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

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

MEMORANDUM

Padova, J. **December 19, 2006**

Plaintiffs, cable television services customers of Defendants in the Philadelphia and Chicago regions, have brought this antitrust action against Defendants for damages arising out of Defendants' alleged imposition of unlawful restraints on trade in the relevant cable television markets and unlawful monopolization and attempted monopolization of those markets. Presently before the Court is Defendants' "Motion for Partial Reconsideration, or, in the Alternative, for Certification for Immediate Interlocutory Appeal." (Docket No. 156.)

I. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs, six non-basic cable television programming services customers of Defendants in the Philadelphia, Pennsylvania and Chicago, Illinois regions, have brought this antitrust suit on behalf of themselves and all those similarly situated, pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for violations of Sections 1 (Count I) and 2 (Counts II and III) of the Sherman Act, 15 U.S.C. §§ 1, 2. The Third Amended Complaint (the "Complaint") alleges that Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") acquired cable systems and cable subscribers from their competitors in the

Philadelphia and Chicago cable markets until the number of competing cable providers in those markets was substantially reduced. (Complaint ¶¶ 3, 49, 51-53.) Comcast then entered into agreements with those companies to avoid competition by allocating the nation's regional cable markets amongst themselves through swaps of their respective cable assets, including subscribers. (Id. ¶ 4.) (The challenged acquisitions and swap agreements are collectively "the Cable System Transactions.") The alleged result of the swap agreements was that Comcast willfully obtained and maintained monopoly power in the relevant geographic markets, defined as Comcast's cable franchises located in Philadelphia and Chicago and geographically contiguous areas and areas in close geographic proximity to Philadelphia and Chicago in designated counties (hereinafter the Philadelphia and Chicago "clusters"). (Id. ¶¶ 6, 31.) The Complaint also contains allegations that Comcast further violated § 2 by engaging in conduct excluding and preventing competition, including competition from an overbuilder, RCN Telecom Services, Inc. ("RCN") (Complaint ¶ 86-97.)[1]

On June 12, 2006, Comcast filed a Motion to Dismiss the Third Amended Complaint, asking this Court to dismiss Plaintiffs' claims relating to the Cable System Transactions on the following grounds: Plaintiffs lacked antitrust standing to challenge the Cable System Transactions; Plaintiffs failed to allege a per se violation under § 1 of the Sherman Act; Plaintiffs failed to state a rule of reason claim under § 1 because they failed to define the relevant market and to plead facts showing that the Cable System Transactions produced any anticompetitive effect; Plaintiffs failed to plead the relevant geographic market in their § 2 claims; the Cable System Transactions were not the type

[1] "Overbuilder" is the term given for cable companies engaged in the business of constructing cable infrastructure for the purpose of competing directly against other cable providers in the same franchise zone.

of predatory or anticompetitive conduct required to state a § 2 claim; Plaintiffs' claims as they relate to three particular transactions that occurred in 1998 and 1999 are time-barred; Plaintiffs lacked antitrust standing to challenge Comcast's alleged conduct toward RCN; Plaintiffs failed to allege a relevant geographic market in their claim based on Comcast's alleged conduct toward RCN; and the RCN-related conduct cannot support claims for monopolization or attempted monopolization. On August 31, 2006, we denied Defendants' Motion to Dismiss in its entirety (the "Decision").

Comcast filed a Motion for Partial Reconsideration on September 15, 2006. (Docket No. 156.) Comcast asks that we reconsider our ruling that Plaintiffs have antitrust standing to assert claims based on the Cable System Transactions, and our decision not to dismiss Count I of the Complaint for failure to state either a per se or rule of reason violation of § 1. Alternatively, Comcast seeks certification for an immediate interlocutory appeal of those rulings. Plaintiffs filed their response on September 22, 2006. (Docket No. 163.) Comcast filed a Reply Memorandum in Further Support (Docket No. 169.) on October 3, 2006. A hearing was held on this Motion on October 26, 2006.

II. MOTION FOR PARTIAL RECONSIDERATION

A. Legal Standard

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). A motion for reconsideration will only be granted if the moving party establishes: (1) the existence of newly available evidence; (2) an intervening change in the controlling law; or (3) a need to correct a clear error of law or prevent manifest injustice. Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, 123 F.3d 111, 116-17 (3d Cir. 1997). Reconsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of judicial resources. Moyer v. Italwork s.a.s., Civ. A. No. 95-2264, 1997 WL 312178, at *3 (E.D. Pa. June 3, 1997).

Comcast does not allege the existence of newly available evidence or an intervening change in the controlling law. Rather, Comcast argues that we made clear errors of law when we (1) ruled that Plaintiffs have antitrust standing to assert claims based on the Cable System Transactions, and (2) failed to dismiss Count I of the Complaint.

