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

CAROLINE BEHREND, *et. al.*, Plaintiffs,	)	Civil Action No. 03-6604
v.	)	The Honorable John R. Padova
COMCAST CORPORATION, *et. al.*, Defendants.	)	

ORDER

AND NOW, this ___ day of _____, 2009, IT IS HEREBY ORDERED that the Defendants' Motion for Leave to File a Reply in Support of their Motion for Judgment on Partial Findings pursuant to Federal Rule of Civil Procedure 52(c) is GRANTED.

Dated: _____, 2009

BY THE COURT:

_____

John R. Padova, J.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

DEFENDANTS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON PARTIAL FINDINGS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 52(C)

Pursuant to Local Rule 7.1(c), Comcast, by its undersigned counsel, respectfully requests leave to file the attached Reply Memorandum (the "Reply") (attached hereto), in support of Comcast's Motion for Judgment on Partial Findings Pursuant to Federal Rule of Civil Procedure 52(c). The Reply is necessary to respond to, and rectify, inaccurate characterizations contained within Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment on Partial Findings Pursuant to Federal Rule of Civil Procedure 52(c).

Dated: October 25, 2009

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Plaintiffs,	)	Civil Action No. 03-6604
v.	)	The Honorable John R. Padova
COMCAST CORPORATION, *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON PARTIAL FINDINGS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 52(C)

Dated: October 25, 2009

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TABLE OF AUTHORITIES

CASES **PAGE(S)**

Allied Orthopedic Appliances v. Tyco Healthcare Group, L.P.,
247 F.R.D. 156 (C.D. Cal. 2007) 4, 8, 9

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
506 U.S. 209 (1993) 17

Concord Boat Corp. v. Brunswick Corp.,
207 F.3d 1039 (8th Cir. 2000) 5

In re Bulk (Extruded) Graphite Prods. Antitrust Litig.,
No. 03-2038, 2006 WL 891362 (D.N.J. April 4, 2006) 8

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2009) 18

In re Plastic Additives Antitrust Litig.,
No. 03-3048, 2006 WL 6172035 (E.D. Pa. Aug. 31, 2006) 8

In re Wellbutrin SR Direct Purchaser Antitrust Litig.,
2008 U.S. Dist. LEXIS 36719 (E.D. Pa. May 2, 2008) 4

McDonough v. Toys R Us, Inc.,
638 F.Supp.2d 461 (E.D. Pa. 2009) 7

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
259 F.3d 154 (3d Cir. 2001) 9

Reed v. Advocate Health Care,
No. 06 C 337, 2009 WL 3146999 (N.D. Ill. Sept. 28, 2009) 12

S. Pac. Commc'ns Co. v. AT&T,
556 F. Supp. 825 (D.D.C. 1982) 5

W. Res., Inc. v. Surface Transp. Bd.,
109 F.3d 782 (D.C. Cir. 1997) 17

Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully submit this reply memorandum of law in further support of their motion pursuant to Fed. R. Civ. P. 52(c) for judgment on partial findings.

PRELIMINARY STATEMENT

The following key points emerged from Plaintiffs' direct case:

- Regardless of any geographic market definition, Plaintiffs did not present any empirical evidence common to the class that the Transactions reduced overbuilding or any other form of actual or potential competition.
- Plaintiffs did not offer any significant empirical evidence common to the class to support their allegation that the Transactions reduced "benchmark competition" in a manner impacting the entire class.
- Plaintiffs did not present any empirical evidence common to the class establishing that clustering led to higher prices in Philadelphia or that such higher prices resulted from conduct actionable under Sections 1 or 2 of the Sherman Act.
- Plaintiffs have not presented any empirical evidence, and have not undertaken any economic study of their own, that the class can use to show higher prices resulting from Comcast's decision not to license Comcast SportsNet Philadelphia to its DBS competitors, and government studies have repeatedly found that there is no link between DBS penetration and cable prices.
- Dr. McClave's antitrust impact model aggregates all of the challenged conduct – the Transactions, the decision not to license SportsNet to DBS providers, and the alleged RCN-related conduct[1] – such that if the Court finds, as the FCC, DOJ and FTC have repeatedly done, that there is no basis for finding that the Transactions reduced competition, Dr. McClave's model cannot be used by the class to show impact.
- Dr. McClave fails to control for a significant demographic variable (population density) that affects his calculations by hundreds of millions of dollars, and fails to take discounts into account in calculating impact; the distortions caused by these errors are reflected in the undisputed fact that his model calculates massive damages in regulated rates.

[1] At the hearing, Plaintiffs presented no testimony or evidence concerning their RCN-related claim. That omission, coupled with their abandonment of their original theory that the Transactions eliminated actual and potential competition, signals that Plaintiffs have abandoned any attempt to certify a class for any of the claims actually pled in their Complaint.

