No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE COX ENTERPRISES, INC. SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION

ON PETITION FOR PERMISSION TO APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
Case No. 5:09-ML-02048-C
Hon. Robin J. Cauthron, United States District Judge

PETITION OF PLAINTIFFS FOR LEAVE TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

A. Daniel Woska
Rachel Lawrence Mor
Michael J. Blaschke
S. Randall Sullivan
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)

Joe R. Whatley, Jr.
WHATLEY DRAKE & KALLAS, LLC
380 Madison Avenue
New York, New York 10017
(212) 447-7070 (Telephone)
(212) 447-7077 (Facsimile)

Additional Counsel on Signature Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF JURISDICTION 2

III. QUESTIONS PRESENTED 2

IV. RELIEF SOUGHT 3

v. RELEVANT FACTS AND PROCEDURAL HISTORY 3

A. STATEMENT OF FACTS 3

B. DISTRICT COURT RULING AND MOTION FOR RECONSIDERATION 9

VI. ARGUMENT 10

A. THE PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT'S DECISIONS DENYING CLASS CERTIFICATION AND DENYING PLAINTIFFS' MOTION TO RECONSIDER ARE MANIFESTLY ERRONEOUS 11

1. The District Court Erred in Finding that Common Issues Do Not Predominate and that Trial Would be Unmanageable Because Proof of Market Power and Antitrust Injury Would Require Analysis of More than One Data Set. 11

2. The District Court Abused Its Discretion in Denying Plaintiffs' Motion to Reconsider Where the Court Had Granted Plaintiffs' Motion to Compel the Data Necessary to Conduct the Analysis of Cox's Market Power and Antitrust Impact on a Regional Basis but Where Cox Had Not Produced the Data at the Time of the Class Certification Hearing. 15

3. The District Court Erred in Finding that Common Issues Do Not Predominate with respect to Relevant Geographic Market and Antitrust Injury. 17

B. THE PETITION SHOULD BE GRANTED BECAUSE DENIAL OF CLASS CERTIFICATION SOUNDS THE DEATH KNELL OF THIS LITIGATION, WHERE THE REPRESENTATIVE PLAINTIFFS'

CLAIMS ARE SIMPLY TOO SMALL TO JUSTIFY THE EXPENSE OF CONTINUED INDIVIDUAL LITIGATION. 19

C. THE DISTICT COURT'S CLASS CERTIFICATION DECISION PRESENTS ISSUES THAT ARE IMPORTANT TO THIS CASE BUT WHICH ARE ALSO SIGNIFICANT WITH REGARD TO CLASS ACTIONS GENERALLY AND ANTITRUST CLASS ACTIONS SPECIFICALLY. 20

VII. CONCLUSION 20

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 19

In re Live Concert Antitrust Litig.,
247 F.R.D. 98 (C.D. Cal. 2007) 7

Mace v. Van Ru Credit Corp.,
109 F.3d 338 (7th Cir. 1997) 19

Messner v. Northshore Univ. HealthSystem,
669 F.3d 802 (7th Cir. 2012) ..... passim

Vallario v. Vandehey,
554 F.3d 1259 (10th Cir. 2009) 11, 20

Wal-Mart v. Dukes,
131 S. Ct. 2541 (2011) 14

Statutes

28 U.S.C. §1332 (2005) 2

Rules

Fed. R. Civ. P. 23(f) ..... passim

Fed. R. Civ. P. 23(b)(3) 11

Plaintiffs-Petitioners ("Plaintiffs") respectfully file this Petition for Leave to Appeal pursuant to the Fed. R. Civ. P. 23(f) from the District Court's December 28, 2011 Order Denying Plaintiffs' Motion for Class Certification (the "Class Certification Order"), a copy of which is attached hereto as Exhibit A, and the District Court's Order of March 28, 2012 denying the Plaintiffs' Motion to Reconsider (the "Reconsideration Order"), a copy of which is attached hereto as Exhibit B.

I. INTRODUCTION

This Court should permit Plaintiffs to appeal the District Court's Class Certification Order and Reconsideration Order. The District Court's interpretation of Rule 23 is manifestly erroneous. The District Court denied class certification of Plaintiffs' claims on the basis that common issues do not predominate because the Court concluded that multiple regional analyses would be required to determine market power and antitrust impact. Even if this conclusion was correct, as the Seventh Circuit's recent decision in *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012) demonstrates, the need to analyze multiple data sets utilizing a common methodology neither defeats predominance nor renders the case unmanageable. The District Court compounded its class certification error and abused its discretion by rejecting Plaintiffs' Motion for Reconsideration without any analysis of the merits of Plaintiffs' request and without any acknowledgement that Plaintiffs were attempting to respond to the concerns raised by the District Court in its Class Certification Order. Interlocutory review of the Class Certification Order and the Reconsideration Order is appropriate because the District Court's denial of class certification was manifestly erroneous, the

Reconsideration Order was an abuse of the Court's discretion, the Court's Order denying certification sounds a death knell to this litigation, and this appeal presents significant and far-reaching legal issues which will not otherwise be addressed.

