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

STANFORD GLABERSON, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 03-6604
COMCAST CORPORATION, *et al.*,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE

Dated: September 19, 2013

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Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") respectfully submit this memorandum of law in support of their motion to strike Plaintiffs' motion for class certification.

PRELIMINARY STATEMENT

For at least three reasons, the Court should not allow Plaintiffs to have a *third* try at class certification, supported by their *sixteenth* and *seventeenth* class expert reports.

First, the Supreme Court's mandate leaves no room for this third class certification motion. The Supreme Court reversed, not vacated or remanded, the Third Circuit's order affirming class certification, and that deliberate choice precludes Plaintiffs' motion, even as to a narrowed putative class.

Second, Plaintiffs twice failed to present competent expert opinions in support of their second motion for class certification. In 2009, the record shows that Plaintiffs were focused on the same damages apportionment problem that ultimately blocked class certification, and yet they never attempted to alter their expert's methodology or narrow the class. Having made a tactical decision not to address the issue, and then more recently doubling down on that decision, Plaintiffs are not entitled to a do-over now simply because the Supreme Court's decision showed that their judgment was wrong. Moreover, this Court expressed concern in 2009 that it was then too late for Plaintiffs to consider changing their expert's damages model. If it was late nearly four years ago, then it is far too late now, particularly when Plaintiffs' motion is based on expert opinions and legal arguments that are directly contrary to positions that Plaintiffs advocated before. For example, having argued vociferously that the geographic market is the Philadelphia

DMA, and that Comcast is wrong to suggest a franchise by franchise analysis, Dr. McClave conducts precisely such an analysis to support his latest damages model.

Third, Plaintiffs' proffered motion would be futile in any event. That motion, and Plaintiffs' latest theories, fail under the express terms of the Supreme Court's decision:

> [E]ven if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices.

Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 n.6 (2013). Plaintiffs do not – and cannot – comply with the Supreme Court's test. Dr. McClave's latest model still fails to isolate damages arising from Plaintiffs' lone surviving theory of liability. Even as to a putative class narrowed to only the five counties that Plaintiffs propose, RCN never even considered overbuilding many communities within those counties. For those communities, RCN never sought, let alone received, OVS certification – the standard that Plaintiffs' expert uses to identify the communities that supposedly would have been overbuilt in the "but for" world.[1] And Plaintiffs themselves have relied on expert testimony and evidence (including in support of class certification) showing that overbuilding was directly relevant to Comcast's alleged ability to charge higher prices.

After a decade of litigation and countless hours spent on two prior failed class certification proceedings, this case is at the end of the line. The Court should strike Plaintiffs' latest class certification motion.

[1] *See In the Matter of RCN Telecom Services of Philadelphia, Inc. Certification to Operate an Open Video System*, 13 F.C.C.R. 12000, DA 98-1153, DA 98-1153, Mem. & Order (June 15, 1998).

BACKGROUND

Plaintiffs first sought class certification nearly nine years ago in 2004, relying on the declaration of Dr. John Beyer. (*See* Pls. Mot. for Class Cert. (Dkt. No. 65) Dec. 1, 2004.) The Third Circuit's subsequent decision in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), confirmed that Plaintiffs' class motion was fundamentally flawed for the reasons Comcast previously had advanced. As a result, this Court decertified the class. (*See* Class Cert. Order (Dkt. No. 326) Mar. 31, 2009.)

Plaintiffs then filed their second class motion in 2009, supported by multiple declarations from Drs. McClave, Williams and Singer. (*See* Pls. Am. Mot. for Class Cert. (Dkt. No. 330) Apr. 15, 2009.) In opposition, Comcast repeatedly argued that Dr. McClave's methodology was fatally defective because it failed to apportion impact and damages to specific liability theories (*see, e.g.*, Dkt. Nos. 425 and 429), while Plaintiffs argued that no apportionment was necessary. (*See* Dkt. No. 428 (11/16/09 Tr.) at 32:12-14.) Although Plaintiffs claimed that it would be "possible" for Dr. McClave to apportion damages between liability theories, the Court warned in 2009 that Plaintiffs had made their decision and could not change their theory so late in the proceedings: "we're not going to design and construct the case or else we'll be here until the end of time." (*Id.* at 39:9-24.) The Court ultimately certified the proposed class, and a divided Third Circuit affirmed on appeal.

Subsequently, in 2012 after the Court narrowed the case on summary judgment and while Comcast's petition for certiorari was pending, the Court did extend to Plaintiffs the opportunity to revisit their tactical choice. At that time, and in response to a request by Comcast, the Court offered Plaintiffs the chance to make a "last-ditch effort" to conform their expert methodology to the remaining theory of liability. (*See* Hr'g Tr. (Dkt. No. 525) 8:14-12:19, Apr. 24, 2012.)