Moreover, Dr. McClave's models cannot be used to show common proof of impact given Dr. McClave's admission that the economic assumptions undergirding his model are not based on any studies that he or Plaintiffs' other experts conducted; i.e., Dr. McClave's county "screens" are not based on input from Plaintiffs' liability experts or any other study of what competitive conditions were likely to be in the Philadelphia DMA but-for the alleged violations.

Meanwhile, Dr. Williams has failed to perform any empirical studies whatsoever and attempts to compensate for that evidentiary deficiency with purely theoretical models and selective quotations from government studies while ignoring the fact that government experts, presented with the same arguments, have approved all of the conduct complained of.

Since this case's inception nearly six years ago, Plaintiffs have amended their claims, changed theories, switched experts and undertaken a massive and invasive party and non-party discovery program. After all of that, Plaintiffs came to Court with no real, hard evidence that can be used by the class to show antitrust impact.

Plaintiffs have been afforded every opportunity to make their case. Their renewed motion to certify the Philadelphia class should be denied.

ARGUMENT

I. Dr. McClave's Reports And Testimony Fail To Show That Classwide Antitrust Impact Can Be Established Through Common Proof Or That There Exists A Reliable Method For Formulaicly Calculating Damages On A Classwide Basis

It is now clear that Plaintiffs rely on Dr. McClave not just for damages, but also for antitrust impact. (See 10/13 Tr., at 13:13-18 ("We offer Dr. McClave's testimony … as an independent … basis for plaintiffs' showing through common proof … that antitrust injury … can be proved on a class[wide] basis."); 64:4-6 ("Q: … Dr. McClave, did you assume impact? A: No, I did not. I was testing whether there was impact."); 121:3-8 ("Q: And does [your model]

allow you to draw a conclusion as to whether the class[,] class-wide[,] was impacted by [Comcast's] behavior?... A: In my view, this model and its application to Philadelphia demonstrates … that there was class-wide impact.").) Dr. McClave, who is not an antitrust economist and has no prior experience with the cable industry, has failed to establish any of the core economic assumptions undergirding his antitrust impact model.

A. Dr. McClave's Benchmark Counties Are Fatally Inadequate Both As A Basis For Establishing Common Antitrust Impact And For Calculating Classwide Damages

As a threshold matter, neither Dr. McClave, nor Plaintiffs' other experts, even attempt to show what competitive conditions would have been in the Philadelphia DMA but-for the allegations in the Complaint. This alone makes it impossible for them to show impact.

Dr. McClave applied two "screens" in selecting his benchmark counties but admitted that those screens (greater than national average DBS penetration and lower than 40% Comcast market share) are not based on a study of what the competitive conditions in the Philadelphia DMA would have been but-for the alleged conduct and do not necessarily replicate those conditions. (See 10/13 Tr., at 179:19-180:17, 192:9-18.) Dr. McClave sought to explain away this disconnect by arguing that the purpose of a benchmark analysis is not to identify what competition would have looked like in the Philadelphia region but-for the challenged conduct, but rather to find areas that are "relatively free" from anticompetitive effects. (See 10/13 Tr., at 64:21-23; see also 178:11-15.) Dr. McClave is wrong.

In the first place, the only support Plaintiffs identify for Dr. McClave's particular view of benchmark construction is Dr. McClave himself. (See Opp. Br., pp. 8-10.) By contrast, courts and the other experts in this case – including Plaintiffs' original expert, Dr. Beyer – recognize

that the cornerstone of any valid benchmark analysis is identifying areas free of the challenged conduct.[2]

Second, though Dr. McClave may validly assume anticompetitive effects in calculating damages, it is inappropriate (and circular) for him to do so for the purpose of establishing antitrust impact. A proper approach is to first identify comparable areas where the alleged conduct is absent, and then examine whether the anticompetitive effects Plaintiffs ascribe to the conduct are present or absent: looking for areas free of the effects – looking, in effect, for markets with lower prices – without first looking to see if the markets are competitively comparable to what the Philadelphia DMA would have looked like absent the conduct assumes impact but does not establish it. Yet Dr. McClave, by his own admission, set out to find areas free from anticompetitive effects. (See Opp. Br., p. 8 (quoting 10/13 Tr., at 64:22-23) (emphasis added).)

Third, the record is clear that Dr. McClave's county screens lack any sound factual or economic basis. Dr. McClave admitted his screen parameters are not based on any findings or studies connected to the Philadelphia DMA absent the alleged conduct. (See 10/13 Tr., at 183:7-184:6, 198:1-4.) He further acknowledged that Comcast's market share in its service areas

