IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	09-ML-02048-C
COX ENTERPRISES, INC., SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION	)	

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

In their Motion for Class Certification, Plaintiffs asserted that their proposed tying class and UCL subclass satisfy the requirements of Rule 23(a) and 23(b)(3) and should be duly certified as class actions. Nowhere in its 70-page Opposition to Motion for Class Certification ("Opposition") did Cox refute Plaintiffs' argument on this score. That aside, the record evidence this Court will rigorously analyze shows without ambiguity that the proposed tying class and UCL subclass satisfy the numerosity, typicality, commonality and adequacy requirements of Rule 23(a) and the superiority prong of Rule 23(b)(3).

While Cox challenged Plaintiffs' ability to establish three of the elements of Plaintiffs' tying claim with common evidence for purposes of Rule 23(b)(3)'s predominance requirement, Cox did *not* contest Plaintiffs' assertion that the remaining two elements of Plaintiffs' tying claim – separate tied and tying products, and substantial volume of commerce – are amply established with fundamentally common proof, which satisfies that portion of Rule 23(b)(3)'s predominance requirement. Plaintiffs' satisfaction of the majority of Rule 23's class certification requirements for both the tying class and the UCL subclass, then, is simply uncontested. With respect to Plaintiffs' Motion for Class Certification, only three elements of Plaintiffs' tying claim are disputed as satisfying Rule 23(b)'s predominance requirement – conditioning, market power, and antitrust injury/impact.

There is likewise no dispute from Cox with respect to the documents and deposition testimony presented by Plaintiffs concerning the uniform nature of Cox's

tying activities. Instead, in its Opposition, Cox tried to shift the Court's focus away from its nationally-based wrongful tying activities, and instead, onto diversionary issues such as the On-Demand viewing habits of the representative named Plaintiffs in an effort to create the illusion of individual questions that might, if they actually existed, preclude class certification. "The antisocial conduct which the rule [against tying] seeks to deter is the act *of the seller conditioning* sale of one product upon purchase of another . . .The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's action." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 450 (3d Cir. 1977) (emphasis added), *abrogation on other grounds recognized by In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 325 n.25 (3d Cir. 2010). Cox's attempts to manufacture individual issues where there are none should properly be disregarded.

The majority of Cox's argument against class certification is based on Cox's refusal to accept Plaintiffs' definition of the tying and tied products. Plaintiffs here define the tying product at issue as Premium Cable and the tied product as Cox's leased set-top boxes ("STBs"). In its Opposition, Cox asserted that there is not a single tying product, and furthermore, no single tied product. Instead, Cox argued that there are numerous tying products, depending on the combination of digital services and packages to which each Cox customer has subscribed. Similarly, Cox argued that there are different types of STBs available, also dependent on the subscribed-to service of each customer. The vast majority of Cox's opposition to class certification is based on Cox's analysis of the tying and tied products in an effort to create the illusion of the existence of class certification-defeating individualized issues. In fact, as acknowledged by Cox's

expert, Dr. Burtis, [redacted] Exh. 1 (Deposition of Michelle Burtis) pp.167:7-170:10. If this underlying premise is rejected, Dr. Burtis' opinions, all of which are based on this faulty premise, must also be rejected, along with Cox's arguments in opposition to class certification. In fact, that premise is entirely infirm.

Plaintiffs define Premium Cable generally as the level of service just above Cox's analog basic and expanded offerings, referred to by Cox as "digital" cable or "Advanced TV", which includes interactive services, such as Cox's Interactive Program Guide ("IPG") and access to Video On-Demand ("VOD") and Pay-Per View ("PPV"). These interactive services are not offered separately by Cox, but are included in whatever package a Cox subscriber purchases beyond the basic level of services. [redacted] Once a Cox subscriber moves into the digital tiers of service, or what Cox generally calls "Advanced TV", the interactive services are automatically included in the subscriber's service. Exh. 3 (Deposition of Cox (David Pugliese)) pp.20:22-21:10. It is immaterial what additional paks or tiers a Cox subscriber may add on after that.[1] As Plaintiffs stated in their opening class papers, regardless of whether a class member elects an extra movie pak or the Zhong Tian channel, a Cox subscriber must lease a STB from Cox in order to access the interactive

[1] Cox's own internal documents show that Cox does not draw these artificial distinctions advocated by Cox and Dr. Burtis here. [redacted] Quite clearly, when Cox is examining its own business, it defines the tying product as Plaintiffs do.

services included with Premium Cable. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification ("Pl. Mem.") at 19-20, n.4. Dr. Singer explained that he [redacted].[2] Exh. 8 (Deposition of Hal J. Singer) pp.58:3-60:17.

The common denominator for all Premium Cable subscriptions is that they all include Cox's IPG and access to VOD, PPV, and other interactive services. Proof of this is found on Cox's own website. Plaintiffs adduced for the Court the information provided by Cox on its website to consumers about its Advanced TV service, which includes the following:

> Cox Digital receiver and Advanced TV (formerly Digital Cable) service required to receive digital lineup, Music Choice, On DEMAND and Pay-Per-View….In order to receive Interactive TV services offered by Cox, such as the Interactive Programming Guide (IPG), On DEMAND, Pay-Per-View, you must rent a digital receiver….

Exh. 9. Cox does not distinguish among the various combinations of subscriptions and packages, nor among the various types of STBs. Cox's publicly announced STB policy

[2] Cox's claim that its Advanced TV can be received using a TiVo or a Moxi or other CableCARD device is simply false. As Dr. Singer stated, [redacted] Exh. 8 (Singer Dep.) pp.61:17-64:4.

applies to all of its Advanced TV subscribers. Moreover, this policy does not vary by market or geographic region. As Exhibit 9 demonstrates, this identical language is found on Cox's website for 32 different cities, crossing all of Cox's local markets, announcing the same Cox policy. Cox's policy requiring subscribers to Advanced TV to lease a STB is identical for each of these cities and their attendant sub-markets. *Id.*

Similarly, it is immaterial whether the class members actually use the interactive features included within Cox's Premium Cable. What matters here for class certification purposes is that all Cox customers who subscribe to Premium Cable have access to these interactive features, and Cox withholds these features from its customers who do not lease a STB from Cox. Cox spent considerable time in its Opposition detailing the preferences and usages of the various Plaintiffs with respect to Cox's On-Demand service, and Cox's expert, Dr. Burtis, did the same in her expert report, presumably to conjure purportedly individualized issues, the existence of which, according to Cox, ought to defeat class certification. However, as Dr. Singer explained, [redacted][3] [redacted]

[3] Cox's interactive services include more than VOD. They include Cox's IPG and access to Cox's PPV services, as well. These latter two interactive services have been available to all Cox Premium Cable subscribers since before the class period. Exh. 10 (Deposition of Cox (Steven Necessary)) p.86:14-24; Exh. 11 (Deposition of Mark Ader) p.80:15-17; Exh. 12 (Deposition of Dallas Clement) p.58:1-4. Thus, while On-Demand may not have been available to some class members for some of the class period (*see* Cox's Opposition to Motion for Class Certification ("Def. Mem.") at 44-45), it cannot be disputed that these other interactive services were available classwide. Cox's interactive features are not available separately or separately from Premium Cable. As acknowledged by Cox, the interactive features of its Premium Cable service are included

[redacted] *See infra*, pp.13-14.

