

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

CAROLINE BEHREND, et al. : CIVIL ACTION
:
v. :
:
COMCAST CORPORATION, et al. : NO. 03-6604

ORDER

AND NOW, this 30th day of March, 2009, upon consideration of the Defendants’ Motion to Decertify Classes (Docket Entry No. 317), all responses thereto, and arguments presented at the Court’s status conference of February 24, 2009, **IT IS HEREBY ORDERED** that:

1. The Motion to Decertify Classes is treated as a Motion for Reconsideration of the Court’s Order of May 2, 2007 (granting Plaintiffs’ Motion to Certify Philadelphia Class) and the Court’s Order of October 10, 2007 (granting Plaintiffs’ Motion to Certify Chicago Class).
2. The Motion, as construed, is **GRANTED IN PART AND DENIED IN PART** as follows:
 - a. The Motion is **GRANTED** as to that portion of the Court’s May 2, 2007 Memorandum Opinion and Order finding, pursuant to Fed. R. Civ. P. 23(b), that Plaintiffs had demonstrated that common questions predominate.¹

¹On December 30, 2008, the United States Court of Appeals for the Third Circuit issued an opinion in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), determining that the “rigorous analysis” necessary when a district court decides whether to certify a Rule 23(b) class “may include a preliminary inquiry into the merits,” *id.* at 317, that a district court “errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [Rule 23] requirements,” *id.* at 320, and that “[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence.” *Id.* In addition, the Court of Appeals made clear that “[r]esolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court – no matter whether a dispute might appear to implicate the

- b. The Motion is **DENIED** as to all other portions of the Court's May 2, 2007 Memorandum Opinion and Order.
- c. The Motion is **DENIED WITHOUT PREJUDICE** as to the Court's Order of October 10, 2007. Defendants are **GRANTED** leave to renew the Motion in this regard if and when the Court's Order of November 16, 2007, staying the Chicago Class proceedings, is modified.
3. The Court's Order of May 2, 2007 is **VACATED**.
4. Plaintiffs are **GRANTED** leave to file an Amended Motion for Certification of the Philadelphia Class, as it pertains to the Fed. R. Civ. P. 23(b) issue of the predominance of the common questions of (1) antitrust impact and (2) methodology of damages, along with declarations from all witnesses Plaintiffs intend to rely upon in support thereof, by April 15, 2009.²
5. Defendants shall file their opposition and opposing declarations by May 6, 2009.
6. Any additional expert depositions shall be held between May 13, 2009 and May 27, 2009.

'credibility' of one or more experts" *Id.* at 324.

In our decision certifying the Philadelphia Class – issued before the Peroxide decision – we did not make factual findings under the preponderance of the evidence standard or resolve the experts' disputed opinions. We merely found that the Class's expert's report was sufficient to establish that common issues predominated. Because we did not require the Class to show the factual basis of its expert's opinions by a preponderance of the evidence and did not make specific credibility determinations, our finding that the Class satisfied the requirement of Rule 23(b) must be vacated.

²In its letter to the Court dated March 25, 2009, Comcast indicates its willingness to stipulate that the only issues that need to be resolved through further class action motions practice are the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages, and that it will not seek to revisit any other class certification issue. Accordingly, the Class's Amended Motion for Certification, and the parties' declarations, need only address these discrete issues.

7. An evidentiary hearing on the Amended Motion shall take place on June 10 - 11, 2009 at 10:00 a.m. in Courtroom 17B.
8. The parties shall submit a hearing memo and proposed findings of fact and conclusions of law pertinent to the Rule 23(b) issue by June 3, 2009.

BY THE COURT:

s/John R. Padova
John R. Padova, J.