Plaintiffs took the opportunity to submit a supplemental expert report on damages, which made no changes to Dr. McClave's damages methodology and which did not address its fundamental flaws. But Plaintiffs expressly disavowed the need for a new methodology, electing instead to rely on the supposed flexibility of Dr. McClave's then-operative model. (*See, e.g.*, Mot. to Strike (Dkt. No. 502-1) at 4, May 22, 2012; Mot. to Exclude or Limit Test. of Dr. James T. McClave (Dkt. No. 511-2) at 15-20, June 8, 2012.)

On March 27, 2013, the Supreme Court confirmed that Plaintiffs' class motion was fatally flawed, and reversed outright the Third Circuit's affirmance of the certification order. *Behrend*, 133 S. Ct. at 1435. On June 19, 2013, this Court held a hearing to address Plaintiffs' request to move a third time for class certification. (*See* Hr'g Tr. (Dkt. No. 556).) The Court ruled that Plaintiffs could file another class motion, after which Comcast would have the opportunity to seek to strike the motion on procedural grounds. (*Id.* at 20:15-22:14.) If the Court decides not to grant the motion to strike, then Comcast will have an opportunity to oppose the class motion on the merits. (*Id.* at 25:6-13.)

ARGUMENT

I. The Supreme Court's Mandate Precludes Plaintiffs' Third Motion for Class Certification

Plaintiffs' third attempt at class certification contravenes the Supreme Court's mandate. Plaintiffs concede the well-established principle that a lower court may not consider any matter covered by an appellate mandate. (Pl. Br. at 2-3.) Thus, the only dispute is whether the Supreme Court's mandate here permits Plaintiffs' successive motion. It does not.

Had the Supreme Court intended to permit this Court to entertain a new motion for class certification – even one based on a narrowed class – and new supporting expert evidence, it

would have remanded the case rather than reversed outright the Third Circuit's decision. Plaintiffs' argument that the Supreme Court's straight reversal permits further class proceedings in this Court ignores the difference between a straight reversal and a reversal *and* remand. That distinction is no mere technicality; rather, it is fundamental to the Supreme Court's disposition of a case. Under Supreme Court practice, if the majority of justices vote to reverse outright, then a vote to reverse and remand is tallied as a *dissent*. *See, e.g., Carcieri v. Salazar*, 555 U.S. 379, 401 (2009) (Souter, J., dissenting) ("I would therefore reverse and remand . . . and respectfully dissent from the Court's straight reversal.").

Plaintiffs' motion is therefore precluded by the Supreme Court's mandate. Under the rule of mandate, "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948); *see also, e.g., Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425 (1978). Plaintiffs acknowledge this rule, but erroneously rely on the Third Circuit's mandate remanding for "proceedings consistent with the Supreme Court's opinion," rather than the Supreme Court's mandate. Where, as here, "the appellate court directs the lower court to act in accordance with the appellate opinion, . . . the opinion becomes part of the mandate and must be considered together with it. On remand, both [the Third Circuit] and the district court [a]re bound to follow the mandate of the Supreme Court as embodied in its opinion. Thus, the language of the Supreme Court opinion is the only authoritative source here." *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 859 (3d Cir. 1994) (citations and quotations omitted).

Gene & Gene, LLC v. Biopay, LLC, 624 F.3d 698 (5th Cir. 2010), demonstrates the preclusive effect of the Supreme Court's mandate. In that case, as here, the defendants appealed the district court's class certification ruling pursuant to Fed. R. Civ. P. 23(f). The Fifth Circuit

reversed (and, in that case, remanded), after which the district court certified a narrower class. On a second appeal, the Fifth Circuit held that the district court had misinterpreted the mandate and abused its discretion in recertifying a narrower class, reasoning that "Rule 23(f) is not an interlocutory tool to clarify issues and provide a roadmap for litigants to reformulate their arguments." *Id.* at 703. The mandate reversing the district court's decision and remanding "for further proceedings not inconsistent with this opinion" was not an opportunity "for a renewed foray into the same issue but for a merits determination and disposition of [the plaintiff's] individual claim." *Id.* As in *Gene & Gene*, Plaintiffs' attempt at a "renewed foray" on behalf of a purportedly narrower class should be rejected. Indeed, here, the Supreme Court's mandate – which included no remand – is even clearer than the mandate in *Gene & Gene* in demonstrating that the Supreme Court did not contemplate further class proceedings.[2]

Despite the Supreme Court's outright reversal, Plaintiffs contend that some of the Supreme Court's commentary on their failure to present a competent methodology was instead an invitation to submit a new model. It was not. The Court's statement that, "[w]ithout presenting another methodology, respondents cannot show Rule 23(b)(3) predominance" (Pl. Br. at 3 (quoting 133 S. Ct. at 1433)) followed from the Court's observation that Plaintiffs relied "solely" on Dr. McClave's methodology. 133 S. Ct. at 1431. In that context, the Court's statement cannot be read to somehow countermand its decision not to remand. And the Court's analysis in footnote 6 hardly "leaves open" the option of a revised damages model. (Pl. Br. at 3.)

[2] Even though Comcast relied on *Gene & Gene* in the parties' previously submitted joint pre-conference statement, Plaintiffs fail to address the Fifth Circuit's *Gene & Gene* decision in any way. Instead, they rely on a series of Supreme Court cases dating back to the late 1800s, all of which involved an appellate court that, unlike the Supreme Court here, expressly remanded, and a smattering of inapposite Third Circuit cases that either arose in the criminal context and addressed double jeopardy concerns upon re-trial or addressed the possibility of a new trial after a final judgment was reversed. (*See* Pls. Br. at 2, 4-5.)

Footnote 6 not only illustrates the deeper levels on which Dr. McClave's model was deficient, but it also forecloses Plaintiffs' attempt to certify another class, even one that is narrowed.

Contrary to Plaintiffs' arguments, the Second Circuit's decision in *In re IPO Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), highlights that the Supreme Court here did not provide for another class certification motion. Unlike the Supreme Court here, the Second Circuit in *In re IPO* remanded for further proceedings after effectively decertifying the class. *See* 471 F.3d at 27. The Second Circuit expressly stated (in a subsequent order denying rehearing) that "[n]othing in our decision precludes the [plaintiffs] from returning to the District Court to seek certification of a more modest class." *In re IPO Sec. Litig.*, 483 F.3d 70, 73 (2d Cir. 2007). No similar language appears in the Supreme Court's (or the Third Circuit's) decision here.

Nor does the district court's unpublished decision on remand in *Dukes v. Wal-Mart Stores, Inc.*, No. 01-02252, 2012 U.S. Dist. LEXIS 135554 (N.D. Cal. Sept. 21, 2012), support Plaintiffs' position. In *Dukes*, the district court reasoned that the Supreme Court did not foreclose a narrower class because the principal flaw identified by the Supreme Court in that case was the absence of commonality across a "nationwide" class, which potentially could be remedied by narrowing the class.[3] *Id.* at *15-16. Here, in contrast, simply narrowing the class cannot remedy the failure of Plaintiffs' expert model "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding." *Behrend*, 133 S. Ct. at 1435. Instead, "[b]y limiting the class geographically,

[3] Further, *Dukes* relied principally on a Ninth Circuit decision that is contrary to Third Circuit law. *Compare Dukes*, 2012 U.S. Dist. LEXIS 135554, at *14-15 ("'[U]nder certain circumstances, an order issued after remand may deviate from the mandate if it is not counter to the spirit of the circuit court's decision.'") (quoting *United States v. Kellington*, 217 F.3d 1084, 1092-93 (9th Cir 2000)) (emphasis added) *with United States v. Kennedy*, 682 F.3d 244, 252-53 (3d Cir. 2012) ("A trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.") (quotation omitted).

plaintiffs simply have created a smaller version of the same problem" identified by the Supreme Court. *Ladik v. Wal-Mart Stores, Inc.*, No. 13-cv-123-bbc, 2013 U.S. Dist. LEXIS 77154, at *22 (W.D. Wis. May 24, 2013).[4]

The Supreme Court's decision closed the door to a successive class motion. If the Supreme Court had wished for Plaintiffs to file a successive motion, it could have and would have remanded for further class proceedings. *See, e.g.*, *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) ("The judgment of the Court of Appeal is vacated, and the case is remanded. On remand, the Court of Appeal should examine the remaining two claims to determine whether either requires arbitration."). That it did not must be credited.

II. The Court Should Not Entertain a Third Motion for Class Certification

Even if the Supreme Court's mandate had left open the possibility of a third motion for class certification (which it did not), this Court should not entertain the motion because Plaintiffs have had ample opportunity to modify their class definition and to put forward an appropriate damages methodology, but repeatedly declined to do so. Having made the tactical decision as recently as twelve weeks before trial to hold fast to their then-existing damages methodology and class definition, Plaintiffs should not now be given yet another opportunity to certify a class.

[4] Indeed, last month, the district court in *Dukes* reached the same conclusion and denied the *Dukes* plaintiffs' successive class certification motion, recognizing that the plaintiffs there could not cure the problems identified by the Supreme Court. "[T]hough Plaintiffs insist that they have presented an entirely different case from the one the Supreme Court rejected, in fact it is essentially a scaled-down version of the same case with new labels on old arguments." *Dukes v. Wal-Mart Stores, Inc.*, No. 01-02252, 2013 U.S. Dist. LEXIS 109106, at *5 (N.D. Cal. Aug. 2, 2013). The same is true here. As *Dukes* demonstrates, successive class proceedings would be a waste of the parties' and the Court's time and resources.