II. STATEMENT OF JURISDICTION

The District Court has jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. §1332 (2005) ("CAFA"), as there are more than 100 class members, many of whom are citizens of a different state from Defendant, and the amount in controversy, in the aggregate, exceeds the sum of $5,000,000, exclusive of interest and costs.

This Court has jurisdiction over this Petition pursuant to Fed. R. Civ. P. 23(f). The District Court entered its Class Certification Order on December 28, 2011. The Plaintiffs filed a timely Motion for Reconsideration on January 6, 2012. The Reconsideration Order was entered on March 28, 2012. This Petition is being timely filed within fourteen days thereafter in accordance with Rule 23(f).

III. QUESTIONS PRESENTED

The questions on which permission to appeal are sought are:

1. Whether the District Court erred in finding that common issues do not predominate because proof of market power and antitrust injury would require analysis of more than one data set.

2. Whether the District Court erred in not reconsidering the Court's denial of class certification where the Court had granted Plaintiffs' motion to compel the data necessary to conduct the analysis of regional market power and antitrust impact the District Court held was required but where the requisite data had not been produced at the

time of the class certification order.

IV. RELIEF SOUGHT

Petitioners respectfully request that the Court grant their petition for appeal, order briefing and oral argument on the merits, vacate the Class Certification Order, and remand the case with instructions to the District Court to certify the Class.

V. RELEVANT FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

This class action presents an important social issue worth hundreds of millions of dollars to consumers, who have been nickeled and dimed year after year by a large corporation, which is making millions, if not billions, of dollars in profit based on its illegal conduct. The named Plaintiffs in this case subscribe to Premium Cable provided by Defendant Cox Communications, Inc. ("Cox"). Cox is one of the nation's three largest providers of cable multi-channel video programming distribution ("MVPD"). First Amended Complaint ("FAC") [D.E. 17] at ¶ 22. Plaintiffs filed this lawsuit on behalf of millions of similarly situated people and allege that Cox has illegally tied the provision of Premium Cable to the renting of a set-top box ("STB") from Cox. The illegal tie permits Cox to charge its customers—the class members—an inflated, illegal lease rate for their STBs. Even Congress, in 1996 recognized the restraint on the STB market imposed by the cable industry's practice of tying its programming to the rental of a STB.

Cox offers MVPD services in different tiers and packages, starting with Limited

Basic Cable and Expanded Basic Cable (collectively, "Basic Cable").[1] In order for Cox customers to access Basic Cable services, they must sign up for Basic Cable with Cox and merely plug the cable into the back of their televisions. Cox's Basic Cable customers need not use a STB to view any of the content that accompanies their cable subscription.

As defined in this case, Premium Cable encompasses Cox's tiers of video service above Basic Cable. FAC ¶¶ 26-28. Cox refers to this service as its "digital" video programming or "Advanced TV." While Cox Premium Cable is available in a variety of packages, *all* Cox Premium Cable customers can receive Cox's Interactive Program Guide ("IPG"), which enables subscribers to navigate quickly through their substantial channel lineup—and thus determine when and where particular programs will appear—as well as access Cox's substantial video on demand ("VOD") and pay-per-view ("PPV") programming, which permits subscribers to view a great array of free and purchased movies, television shows and specialty events.[2] Cox's Basic Cable customers do not receive Cox's IPG and access to Cox's VOD and PPV.

---

[1] Cox's Limited Basic Cable package, as its name implies, provides a Cox customer access to the most rudimentary cable services: a small number of mostly network and public-access broadcasting. Cox's Expanded Basic Cable adds a small number of channels to the Limited Basic Cable channel lineup, but does not include features such as premium movie channels and an interactive programming guide ("IPG").

[2]The District Court rejected Cox's attempts to create individual questions based on the fact that Cox offers different packages and variations of service within Cox's digital tier of programming or Premium Cable as defined by Plaintiffs. Memorandum Opinion and Order at 13-14 [D.E. 264]. Relying on Plaintiffs' evidence and testimony of Plaintiffs' expert Dr. Singer, the District Court properly concluded that common evidence would be used to establish the separateness of the tying and tied products and the relevant product market. *Id.* at 14, 19-22 [D.E. 264].

Unlike Basic Cable subscribers, Cox's Premium Cable customers must use a Cox-leased STB in order to access all of the content and services in their cable subscription. FAC ¶ 33-34. Although Cox customers can view certain Premium Cable content—specifically, some Premium Cable channels—with a STB that they can purchase at retail, Cox customers *across all areas where Cox does business* simply cannot view and utilize a significant amount of Cox's Premium Cable content and services, including certain channels, Cox's VOD, PPV movies, and IPG, among other services, *unless they rent a STB from Cox*. Cox Premium Cable customers cannot access these services—part of the cable services for which they pay Cox on a monthly basis—if they fail to rent a STB from Cox. This situation presents an illegal tie.

