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

CAROLINE BEHREND, *et. al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 03-6604
COMCAST CORPORATION, *et. al.*,	)	Class Action
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DE-CERTIFY CLASSES

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Pursuant to the direction of the Court at the February 24, 2009 status conference, defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully submit this reply memorandum in support of their motion to de-certify the classes certified by this Court on May 2, 2007 and October 10, 2007.[1]

I. PRELIMINARY STATEMENT

Plaintiffs' opposition to Comcast's de-certification motion rests on two arguments. First, they assiduously downplay the significance of the Third Circuit's decision in In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008), characterizing it as "nothing new" (Feb. 24, 2009 Tr. at 6) and claiming that class certification standards "remain unchanged." (Pl. Br. at 5). Next, they argue that this Court's class certification decisions "comport fully" with the standards set forth in Hydrogen Peroxide. However, as will be demonstrated more fully below, plaintiffs are wrong on both scores.

The watershed Hydrogen Peroxide decision established a new paradigm for class certification decisions, and set aside several precedents upon which this Court had expressly relied in certifying the classes here. Moreover, at plaintiffs' urging,[2] this Court had refrained from weighing the experts' credibility and resolving the disputes between the parties' experts regarding the critical issue of whether antitrust impact is capable of proof at trial through evidence common to the class. The Hydrogen Peroxide decision now makes it clear that

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[1] Contrary to plaintiffs' arguments (Pl. Br. at 24), there is nothing in the November 16, 2007 Stipulation and Order that precludes Comcast's motion to de-certify the Chicago class.

[2] Plaintiffs' Reply Memo. In Support of Class Certification filed Dec. 4, 2006 at pp. 24-26 (Doc. #184).

"[r]esolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court – no matter whether a dispute might appear to implicate the 'credibility' of one or more experts. . ." 552 F.3d at 324.

Before proceeding, it should be noted that the Court gave the parties a specific directive with respect to this particular round of briefing. Rather than try to persuade the Court whether, in accordance with Hydrogen Peroxide, plaintiffs' evidence can meet the requirements of Rule 23, the parties were directed to address in these briefs whether the Court's prior decisions fall short of the Hydrogen Peroxide standards, such that the Court will need to decide the certification question anew. (Feb. 24, 2009 Tr. at 12-13.) If so, the Court will then have the benefit of the live evidentiary hearing that has been scheduled, as well as whatever briefing it directs in connection with that hearing. Thus, in this brief, Comcast will abstain from a detailed rebuttal of plaintiffs' evidence, so that it may focus instead on why the currently-certified classes must be de-certified because they do not comport with Hydrogen Peroxide.

As shown below, this Court should de-certify the classes and proceed with an evidentiary hearing as contemplated by Hydrogen Peroxide so that it can make a first-hand assessment of the experts' credibility and "choos[e] between competing perspectives." 552 F.3d at 324.

II. ARGUMENT

A. De-Certification is Warranted Because There Has Been An Intervening Change in the Law

Plaintiffs seek to minimize the significance of the Hydrogen Peroxide opinion to such an extreme degree that they say it is much ado about nothing:

> THE COURT: Well, do you acknowledge -- do you acknowledge Peroxide as having been a watershed decision that changed the landscape, the standards with respect to certification motions?

> MR. WOODWARD: I do not, your Honor, frankly.
>
> THE COURT: Pardon?
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> MR. WOODWARD: I do not regard it as a landscape-changing decision. If you -- and I know you have -- analyze and look carefully at Hydrogen Peroxide, the principles that are enunciated in Hydrogen Peroxide, there is nothing new in there.
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> * * *

(Feb. 24, 2009 Tr. at 6).

Notwithstanding plaintiffs' refusal to acknowledge the significance of Hydrogen Peroxide, that opinion is obviously enormously important. In fact, it has already led the Third Circuit itself to vacate a class certification decision in another price-fixing case. See In re: Plastic Additives Antitrust Litigation, Nos. 07-2159 and 07-2418 (3d Cir. Jan. 27, 2009) (attached as Exhibit "A" to Comcast's initial Brief). Moreover, plaintiffs' blithe dismissal of Hydrogen Peroxide as "nothing new" is at odds with the views of numerous legal commentators, not just in the Third Circuit but around the country. See, e.g., Linda S. Mullenix, "Class Certification," The National Law Journal, Jan. 26, 2009 at p. 9:

> In what may be the most influential decision relating to class certification since the U.S. Supreme Court decided Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997), the 3d U.S. Circuit Court of Appeals on Dec. 30, 2008, issued a sweeping opinion articulating standards of proof likely to have a tremendous impact on all class litigation. In re Hydrogen Peroxide Antitrust Litg., No. 07-1689, 2008 WL 5411562 (3d Cir. Dec. 30, 2008).

