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

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

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs, subscribers of non-basic cable services from Defendants (collectively, "Comcast"), filed this antitrust action against Comcast for damages and injunctive relief for its alleged violations of §§1 and 2 of the Sherman Act, which have caused Plaintiffs to pay supra-competitive prices for cable services. Plaintiffs allege that Comcast engaged in a series of acquisitions of competitor cable companies and imposed horizontal restraints in the Philadelphia and Chicago regional cable markets in violation of § 1. Plaintiffs further allege that Defendants have unlawfully monopolized and attempted to monopolize the Philadelphia and Chicago cable television markets by engaging in the following anticompetitive conduct: (1) imposing horizontal market allocations through "swap" agreements with competitors (Compl.[1] ¶¶ 83-85); (2) acquiring competitor cable companies (*id.* ¶ 85); (3) engaging in exclusionary conduct aimed at a competitor for the purpose of maintaining monopoly power in the Philadelphia market, including initially refusing to provide the competitor access, and then failing to provide reasonable, long-term, nondiscriminatory access, to essential local sports programming controlled by Comcast and needed by the competitor to compete (*id.* ¶¶ 86-90); (4) substantially interfering with a competitor's access to contractors needed by the competitor to build competing cable television facilities in Comcast's Philadelphia market (*id.* ¶¶ 91-92); and (5) engaging in anticompetitive, non-uniform, targeted pricing and sales practices designed to eliminate or prevent competition (*id.* ¶¶ 93-94). Plaintiffs allege that they have suffered antitrust injury–the payment of supra-competitive cable prices—as a result of Defendants' antitrust violations. On August 31, 2006, the Court denied Defendants' motion to dismiss Plaintiffs' Third Amended Complaint.

[1] Plaintiffs' Third Amended Class Action Complaint for Violations of the Sherman Antitrust Act (Docket No. 133) is referred to as "Complaint" or "Compl." in this memorandum.

Plaintiffs filed their motion for class certification (Docket No. 65) on November 30, 2004. Given the substantial passage of time related to litigating Defendants' motion to compel arbitration, together with the filing of Plaintiffs' Third Amended Complaint, Plaintiffs submit this updated supplemental memorandum in support of their motion, pursuant to Fed. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(b)(3) , to certify the following Philadelphia class:

> All cable television customers who subscribe or subscribed at any time since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

Compl. ¶ 31.b (1).

Plaintiffs' arguments for certification of the Philadelphia class apply equally to certification of the Chicago class[2]; however, given the Court's April 12, 2006 order staying Defendants' motion to compel arbitration as to the Chicago area class,[3] Plaintiffs now move for certification with respect to the Philadelphia class. Accompanying this memorandum and further supporting Plaintiffs' class certification motion is the Updated Declaration of John C. Beyer, Ph.D.[4]

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[2] The Chicago class is defined at Compl. ¶ 31.b(2) as follows:

> All cable television customers who subscribe or subscribed at any time since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from AT&T and/or Comcast, or any of their subsidiaries or affiliates in Comcast's Chicago cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

[3] Based on the parties' stipulation, the Court entered an Order dated April 12, 2006 (Docket #117), providing that Defendants' motion to compel arbitration as to Plaintiffs Cutler and Glaberson is withdrawn; that all claims of Plaintiffs Cutler, Glaberson and members of any certified class shall be resolved in court and not through arbitration; and that Comcast shall not for any purpose, including class certification, allege that an arbitration agreement applies to Plaintiffs Glaberson, Cutler, or to those cable customers of Comcast in the Philadelphia cluster who are similarly situated to Plaintiff Glaberson or Cutler. (*Id.* ¶ 1). The Order also provides that Defendants' amended motion to compel arbitration is stayed as to the Illinois Plaintiffs and the Illinois putative class members until the Illinois Supreme Court decides *Kinkel v. Cingular Wireless, LLC*, No. 100929 (Ill. 2005). *Id.* ¶2.

[4] Dr. Beyer has updated his initial Declaration (Docket #65) filed on November 30, 2004, in support of Plaintiffs' motion for class certification.

ARGUMENT

I. LEGAL STANDARDS

The legal standard for class certification is well established:

> To be certified, a class must satisfy the four threshold requirements of Federal Rule of Civil Procedure 23(a): (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class"). In addition to the threshold requirements of Rule 23(a), parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). Rule 23(b)(3) . . . provides for so-called "opt-out" class actions [sic] suits. Under Rule 23(b)(3), two additional requirements must be met in order for a class to be certified: (1) common questions must "predominate over any questions affecting only individual members" (the "predominance requirement"), and (2) class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy" (the "superiority requirement").

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004) (internal citations omitted).

As the Supreme Court has cautioned, "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140 (1974). Rather, the focus is on whether the requirements of Rule 23 are satisfied. *Id.* As this Court stated in *Bradburn Parent/Teacher Store, Inc. v. 3M*, No. Civ. A. 02-7676, 2004 WL 1842987, at *2 (E.D. Pa. Aug. 18, 2004), "[i]n determining whether the class should be certified, the Court examines only the requirements of Rule 23 and does not look at whether the Plaintiffs will prevail on the merits." The allegations of the complaint are accepted as true for purposes of determining whether class certification is appropriate. *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 393 (E.D. Pa. 2001); *Cullen v. Whitman Medical Corp.*, 188 F.R.D. 226, 228 (E.D. Pa. 1999). Courts resolve any doubt in

favor of certifying the class. *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) ("[T]he 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.") (citation omitted), *cert. denied*, 474 U.S. 946 (1985).