A. Rule 23 Does Not Permit Successive Class Motions Based on New Expert Theories

Although district courts have some discretion to revisit certain class certification orders, *see* Fed R. Civ. P. 23(c)(1)(C); they decline to do so where, as here, plaintiffs fail to come forward with any new facts that have emerged since the prior motion. Under Rule 23, "a plaintiff ought not to have unlimited bites at the apple." *In re Piper Aircraft Distribution Sys. Antitrust Litig.*, 551 F.2d 213, 219 (8th Cir. 1977); *cf. Yang v. Odom*, 392 F.3d 97, 99 (3d Cir. 2004) (refusing to toll statute of limitations for subsequent class action where certification in initial suit was denied because the class failed to satisfy the requirements of Rule 23). Consequently, successive class certification motions must be supported by new facts, not merely reformulated legal theories.

Courts have made clear that a new damages model in support of a narrower class is not an appropriate basis for filing a successive class certification motion. *See, e.g., Fleischman v. Albany Med. Ctr*, No. 06-cv-0765, 2010 U.S. Dist. LEXIS 23727, at *10 (N.D.N.Y Feb. 13, 2010); *see also, e.g., In re Fed. Home Loan Mortgage Corp.*, Nos. 09 Civ. 832 (MGC), 09 MD 2072 (MGC), 2012 U.S. Dist. LEXIS 138638, at *3-4 (S.D.N.Y. Sept. 26, 2012) ("*FHLMC*"). The plaintiffs in *Fleischman* moved to amend a previously entered partial grant of class certification based on a narrower class definition and a new expert report using a different methodology. The court rejected the plaintiffs' motion because the new methodology "merely adopted a new 'benchmark' from previously discoverable data to compute damages and assess common impact," and, "rather than presenting new facts," the plaintiffs were simply "presenting a new formula addressing the Court's prior concerns." 2010 U.S. Dist. LEXIS 23727, at *11-12. In *FHLMC*, the district court likewise denied a request for leave to file a successive class

certification motion based on a shorter class period and new expert evidence where the facts had not changed since the prior motion, reasoning:

> [P]laintiff effectively seeks a new opportunity to engage in a battle of the experts. Plaintiff was free to choose his most persuasive expert in support of class certification. A plaintiff who wants to lead a class action should be prepared to put his best foot forward on the initial application.

2012 U.S. Dist. LEXIS 138638, at *3-4.

Further, courts have refused to allow plaintiffs to file successive motions for class certification, or to otherwise amend a prior class certification decision, where the plaintiffs previously had the opportunity to frame the issues differently, but elected not to do so. For instance, in *Mogel v. UNUM Life Insurance Company of America*, 677 F. Supp. 2d 362, 366 (D. Mass. 2009), the plaintiffs sought leave to file an amended complaint and a renewed motion for class certification under Rule 23(b)(3) after their motion for class certification under Rule 23(b)(2) was denied. The court denied the plaintiffs' requests, explaining that the "plaintiffs have had ample opportunity to move for class certification under Rule 23(b)(3) previously … [w]hatever their reasons for not doing so here, the Court declines to allow plaintiffs to revisit their prior (unsuccessful) tactical decision or to delay the case any further." *Id.*; *see also Clarke v. Baptist Mem. Healthcare Corp.*, 264 F.R.D. 375 (W.D. Tenn. 2009) (denying plaintiffs' motion to allow a new class representative to intervene where plaintiffs had knowledge that both of their proposed class representatives were flawed more than two years before but waited to substitute for them until the court had denied class certification); *Washington v. Vogel*, 158 F.R.D 689, 692 (M.D. Fla. 1995) (denying renewed motion for class certification under alternative theory where the court's rationale for denying certification was "something the

[p]laintiffs should have reasonably anticipated" and their "conduct in not seeking alternative certification must have been the product of a conscious tactical decision").

Plaintiffs' effort to distinguish this case from those cited above on the ground that this Court initially granted Plaintiffs' motion for class certification (Pl. Br. at 8 n.4) is unavailing. As an initial matter, courts have properly declined to allow successive motions for class certification, or to modify prior class certification orders in the absence of new factual evidence, even where certification was initially granted by the District Court, but later reversed on appeal. For example, in *Gene & Gene*, the Fifth Circuit reversed the district court's recertification of the class following defendant's successful Rule 23(f) appeal of the district court's initial grant of certification because, as here, discovery was complete at the time of the prior motion. The court correctly observed that "Rule 23(f) is not an interlocutory tool to clarify issues and provide a roadmap for litigants to reformulate their arguments." *Gene & Gene*, 624 F.3d at 703. And courts repeatedly have declined to modify prior orders granting class certification in the absence of new evidence where, as here, the only thing that has changed is a legal ruling showing the plaintiffs' initial class definition to be flawed.[5] *See Dukes*, 2013 U.S. Dist. LEXIS 135554, at *5; *see also Ladik*, 2012 U.S. Dist. LEXIS 77154, at *22 (denying renewed motion for geographically narrower class where plaintiffs "simply have created a smaller version of the same problem"). In *Schilling v. Transcor Am. LLC*, No. C08-941 SI, 2012 U.S. Dist. LEXIS

[5] Plaintiffs argue that the instant case is different from the cases cited by Comcast in which plaintiffs were denied an opportunity "to file a new class certification motion based upon a different theory after the same district court denied their first broader motion." (Pl. Br. at 8.) But Plaintiffs fail to explain how or why this is the case. That the Supreme Court, and not the district court, ultimately denied Plaintiffs' theory is of no consequence, particularly where, as here, the Supreme Court's ruling was based on long-standing class certification principles. *See Behrend*, 133 S. Ct. at 1432-33 (holding that the case "turns on the straightforward application of class-certification principles" and that, "under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis").