Plaintiffs define the tied product as a STB. As explained in Plaintiffs' opening brief, the fact that Cox offers different types of STBs is immaterial. Pl. Mem. at 20, n.5; [redacted] Cox's tie affected the two-way services, which are available on all types of Cox's leased STBs, the lowest common denominator being Cox's standard STB. *Id.* [redacted] Exh. 8 (Singer Dep.) p.173:9-16.

Likewise, Cox went to great lengths to shift the Court's focus onto the individual consumption preferences of Cox subscribers.[4] However, for purposes of Plaintiffs' alleged antitrust violations, the relevant issues concern Cox's conduct and its impact on competition. Plaintiffs abundantly have shown on the basis of unambiguous record evidence that, with respect to the relevant conduct, the decisions at issue were made at Cox's national headquarters, and the challenged policy herein was instituted and

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with the first level of its digital service and all combinations of paks and tiers beyond that. Exh. 3 (Cox Dep. (Pugliese)) pp.20:22-21:10; Exh. 11 (Ader Dep.) pp.86:4-88:25.

[4] Although individual usage issues are not relevant, while Cox spent significant time citing deposition testimony of the Plaintiffs with respect to their On-Demand usage, Cox failed to note that each Plaintiff testified that they used some aspect of Cox's interactive services, whether it was VOD, IPG, or PPV. *See* Exh. 13 (Deposition of Elizabeth Brady, p.20:9-15; Deposition of John Brady, p.17:7-13; Deposition of Sharon Coughlin, pp.15:6-10, 19:9-11; Deposition of Jessica Diket, p.18:6-23; Deposition of Bradley Gelder, pp.17:19-18:1; Deposition of Trevor Haynes, p.29:20-25; Deposition of Henry Holmes, pp.20:22-21:2, 36:5-7; Deposition of Barksdale Hortenstine, pp.25:9-15, 29:1-16; Deposition of Sandra Prezgay, p.12:15-19; and Deposition of Ronald Strobo, pp.19:12-17, 20:23-21:1). As a matter of economics, however, it does not matter if a class member subscribes to Premium Cable for its option value alone.

implemented by Cox's national headquarters using standardized language across its entire market footprint.

ARGUMENT

Plaintiffs properly set forth the applicable standard for class certification in their Memorandum in Support of Class Certification. Contrary to Cox's argument, nothing in the Supreme Court's recent decision of *Wal-Mart Stores, Inc., v. Dukes*, 131 S.Ct. 2541 (2011), altered the application of Rule 23 to the case at bar. The fact remains that certain cases are better suited for class action treatment than others, including cases alleging consumer or securities fraud or violation of the antitrust laws, such as the case brought by Plaintiffs herein. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Behrend v. Comcast Corp.*, No. 10-2865, 2011 WL 3678805, at *6 & n.12 (3d Cir. Aug. 23, 2011) (observing that "[t]he factual and legal underpinnings of *Wal-Mart* -which involved a massive discrimination class action and different sections of the Rule 23 -are clearly distinct from those of this case. *Wal-Mart* therefore neither guides nor governs the dispute before us."). This has always been true.

Plaintiffs, of course, acknowledge and endorse the Court's obligation to conduct a rigorous analysis of the evidence before it in making its class certification decision here. *Behrend*, 2011 WL 3678805, at *5 (discussing the court's opinion in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008)). Plaintiffs likewise acknowledge that this analysis may include, only so far as it is necessary, a preliminary inquiry into the merits of the instant litigation to the extent it bears upon the class inquiry. *Id.* Indeed, during the first conference before the Court in this matter, Plaintiffs argued against

bifurcation of class and merits discovery precisely because of the overlap of class and merits issues – only to be opposed on this score by Cox. While *Wal-Mart* reinforces the *Hydrogen Peroxide* trend of cases counseling inquiry into the merits where needed for duly rigorous class certification analyses, that decision does not alter the applicable standard Plaintiffs must meet for class certification here, nor does it dictate that Rule 23 requires "mini-trials" on purported "merits" issues in a case like this one. In sum, the record before this Court reflects that Plaintiffs have ample proof of each Rule 23 element required for class certification. Plaintiffs' tying class and the UCL subclass should thus be certified.

I. PLAINTIFFS' TYING CLASS SHOULD BE CERTIFIED.

In their initial class papers, Plaintiffs set forth their arguments, and the accompanying common evidence in support of same, which amply satisfy each prong of Rule 23 for class certification. Faced with evidence of Cox's common policies and practices supporting Plaintiffs' tying claim, in its Opposition, Cox attempted to divert the Court's focus from Cox's uniform actions with respect to the issues involved in this litigation to the viewing habits and other irrelevant characteristics of individual class members.

A. Classwide Proof Shows that Cox Conditions the Sale of Premium Cable on the Leasing of a STB.

Contrary to Cox's assertions, in the absence of a contract, proof of conditioning one product on the purchase of another is not fundamentally an individualized inquiry at odds with Rule 23. It is well accepted that evidence of Cox's conditioning the sale of

Premium Cable on the lease of its STBs can be, and here has been, established by common evidence, such as, among other things, Cox's own public pronouncements, Cox's unvarying policy of the tie-in, and the practical economic effects of Cox's uniform policy. *See Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236 (E.D. Mich. 1997) (and cases discussed therein); *George Lussier Enters., Inc. v. Subaru of New England, Inc.*, No. Civ. 99-109-B, 2001 WL 920060 (D. N.H. Aug. 3, 2001).

Plaintiffs will establish at trial that Cox conditions the sale of Premium Cable on the leasing of a STB with evidence of Cox's uniform policy of only providing the full suite of content and services of its Premium Cable to those subscribers who lease a STB from Cox.[5] Cox's uniform policy, which effectuates its tie, is set forth in Cox's public pronouncements, as well as in the practical effects of its actions. These public pronouncements, as well as Cox's admissions of the same, are outlined in Plaintiffs' Memorandum in Support of Class Certification. Pl. Mem. at 22-24.

Cox relied heavily on *Freeland v. AT&T Corp.*, 238 F.R.D. 130 (S.D. N.Y. 2006), a case Cox claimed is directly on point here, as concerns its individualized-proof-of-coercion argument against class treatment of this litigation. In its discussion of *Freeland*, Cox acknowledged that sufficient classwide proof of coercion can be established by an "unremitting policy of tie-in" which can be shown by an admission by the defendant of conditioned sales. Def. Mem. at 25. This is precisely Plaintiffs' proof of Cox's

[5] Plaintiffs' expert Dr. Singer referred to this as [redacted] (Plaintiffs reference the exhibits included by Plaintiffs in their Motion for Class Certification as "Pl. Exh.", and Plaintiffs reference the exhibits included by Cox in its Opposition as "Def. Exh.".)

conditioning. In depositions and in its documents produced in discovery, Cox acknowledged its unremitting policy of the instant tie-in, requiring its customers to lease a STB from Cox in order to have access to Premium Cable. These admissions bolster the related public pronouncements of Cox's unremitting policy of its tie-in found in Cox's promotional materials, as well as its website.[6]

Cox attempted to disavow its public pronouncements, claiming that it informs its customers that they are not required to rent a STB from Cox. Def. Mem. at 27-28. As the record before the Court reflects, Cox, in fact, does no such thing, and the documents cited by Cox for support of this statement actually contradict Cox's position here.[7] *Id.* at p.28, n.65. In Cox's Annual Customer Notice for 2011, Exhibit 25 to Cox's Opposition, Cox informs its customers that (1) "Cox may also offer customers the option to rent equipment, such as cable set-top converters, CableCARDs, and remotes that may be needed to access certain programming services" and (2) "[i]f your TV, VCR or DVR is not able to receive all of the channels desired, you can obtain a set-top converter from Cox at a monthly charge, or if available at a retail store." Def. Exh. 25. No STBs that would allow a customer to access all of the content and services of Premium Cable are

[6] As Cox noted, the *Freeland* plaintiffs did not have evidence of the corporate policy of the tie-in and admissions of the same that Plaintiffs have in this matter. The *Freeland* court noted that two of the defendants included language in their subscriber agreements directly contrary to the plaintiffs' alleged tie-in. *Freeland*, 238 F.R.D. at 155. Thus, the *Freeland* plaintiffs attempted to use circumstantial evidence to establish the conditioning element. *Freeland* is distinguishable from this case on its facts.

