No. 12-706

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: COX ENTERPRISES, INC. SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION	Answer in Opposition to Petition for Rule 23(f) Appeal from the United States District Court for the Western District of Oklahoma No. 09-ML-2048-C United States District Court Judge Robin J. Cauthron

DEFENDANT-RESPONDENT COX COMMUNICATIONS, INC.'S ANSWER IN OPPOSITION TO PLAINTIFFS' PETITION FOR LEAVE TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

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INTRODUCTION

The Tenth Circuit does not accept Rule 23(f) petitions as "a matter of course." In fact, this Court recently stated that the grant of a petition for interlocutory review constitutes "the exception rather than the rule." *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009). As is the case under Rule 60(b) motions for reconsideration, Rule 23(f) appeals are "not an opportunity for unsuccessful litigants to take a mulligan."[1/]

In this case, Plaintiffs, undeterred by this Court's restraint in accepting such petitions, attempt to re-litigate their class certification arguments on new grounds. Plaintiffs seek to convert their proposed national geographic antitrust market into regional or local ones, even though they have never before pleaded or defined such markets. In their Petition, Plaintiffs ignore their failure to sufficiently plead the substantive elements of their tying claim through a series of flawed arguments. Their attempt to gain interlocutory review of the District Court's Opinion denying class certification must fail, as it does not satisfy the requirements in this Circuit to permit an appeal under Rule 23(f).

Plaintiffs have alleged that Cox Communications, Inc. ("Cox") illegally forces customers to rent a set-top box in order to gain full access to Cox's "premium cable" services in violation of the Sherman Act, 15 U.S.C. § 1.[2/] From the outset of this case,

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[1/] *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007); *Oasis Indus. v. G.K.L. Corp.*, 1997 WL 85167, at *1 (N.D. Ill. Feb. 24, 1997) ("This is not golf. There are no motions for 'mulligans.'").

[2/] Plaintiffs' Amended Complaint named two defendants, Cox Communications, Inc.

Plaintiffs sought certification of a single nationwide class of Cox subscribers in a single alleged nationwide geographic market. The District Court denied class certification on the basis that the market power, antitrust injury, and damages elements of the claim that Plaintiffs pleaded were not amenable to common proof across a single nationwide class.

Plaintiffs' Petition rests primarily on the false premise that the District Court committed error when, after concluding that a localized analysis of Cox's markets was necessary and market power and antitrust injury could not be proven by common evidence, it failed to take upon itself the task of defining, and then analyzing, possible local markets. Plaintiffs ignore the fact that the burden to assert a proper geographic market—and then to proffer a methodology for proving market power and antitrust injury within that defined geographic market in a class action— rested on them and not the District Court. Plaintiffs never seriously pleaded that a non-nationwide market could be identified with any precision. Crucially, Plaintiffs to this day have not defined what such local or regional markets would look like for an antitrust analysis. It is not "manifest error" for the District Court to decline to shoulder the Plaintiffs' burden.

Plaintiffs also mention two other points. Plaintiffs claim that denial of class certification is the "death knell" of this case and that interlocutory review will facilitate the development of the law. To the contrary, the denial of class certification is no death

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and Cox Enterprises, Inc. (Dkt. No. 17). Cox Enterprises, Inc. was voluntarily dismissed from the case on April 15, 2010 (Dkt. No. 39). Although the District Court's Opinion and Reconsideration Order refer to "Defendant Cox Enterprises, Inc.," the sole remaining Defendant—and the only party remaining to respond to Plaintiffs' Rule 23(f) Petition—is Cox Communications, Inc.

knell. The District Court left the door open for Plaintiffs to attempt to plead appropriate regional or local markets. In fact, co-lead counsel for Plaintiffs in this case has already asserted in a similar antitrust proceeding against a different cable company that the *Cox* Plaintiffs are in the process of filing a motion to allege regional classes. Similarly, Plaintiffs' argument that review will facilitate the development of the law in this area has no substance to it. The District Court's Opinion was securely grounded in well-settled antitrust case law precedent, and interlocutory review will add nothing to this line of authority.

Finally, this Court should dismiss Plaintiffs' untimely petition for lack of jurisdiction. Rule 23(f) does not provide a second 14-day window to appeal an order denying reconsideration of a class certification order. The Tenth Circuit has suggested that the filing of a motion for reconsideration in the District Court *tolls* the 14-day period, rather than provides a new 14-day period running from the date of the District Court's order regarding reconsideration.