B. Discussion

1. Plaintiffs' Antitrust Standing

Comcast argues that we deviated from well-established principles of antitrust standing when we found that Plaintiffs' have antitrust standing to challenge the Cable System Transactions. In its Motion to Dismiss, Comcast argued that Plaintiffs lack antitrust standing to assert claims based on the Cable System Transactions because the Complaint pleads no facts that, if true, would establish that those transactions had any impact on actual or prospective price competition for cable programming in the Chicago or Philadelphia clusters. Rather than diminishing competition, Comcast argued that, based on the allegations in the Complaint, the Cable System Transactions were "competition-neutral." According to Comcast, the Complaint acknowledges that price competition for cable programming services only arises when an overbuilder operates in a given franchise area alongside the incumbent cable provider. Thus, to show antitrust injury, the Complaint must plead facts showing that the Cable System Transactions specifically removed overbuilders from Comcast's franchise areas or prohibited overbuilders from entering Comcast's franchise areas. Comcast maintained that, based on the allegations in the Complaint, the challenged transactions resulted only in the substitution of Comcast as the exclusive provider of cable services in a given franchise area for another exclusive provider. Therefore, Comcast argued, the challenged transactions were "competition-neutral," and Plaintiffs cannot show that they had anticompetitive effects that could give rise to an antitrust injury.

In the Decision, we found that Plaintiffs' have antitrust standing to challenge the Cable System Transactions and stated: "We need not consider whether Comcast's actions should be considered 'competition-neutral' absent allegations specifically concerning the elimination of overbuilders since, for the purposes of assessing antitrust injury standing, we assume as true the statements in the Third Amended Complaint that Comcast's conduct threatened competition in the relevant markets." (Decision at 8.)

In its Motion for Reconsideration, Comcast contends that we erred by holding that a private plaintiff can establish antitrust injury without pleading facts that would establish that the challenged conduct has harmed or threatened to harm competition generally in the relevant market. Comcast asserts that antitrust injury is a necessary condition of antitrust standing, see City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 265 (3d Cir. 1998), and that it is a bedrock principle of antitrust law that antitrust injury is lacking where the challenged conduct did not harm competition in the relevant market. See Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Eichorn v. AT&T Corp, 248 F.3d 131, 140 (3d Cir. 2001); Brotech Corp v. White Eagle Int'l Technologies Grp., Inc., No. Civ. A. 03-232, 2004 WL 1427136 (E.D. Pa. June 21, 2004) (dismissing complaint for lack of antitrust injury where complaint failed to plead facts showing anticompetitive market injury). Comcast further argues that courts within this Circuit and elsewhere have recognized that antitrust injury cannot be shown where the challenged conduct occurs in a market in which there is no alleged competition to begin with, whether by law, by contract, or simply because no actual or potential competitors are present. See West Penn, 147 F.3d at 265; Balaklaw v. Lovell, 14 F.3d 793, 798-800 (2d Cir. 1994); Bar Techs. Inc. v. Conemaugh & Black Lick R.R. Co., 73 F. Supp. 2d 512, 519 (W.D. Pa. 1999).

Comcast also contends that the Decision was incorrect as a matter of law because it improperly credited Plaintiffs' conclusory allegations that Comcast's conduct threatened competition in the relevant markets. Comcast argues that the Complaint does not plead a single fact in support of its conclusory assertion that the Cable System Transactions removed competitors from the putative Chicago and Philadelphia clusters. Comcast relies on West Penn where, Comcast asserts, the court found that plaintiff's "bold [sic] averments as to loss of competition" were insufficient to establish anticompetitive impact (and thus antitrust injury) where "nowhere in the complaint [did plaintiff] directly aver that there had ever been competition [in the relevant market]." West Penn, 147 F.3d at 267. Comcast further contends that the Decision fails to credit well-pled allegations in the Complaint concerning the source of competition in the putative clusters. Comcast argues that because the Complaint alleges only one source of price competition for cable programming and expressly disavows others, it was improper for the Decision to state that there were "questions of fact regarding . . . the sources of competition in the relevant market," and to assume that Plaintiffs might be able to devise an antitrust claim based on some other theory not alleged in the Complaint.