[7] *See also* Exh. 2 (Cox Dep. (Langner)) pp.61:3-64:11 [redacted]).

actually available at retail. Exh. 10 (Cox Dep. (Necessary)) pp. 46:5-13, 146:10-15; Exh. 11 (Ader Dep.) pp.25:20-26:21; [redacted]. An illusory choice is no choice at all. Further, while Cox's Annual Customer Notice used terms like "may" and "can" to describe its requirement that customers lease a STB from Cox to have access to Premium Cable, Exhibit 26 to Cox's Opposition clearly states Cox's policy in this regard: "In order to receive interactive TV services offered by Cox, such as the Interactive Programming Guide (IPG), Pay-Per-View, and all Advanced TV programming options, *you must rent a digital receiver*." Def. Exh. 26 (emphasis added). As discussed above, this unequivocal language is repeated on Cox's website wherever it does business. Exh. 9. This representation is also consistent with the other documents and deposition testimony cited by Plaintiffs in their opening brief. Pl. Mem. at 2-4, 22-24.

Cox flatly misrepresented the key facts concerning its policies regarding retail STBs and class members' ability to receive Premium Cable, including Cox's interactive services, via third party STBs. Def. Mem. at 28, 45-46. Citing testimony from Mr. Smithpeters, a Cox employee, [redacted], does not refute Cox's stated policy that applies to its subscribers presently – namely, that its subscribers must lease a STB from Cox in order to receive interactive TV services. (*Cf.* Def. Exh. 26 and Def. Exh. 27.) Cox has not cited any evidence that retail STBs actually exist that will enable Cox subscribers to access Cox's interactive services.[8] The undisputed record evidence before this Court

[8] As noted in Plaintiffs' opening brief, Cox's actions and inactions inhibited the market for suitable alternatives for leasing STBs from Cox. Pl. Mem. at 39. This is an

shows that there are no STBs available at retail that will allow a Cox subscriber to access Cox's interactive services, which are integral to Premium Cable.[9] *See* Exh. 12 (Clement Dep.) p.153:3-7 ("Q: So within any Cox market, you could – you can buy a TiVo – you can subscribe to TiVo and get the Cox On Demand package or all the Cox Cable service? A: As of today you can't do either of those."); [redacted]

industry-wide problem among the cable providers. Rather than being innovators in the field, the cable providers generally work together to keep competition out. One example is the tie at issue in this case and in other cases throughout the country against other cable providers. The tie interferes with technological developments and quality of available service, as noted by Congress in §629 of the Telecommunications Act of 1996.

[9] Cox misstated the facts on this issue in two other respects. First, Cox appeared to say that retail boxes such as TiVo or Moxi are substitute products for Cox's STB; however, the evidence shows that these boxes do not provide full access to Cox's Premium Cable. *See* Pl. Mem. at 4. As Cox noted, many of its subscribers who lease a STB from Cox also have a TiVo box. The fact that some class members have a TiVo in addition to their leased STBs shows that these devices are not substitutes for leased STBs, not that these class members were not coerced, as Cox suggested. Def. Mem. at 46. Second, Cox claimed that its customers with CableCARDS are able to access switched digital video channels and view pay-per-view events, implying that the experience of these Cox customers are the same as those who lease a STB. Def. Mem. at 58, n.116. [redacted] Exh. 8 (Singer Dep.) pp.108:21-118:13. *See also* Pl. Mem. at p.23, n.6. Nevertheless, as Dr. Singer testified, [redacted] Exh. 8 (Singer Dep.) pp.123:3-124:5.

[redacted] Exh. 10 (Cox Dep. (Necessary)) pp. 46:5-13, 146:10-15; Exh. 11 (Ader Dep.) pp.25:20-26:21; [redacted].

Cox improperly criticized Dr. Singer's expert opinion that Cox's coercion here can be proven with common evidence. As Dr. Singer explained, [redacted] Exh. 8 (Singer Dep.) p.36:12-15. In this case, [redacted] *Id.* at p. 40:2-20; Pl. Exh. 13 (Singer Report) at 26-30. As Dr. Singer noted, [redacted] Exh. 8 (Singer Dep.) p.39:2-7. Dr. Singer rejected the [redacted] advanced by Dr. Burtis in his Expert Report. *See* Pl. Exh. 13 (Singer Report). Even if the Court were to embrace this [redacted], that Cox withholds critical elements of Premium Cable rather than withholding all elements of Premium Cable for customers who break the tie-in, it is a distinction without a difference.

Dr. Singer additionally rejected Cox's attempt to distinguish between those customers who actually use its interactive services and those who do not. Def. Mem. at 42-45, 59-60. As Dr. Singer explained, [redacted]. Exh. 8 (Singer Dep.) pp.33:18-35:21. [redacted] *Id.* [redacted] *Id.*

Dr. Singer's assumption is a fundamental concept in economics, [redacted]. *Id.*

Cox's class opposition transparently attempted to shift the Court's focus away from Cox's anticompetitive conduct, which is common to all class members. To this end, Cox asserted at length that individualized inquiry is required to determine which class members were coerced, as opposed to which class members leased a STB from Cox voluntarily. Cox's argument here is utterly without merit, as the core issue in a tying case is the harm to the marketplace caused by an allegedly unreasonable restraint on competition. *Little Caesar Enters.*, 172 F.R.D. at 252. As one court explained, "[t]he purpose of the antitrust laws is to stimulate economic competition, the essence of which is the presence of many competing sellers; salesmanship – the art of persuasion and influence- is inherent in competition among sellers. It is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play: so long as 'the buyer is free to take either product by itself there is no tying problem.'" *Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1226 (3d Cir. 1976) (quoting *N. Pac. Ry. v. United States*, 356 U.S. 1, 6 n.4 (1958)). Here, Plaintiffs and class members cannot obtain Cox's Premium Cable in its full form without also leasing a STB from Cox. The record before the Court unambiguously shows this, and it is dispositive as to Cox's argument against class certification here. To wit:

> Where there is a tying arrangement, it is not made legal by the fact that the buyers would have purchased the defendant's product without regard to the tie, [or buyers] do not consider the contract onerous or suffer rigorous

> enforcement. The relevant question is whether the seller has illegitimately constrained buyer choices.