STATEMENT OF FACTS

Cox's Services and Competition

Plaintiffs' illusory portrayal of Cox as a cable company offering identical services with identical equipment at identical prices to its customers across the United States in order to certify a nationwide class of subscribers ignored the reality of the competitive landscape. In fact, since 2005, Cox has provided cable service to neighborhoods in

nineteen different states.[3/] In each of these locations, Cox offers different programming services.[4/] The price that Cox charges for its tiers and packages of video programming, and for the various types of set-top boxes that it leases to consumers, varies from place to place and from subscriber to subscriber.[5/]

The District Court recognized that Cox competes with different competitors in different areas. (Dist. Ct. Op. at 26-28) (Dkt. No. 264). Some of these competitors provide a complete multichannel video programming distribution ("MVPD") service, including packages of both video programming and set-top boxes. The only way to know what services are available to a particular consumer is to cross-check his or her street address with each area provider, since coverage varies by neighborhood and street.

In addition to its MVPD competitors, Cox also competes with non-MVPD providers for less than the entire suite of MVPD services. For example, TiVO and Moxi sell set-top boxes, electronic programming guides, and video-on-demand interfaces that compete with Cox's similar offerings. [6/] Netflix and Amazon compete with Cox to provide video programming, and are particularly close substitutes for Cox's video-on-demand products.[7/] In fact, five of the 14 named Plaintiffs in the instant action have

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3/ Cox's Opposition to Motion for Class Certification ("Cox Class Cert. Br.") at 10, n. 22 (Dkt. No. 181).

4/ Cox Class Cert. Br., at 11, n. 26 (Dkt. No. 162).

5/ Cox Class Cert. Br., at 11, n. 27.

6/ Cox Class Cert. Br., at 17, n. 56.

7/ Cox Class Cert. Br., at 17, n. 57.

subscriptions to Netflix and use the service regularly.[8/] The practical availability of these types of alternatives can vary from area to area depending on the local broadband infrastructure.

Named Plaintiffs Do Not Represent a Readily Ascertainable Class

Plaintiffs sought to bundle millions of current and former Cox cable subscribers from across the country into a single undifferentiated mass. An analysis of just the named Plaintiffs in this case reveals that these subscribers have little in common. The named Plaintiffs purchased different video services, packages, and set-top boxes at varying prices and valued different features.[9/] With respect to the geographic market, which is at the heart of Plaintiffs' Rule 23(f) putative appeal, the named Plaintiffs also faced different competitive choices in their local areas—a factor that Plaintiffs and their expert ignored in sponsoring a national class of subscribers in a single national geographic antitrust market.

District Court Opinion

The District Court held that Plaintiffs failed to satisfy Rule 23(b)(3) with respect to three essential elements of their tying claim. Specifically, the District Court held that the market power element of Plaintiffs' tying claim was not amenable to proof on a classwide basis, and that Plaintiffs failed to show that antitrust injury or damages could be proven with common evidence. The District Court also identified a serious problem

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8/ Cox Class Cert. Br., at 18, n. 58.

9/ Cox Class Cert. Br., at 3.

with Plaintiffs' ability to plead an ascertainable class in light of the inconsistent patchwork of federal and local regulation of rates for set-top boxes.

First, the District Court rejected Plaintiffs' argument that the relevant geographic market is Cox's *national* footprint (Dist. Ct. Op. at 23; Am. Compl. ¶¶ 102-103, 106, 117) (Dkt. No. 17). Relying on established federal law and Federal Communications Commission ("FCC") precedent, the District Court held that the appropriate geographic market for analysis at trial was local, not national, thereby making proof of Cox's market power as Plaintiffs had pleaded it incapable of being proved on a classwide basis. The Court stated correctly that "Cox's national conduct regarding set-top boxes does not convert a local geographic market into a national one" and that "the determination of Cox's market power should not be divorced from the appropriate geographic market." (Dist. Ct. Op. at 27). The Court concluded that the determination of which competitors Cox faced in each geographic region cannot be proven with evidence common to a single national class. (Dist. Ct. Op. at 28). Simply put, the District Court held that Plaintiffs failed to sufficiently establish that their national geographic market argument satisfied Rule 23. (Dist. Ct. Op. at 23, n.15).