Plaintiffs maintain that the Decision did not hold that a private plaintiff can establish antitrust injury without pleading facts showing that the challenged conduct has harmed or threatened to harm competition generally in the relevant market, and, therefore, there is no clear error of law. Plaintiffs assert that the statement in the Decision that "for purposes of assessing antitrust standing, we assume as true the statements in the Third Amended Complaint that Comcast's conduct threatened competition in the relevant markets," follows black letter law that, in the context of a motion to dismiss, a court must accept as true all well-pled allegations in the complaint and view them in the light most favorable to the plaintiff. Plaintiffs assert that the Decision did not hold that anticompetitive effects need not be shown, but rather, it held that Plaintiffs properly pled a reduction of actual and potential competition resulting from Comcast's alleged antitrust violations. Plaintiffs also respond to Comcast's claim that the Complaint does not plead a single fact to support its conclusory assertion that the Cable System Transaction "removed competitors" from the Chicago and Philadelphia clusters by asserting that the Complaint repeatedly alleges that the challenged transactions removed actual and potential competitors from the Philadelphia and Chicago markets. (Complaint ¶¶ 3, 10, 11, 25, 50 and 54.) Additionally, Plaintiffs contend that the Complaint identifies numerous cable companies that were removed from the Philadelphia and Chicago areas as a result of Defendants' allegedly unlawful conduct. (Complaint ¶¶ 52-56.) Therefore, Plaintiffs assert that we properly concluded that the Complaint pleads a reduction of actual and prospective competition. Plaintiffs also assert that Comcast mischaracterizes the Complaint when it claims that the only theory of price competition alleged in the Complaint is premised upon the presence or absence of overbuilders. Instead, Plaintiffs argue that in none of the paragraphs in the Complaint do they pin their claims on the presence or absence of overbuilders. Plaintiffs argue that the Complaint specifically alleges that "Defendants' unlawful conduct raised entry barriers to actual and potential competition, including from overbuilder competitors and from former competitors that ceased or reduced cable operations and sold or abandoned infrastructure necessary to effective competition in the Philadelphia and Chicago clusters." (Complaint ¶¶ 62b, 99b.)

In the Decision, we applied the five-factor balancing test used to evaluate antitrust standing. The five factors are:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 740-41 (3d Cir. 2004). The Decision noted that factors 1 and 2 are related and that factor 2 is often termed the "antitrust injury requirement." See West Penn, 147 F.3d at 265 n.14. Combining factors 1 and 2, for a plaintiff to have antitrust standing there must be an antitrust injury, an injury of the type the antitrust laws were intended to prevent, and this injury must be causally related to the defendant's allegedly anticompetitive conduct. See Id. at 264-65.

In examining factors 1 and 2 of the five factor test, the Decision stated that the Complaint pleads a reduction of actual and prospective competition in the Philadelphia and Chicago clusters that was the intended result of the challenged swap agreements and acquisitions, and that the Complaint provides examples of how the transactions were structured to achieve the removal of competitors from the relevant markets. (Decision at 9.) The Decision also stated that Plaintiffs' alleged injury, an increase in price resulting from the dampening of competitive market forces, is one type of injury for which the § 4 of the Clayton Act potentially offers redress. (Id.) Based on this review of the Complaint, the Decision stated, with respect to the challenged swap agreements and acquisitions, that the Complaint sufficiently pleads the antitrust injury and causal connection/defendant intent elements required to satisfy factors one and two of the five-factor balancing test governing antitrust standing. (Id. at 10.) The Decision also found that the Complaint satisfied requirements three through five of the five factor test, and concluded that the Complaint satisfactorily alleges the elements of antitrust standing. (Id. at 10-11.) Therefore, contrary to Comcast's argument in its Motion for Partial Reconsideration, we did not hold that a private plaintiff can establish antitrust injury without pleading facts that would establish that the challenged conduct has harmed or threatened to harm competition generally in the relevant market, and we find that our application of the five-factor test to determine whether Plaintiffs have antitrust standing presents no clear error of law.

In response to Comcast's argument that its actions should be considered "competition-neutral," the Decision stated that we need not consider this argument because we assume that the statements in the Complaint that Comcast's conduct threatened competition in the relevant markets are true. (Id. at 8.) Comcast's reliance on West Penn, for the proposition that bald averments of a loss of competition are insufficient to establish antitrust injury, is misplaced. Unlike in West Penn where there were no averments of competition between the two companies that were participants in the challenged conduct, in the instant case, the Complaint contains numerous allegations that Comcast, AT&T, and the cable companies acquired by the acquisition transactions were competitors. (Complaint ¶¶ 1, 3, 6, 8, 10, 11, 25, 49, 50, 51, 54, 56.) Furthermore, contrary to Comcast's argument, the Complaint does not rely solely on the presence or absence of overbuilders in a franchise area as the only source of competition. The Complaint alleges that the various parties to these transactions were competitors, and that the challenged transactions reduced competition. We find that accepting these allegations of competition as true does not constitute clear error, given this early stage of the proceedings.

Based on the preceding discussion, Comcast's Motion for Partial Reconsideration with respect to the argument that Plaintiffs lack antitrust standing is denied.