Little Caesar Enters., 172 F.R.D. at 254 (internal citations and quotations omitted). Where, as here, Plaintiffs have shown on the basis of clear record evidence that Cox conditions Premium Cable on the leasing of a STB from Cox through public announcement and practical economic effects, individualized inquiry into particular consumer transactions is not in order. The record, in short, shows Plaintiffs can and will prove this element of their case by fundamentally common proof, and class treatment of this matter is thus warranted. At the same time, Cox is not deprived of any material defense.

B. Classwide Proof Shows that Cox Has Sufficient Economic Power in the Premium Cable Market.

In their opening papers, Plaintiffs set forth a wealth of record evidence common to all class members reflecting that Cox has sufficient economic power in the Premium Cable market to compel acceptance of Cox's tie. *See* Pl. Mem. at 25-35. The scope of the market is usually a question of fact and is dependent on the context and circumstances of each case. *Teleco Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1131 (10th Cir. 2002). Although Cox seemed to acknowledge this in footnote 64 of its Opposition, it sought to apply market definitions from other cases and proceedings to this matter in a bid to avoid certification of the instant class. Cox also criticized Dr. Singer for his product market and geographic market definitions in this case, largely based on his expert opinions and testimony in other unrelated matters. In all cases in which he offers his expert opinions, Dr. Singer [redacted]

[redacted][redacted][10] Exh. 8 (Singer Dep.) p.284:11-19.

1. Product Market

Cox cited the "reasonable interchangeability" test as the appropriate basis for defining the relevant product market definition. Plaintiffs agree on this point. However, Plaintiffs take issue with Cox's position that the focus of this inquiry is on the subjective perceptions of each class member. Notably absent from Cox's Opposition is any case law supporting Cox's argument that analysis of individualized evidence concerning the relevant product market definition based on the subjective perceptions of individual class members is required by Rule 23 and authority applying it.

In fact, quite to the contrary of Cox's position, courts base the reasonable interchangeability analysis for purposes of product market definition on the product's price, use and qualities. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). This analysis is "an economic task put to the uses of the law," utilizing cross-elasticity of demand to determine the boundaries of a product market. *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)). Elasticity of demand for a product is the degree by which the amount of a product purchased will change in response to changes in its price. *Id.*; *In re Webkinz Antitrust Litig.*, 695 F.Supp.2d 987, 994 (N.D. Cal. 2010). In calculating the cross-elasticity of demand, economists examine the aggregate demand of

[10] By way of contrast, Cox's Dr. Burtis [redacted] Exh. 1 (Burtis Dep.) pp. 8:9-11, 170:11-171:13. *Daubert* frowns on such extreme views.

consumers, which is represented by a market-wide demand curve, rather than the purchasing decisions of an individual consumer. Courts note that the least reliable evidence in predicting the effects of a hypothetical price increase is the subjective testimony by customers that they would or would not defect in response to a given price increase. *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 127 (C.D. Cal. 2007) (citing Areeda & Hovenkamp, *Antitrust Law* ¶538b).

Plaintiffs here define the relevant product market as Premium Cable. In support of this position, Plaintiffs offer the expert opinion of their economist, Dr. Singer, who reasonably concluded that the relevant product market here may be defined using common evidence such as [redacted] Pl. Exh. 13 (Singer Report) at 21-22, 30-31, 76-86. Dr. Singer has applied the interchangeability standard to the facts of this case and determined that [redacted] Exh. 8 (Singer Dep.) pp.9:12-10:1, 25:10-19, 64:18-66:9. Dr. Singer duly concluded that [redacted][11] *Id.*, pp.10:14-11:19. As set forth in Plaintiffs' opening

[11] That Cox's Premium Cable and over-the-top services such as Netflix are complementary and not substitutes is confirmed by Cox in estimating that 35-40% of people with MVPD service also have over-the-top service. Exh. 16 (Deposition of Cox (Jennifer Rich)) p.113:4-18; [redacted]

brief, with Cox's documents providing support, Plaintiffs maintain that satellite and telco MVPD services are not truly interchangeable with Cox's Premium Cable; nevertheless, even assuming these providers are included in the relevant product market, Plaintiffs have met this element of their class proof burden using evidence common to each class member. Pl. Mem. at 25-26.

To this end, as one court properly found:

> [T]he process of defining the product market will be predominated by common questions. The analysis involves the same data, the same experts, the same industry analyses, and the same application of the same economic tests. It would be incredibly inefficient to duplicate this analysis in thousands of individual cases.

In re Live Concert Antitrust Litig., 247 F.R.D. at 131. So here.

2. Geographic Market

The geographic market definition must correspond to the commercial realities of the industry and be economically significant. *Brown Shoe Co.*, 370 U.S. at 336-37. Plaintiffs proposed two alternative geographic markets – Cox's national footprint, meaning the combination of each of Cox's local markets in which it operates, or each of the local markets in which Cox operates individually.[12] Pl. Mem. at 26-27.

Per *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), Plaintiffs submit respectfully that a national class here most closely corresponds to the commercial realities applicable in this case based on record evidence of Cox's national planning and decision making, including its uniform policy of requiring a STB from Cox to receive

[12] Cox incorrectly stated that Plaintiffs only moved for a national class. Def. Mem. at 36.

Cox's Premium Cable, as described in Plaintiffs' Memorandum in Support of Class Certification. Pl. Mem. at 26-31. As discussed above, not only did Cox enact this uniform policy throughout each of its local markets, Cox also announced this policy across all of its markets in standardized form in its promotional material and on its website using identical language. Exh. 9. The challenged practices at issue here are of a national scale.

In arguing against the existence of a national market, Cox seemed to suggest the propriety of certification on the basis of its individual local markets. Cox cited to an FCC opinion, a filing by the Department of Justice, and opinions from Dr. Singer in cases other than this one, in which these entities or individuals have supported local markets in various contexts. Def. Mem. at 30-31. Cox ignored the fact that not one particular market exists with respect to all cable cases. The relevant geographic market should be determined in the context of each case. *Behrend*, 2011 WL 3678805 at *8; Exh. 8 (Singer Dep.) pp.15:5-16:5.

> Market delineation in antitrust is a means to an end rather than an end in itself. Markets are tools used to aid in the assessment of market power-related issues. The best tool for any task is one designed to perform it. A market delineated for one purpose may not be any more suitable for another than a dental drill is for coal mining or a mining drill is for dentistry.

Gregory J. Werden, *Four Suggestions on Market Delineation*, 37 Antitrust Bulletin 107 (1992).

Dr. Singer's expert opinions, criticized by Cox, provide a perfect example of the need to correlate the relevant geographic market to the facts and circumstances of each case. Cox pointed out that Dr. Singer defined the geographic market in *Behrend v.*

Comcast at the Philadelphia DMA level, as opposed to the national level which Dr. Singer opined is appropriate in this case. Def. Mem. at 31. The issue in *Behrend* related to Comcast's clustering strategy in the Philadelphia area, and Comcast's expert opined that the appropriate geographic market was each individual household. *See Behrend*, 2001 WL 3678805. Defining the relevant geographic market on a national basis would have been utterly inapposite to the facts and circumstances of that case. Dr. Singer's opinion that a national geographic market is appropriate under the fact and circumstances of this case do not conflict with his opinions in other cases, as Cox suggested. [redacted]

As Dr. Singer explained, [redacted][13] Singer Dep. (Exh. 8) pp.26:5-18. Dr. Singer testified that [redacted] *Id.* As Dr. Singer stated, [redacted] *Id.* [redacted]

[13] [redacted] Cox routinely aggregates its local markets regardless of alleged competitive differences. Exh. 10 (Cox Dep. (Necessary)) pp.52:3-53:3; Exh. 3 (Cox Dep. (Pugliese)) pp. 126:1-127:25.