See also Richard Ripley and Mark Glueck, In re Hydrogen Peroxide Antitrust Litigation: Bleaches Clean the Class Certification Standard (Feb. 2009) (http://www.abanet.org/antitrust/at-source/09/02/Feb09-Ripley2-26.pdf) (noting that Hydrogen Peroxide "will undoubtedly influence" class certification and that "[a]nother likely change in the scope and rigor of expert testimony will be more thorough vetting of evidence relating to the functioning of the market in

the absence of the challenged conduct (the 'but-for' market). . . Because a common impact finding may turn on the decision among alternative versions of the 'but-for' market, Hydrogen Peroxide places heightened emphasis on developing the facts by which experts are able to opine about the most plausible outcome").[3]

Plaintiffs' claims that the Hydrogen Peroxide decision merely reiterated "existing precedent," and that the standards governing class certification "remain unchanged" (Pl. Br. at 4, 5), are spurious. Quite to the contrary, the Third Circuit specifically disavowed its earlier decisions stating that: (a) close or doubtful cases should be resolved in favor of certification, 552 F.3d at 321[4]; and (b) the allegations of the complaint must be taken as true at the certification stage. Id. at 318 n. 18.[5] Significantly, and as addressed below, this Court had relied on those now-discredited precedents in its certification decision. See 245 F.R.D. at 197.

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[3] See also Legal Intelligencer, March 2, 2009, "Court Adds Teeth to 'Rigorous Analysis Requirement for Class Certification;" 77 United States Law Week 1404, Jan. 13, 2009, "Third Circuit Offers Rigorous Standards For Use in Class Certification Determinations;" BNA, 10 Class Action Litigation 9, Jan. 9, 2009, "Third Circuit Toughens Certification Rules Under 'Rigorous Analysis' Standard;" BNA, 10 Class Action Litigation 203, Feb. 27, 2009, "In re Hydrogen Peroxide Antitrust Litigation: The Third Circuit Recognizes that Defendants – And Not Just Plaintiffs – Should Be Heard on Rule 23 Class Certification;" 96 Antitrust & Trade Regulation Report 5, Jan. 9, 2009, "Court Must Conduct Rigorous Analysis To Assure Satisfaction of Rule 23 Standards;" Archis Parasharami, Third Circuit Requires District Courts to Make Findings that Each Element of Rule 23 is Met Before Granting Class Certification, MONDAQ BUSINESS BRIEFING, Jan. 16, 2009 ("The [Hydrogen Peroxide] decision is important because it underscores the principle that Rule 23's requirements 'are not mere pleading rules,' but rather, require district courts to engage in rigorous analysis of evidence concerning whether the requirements have been met").

[4] Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985), had been widely cited on this point. Chief Judge Scirica, well aware of course of the "tradition" that one panel cannot overrule another panel decision, IOP 9.1, pointed out that the 2003 amendments to Rule 23 superseded this principle, although courts had erroneously continued to follow it. 552 F.3d at 321.

[5] The opinion explained that the statement to this effect in Chiang v. Veneman, 385 F.3d 256, 262 (3d Cir. 2004), was accompanied by no analysis, was in conflict with prior decisions, and was therefore an improper statement of the law. 552 F.3d at 318 n.18.

(continued...)

Just as importantly, the Third Circuit established critically important evidentiary standards that simply had not been addressed before by the Court. As has been amply documented already by the commentators, the most significant of these is that a court must not only delve into the merits where the merits intersect with the requirements of Rule 23, but must also weigh the evidence and, where necessary, make credibility determinations on conflicting fact and expert testimony. Plaintiffs must bury their heads deep into the sand to characterize that development as "nothing new."