[2] See, e.g., In re Wellbutrin SR Direct Purchaser Antitrust Litig., 2008 U.S. Dist. LEXIS 36719, at *36 (E.D. Pa. May 2, 2008) ("[T]he 'yardstick approach,' identifies … another geographic market not affected by the anticompetitive conduct…. Comparing the two price levels provides an estimate of the overcharge resulting from the anticompetitive conduct.") (emphasis added); Allied Orthopedic Appliances v. Tyco Healthcare Group, L.P., 247 F.R.D. 156, 165 (C.D. Cal. 2007) ("Plaintiffs must show that common, class-wide proof exists to show that [class members] paid more in the actual world than they would have in a 'but-for' world characterized by the absence of the … challenged practices….") (emphasis added); Beyer Dep., pp. 185:21-186:4 ("Q: [H]ow would you calculate the rate of increase [in cable prices] in the lack of anticompetitive behavior alleged in the complaint? A: In principle, you would use another geographic area that is not subject to the anticompetitive behavior.") (emphasis added); 190:9-15 ("Q: And you're not estimating how you would go about finding the but-for prices, right? A: Oh, I've said I would do that…. By looking – by identifying a geographic yardstick where the alleged anticompetitive behavior is not present.") (emphasis added).

would almost certainly have been substantially greater than 40% but for the Transactions, and that DBS penetration in the Philadelphia region would likely have been lower than the national average even without the alleged "denial" of regional sports programming. (See 10/13 Tr., at 185:7-186:4, 192:15-193:2, 197:14-25.) Dr. McClave expressly admitted that, for all he knew, Philadelphia was not competitive even before the deals – all the more reason that an analysis of what Philadelphia would have looked like but-for the deals is essential. (See 10/13 Tr., at 193:3-11.)

In short, Dr. McClave's benchmark counties do not present a reasonable proxy for the competitive landscape that would have prevailed in the Philadelphia region but for the challenged conduct in this case.[3] This failing alone is fatal to Plaintiffs' attempt to use Dr. McClave's benchmark analysis as "common proof" of classwide antitrust impact.

B. Dr. McClave's Attempt To Show Common Antitrust Impact Is Doomed By His Failure To Account For Discounts And Bundled Rates Paid By Substantial Portions Of The Putative Class

In their opposition brief, Plaintiffs argue that Dr. McClave's damages and impact model adequately accounts for discount prices and bundled rates. (See Opp. Br., pp. 10-13.) Plaintiffs are wrong.

Plaintiffs insist that Dr. McClave's model picks up discounts for damages purposes (a point Comcast disputes), but do not deny that his model totally fails to account for discounts and bundled rates for purposes of assessing antitrust impact. (See 10/14 Tr., at 59:11-16, 61:17-20.)

[3] See Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000) (excluding damages model that "did not separate lawful from unlawful conduct" and was based on a but-for world in which the defendant had already achieved a 75% market share before the alleged antitrust violation); S. Pac. Commc'ns Co. v. AT&T, 556 F. Supp. 825, 1079 (D.D.C. 1982) (finding unreliable a damages model that relied on unfounded projections of market shares in the "but for" world).

Indeed, this is precisely the concern that the Court expressed in its questioning of Dr. McClave at the hearing:

> **The Court:** … I don't want to talk about the part that discount pricing plays in computing damages…. Rather, I want to talk about the lack of use of … discount prices in determining the benchmark price. My understanding is that discount prices were not addressed and were not part of your determination of what the benchmark price is.
>
> **McClave:** That's true.
>
> **The Court:** What concerns me about the process that you took with respect to discounts, the use or non-use of discounts, is not in the calculation of damages as you've described that to me but rather in whether … a benchmark price that does not include discounts validly … deprives your process of being a valid process with respect to the mission you have in this case.
>
> **McClave:** Well, your Honor –
>
> **The Court:** Your benchmark price is a distorted benchmark price, isn't it? Wasn't tak[ing] into account discounts.
>
> **McClave:** The benchmark price does not take into account discounts, that's absolutely true….
>
> * * *
>
> **McClave:** Your Honor, in order to use these data to try to incorporate discounts I think would have run into the same problem that everybody else that's analyzed this industry had and that is it doesn't give you a valid comparison.
>
> **The Court:** Well, that might be so but without it is there a valid comparison or are we simply in an area where we can't proceed reliably?

(10/14 Tr., at 114:6-116:3) The Court's concern that analysis of the benchmark counties did not take discounting into effect could not be more critical. Perhaps discounting occurs less in the benchmarks because they were already more "competitive" – if so, to ignore the comparatively heavier discounting in Philadelphia makes the comparison apples to oranges. The difference in discounting is unknown because Dr. McClave made no effort to find out.

Dr. McClave's justifications for ignoring list prices do not save his impact model. With respect to the discounts given in Philadelphia, he argued that discounts are merely temporary, but conceded that at any point as much as 20% of putative class members were

paying discounted prices. (See 10/13 Tr., at 143:19-144:3; 10/14 Tr., at 54:2-25.) He also claims that ignoring discounts is acceptable because they are simply percentage deductions off "supracompetitive" list prices. (See 10/14 Tr., at 55:18-23.) But that assumption is untenable – bundled rates and promotional packages, which are by far the most common discounts, are not discounted off of local rates, but are instead national prices. (See 10/14 Tr., at 135:18-136:8.) Dr. McClave made no attempt to determine which discounts are based on list prices and which are not.