II. THE PURPOSES AND REQUIREMENTS OF RULE 23 ARE SATISFIED.

A. This is a Traditional Antitrust Action Meriting Class Certification.

This Court and other courts within the Third Circuit have repeatedly certified classes in antitrust actions.[5] This case presents a paradigm example of the appropriateness and necessity of class treatment. It is a classic market allocation (Section 1), monopolization and attempted monopolization (Section 2) case involving common questions of law and fact that can be resolved most efficiently through the superior class action mechanism. Class treatment is the only possible way to litigate Plaintiffs' and class members' claims because the damages recoverable in individual actions would clearly not be sufficient to justify the high costs of such litigation. Absent certification, Plaintiffs and absent class members will be denied any effective means of enforcing their antitrust rights and recovering for Comcast's alleged antitrust violations. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006) (invalidating class action prohibition in Comcast's arbitration clauses, noting that "[i]f the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law" and "plaintiffs will be

[5] Illustrative cases include: *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718 (E.D. Pa. Aug. 14, 2006) (Padova, J.) (certifying settlement class); *Bradburn Parent/Teacher Store, Inc. v. 3M*, 2004 WL 1842987 (E.D. Pa. 2004) (Padova, J.); *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79 (E.D. Pa. 2003) (O'Neil, J.); *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197 (E.D. Pa. 2001) (Dubois, J.); *In re Flat GlassAntitrust Litig.*, 191 F.R.D. 472 (W.D. Pa. 1999) (Ziegler, C. J.); *In re Plastic Cutlery Antitrust Litig.*, Civ. A. No. 96-CV-728, 1998 WL 135703 (E.D. Pa. Mar. 20, 1998) (McGlynn, J.), *aff'd*, 305 F.3d 145 (3d Cir. 2002), *cert. denied*, 538 U.S. 977 (2003); *Lumco Industries, Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168 (E.D. Pa. 1997) (Broderick, J.); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 1992 WL 212226 (M.D. Pa. 1992) (McClure, J.); *In re Chlorine and Caustic Soda Antitrust Litig.*, 116 F.R.D. 622 (E.D. Pa. 1987) (Bechtle, J.); *In re Glassine and Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302 (E.D. Pa. 1980) (Pollak, J.); and *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143 (E.D. Pa. 1979) (McGlynn, J.), *aff'd*, 685 F.2d 810 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983).

unable to vindicate their statutory rights"). *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (citation omitted); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193 (1981) ("Class actions serve an important function in our system of civil justice."). This case precisely fits the purposes of Rule 23. *Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 163 (3d Cir. 1975) (Rule 23 reflects "a policy in favor of having litigation in which common interests, of common questions of law or fact prevail, disposed of where feasible in a single lawsuit"), *cert. denied*, 423 U.S. 832 (1975).

B. Each of the Rule 23(a) Factors is Fully Satisfied.

The proposed Philadelphia Class easily satisfies each of the requirements for certification under Rule 23.

1. The Members of the Class Are So Numerous That Joinder Would Be Impracticable.

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. The Third Circuit has explained that "[n]o minimum number of plaintiffs is required . . . , but generally if the named plaintiffs demonstrate that the potential number of plaintiffs exceeds forty, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (citation omitted); *Bradburn Parent/Teacher Store, Inc. v. 3M*, 2004 WL 1842987, at *3 (citation omitted). Courts have certified classes of various sizes, reflecting the principles that no threshold number exists and that the requirement is simply that joinder be impracticable.[6]

[6] *See, e.g., Bradburn Parent/Teacher Store, Inc. v. 3M*, Civ. A. No. 02-7676, 2004 WL 1842987 (E.D. Pa. Aug. 18, 2004) (certifying class exceeding 200 members); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143 (E.D. Pa. 1979) (holding class consisting of 30 local governmental units satisfies numerosity requirement); *In re Glassine and*

Plaintiffs allege that the total number of members of Comcast's Philadelphia class exceeds 2,000,000 persons dispersed throughout Philadelphia and the surrounding area. Compl. ¶ 32.[7] In its 2005 Annual Report, Comcast estimates that the number of cable subscribers in its Philadelphia market is 1.8 million.[8] *Id.* Comcast's deposition witness, Andrew Gribschaw, testified during the arbitration discovery process that the total number of Comcast cable subscribers in the Philadelphia and Delaware region is 1.5 million. Gribschaw Dep. Tr. 53:5-17.[9] Plaintiffs' expert, John C. Beyer, Ph.D., indicates that Comcast is the largest cable multiple system operator in the country, with approximately 21.5 million subscribers nationally, and approximately 1.91 million subscribers in its Philadelphia cluster and 1.76 million subscribers in its Chicago cluster. Updated Declaration of John C. Beyer, Ph. D., Regarding Class Certification ("Updated Beyer Decl.") ¶ 15.

It is clear that joinder of members of the Philadelphia class (and of the Chicago class) is clearly impracticable. This is especially true in light of the fact that the class members have relatively small individual claims, "rendering it unfeasible in an economic sense for them to bring their claims individually." *In re Fine Paper Antitrust Litig.*, 82 F.R.D. at 149 (citing *In re Sugar Industry Antitrust Litig.*, 73 F.R.D. 322, 335 (E.D. Pa. 1976)). As the First Circuit noted in invalidating Comcast's class action prohibition contained in its arbitration provision, "[t]o say that each potential class member is unlikely to have or make available the up-front costs needed

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Greaseproof Paper Antitrust Litig., 88 F.R.D. 302 (E.D. Pa. 1980) (finding class "in the hundreds" sufficient); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 477 (W.D. Pa. 1999) ("Classes consisting of hundreds (and potentially thousands) of putative plaintiffs have routinely satisfied the numerosity requirement.") (citations omitted); *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 83 (E.D. Pa. 2003) (holding class in "thousands" satisfies numerosity).

[7] Plaintiffs' Complaint further alleges that the Chicago class includes at least 1,700,000 cable subscribers located throughout Chicago and the surrounding area. Compl. ¶ 32.

[8] Comcast's 2005 Annual Report further indicates that the estimated number of cable subscribers in Comcast's Chicago market is 1.6 million. Compl. ¶ 32.

