoing reply memorandum, declarations and exhibits were electronically filed and are available for viewing and downloading from the ECF system.

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