There is no dispute that the effect of ignoring these national discounts is material. For example, Dr. McClave admits that the video programming component of the Triple Play bundle (which as much as one third of the class takes at present), costs $33. (See 10/14 Tr., at 66:12-13.) Significantly, this amount is lower than the but-for prices predicted by McClave's model in every year he studied. (See McClave Merits Rpt., p. 9, Table 2.) Dr. McClave conceded that if his assumption that discounts "are off of the list price" is incorrect "then … not using discount prices is a problem." (10/14 Tr., at 116:8-9, 12.)

C. Plaintiffs' Cases Do Not Justify Dr. McClave's Failure To Account For Discounts And Bundled Rates Is Unavailing

Plaintiffs' main authority, McDonough v. Toys R Us, Inc., 638 F.Supp.2d 461 (E.D. Pa. 2009), is materially distinguishable. Plaintiffs in that case alleged that Toys R Us ("TRU") had coerced manufacturers into preventing retailers from offering discounts off of the manufacturers' suggested retail price ("MSRP"). The Court rejected the defendant's argument that common impact could not be shown because some class members paid different prices, below the MSRP, when they purchased goods from TRU for two principal reasons: (1) defendants conceded that the inability of retailers to offer discounts allowed TRU to maintain higher prices; and (2) plaintiffs produced substantial evidence (from TRU's own internal documents) that TRU would

have lowered its prices to match discounts by retailers. See McDonough, at 483. Critically, neither of these factors is present here: Comcast and its experts vigorously dispute Plaintiffs' various theories that clustering and the other challenged conduct have led to higher prices, and Plaintiffs have failed to produce any evidence that Comcast would have lowered its prices across the board if, for example, DBS penetration were higher.[4] (See 10/14 Tr., at 127:7-128:12).

Much more relevant to the present situation is Allied Orthopedics, 247 F.R.D. 156 (C.D. Cal. 2007), which Comcast cited in its moving brief but which Plaintiffs failed to address in their opposition papers. Allied is instructive because it exposes a fundamental, unwarranted logical leap in Dr. McClave's assumption about discounts. Specifically, he argues that putative class members who paid discounted or bundled rates would still have been better off in the "but for" world because those discounts would have been off of lower list prices. (See 10/14 Tr., at 105:1-21.) This assertion, however, is based on the unjustified assumption that Comcast would have offered the same discounts in the but-for world. This is exactly the same assumption which the Allied court refused to make:

> As would be expected, some courts readily make that assumption if it is shown that the "list" price that forms the starting point for individual pricing negotiations was higher in the actual world than it would have been in the but-for world.

[4]The other cases Plaintiffs rely on all pre-date Hydrogen Peroxide, and the courts in those cases, applying prior legal standards, declined to seriously analyze defendants' arguments about discounts and price variations. See, e.g., In re Bulk (Extruded) Graphite Prods. Antitrust Litig., No. 03-2038, 2006 WL 891362, *14 (D.N.J. April 4, 2006) ("The Court is not in a position at the class certification stage to weigh the arguments of the plaintiffs' expert and the defendant's expert. Whether the market for bulk extruded graphite products is homogenous and whether prices varied widely are substantive issues that go to the merits of the case, and are to be resolved by the fact finder."); In re Plastic Additives Antitrust Litig., No. 03-3048, 2006 WL 6172035, at *10 (E.D. Pa. Aug. 31, 2006) ("The Court also finds that defendants' introduction of expert testimony … which [allegedly] shows the existence of price diversity within and across each product segment, fails to defeat the propriety of class certification. Although this Court acknowledges the belief of defendants' … expert … it is not appropriate at this stage to balance the credibility of the parties' experts.").

> Plaintiffs and Dr. Beyer appear to be asking the Court to make a similar assumption here.
>
> Here, however, Plaintiffs do not simply challenge a price-fixing agreement or a single anticompetitive practice that directly impacts purchasers, situations where that assumption might be reasonable because the conduct affects purchasers in the same way. Rather, Plaintiffs allege an array of three different types of anticompetitive conduct, each with direct and indirect effects on individual purchasers and competitors…. Thus, even if [the challenged conduct] resulted in a higher average [product price] in the actual world, many individual class members may have benefited from discounts and deals on [Defendant's] products that would be unavailable to them in the but-for world. In other words, any reduction in price due to [the allegedly foreclosed] competition is potentially outweighed by the loss of … discounts off list prices. The result is to shuffle the position of … purchasers in the but-for world in a manner that defies predictability with common evidence.

Allied, 247 F.R.D. at 168-69 (emphasis added). The reasoning in Allied applies with equal force here, where Plaintiffs are likewise seeking to certify a class based on conduct that does not directly impact prices (unlike the conduct in the cases they rely on) but have presented no evidence that Comcast would have offered any (much less the same) discounts in the but for world. In sum, both the distinction the Court drew between damages and impact and the concern it expressed over Dr. McClave's failure to factor discounts and bundled rates into his impact analysis were well-placed. See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 188 (3d Cir. 2001) ("The ability to calculate the aggregate amount of damages does not absolve plaintiffs from the duty to prove each [class member] was harmed by the defendants' practice.").

D. Dr. McClave's Excuses For Failing To Control For Population Density – Which Were Statistically Significant In His Model And Substantially Reduced His Damages Calculation – Are Not Credible

Dr. McClave has admitted that he originally included a population density variable in his regression analysis and that its inclusion substantially reduced – by hundreds of millions of dollars – the amount of damages predicted by his model. (See 10/13 Tr., at 210:1-11; 10/14 Tr.,

29:18-21.) He also admitted that population density is a factor that government agencies and industry experts have routinely included in their multiple regression analyses of cable prices. (See 10/14 Tr., at 7:24-8:20, 18:2-19:5.) This point is important because controlling for population density coupled with accounting for discounts destroys Dr. McClave's model as a tool for establishing impact. (See 10/14 Tr., at 75:6-76:5.)

Dr. McClave claimed that it was appropriate to drop the population density variable because, contrary to his "*a priori* expectations," he found a negative relation between density and cable prices. (See 10/13 Tr., at 58:21-60:2.) Without a detailed structural study or any grounding in this industry, Dr. McClave's *a priori* views afford no basis to jettison highly significant data.

Dr. McClave next argued that it was appropriate to drop population density because it may be correlated with – or "tainted" by – Comcast's allegedly anticompetitive clustering transactions. (See 10/13 Tr., at 60:2-9.) He admitted, however, that cable clustering itself does not cause higher population density (see 10/13 Tr., at 203:19-204:1), and he conceded that the demographic control variable he did choose to include – median income – may also be correlated with clustering (see 10/14 Tr., at 4:20-5:1). He further acknowledged that prices may be higher in urban areas (i.e., those with high population density) for reasons that having nothing to do with anticompetitive conduct. (See 10/13 Tr., at 214:10-19.)

E. Dr. McClave's Benchmark Model Produces Unreliable Results And Leaves Over Half Of The Putative "Anticompetitive Overcharge" Unexplained

Dr. McClave's damages model purports to identify anticompetitive "overcharges" in the aggregated price for B1 (rate-regulated limited basic), B2 (expanded basic), and B3 (a higher-tiered service, Value Pak) as between his benchmark counties and Comcast's systems in the Philadelphia region. In her supplemental class report, Dr. Chipty demonstrated the inherent

unreliability of Dr. McClave's model by showing that it cannot survive a rudimentary and obvious falsification test: when just the B1 prices are isolated, Dr. McClave's model would "find" substantial "overcharges" and yield massive damages based on this regulated rate alone. (See Chipty Suppl. Rpt., ¶¶ 63.) At the hearing, Dr. McClave attempted to parry this criticism, arguing that applying his model to B1 rates only somehow "changes" his model, and that he would have come up with a different model using different variables (none of which he could identify on the stand) if he had wanted to investigate B1 rates only. (See 10/14 Tr., at 76:12-21, 91:13-25.) This explanation rings hollow for the simple reason that the "overcharges" identified in Dr. McClave's model – as he himself implemented it – are based in part on differences in B1 rates. Dr. McClave could not explain why his model would be accurate only when applied to aggregated prices but totally inadequate when applied to the disaggregated component prices. Indeed, Dr. McClave offered no convincing explanation for why he was including regulated rates in his damage calculation model in the first place.

Plaintiffs also attempt to defend the low R-squared value of Dr. McClave's model – which indicates that the control variables in his regression explain less than half of the variation in the dependent variable (price) he is analyzing – by arguing that the R-squared values in Dr. Chipty's regressions are even lower. (See Opp. Br., p. 21.) But unlike Dr. McClave, Dr. Chipty's regressions did not impute the unexplained portion of the R-squared to damages. It is uncontroverted that Dr. McClave's regression model "leaves up to half of the causes of the differences in real-world [prices] unexplained. Perhaps this rate is sufficient for the 'economics literature,' but it falls far short of satisfying plaintiffs' legal burden to establish a means of demonstrating by common proof that the members of the putative class were injured, and if so,

by how much." Reed v. Advocate Health Care, No. 06 C 337, 2009 WL 3146999, *19 (N.D. Ill. September 28, 2009).

F. Plaintiffs' Observation That Multiple Regressions And Benchmark Analyses Are "Commonly Accepted" Is Irrelevant Because They Have Not Shown By A Preponderance Of The Evidence That ***This*** Model Is Reliable In ***This*** Case

In the end, Plaintiffs argue that Dr. McClave's damages and impact model should be found adequate because the techniques he employs – multiple regression analysis and benchmark samples – are "commonly accepted" by courts (see Opp. Br., p. 22), but that is beside the point. "Multiple regression analysis is not a magic formula. It is simply a mathematical tool for estimating a dependant variable based on a number of independent variables, which may or may not yield statistically significant results." Reed, 2009 WL 3146999, at *19. The real issue is not whether these techniques are commonly employed or generally accepted, but rather whether Dr. McClave has correctly employed them in this model in this case. As discussed above and in Comcast's moving brief, it is clear even on a partial record that Dr. McClave has not done so.