2. Failure to dismiss Count I

Comcast next argues that the decision not to dismiss Count I of the Complaint was clearly erroneous because the determination that the asset swap transactions are subject to per se treatment and the failure to assess the legal sufficiency of Count I under the rule of reason were incorrect as a matter of law.

a. The Rule of Reason and Per Se Approaches

Courts have construed the Sherman Act as precluding only those contracts or combinations which "unreasonably" restrain competition. Northern Pac. Ry Co. v. U.S., 356 U.S. 1, 4 (1958). Courts use two modes of analysis to determine if a restraint on trade is unreasonable: the rule of reason and the per se approaches. InterVest Inc. v. Bloomberg L.P., 340 F.3d 144, 158 (3d Cir. 2003). Under the rule of reason, to establish a § 1 violation, a plaintiff must prove: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action." Rossi v. Standard Roofing, 156 F.3d 452, 464-64 (3d Cir. 1998) (citations omitted). The per se approach applies to certain agreements or practices that because of their pernicious effect on competition and lack of any redeeming virtue are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289-90 (1985). The per se approach "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, . . . in an effort to determine at large whether a particular restraint [is] unreasonable." Northern Pac. Railway, 356 U.S. at 5. When a per se violation of § 1 is alleged, a plaintiff need only prove concerted action that was the proximate cause of the plaintiff's injuries. In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3d Cir. 2004). "The decision to apply the per se rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive." Northwest Wholesale Stationers, 472 U.S. at 289-90 (internal quotations omitted). "One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of market structure to allocate territories in order to minimize competition. . . . This Court has reiterated time and time again that [h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling competition." Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49 (1990).

b. Failure to Dismiss Count I Under the Per Se Rule

Comcast argued in its Motion to Dismiss, and reiterates in its Motion for Reconsideration, that the Complaint fails to state a viable § 1 claim under either the rule of reason or the per se approach. Comcast contends that the determination that the asset swap transactions are subject to the per se rule was incorrect as a matter of law and that no court has ever held that an asset acquisition transaction (whether the consideration at issue is cash or the exchange of some other asset) is subject to the per se treatment. Comcast further argues that the Decision improperly accepted the Complaint's conclusory characterization of the asset swap transactions as "horizontal market allocations" among competitors. Comcast maintains that the Decision should not have simply accepted Plaintiffs' characterization of the challenged conduct, but rather should have looked to case law to determine whether the specific type of conduct challenged has ever been held to fall within the per se category of illegal "market allocations." Comcast asserts that while the Decision relied on Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990), and U.S. v. Topco Assocs., Inc., 405 U.S. 596 (1972), for the proposition that "market allocations" are per se illegal, neither of those cases involved asset exchanges, and thus neither shed any light on the relevant question here: whether asset exchanges constitute illegal horizontal market allocations. Finally, Comcast argues that there is no precedent for applying the per se approach to a transaction subject to the scrutiny and approval of federal regulatory agencies, as well as state and local authorities.

Plaintiffs respond that it is a bedrock principle of antitrust jurisprudence that horizontal agreements between competitors to allocate markets constitute per se violations of § 1 of the Sherman Act. Plaintiffs contend that the Complaint alleges with specificity that Comcast's swap agreements constituted and effected the division of markets, territories, and customers, which is precisely the conduct courts historically have treated as per se § 1 violations. Plaintiffs argue that the Decision recognized that Courts should not credit "bald allegations" even at the motion to dismiss stage, but that the Complaint properly set forth a valid § 1 claim under the per se approach.

The Decision noted that "[o]ne of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." (Decision at 17 citing Palmer, 498 U.S. at 49.) The Decision also stated that "Count [I]'s allegations that the swap agreements constitute horizontal market allocations are buttressed by descriptions in the Complaint of the parties to the swap agreements, when the agreements were completed, and how the terms of the agreements served to eliminate competitors from the Philadelphia and Chicago clusters and effectively preclude opportunities for entry and reentry." (Decision at 18 citing Complaint ¶¶ 10, 54-56, 63-64.) The allegations made in the Complaint are, therefore, not "bald allegations" of conduct constituting an unlawful horizontal market allocation. (See Complaint ¶¶ 10, 54-56, 63-65, 70-74.) Moreover, the Decision did not hold that asset swap transactions in general should be treated as per se violations of § 1. Rather, the Decision held that the Complaint sufficiently alleged that these asset swap transactions were horizontal market allocations, and because horizontal market allocations are subject to the per se rule, the Complaint need only plead the elements of a per se violation of § 1 in order to survive a motion to dismiss. Because the Decision did not find that the per se rule is applicable to a new category of conduct, and because it did not simply accept Plaintiffs' allegations that Defendants' conduct constituted horizontal market allocations, there is no clear error of law in the portion of the Decision that holds that the claim in Count I pertaining to the asset swap transactions sufficiently alleges a per se violation.

