No. 12-706

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE COX ENTERPRISES, INC. SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION

ON PETITION FOR PERMISSION TO APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
Case No. 5:09-ML-02048-C
Hon. Robin J. Cauthron, United States District Judge

REPLY BRIEF IN SUPPORT OF PETITION OF PLAINTIFFS FOR LEAVE TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

A. Daniel Woska
Rachel Lawrence Mor
Michael J. Blaschke
S. Randall Sullivan
A. DANIEL WOSKA
& ASSOCIATES, P.C.
3037 N.W. 63rd Street, Suite 205
Oklahoma City, OK 73116
405-562-7771 (Telephone)
405-285-9350 (Facsimile)

Joe R. Whatley, Jr.
WHATLEY DRAKE & KALLAS, LLC
380 Madison Avenue
New York, New York 10017
(212) 447-7060 (Telephone)
(800) 922-4851 (Facsimile)

Additional Counsel on Signature Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Plaintiffs' Petition should be granted. Cox presents no compelling arguments to the contrary. Granting Plaintiffs' Petition is procedurally proper. Plaintiffs' Petition is timely under long-standing Supreme Court precedent related to the time for appeal following denial of a motion to reconsider. Interlocutory review is also substantively appropriate because the District Court's denial of class certification was manifestly erroneous, the District Court abused its discretion in denying Plaintiffs' motion to reconsider, the Courts' orders sound a death knell to this litigation and the appeal presents significant legal issues this Court has not previously considered.

II. ARGUMENT

A. PLAINTIFFS' PETITION IS TIMELY

Cox argues that Plaintiffs' petition is untimely, latching on to this Court's use of the word "toll" in discussing Rule 23(f) in *Carpenter v. Boeing Co.*, 456 F.3d 1183 (10th Cir. 2006). Cox's argument misconstrues the Court's comments in *Carpenter* and is clearly at odd with United States Supreme Court precedent. As the Court recognized in *Carpenter*, the Supreme Court has held that "'the consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending.'" *Carpenter*, 456 F.3d at 1192, quoting *United States v. Dieter*, 429 U.S. 6 (1976). The Supreme Court has consistently held that the filing of a petition for rehearing or a motion for reconsideration renders the original judgment nonfinal and the time for appeals runs from the entry of the order on the petition for rehearing or the motion for reconsideration.

In fact, in a subsequent appeal from this Court, the Supreme Court specifically rejected the premise of Cox's timeliness argument:

> The Court of Appeals' decision discusses the issue as a matter of whether the motion for reconsideration "tolled" the 30-day period that, by assumption, began to run with the District Court's first decision. We believe the issue is better described as whether the 30-day period began to run on the date of the first order or on the date of the order denying the motion for reconsideration, rather than as a matter of tolling….[W]e previously made clear that would-be appellants are entitled to the full 30 days after a motion to reconsider has been decided. *United States v. Dieter*, 429 U.S. 6, 7-8, 50 L. Ed. 2d 8, 97 S. Ct. 18 (1976)(per curiam).

United States v. Ibarra, 112 S. Ct. 4, 5 (1991). Plaintiffs filed their petition within fourteen days of the Court's order denying Plaintiffs' motion to reconsider. Accordingly, Plaintiffs' petition is timely.

B. COX DOES NOT ADDRESS PLAINTIFFS' CORE CONTENTIONS REGARDING THE DISTRICT COURT'S MANIFESTLY ERRONEOUS RULE 23 ANALYSIS

The District Court denied class certification because the Court determined that an analysis of Cox's regional data would be required to establish antitrust impact and market power. Yet, the District Court failed to consider that even the more complex regionalized analysis would be based on common evidence from Cox and the common methodology proposed by Dr. Singer. Given this commonality of proof and the numerous common issues the District Court identified, the District Court committed manifest error in finding that common issues did not predominate.

As discussed at length in Plaintiffs' Petition, the Seventh Circuit recently addressed the proper predominance inquiry when complex data analysis is at issue in *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802 (7th Cir. 2012). Plaintiffs'

Petition should be granted to consider the Seventh Circuit's opinion regarding this issue which has not been previously addressed by this Court. In an effort to suggest that the Seventh Circuit's legal analysis in *Messner* is inapposite, Cox attempts to marginalize the issues addressed by the Seventh Circuit and argues that because *Messner* did not specifically address market power the decision is irrelevant. Cox's arguments, however, are unavailing.