[9] Janet Funchess, another Comcast arbitration deposition witness, estimated that the total number of Comcast's cable customers in the Chicago area is about 1.6 million. Funchess Dep. Tr. 23:14-20.

to prosecute this costly antitrust suit is a large understatement." *Kristian v. Comcast Corp.*, 446 F.3d at 55 (1st Cir. 2006). The numerosity requirement is satisfied under these facts.[10]

2. There Are Questions of Law or Fact Common to the Class.

Rule 23(a)(2) requires that there are "questions of law or fact common to the class." "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the prospective class." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). Further, [b]ecause the requirement may be satisfied by a single common issue, it is easily met. . . ." *Id.* Although a single common question is enough, Plaintiffs have identified numerous common questions of fact and law, including: (1) whether Comcast's conduct in entering into agreements with competitors allocating markets violates § 1 of the Sherman Act, including as a *per se* violation; (2) whether Defendants' acquisitions of competitor cable companies and subscribers in the Philadelphia (and Chicago) cable markets constitute contracts and conduct in restraint of trade in violation of § 1 of the Sherman Act; (3) whether Comcast's conduct in possessing and willfully acquiring or maintaining monopoly power in, or attempting to monopolize, the Philadelphia (and Chicago) markets violates § 2 of the Sherman Act; (4) whether Comcast's conduct caused prices for cable television services to be artificially high and not competitive; (5) whether Plaintiffs and class members were injured by Comcast's conduct;

[10] The precise number of class members is not known by Plaintiffs but is within Comcast's records. The proposed Philadelphia class consists of Comcast customers who subscribe or subscribed from December 1, 1999, to the present to video programming services, other than solely to basic cable services, in Comcast's Philadelphia cluster (or in Comcast's Chicago cluster). Compl. ¶ 31.b(1). The proposed Chicago class is similarly defined. Compl. ¶ 31.b(2). "Basic cable services" refers to the basic tier of video programming services to which subscription is required for access to other tiers of cable service and generally includes public, educational and governmental access channels. *Id.* Compl. ¶ 31.a. The FCC has reported that most cable customers (approximately 90%) subscribe to both basic and other tiers of cable service, while the remaining approximately 10% subscribe only to basic cable services. *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-266, *Report on Cable Industry Prices* (July 8, 2003) at ¶ 3. The fact that the vast majority of cable customers subscribe to non-basic services, coupled with Dr. Beyer's reports and Plaintiffs' and Comcast's arbitration deposition witnesses' estimates of the total number of Comcast cable subscribers in the Philadelphia (and Chicago) areas, further demonstrates that the numerosity requirement is amply satisfied.

(6) the measure of damages by which Comcast's conduct injured Plaintiffs and class members; and (7) whether Plaintiffs and members of the Class(es) are entitled to injunctive relief. *See* Compl. ¶¶ 36, 74. Plaintiffs and all members of the Class(es) must establish each element of Plaintiffs' § 1 (restraint of trade) and § 2 (monopolization and attempted monopolization) claims. For example, as to their § 2 claims, Plaintiffs and class members must establish the proper definition of the relevant product and geographic markets; whether Comcast has monopoly power in the relevant market(s); whether Comcast acquired monopoly power through anticompetitive conduct; and whether Comcast's anticompetitive conduct caused Plaintiffs and members of the class(es) to pay artificially inflated prices. *See Meijer, Inc. v. 3M*, No. 04-5471, 2006 WL 2382718 at *6 (E.D. Pa. Aug. 14, 2006) (Padova, J.) (finding commonality element satisfied based on existence of common questions of law and fact centered on need by plaintiff and all class members to establish elements of § 2 monopolization claim).

Courts have held that similar common questions implicated in antitrust actions satisfy the commonality requirement. *See, e.g., In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 206 (E.D. Pa. 2001) (listing numerous questions of law and fact common to all members of each subclass and noting that "[c]onsidering all of plaintiffs' allegations, the Court concludes that there are significant questions of law and fact common to both classes"), *aff'd*, 305 F.3d 145 (3d Cir. 2002), *cert. denied*, 538 U.S. 977 (2003).

Similarly, in *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79 (E.D. Pa. 2003), plaintiffs alleged that defendants' agreement to allocate the international market for microcrystalline cellulose products violated §§ 1 and 2 of the Sherman Act. The court determined that the commonality requirement was satisfied based on several common questions relating to defendants' potential liability. Specifically, "[w]hether [defendants] entered into an

illegal agreement to divide the MCC market is a factual question common to all class members. . . ." *Id.* at 84. By the same token, Plaintiffs' allegations here that Comcast engaged in unlawful market allocations through "swap" agreements raise factual and legal questions as to Comcast's liability under the antitrust laws that are common to all class members. Further, Plaintiffs allege that Comcast's violations of §§ 1 and 2 of the Sherman Act have caused Plaintiffs and class members to pay higher cable prices than they would have paid absent Comcast's antitrust violations. These allegations raise fact questions common to Plaintiffs and class members. *See, e.g., In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at *3 (finding common questions in antitrust action, including "whether the prices paid by plaintiffs and the proposed class members were higher than they would have been absent the alleged conspiracy"); *In re Chlorine and Caustic Soda Antitrust Litig.*, 116 F.R.D. 622, 626 (E.D. Pa. 1987) (same).

A common nucleus of operative facts or the existence of common questions of law satisfy commonality. *In re Mellon Bank Shareholders Litig.*, 120 F.R.D. 35, 37 (W.D. Pa. 1988). Commonality is typically found where defendants have engaged in a similar course of conduct with respect to members of the class. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. 450, 512 (D.N.J. 1997), *aff'd* , 148 F.3d 283, 312-14 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999). Plaintiffs' Complaint sets forth a common course of conduct by which Comcast's alleged antitrust violations, including entering into market allocating "swap" agreements and acquiring competitor cable companies in violation of § 1 and monopolizing or attempting to monopolize the Philadelphia (and Chicago) markets in violation of § 2, have injured all class members by compelling them to pay higher cable prices.

Because Plaintiffs have identified numerous questions of fact and law common to all members of the Class(es), Rule 23(a)(2)'s commonality requirement is fully satisfied.