[redacted][14] *Id.* Dr. Singer confirmed that [redacted] *Id.* at p.52:2-11.

For purposes of class certification, Plaintiffs need only establish that the definition of the geographic market is capable of proof through evidence common to all of the members of the class. *Hydrogen Peroxide*, 552 F.3d at 311. Regardless of whether a national footprint class is more appropriate as opposed to local market subclasses, fundamentally common proof defines the geographic market for purposes of analyzing Cox's market power in the tying market.

Cox's argument that differing competitive options for class members based on location assumes that what Cox refers to as "competitive options" are reasonable substitutes for Premium Cable. Cox's assumption on this issue is in error. As Dr. Singer noted, [redacted] Exh. 8 (Singer Dep.) pp.55:18-57:17; Pl. Exh. 13 (Singer Report) at 76-86. [redacted] Exh. 8 (Singer Dep.) p.19:4-12. Further, Dr. Singer testified that

[14] Dr. Singer testified that [redacted] Exh. 8 (Singer Dep.) p.20:1-15.

[redacted]

[redacted] *Id.* at pp.20:1-21:7, 56:16-57:17. Thus, the purportedly individualized and class certification-defeating questions Cox conjures are illusory.

Cox's faulty assumption also doomed its reliance on the Second Circuit case of *Heerwagen v. Clear Channel Communications*, 435 F.3d 219 (2d Cir. 2006). Cox relied heavily on *Heerwagen* in an attempt to distinguish *Grinnell*, upon which Plaintiffs rely; however, Cox misrepresented the facts of *Heerwagen* with respect to this case. First, while Cox correctly stated that the *Heerwagen* plaintiff believed she could prove her claims of monopolization with direct evidence of market power without the need to define a relevant geographic market, Cox incorrectly asserted that Plaintiffs here likewise argue that they can establish Cox's market power with direct evidence of Cox's ability to raise prices without regard to a specific geographic market. Def. Mem. at 32. While Plaintiffs do provide direct proof of Cox's ability to control prices and exclude rivals with respect to their market power analysis, Plaintiffs do so within the confines of a defined geographic market.

Further, the facts of Plaintiffs' case herein are more closely aligned to those of *Grinnell* than of *Heerwagen*. As explained by the *Heerwagen* court,

> [t]he Supreme Court affirmed a finding of a national market where a company that supplies fire and burglar alarm services operates nationally, engages in national planning, is a party to national agreements with competitors, has a "national schedule of prices, rates and terms, though the rates may be varied to meet local conditions," follows rate-making, inspection, and certification by national insurers, and makes nationwide contracts with customers.

Id. at 230. Plaintiffs' opening brief detailed the evidence demonstrating that the facts in this case align it with *Grinnell*, making a national market the appropriate market. Pl. Mem. at 27-30. Cox did little in its Opposition to dispute this record evidence, which, again, is common to all class members.

3. Market Power

Market power is the power to control prices or exclude competition. *E.I. Dupont*, 351 U.S. at 391. Plaintiffs have furnished the Court with both direct evidence and indirect evidence of Cox's market power – all of it common in nature and not individualized. In short, this common evidence shows that Cox possesses market power in both its national footprint market and in each of the local markets in which it operates. Pl. Mem. at 31-35.

Plaintiffs' direct evidence comes through Dr. Singer's expert analysis of [redacted] In concluding that direct evidence shows that Cox has the power to control prices in the markets in which it operates, Dr. Singer relied on evidence common to all class members – namely, Cox's customer database (for the one geographic market that Cox provided) and other Cox documents produced in discovery relevant to Cox as a whole.

Plaintiffs noted that while unnecessary due to their direct evidence, Plaintiffs also have indirect proof demonstrating Cox's sufficient market power. Pl. Mem. at 32-35. As

Dr. Singer said, [redacted] Pl. Exh. 13 (Singer Report) at 102-103. Plaintiffs' indirect evidence is also common as to each class member.

Cox disputed Plaintiffs' indirect evidence of market power, in particular Plaintiffs' market share analysis. Cox cited to *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir. 1990), for the unremarkable, and undisputed, proposition that market share alone is insufficient to establish market power. Def. Mem. at 34. The *Reazin* court follows this statement with its reasoning that market share may or may not reflect actual power to control price or exclude competition. *Reazin*, 899 F.2d at 967. Cox's argument here entirely ignored that Plaintiffs have direct, fundamentally common and compelling evidence of Cox's ability to control price and exclude competition in its markets.

Cox incorrectly argued that Plaintiffs' market share statistics are not based on a properly defined geographic market. Def. Mem. at 34 and n.74. Relying on Cox's own documents, Dr. Singer determined the market share for each of Cox's [redacted] local markets, representing the total area in which Cox does business. [redacted] As discussed above, whether the Court determines the appropriate geographic market is each individual local market or the entirety of Cox's national

footprint, Plaintiffs have properly defined the geographic market using common evidence.[15]

Relying on its expert, Cox criticized Dr. Singer for calculating market share using something other than DMAs.[16] Def. Mem. at 35-36, 56-57. [redacted][17] Exh. 8 (Singer Dep.) pp.76:17-77:14. Thus, Cox's criticism of Dr. Singer for aggregating over large areas is misplaced. *See* Def. Mem. at 34, n.74.

Moreover, as Cox noted, Dr. Singer has calculated market share using DMAs in other matters, but in circumstances such as this, where market share information is

[15] Cox also incorrectly stated that Dr. Singer did not perform an analysis of market power in a national geographic market. Def. Mem. at 56. [redacted] As acknowledged in her deposition, [redacted] Exh. 1 (Burtis Dep.) p.54:10-12. Only after she submitted her expert report and was deposed, did Dr. Burtis offer any expert analysis to contradict Dr. Singer's market share opinions. Accordingly, Dr. Burtis' untimely expert opinions should not be considered. Paragraphs 10-12, 19-20, 24-26 and 31in Dr. Burtis' Supplemental Report contain new opinions not previously included in her original expert report or discussed during her deposition. Def. Exh. 31. These opinions should likewise be discarded.

[17] Dr. Singer's aggregation of Cox's local markets into a larger footprint market is not unique. As Dr. Singer discussed, [redacted] Exh. 8 (Singer Dep.) pp.48:14-51:14. The fact that Cox cited the FCC and Department of Justice for support of its local geographic market argument simply demonstrates that the relevant geographic market analysis is dependent on the facts and circumstances of each case.

available at a more granular level, [redacted].[18] Exh. 8 (Singer Dep.) pp.81:3-82:3, 262:1-4. [redacted] *Id.* at pp.81:3-82:3. Dr. Singer's analysis of market share at the local market level provides a more accurate reflection of Cox's market share than the DMA analysis put forth by Dr. Burtis. As explained by Dr. Singer, [redacted] *Id.* at pp.77:20-78:22.[19]

Continuing its efforts to discredit Dr. Singer's opinions here, Cox cited to Dr. Singer's expert report in the Comcast/NBC merger proceeding in which he was asked by a third party to analyze the competitive effects of Comcast's proposed joint venture with NBC Universal. *See* Def. Exh. 22. According to Cox, Dr. Singer provided testimony regarding the impact of telco overbuilders into a cable operator's market that conflicts with his testimony here. Def. Mem. at 57-58. Dr. Singer refuted this contention, [redacted] Exh. 8 (Singer Dep.) pp.99:5-6. [redacted] Exh. 8 (Singer

[18] [redacted] Exh. 8 (Singer Dep.) pp.73:16-76:11. [redacted] *Id.*

[19] [redacted] Exh. 8 (Singer Dep.) pp.82:14-83:12.