Second, the District Court found that Plaintiffs failed to show that either antitrust injury or damages were amenable to common proof in a single national market. Plaintiffs alleged that they suffered an antitrust injury by paying supracompetitive prices for the tied product. Plaintiffs relied on the "GRS Test" and "Benchmark Method" set forth by their expert, Dr. Hal Singer, as methods to evaluate the alleged tie's impact on Cox's customers and their alleged damages. (Dist. Ct. Op. at 29-30). The GRS Test "seeks to

estimate the price effects of a particular vertical restraint, in this case, a bundled rebate or a tie-in." (Dist. Ct. Op. at 29-30). It is not a method for determining antitrust injury with common proof. As for the "Benchmark Method," Singer attempted to compare rental rates of set-top boxes in the U.S. to rates in Canada for purposes of calculating aggregate damages. (Dist. Ct. Op. at 29-30).

After evaluating Dr. Singer's opinions and noting that Dr. Singer's methods of calculating damages rested on "unstable ground," the District Court concluded that application of the "GRS Test" and "Benchmark Method" could not be based on evidence common to the class in a single nationwide geographic market. (Dist. Ct. Op. at 35-37).

Motion for Reconsideration

Plaintiffs' next step was to file a motion for reconsideration in an attempt to re-plead their claim, this time with unspecified regional or local sub-markets. Plaintiffs requested that the Court grant additional time to brief regional classes, and compel Defendant to provide additional regional data. (Recons. Order at 3) (Dkt. No. 288). Until this point, Plaintiffs had never seriously pursued subclasses or regional market classes. Plaintiffs made only one passing reference in both their Amended Complaint and Motion for Class Certification ("Class Cert. Br.") (Dkt. No. 162) suggesting that an alternative market to the national one could be each local area individually. (Dist. Ct. Op. at 23; Class Cert. Br. at 31, n.9; Am. Compl. ¶ 107 (Dkt. No. 17).

In its order denying class certification, the District Court stated that "while Plaintiffs have stated in passing that the appropriate geographic market could be regional markets, they have not fleshed out this argument in the briefs sufficiently to establish that

Rule 23 is satisfied as to each region…" (Dist. Ct. Op. at 23). The Court held that Plaintiffs did not establish any of the "exceptional circumstances" that warrant relief under Fed. R. Civ. P. 60(b). (Recons. Order at 4).

ARGUMENT SUPPORTING DENIAL OF PETITION TO APPEAL

I. STANDARD OF REVIEW

The grant of a petition for interlocutory review constitutes "the exception rather than the rule." *See Vallario*, 554 F.3d at 1263 (citing *Chamberlin v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005)). As a result, Rule 23(f) petitions should be granted rarely. *See In re Delta Airlines*, 310 F.3d 953, 959 (6th Cir. 2002) (internal citations omitted); *see also Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 140 (2d Cir. 2001) ("the standards of Rule 23(f) will rarely be met"). This Court has stated expressly that it will exercise "restraint" in accepting Rule 23(f) petitions and will not accept such petitions as "a matter of course." *See Vallario*, 554 F.3d at 1263 (internal citations omitted). This is particularly so where, as here, none of the factors that justify Rule 23(f) review are satisfied and Plaintiffs' request for interlocutory appeal was not timely filed.

II. PLAINTIFFS' PETITION IS UNTIMELY

The deadline for Plaintiffs to file this Petition under applicable Circuit guidance was April 2, 2012. Plaintiffs filed the Petition on April 11, 2012, and it is therefore untimely.

Fed. R. Civ. P. 23(f) provides that a petition for permission to appeal must be filed within 14 days after an order granting or denying class certification is entered. The Tenth

Circuit has indicated, albeit in *dicta*, in *Carpenter v. Boeing Co.*, 456 F.3d 1183 (10th Cir. 2006) that the filing of a motion for reconsideration in the district court *tolls* this 14-day period (then a 10-day period prior to revision of the Rule) rather than provides a new 14-day period running from the date of the district court's order, because "[a]n order that leaves class-action status unchanged from what was determined by a prior order is not an order 'granting or denying class action certification'" from which a Rule 23(f) appeal may be taken and for which a 14-day time period is allowed. *Id*. at 1191. The Court stated that "the Supreme Court has long recognized that motions to reconsider toll the time for appeal when they are filed within the time for filing a notice of appeal." *Id.* (citing *United States v. Dieter*, 429 U.S. 6, 8 & n. 3 (1976)). The Court further assumed that "such motions to reconsider would also toll the time limit in Rule 23(f)." *Id*. at 1192.

The District Court issued its order denying class certification on December 28, 2011. The Plaintiffs filed their Motion to Reconsider that order on January 6, 2012—nine days later. That filing *tolled* the 14-day appeal period. The District Court issued its order denying reconsideration on March 28, 2012. Plaintiffs then had five days left in their appeal period to file the Petition at bar on or before April 2, 2012. They missed that deadline, instead assuming a new 14-day appeal period running from the date of the District Court's order denying reconsideration.

Rule 23(f) does not provide a second 14-day window to appeal an order denying reconsideration of a class certification order. Plaintiffs' untimely petition should be dismissed for lack of jurisdiction. *See Carpenter*, 456 F.3d at 1189-90 (stating Rule 23(f) timeliness is mandatory and Tenth Circuit is among several circuits that have treated the

timeliness requirement as jurisdictional); *see also Delta Airlines v. Butler*, 383 F.3d 1143, 1144 (10th Cir. 2004).

III. THE DISTRICT COURT PROPERLY APPLIED RULE 23(b)(3)

Plaintiffs ignore the fact that they did not plead the local markets that they now claim should have been certified. Additionally, Plaintiffs failed to present a methodology for proving Cox's market power with common evidence in anything other than a single nationwide geographic market. Instead, Plaintiffs commingled Cox's multiple geographic markets into one national market, which the District Court correctly found was not amenable to proof on a classwide basis. The District Court did not analyze whether common data and methodology could apply to any possible regional or local sub-markets because Plaintiffs never alleged, argued, or presented evidence about any regional markets.

A. Plaintiffs Moved for a Single Nationwide Class Using a Single Nationwide Geographic Market.

Plaintiffs argue that the District Court committed error when, after concluding that a localized analysis of Cox's markets would be necessary at trial, it failed to take the task onto itself of defining and analyzing possible local markets. But the burden rested on Plaintiffs to establish whether each of the essential elements of their tying claim—including geographic market, antitrust injury and damages—could be proven with

common evidence in order to determine whether common issues predominate, which they failed to do.[10/]

Plaintiffs will be required to prove at trial that Cox "has market power in the tying product." *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006); *see also Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995). A market power analysis can only be performed in the context of an appropriately defined relevant geographic market, the bounds of which are determined by where a consumer can turn for substitutes. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 356 (1963); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1026-27 (10th Cir. 2002) (the relevant geographic market is "the narrowest market which is wide enough so that products from adjacent areas … cannot compete on substantial parity with those included in the market"); Dist. Ct. Op. at 18-22.

Throughout this case, Plaintiffs have argued that the appropriate or "narrowest" geographic market for their alleged class is Cox's national footprint. (Am. Compl. ¶¶ 102-103) ("[t]he relevant geographic market is the area in which Cox provides Premium Cable …"); (Class Cert. Br., at 31 n.9) (Plaintiffs "believe that one class that covers Cox's footprint is both the proper class to be certified…"). Plaintiffs even admit that as a result of pursuing a national geographic market, they did not provide any substantive

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[10/] *See Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 226 (2d Cir 2006), *overruled on other grounds by Teamsters Local 445 Freight Div. Pension Fund v. Bombardier*, 546 F.3d 196, 200 (2d Cir. 2008)*; see also Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 316 (5th Cir. 1978); *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 142 (S.D.N.Y. 2006) (internal citations omitted).

discussion of regional or local markets. (Pls.' Mot. for Recons. at 2) (Dkt. No. 266). They also acknowledge that their expert did not estimate the elasticity of demand in each of Cox's regional markets, only offering to do so (for the first time) in their Motion for Reconsideration, and only after obtaining additional data from Cox that Plaintiffs sought solely to calculate damages at the merits stage. (Pls.' Pet. at 10; Pls.' Mot. for Recons. at 4; Def. Opp'n. to Mot. for Recons. at 5-7, Dkt. No. 274). As the District Court properly noted, "While the Plaintiffs have stated in passing that the appropriate geographic market could be regional markets, they have not fleshed out this argument in the briefs sufficiently to establish that Rule 23 is satisfied as to each region, and the Court will not now undertake that responsibility itself." (Dist. Ct. Op. at 23, n. 15; *see also* Cox Class Cert. Br. at 36 and notes 77-78).

Plaintiffs essentially asked the District Court "to ignore the economic reality that Cox customers face different options depending on where they live and that most customers will not relocate their homes in order to change their options for MVPD services." (Dist. Ct. Op. at 26 and n. 19). Moreover, Plaintiffs' reliance on Cox's alleged national conduct regarding set-top boxes as a means of establishing a national geographic market did "not convert a local geographic market into a national one, and the determination of Cox's market power should not be divorced from the appropriate geographic market." (Dist. Ct. Op. at 26-27).

Plaintiffs admit that they were unable to present evidence of, or a methodology for determining, market power in each of Cox's recently alleged (but still unidentified) regional markets. (Pls.' Mot. for Recons. at 3-4). They claim that this was due to Cox's

alleged failure to produce the remaining portion of its customer database. But, as the Plaintiffs conceded, and the District Court agreed, Plaintiffs "focused their class certification briefing on a national class." (Pls.' Mot. for Recons. at 3) (citing Pls.' Br., Dkt. No. 277, at 4). Plaintiffs' litigation strategy did not succeed, and their after-the-fact attempt to convert their national market allegation into an allegation of local markets cannot be repaired through appeal.

B. The District Court Denied Class Certification Because Plaintiffs Did Not Adequately Plead the Essential Elements of Their Claim, Not Because an Analysis of More Than One Data Set Was Required.

The District Court did not deny class certification because an analysis of "more than one data set" was required, as Plaintiffs allege. The District Court denied class certification because Plaintiffs were unable to demonstrate that common evidence existed for three essential elements of their tying claim— market power, antitrust injury, and damages. (Dist. Ct. Op. at 12.) Plaintiffs' citation to *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012), does not alter that conclusion.

The primary issue in *Messner* was whether common evidence of the post-merger price increases that Northshore negotiated with insurers could be used to show that insurers and individuals who received coverage through those insurers suffered an antitrust injury resulting from the merger. *Messner*, 669 F.3d at 818. In that case, the Federal Trade Commission ("FTC") had already fully litigated the merits of the underlying antitrust violation and established liability. In order to undertake the injury analysis, the court focused on whether a common methodology could be used to analyze common contracts between hospital providers and insurers in a control group of

"comparable area hospitals." *Id.* at 817. While the *Messner* court concluded that the various contracts at issue could be analyzed using common evidence, the case is inapposite to this case for several fundamental reasons.

First, there was no dispute over geographic markets in *Messner*. Unlike here, where Plaintiffs had to demonstrate that an appropriately pleaded geographic market for the tying product could be proven with common evidence, the parties in *Messner* did not dispute geographic market. In fact, had the hospitals at issue in *Messner* been located in New York, California, and Florida, instead of just the north side of Chicago, for instance, the result may have been far different. Under Plaintiffs' interpretation of Rule 23(b) and *Messner*, they are entitled to demand that the District Court undertake the burden of determining what geographic market(s) their expert's methodologies are adequate to support. But it is not the District Court's job to figure out how to apply the methodology of Plaintiffs' expert to markets that were never pleaded in the first place. (Dist. Ct. Op. at 23).

Second, *Messner* is basically a damages case that addresses whether plaintiffs' expert could examine price differences in a single geographic market using the common method from his initial report. *Id.* at 819. The model adopted by plaintiffs in *Messner* did not have to be adapted for differences in competition in different markets. In this case, Plaintiffs' expert Dr. Singer never set forth any method for determining how he could aggregate elasticities of demand across multiple geographic markets for use in his "GRS Test." Not surprisingly, the "GRS Test" has never been cited by any court as a reliable class certification methodology. Moreover, unlike the methodology in *Messner*,

the methodology adopted by Dr. Singer is far more fanciful and theoretical, requiring data from multiple sources that varies across different geographic markets. Neither Plaintiffs nor Dr. Singer presented such data or explained how it could possibly be common to all Cox subscribers.

C. The District Court Did Not Ignore Dr. Singer's Opinions.

The District Court did not unjustly ignore Dr. Singer's opinions in favor of those of Cox's expert, Dr. Michelle Burtis. The Court's decision not to certify the proposed class was based on the fact that Plaintiffs' (and Dr. Singer's) claims could not be proven with common evidence in a nationwide market. (Dist. Ct. Op. at 37). While noting that the question of whether Dr. Singer's methodologies satisfied *Daubert* was "not easily resolved," and that his opinions rested on "unstable ground," the District Court did not ultimately resolve that point because Dr. Singer's novel application of the "GRS Test" could not be based on evidence common to the class. (Dist. Ct. Op. 34-36).

"Plaintiffs seeking class certification may carry their burden of establishing that injury is subject to generalized proof by submitting an expert report that 'posits class-wide injury resulting from every single class members' overpaying for [a tied product] as a direct result of the tie.'" (Dist. Ct. Op. at 29) (citing *Freeland*, 238 F.R.D. at 143 (internal citations omitted)). Here, Plaintiffs alleged that they suffered an antitrust injury by paying supracompetitive prices for set-top boxes. (Dist. Ct. Op. at 29). As a method of calculating the impact of the tie on Cox customers, and also to determine aggregate damages, Plaintiffs' expert Dr. Hal Singer offered the "GRS Test" as his method to prove impact and damages with common evidence. After a careful analysis, the District Court

held that the application of the GRS Test cannot be based on evidence common to the class for several well-founded reasons.

First, the GRS Test is not a method for proving antitrust injury with common evidence in a tying claim, but rather was designed to analyze a bundled rebate monopolization claim under §2 of the Sherman Act. (Dist. Ct. Op. at 33-34). Second, Dr. Singer chose to ignore the flaws inherent in his novel attempt to deploy the GRS Test as a class certification device. But "because the elasticity of demand depends on the extent of competition in the market, which varies regionally, application of this factor in the GRS Test would not be conducive to evidence common to the class." (Dist. Ct. Op. at 35). Third, Dr. Singer conceded that a different elasticity of demand could be needed in each different local market—however defined. Plaintiffs suggest that Cox bore the burden of pleading the appropriate elasticities in each market. (Pls.' Pet. at 18). Setting aside the fact that it was the Plaintiffs' burden, not Cox's, here, the District Court's determination that a nationwide market was unsupported was based on Dr. Singer's testimony, as well as the FCC Report that Plaintiffs relied on. (Dist. Ct. Op. at 35 and n. 27).

Similarly, the District Court found that Dr. Singer's Benchmark Method rested on "unstable ground" where, when comparing the Canadian and American rental rates of set-top boxes, Dr. Singer utterly failed to consider the differences between the two countries' regulations, differences between the compared set-top boxes, and differences in costs incurred by Canadian and American cable providers. (Dist. Ct. Op. at 35-36).

IV. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION TO RECONSIDER.

Plaintiffs argue in their Petition that the District Court abused its discretion by denying Plaintiffs' Motion for Reconsideration because Cox had allegedly failed to comply with an order compelling production of certain data. (Pls.' Pet. at 15). Plaintiffs claim that they "had been unable to fully analyze region specific data because Cox had failed to comply…with the order compelling production…" *Id.* But the Plaintiffs did not even file their motion to compel additional billing system data[11/] until after they had moved to certify a nationwide class. Plaintiffs' suggestion that Cox failed to comply with the District Court's Order compelling production of additional billing system data, and that this failure had any effect at all on their strategy of seeking certification of a national class, is a red herring.

From the outset of this litigation, Plaintiffs have pleaded only a single nationwide class. *See* Am. Compl. ¶ 117. As the District Court acknowledged in its Class Certification Order, and again in its Order Denying Reconsideration, Plaintiffs did not present or brief the issue of regional or local classes. (Dist. Ct. Op. at 23, n. 15, Recons. Order at 2-3). This was not due to any failing on the part of Cox. Rather, it was due to Plaintiffs' own tactical decision to pursue a single nationwide class.

[11/] Cox produced all of its billing system data for Oklahoma City, OK and Orange County, CA—the data sample relied upon by Cox's own expert—to Plaintiffs in the Spring of 2011, long before class certification briefing.