3. Plaintiffs' Claims Are Typical of the Claims of the Class.

Rule 23(a)(3) requires that the claims of the representative plaintiffs must be typical of the claims of the class. As this Court has observed, "[t]he named plaintiffs' claims need only be sufficiently similar to those of the class such that 'the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented.'" *Meijer, Inc. v. 3M*, 2006 WL 2382718, at *6 (E.D. Pa. 2006) (Padova, J.) (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 631 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). As the Third Circuit has stated, "typicality entails an inquiry whether 'the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.'" *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988) (citations and internal quotations omitted). "Commentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) (citing 1 Newberg and Conte, Newberg on Class Actions § 3.13).

Typicality does not require that Plaintiffs' claims be identical. *In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at *4. "'[A] plaintiff's claim is typical if it is arises from the same event or course of conduct that gives rise to the claims of other Class members and is based on the same legal theory.'" *T.B. v. School Dist. of Phila.*, Civ. A. No. 97-5453, 1997 WL 786448, at *4 (E.D. Pa. 1997) (quoting *Paskel v. Heckler*, 99 F.R.D. 80, 83 (E.D. Pa. 1983)). Thus, in antitrust cases involving allegations that the defendant engaged in a common scheme applicable to all members of the class, the typicality requirement is met. *In re Warfarin Sodium Antitrust Litig.*, 394 F.3d 516, 531 (3d Cir. 2004) (finding typicality where "the claims of the

representative plaintiffs arise from the same alleged wrongful conduct on the part of DuPont" and "[t]he claims also arise from the same general legal theories"); *In re Linerboard Antitrust Litig.*, 203 F.R.D. at 207 ("[I]n instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members.") (citation omitted).

Plaintiffs' antitrust claims are based on the same legal theories as those of all class members. For example, Plaintiffs allege that Comcast's imposition of horizontal market restraints pursuant to "swap" agreements entered into with competitors violates § 1 of the Sherman Act, including pursuant to the *per se* violation doctrine. Compl. ¶¶ 10, 71, 73. *See Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 20 S.Ct. 96 (1899); *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847 (1967); *United States v. Topco Assocs.*, 405 U.S. 596, 92 S.Ct. 1126 (1972); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 111 S.Ct. 401 (1990); *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79, 86 (E.D. Pa. 2003). Compl. ¶ 74. Plaintiffs further allege that Defendants' acquisitions of competitor cable companies and subscribers in the Philadelphia (and Chicago) markets constitute restraints of trade in further violation of § 1. Compl. ¶¶ 51-53, 74; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("it has long been clear that a pattern of acquisitions may itself create a combination illegal under § 1 . . ."); *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 658 (1964) (holding merger of two banks constituted unreasonable restraint of trade in violation of § 1.). Plaintiffs' § 1 claims are based on the same legal theories as those of the class members. Similarly, in order to prevail on their § 2 monopolization claim, Plaintiffs must establish Comcast's possession of monopoly power in the relevant market and its willful acquisition or maintenance of that power as distinguished from growth or development as a

consequence of a superior product, business acumen, or historic accident. *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S.Ct. 1698 (1966); *LePage's, Inc. v. 3M*, 324 F.3d 141, 146 (3d Cir. 2003). To prevail on their attempted monopolization claim, Plaintiffs must establish "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884 (1993). These are the same elements and legal theories upon which class members' claims are based.

Plaintiffs' antitrust claims arise from the same course of conduct that underlies the class claims: Comcast's unlawful market-allocating "swap" agreements, Defendants' acquisitions of competitors, and Defendants' monopolization and attempted monopolization of the relevant markets. Additionally, Plaintiffs and the members of each class alike suffered antitrust injury because of Comcast's antitrust violations in that Plaintiffs, and all class members, were compelled to pay supra-competitive cable prices as a result of Comcast's unlawful conduct. In another antitrust overcharge case, this Court recently found typicality where the plaintiff "and all Settlement Class Members allegedly have been injured by the same anti-competitive conduct of 3M, and purportedly suffered overcharges as a result." *Meijer, Inc. v. 3M*, 2006 WL 2382718, at *6 (E.D Pa. 2006) (Padova, J.). Plaintiffs have the same interest in pursuing and prevailing on the same legal claims, based on the same theories, and for the same damages (overcharges) as all members of the classes.

Because Plaintiffs' claims arise out of the same events, course of conduct and legal theories that give rise to the claims of all class members and are typical of the claims of absent class members, the typicality requirement of Rule 23(a)(3) is satisfied.

4. Plaintiffs and Their Counsel Will Adequately Represent the Class.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The adequacy of representation inquiry is twofold. "'Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.'" *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992); *Bradburn Parent/Teacher Store*, 2004 WL 1842987, at *3.

Plaintiffs are represented by experienced counsel with expertise in complex class actions and antitrust litigation. Plaintiffs' proposed co-lead counsel have extensive experience in class actions generally and have served in leadership roles in antitrust and other numerous complex class action lawsuits throughout the country. Plaintiffs' proposed co-lead counsel's resumes are attached to the Declaration of Joshua H. Grabar, Esq. in support of Plaintiffs' Motion for Entry of Practice and Procedure Order No. 1.[11] Plaintiffs' counsel have done extensive work in identifying, investigating and developing the claims of Plaintiffs and the Class(es). Counsel have demonstrated their knowledge of applicable law in the course of the proceedings to date, including the drafting of Plaintiffs' complaints, including the recently filed Third Amended Class Action Complaint; litigating Comcast's motion to compel arbitration in this Court and on appeal to the Third Circuit (and in the related Boston cable market cases before the District of Massachusetts and the First Circuit) and successfully keeping Plaintiffs' claims in court as the only forum in which Plaintiffs may vindicate their antitrust rights; and briefing, arguing and defeating Comcast's motion to dismiss. Plaintiffs' counsel have committed and will continue to

[11] On August 7, 2006, the Court denied without prejudice Plaintiffs' motion, indicating that the Court would consider the motion at the time of class certification (Docket No. 150). Plaintiffs renew their Motion for Entry of Practice and Procedure Order No. 1 and are filing an accompanying memorandum in support of that motion, as to which Comcast does not take a position.

commit the resources necessary to representing the Class(es) and have demonstrated that they possess the ability and willingness to vigorously prosecute this action.

Moreover, there are no actual or potential conflicts between Plaintiffs and members of the class. Plaintiffs Behrend and Glaberson are each subscribers of video programming cable services, other than solely basic cable services, from Comcast. Compl. ¶¶ 13, 14. Each Plaintiff and each class member has an interest in establishing Comcast's liability. As this Court recently determined, "[Plaintiff] Meijer is capable of providing adequate representation of the absent Class Members" and "Meijer, as a purchaser . . ., has the same interest in this antitrust claim as the absent Class Members do: namely, to challenge and obtain damages for 3M's anti-competitive conduct." *Meijer, Inc. v.* 3M, 2006 WL 2382718, at *7 (E.D. Pa. 2006) (Padova, J.). In pursuing this litigation, each representative Plaintiff will necessarily advance the common interests of all members of the Class(es). Rule 23(a)(4)'s requirement of adequate representation is fully satisfied.

C. This Action Fulfills All of the Requirements of Rule 23(b)(3).

Once Rule 23(a) is satisfied, Rule 23(b)(3) permits class certification if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods." The Supreme Court has stated that "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws. . . ." *Amchem Prods.*, 521 U.S. at 625. As this Court has determined, "[o]n a motion for class certification, the issue confronting the court is whether the proof necessary to demonstrate impact as to each class member is particular to that class member . . . or whether the necessary proof of impact would be common to all class members and sufficiently generalized that class treatment of their claims would be feasible." *Bradburn Parent/Teacher Store*, 2004 WL 1842987, at *12 (citation omitted). *See also In re*

Linerboard Antitrust Litig., 203 F.R.D. at 220 (predominance requirement met where "[p]laintiffs have shown that they plan to prove common impact by introducing generalized evidence that will not vary among individual class members.")

Predominance analysis centers on the defendant's conduct and liability. In *In re: Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004), the Third Circuit determined that plaintiffs' allegations that defendant violated federal and state consumer fraud and antitrust law raised "several questions of law and fact common to the entire class . . . which predominate over any issues related to individual class members" and stated, "[i]n other words, while liability depends on the conduct of DuPont, and whether it conducted a nationwide campaign of misrepresentation and deception, it does not depend on the conduct of individual class members." (citation omitted.) *See also In re Linerboard Antitrust Litig.*, 203 F.R.D. at 214 ("'The courts have repeatedly focused on the liability issues, in contrast to damage questions, and, if they found issues were common to the class, have held that Rule 23(b)(3) was satisfied.'") (quoting 4 Newberg and Conte, Newberg on Class Actions, § 18-26); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977).

In order to prevail on their antitrust claims, Plaintiffs must generally demonstrate: (1) a violation of the antitrust laws; (2) antitrust injury resulting from the violation; and (3) the amount of the damages suffered. *Bradburn Parent/Teacher Store*, 2004 WL 1842987, at *12. In this case, as in the vast majority of antitrust cases, common issues clearly predominate and each element of Plaintiffs' antitrust claims present common questions subject to common proof.

(1) Comcast's Liability Presents Common Questions.

Plaintiffs' allegations that Comcast entered into unlawful market allocating "swap" agreements with competitors and unlawfully acquired competitors in violation of § 1 of the Sherman Act present common questions that are susceptible to generalized proof. Plaintiffs will

prove their § 1 claim by relying upon the agreements and transactions entered into and implemented by Comcast and identified in the Complaint and upon relevant facts, documents, understandings and transactions developed in the course of discovery. Plaintiffs' § 1 claims will focus on Comcast's conduct that affects all class members and is subject to common proof. As this Court noted in *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. at 86, "[w]hether [defendants] conspired to allocate the MCC market, and if so, whether this constitutes a *per se* violation, are questions that would be common to all putative class members." Similarly, Plaintiffs' claims that Defendants' conduct, including entering into market allocating "swap" agreements, acquiring competitor cable companies and engaging in the additional anticompetitive conduct alleged in Plaintiffs' Complaint, violates § 2 of the Sherman Act focuses on Comcast's conduct and will involve proof common to all class members. As in other antitrust cases, this is a case where "[t]he common questions and their predominance over individual claims are manifested in the fact that if plaintiffs and every class member were each to bring an individual action, they would still be required to prove the existence of the alleged activities of defendants in order to prove liability." *Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc.*, 120 F.R.D. 642, 647 (E.D. Pa. 1988); *see also In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at *4 (finding predominance requirement satisfied where plaintiffs' claims involved "the same elements the other class members would have to prove if they brought individual actions").

In recently certifying a settlement class in an antitrust action in which plaintiffs alleged that defendant's conduct compelled them to pay overcharges, this Court reasoned:

> The Court finds that common questions of law and fact predominate in this case. The substance of this antitrust claim derives from the anti-competitive conduct of 3M and 'does not depend on the conduct of individual class members.' The success of the claim hinges on matters of common, class-wide proof; the evidence that proves a violation as to one Class Member proves it as to all Class Members.

Meijer, Inc. v. 3M, No. 04-5871, 2006 WL 2382718, at *8 (E.D. Pa. Aug. 14, 2006) (citations omitted.).

An additional factor supporting a finding of predominance is that Plaintiffs here allege economic injury as a result of Comcast's anticompetitive conduct. As the Third Circuit has pointed out, "the fact that plaintiffs allege purely an economic injury as a result of DuPont's conduct (i.e., overpayment for Warfarin Sodium) and not any physical injury, further supports a finding of commonality and predominance because there are little or no individual proof problems in this case otherwise commonly associated with physical injury claims." *In re Warfarin*, 391 F.3d at 529 (citing *Prudential*, 148 F.3d at 315). This Court has recently cited with approval the Third Circuit's reasoning in *In re Warfarin* in approving a settlement class in an antitrust case involving, as does this one, alleged overcharges. *Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *8 (E.D. Pa. Aug. 14, 2006) (Padova, J.).