146822 (N.D. Cal. Oct. 11, 2012), the court denied plaintiffs' motion to amend the court's class certification order to certify subclasses and to add subclass representatives after the court granted defendants' motion for partial summary judgment on plaintiffs' class claims. The court noted that plaintiffs never argued for subclass differentiation in opposing the motion for partial summary judgment, nor did they seek certification of subclasses sooner, even though "[t]he potential need to distinguish among subclasses should have been clear since the inception of this case." *Id.* at *9. Because plaintiffs made "a strategic decision to seek class-wide relief for one class," plaintiffs were not entitled to revisit that decision "simply because plaintiffs' strategy did not work." *Id*. at *10.

Plaintiffs' reliance on *Dukes* is also unavailing because discovery in that case was not closed. There, the court allowed the plaintiffs to amend their complaint to revise their class definition because it expressly found that further "discovery might permit [plaintiffs] to meet the Rule 23 obligations clarified by the Supreme Court's ruling." *Dukes*, 2012 U.S. Dist. LEXIS 135554, at *11. After an additional year of discovery, the court denied plaintiffs' motion, finding that the narrower class suffered from the same underlying flaws that previously resulted in rejection of the broader class. *See Dukes*, 2013 U.S. Dist. LEXIS 109106, at *5-6. In *Dukes*, as well as in every other case relied on by Plaintiffs (Pl. Br. at 2), discovery was not complete at the time plaintiffs sought a modified class. Consequently, Plaintiffs' authority lends no support to an argument that amendment of the class should be permitted in a case such as this, where the factual record closed nearly four years ago.

B. It Is Too Late for Plaintiffs to Revise Their Expert Methodology and Class Definition

1. Plaintiffs Deliberately Chose to Rely on a Flawed Damages Model and Over Broad Class Definition

Plaintiffs submitted fifteen expert reports from four different experts over the course of eight years in support of their two prior failed class motions. All attempted to support Plaintiffs' deliberate tactical choice to define a single class spanning the entire Philadelphia DMA. Plaintiffs chose that overbroad class even though they knew that RCN – the only identified potential overbuilder in the Philadelphia DMA – had sought FCC permission to enter only selected franchises within five of the eighteen counties in the Philadelphia DMA.[6] Significantly, that FCC permission did not cover all franchises within those counties, and it did not relieve RCN of the requirement that it obtain approval from *each* franchise before overbuilding. *See Behrend v. Comcast*, 2012 U.S. Dist. LEXIS 51889, at *103 (E.D. Pa. Apr. 12, 2012).

Plaintiffs also made a deliberate tactical choice to rely on a damages model that aggregated damages across four theories of potential liability rather than apportioned damages between each specific liability theory. (*See* Hr'g Tr. (Dkt. No. 425), 173:22-175:1, Oct. 13, 2009.) Plaintiffs made that choice despite settled law holding that a damages model that fails to separate "losses resulting from unlawful, as opposed to lawful, competition" is not valid. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975).[7] Thus, Plaintiffs

[6] *See* Corrected Expert Decl. of Dr. James T. McClave (Dkt. No. 332), 8, April 10, 2009 ("I have assumed that only the five counties that RCN indicated it planned to enter as an overbuilder would have been overbuilt: Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties."); Expert Declaration of Michael A. Williams, Ph.D. (Dkt. No. 332), ¶ 93, 95, April 10, 2009 ("RCN applied in 1998 for certification to operate an open video system in the adjacent areas of the City of Philadelphia and the counties of Bucks, Chester, Delaware, and Montgomery.").

[7] *See also Van Dyk Research Corp. v. Xerox Corp.*, 478 F. Supp. 1268, 1327-28 (D.N.J. 1979) (finding for defendants in bench trial where damages evidence did not distinguish between effects of lawful and allegedly unlawful conduct), *aff'd*, 631 F.2d 251 (3d Cir. 1980); *R.S.E., Inc. v. Pa. Supply, Inc.*, 523 F. Supp. 954, 964 (M.D.

assumed the risk that their damages model would be rejected if the Court failed to credit each of their theories of liability.