Messner is not merely a "damages case" as Cox suggests. Opp'n, p. 14. As the Seventh Circuit noted, the central issue in *Messner* was "whether plaintiffs could show on a class-wide basis the antitrust impact of Northshore's actions on the proposed class." *Messner*, 669 F.3d at 810.[1] The Seventh Circuit's rationale regarding complex expert analysis, however, is not limited to antitrust impact but applies with equal force to the analysis of market power.

The District Court in *Messner* denied class certification because the prices for the various services under each contract at issue did not change uniformly but instead changed at variable rates. *Id.* at 817-818. Yet, the plaintiff's expert testified that he could account for these variations by analyzing "each individual non-uniform price increase imposed in the contract being analyzed" for all the contracts at issue. *Id.* at 819. The Seventh Circuit recognized that this would involve "multiple analyses" with regard to each and every contract but concluded that this would not preclude class certification

[1] The Court recognized that the plaintiffs must, of course, prove damages but stated that "[i]t is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." *Messner*, 669 F.3d at 815, citing *Wal-Mart v. Dukes*, 131 S. Ct. 2541 at 2558 (2011).

because the analyses "all rely on common evidence – the contract setting out the non-uniform prices increases – and a common methodology to show that impact." *Id.*[2]

Despite Cox's arguments to the contrary, this is precisely the question presented by Plaintiffs' Petition. Obviously, the analysis would be less complicated if consideration of Cox's regional data was not necessary. Yet, the need for multiple analyses does not defeat predominance. Plaintiffs' expert in this case can establish both market power and antitrust injury using the common evidence supplied by Cox's data and the common methodology proposed by Dr. Singer. The data analysis Dr. Singer initially conducted utilized the limited local market data that Cox has produced in this case and Dr. Singer confirmed that regardless of whether the geographic market is defined as each local Cox market or the Cox national footprint, his conclusions would apply equally to both. Singer Depo. at p. 52: 2-11. Morevover, in his Declaration in support of Plaintiffs' Motion for Reconsideration, Dr. Singer explained that if he were provided the evidence that Cox has withheld, he would be able to use "direct evidence of whether Cox possessed market

[2] Notably, not every class member in *Messner* was subject to every contract and not every class member that was subject to a particular contract was impacted by every non-uniform price increase for the various services provided. The defendant in *Messner* argued that the proposed class included members who had not been impacted by the alleged antitrust violations. *Messner,* 669 F.3d at 810. As the Seventh Circuit explained, however, plaintiffs' expert "claimed that he could use common evidence – the post-merger price increases Northshore negotiated with insurers – to show that all or most of the insurers and individuals who received coverage through those insurers suffered some antitrust injury as a result of the merger." *Id.* at 818. The Court concluded "[t]hat this was all that was necessary to show predominance for purposes of Rule 23(b)(3)." *Id.* In response to the defendant's argument that not all class members had been injured, the Seventh Circuit responded that "[a]ll of this is at best an argument that some class members' claims will fail on the merits if and when damages are decided, a fact generally irrelevant to the district court's decision on class certification." *Id.* at 823.

power in each of its regional markets" and would "be able to estimate the elasticity of demand in each of Cox's regional markets." Declaration of Hal J. Singer, Ph.D. in support of Plaintiffs' Motion for Reconsideration, [D.E. 266, Att. 2] at ¶¶ 4, 5. Given the commonality of the expert's evidence and methodology and given the numerous common issues the District Court identified, the District Court committed manifest error in denying class certification on the basis that common issues do not predominate.

C. INTERLOCUTORY APPEAL IS APPROPRIATE BECAUSE THE COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO RECONSIDER

Cox suggests that Plaintiffs' Petition as it relates to the District Court's Order denying Plaintiffs' Motion to Reconsider is a "red herring." Brief, p. 17. Yet, it's Cox's argument that misses the mark. Once the Court held that Plaintiffs must analyze regional data, Plaintiffs sought to enforce the District Court's Order compelling the regional data so Plaintiffs could, in fact, conduct the analysis the District Court required and submit additional briefing on the issues of market power and antitrust injury. The District Court abused its discretion in denying Plaintiffs' Motion to Reconsider.