II. Dr. Williams's Conclusion That The Class Has Suffered Antitrust Impact Is Not Supported By Common Proof

Contrary to Plaintiffs' assertions (See Opp. Br., pp. 5-6, 25-45), none of the "economic mechanisms" that Dr. Williams described in his reports or in his testimony establish that classwide antitrust impact is capable of being proven at trial through proof common to the class.

A. Plaintiffs Have Failed To Show That Common Proof Can Be Used To Establish Classwide Antitrust Impact Resulting From Comcast's Decision Not To License SportsNet to DBS Operators

Plaintiffs' contention that "'the withholding of Comcast's SportsNet Philadelphia from these satellite providers,' … can serve as the beginning and end of the common impact analysis" (Opp. Br., p. 25) is wrong. Even assuming that Plaintiffs could show that clustering increased Comcast's incentive to deny DBS providers access to SportsNet and that the denial of access to

regional sports programming has been shown to cause a reduction in DBS penetration rates (neither of which Plaintiffs have established), Plaintiffs have offered no common proof the class can use to show that lower-than-expected DBS penetration rates in Philadelphia caused all class members to pay higher cable rates.

Despite the fact that this proposition is now at the core of their case, Plaintiffs present no empirical analysis of their own to show that lower-than-expected DBS penetration rates in the Philadelphia DMA resulted in higher prices for all class members. (See Mov. Br., p. 17.) Nor can Dr. McClave's model be used to support that inference because Dr. McClave admits that his model fails to disaggregate any effects of the DBS-related conduct from any alleged effects of the Transactions and other anti-competitive conduct pleaded in the Complaint. (10/13 Tr., at 174:3-175:1, 182:17-183:2.)

In the absence of their own empirical analysis, Plaintiffs can point only to a series of FCC and GAO reports and academic studies, none of which examined whether (much less concluded that) lower-than-expected DBS penetration in Philadelphia resulted in higher prices for subscribers. (See Opp. Br., pp. 27-28, n.4; Williams Supp. Decl., Table 3.) To the contrary, the FCC and the GAO have separately – and repeatedly – concluded that increased DBS penetration does not constrain cable prices. (See Mov. Br., p. 17.)

For example, Plaintiffs and Dr. Williams ignore the fact that the GAO concluded in 2002 and 2005 that the acquisition by DBS providers of new programming – local channels, including local sports – was not associated with any reduction in cable rates despite a substantial increase in DBS penetration. (See Mov. Br., pp. 17-18; Def. Ex. 13 (2002 GAO Report) at 44-45; Def.

Ex. 3 (2005 GAO Report) at 33; 10/15 Tr., at 120:7-124:9.)[5] Similarly, Plaintiffs and their experts disregard the fact that the FCC concluded as recently as January 2009 that increased DBS penetration does not constrain cable prices. (See Def. Ex. 2 (FCC 2009 Cable Industry Pricing Report), ¶ 3; 10/15 Tr., at 120:7-124:9.)

Plaintiffs attempt to support their theory that lower DBS penetration leads to higher prices by selectively quoting from the FCC's 2007 Program Access Order and NPRM (see Opp. Br., p. 27). However, they fail to include language clarifying that the FCC's reference to "empirical evidence" of a "material adverse impact on competition in the video distribution market" referred only to the FCC's conclusion that an MVPD's lack of access to regional sports programming could result in decreased market share. (See FCC 07-169 Report and Order and Notice of Proposed Rulemaking, MB Docket No. 07-29, MB Docket No. 07-198, ¶ 39; Singer Decl., ¶¶ 30, 35.) Nothing in the FCC's 2007 Program Access Order correlates any purported decrease in market share with an effect on subscriber prices. (See 10/15 Tr., at 119:15-25.)

B. Plaintiffs Have Failed To Show That Common Proof Can Be Used To Establish Antitrust Impact Caused By The Transactions Or The Clustering That Resulted From The Transactions

Plaintiffs' efforts to downplay Dr. Williams's admissions on both direct and cross-examination that the Transactions did not eliminate "actual or potential competition" in any judicially-recognized sense of the term are ineffective, and these admissions eviscerate Plaintiffs' primary theory of the case as originally pled. (See Opp. Br., pp. 29-38; 10/14 Tr., at 216:2-225:21; 10/15 Tr., at 75:5-78:9.)

[5] The academic studies Plaintiffs purport to rely on were never mentioned in their experts' testimony and Plaintiffs admit they do not even have the data or the models underlying these generic articles. (See Opp. Br., p. 16.)