Plaintiffs' failure to apportion damages was a central focus of the prior class certification hearing. In opposition to Plaintiffs' second class certification motion, Comcast argued that Dr. McClave's failure to apportion damages was fatal to his methodology (*see* Hr'g Tr. (Dkt. No. 425), 173:22-175:1, Oct. 13, 2009), and the Court directed the parties to address this issue during closing arguments. (*See* Letter, Oct. 29, 2009.) In response, Plaintiffs argued that it was not their "burden … to separate out which act caused what injury" and maintained that "Dr. McClave's analysis fully supports a finding of classwide damages as higher prices to consumers, as a result of defendant's conduct, if the Court credits any one, even if it doesn't credit all of Dr. Williams' theories." (*See* Hr'g Tr. (Dkt. No. 428) 32:12-14, 34:4-7, Nov. 16, 2009.) Plaintiffs claimed that it would be "possible" for Dr. McClave to do what he had not done previously (*i.e.*, to separate out damages among the various theories of liability), but this Court said even back then that Plaintiffs could not alter course so late in the proceedings: "*we're not going to design and construct the case or else we'll all be here until the end of time*." (*Id.* at 39:9-24 (emphasis added).)

2. Plaintiffs Rejected the Opportunity Afforded Them to Revise Their Flawed Damages Model and Overbroad Class Definition

Plaintiffs point to this Court's justifiable reluctance to entertain additional expert evidence at the close of the class hearing in 2009 in an effort to convince this Court that they never had the opportunity to conform Dr. McClave's methodology to their sole remaining theory

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Pa. 1981) ("In private antitrust actions, the burden is placed upon the plaintiff to show that the damage claimed was in fact caused by the unlawful acts of the defendant and did not result from some other factor, such as … lawful competition by the defendant.").

of antitrust impact. (Pl. Br. at 8; *see also* Tr. (Dkt. No. 556) 13:2-8, June 19, 2013.) The record shows, however, that Plaintiffs had precisely that opportunity in the spring of 2012 – after summary judgment and just twelve weeks before trial was scheduled to begin. Not only did Plaintiffs fail to utilize it, they expressly disavowed that any changes needed to be made.

After substantially narrowing the case on summary judgment, the Court offered Plaintiffs the chance to make a "last ditch effort" to submit a supplemental expert report to conform their damages analysis to the theory of liability that remained in the case and the narrower contours of Plaintiffs' Section 2 claim – precisely the type of adjustment that Plaintiffs had claimed at class certification that they could make. (*See* Hr'g Tr. (Dkt. No. 525) 8:14-12:25, Apr. 24, 2012.) But Plaintiffs submitted a supplemental expert report that made no meaningful change to Dr. McClave's damages methodology or their claimed damages and that did not address any of the fundamental flaws previously identified by Comcast – the same flaws that later caused the Supreme Court to reject Plaintiffs' model. (*See*, *e.g.*, Mot. to Strike (Dkt. No. 502-1) at 4, May 22, 2012; Mot. to Exclude or Limit Test. of Dr. James T. McClave (Dkt. No. 511-2) at 15-20, June 8, 2012.) Plaintiffs insisted that the model was "designed to differentiate between legitimate and anti-competitive factors" and that there was, therefore, "no need for Dr. McClave to adjust his damages assessment after the Court's ruling on summary judgment." (*See* Opp'n to Mot. To Strike (Dkt. No. 509) at 14, June 8, 2012.)

Plaintiffs also opposed Comcast's motion to narrow the class after the Court limited their Section 2 claim to allegations concerning Comcast's CAP program. *See Behrend v. Comcast*, 2012 U.S. Dist. LEXIS 51889, *97-98 (April 12, 2012); Mot. To Narrow Class (Dkt. No. 499) at 4-6 (May 8, 2012).) Plaintiffs asserted that "Dr. McClave's model reflects supracompetitive

prices, both in overbuilt areas and throughout the Philadelphia DMA." (Opp'n to Mot. To Narrow Class (Dkt. No. 504) at 15.)[8]

3. To Countenance Plaintiffs' Complete Reversal of Their Position Would be Fundamentally Unfair and Prejudicial to Comcast

Plaintiffs' class motion reflects an attempt to keep their fatally defective case on life support by tactically reversing a fundamental position that Plaintiffs have held for years – a position on which they relied to defeat Comcast's motion for summary judgment. In particular, Plaintiffs' Section 1 claim survived summary judgment based solely on Plaintiffs' rejection of Comcast's position that each franchise constitutes a separate market. In an about-face, however, Plaintiffs now seek to recertify a class based on an expert analysis that measures impact and damages on that very basis. Having prevailed on summary judgment by rejecting the franchise-by-franchise approach, Plaintiffs should now be estopped from taking the opposite position and adopting that approach in a desperate attempt to resuscitate their case. To hold otherwise would be unfair and prejudicial to Comcast.