D. PLAINTIFFS' PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT'S ORDERS PRESENT IMPORTANT LEGAL ISSUES AND SOUND A DEATH KNELL FOR THIS LITIGATION

In its response, Cox argues that denial of class certification is not a death knell in this case because the District Court can consider certifying classes in each of the regional markets. Should the Court deny Plaintiffs' petition on the condition the District Court consider certifying classes in each of the regional markets while permitting Plaintiffs' the additional data and briefing Plaintiffs have requested, Plaintiffs would have no objection.

Rule 23(c)(1) provides that a class certification order may be revisited up until the time of a final judgment. The Rule suggests that a district court may revisit its class certification decision and, therefore, theoretically, the District Court could certify regional classes. However, at this juncture, the Court has held that regionalized analysis is necessary and has denied class certification without any consideration of whether the regionalized analysis which is not individualized would, in fact, defeat predominance despite the fact that the source of the data and the methodology to be utilized are common and despite the presence of multiple common issues, a significant issue this Court has not previously addressed.

Moreover, despite the Court's determination regarding the need for regionalized analysis, the Court has refused to require Cox to produce the necessary data by a date certain in order to permit analysis of the data and additional briefing with regard to market power and antitrust impact. Accordingly, the Orders that exist at this time are a clear abuse of discretion. The District Court's orders denying class certification, denying Plaintiffs' motion to reconsider, and denying Plaintiffs the opportunity to analyze the requested data and to submit additional briefing are erroneous. Any requirement that this litigation proceed on an individual basis would sound the death knell because this litigation cannot be economically pursued on an individual basis.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Court should grant review of the District Court's Class Certification Order and Reconsideration Order under Rule 23(f).

DATED: May 4, 2012

Respectfully submitted,

/s/ *Joe R. Whatley, Jr.*
Joe R. Whatley, Jr.
WHATLEY DRAKE & KALLAS LLC
380 Madison Avenue, 23rd Floor
New York, NY 10017
212-447-7060 (Telephone)
800-922-4851 (Facsimile)

A. Daniel Woska, OBA No. 9900
Rachel Lawrence Mor, OBA No. 11400
Michael J. Blaschke, OBA No. 868
S. Randall Sullivan, OBA No. 11179
A. DANIEL WOSKA & ASSOCIATES, P.C.
3037 N.W. 63rd Street, Suite 205
Oklahoma City, OK 73116
405-562-7771 (Telephone)
405-285-9350 (Facsimile)

Allan Kanner, OBA No. 20948
Cynthia St. Amant
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
504-524-5777 (Telephone)
504-524-5763 (Facsimile)

Todd M. Schneider
Adam B. Wolf
SCHNEIDER WALLACE COTTRELL BRAYTON & KONECKY, L.L.P.
180 Montgomery St., Ste. 2000
San Francisco, CA 94104
415-421-7100 (Telephone)
415-421-7105 (Facsimile)

Garrett W. Wotkyns
Michael C. McKay
SCHNEIDER WALLACE COTTRELL BRAYTON & KONECKY LLP
8501 N. Scottsdale Road, Suite 270
Scottsdale, AZ 85253
480-428-0144 (Telephone)
866-505-8036 (Facsimile)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served via the Court's CM/ECF system on May 4, 2012, to the following:

D. Kent Meyers, Esquire
Elizabeth Barnett LaBauve, Esquire
CROWE & DUNLEVY
20 North Broadway, Suite 1800
Oklahoma City, OK 73102
kent.meyers@crowedunlevy.com
elizabeth.labauve@crowedunlevy.com

Robert G. Kidwell, Esquire
Bruce D. Sokler, Esquire
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., NW
Suite 900
Washington, DC 20004
rgkidwell@mintz.com
BDSokler@mintz.com

Teresa Anne Arnold-Simmons, Esquire
QUINTAIROS PRIETO WOOD, PA
One Independent Drive, Suite 1650
Jacksonville, FL 32202
tarnold@qpwblaw.com

Martin E. Landrieu, Esquire
GORDON ARATA McCOLLAM & DUPLANTIS
201 St. Charles Ave., Suite 4000
New Orleans, LA 70170-4000
mLandrieu@gordonarata.com

/s/ *Joe R. Whatley, Jr.*
Of Counsel