Only after failing to satisfy the requirements for certification of a nationwide class did Plaintiffs seek permission to try again with a different theory, seeking certification of undefined regional classes. However, the District Court recognized in its denial of the Motion for Reconsideration that Plaintiffs had not sought this data to analyze market power or antitrust impact; never requested that the class certification hearing be continued until the production was complete; and did not raise the issue at the class certification hearing.[12/] (Recons. Order at 3-4). The District Court properly concluded that if this had been a legitimate need of Plaintiffs, "it would have, or should have, been raised before now." *Id.*

V. THE DISTRICT COURT'S DENIAL OF CLASS CERTIFICATION IS NOT THE DEATH KNELL OF PLAINTIFFS' CASE.

The Tenth Circuit has stated that "for a plaintiff, where the high costs of litigation grossly exceed an individual plaintiff's potential damages, the denial of class certification sounds the death knell of that plaintiff's claims." *See Vallario*, 554 F.3d at 1263 (citing *Blair v. Equifax Check Servs., Inc.*, 181 F. 3d 832, 834 (7th Cir. 1999)). The number of decisions warranting immediate "death knell" review on is small. *See Prado Steinman v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000). When a plaintiff claims that a denial of class certification would be the "death knell" of the case, courts "must be wary lest the mind hear a bell that is not tolling." *See Blair*, 181 F.3d at 834.

12/ At the conclusion of the two-day hearing on class certification, the Court asked the parties if there was anything else to discuss. If this issue was in fact so significant as to hobble the Plaintiffs' ability to present their motion, one would expect it to be raised. *See* Class Cert. Hr'g Tr. Volume II, November 17, 2011, at 345:20 – 347:10.

The District Court's decision is not the "death knell" of this litigation. First, the Court did not dismiss Plaintiffs' case with prejudice. It left open the option for Plaintiffs to attempt to replead their case using appropriate regional or local markets. (Dist. Ct. Op. at 23, n. 15). In fact, co-lead counsel in this case have already argued to the U.S. District Court for the Northern District of Alabama that the "plaintiffs in the *Cox* case are, in fact, filing a motion to certify classes in regional markets." *See* Response to Notice of Suppl. Authority at 10, *Parsons v. Bright House Networks*, Case No. 2:09-cv-00267 (N.D. Ala., filed under seal Jan. 13, 2012).

Second, this case does not involve "low stakes." Plaintiffs seek millions of dollars in damages from Cox, and are represented by multiple large and well financed law firms specializing in plaintiff's class action lawsuits. As the Seventh Circuit explained in *Blair*, "many class suits are prosecuted by law firms with large portfolios of litigation, and these attorneys act as champions for the class even if the representative plaintiff would find it uneconomical to carry on with the case. These law firms may carry on in the hope of prevailing for a single plaintiff and then winning class certification (and the reward of larger fees) on appeal, extending the victory to the whole class." *See Blair*, 181 F.3d at 834.

VI. INTERLOCUTORY REVIEW WILL NOT DEVELOP THE LAW WHERE THE DISTRICT COURT APPLIED WELL-SETTLED PRECEDENT TO ARRIVE AT ITS OPINION.

Interlocutory review would not facilitate "development of the law" here. *See Vallario*, 554 F.3d at 1263 (citing Fed. R. Civ. P. 23(f) Advisory Committee Notes). This Court has indicated that this category of cases is "narrow." *Id.* To come within its

bounds, a class certification decision must: (1) involve an unresolved issue of law relating to class actions that is likely to evade end-of-case review; and (2) the issue must be significant to the case at hand, as well as to class action cases generally. *Id*. (citing *Chamberlin*, 402 F.3d at 959; *In re Lorazepam*, 289 F.3d at 105)).

Here, this case "present[s] familiar and almost routine issues" in antitrust law. Fed. R. Civ. P. 23(f), 1998 Comm. Note. The District Court's decision is not "novel." *West v. Prudential Sec.*, 282 F.3d 935, 937 (7th Cir. 2002). This denial of certification decision does not involve any unresolved issue of law relating to class actions that is likely to evade end-of-case review, nor does it involve any unfamiliar or non-routine issues. Plaintiffs merely disagree with the District Court's decision.

CONCLUSION

The petition for Rule 23(f) appeal should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2012, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Docket Activity to the following ECF registrants.

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