The Decision, also addressed Comcast's argument that Plaintiffs cannot show that Comcast engaged in per se unlawful conduct because the transactions challenged in Count I were approved by government authorities at the federal, state, and local levels. The Decision stated that "[t]he mere fact that regulatory and law enforcement agencies may have reviewed and approved the challenged transactions is not ground for dismissal of Plaintiffs' claims." (Decision at 19) (citing Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (explaining that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws") and CableAmerica Corp. v. FTC, 795 F. Supp. 1082, 1092 (N.D. Ala. 1992) (stating that "'[a]ntitrust immunity is not conferred by the bare facts that defendants' activities might be controlled by an agency having broad powers over their conduct'" and that "'[t]here is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry'")). Comcast relies on Texaco v. Dagher, 126 S. Ct. 1276 (2006), for its position that the per se analysis is inapplicable in cases challenging conduct that has been previously approved by a government authority. In Dagher, the Court held that it is not per se illegal for a lawful joint venture to set the prices at which it sells its products. Id. at 1278. In a footnote, the Court stated that the joint venture had been approved by federal and state regulators and that, "[h]ad the respondents challenged the joint venture itself, they would have been required to show that its creation was anticompetitive under the rule of reason." Id. (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984). The specific pinpoint in Copperweld cited by Dagher stands for the proposition that the rule of reason is used to analyze combinations such as mergers, joint ventures, and various vertical agreements because they hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Copperweld Corp, 467 U.S. at 768. Therefore, Dagher merely affirms the proposition that the rule of reason is used to analyze joint ventures. Dagher does not stand for the proposition, as Comcast asserts, that a transaction that has received approval from federal and state regulators must be analyzed under the rule of reason and not under the per se rule. Because antitrust laws are applicable even in situations where government authorities have approved the challenged conduct, and because there are no cases cited by the parties which hold that the per se rule is inapplicable in these situations, there is no clear error of law in the denial of Comcast's Motion to Dismiss based on this argument.

Consequently, Comcast's Motion for Partial Consideration with respect to the portion of the Decision holding that Plaintiffs have pled a viable § 1 claim under the per se approach is denied.

c. Failure to Assess Sufficiency of Count I Under the Rule of Reason

Comcast next argues that the failure to assess the legal sufficiency of Count I under the rule of reason was erroneous. In Comcast's Motion to Dismiss, it asserted that Count I, under a rule of reason analysis, fails to state a claim because the Complaint does not contain any allegations that the Cable System Transactions produced any anticompetitive effects in the relevant markets. After concluding that the per se rule applies to the swap agreements, the Decision stated: "We need not consider Comcast's arguments that Count One fails to plead an anticompetitive effect in a relevant product or geographic market under the rule of reason." (Decision at 20.) Comcast now argues that this failure to consider whether Count I sufficiently stated a claim under the rule of reason analysis was erroneous given that the Complaint does not purport to state anything other than a rule of reason claim with respect to eight of the ten Cable System Transactions, a fact which Comcast says was recognized in footnote 7 of the Decision.[2] Plaintiffs agree that the Decision accurately noted that the Complaint only alleges that Comcast's swap agreements with horizontal competitors constitute per

[2] Footnote 7 of the Decision states:

> Comcast emphasizes that the conduct Plaintiffs challenge under § 1 of the Sherman Act includes Comcast's acquisitions. Count [I] only alleges that Comcast's swap agreements with horizontal competitors constitute per se violations of § 1. (Complaint ¶ 73.) Count [I] separately alleges that Comcast's acquisitions of competing cable companies and their cable subscribers in the Philadelphia and Chicago clusters constitute contracts and conduct in restraint of trade in violation of § 1 under the applicable rule of reason analysis. (Id. ¶ 74.) Thus, Comcast's assertions that acquisitions hold the promise of increasing a firm's efficiency, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984), and, thus, are not manifestly anticompetitive business practices are irrelevant to the assessment of whether Count [I] has alleged per se violation of § 1.

(Decision at 17 n.7.)

se violations, and that Count I separately alleges that Comcast's acquisitions of competing cable companies and their cable subscribers constitute violations of § 1 under the rule of reason. (Pl's Brief in Opposition at 10.)

Count I of the Complaint, titled "Violations of Section 1 of the Sherman Act," contains multiple allegations against Defendants. (Complaint ¶¶ 69-75.) As noted in the Decision, Count I only alleges that Comcast's swap agreements with horizontal competitors constitute per se violations of § 1. (Complaint ¶ 73.) Count I separately alleges that Comcast's acquisitions of competing cable companies and their cable subscribers in the Philadelphia and Chicago clusters constitute contracts and conduct in restraint of trade in violation of § 1. (Complaint ¶ 74.) Therefore, Count I of the Complaint asserts two separate violations of § 1 of the Sherman Act.