Finally, Plaintiffs' antitrust claims involve allegations that Comcast engaged in a course of conduct affecting all class members. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. 450, 511 (D.N.J. 1997) ("[C]ourts frequently find allegations that the defendant engaged in a course of conduct to satisfy the commonality and predominance requirements"), *aff'd*, 148 F.3d 283 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999). Whether Comcast unlawfully allocated markets through "swap" agreements with competitors, unlawfully acquired competitor cable companies, and engaged in unlawful monopolization and attempted monopolization present predominant questions of fact and law common to the Plaintiffs' and each individual class member's antitrust claims. Thus, Comcast's liability under the antitrust laws presents questions common to all class members, which predominate over any questions affecting only individual members.

(2) The Fact of Injury May Be Demonstrated By Class-Wide Proof.

In this case, the existence of the fact of injury presents an issue that is common to the Class(es). The Third Circuit has held that "when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof demonstrates some damage to each individual." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

Impact may be proven on a class-wide basis where a defendant's anticompetitive conduct artificially raises the price of a product:

> If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.

Id. at 455. Common proof of impact may be demonstrated in this case as it is in other antitrust cases, including market allocation cases:

> [B]asic economic theory predicts that the artificial absence of competition leads to less competitive prices. A firm creates barriers to market entry, such as exclusion of a competitor from a territory, in order to secure market power and charge prices above the prevailing market price under competitive conditions. This is one of the primary reasons that market allocation, like price-fixing, is considered a *per se* Sherman Act violation.

In re Microcrystalline Cellulose Antitrust Litig., 218 F.R.D. at 90. This Court has further recognized that the same line of reasoning applies in § 2 monopoly cases, in which it makes sense to conclude that price increases by a monopolist result in class-wide injury:

> In *LePage's II*, the Court wrote: ["]Once a monopolist achieves its goal by excluding potential competitors, it can then increase the price of its product to the point at which it will maximize its profit. This price is invariably higher than the price determined in a competitive market.["] *LePage's II*, 324 F.3d at 164. Under this line of reasoning, when a monopolist unlawfully maintains its monopoly power in violation of Section 2 of the Sherman Act, as is asserted in

> this case, it is logical, at least as a general rule, to presume that all class members have suffered injury as a result of the conduct, in the form of supra-competitive prices.

Bradburn Parent/Teacher Store, 2004 WL 1842987, at *13 (footnote omitted).

Plaintiffs allege that Comcast's conduct in violation of the Sherman Act caused Plaintiffs and class members to pay higher cable prices than they would have paid absent Comcast's antitrust violations. Common proof of impact in this case can be made by showing the effect of Comcast's antitrust violations upon all class members in the form of higher cable prices. The Updated Declaration of John C. Beyer, Ph.D., an expert in economics, demonstrates that common impact can be shown on a class-wide basis. Dr. Beyer concludes that Comcast's antitrust violations would have impacted all class members through the payment of higher cable prices than would have otherwise prevailed in the marketplace. Updated Beyer Decl. ¶ 7. Dr. Beyer discusses in detail the economic bases for this conclusion of common impact, including the facts that the product is essentially the same for all class members; Comcast has dominant market power in the Philadelphia (and Chicago) markets; class members are impacted by Comcast's cable pricing practices; Comcast's cable price increases have been essentially the same across Comcast's Philadelphia (and Chicago) clusters; and Comcast's subscribers would all benefit from effective competition, in the form of lower cable prices. *Id.* ¶¶ 7, 22-36. Dr. Beyer's expert analysis demonstrates that proof of impact may be shown on a class-wide basis in this case: "Given all these facts and considerations, it is clear that Comcast subscribers in the Philadelphia and Chicago clusters are paying higher prices for cable services than they would have paid absent Comcast's alleged wrongdoing. Therefore, all members of the proposed Classes would have been adversely affected by Comcast's allegedly unlawful conduct." *Id.* ¶ 37.

(3) Damages May Be Shown By Class-Wide Proof.

Although the precise amount of damages suffered by each class member as a result of Comcast's antitrust violations may raise individual issues, proof of damages can be accomplished on a class-wide basis in this case. The Third Circuit has made clear that the predominance requirement of Rule 23(b)(3) is satisfied with respect to proof of injury, even though individualized inquiry may be needed on the quantum of damages each class member suffered. *Bogosian*, 561 F.2d at 456. This Court too, has recognized that "it is well settled that, if impact can be established by the use of common proof, the fact that individualized determinations of the amount of the damages that each individual class member suffered will be needed does not, in itself, preclude class certification." *Bradburn Parent/Teacher Store*, 2004 WL 1842987, at *12; *see also In re Linerboard Antitrust Litig.*, 203 F.R.D. at 220 (same).

Dr. Beyer concludes "that there are accepted methodologies available, which are common to all members of the proposed Classes, to quantify damages related to the defendants' antitrust violations, and that damages can be feasibly calculated on a class-wide basis." Updated Beyer Decl. ¶ 8. Dr. Beyer sets forth two "yardstick" methods, based on well accepted economic theories and applicable class-wide, of determining damages in this case: "(1) the supra-competitive overcharge; and/or (2) the supra-competitive rate of price increase for cable TV service in Comcast's Philadelphia and Chicago clusters since 1999." *Id.* The first yardstick benchmark involves calculating the "supra-competitive overcharge that Comcast's subscribers have paid, and continue to pay, because Comcast's cluster systems do not have effective competition from an existing or potential competitor, including an overbuilder or another large cable MSO that has exited the cluster area." *Id.* ¶ 40. For example, Dr. Beyer points to various government and academic studies that have estimated that cable prices are 15%-20% lower in cable systems where the incumbent cable operator faces effective overbuild competition. *Id.* Dr.