The passages Plaintiffs quote from Dr. Williams's testimony (see Opp. Br., pp. 30-31) make clear that however this Court defines the relevant geographic market, the Transactions did not eliminate any "actual or potential competition" between Comcast and the counterparties. Dr. Williams's characterization of the Counterparties as "competitor cable operators" is entirely unsupported by any reference to the record or any empirical study. (Williams Decl., ¶¶ 121-124.) It is undisputed that Comcast and the Counterparties never competed (and never would have competed) to provide service to the same consumers at the same time. Because actual and potential competition to serve the same consumers are the only types of competition that can be directly correlated with an effect on consumer prices, Dr. Williams's insistence that "some form of competition is being reduced" at the DMA level (Opp. Br., p. 30; see also 10/14 Tr., at 227:7-20) because prices have gone up is untenable. (See Mov. Br., pp. 9-10.)

Even if Dr. Williams were correct in his assumption that "some form of competition is being reduced" (which Plaintiffs have not shown), Plaintiffs have come forward with no common proof correlating any such reduction in "competition" with the prices paid by Comcast's Philadelphia-area subscribers. Dr. Williams admitted that he has seen no evidence of a direct correlation between the alleged elimination of competition among MSO's for original franchises or cable system acquisitions and the prices paid by consumers (and Plaintiffs appear to have abandoned that theory, not even mentioning it in their brief). (See 10/15 Tr., at 98:19-101:1.)

Nor do Plaintiffs present credible empirical evidence the class can use to show that benchmark "competition" takes place at all, let alone linking an alleged (and disputed) reduction in "benchmark competition" with an increase in cable prices paid by consumers. (See Opp. Br., pp. 34-38; Williams Supp. Rpt., p. 34, Table 7 ("Dr. Teece correctly notes that there is no

quantitative estimate of the effect on rates resulting from benchmark competition."); 10/15 Tr., at 94:6-95:6, 96:4-97:18.) As Comcast described in its moving brief, Plaintiffs' only empirical evidence is their flimsy telephone survey of 0.02% (or 400) subscribers in the Philadelphia region that found that 7.7% fewer Philadelphia DMA-area subscribers were able to name another cable company serving their neighborhood. (See Mov. Br., p. 11.) Plaintiffs cannot credibly ask this Court to predicate a finding of evidence of classwide antitrust impact on a survey showing that *30* fewer subscribers (out of a class of 2 million) were able to name another cable company serving their neighborhood.

Ultimately, Dr. Williams's theory that the Transactions have caused antitrust impact rests solely on the economic proposition that clustering is correlated with higher prices. (See Opp. Br., pp. 32-33) (a proposition that Comcast has vigorously disputed (see Mov. Br., pp. 12-16).)[6] Even if a correlation between clustering and higher prices had been shown, such a correlation alone could not form the basis for an antitrust claim in the absence of predatory or anticompetitive conduct. (See Mov. Br., p. 14 (citing cases).) Plaintiffs' assertion that "[t]he anticompetitive conduct here is the alleged anticompetitive conduct – the swaps and acquisitions that created the Philadelphia cluster" is entirely circular and proves nothing because Plaintiffs

[6] Plaintiffs again misrepresent the FCC's 2009 Thirteenth Annual Report as supporting the conclusion that clustering leads to higher cable rates. (See Opp. Br., p. 39.) Plaintiffs' efforts to characterize Dr. Williams's misrepresentation of the FCC's conclusions as simply a "mis-cite" are unpersuasive. (See Opp. Br., p. 43.). Dr. Williams represented that this report finds that clustering leads to higher prices when it does not say that. Finally, Plaintiffs' reliance on the FCC's conclusion in 2000 and 2001 that "operators that were part of a cluster had, on average, higher monthly rates than operators that were not part of a cluster" proves nothing considering the FCC considered a cluster to be any combination of cable systems regardless of size. (See Opp. Br., pp. 43-44.)

have not shown (and cannot show through common proof) that the swaps and acquisitions had any anticompetitive effect (much less a classwide effect).[7]

Accordingly, Plaintiffs cannot establish classwide antitrust impact simply by pointing to an economic correlation (even assuming one exists, which has not been shown) between MSO size and prices. See, e.g., W. Res., Inc. v. Surface Transp. Bd., 109 F.3d 782 (D.C. Cir. 1997) (finding no evidence of horizontal integration effects where proposed transaction simply changed ownership of a monopoly).

C. Plaintiffs' Defense of Dr. Williams's Theoretical Models Is Unpersuasive

Plaintiffs offer no support for the proposition that a court can rely on theoretical models to establish classwide impact even where, as here, those models are unsupported by empirical facts and fly in the face of reality. (See Opp. Br., pp. 32-38) See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.... Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them.").