Plaintiffs spent nearly a decade insisting to this Court that the appropriate geographic market is the entire 18-county DMA and that, consequently, damages should be analyzed only at the county or DMA level. Plaintiffs opposed every effort by Comcast to show that damages can be analyzed, if at all, only at the franchise or household level.[9] Significantly, this Court relied on

[8] Plaintiffs' argument that their effort to certify a third class here is no different from Comcast's post-*Twombly* and post-*Hydrogen Peroxide* motion practice (Pl. Br. at 7) ignores entirely that Comcast did not support its new motions with theories that it previously had decided not to advance for tactical reasons, but instead used the new motions to vindicate its previously advanced theories.

[9] *See* Defendants' Mem. In Opp. To Motion to Certify Cl. (Dkt. No. 176), 2, Nov. 9, 2006 ("Given the wide variety of communities across the broad territory included in Plaintiffs' Complaint, and differences in the cable operators adjacent to each such communities, Plaintiffs' proof will necessarily vary widely from franchise to franchise, provider to provider, and subscriber to subscriber."); Expert Report of David J. Teece, Ph.D. (Dkt. No. 392), ¶¶ 44-45, Apr. 10, 2009 ("Thus, from an economic perspective, under the FTC/DOJ Merger Guidelines

Plaintiffs' rejection of the franchise-by-franchise approach in granting summary judgment to Plaintiffs on their Section 1 "rule of reason" claim.

> Comcast's assertions that the Counterparties were not its actual competitors — because each operated cable systems in their own respective, non-overlapping franchise area, and never offered services to the same subscribers, at the same time, anywhere in the Philadelphia region — *would have some purchase had we determined that the relevant geographic market was the individual franchise area*.

Behrend, 2012 U.S. Dist. LEXIS 51889, at *65 (emphasis added). Having kept their Section 1 claim alive by urging rejection of the franchise-by-franchise approach, Plaintiffs now do an about-face and embrace that approach in an effort to salvage their claims. (Pl. Br. at 13-14.) Plaintiffs propose a class that encompasses only five counties as opposed to the eighteen counties they previously insisted were the only appropriate geographic market. Plaintiffs further support their motion with a new opinion by Dr. McClave who calculates damages on a franchise by franchise basis, now claiming that this "refinement" allows him to measure damages more accurately. (McClave Rep. at 2, 4, 5.) To allow plaintiffs to proceed at this stage based upon the very theory that they rejected through the entirety of this case would be fundamentally unfair and prejudicial to Comcast.

Similarly, Plaintiffs have temporally revised their class definition to start the class period in 2003, as opposed to 1999. (Pl. Br. at 11.) However, the only Section 2 claim to survive

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approach, the relevant geographic market may be as small as one household. Because it is impractical to define each household as a separate geographic market, the FCC calculates market shares using the franchise area of the incumbent cable operator."); Corrected Expert Decl. of Dr. James T. McClave (Dkt. No. 332), Table A.2, April 10, 2009 (calculating damages on a county wide basis); Hr'g Tr. (Dkt. No. 425), 170:6-9 (McClave Direct Examination), Oct. 13, 2009 ("I wanted a level of aggregation where I could see some variation. If you just look at the franchise level, neighboring franchises are almost all the same price. By the time you get to the county level, you do start to see some variability."); Hr'g Tr. (Dkt. No. 429) 18:19-24 (Chipty Direct Examination), Oct. 26, 2009 ("Q: Q But if you're evaluating overbuilding, in the normal course of your work and what economists do in this industry, do you look at the whole DMA or do you look at specific franchise areas where overbuilders are likely to come in? A: Well, you have to evaluate overbuilding at a franchise-by-franchise level because that's how the entry occurs.").

summary judgment is based on conduct that began in 2000. *See Behrend*, 2012 U.S. Dist. LEXIS 51889, at *121 ("The summary judgment record shows that, beginning in the winter of 2000, when RCN was about to offer service in Folcroft, Delaware County, Comcast offered discounts in the form of the 'Comcast Advantage Plain' or 'CAP' to customers in Folcroft."). This Court has already rejected another of Plaintiffs' theories (concerning DBS access to Comcast's regional sports programming) on the ground that it was based on Comcast's alleged conduct that began before the start of Plaintiffs' original class period. *See Behrend v. Comcast*, 264 F.R.D. 150, 165 (E.D. Pa. 2010).

Thus, at a minimum, if Plaintiffs are permitted at this late stage to propose a class period inconsistent with this Court's prior ruling and to revise their expert methodology to evaluate damages at the franchise level, Comcast should be permitted to renew its summary judgment motion on Plaintiffs' remaining claims.[10]

III. The Court Should Strike Plaintiffs' Motion Because It Is Futile

Dr. McClave's latest report suffers from the same fatal flaw as his discredited reports – it calculates "damages" which, on their face, *cannot be attributed* to the allegedly unlawful deterrence of overbuilding by RCN.[11] For example, his model calculates approximately $76 million in damages in Philadelphia County. *See* McClave Rep. at App'x A. Those asserted damages represent a "false positive" in light of the Court's holding that RCN did not overbuild

[10] Further, if intervening Supreme Court decisions suffice as a basis for Plaintiffs to file another class certification motion, then the same should be true for Comcast's arbitration defense to class certification. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (holding that the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery).