The Hydrogen Peroxide decision itself makes abundantly clear the Court's intention to change the landscape governing class certification. The Court emphasized that "[o]ne important reason for granting interlocutory appeals under Fed.R.Civ.P. 23(f) is to address 'novel or unsettled questions of law' like those presented here." 552 F.3d at 322 (emphasis added). In remanding the case, the Court pointed out that "the able District Court did not have the benefit of the standards we have articulated." Id. The same is true here, as this Court likewise did not have the benefit of the Hydrogen Peroxide standards when it rendered its May 2, 2007 and October 10, 2007 certification decisions.[6]

Comcast's opening brief (pp. 3-4) cited a number of cases in which courts have granted de-certification motions where, as here, there has been an intervening change in the

(...continued)

[6] Plaintiffs attempt to ascribe great significance to the fact that the Third Circuit denied Comcast's Rule 23(f) petitions in this case. (Pl. Br. at 1). Of course, the denial of those petitions has no precedential import. Moreover, the Third Circuit had already granted the defendants' Rule 23(f) petition in Hydrogen Peroxide two months before Comcast filed its initial Rule 23(f) petition, and thus there was no reason for the Third Circuit to grant review in this case to consider the same legal issues it had already decided to review in Hydrogen Peroxide. Clearly, whatever holding ultimately emanated from the Third Circuit in Hydrogen Peroxide would become binding in this case, regardless of whether or not the Court of Appeals allowed interlocutory review.

controlling law. Plaintiffs' opposition brief does not even address those decisions, much less successfully distinguish them. This Court's class certification decisions were based on standards that have now been superseded by Hydrogen Peroxide. Accordingly, de-certification is warranted.[7]

B. The Significant Conflicts Between The Former Certification Standards Utilized in This Court's Decisions and Those Adopted in Hydrogen Peroxide Warrant De-Certification of the Classes

Plaintiffs are simply wrong in arguing that this Court's certification decisions "fully comport" with the certification standards set forth in Hydrogen Peroxide (Pl. Brief at 1, 5). Like the trial judges in Hydrogen Peroxide and Plastics Additives, this Court "did not have the benefit of the standards" articulated by the Third Circuit in Hydrogen Peroxide, 552 F.3d at 322, and instead relied on earlier precedents that have now been set aside.

1. The Complaint's Allegations Should Not Be Taken As True

In both the May 2, 2007 and October 10, 2007 certification decisions, this Court relied on Chiang v. Veneman, 385 F.3d 256, 262 (3d Cir. 2004), for the proposition that "in determining whether a class will be certified, the substantive allegations of the complaint must be taken as true." 245 F.R.D. at 197; 2007 U.S. Dist. LEXIS 75186 at *6. However, in Hydrogen Peroxide, the Third Circuit declared that this statement in Chiang is no longer good

[7] Plaintiffs argue that the Court should deny the de-certification motion in order to prevent Comcast from pursuing a Rule 23(f) appeal. (Pl. Br. at 2-3). That hardly constitutes a legitimate reason to deny the motion. While Comcast respectfully submits that this Court should, following an evidentiary hearing, refuse to certify the class, if the Court were to disagree, a Rule 23(f) appeal could be beneficial to this Court and all parties. If class certification is not appropriate under the Hydrogen Peroxide standards, it is far better for everyone to find that out now from the Third Circuit, rather than after enormously expensive, burdensome and time-consuming pre-trial proceedings and trial, not to mention the very costly dissemination of Notice to millions of class members. (Notice has still not been sent out by plaintiffs). Meanwhile, a Rule 23(f) petition would not prejudice plaintiffs because it would not stay proceedings in this Court, and Comcast would not seek such a stay unless the Third Circuit granted the petition.

law.[8] Significantly, plaintiffs fail to acknowledge that this Court had relied on Chiang, or that the Third Circuit disavowed Chiang in Hydrogen Peroxide.

Not only did this Court accept the truth of the allegations of the Complaint in ruling on the class certification motions, so too did Dr. Beyer in his expert reports. Nov. 29, 2004 Report at ¶ 4; Sept. 21, 2006 Report at ¶ 4. Indeed, this Court twice noted in its May 2, 2007 opinion that "Beyer assumed as true that 'the facts and antitrust violations alleged in the Plaintiff's Complaint did in fact occur." 245 F.R.D. at 198, 211.