Beyer finds that such studies, or a similar study using a combination of publicly available data and data that can be provided by Comcast, can be used to calculate the supra-competitive prices that Comcast has imposed on its Philadelphia and Chicago area subscribers. "The percentage overcharge can then be applied to Comcast's total revenue from Class members in each cluster to estimate total class-wide damages." *Id.* As an illustrative example, Dr. Beyer notes that "if the appropriate overcharge benchmark is determined to be 15 percent, estimated class-wide damages would be 15 percent of Comcast's total cable service revenue from Class members during the Class or damage period." *Id.*

The second yardstick measure of damages applicable class-wide involves comparing "the difference between the rate of price increases during the Class period in Comcast's cluster markets with the rate of price increases during the same period by other cable systems that do face effective competition." *Id.* ¶ 41. For example, Dr. Beyer determined that since 1999, the average annual rate of increase in cable prices in Comcast's Philadelphia cluster was 10.8%. *Id.* ¶ 41. This rate of increase is considerably higher than the 5.8% average annual rate of increase reported by the FCC. *Id.* ¶ 41. Under this second yardstick benchmark, "[t]he 5.8 percent annual rate of price increase, (or a similar measure derived from analysis of cable price data produced during discovery by defendant Comcast, and from publicly available data and information), can be applied to the cable prices in Comcast's cluster systems at the start of the Class period, to estimate the cable price changes that would have occurred absent the alleged anticompetitive increases. The percentage difference between the estimated and actual cable prices can then be calculated and applied to the revenue received from Comcast subscribers in each cluster to determine damages attributable to the overcharge resulting from more, supra-competitive price increases." *Id.* ¶ 41. Dr. Beyer further explains that both yardstick methods for calculating

damages in this case (the supra-competitive price level and the supra-competitive annual rate of price increase) can also be applied to estimate the damages of individual class members. *Id.* ¶ 42.

Dr. Beyer demonstrates that a class-wide formula for damages can be employed based on the facts of this case. The "yardstick" methodology proposed by Dr. Beyer for estimating damages on a class-wide basis is well recognized in economics literature (*Id.* ¶ 39) and has been used in government and academic economic studies of the cable industry. *Id.* The "yardstick" approach has also been recognized by courts as presenting generally acceptable methodologies for estimating damages in antitrust cases. *See, e.g., In re Linerboard Antitrust Litig.*, 203 F.R.D. at 218 ("Plaintiff's expert, Dr. Beyer, has presented two possible means of assessing impact on a classwide basis – multiple regression analysis, and the benchmark or yard stick approach, . . . which are methods of showing 'antitrust impact by generalized proof.'") (citations omitted); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. at 486-87 (discussing Dr. Beyer's expert testimony and finding that "plaintiffs have presented a viable method for proving class-wide impact in both proposed subclasses").

Plaintiffs have demonstrated that issues involving Comcast's conduct allegedly violative of the Sherman Act, the impact of Comcast's conduct on Class members, and the amount of damages suffered by Class members are susceptible to proof on a common, class-wide basis. Rule 23(b)(3)'s predominance requirement is fully satisfied.

D. A Class Action is Superior to Other Available Methods for the Fair and Efficient Adjudication of the Controversy.

Rule 23(b)(3)'s superiority requirement is clearly met. Under the facts of this case, a class action offers not only the superior method but, in fact, the only practical means Plaintiffs and class members have to litigate their antitrust claims against Comcast. The First Circuit has

recognized this bottom line reality in parallel cases that are substantively identical for class certification purposes to this action and are brought by plaintiffs, who are represented by Plaintiffs' counsel here and who allege that Comcast violated §§ 1 and 2 of the Sherman Act in Comcast's Boston cluster:

> Here, the putative class would consist of Comcast's Boston area subscribers. According to the factual information contained in the unopposed expert declarations Plaintiffs submitted to the district court below, each putative class member's estimated recovery – assuming the damage award was trebled pursuant to the applicable antitrust statute – would range from a few hundred dollars to perhaps a few thousand dollars. By contrast, the expert fees alone are estimated to be in the hundreds of thousands of dollars; and attorney's fees could reach into the millions of dollars. To say that each potential class member is unlikely to have or make available the up-front costs needed to prosecute this costly antitrust suit is a large understatement. The class mechanism ban – "particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements" – forces the putative class member "to assume financial burdens so prohibitive as to deter the bringing of claims . . . . And these costs . . . will exceed the value of the recovery she is seeking." Myrian Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L.Rev. 373, 407 (2005).

Kristian v. Comcast Corp., 446 F.3d 25, 54-55 (1st Cir. 2006). Later in its extensive opinion, the First Circuit noted that "Plaintiffs have provided uncontested and unopposed expert affidavits demonstrating that without some form of class mechanism . . . the consumer antitrust plaintiffs will not sue at all." *Id.* at 58. Striking down the class prohibition contained in Comcast's arbitration clause, the First Circuit underscored the critical importance of the class action mechanism:

> If the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law. Plaintiffs will be unable to vindicate their statutory rights. Finally, the social goals of federal and state antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield.

Id. at 61 (footnote omitted).

This Court reached the same logical conclusion in *Bradburn Parent/Teacher Store*, 2004 WL 1842987, at *18, reasoning that "bringing this suit as a class action 'provides an efficient alternative to individual claims, . . . because individual Class members are unlikely to bring individual actions given the likelihood that their litigation expenses would exceed any potential recovery.'" (citation omitted.) Courts consistently find the class action device to be superior in circumstances where plaintiffs' small claims will otherwise be foreclosed by the non-alternative of individual actions.[12] As the Seventh Circuit has made quite clear, the only realistic option is either proceeding on a class basis or not proceeding at all:

> It would hardly be an improvement to have in lieu of this single class action 17,000,000 suits each seeking damages of $15.00 to $30.00 . . . . The *realistic* alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative – no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied – to no litigation at all.