[11] The deficiencies generally described in the following discussion are merely examples of the numerous fatal defects in the new expert opinions proffered by Plaintiffs in support of their class motion. Should the Court allow Plaintiffs' motion to proceed, Comcast expressly reserves its right to present further arguments, including in *Daubert* motions, and to submit opposition expert opinions, on these and other defects in Plaintiffs' expert opinions.

that county as a result of Comcast's lawful lobbying efforts – which, as a matter of law, are not a basis for antitrust liability. *See Behrend*, 264 F.R.D. at 175.

In rejecting Dr. McClave's damages model, the Supreme Court held that even if it had "identified subscribers who paid more *solely* because of the deterrence of overbuilding" (which it did not do), it still would have failed because it did not plausibly show either that (1) "the extent of overbuilding (absent deterrence) would have been the same in all counties," or (2) "the extent [of overbuilding] is irrelevant to [Comcast's] ability to charge supra-competitive prices." *Comcast*, 133 S. Ct. at 1435 n.6 (emphasis added). Plaintiffs have not made, and cannot make, either showing.

To try to satisfy the first prong of the Supreme Court's test, Plaintiffs contend that the extent of overbuilding throughout the five counties would have been "the same" by 2003 because, by that date RCN would have overbuilt at least 50% of "any franchise area in each of the five counties *it was authorized to serve*." (Williams Rpt. ¶ 14 (emphasis added).) As an initial matter, Dr. Williams' conclusion about the time it would have taken RCN to reach this threshold contains no economic analysis and is based entirely on a compilation of anecdotal exemplars about companies other than RCN that he selected.[12] These assumptions do not and cannot show that the extent of overbuilding would have been the "same" throughout the five-

[12] Dr. Williams is constrained to rely on anecdotal exemplars because the actual record concerning RCN belies his conclusion. As reported in the FCC's Seventh Annual Cable Competition Report, "as with most overbuilders, RCN has not built out all of the homes for which it holds franchise awards." *See* FCC Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report ¶ 38 (Jan. 8, 2001). Indeed, the FCC reported that as of June 2000, RCN held OVS certifications for more than 15 million homes nationally, but had only obtained franchise agreements to serve 30% of those homes, and had only actually built out its systems to serve roughly 5% of the homes covered by its OVS certifications. *See id.* By June 2003, the point at which Dr. Williams opines that RCN would have overbuilt at least 50% of all franchise areas in the five counties it was authorized to serve, the FCC reported that RCN had built out less than 10% of the homes it was authorized to serve. *See* FCC Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report ¶ 81 (Jan. 28, 2004).

county region. Moreover, there is no dispute that RCN never sought "authoriz[ation] to serve" the entire five-county area. Dr. Williams relies exclusively on RCN's receipt of OVS certification from the FCC to identify the franchise areas that RCN supposedly would have overbuilt "but for" Comcast's alleged anticompetitive conduct. (*See id.* ¶ 12.) But RCN *neither sought nor received* FCC certification to operate OVS systems in all communities in the five counties.[13] Thus, even accepting Plaintiffs' expert opinions at face value, Plaintiffs have not established that "the extent of overbuilding (absent deterrence) would have been the same in all [five] counties." 133 S. Ct. at 1435 n.6.

Plaintiffs also cannot show that the extent of overbuilding in the five counties "is irrelevant" to their claim that all proposed class members were harmed by the deterrence of overbuilding. Plaintiffs have contended for years – including through allegations, arguments, and expert testimony – that the putative benefits of overbuilding are *limited* to the specific communities in which an overbuilder competes head-to-head with the incumbent cable company. For example, Plaintiffs allege that Comcast responded to RCN's overbuilding in Folcroft (Delaware County) by offering targeted price discounts in that community only, while keeping prices high in neighboring communities. (*See* Third Am. Compl., ¶ 94 (alleging that Comcast subsidized the discounted prices offered in overbuilt communities by keeping prices at supra-competitive levels in non-overbuilt areas).) And Plaintiffs concede that Comcast responded to RCN's overbuilding by offering lower prices to customers "only on streets with 'competitive activity.'" (Am. Decl. of Hal J. Singer (Dkt. No. 332) Apr. 10, 2009), ¶ 113.) Nothing in the record or in Plaintiffs' latest round of expert reports demonstrates the contrary.

[13] Regardless, OVS certification was merely RCN's first small step in its ambition to one day operate franchised cable systems in selected communities within the five counties. (*See* Williams Rep. ¶ 11 n.9.)

Accordingly, Plaintiffs' motion to re-certify should be stricken as futile.

CONCLUSION

For the foregoing reasons, Comcast respectfully requests that the Court grant its motion and strike Plaintiffs' third motion for class certification.

Respectfully submitted,

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