Dep.) pp.87:7-99:17, 100:3-101:4. [redacted] *Id.*

Regardless, the fact that telcos have entered in a small number of Cox's markets does not mean that Plaintiffs cannot establish the existence of Cox's market power at trial with evidence that applies commonly to each class member. Cox's documents, including its customer database and SNL Kagan, are classwide evidence Plaintiffs intend to use at trial to identify where the telcos have entered and Cox's pricing reaction to the same. [redacted] In short, Dr. Singer's analysis of Cox's market power in those areas is also common to the class, as the same direct and indirect evidence would be used for each class member to prove this element of Plaintiffs' case. [redacted]

In their opening class papers, Plaintiffs noted that the minimum market share for successful tying claims is in the range of 30-40% and that Plaintiffs were unable to find any case holding market share over 35% was not a sufficient market share for purposes of assessing market power. Pl. Mem. at 33. Given the chance to refute Plaintiffs' contention that market share over 35% was sufficient, Cox has remained tellingly silent. In fact, the only cases Cox cited in its Opposition on this point are monopolization cases, which are irrelevant to this issue. Def. Mem. at 35. As one court noted, courts generally require a minimum market share of between 70% and 80% as an indicator of monopoly power, *Colo. Interstate Gas Co. v. Natural Case Pipeline of Am.*, 885 F.2d 683, 694 n.18

(10th Cir. 1989), something that is not at issue in this matter given that this case is not a monopoly case.

C. Plaintiffs Have Common Evidence of Antitrust Injury.

With respect to antitrust injury, Cox's arguments focused on Dr. Singer's damages models. Cox asserted that these models do not show impact or damages on a classwide basis using common evidence.[20] Cox also ignored Plaintiffs' arguments and record evidence of causation, which turns on fundamentally common evidence. *See* Pl. Mem. at 39-40.

The issue for class certification in this respect is the fact of damage, proof of which must be common to the members of the class. The fact of damage or so-called antitrust impact is distinct from the amount or quantum of damage. *Caitlin v. Wash. Engery Co.*, 791 F.2d 1343, 1350 (9th Cir. 1986). Cox's arguments that its subscribers pay different amounts for Cox's service and equipment relate to the *amount* of damage sustained by each class member, and not to the fact of damage. These arguments are thus irrelevant. Courts consistently hold that individual damage questions do not preclude class certification where issues of liability are common to the class. Pl. Mem. at 36-37; *see also In re Live Concert Antitrust Litig.*, 247 F.R.D. at 131 (collecting cases).

The well-established method of demonstrating the fact of antitrust injury/damage based on common proof is to show that the defendant's tie injured plaintiffs by charging

[20] Dr. Singer characterized Dr. Burtis' report and analysis as [redacted] Exh. 8 (Singer Dep.) pp.45:15-46:8. [redacted] *Id.*

plaintiffs supracompetitive prices for the tied product. *Bogosian*, 561 F.2d at 455 (referring to this injury as "illegal overcharge").

> [Plaintiffs] could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that [plaintiffs] made some purchases at the higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among [plaintiffs] as to the extent of their damage…. Under these circumstances, proof on a common basis would be appropriate.

Id. Plaintiffs have provided the Court with two methods of establishing the existence of antitrust injury/damage that employ common proof: (1) the GRS Test and Squeezing Surplus Method, which measures overcharges that class members paid to Cox for their STBs and (2) the Canadian Benchmark method, comparing prices paid by class members with those of Canadian cable companies to determine an overcharge.[21] Pl. Mem. at 37-40.

Dr. Singer used the GRS Test as a methodology to show common impact. As Dr. Singer explained, [redacted] Exh. 8 (Singer Dep.) p.190:7-19. If the bundle/tie reduces consumer welfare, then it inflicts anticompetitive harm. [redacted]

[21] Even if Cox is able to ultimately demonstrate that some class members were not harmed by Cox's illegal tie, class certification is not precluded. A great many courts have certified classes even when some class members may not have been harmed. *See In re Live Concert Antitrust Litig.*, 247 F.R.D. at 141 (compiling cases).

[redacted].[22] Exh. 8 (Singer Dep.) pp.190:21-198:19. [redacted]. at pp.52:13-53:21.

Cox and Dr. Burtis strongly criticized Dr. Singer for his use of the GRS Test to show common impact. But Cox's Opposition and Dr. Burtis' testimony and supplemental expert report reflect that neither of them properly understands the GRS Test.[23] Nor, for that matter, did Cox seem to understand the plain English used by Dr. Singer in his report on this score. In its Opposition, Cox claimed Dr. Singer simply

[22] [redacted]

assumes common impact by asking the Court to "suppose" that the GRS test shows classwide impact, citing to Paragraphs 72-74 of the Singer Expert Report. Def. Mem. at 62. Plaintiffs respectfully submit that Cox here simply misread Dr. Singer's report. Dr. Singer, in fact, opined that the GRS Test is a method to show impact on a classwide basis using common proof for all class members and then explained how the GRS Test works. Pl. Exh. 13 (Singer Report) at ¶¶71-75. Cox's argument confused merits and class issues (perhaps strategically), as at this stage in the proceeding, Plaintiffs need only show that impact is capable of proof on a classwide basis, which is precisely what Dr. Singer has done. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 170 (D. D.C. 2009) ("At the class certification stage, plaintiffs need only 'demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class'; they need not prove the element of antitrust impact itself.") (citation omitted).

Cox further underscored its lack of understanding of the GRS Test: (1) in stating that the GRS Test only applies when the subject firm is a monopolist, (2) in claiming Dr. Singer began his analysis with the assumption that Cox has monopoly power, (3) in failing to recognize that the GRS Test performs the analysis across a range of prices, and (4) in claiming that the GRS Test must be applied to each class member individually. Def. Mem. at 61-62; Def. Exh. 31 (Burtis Supp. Report). Cox erred on all of these items.