In support of their Motion for Class Certification, the Plaintiffs presented significant documents and other evidence and provided expert testimony from economist Dr. Hal J. Singer. Dr. Singer opined on a number of economic issues presented by the Plaintiffs' antitrust claims, including, and most salient for purposes of this petition, Cox's market power in the relevant market and the antitrust impact of Cox's tying arrangements. Dr. Singer's testimony supported and was consistent with the documents and other evidence presented by Plaintiffs. Dr. Singer presented an expert report, submitted a declaration in support of Plaintiffs' Motion for Class Certification, was deposed twice and testified at the class certification hearing. Dr. Singer opined that he could establish both market power and antitrust impact using common evidence and a methodology that was common to the class. Singer Expert Report [D.E. 162, Exh. 13] at ¶¶28, 30-31, 36, 39-63, 81-82. Dr. Singer focused his report and testimony on the

certification of a national class of Cox subscribers who rented STBs from Cox. Dr Singer found that there was overwhelming *direct* proof of Cox's ability to raise prices without losing a significant percentage of customers--the salient inquiry for market power. *See, e.g.,* Singer Expert Report at 101 fig. 9. Review of the data that Cox did produce reveals that Cox was able to increase the price of Premium Cable by 17% during the class period. *See* Singer Class Certification Declar. [D.E. 162] at ¶ 7. As part of this analysis, Dr. Singer noted that there are a variety of ways to approach the question of market power, many of which rely on common evidence. As Dr. Singer explained, local markets are one possibility for the geographic market definition in this matter, but an aggregation of all of Cox's local markets into Cox's national footprint market can also be appropriate. Singer Sept. 16, 2011 Depo., "Singer Depo", [D.E. 216, Exh. 8 to Plaintiffs' Reply in Support of Motion for Class Certification] pp. 26:5-18. Dr. Singer testified that aggregation into a national footprint market is appropriate, as long as the competitive circumstances across local markets do not vary significantly. *Id.* at pp.17:15-20:15. As Dr. Singer discussed, aggregation of local markets when competitive circumstances do not significantly vary is the standard used by antitrust agencies such as the FCC and the Department of Justice. Singer Depo. pp. 48:14-51:14. The aggregation of local markets into a national footprint market was consistent with Cox's own practices, as evidenced by the internal Cox documents presented by Plaintiffs. Dr. Singer noted that the primary "regional" issue of market power argued by Defendant--the presence of telephone company over builders ("telcos")--was insignificant to the question of Cox's market power in a given market, national or regional. *See* Hearing Tr. [D.E. 286] at 285. Dr.

Singer noted recent reports from the FCC on cable pricing do not support the notion that telcos cause incumbent cable operators to modify their pricing.[3] *Id.* Dr. Singer believed that this was direct evidence that Cox has market and pricing power in each market, regardless of the presence of a telco. Dr. Singer confirmed that regardless of whether the geographic market is defined as each local Cox market or the Cox national footprint, his conclusions apply equally to each. Singer Depo. at p. 52:2-11.

Further, Dr. Singer testified that he could establish antitrust impact using common evidence. Dr. Singer and Plaintiffs 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, which compares prices paid by class members with those of Canadian cable companies to determine an overcharge.[4] Pl. Class Cert. Mem. [D.E. 162] at 37-40.

Dr. Singer used a method known as the GRS Test to show common impact of Cox's tying arrangement. As Dr. Singer explained, the purpose of the GRS Test is to

---

[3] Dr. Singer testified that even assuming that telco entry has a significant impact on cable prices, he could apply his common methodology to the two scenarios and analyze all telco-entry markets together and the non-telco-entry markets together in his damages model. Singer Depo. p. 20:1-15. The Court declined that highly manageable alternative.

[4]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 Thompson v. Clear Channel Commc'ns, Inc. (In re Live Concert Antitrust Litig.)*, 247 F.R.D. 98, 141 (C.D. Cal. 2007) (compiling cases).

determine whether an observed bundle of products is procompetitive or anticompetitive. Singer Depo. p.190:7-19. Dr. Singer further explained that the inputs for his GRS Test are based on common evidence. *Id.* at pp. 52:13-53:21. The GRS takes as inputs the Independent Monopoly Price, Bundle-Compliant price of Premium Cable, and demand elasticities, among other factors. *Id.* Accepted by economists and in the peer-reviewed academic literature, this analysis permits Dr. Singer to arrive at Cox's estimated STB rental fee overcharge. *Id.* at 72-73, ¶¶ 1-2. In particular, he noted that while theoretically subject to some geographic variety, there was no evidence that elasticity of demand for premium cable varied across geographic markets here. Hearing Tr. [D.E. 286] at 278. The evidence Dr. Singer relied upon for elasticity of demand was common evidence and did not vary by subscriber. Singer Depo. at pp.141:13-142:15. For example, elasticity of demand is not a metric that typically varies from neighbor to neighbor or requires true "individual" proof. *See* