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

Caroline Behrend, et al.,	)	Civil Action No. 03-6604
	)	
Plaintiffs,	)	The Honorable John R. Padova
	)	
v.	)	
	)	
Comcast Corporation, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DECERTIFY CLASSES

Samuel D. Heins
Vincent J. Esades
David Woodward
Jessica N. Servais
HEINS MILLS & OLSON, P.L.C.
310 Clifton Avenue
Minneapolis, Minnesota 55402
Tel: 612-338-4605
Fax: 612-338-4692

Barry Barnett
William R. H. Merrill
Daniel H. Charest
Donna McNamara
SUSMAN GODFREY L.L.P.
901 Main Street, Suite 5100
Dallas, Texas 75202-3775
Tel: 214-754-1900
Fax: 214-754-1933

Anthony J. Bolognese (#36937)
Joshua H. Grabar (JHG 1707) (#82525)
BOLOGNESE & ASSOCIATES, LLC
Two Penn Center Plaza
1500 JFK Boulevard, Suite 320
Philadelphia, PA 19102
Tel: (215) 814-6750
Fax: (215) 814-6764

COUNSEL FOR PLAINTIFF CLASSES

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Federal Statutes

Other Authorities

Plaintiffs respectfully submit this memorandum pursuant to the Court's directive at the February 24, 2009 status conference that the parties address the threshold question of whether *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), warrants reconsideration of the Court's class certification decisions. The answer is "no." Defendants' ("Comcast's") motion to decertify should be denied.

PRELIMINARY STATEMENT

This is the third time Comcast has sought to challenge the Court's class certification rulings. The Rule 23(f) petition for appeal in *Hydrogen Peroxide*, docketed March 13, 2007, was before the Third Circuit at the very time Comcast filed its Rule 23(f) petition seeking review of this Court's order certifying the Philadelphia Class. The Third Circuit denied Comcast's Rule 23(f) petition. The Third Circuit also denied, on November 2, 2007, Comcast's Rule 23(f) petition with respect to the Court's October 10, 2007, decision certifying the Chicago Class. In twice denying Comcast's Rule 23(f) petitions in this case, while granting review in *Hydrogen Peroxide*, the Third Circuit did not identify any abuse of discretion in either of this Court's class certification decisions. Comcast's previous failures to establish an abuse of discretion by this Court are not surprising. This Court's class certification decisions fully comport with each of *Hydrogen Peroxide*'s clarifying principles. A hearing – evidentiary or otherwise – is wholly unnecessary.

LEGAL STANDARDS

"[W]hen seeking decertification of a class, the defendant bears a heavy burden to show that there exist clearly changed circumstances that make continued class action treatment improper." *In re Atlantic Fin. Fed. Sec. Litig.*, Civ. A. No. 89-645, 1992 WL 50072, at *2 (E.D. Pa. Feb. 28, 1992) (*citing Sley v. Jamaica Water & Utilities, Inc.*, 77 F.R.D. 391, 394 (E.D. Pa. 1977) ("Applying a 'law of the case' rationale, a class once certified on the basis of the

requirements of rule 23(a) and Rule 23(b) should be decertified only where it is clear there exist changed circumstances making continued class action treatment improper.")). A motion to decertify will be denied where a defendant lists grounds that were previously given or could have been asserted earlier but were not. *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1975) (noting that "the proponents of revocation or modification of a class action Order should, at a minimum, show some newly discovered facts or law" and denying motion where defendants' grounds "now include those which they gave previously or could have asserted earlier but did not"); *In re School Asbestos Litig.*, No. 83-0268, 1990 WL 2194, at *1 (E.D. Pa. Jan. 11, 1990) (denying defendants' motion for decertification of the class where "defendants [did] not present arguments which are either novel or representative of changed circumstances"). "In the absence of materially changed or clarified circumstances, or the occurrence of a condition on which the initial class ruling was expressly contingent, courts should not condone a series of reargruments on the class issues by either the proponent or the opponent of class, in the guise of motions to reconsider the class ruling." 3 Newburg on Class Actions § 7:47 (4th ed.).

If the Court denies Comcast's motion to decertify, yet another Rule 23(f) petition for interlocutory appeal by Comcast would be precluded. Rule 23(f) provides for the filing of a petition requesting permission to appeal from an order granting or denying class certification within ten days after entry of the order. "This ten-day time limit, as other courts have noted, is strict and mandatory." *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008). A motion to reconsider a class certification decision filed more than ten days after the order granting or denying class certification is untimely under Rule 23(f). *Id.* at 193. "A later order that does not change the status quo will not revive the ten-day time limit." *Id.* (*citing Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir. 2007)) ("[W]hat counts is the original order

denying or granting class certification, not a later order that maintains the status quo."); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006) ("An order that leaves class-action status unchanged from what was determined by a prior order is not an order 'granting or denying class action certification.'"); and *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("As the district court . . . merely reaffirmed its prior ruling, the court's order was not 'an order . . . granting or denying class action certification' under Rule 23(f).")).

A motion to decertify a class is treated as a motion to reconsider. *See Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999) (denying Rule 23(f) petition seeking review of an order denying motion to decertify class, noting that "we do not think that it matters what caption the litigant places on the motion to reconsider" and that "[o]therwise, by styling a motion to reconsider as a motion to decertify the class, a litigant could defeat the function of the ten-day line drawn in Rule 23(f)")[1]. Disallowing multiple Rule 23(f) interlocutory appeals promotes the purpose of Rule 23(f). *See Gary*, 188 F.3d at 893 (noting that "[i]nterlocutory appeals are rare, because they may disrupt progress of the case" and that "to ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small").

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IN *HYDROGEN PEROXIDE* DOES NOT CONSTITUTE A CHANGE IN CONTROLLING LAW WARRANTING RECONSIDERATION OF CLASS CERTIFICATION IN THIS CASE.

Comcast does not point to any "changed circumstances" requiring decertification of the Philadelphia Class. It simply repeats the grounds it previously advanced, and the Court rejected,

[1] *See also Jenkins*, 491 F.3d at 1291-92 ("If appeal were allowed after later motions, any litigant could effectively defeat the function of the 10-day limit by filing a motion to decertify at any point in the litigation and then requesting an interlocutory appeal from that ruling." (citation omitted)); *Gutierrez*, 523 F.3d at 194 (noting "the denial of the Motion to Reconsider does not qualify as an order 'granting or denying class action certification' within the meaning of Rule 23(f)" (citations omitted)).

in opposition to class certification. Comcast fails to present any new grounds warranting decertification. Rather, Comcast argues that *Hydrogen Peroxide* constitutes an intervening change in controlling law warranting decertification. Defs'. Mem. at 3-4. Plaintiffs disagree.

To guide district courts in future class certification determinations, the Third Circuit in *Hydrogen Peroxide* relied largely upon existing precedent. For example, in reiterating that "[c]lass certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met," the Third Circuit cited established Supreme Court and Third Circuit decisional law. *Hydrogen Peroxide*, 552 F.3d. at 309 (*citing Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006); and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)). Similarly, the *Hydrogen Peroxide* court invoked a principle it articulated years ago in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001), that "[t]he court may 'delve beyond the pleadings to determine whether the requirements for class certification are satisfied.'" *Id.* at 316. In further clarifying existing law, the Third Circuit drew upon the 2003 Amendments to Rule 23, observing: "While these amendments do not alter the substantive standards for class certification, they guide the trial court in its proper task – to consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class." *Id.* at 320. The Third Circuit further invoked existing law in clarifying that district courts are to "resolve all factual or legal disputes relevant to class certification" and that the "court's obligation to consider all relevant evidence and arguments extends to expert testimony." *See id.* at 307.

Indeed, the Third Circuit indicated it was clarifying existing legal standards. *Id.* ("In this appeal, we clarify three key aspects of class certification procedure.") Core principles governing

class certification remain unchanged and, in fact, are reinforced in *Hydrogen Peroxide*. For example, the bedrock concept – that plaintiffs at the class certification stage need not prove antitrust impact but must demonstrate that antitrust impact is capable of common proof at trial – was again recognized by the Third Circuit:

> Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact . . . . Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

Id. at 311-12.

The Third Circuit's statement that the "proper task" of the trial court in making class certification decisions is "to consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class" (*id.* at 320) provides important guidance, but does not constitute a change in controlling law warranting decertification of this Court's sound decisions.[2]

II. THE COURT'S CLASS CERTIFICATION DECISIONS FULLY COMPORT WITH THE PRINCIPLES SET FORTH IN *HYDROGEN PEROXIDE*.

Hydrogen Peroxide clarifies three class certification procedures. "First, the decision to certify a class calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of rule 23 is met." *Id.* at 307. "Second, the Court must resolve all factual or legal disputes *relevant to class certification*, even if they overlap with the merits . . . ." *Id.* (emphasis added). "Third, the court's obligation to consider all relevant evidence and arguments

[2] The Third Circuit did cite in a footnote a Seventh Circuit decision, noting that "[t]he proposition that a district judge must accept all of the complaint's allegations . . . cannot be found in Rule 23 and has nothing to recommend it." *Hydrogen Peroxide*, 552 F.3d at 316 n. 15 (quoting *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001)). However, neither the Third Circuit's reminder that a court may "delve beyond the pleadings" nor its directive that courts should avoid suppressing "doubt" as to whether a Rule 23 requirement has been satisfied, provides any support for decertification in this case. As discussed *infra*, this Court delved well beyond the pleadings in finding Rule 23's requirements satisfied and never expressed, let alone resolved in plaintiffs' favor, any "doubt" in finding that plaintiffs satisfied each and every Rule 23 requirement.

extends to expert testimony . . . ." *Id.*

This Court's class certification decisions fully comply with each of these principles. First, beyond question, the Court expressly found that plaintiffs had satisfied each requirement of Rule 23(a) and Rule 23(b)(3).[3] Second, the Court rigorously analyzed, in exacting detail, the class certification record before it and considered all relevant evidence and arguments made by the parties – precisely what the Third Circuit directs in *Hydrogen Peroxide*. Third, the Court fully satisfied the Third Circuit's reminder that "the court's obligation to consider all relevant evidence and arguments extends to expert testimony." 552 F.3d at 307. The Court spent a significant portion of its comprehensive 35-page opinion scrutinizing the opinions and underlying bases of both Dr. John C. Beyer (plaintiffs' expert), and Dr. Stanley Besen (defendants' expert). *See* 245 F.R.D. at 197-202, 205 and 208-12

As the Third Circuit noted, "[L]ike any evidence, admissible expert opinion may persuade its audience, or it may not." 552 F.3d at 323. After weighing the parties' expert testimony, this Court was persuaded and found that plaintiffs met all class certification requirements. Necessarily, each of the factual disputes relevant to class certification, painstakingly discussed in the Court's decision, were resolved in plaintiffs' favor. An objective observer would be hard pressed to find an opinion reflecting a more rigorous analysis than that found in this Court's class certification opinions. The fact that Comcast continues to disagree is not a basis for reconsideration. Nothing in *Hydrogen Peroxide* supports reconsideration.

[3] This Court made all necessary Rule 23 findings. "We find that the numerousity requirement . . . is clearly satisfied in this case." *Behrend v. Comcast Corp.*, 245 F.R.D. 195, 202 (E.D. Pa. 2007). "[W]e find the commonality requirement has been satisfied." *Id.* at 203. The Court determined that plaintiffs had sufficiently established typicality and adequacy of representation. *Id.* at 205. "[W]e find that predomination has been established . . . ." *Id.* at 210. "[W]e conclude that the Plaintiffs have established that common issues predominate and that class action treatment is the superior means of fairly adjudicating the dispute." *Id.* at 212. The Court concluded, "Plaintiffs have satisfied the four requirements of Fed. R. Civ. P. 23(a) and the predominance and superiority requirement of Rule 23(b)." *Id.*

III. NONE OF THE SHORTCOMINGS DISCUSSED IN *HYDROGEN PEROXIDE* ARE FOUND IN THIS COURT'S CLASS CERTIFICATION DECISIONS.

The Third Circuit found that the district court's class certification ruling in *Hydrogen Peroxide* fell short in three respects. Not one applies here.

First, the Third Circuit noted that the district court had stated that "plaintiffs need only make a threshold showing" that impact will involve generalized proof and that "invoking the phrase 'threshold showing' risks misapplying Rule 23." 552 F.3d at 321. Nowhere in your Honor's decisions is there any indication that a "threshold showing" is sufficient. Rather, after fully examining the class certification record before it, the Court made its own independent determinations that plaintiffs met each of the Rule 23(a) and Rule 23(b)(3) requirements.

Second, the Third Circuit noted that the district court had reasoned that "in an alleged horizontal price-fixing conspiracy case when a court is in doubt as to whether or not to certify a class, the court should err in favor of allowing the class." *Id.* The Third Circuit explained that a district court "should not suppress 'doubt' as to whether a Rule 23 requirement is met…." *Id.* In its statement of general class certification principles, after emphasizing that plaintiffs have the burden of establishing the prerequisites of Rule 23, this Court cited the principle that "in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." *Behrend*, 245 F.R.D. at 197 (citation omitted). However, nothing in this Court's class certification decisions indicates that the Court entertained, let alone suppressed any "doubt" as to whether plaintiffs satisfied Rule 23 requirements.

Similarly, the Third Circuit recognized the Supreme Court's observation that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws" (552 F.3d at 321-22, *quoting Amchem*, 521 U.S. at 625), but cautioned that the district court is not to "relax its certification analysis, or presume a

requirement for certification is met, merely because a plaintiff's claims fall within one of those substantive categories." *Id.* Nothing in this Court's class certification rulings indicates that it presumed plaintiffs' satisfaction of any certification requirement. Nor did the Court in any way relax its rigorous certification analysis. To the contrary, the Court's opinions represent paradigm examples of rigorous analysis of all record evidence leading to express Rule 23 findings.

Third, the Third Circuit explained that "[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis." *Id.* at 323. This Court's opinion reflects penetrating analysis of the parties' competing expert opinions. The Court did not hesitate in fully considering both experts' opinions, weighing all of the evidence before it (including expert testimony) and performing its "proper task" of making "a definitive determination that the requirements of Rule 23 have been met before certifying a class." *Id.* at 320.

IV. COMCAST'S CRITICISMS OF THE COURT'S CLASS CERTIFICATION DECISIONS ARE UNFOUNDED AND MISS THE MARK.

A. Comcast's Argument That the Court Should Not Credit Allegations in the Complaint Does Not Support Decertification.

Comcast asserts that *Hydrogen Peroxide* "now makes clear that a trial court must not credit allegations in the complaint at the class certification stage." Defs'. Mem. at 8. The error in Comcast's position is that the Court did not do so. In its introductory statement of principles, this Court stated that "'it is not necessary for the plaintiffs to establish the merits of their case at the class certification stage' and 'the substantive allegations of the complaint must be taken as true.'" 245 F.R.D. at 197 (citations omitted). However, just as the Third Circuit did in *Hydrogen Peroxide*, this Court invoked *Newton* for the proposition that "[t]he United States Court of Appeals for the Third Circuit has recognized the utility, and often the necessity, of looking beyond the pleadings at the class certification stage of the litigation." *Id.* (*citing*

Newton, 259 F.3d. at 168). Nothing in this Court's class certification rulings indicates that the Court blindly accepted the allegations of the plaintiffs' complaint or confined its analysis to plaintiffs' complaint. Rather, the Court dove deeper than the pleadings and immersed itself in the entire class certification record, which the Court noted included plaintiffs' expert reports, excerpts of the plaintiffs' and their expert's depositions and Comcast's "own expert report, along with attorney declarations, exhibits and deposition excerpts." *Id*. Far from simply accepting or confining itself to complaint allegations, the Court's thorough discussion of the class certification record, analyzed at length in its opinion (*see* 245 F.R.D. at 197-202), reflects precisely the comprehensive examination the Third Circuit said courts should undertake in satisfying themselves, and finding, that Rule 23 requirements have been met.

B. The Court, Contrary to Comcast's Argument, Did Not Draw Inferences in Favor of Plaintiffs.

Comcast argues that the Court should consider the same arguments it previously made in opposing class certification "so that it can consider those arguments anew without any deference or presumption in favor of plaintiffs." Defs'. Mem. at 9. Comcast is mistaken. It has not shown, and cannot demonstrate, that this Court exercised and applied any "deference" or "presumption" in favor of plaintiffs. What the Court did do was what the Third Circuit said it should do – subject all the evidence, including the parties' expert opinions, to rigorous analysis and find whether Rule 23 requirements have, or have not, been met. The Court carefully scrutinized both experts' opinions. Far from "presuming" or "deferring," this Court examined in detail and rejected Comcast's criticism of Dr. Beyer's opinions. *See* 245 F.R.D. at 210-212. The Court concluded, "we find that Beyer did not make improper assumptions in his analysis of common impact." *Id.* at 211. The Court summarized each of Dr. Beyer's opinions and discussed the multiple bases for those opinions, including FCC pricing data, Comcast's own website

information, Nielsen data, a study by Hal Singer, Ph.D. showing a decrease in the probability of overbuilding relative to the increase in the size of a cluster, and numerous government and private studies. *Id.* After listing these sound bases anchoring Dr. Beyer's opinion, the Court determined that "unlike in cases where Beyer was criticized, here he succeeded in demonstrating the *sine qua non* of class-wide proof of impact: damage to each class member because the prices charged by Comcast were higher. . . ." *Id*. Thus, Comcast's argument that under *Hydrogen Peroxide*, Dr. Beyer "is not entitled to assume class-wide injury" (Defs.' Mem. at 9) and that plaintiffs are not entitled to "deference or presumption" (*id.*) completely ignores the Court's careful analysis and determinative findings in its class certification decisions.

Comcast, in particular, re-argues that Dr. Beyer "assumed" class wide impact. The Court has already rejected Comcast's mischaracterization of Dr. Beyer's testimony and, instead, ruled that Dr. Beyer did not assume class wide impact: "we find that Beyer *did not* make improper assumptions in his analysis of common impact." *Id*. at 211 (emphasis added). Rather, the Court determined that Dr. Beyer had "succeeded in demonstrating" class wide impact. *Id.* at 211. Nothing in *Hydrogen Peroxide* merits revisiting this issue. No expert is allowed – nor has ever been allowed – to "assume" class wide proof of impact, either pre-*Hydrogen Peroxide* or post-*Hydrogen Peroxide*. There has simply been no "change of circumstances" that would cause the Court to reconsider Comcast's tired characterization of Dr. Beyer's opinion.

In resurrecting its previous criticisms of Dr. Beyer, Comcast also argues that *Hydrogen Peroxide* requires that the Court must be satisfied that the cable companies Comcast removed from the market would have re-entered the market. Defs'. Mem. at 9-10. Comcast is wrong.

Comcast asserts, without citation or support, that "without a real, genuine threat of entry", there could not have been any price constraining influence on Comcast's prices. *Id.* at

10. This assertion is false and mischaracterizes plaintiffs' case.

Plaintiffs do not contend that "potential entry" is the only means by which a cable operator's presence in a market can constrain prices. Cable competitors removed from the Philadelphia area market by Comcast's unlawful swaps and acquisitions previously exercised a price constraining influence independent of whether they would have entered, re-entered or posed "a real, genuine threat of entry" as overbuilders. The Court rightly found that: "Beyer's opinion is not that overbuilding would have necessarily occurred but for the cable transactions. Rather, his opinion is that all members of the class have paid higher prices as a result of the effects of the cable transactions." 245 F.R.D. at 210.

Comcast further ignores the scope of plaintiffs' case. Plaintiffs allege that Comcast violated sections 1 and 2 of the Sherman Act by engaging in swaps, acquisitions and other unlawful conduct, specifically including Comcast's conduct in withholding, denying or unreasonably limiting access to essential sports programming controlled by Comcast (Comcast's SportsNet Philadelphia) and needed by competitors to compete against Comcast; attempting to thwart competition by opposing entry by competitors into the Philadelphia market; substantially interfering with competitor RCN's access to contractors needed to build out competing cable systems; and engaging in anticompetitive, targeted discounts resulting in non-uniform rates in order to preclude or suppress competition. As the Third Circuit and this Court have both recognized, a monopolist's conduct is to be considered as a whole. *Glaberson v. Comcast Corp.*, 2006 WL 2559479, at *14 (E.D. Pa. 2006) (noting, "[a]s the Supreme Court recognized in *Cont.'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2 777 (1962), the courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation" (*citing LePage's, Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir.

2003))).

Comcast's position also ignores established case law recognizing that the potential competition theory, one of several bases for Dr. Beyer's conclusions, is both fact intensive and a merits issue to be resolved at trial. *See, e.g., United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); and *Tenneco, Inc. v. F.T.C.*, 689 F.2d 346 (2d Cir. 1982). As this Court properly concluded, "[w]e find that Comcast's market entry argument does not lead to a conclusion that individual issues predominate over common issues." 245 F.R.D. at 210.

Importantly, in its decisions, the Court properly focused on the core class certification issues Comcast challenged (before and again now) of common proof of antitrust impact and predominance, noting that "the discrete class certification issue of predominance does not depend on one or the other potential competition theories to show common proof of antitrust injury." *Id.* at 208. The Court did not assume, but found that plaintiffs demonstrated that common antitrust liability issues predominate, are common to the class and can be determined on a class wide basis.[4]

C. Comcast's Laundry List of Previously Asserted Arguments Does Not Warrant Class Decertification.

Comcast contends that the Court must resolve numerous disputes between the parties including differing positions between the parties' experts. Defs'. Mem. at 10-20. Two points should be considered in evaluating Comcast's laundry list. First, Comcast simply repeats arguments it made before in opposing class certification, which the Court already resolved.

[4] "Plaintiffs have shown, without opposition, that common antitrust liability issues predominate on these claims. The facts that the various cable systems were: (1) acquired at different times; (2) covered different franchises areas; (3) did not compete head to head with each other or with Comcast prior to their acquisition; or (4) would have entered a specific franchise area; do not negate Plaintiffs' arguments that the effects of the cable transactions (*per se* market allocation, unlawful restraint of trade, and monopolization) are common to the class, constitute a significant part of the individual cases, and can be determined on a class-wide basis." 245 F.R.D. at 208.

Comcast's listing of the same grounds previously advanced warrants denial of Comcast's motion. *Kramer*, 67 F.R.D. at 99.

Second, not every dispute must be resolved at the class certification stage. Rather, the Third Circuit indicated that only factual or legal disputes "relevant to class certification" need be resolved. *Hydrogen Peroxide*, 552 F.3d at 307. Conversely, merits issues not relevant to class certification need not be resolved at the class certification stage. *Id.* at 317 ("As we explained in *Newton*, 259 F.3d at 166-69, *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement.") *See also id.* at 310 ("The trial court, well-positioned to decide which facts and legal arguments are most important to each Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23."); *id.* at 324 (stating that "[i]n its sound discretion, a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement"). Comcast's motion to decertify rests upon a challenge to the predominance requirement of Rule 23(b)(3). Defs'. Mem. at 2 (urging the Court to "require plaintiffs and their expert to demonstrate that the predominance requirement can be satisfied as to antitrust impact.") The Court need not resolve issues extraneous to the predominance requirement, nor address merits decisions not necessary to resolving a Rule 23 requirement.

1. Comcast is Wrong in Criticizing the Court for Failing to Weigh the Credibility of the Parties' Experts and Failing to Subject the Expert Reports to Rigorous Analysis.

In making this argument, Comcast ignores the Court's decisions. This Court exhaustively analyzed the respective experts' opinions. *Behrend*, 245 F.R.D. at 197-202. Specifically, the Court discussed in detail the parties' respective expert opinions concerning Rule 23(b)(3)'s predominance requirement before coming to rest on the conclusion that the predominance requirement was satisfied. *Id.* at 205-210. Throughout its comprehensive

analysis, the Court indicated it was persuaded by Dr. Beyer's position and unpersuaded by Dr. Besen's competing views. For example, Comcast and its expert argued that the varying closing dates of the challenged transactions created differences among class members. The Court noted that "[a]lthough Besen claims the time that the subscriber came to Comcast makes a difference, we note that he does not explain how." *Id.* at 200 n.10. Comcast and Dr. Besen further argued that certain regional distinctions within Comcast created differences among class members. The Court pointed out that Dr. Besen "opines that differences in these functions can result in differences in offerings to subscribers" but that "he does not opine that they actually have resulted in differences." *Id.* at 200 n.13. The Court further critiqued Dr. Besen's factual claim that subscribers did not pay common prices for expanded basic services. *Id.* at 201 n.19 (noting Dr. Besen's failure to explain how, if the deviation from mode was declining, the deviation in price per channel increased). Similarly, the Court found that despite his reliance on price per channel data, Dr. Besen conceded at his deposition that he treated each channel equally without considering the relative value of channels. *Id.* n.20. The Court went on to note that "Besen faults Beyer for his 'implicit assumption' . . . that overbuilding *necessarily* would have occurred in the absence of clustering . . . ." *Id.* at 210. The Court's response again indicates that it carefully considered and weighed the competing experts' views, but was persuaded by one of them:

> We disagree . . . . [T]he gist of Beyer's opinion is not that overbuilding would have necessarily occurred but for the cable transactions. Rather, his opinion is that all members of the class have paid higher prices as a result of the effects of the cable transactions. In arriving at this opinion, he does not focus on an assessment of the probability of overbuilding. He looked, rather, to Comcast's use of market power in the Philadelphia and Chicago markets, as a consequence of its building clusters of cable systems, which increased its monopoly power *and* raised entry barriers for potential competitors and overbuilders . . . . As Comcast does not argue that its alleged use of market power is not a predominant common issue, we find that predomination has been established as to these issues.

Id. at 210.

Comcast further faults the Court for failing to weigh the credibility of the parties' experts. To the contrary, the Court assessed and rejected Comcast's numerous criticisms of Dr. Beyer and his analysis. *Behrend*, 245 F.R.D. at 211. The fact that the Court rejected Comcast's attack on Dr. Beyer's credibility, determined that his conclusions were well supported by studies and data, and expressly found that "Plaintiffs have established that common issues predominate" means that the Court, after evaluating all the evidence before it, including the parties' expert opinions, was persuaded by Dr. Beyer's opinion. *Id.* at 212. "Like any evidence, admissible expert opinion may persuade its audience, or it may not." *Hydrogen Peroxide*, 552 F.3d at 323. Comcast's continued disagreement with the Court's findings does not alter the fact that the Court was persuaded by the exhaustive record before it to find that all of the elements of Rule 23 were satisfied, nor provide any basis for reconsideration.

2. Comcast's Contention that the Court Must Resolve the Issue of Whether Adjoining Cable Operators Were "Potential Competitors" Who Restrained Comcast's Prices is Unavailing.

Comcast again argues that the Court should resolve the issue of whether adjoining cable operators removed by Comcast's swaps and acquisitions should be considered "potential competitors" who previously restrained Comcast's prices. Defs'. Mem. at 11-13. Dr. Beyer made clear that "major competitor cable MSOs that once had a significant share of the cable subscribers in each cluster area have exited the market and no longer exert any competitive constraint on Comcast's ability to raise prices in each cluster, as they did prior to the 'swaps' and acquisitions"; that as of 1999, "many of the cable systems now in the Comcast Philadelphia cluster were owned by other major cable MSOs that previously competed with Comcast"; and that "[h]aving exited the Philadelphia cluster area, these other cable MSOs no longer constrain

cable prices in the area." Updated Decl. of John C. Beyer, Ph.D. ¶ 20. Comcast contends that its expert "has raised an argument" that potential entry is a "remote possibility" and is unlikely to restrain prices. Defs'. Mem. at 12-13.[5]

As discussed earlier, Comcast is raising a merits issue to be resolved at trial, as recognized in Supreme Court precedent and by this Court (*Falstaff Brewing Corp., supra*; *Marine Bancorporation, supra; Behrend,* 245 F.2d at 209-210). Furthermore, as the Court noted, Comcast's argument "ignores the fact that Dr. Beyer opined that potential overbuilders include not only the former incumbent cable operators, but also independent competitors, such as RCN." *Behrend*, 245 F.R.D. at 209.

Additionally and fundamentally, Comcast's argument, previously made and rejected, does not go to the key issue of whether plaintiffs have shown that their claims are subject to common proof on a class wide basis. *See id.* (concluding that Comcast's argument "does not, we find, negate common proof"); *see also id.* at 210 (concluding that "Comcast does not argue that its alleged use of market power is not a predominant common issue" and finding that "predomination has been established"); *id.* at 208 (determining that "the discrete class certification issue of predominance does not depend on one or the other potential competition theory to show common proof of antitrust injury). This Court's analysis fully complies with *Hydrogen Peroxide* and its reaffirmation of the core class certification issue—the availability of common proof. *Hydrogen Peroxide*, 552 F.3d at 311-12 (recognizing that plaintiffs' burden at class certification is not to prove antitrust impact but "to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than

[5] In a footnote, Comcast argues that subsequent discovery undermines Dr. Beyer's position. Defs. Mem. at 13 n. 5. To the contrary, as plaintiffs will demonstrate at summary judgment and trial, discovery fully supports each of plaintiffs' section 1 (restraint of trade) and section 2 (monopolization and attempted monopolization) Sherman Act claims.

individual to its members").

3. Comcast's Contention that the Court Should Revisit Comcast's Previous Challenges to Dr. Beyer's Pricing Analysis Does Not Support Class Decertification.

Once again, Comcast asks the Court to revisit the studies cited by Dr. Beyer in demonstrating common proof and class wide impact. Once again, Comcast argues that "the studies are only relevant" if one assumes that 100% of the market would have been overbuilt but for the challenged transactions. Defs'. Mem. at 14-15. Once again, Comcast is wrong. More important, Comcast's tired argument does not constitute anything new under *Hydrogen Peroxide*.

The Court has already analyzed and rejected Comcast's argument and Dr. Besen's position. *See, e.g.,* 245 F.R.D. at 208 (noting that plaintiffs have shown that common antitrust liability issues predominate, reasoning that various factors raised by Comcast, including that "the various cable systems . . . did not compete head to head . . ." or "would have entered a specific franchise area . . . do not negate Plaintiffs' arguments that the effects of the cable transactions . . . are common to the class, constitute a significant part of the individual cases, and can be determined on a class-wide basis").

Comcast also repeats its previous argument that Dr. Beyer's analysis does not accurately reflect the actual experience of class members, including plaintiffs Glaberson and Behrend. Defs'. Mem. at 15-17. Comcast argues that Dr. Beyer uses an "average list price" analysis. *Id.* at 16. Comcast's newly coined "average list price," created in an attempt to analogize to the completely different facts in *Hydrogen Peroxide*, reflects a transparently specious argument. Dr. Beyer invoked numerous studies, including FCC annual reports that are based on the cable rates (not discounted rates) reported by cable operators, including Comcast, as well as (non-discounted) price information derived from Comcast's own website. Similarly, Comcast's own

expert, Dr. Besen, relied upon data derived from Comcast's rate cards, which are "list" prices. *See*, 245 F.R.D. at 200 n.15 (noting that Dr. Besen's "data came from Comcast's rate cards for each of the franchises in the cluster for year 2005").

Comcast's argument that Dr. Beyer's analysis did not account for the actual experiences of class members fails. Comcast refers to the "significant" discount plaintiff Caroline Behrend obtained. Yet Comcast ignores Ms. Behrend's deposition testimony that the discount was temporary (lasting three months) and that Comcast's prices returned to higher levels following expiration of the discount. Decl. of Jessica Servais, Dckt. #186, Ex. C, Tr. 67:14-15 and 21-23.[6] Comcast further argues that, based on bills from only two years of the class period, Plaintiff Glaberson's cable prices increased at an average annual rate of "just 6%," which Comcast argues was lower (for those two years) than the rate of increase in competitive communities. Defs'. Mem. at 17. Comcast raised, and the Court flatly rejected the same arguments, and Dr. Besen's use of the "price per channel measure," before, in Comcast's challenge to typicality:

> For a similar reason, we find that Comcast's alternative argument – that named Plaintiffs Behrend and Glaberson are atypical because Glaberson experienced smaller increases in prices per channel than subscribers in the United States as a whole, and Behrend actually experienced a decrease – must be rejected. Dr. Beyer rejects price per channel as an artificial measure because it is not used by the industry. In his opinion, based on the change in average monthly prices for expanded basic cable reported by the FCC, Glaberson and Behrend experienced increased prices due to the cable transactions.

Behrend, 245 F.R.D. at 205 n.28; *see also id*. at 201 n.20 (noting that Dr. Besen failed to support his use of the price-per channel measure). As the Court noted, Dr. Beyer determined that the

[6] Comcast also faults Dr. Beyer for not considering other Comcast promotions and discounts, including the "discounts" referenced in plaintiffs' Complaint ¶ 93 (alleging that Comcast engaged in anticompetitive marketing campaigns and price discounts, with long-term, 18 month contracts and penalty provisions for cancellation, designed to prevent or eliminate competition from, and to lock out a competitor, RCN). Doing so would only emphasize the amount of the overcharges Comcast was able to exact from class members due to its anticompetitive conduct. Were the "discounted" (temporarily frozen) prices Comcast adopted in an effort to thwart competition considered reflective of prices Comcast would have charged in areas with overbuild competition, those price effects would be very substantial in and of themselves.

average annual rate of cable price increases in the Philadelphia Cluster was 10.8%, compared to the average price increases for systems facing "effective competition" of 5.8%. *Id.* at 198 n.5.[7]

The Court expressly found that Dr. Beyer did not err in his analysis of common impact. 245 F.R.D. at 211. Comcast's unfounded assertion that Dr. Beyer's analysis fails to account for individual class members' experiences is factually inaccurate and provides no support for class decertification.[8]

Moreover, to the extent that Comcast argues that class members' damages may vary and must be individually determined, it misses the mark (the existence of common proof of plaintiffs' claims) and ignores settled law. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) ("[I]t 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, 487 (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."); *see also Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("[F]actual differences among the claims of the putative class members do not defeat certification."). Nothing in *Hydrogen Peroxide* alters these established principles.

[7] Comcast argues that Dr. Besen concluded that the average annual rate of increase for "effective competition" communities was 7.2%. This is essentially an argument that the overcharges, calculated from the supracompetitive rate of increase benchmark, according to Comcast, may have been less than what Dr. Beyer found. Any dispute about the *extent* of Comcast's overcharges hardly supports class decertification or undermines the Court's finding that Dr. Beyer demonstrated class wide proof of impact and damage to each class member.

[8] In a footnote, Comcast argues the merits issue that the relative price constraining force of wireline overbuilders as compared to satellite providers "is irrelevant" and that class members who do not like Comcast are free to switch to satellite. Defs'. Mem. at 16 n.6. As plaintiffs will demonstrate at summary judgment and trial (the proper venue for this argument), Comcast's anticompetitive conduct, including its foreclosure strategies, such as the complete denial of essential sports programming to DBS competitors, has greatly suppressed DBS penetration in the relevant market, adversely impacting all Philadelphia class members.

4. Comcast's Resurrected Challenge To Plaintiffs' Demonstration Of Workable Methodologies For Calculating Damages On A Class Wide Basis Is Meritless.

Just as it did in challenging plaintiffs' motions for class certification, Comcast again argues that plaintiffs have not demonstrated that damages can be determined on a class wide and individual basis. Defs.' Mem. at 18-19. Comcast argues that it is not enough for a plaintiffs' expert to "promise to simply 'do the math' later." *Id*. at 18. And once again, Comcast ignores both Dr. Beyer's analysis and this Court's conclusions.

Dr. Beyer used two accepted "yard-stick" benchmarks, as suggested by FCC and other cable price studies, for determining damages. Beyer Updated Decl. at ¶¶ 8, 38-43; Beyer Rebuttal Decl. at ¶¶ 38-40. One benchmark, the change in the price charged for expanded basic programming by other [non-cluster] cable systems, provides a sound basis for estimating the supra-competitive price increases charged by Comcast in the relevant market as a consequence of Comcast's anticompetitive conduct. For example, the FCC's reported 39.6% average increase in the monthly charge for expanded basic programming across all cable systems provides a benchmark against which to compare the 89.3% average increase in the charge for expanded basic in Comcast's Philadelphia cluster. *See* Beyer Updated Decl. at ¶¶ 8, 40; Beyer Rebuttal Decl. at ¶¶ 39-40, Ex. 5. Dr. Beyer further demonstrated that a second benchmark, a 15% to 20% price differential between cable systems not facing overbuild competition and cable systems facing cable competition, as reported by the FCC, GAO and other cable price studies, can be used to estimate the supra-competitive overcharge that Comcast has protected, maintained and increased as a result of its anticompetitive conduct. Dr. Beyer testified that these benchmarks are appropriate for calculating damages on a class wide and individual basis. Beyer Updated Decl. at ¶¶ 8, 41-42; Beyer Rebuttal Decl. at ¶¶ 38-40, Ex. 5.

As this Court stated, after concluding that Dr. Beyer "succeeded in demonstrating the

sine qua non of class-wide proof of impact" in the form of damage to each class member because of Comcast's higher prices:

> Beyer has also provided metrics for evaluating common impact, the supra-competitive overcharge and the supra-competitive rate of price increase. To arrive at the supra-competitive overcharge, Beyer compared Comcast prices with Government and academic statistics from areas with overbuilder competition, showing a 15-20% differential in price. He also used statistics to determine that the average annual rate of price increase is 10.8% in the Philadelphia cluster and 9.7% in the Chicago cluster, in contrast to 5.8% where cable systems face effective competition.

Behrend, 245 F.R.D. at 211-12 (citations omitted).

The fact that pricing and other data gleaned from merits discovery will further inform plaintiffs' actual damages calculations does not mean, contrary to Comcast's previously raised and renewed argument, that plaintiffs are in any way "promising" to provide damages methodologies in the future. Rather, plaintiffs amply met their burden, the Court made its findings, and nothing in *Hydrogen Peroxide* warrants reconsidering the Court's conclusions that plaintiffs have demonstrated class wide proof of impact (injury to class members in the form of higher prices charged by Comcast) and sound methodologies for determining damages.

V. COMCAST'S REQUEST FOR AN EVIDENTIARY HEARING SHOULD BE DENIED AND THE TENTATIVELY SCHEDULED HEARING SHOULD BE DETERMINED UNNECESSARY.

Comcast's request for an evidentiary hearing is conditional on the Court's decertifying the class and "upon Plaintiffs' renewed class certification motions." Defs'. Mem. at 3, 20; Defs.' Proposed Order.

Comcast is not entitled to an evidentiary hearing. Having failed to make a threshold showing that *Hydrogen Peroxide* warrants reconsideration of the Court's class certification rulings, Comcast's request for a hearing should be denied.

The existing class certification record is extensive. Plaintiffs' motions for class

certification were fully briefed. Both parties submitted expert reports. Each party's expert was deposed, as were plaintiffs Glaberson and Behrend. Comcast submitted Dr. Beyer's deposition transcript. Plaintiffs submitted Dr. Besen's deposition testimony. This Court clearly considered the entire class certification record.

Federal courts have consistently ruled that an evidentiary hearing, in the context of a motion for class certification, is unnecessary when the record contains a sufficient basis to rule on class certification. *See* Plaintiffs' Reply in Support of Plaintiffs' Motion for Class Certification at 48-50 (collecting cases). In light of the advanced procedural context of this case – discovery is substantially complete; two classes were properly certified in 2007 based on briefing, argument and an extensive class certification record; the Third Circuit denied Comcast's two previous Rule 23(f) petitions; additional expert reports will be submitted on April 10, 2009, followed by expert discovery and summary judgment motion practice; and trial is scheduled for January 2010. Comcast shoulders the burden of justifying just why an evidentiary hearing makes sense in terms of the efficient, timely and inexpensive prosecution of this case. *See* (appropriately numbered) Rule 1 (purpose of the federal rules is "to secure the just, speedy and inexpensive determination of every action and proceeding."). Comcast has not met its burden of demonstrating that anything in *Hydrogen Peroxide* warrants reconsideration of this Court's sound class certification rulings. Despite the Court's directive at the February 24 status conference, Comcast has not yet identified what purported deficiencies in this Court's certification decisions it believes warrant, and are to be the subject of, a hearing.

As the Third Circuit noted, whether an evidentiary hearing is appropriate in the context of a motion to certify a class and, if so, its scope are within the district court's sound discretion. *Hydrogen Peroxide*, 552 F.3d at 324 (noting "[t]hat weighing expert opinions is proper does not

make it necessary in every case or unlimited in scope" and that "[i]n its sound discretion, a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement"). *Hydrogen Peroxide* does not modify the judicial aversion to converting Rule 23 determinations into mini-trials on the merits. *Id*. ("To avoid the risk that a Rule 23 hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation, a district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements," (*quoting In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)). Further, the Third Circuit confirmed that a district court may continue to rely upon the record, including affidavits, to satisfy itself that Rule 23 requirements have been satisfied. *Id.* ("[T]he district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." (quoting *In re IPO*, 471 F.3d at 41)).

Plaintiffs recommend to the Court the recent decision of the District of Connecticut certifying a class and applying the lessons of *In re IPO* and *Hydrogen Peroxide*. In *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 2009 WL 395131 (D. Conn. 2009), the court noted, "I do not understand the Second Circuit to be asking the district judge to determine which expert's report is more persuasive on the merits, but rather which expert is correct about whether or not the plaintiffs' method of proof is a form of common evidence." *Id.* at *22. The district court's reasoning properly focused on the class certification issue at hand – whether common proof of impact is available:

> Where the plaintiffs and defendants disagreed about whose experts' statistical findings were more persuasive, Judge Lynch noted that:
>
> > This disagreement is relevant only to the merits of plaintiffs' claim . . . and not to whether plaintiffs have asserted common *questions* of law or fact. By asking the court to decide which expert report is more credible,

> defendants are requesting that the court look beyond the Rule 23 requirements and decide the issues on the merits, a practice *In re IPO* specifically cautions against.

Id. at *23.

VI. DEFENDANTS' MOTION TO DECERTIFY THE CHICAGO CLASS VIOLATES THE COURT'S NOVEMBER 16, 2007 ORDER.

Following a case management conference, the Court on November 16, 2007 entered a jointly stipulated implementing Order, providing that "[p]ursuant to the above sequential trial and case management plan, further proceedings with respect to plaintiffs' claims relating to the Chicago area cable market and the Boston area cable market shall be stayed and suspended . . . ." Dckt. #244, ¶ 7. Defendants' motion to decertify the Chicago class is procedurally improper. It directly contravenes the stipulation between the parties and the Court's Order.

In reliance on the mutually agreed upon order and stay, discovery has centered on the Philadelphia Class and market. Plaintiffs have spent more than a year working through mountains of documents, searching for relevant materials and deposing key witnesses—about the Philadelphia Class. In reliance on the stay, plaintiffs have concentrated discovery on Philadelphia. To change course at this late date and revisit the Chicago Class and market would prejudice plaintiffs. The Court should decline Comcast's invitation to ignore the order to which it previously agreed and under which the parties have lived to date. The portion of Comcast's motion to decertify the Chicago Class should therefore be denied.[9]

CONCLUSION

Comcast has not demonstrated – and it cannot demonstrate – that this Court's rigorous class certification analyses reflect anything other than full compliance with the standards set

[9] Nevertheless, plaintiffs' arguments advanced in this memorandum, while focused on the Court's May 2, 2007 decision certifying the Philadelphia Class, apply with equal force to the Court's October 10, 2007 decision certifying the Chicago Class.

forth in *Hydrogen Peroxide*. Nor has Comcast specified a single necessary finding that it contends the Court failed to make. Defendants' Motion to Decertify Classes should be denied in its entirety.

Dated: March 9, 2009

s/ *David Woodward*
Samuel D. Heins
Vincent J. Esades
David Woodward
Jessica N. Servais
Katherine T. Kelly
HEINS MILLS & OLSON, P.L.C.
310 Clifton Avenue
Minneapolis, MN 55403
Tel: (612) 338-4605
Fax: (612) 338-4692

Barry Barnett
William R. H. Merrill
Daniel H. Charest
Donna McNamara
SUSMAN GODFREY L.L.P.
901 Main Street, Suite 5100
Dallas, Texas 75202-3775
Tel: (214) 754-1900
Fax: (214) 754-1933

Anthony J. Bolognese (#36937)
Joshua H. Grabar (JHG 1707) (#82525)
BOLOGNESE & ASSOCIATES, LLC
Two Penn Center Plaza
1500 JFK Boulevard, Suite 320
Philadelphia, PA 19102
Tel: (215) 814-6750
Fax: (215) 814-6764

Joseph Goldberg
FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE
20 First Plaza, Suite 700
Albuquerque, NM 87102
Tel: (505) 842-9960
Fax: (505) 842-0761

Marc H. Edelson (#51834)
EDELSON & ASSOCIATES LLC
45 West Court Street
Doylestown, PA 18901
Tel: (215) 230-8043
Fax: (215) 230-8735

Robert N. Kaplan
Gregory K. Arenson
Christine M. Fox
KAPLAN FOX & KILSHEIMER LLP
805 Third Avenue, 22nd Floor
New York, NY 10022
Tel: (212) 687-1980
Fax: (212) 687-7714

Lynn Lincoln Sarko
Mark A. Griffin
John H. Bright
Raymond J. Farrow
KELLER ROHRBACK, L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Tel: (206) 623-1900
Fax: (206) 623-3384

Gary L. Specks
KAPLAN FOX & KILSHEIMER LLP
423 Sumac Road
Highland Park, IL 60035
Tel: (847) 831-1585
Fax: (847) 831-1580

COHEN MILSTEIN SELLERS
& TOLL, P.L.L.C.
1100 New York Avenue N.W.
West Tower, Suite 500
Washington, D.C. 20005
Tel: (202) 408-4600
Fax: (202) 408-4699

Michael D. Hausfeld
Hilary Ratway
HAUSFELD LLP
1700 K Street NW, Suite 650
Washington, DC 20006
Tel: (202) 540-7200
Fax: (202) 540-7201

Ann D. White
ANN D. WHITE LAW OFFICES
101 Greenwood Avenue, Fifth Floor
Jenkintown, PA 19046
Tel: (215) 690-3858
Fax: (215) 481-0271

Jayne Goldstein
SHEPHERD FINKELMAN MILLER
& SHAH, LLP
1640 Town Center Circle, Suite 216
Weston, FL 33326
Tel: (954) 943-9191
Fax: (954) 943-9173

John Peter Zavez (#555721)
Noah Rosmarin (#630632)
ADKINS KELSTON & ZAVEZ, P.C.
90 Canal Street
Boston, MA 02114
Tel: (617) 367-1040
Fax: (617) 742-8280

Ted Donner
DONNER & COMPANY
LAW OFFICES LLC
203 North LaSalle Street, Suite 2100
Chicago, IL 60601
Tel: (312) 805-2100
Fax: (312) 556-1369

Martin Twersky
David Anziska
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604

William H. London
Doug A. Millen
FREED KANNER LONDON & MILLEN, LLC
2201 Waukegan Road, Suite 130
Bannockburn, IL 60015
Tel: (224) 632-4500
Fax: (224) 632-4521

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 9th day of March, 2009, he caused to be served, via U.S. Mail, e-mail and ECF, copies of PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DECERTIFY CLASSES and [PROPOSED] ORDER upon the following counsel:

Michael S. Shuster
Sheron Korpus
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, NY 10019
mshuster@kasowitz.com
skorpus@kasowitz.com

Darryl May
BALLARD SPAHR ANDREWS & INGERSOLL LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
may@ballardspahr.com

The undersigned attorney further certifies that the foregoing memorandum was electronically filed and is available for viewing and downloading from the ECF system.

s/ *David Woodward*
David Woodward (drw6156)