One example will suffice to show how Dr. Beyer's blind acceptance of the Complaint's allegations is inconsistent with the standards now enunciated by the Court of Appeals. As discussed in Comcast's opening brief and as further discussed below, the question of whether potential competitors were eliminated by the challenged transactions is critical to whether antitrust impact can be shown on a classwide basis. Dr. Beyer made an "observation," relied upon heavily by plaintiffs, that the challenged transactions eliminated actual and potential

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[8] The Court stated:

> Chiang v. Veneman, 385 F.3d 256, 262 (3d Cir. 2004), decided after Newton and Johnston, cited Eisen for the proposition that 'in determining whether a class will be certified, the substantive allegations of the complaint must be taken as true.' No supporting analysis of Rule 23 jurisprudence accompanied this statement, which contradicts and conflicts with Newton, Johnston, and Szabo (which we relied upon in Newton). 'To the extent that the decision of a later panel conflicts with existing circuit precedent, we are bound by the earlier, not the later, decision.' United States v. Monaco, 23 F.3d 793, 803 (3d Cir. 1994).

552 F.3d at 318 n. 18.

The Third Circuit expressed its agreement with the Seventh Circuit that "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it." 552 F.3d at 316 n. 15, quoting Szabo v. Bridgeport Machines, 249 F.3d 672, 675 (7th Cir. 2001).

competitors, and erected barriers against the return of new, unnamed firms. (See Beyer Sept. 21, 2006 Report at ¶ 20; Beyer Dec. 4, 2006 Report at ¶ 5; Beyer Aug. 7, 2007 Report at ¶ 6.) But Dr. Beyer had no basis for his opinion other than the plaintiffs' conclusory characterization of the transaction counterparties as actual and potential competitors, because Dr. Beyer simply assumed the truth of plaintiffs' allegations that the challenged transactions eliminated actual and potential competitors from the clusters and created barriers to the entry of new or returning MVPD providers. (See Nov. 29, 2004 Report at ¶ 4; Sept. 21, 2006 Report at ¶ 4.) Thus, Dr. Beyer did not attempt to show how the presence of these transaction counterparties constrained prices in the clusters, such that their removal impacted subscribers in the whole class. Because Dr. Beyer's opinions proceeded from a faulty premise, they do not demonstrate the key disputed predominance issue in this case – class-wide antitrust impact.

2. Certification of a Class In A "Doubtful" Case Is Not Permissible

In both its May 2, 2007 and October 10, 2007 certification decisions, this Court relied on earlier Third Circuit precedents for the proposition that "the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." 245 F.R.D. at 197; 2007 U.S. Dist. LEXIS 75186 at *6, quoting Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985) and Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970)). However, in Hydrogen Peroxide, the Court specifically held that the foregoing statements in Eisenberg and Kahan "invite error" and are no longer good law. 552 F.3d at 321. The Court emphasized that a trial judge "should not suppress 'doubt' as to whether a Rule 23 requirement is met." Id. Moreover, the party moving for certification is no longer entitled to "receive[] deference or a presumption in its favor." Id.

Once again, it is most telling that the plaintiffs, in their opposition brief, fail to acknowledge that this Court relied on Eisenberg and Kahan, or that the Third Circuit overruled those cases in Hydrogen Peroxide.

This Court recognized in both of its certification decisions that "Comcast raises significant arguments under Fed.R.Civ.P. 23(b) that common questions do not predominate . . . " 245 F.R.D. at 203; 2007 U.S. Dist. LEXIS 75186 at *19. But in considering those "significant arguments," the Court gave plaintiffs the benefit of the doubt, as it applied the former certification standards set forth in Eisenberg and Kahan. For example, as the Court noted during the February 24, 2009 status conference, it had analyzed Comcast's market entry argument under the pre-Hydrogen Peroxide analytical framework of making presumptions in favor of certification:

> THE COURT: Well, we had the market entry predominance issue.
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> MR. WOODWARD: Sure.
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> THE COURT: What about engaging in presumptions with respect to the market entry, for example? That just comes to mind.

(Feb. 24, 2009 Tr. at 8.)

The Court did indeed engage in presumptions on this critical issue, and the impact this had on the Court's analysis is exemplified by this passage in its opinion:

> In addition to its potential competition argument, Comcast makes a separate predominance argument based on ease of market entry. Comcast argues that it is improper as a matter of economics to merely assume that there will be potential competitors entering the market. (Def. Mem. at 13-14).
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> * * *
>
> Comcast argues that, as Dr. Beyer admits that none of the counterparts to the cable transactions had ever entered a franchised cable providers' area as a overbuilder, his opinion that the

> counterparties were competitors waiting in the wings to enter Comcast's territory is a theoretical fabrication. This 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. While the intent and preparedness of overbuilders to enter the market will clearly be in issue at trial, the fact that the counterparties to the cable transactions never attempted in the past to enter a Comcast franchise area does not, we find, negate common proof of this attempted monopolization issue. We must give Plaintiffs adequate opportunity to develop their case that the prior incumbent operators could have –absent Comcast acquiring them – entered a Comcast area as an overbuilder. On the record presented, at least two of the three indicia of preparedness recognized in Hecht, experience in the field and financial capacity, may be inferred given that the incumbent operators were in the same business and were on-going concerns. The third indicia, affirmative steps toward entry, has not however been argued by Plaintiffs in their Brief. Nonetheless, we 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 208-210 (emphasis added).

Thus, relying on the pre-Hydrogen Peroxide standards, the Court simply presumed, without plaintiffs having submitted any evidence on the point, that incumbent operators intended and were prepared to enter the markets and compete absent the challenged transactions. That is no tangential presumption – the absence of potential competition, allegedly creating classwide injury, goes to the very heart of the certification decision. In making a presumption on so central an issue, the Court proceeded in a manner inconsistent with the new teachings of Hydrogen Peroxide.

Moreover, Hydrogen Peroxide now makes clear that plaintiffs are required to demonstrate at the class certification stage that antitrust impact is capable of classwide proof, and it is not sufficient for them to express their intent to make such a showing later on at trial. See Hydrogen Peroxide, 552 F.3d at 321 ("It is incorrect to state that a plaintiff need only demonstrate an 'intention' to try the case in a manner that satisfies the predominance

requirement."). Thus, it is incumbent upon plaintiffs to show now, not later on at trial, how they will purportedly prove with common evidence that the counterparties to the transactions constrained prices everywhere in the cluster such that their "removal" had impact on all class members.

Comcast respectfully submits that de-certification is warranted so that the Court may now consider the foregoing market entry issue, as well as Comcast's other "significant arguments," 245 F.R.D. at 203, in light of the new Hydrogen Peroxide standards, which no longer countenance any presumption in favor of certification, nor allow the requirements of Rule 23 to be met with mere promises of what will happen later on.

3. The Court Must Weigh the Evidence and Resolve All Factual Disputes Relevant to Class Certification, Even if These Disputes Overlap With the Merits

In Hydrogen Peroxide, the Court emphasized that "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits." 552 F.3d at 307. Stated differently, "some inquiry into the merits at the class certification stage is not only permissible but appropriate to the extent that the merits overlap the Rule 23 criteria." Id. at 317 n. 17.

This Court was confronted with disagreements between Dr. Beyer and Dr. Besen on a number of issues, but refrained from resolving those disputes because it believed that doing so would implicate the merits of the case. For example, the Court noted that Dr. Besen's data "suggests that a significant number of subscribers were unaffected by the formulation of the Philadelphia cluster and, therefore, faced little or no possibility of overbuilding by a neighboring MSO." 245 F.R.D. at 204-205. By contrast, Dr. Beyer "opined that all class members in the cluster – presumably including the named Plaintiffs – are similarly impacted by Comcast's

pricing decisions . . . ." Id. at 205. The Court did not find that Dr. Beyer was right and that Dr. Besen was wrong, but instead stated as follows:

> As it is not necessary for the Plaintiffs to establish the merits of their case at the class certification stage, Dr. Beyer's opinion that all class members were similarly impacted by the elimination of possible over-builders is sufficient to establish typicality and adequacy of representation.

Id. at 205 (emphasis added).

Similarly, after noting that Comcast disputed Dr. Beyer's calculations of the supra-competitive overcharge and the supra-competitive rate of price increase because "the areas of effective competition examined by Beyer in formulating his results constitute only 2% of franchise areas in the United States," the Court once more stopped short of deciding which expert was right: "Again, it must be remembered that it is not necessary at the class certification stage for the Plaintiffs to establish the merits of their case." Id. at 212.[9]

The foregoing examples are merely illustrative. The Court's certification decisions consistently refrained from weighing the experts' credibility against one another and

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[9] In certifying the Chicago class, the Court likewise avoided resolution of the experts' differences in opinion, concluding once more that doing so would improperly delve into the merits:

> Finally, Comcast argues that Beyer's methodologies do not take into account other salient factors such as the quality of programming, availability of advanced services like digital cable, the number of channels offered, and the effect of the presence of overbuilders in as much as 20% of the franchise areas. As we discussed previously, these arguments go to the weight accorded to Beyer's opinions, not their admissibility. See Behrend 2007 WL 1300725, *17 ("it must be remembered that it is not necessary at the class certification stage for the Plaintiffs to establish the merits of their case…")

2007 U.S. Dist. LEXIS 75186 at *52-53 (emphasis added).

from resolving the experts' numerous disputes concerning antitrust impact and damages, and there is no point to be made in burdening this brief with a catalog of all such instances.[10] But even these few examples alone demonstrate that the classes should be de-certified under the Hydrogen Peroxide standards. Whether or not plaintiffs had credible evidence on these matters about which Dr. Beyer just speculated goes to whether any anticompetitive impact could ever be shown on a classwide basis.

In their opposition, plaintiffs make a two-fold attack on Comcast's argument that the Court refused to resolve, by weighing the evidence where necessary, merits-related issues that, under Hydrogen Peroxide, must be resolved for purposes of class certification. These two prongs of attack are not only wrong, but inconsistent.

On the one hand, plaintiffs assert that the Court did indeed weigh the experts' conflicting testimony and make merits determinations. See, e.g., Pl. Br. at 6 ("After weighing the parties' expert testimony. . ."); id. at 14 ("Throughout its comprehensive analysis, the Court indicated it was persuaded by Dr. Beyer's position and unpersuaded by Dr. Besen's competing views."); id. at 15 ("the Court assessed and rejected Comcast's numerous criticisms of Dr. Beyer and his analysis.").

In an attempt at revisionist history, plaintiffs highlight the handful of instances where the Court either expressed agreement with certain of Dr. Beyer's conclusions or disagreement with certain criticisms of Dr. Beyer made by Dr. Besen and Comcast. (Pl. Br. at 14). However, plaintiffs fail to acknowledge the numerous areas where the Court outlined the experts' differences but chose not to resolve them. The fact that the Court's opinion reflects

[10] Plaintiffs erroneously suggest that the Court ruled on the parties' experts' credibility. (Pl. Br. at 15.) To the contrary, and as pointed out in defendants' opening brief (at 10), the Court expressly stated that, as plaintiffs urged, it would not engage in a Daubert evaluation of the experts. 245 F.R.D. at 212.

several statements either agreeing with certain of Dr. Beyer's points or disagreeing with certain of Dr. Besen's points does not suffice under Hydrogen Peroxide, particularly since the vast majority of the differences between the competing experts' opinions were either not commented upon by the Court or, as stated above, the Court held that it need not resolve those issues in connection with class certification. Indeed, it is most telling that the Third Circuit remanded the class certification decision in Hydrogen Peroxide for further consideration even though the District Court's opinion there – just like this Court's decisions – had expressed agreement with certain of Dr. Beyer's opinions and disagreement with certain of the criticisms of Dr. Beyer's analysis by defendants' expert. See 552 F.3d at 315; 240 F.R.D. at 171-175.

Plaintiffs' revisionist characterization of the Court's decisions as having resolved the experts' disputes contrasts markedly with the position they took prior to Hydrogen Peroxide. In arguing for class certification, they had vigorously – and successfully – urged the Court not to weigh the experts' credibility or resolve their many disputes. After Comcast submitted its opposition to plaintiffs' motion for certification of the Philadelphia cluster class and highlighted the many flaws in Dr. Beyer's analysis that had been pointed out by Dr. Besen, plaintiffs filed a reply brief which devoted an entire section to their argument that "**Class Certification is Not the Stage for the Court to Resolve Dueling of the Parties' Experts**." (Plaintiffs' Reply in Support of Plaintiffs' Motion for Class Certification, Dec. 4, 2006 at pp. 24-26 [Doc. #184]). Plaintiffs argued that:

> **III. Class Certification is Not the Stage for the Court to Resolve Dueling of the Parties' Experts**.
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> 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)).

Pl. Reply Br. at p. 24.[11]

That plaintiffs were successful in convincing this Court not to resolve the experts' disagreements is further evidenced by the brief they filed in the Third Circuit opposing Comcast's Rule 23(f) petition. In that brief, plaintiffs acknowledged that this Court had not weighed the competing expert opinions against one another to resolve which was more credible:

> The fact that Comcast's expert disagreed with Plaintiff's expert provides no basis for interlocutory appellate review under Rule 23(f). A 'battle of the experts' need not be resolved at the class certification stage.

"Plaintiffs' Opposition to Defendants' Petition for Permission to Appeal Pursuant to Fed.R.Civ.P. 23(f)," No. 07-8028, June 1, 2007 at p. 16 n. 8[12] (emphasis added).

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[11] Plaintiffs further elaborated on their argument as follows:

> The fact that Comcast and its expert, Dr. Besen, disagree [with Dr. Beyer] provides no basis for withholding certification of Plaintiffs' claims.[14]
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> [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 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.").

Pl. Reply Br. at pp. 25-26 and n.14.

[12] The certification of the Chicago cluster followed the same path as the prior certification of the Philadelphia cluster class. Plaintiffs' Aug. 8, 2007 Reply Memorandum in Support of

(continued...)

Oddly, while on the one hand plaintiffs now argue that the Court satisfied Hydrogen Peroxide by making the required determinations on merits issues involved in the certification analysis, on the other hand plaintiffs still continue to assert that such determinations are improper, at least when they go to important issues. As discussed, a critical class certification issue is whether Dr. Beyer's analysis, which hinges on classwide impact caused by the exclusion of potential competition, including from incumbents becoming overbuilders, is correct. Plaintiffs continue to say the Court cannot make that finding:

> 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).

(Pl. Br. at 12.)

However, the cases plaintiffs cite above have nothing to do with whether this issue must be preliminarily resolved on a class certification motion to determine whether classwide proof of impact is possible. These were not class actions, and the courts merely held that the issue of potential competition was a merits issue. But of course Comcast has never argued that the potential competition question would not also be a merits question if the case

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(...continued)
Certification of the Chicago Class reprised their earlier argument that "Class Certification is Not the Stage for the Court to Resolve Dueling of the Parties' Experts." (Doc. #221 at pp. 30-31). The Court again agreed with plaintiffs' position, as its October 10, 2007 decision refrained once more from resolving the many continuing disagreements between Dr. Beyer and Dr. Besen. Subsequent to the decision, Comcast filed another Rule 23(f) petition, and plaintiffs' brief in the Third Circuit once again acknowledged that the certification decision had not resolved the parties' competing expert opinions: "A 'battle of the experts' need not be resolved at the class certification stage." "Plaintiffs' Opposition to Defendants' Petition for Permission to Appeal Pursuant to Fed.R.Civ.P. 23(f)," No. 07-8058, Nov. 7, 2007 at p. 17 n. 12 (emphasis added).

were to proceed to trial. That is of utterly no consequence to the question of whether, in a class action, this merits issue should also be considered in adjudicating class certification, as the Third Circuit has now commanded in Hydrogen Peroxide.

In fact, the Third Circuit took it one step further. In order to avoid the very type of concern stated by plaintiffs, it took pains to stress that "findings with respect to class certification do not bind the ultimate fact-finder on the merits." 552 F.3d at 324. So the fact that plaintiffs point to out-of-context cases saying that potential competition is a merits question does nothing but highlight plaintiffs' implicit concession that the Court did not make the required findings on this fundamental issue that bears equally on class certification. As stated above, the Court needs to determine on class certification whether and how plaintiffs' potential (or even actual) competition theory works in the wireline cable industry such that the removal of the alleged price constraint from these potential competitors, or the alleged removal of barriers to entry, can be shown to have commonly impacted the entire class.

And, of course, there can be no question that plaintiffs and Dr. Beyer know full well that their theory of potential competition is highly relevant to class certification. Otherwise, why would Dr. Beyer have opined on it in several affidavits submitted in connection with the certification motion?

C. The Court Should Proceed With The Evidentiary Hearing To Weigh the Competing Expert Opinions

This Court's tentative decision to hold an evidentiary hearing is fully consistent with Hydrogen Peroxide, which quoted with approval from the Seventh Court's decision in West v. Prudential Securities, Inc., 283 F.3d 935, 938 (7th Cir. 2002):

> Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.