Plaintiffs seek to downplay the flaws in Dr. Williams's theoretical overbuilding model (which baselessly assumes that overbuilding is profitable and would have affected all class members in the absence of clustering) on the ground that RCN's financial condition is a "merits

[7] While Plaintiffs also argue that the FCC and other studies described in Tables 4-7 of Dr. Williams's reports "show that ownership of a cable system by a large, highly clustered MSO actually causes higher cable rates, all else equal" (Opp. Br., pp. 32-33) and that there is a "causal relationship between large MSOs and higher cable rates" (Opp. Br., p. 44), those arguments are irrelevant and, in any event, wrong. As Comcast described in its moving brief, most subscribers in the Philadelphia DMA already belonged to a large, clustered MSO prior to the Transactions at issue. (See Mov. Br., p. 16.)

issue for trial." (Opp. Br., p. 38) However, the Third Circuit made clear in Hydrogen Peroxide that courts should not avoid delving into the merits of the case if consideration of the substantive elements of the plaintiff's case is necessary in order to determine whether the requirements of Rule 23 have been satisfied. See Hydrogen Peroxide Antitrust Litig., 552 F.3d at 317, 320-23. In any event, neither Dr. Williams nor Dr. McClave has offered any empirical basis for this Court to conclude that a diminution in the likelihood of overbuilding affected the prices paid by all class members. At best, Dr. McClave's model assumes only that five counties out of the 18 in the Philadelphia DMA would have experienced some partial overbuilding in the absence of the Transactions and conduct at issue. (See 10/13 Tr., at 157:9-10; McClave Merits Rpt., p. 8.) Finally, Plaintiffs' suggestion that Comcast somehow caused RCN's financial difficulties by allegedly erecting barriers to entry in Philadelphia during the class period (see Opp. Br., p. 39, n.7) appears nowhere in the Complaint, Plaintiffs' prior pleadings, the testimony of RCN executives who have been deposed in this case, or RCN's public filings with the Securities and Exchange Commission and the bankruptcy court (in other words, it is wholly unsupported speculation).

Plaintiffs likewise seek to downplay the flaws in their HHI analysis by arguing that this Court need not determine market definition at the class certification stage. (See Opp. Br., p. 40.) Having attempted to use HHI analysis to show classwide antitrust impact, however, Plaintiffs should not now be heard to complain about Comcast disputing the utility of that analysis. As Comcast explained in its moving brief (see Mov. Br., pp. 13-14), the FCC has expressly rejected the use of HHI calculations in evaluating cable industry transactions and this Court should likewise decline to find such evidence persuasive here.

D. The Fact That Regulators Analyzed And Approved The Challenged Transactions Is Persuasive Evidence

Contrary to Plaintiffs' assertions (see Opp. Br., pp. 45-48), Comcast is not arguing that the regulatory review and approval of the Transactions by the FCC, the FTC and the DOJ should be construed by this Court as supplanting the antitrust laws. Rather, in deciding whether Plaintiffs have met their burden to show by a preponderance of the evidence that antitrust impact can be proven by proof common to the class, the fact that the "outstanding" economists (to use Dr. Williams's own phrase (see 10/15 Tr., 14:23-15:2)) at the DOJ, FTC and FCC examined the very same evidence upon which Plaintiffs rely, and still approved Comcast's swaps and acquisitions on multiple occasions over nearly a decade, should be considered strong, persuasive evidence that the "common proof" upon which Plaintiffs rely does not, in fact, support their claim that the Transactions were anticompetitive.

Plaintiffs' suggestion that Comcast somehow misled the FCC concerning the motivations behind its decision to continue delivering SportsNet terrestrially (see Opp. Br., pp. 47-48) is wholly unfounded. Plaintiffs point to no documentary evidence that Echostar "could have ... retrieved through discovery" that suggests that Comcast's decision to withhold SportsNet constituted predatory or anticompetitive conduct. (Singer Decl., ¶¶ 69-76.) The mere fact that Comcast employees recognized that continued cable exclusivity for SportsNet gave Comcast a competitive and marketing advantage does not constitute unlawful or predatory conduct. (See Comcast's Supplemental Hearing Memorandum, Docket No. 395, pp. 14-15 (Comcast is under no duty to deal with the DBS operators).) Moreover, the fact that the FCC indicated its intent to revisit the subject of the terrestrial loophole in the 2007 Proposed Rulemaking Order and NPRM, but has taken no further action on the issue, only underscores that the FCC does not view the withholding of SportsNet pursuant to the terrestrial loophole to be a serious anticompetitive threat to the DBS providers.

CONCLUSION

For the foregoing reasons and those set forth in its moving brief, Comcast's motion for judgment on partial findings should be granted and Plaintiffs' renewed motion for certification of the Philadelphia class should be denied with prejudice.

Dated: October 25, 2009

By: /s/ Darryl J. May

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that, on this date, he caused to be served copies of the foregoing Reply Memorandum of Law in Support of Comcast's Motion for Judgment on Partial Findings Pursuant to Federal Rule of Civil Procedure 52(c), upon the following counsel:

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