Similar to the Complaint in the instant case, the complaint in IDT Corp. v. Building Owners & Managers Ass'n. Int'l, Civ. A. No. 03-4113, 2005 U.S. Dist. LEXIS 33208 (D.N.J. Dec. 15, 2005), alleged multiple violations of § 1 of the Sherman Act. Id. at *6. Count 1 of the IDT Corp. complaint alleged that the defendants violated § 1 based on horizontal price fixing, concerted refusals to deal (group boycott), and conspiracy to impose discriminatory prices. Id. In that court's opinion dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6), the court addressed whether the allegations of each individual claim of a § 1 violation stated a claim upon which relief may be granted based on either the rule of reason or per se approach, depending on which standard was applicable to that particular claim. Id. at *23-39.

In the instant case, the Decision only assessed the legal sufficiency of the § 1 per se claim of unlawful horizontal market allocations predicated on the swap transactions, and did not assess the sufficiency of the rule of reason claim predicated on the acquisition transactions. We should have assessed the rule of reason claim separately to ensure that the allegations of this claim are sufficient to support a claim upon which relief may be granted. Therefore, Defendants' Motion for Partial Reconsideration is granted as to this issue.

d. Reconsideration of the Rule of Reason analysis

Comcast argues that the Complaint fails to state a claim under the rule of reason approach because the Complaint does not identify markets for the § 1 claim. Comcast relies on Queen City Pizza, Inc. v. Domino's Pizza Inc., 124 F.3d 430 (3d Cir. 1997), which held that where a plaintiff "fails to define its proposed relevant market . . . a motion to dismiss may be granted." Id. at 436. Plaintiffs, however, contend that they have identified the relevant geographic and product markets in the Complaint.

In most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers. Id. (citing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482 (1992). However, this general rule is not a per se prohibition against dismissal of antitrust claims for failure to plead a relevant market under Fed. R. Civ. P. 12(b)(6). Queen City Pizza, 124 F.3d at 436. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." Id.

Plaintiffs do not explicitly state in the Complaint the proposed geographic or product market for the § 1 claims as they do for their § 2 claims.[3] However, Plaintiffs state in their Brief in Opposition to Defendants' Motion to Dismiss that "the relevant markets pled in the Complaint apply to each of their claims." (Pl's Brief in Opposition at 33-34.) The relevant product and geographic markets are also implied in numerous paragraphs throughout the Complaint. (See Complaint ¶¶ 1, 2, 3, 10, 49, 50, 51, 54, 60, 61, 62a-e.) Therefore, the relevant geographic markets at issue in Plaintiffs' § 1 claim under the rule of reason are the Philadelphia and Chicago clusters, as defined in the Complaint in paragraphs 31.a.(2) and (3), and the relevant product market consists of multichannel video programming services, which are distributed by multichannel video programming distributors ("MVPDs"), including cable television operators, such as Defendants, overbuilders and direct broadcast satellite operators. Plaintiffs, therefore, have sufficiently alleged relevant product and geographic markets. Consistent with the general rule articulated in Eastman Kodak, any further precision of such markets can only be determined after factual inquiries into the commercial realities faced by consumers. Eastman Kodak, 504 U.S. at 482.

Comcast next argues that the Complaint fails to allege that the Cable System Transactions produced anticompetitive effects in any actual market. Comcast argues that Plaintiffs do not aver that there was direct competition among the cable providers prior to the Cable System Transactions in the Philadelphia and Chicago clusters, and therefore, the Cable System Transactions only resulted in the substitution of one franchised cable provider for another franchised cable provider and were

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[3] In Count II, which alleges monopolization by Comcast, the Complaint states: "The relevant geographic markets are Comcast's Philadelphia cluster, as defined in paragraph 31.a.(2) and Comcast's Chicago cluster, as defined in paragraph 31.a.(3)" (Complaint ¶ 78.), and "The relevant product market is defined as multichannel video programming services, which are distributed by multichannel video programming distributors ("MVPDs"), including cable television operators, such as Defendants, overbuilders and direct broadcast satellite operators." (Id. ¶ 79.)

competition neutral. Comcast argues that conduct that is competition-neutral cannot, as a matter of law, support a § 1 rule of reason claim. Plaintiffs reply that they have alleged that there was direct competition between Comcast and the transacting cable providers in the Philadelphia and Chicago clusters. Plaintiffs further maintain that the challenged transactions resulted in anticompetitive effects by removing actual and potential competitors from, and raising barriers to competition within, the Philadelphia and Chicago clusters.