552 F.3d at 324 (emphasis added).

A court simply cannot weigh the credibility of dueling experts without an evidentiary hearing. Indeed, the Third Circuit stressed that "[t]he district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." Id. at 323 (emphasis added). Similarly, it stressed that "Rule 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties." Id. at 325 (emphasis added). See also Parasharami, p. 4 n. 3, supra (Hydrogen Peroxide "also should lay to rest either side's attempts to oppose an evidentiary hearing on a class certification motion. The district court's now explicit duty to assess credibility and persuasiveness should make the request for an evidentiary hearing a no-brainer. . .").

As noted in Comcast's initial Brief, the Third Circuit has emphasized that an evidentiary hearing "in which the parties' experts [are] subject to cross-examination from opposing counsel" is often very beneficial to a trial court: "Particularly where opposing affidavits duel for the key to a dispositive issue, affidavits often prove a poor substitute for live testimony." Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 167 n. 19 (3d Cir. 1999) (emphasis added).

Thus, in accord with Hydrogen Peroxide, the Court should proceed to the evidentiary hearing it has scheduled in order to make affirmative findings, "based on the available evidence," on the "tough questions." 552 F.3d at 324. As discussed above, such key

questions are whether potential competition can be shown to constrain prices in the wireline cable industry and, if so, whether it can be shown here by common proof across the class.[13]

The Court should also make affirmative findings concerning whether the complained-of conduct can, as a matter of proper analysis and methodology, be said to have raised barriers to entry such that all class members have been impacted in a manner that can be shown via common proof.

On the subject of pricing, the Court should determine whether pricing among class members is in fact substantially uniform, or whether Dr. Besen is correct that pricing among class members is not substantially uniform due to inarguable and substantial differences in both the levels and rates of change in such pricing during the class period. At the evidentiary hearing, the Court should also consider Dr. Besen's data showing that, in both Philadelphia and Chicago, large swaths of class members, including the named plaintiffs,[14] experienced pricing and price increases at levels lower than those in areas generically selected by Dr. Beyer as his benchmark areas. This showing by Dr. Besen directly parallels Dr. Ordover's showing in Hydrogen Peroxide, which the Third Circuit characterized as "significant[ ]," that various class members experienced decreases in pricing during the class period. 552 F.3d at 314.

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[13] Plaintiffs make the statement in their brief that "[c]able 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." (Pl. Br. at 11). This statement is fundamentally false, as will be shown at the hearing, and is an attempt by plaintiffs to avoid the thorny issue of how to establish by common proof the impact of removing these companies' ownership of certain systems in the cluster.

[14] In their opposition, plaintiffs seek to undermine Comcast's observation that the two Philadelphia named plaintiffs were not impacted under Dr. Beyer's own benchmark by arguing that Comcast used price per channel for its calculations for one plaintiff and took into account short term discounts for the other plaintiff. (Pl. Br. at 18.) Both assertions are wrong. Comcast will demonstrate at the evidentiary hearing that even when examined under Dr. Beyer's impact theory, the two named plaintiffs had rate increases lower than the benchmark.

On the subject of damages, the issue is not merely whether Dr. Beyer's benchmark methodology is generically or formulaically feasible – clearly, benchmark methodology in general is often appropriate – but whether it is the correct methodology here given the industry and the markets involved, and whether it will actually work such that any and all class members will be able to establish damages by reference to such methodology. The Court should resolve the "competing perspectives" between the parties and the experts, 552 F.3d at 324, as to whether any damages methodology exists that can quantify on any basis, let alone on a class-wide basis, the effect of the loss of potential competition or potential entry or the effect of the alleged increase in market power and/or increased barriers to entry, given the nature of competition and markets in this industry.

Finally, it should be pointed out that plaintiffs' professed concern about the hearing becoming a "mini-trial on the merits" (Pl. Br. at 23) is unfounded. No doubt the questions to be raised at the hearing are important ones – that's precisely why the Court needs to hear the testimony – but the hearing need not be unduly burdensome for either the Court or the parties. Consistent with the instructions given by the Court at the February 24, 2009 status conference (Tr. at 32-33), the parties will agree on the procedure in advance of the hearing, and the issues will be confined to those bearing directly on the parties' dispute regarding antitrust impact and damages. Comcast anticipates that plaintiffs' counsel will cooperate in making the hearing proceed smoothly and efficiently, while enabling the Court to make the findings now required by Hydrogen Peroxide.

III. CONCLUSION

For the reasons set forth above as well as in Comcast's initial Brief, the Court should de-certify the classes and proceed with the evidentiary hearing scheduled for April 15-16, 2009.

Respectfully submitted,

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