[redacted] Exh. 8 (Singer Dep.) p.138:1-9. [redacted]

[redacted] *Id.* at pp.138:1-139:2. [redacted] *Id.* at pp.226:12-227:12. As he explained in his deposition, [redacted]

Next, Dr. Burtis incorrectly stated in her Supplemental Report that [redacted] Def. Exh. 31 (Burtis Supp. Report) at ¶21. [redacted] Dr. Singer explained that [redacted] Exh. 8 (Singer Dep.) pp.151:11-154:15, 205:2-21. Dr. Singer further noted that [redacted]

[redacted] *Id.*

Dr. Burtis' errors and individualized issues largely stem from her failure to understand Plaintiffs' definition of the tying product. In her attempt to show that Dr. Singer's GRS Test is sensitive to different prices, Dr. Burtis purported to perform the same analysis using prices of [redacted], representing prices no class member pays for Premium Cable. Def. Exh. 31 (Burtis Supp. Report) at 5, Figure 1. As Dr. Singer explained, [redacted] Exh. 8 (Singer Dep.) pp.145:6-146:3. In fact, as Cox's annual customer notice explains, Cox is prohibited by law from providing its digital cable service without the basic and expanded basic portion of its Premium Cable. *See* Def. Exh. 25. However, Dr. Burtis' calculation using [redacted] Exh. 8 (Singer Dep.) pp.211:8-215:18. Thus, Dr. Burtis' criticism of Dr. Singer's GRS Test is an accounting gimmick that does not reflect real life options. Such irrelevant analysis does little to advance the issues in this case, but it does a great deal to show Dr. Burtis' fundamental lack of understanding. [redacted]

Dr. Singer presented two methods for calculating aggregate damages on a classwide basis. Pl. Mem. at 37-38; Pl. Exh. 13 (Singer Report) at 63-75. In claiming that Dr. Singer's damage calculation is his impact calculation, Def. Mem. at 62, Cox confused proof of common impact, which is a merits determination, with proof that a methodology

exists for proving common impact, which is the issue for class certification. [redacted] Exh. 8 (Singer Dep.) p.158:8-21.

With respect to his GRS Test/Squeezing Surplus model, Cox criticized Dr. Singer for performing his damage calculation for only one package of services. Def. Mem. at 64. As Dr. Singer explained, for purposes of the class certification portion of his report, [redacted] Exh. 8 (Singer Dep.) pp.159:15-160:6. [redacted]

Relying on Dr. Burtis, Cox incorrectly claimed that Dr. Singer used an average demand elasticity value in his GRS Test/Squeezing Surplus damages model. Def. Mem. at 65. As Dr. Singer explained, [redacted] Exh. 8 (Singer Dep.) pp.162:1-163:7. [redacted] Neither is an average, but instead are the best estimates of demand elasticity for Premium Cable, given the data used in the two studies, and Dr. Singer used both of them in the GRS Test to show that his results were robust to this range of peer-reviewed demand elasticities. Cox is simply wrong in its argument regarding averages.

[redacted]

With respect to his Canadian Benchmark model, Cox criticized Dr. Singer for: (1) failing to compare the prices of the products impacted by the tie, (2) ignoring the question of whether Canadian STB-manufacturers have the same costs as U.S. providers, and (3) ignoring the prices for HD, DVR and HD DVR STBs. Def. Mem. at 66-68. Each of Cox's criticisms should be rejected.

[redacted]

at pp.168:1-171:21. [redacted] Finally, as discussed earlier, Cox's alleged tie does not implicate the additional features of an HD, DVR or HD DVR STB. Cox's tie affected the two-way services, which are available on all types of Cox's leased STBs, the lowest common denominator being Cox's standard STB. *See* Pl. Mem. at 20, n.5; [redacted]

Additionally, with respect to the Canadian Benchmark model, Dr. Burtis incorrectly claimed that Dr. Singer abandoned his original methodology in favor of new opinions in his Erratum due to the mathematical error contained in his original report.[24] Def. Mem. at 66. Dr. Singer rejected this contention, explaining that [redacted]

[24] Cox and Dr. Burtis falsely claimed that Dr. Singer's Expert Report contains numerous mathematical errors. Def. Mem. at 52-53 and n.109. [redacted] xh. 18. [redacted]

[redacted] Exh. 8 (Singer Dep.) pp.175:7-180:4. [redacted] *Id.* at pp.177:16-178:7.

Finally, with respect to Dr. Singer's Canadian Benchmark methodology, in addition to falsely stating that [redacted] Def. Exh. 31 (Burtis Supp. Report) at ¶28. Dr. Singer graciously gave Dr. Burtis the benefit of the doubt, [redacted] Exh. 8 (Singer Dep.) pp.274:20-275:21. Dr. Singer has never made such a statement, and it is not his opinion now, nor has it ever been, that [redacted]. *Id.*

In the end, Dr. Singer has provided common methods and proof to enable Plaintiffs to present their tying claim using classwide evidence. Dr. Singer has presented a reliable method of showing classwide impact with his GRS Test, and he has presented two methods for calculating aggregate damages. The inputs and analysis for each of these models and methodologies involve proof common to all class members, such that class certification is appropriate.

D. The Filed Rate Doctrine Does Not Create Individual Issues Precluding Class Certification.

As a final effort to create individual issues, Cox asserted that it has a defense associated with rate regulation that is applicable to some class members but not others. Def. Mem. at 47-50. Cox's filed rate doctrine argument fails in several respects.

First, for purposes of its filed rate doctrine argument, Cox relied on its Fifth Affirmative Defense[25], which states as follows:

> Plaintiffs' claims are barred, in whole or in part, because the complained-of-conduct is required by, regulated by, or approved by Federal Law and/or the rules and policies of the Federal Communications Commission.

Amended Answer, p.25 [Rec. Doc. #31] *See* Def. Mem. at 49, n.108. This Fifth Affirmative Defense does not invoke the filed rate doctrine.

In order to give its filed rate doctrine argument the appearance of plausibility, Cox had to construe Plaintiffs' "complained-of-conduct" as overcharges on STBs, which, if true, could potentially implicate local and/or federal regulation. However, Cox yet again, got its facts wrong. The "complained-of-conduct" in this case is Cox's wrongful tying of the rental of its STBs to its Premium Cable. Cox cannot dispute this, given its reference to Plaintiffs' "tying claim" throughout its Opposition. Cox's tie is neither required by, regulated by, nor approved by federal law or the FCC, as claimed in Cox's Fifth Affirmative Defense. Thus, Cox has not pled the filed rate doctrine as a defense. Moreover, any arguments concerning whether Cox's Fifth Affirmative Defense includes

[25] In its Motion to Dismiss, Cox unsuccessfully sought to use this same Fifth Affirmative Defense to bar Plaintiffs' claims. The Court rejected Cox's *Trinko* argument then, and it should likewise reject Cox's filed rate doctrine argument now.

the filed rate doctrine will be common to all class members, as all class members have alleged an illegal tie.

In the event the Court determines that Cox has sufficiently pled the filed rate doctrine as a defense, contrary to Cox's argument, this defense does not preclude certification of the proposed class. After a lengthy recitation of the FCC's requirements governing rate regulation and asserting that some unspecified number of areas serviced by Cox are still under a "rate regulation" regime, Cox argued that it has a right to raise the filed rate doctrine defense against each class member who lives in a "regulated" area and that there "is no way that the Court could ascertain which individual purported class members would need to be excluded, without conducting thousands of mini-trials to determine where each plaintiff lived and when and whether they moved in-between regulated and non-regulated areas during the class period." Def. Mem. at 50. The upshot of Cox's file rate doctrine argument is that the class is not ascertainable.[26] *Id*.