Examples of anticompetitive effects include: reduction in output, increase in price, and deterioration in quality of goods or services. See United States v. Brown, 5 F.3d 658, 668 (3d Cir. 1993). The Complaint alleges that before the merger, Comcast and AT&T were competitors (Complaint ¶ 25), and that, before December 1, 1999, Comcast and AT&T restrained trade through a series of acquisitions of competitor cable companies. (Complaint ¶ 49, 51.) The Complaint also alleges that as a result of these transactions, actual and potential competitors were removed from the Philadelphia and Chicago clusters and Defendants were able to exclude actual and potential competitors from and raise prices within these two areas. (Complaint ¶ 60.) Therefore, contrary to Comcast's argument, the Complaint does aver that there was competition among the cable providers prior to the Cable System Transactions. The Complaint further alleges that these transactions had the following effects: competition, including price competition, has been restrained; competitors have been restrained from entering into the areas subject to the allocation agreements; barriers to entry from actual and potential competitors, including from overbuilder competitors and from former competitors that ceased or reduced cable operations and sold or abandoned infrastructure necessary for effective competition in the Philadelphia and Chicago clusters, have been raised; supra-competitive prices have been maintained; the cable operators involved in the transactions have not re-entered or competed against Comcast in its Philadelphia and Chicago clusters; and cable subscribers have been deprived of the benefits of free and open competition, including lower prices. (Complaint ¶¶ 62(a)-(e).) Based on these allegations in the Complaint we find that Plaintiffs have sufficiently alleged anticompetitive effects in the relevant markets.

Comcast also argues that the Cable System Transactions were not illegal since they were examined and approved by authorities at the federal, state, and local levels. This issue was also raised by Comcast in its argument that the Complaint fails to allege a per se violation of § 1. We addressed and rejected this argument in the Decision and in this Memorandum, see supra part II.B.2.b. The same reasoning applies in the context of a rule of reason claim. Thus, Comcast's argument that the Complaint cannot state a valid rule of reason claim because the transactions received regulatory approval is without merit.

Finally, Comcast argues that the Complaint is insufficient in stating a rule of reason claim because it fails to allege a causal link between the Cable System Transactions and the injury alleged to have been suffered by Plaintiffs. Comcast contends that because Plaintiffs have not demonstrated that there was competition in the Philadelphia and Chicago clusters in the first place, they cannot demonstrate that Comcast's entry into these areas through the challenged transactions eliminated competition. Furthermore, Comcast argues that Plaintiffs cannot demonstrate that potential future competition was suppressed by the Cable System Transactions because Plaintiffs failed to plead facts showing that a transacting cable provider would have competed with Comcast but for the challenged transactions, or that any overbuilder who had the intention to enter those areas was prevented from doing so as a result of the challenged transactions. Contrary to Comcast's argument, Plaintiffs have alleged that the parties to the transactions were competitors and that the challenged transactions reduced competition. (Complaint ¶¶ 1, 3, 6, 8, 10, 11, 25, 49, 50, 51, 54, and 56.) The Complaint also alleges that as a result of the challenged transactions, Plaintiffs were forced to pay higher prices for cable services than they would have paid if there was effective competition. (Id. ¶¶ 62a, c, d, e, 66-68, and 75.) Thus, the Complaint sufficiently alleges a causal connection between the alleged misconduct and the injury suffered by Plaintiffs.

Based on the foregoing discussion, Plaintiffs have sufficiently plead a § 1 claim pursuant to the rule of reason analysis. Consequently, upon reconsideration of Comcast's Motion to Dismiss with respect to the challenged asset acquisition transactions, Comcast's Motion is denied.

III. CERTIFICATION FOR IMMEDIATE INTERLOCUTORY APPEAL

In the alternative, Comcast asks that we certify the following questions for immediate interlocutory appeal to the Third Circuit:

> 1) Whether the Court erred in ruling that a private plaintiff can demonstrate antitrust standing without pleading facts showing that the defendant's challenged conduct had a negative impact on the competitive landscape in the relevant market.
>
> 2) Whether the Court erred by (a) ruling that asset swap transactions are per se violations of the Sherman Act, and (b) disregarding the remainder of Comcast's motion to dismiss for failure to state a rule of reason claim with respect to the merger and asset acquisition transactions alleged in the Complaint.[4]

A. Legal Standard

Pursuant to 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal if "[1] such order involves a controlling question of law[,] as to which [2] there is substantial ground for difference of opinion[,] and [3] an immediate appeal from the order may materially advance the

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[4] As we have reconsidered the portion of the Decision in which we did not apply the rule of reason analysis to the merger and asset acquisition transactions, question 2(b) is now moot.

ultimate termination of the litigation." 28 U.S.C. § 1292(b). Before an order can be certified for interlocutory appeal, all three factors identified in the statute must be satisfied. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974). "The decision to certify an order for appeal under § 1292(b) lies within the sound discretion of the trial court." Fox v. Horn, No. Civ. A. 98-5279, 2000 U.S. Dist. LEXIS 3106, at *3 (E.D. Pa. Mar. 13, 2000) (quotation omitted). Certification, however, is only appropriate in exceptional circumstances, and "[a] district court should be mindful of the strong policy against piecemeal appeals when exercising its discretion." Koken v. Viad Corp., No. Civ. A. 03-5975, 2004 U.S. Dist. LEXIS 9920, at *2 (E.D. Pa. May 11, 2004).