Carnegie v. Household Int'l., Inc., 376 F.3d 656, 661 (7th Cir. 2004).

By certifying the class, this Court will allow Plaintiffs and Class members to proceed with their modest individual claims and will thereby promote an essential purpose of the class action mechanism. *See Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965 (1985) (noting that "[c]lass actions may also permit the plaintiffs to pool claims which would be

[12] *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig*, 148 F.3d 283, 316 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (upholding district court's conclusion that a class action presented the "only rational avenue of redress for many class members."); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. at 155 ("Class members who, because of the tremendous costs of discovery and trial that are present in any alleged conspiracy among large business corporations, might not otherwise be able to pursue their claims, are able to share the costs among themselves and thereby have their claims adjudicated in a single lawsuit."); *In re Flat Glass Litig.*, 191 F.R.D. at 489 ("Given the assertion that some plaintiffs have relatively modest claims, it is apparent that a class action is the only rational avenue of redress for these individuals."); *In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at *9 ("[R]efusing to certify the proposed class might preclude recovery for many putative class members who lack the resources to pursue individual claims, or whose financial injuries are insufficiently grave to make pursuit of individual claims worthwhile."); *In re Linerboard Antitrust Litig.*, 203 F.R.D. at 223 ("[T]he Court concludes that a class action is the fairest way to adjudicate the questions raised in this case, as the cost of maintaining individual actions in this sort of antitrust case would be prohibitive." (citation omitted)).

uneconomical to litigate individually" and that "most of the plaintiffs would have no realistic day in court if a class action were not available").

Besides constituting the only practical means for Plaintiffs and class members to proceed with their antitrust claims, a class action is clearly superior in light of the size of the Class(es). Judicial economy will be served by certifying the Class(es). *In re Flat Glass Antitrust Litig.*, 191 F.R.D. at 489 ("A class action will serve judicial economy, as the proposed subclasses are alleged to have members numbering in the hundreds and possibly thousands. . . ."); *In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at * 9 ("Individual actions would be needlessly duplicative, expensive, and time consuming, especially in light of the predominance of common questions." (citation omitted)).

Additionally, the four nonexclusive factors[13] identified in Rule 23(b)(3) weigh heavily in favor of a superiority determination in this case. Other than the consolidated putative class actions in *Kristian* and *Rogers* pending before the District Court for the District of Massachusetts, Plaintiffs' counsel are unaware of other antitrust lawsuits brought by cable subscribers alleging similar claims against Comcast.[14] The apparent absence of other similar pending suits by subscribers suggests that many cable subscribers are unable to pursue such claims and may lack a compelling interest in controlling the prosecution of their individual claims. *See In re Warfarin*, 391 F.3d at 534 ("[T]here were a relatively small number of

[13] These non-exclusive factors are: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

[14] Non-class cases have recently been brought against Comcast by competitors raising various antitrust claims. See *America Channel, LLC v. Time Warner Cable Inc., Time Warner NY Cable LLC, and Comcast Corp.*, No. 06-CV-2175 (D.Minn., filed May 30, 2006) (antitrust action by independent cable television channel alleging refusal to deal with intent to obtain a monopoly and asserting §§ 1 and 2 Sherman Act claims; stayed after complaint filed); *Southern Entertainment Television, Inc. v. Comcast Corp.*, No. 06-CV-1593 (N.D. Ga., filed July 6, 2006) (antitrust action by music television programming service alleging refusal to deal with plaintiff and use of defendant's monopoly power in violation of § 1 of the Sherman Act and § 7 of the Clayton Act).

individual lawsuits pending against [defendant] in this matter, which indicated . . . that there was a lack of interest in individual prosecution of claims." *See also In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d at 316 (noting that the district court "reasoned the relatively small number of individual suits pending against Prudential indicated that individual policyholders lacked a compelling interest to control the prosecution of their own claims. . . ."). Litigating this case in this forum is both desirable and practical. Comcast is headquartered in this district. *See Prudential*, 148 F.3d at 316 (finding it was appropriate to litigate the case in New Jersey, defendant's principal place of business); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. at 489 (finding "that it is appropriate to litigate the case here in Pennsylvania," the principal place of business for several named plaintiffs and a large flat glass producer defendant).

Moreover, this case presents no significant manageability difficulties. This is especially true in cases, such as this, where common questions subject to common proof predominate. *See In re Linerboard Antitrust Litig.*, 203 F.R.D. at 223 ("[T]he class action will not be inefficient or unmanageable. Each class member's claims center on common questions of law and fact – namely whether or not the defendants committed the acts alleged – which require the same sort of proof.") (citation omitted). A class action is also beneficial to Comcast in that it may defend against the claims of Plaintiffs and members of the Class(es) in a single forum. *See In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at *9; *In re Flat Glass Antitrust Litig,*, 191 F.R.D. at 489; *In re Fine Paper Antitrust Litig.*, 82 F.R.D. at 155. Finally, the public interest favors class certification:

> Furthermore, the public at large will also derive benefits from class certification. [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. This deterrent cannot effectively function if potential violators conclude that large numbers of potential claimants

> will not be afforded an efficient and cost-effective method of vindicating their claims.

In re Fine Paper Antitrust Litig., 82 F.R.D. at 155 (quotations omitted).

There can be no serious question that under the facts of this case, a class action presents not only in every realistic sense the superior, but the only practical alternative for Plaintiffs and members of the Class(es) to proceed with their antitrust claims.

CONCLUSION

Rule 23 was designed for this case. Plaintiffs respectfully request that the Court grant their motion for class certification and enter an Order certifying the proposed Philadelphia Class, appointing Plaintiffs Caroline Behrend and Stanford Glaberson as representatives of the Philadelphia Class, and appointing Heins Mills & Olson, P.L.C. and Susman Godfrey L.L.P. as Co-Lead Counsel for Plaintiffs and the Philadelphia Class and for the putative Chicago Class.

Dated: September 21, 2006.

Respectfully submitted,

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