[26] Though "ascertainability" is not one of the requirements of Rule 23, several courts have required that the class be identifiable before it may be properly certified. *See McNeely v. National Mobile Health Care, LLC*, No. CIV-07-933, 2008 WL 4816510, * 5 (W.D. Okla. Oct. 27, 2008)(finding the proposed class ascertainable because, among other things, defendant's records contained mailing addresses and one can determine from the address whether the class member resided in a nursing home); *Engle v. Scully & Scully*, No. 10 CIV. 3167, 2011 WL 4091468 (S.D.N.Y. Sept. 14, 2011)(observing that Second Circuit courts have implied a requirement of ascertainability). A class is adequately defined if "its members can be ascertained by reference to objective criteria." *Anderson v. Merit Energy Co.*, No. 07-cv-00916 and No. 07-cv-01025, 2008 WL 2484187, *2 (D. Colo. June 19, 2008)(rejecting argument that class members could not be ascertained from royalty agreements). The fact that some individuals included in the class definition may not have suffered damages does not render the class unascertainable. *See Sibley v. Sprint Nextel Corp.*, 254 F.R.D. 662, 671 (D. Kan. 2008). "If the class definition should require tailoring as the litigation progresses, the Court and parties are authorized to do so." *Id*. (citing FRCP Rule 23(c)(1), (d)).

Significantly, Cox did not argue that issues of whether STB lease rates are regulated, whether the defense bars the tying claim asserted by Plaintiffs and/or whether such "rate regulation" potentially bars a subscriber's damage claim turn on individualized issues.[27] Obviously, these are issues that do not depend on a class member's individual circumstance and go to the merits of their claim.[28] The only argument against certification that Cox made based on the filed rate doctrine defense is "ascertainability"; in other words, Cox argued it is entitled to litigate the file rate doctrine defense and that the Court will not be able to determine which class members are subject to this defense. Def. Mem. at 50.

There are several flaws with Cox's "ascertainability" argument. First, to the extent the filed rate doctrine defense is a viable defense in this case, it only bars recovery of treble damages by the affected class members. These class members are still entitled to equitable relief with respect to the challenged conduct. *See Saunders v. Farmer's Ins. Exchange*, 440 F. 3d 940, 944 (8th Cir. 2006)(noting that under *Square D v. Niagara*

[27] It is not clear that the regulation Cox relies on actually applies to the tying and tied products at issue here. [redacted] Further, the regulation provides a formula for calculating a ceiling or maximum rate that could be charged. Exh. 3 (Cox Dep. (Pugliese)) pp.86:9-87:18; [redacted] Notably, Cox acknowledged that its STB rates were always below the Maximum Permitted Rate. Exh. 12 (Clement Dep.) pp.83:20- 84:14; Exh. 3 (Cox Dep. (Pugliese)) pp.86:9-87:18. Therefore, an issue for determination on the merits is whether Plaintiffs are actually challenging a filed rate.

[28] Indeed, the regulation on which Cox relied is a federal statute. Thus, it is the same for all class members, regardless of their geographic location. Moreover, as Cox witnesses explained in deposition, this statute provides a formula for calculating a Maximum Permitted Rate, which includes a guaranteed rate of return. Exh. 12 (Clement Dep.) pp.83:20- 84:14; Exh. 3 (Cox Dep. (Pugliese)) pp.86:9-87:18. The Maximum Permitted Rate was computed by Cox on a national basis. Exh. 3 (Cox Dep. (Pugliese)) pp.86:9-87:18; [redacted]

Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 (1986) the doctrine was narrowed in scope to just recovery of damages).

Second, if the Court rules in favor of Cox on its filed rate doctrine defense, then class members in areas subject to STB rate regulation will not be entitled to damages for the time spent in that area. Alternatively, as the litigation progresses and the filed rate doctrine argument is fully addressed, the Court can modify the class definition to exclude areas subject to Cox's filed rate doctrine defense, if it finds that defense meritorious. In the unlikely event that a class member moved to an unregulated area during the class period, then damages would be allowed only for the time that he or she leased a STB in an unregulated area. The only information relevant to this determination is the geographic location of the class members. Cox's customer transaction database identifies where each class member was located when he or she leased a STB. Thus, there is no need to question thousands of class members about where and when they lived at a certain location.

Finally, despite the fact that Cox itself possesses the information necessary to determine whether and when a class member lived in a regulated area, Cox asserted that it has a "substantive" right to demand proof from every class member about where they lived and when and whether they moved in between regulated and non-regulated areas during the class period. Def. Mem. at 50. Cox did not identify the source of this "substantive" right, other than citing to *Wal-Mart*. *Id.* The *Wal-Mart* opinion does not support a categorical rule that in any Rule 23 class action, a defendant is substantively entitled to proof from purported class members simply because it raises an affirmative

defense to some of the claims.[29] Cox simply demands "proof" of residency; a fact which can be established through its own records and which has no bearing on whether the defense is meritorious.

II. THE UCL SUBCLASS SHOULD BE CERTIFIED.

Cox presented no unique opposition to the UCL subclass, other than those expressed with respect to Plaintiffs' tying class. Therefore, Plaintiffs' above arguments supporting the tying class apply equally to the UCL subclass. Plaintiffs' have aptly satisfied the requirements for certification of the UCL subclass.

[29] In *Wal-Mart*, the substantive right at issue was grounded in "Title VII's detailed remedial scheme" which involved a familiar burden shifting framework. *Wal-Mart*, 131 S.Ct. at 2561. One of the steps in this statutory remedial scheme, grants an employer the right to show that if it took an adverse employment action against an employee for any reason other than discrimination, the trial court could not award, among other things, back pay. *Id*. The Court noted that it had established a procedure for trying practice or pattern cases that gave "effect to these statutory requirements." *Id*. After establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings. . . to determine the scope of individual relief." *Id*. The Court disapproved of the Ninth Circuit's method of determining back pay for all class members through representative trials and thus replacing the Court's procedure for trying pattern or practice cases. According to the Court, the Ninth Circuit's approach did not allow Wal-Mart to raise its statutory defenses to individual claims and because Wal-Mart had a statutory right to raise these defenses to individual back pay claims, a class under Rule 23(b)(2) was not appropriate. The case at bar is clearly distinguishable from *Wal-Mart*. Cox does not have a "statutory defense" that requires individualized inquiries regarding remedies. The file rate doctrine defense is (1) not a statutory defense and (2) does not require individualized inquiries of the sort at issue in *Wal-Mart*. Unlike the Defendant's interpretation of the filed rate doctrine, Title VII expressly provides that an employer avoids back pay liability if it can show that an employment action related to an individual was taken for reasons other than discrimination. The employer has a statutory right to show what motivated a particular employment decision. Even as articulated by Cox, there is no such comparable showing with the filed rate doctrine defense.

CONCLUSION

For the reasons set forth herein and in Plaintiffs' original Memorandum in Support of Class Certification, Plaintiffs request that their tying class and UCL subclass be certified. Plaintiffs further request that their counsel be appointed as class counsel to diligently represent the class and subclass through the conclusion of this case.

Dated: September 23, 2011

Respectfully submitted,

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

Allan Kanner, Esquire
Cynthia St. Amant, Esquire
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
504-524-5777 (Telephone)
504-524-5763 (Facsimile)

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

Garrett W. Wotkyns, Esquire

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

Joe R. Whatley, Jr., Esquire
WHATLEY DRAKE
& KALLAS, L.L.C.
1540 Broadway, 37th Floor
New York, NY 10036
212-447-7070 (Telephone)
212-447-7077 (Facsimile)

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, A. Daniel Woska, hereby certify that on this 23rd day of September, 2011, Plaintiffs' Reply in Support of Class Certification and supporting documents were served via ECF and email, on the following counsel for Defendant:

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

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

/s/ A. Daniel Woska