In deciding whether to certify an order for interlocutory appeal, "the key consideration is... whether the order . . . truly implicates the policies favoring interlocutory appeal. . . . Those policies . . . include[] the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense." Katz, 496 F.2d at 756. "The moving party bears the burden of showing . . . that 'exceptional circumstances justify a departure from the basic policy against piecemeal litigation and of postponing appellate review until after the entry of a final judgment.'" Fox, 2000 U.S. Dist. LEXIS 3106, at *3 (quoting FDIC v. Parkway Exec. Office Ctr., Nos. Civ. A. 96-121, 96-122, 1997 U.S. Dist. LEXIS 14939, at *5 (E.D. Pa. Sept. 24, 1997)).

B. Discussion

Comcast argues that all three of the factors required for a court to grant interlocutory appeal are satisfied in this case. Particularly, Comcast argues that there are substantial grounds for differences of opinion on these two questions. Comcast contends that the Decision on these two issues cannot be reconciled with opinions by other Third Circuit courts which held that antitrust injury requires a showing of anticompetitive impact and that the rule of reason analysis applies to those practices which the Supreme Court has not yet held to be per se illegal.

We disagree. Substantial grounds for difference of opinion exist when there is genuine doubt or conflicting precedent as to the correct legal standard. Bradburn Parent Teacher Store, Inc. v. 3M, Civ. A. No. 02-7676, 2005 U.S. Dist. LEXIS 15815, at 12 (E.D. Pa. 2005 August 1, 2005) (citing P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 161 F. Supp. 2d 355, 360 (D.N.J. 2001). As discussed above, we did not hold that a private plaintiff can demonstrate antitrust standing without pleading facts showing that the challenged conduct has harmed competition as implied by question one. Instead, the Decision accepted the well-pled allegations in the Complaint that there was a reduction in competition that was the actual and intended result of the alleged antitrust violation by Comcast. There is no genuine doubt that we are to accept as true the allegations as alleged in the Complaint for purposes of deciding a motion to dismiss pursuant to 12(b)(6). Consequently, this question does not present an issue where there are substantial grounds for a difference of opinion.

The second question for which Comcast seeks immediate interlocutory appeal also does not present a question on which there are substantial grounds for a difference of opinion. Comcast argues that we applied the per se approach to a new category of conduct, which the Supreme Court has not yet held to be per se illegal. Comcast, however, mischaracterizes the Decision. The Decision does not hold that asset swap transactions in general should be subject to the per se rule. Rather, it holds that this Complaint sufficiently alleges that these alleged swap transactions are horizontal market allocations. This holding was based on the descriptions in the Complaint of the parties to the swap agreements, when the agreements were completed, and how the terms of the agreements served to eliminate competitors from the Philadelphia and Chicago clusters and effectively precluded opportunities for entry and reentry. Since the Decision found that the alleged swap transactions constituted a horizontal market allocation, they are subject to review under the per se approach. See Palmer, 498 U.S. at 49 (1990). There is no genuine doubt as to whether horizontal market allocations are subject to the per se rule, and, consequently, this question does not present an issue where there are substantial grounds for a difference of opinion.

As Comcast has failed to satisfy the requirement that there be substantial grounds for a difference of opinion with respect to either its proposed questions, its motion for immediate interlocutory appeal under 28 U.S.C. § 1292(b) is denied.

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

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

O R D E R

AND NOW, this 19th day of December 2006, upon consideration of Defendants' "Motion for Partial Reconsideration, or, in the Alternative, for Certification of Immediate Interlocutory Appeal" (Docket No. 156), Plaintiffs' Response thereto (Docket No. 163), Defendants' Reply (Docket No. 169), and a hearing held on this motion on October 26, 2006, **IT IS HEREBY ORDERED** as follows:

1. Defendants' Motion for Partial Reconsideration is **GRANTED** in part and **DENIED** in part. It is **GRANTED** with respect to the portion of our Decision of August 31, 2006, in which we did not assess the sufficiency of Plaintiffs' Section 1 claim pertaining to the challenged asset acquisition transactions under the rule of reason analysis. It is **DENIED** in all other respects.

2. Upon Reconsideration, Defendants' Motion to Dismiss Plaintiffs' Section 1 claim pertaining to the challenged asset acquisition transactions is **DENIED**.

3. Defendants' Motion for Certification for Immediate Interlocutory Appeal is **DENIED**.

BY THE COURT:

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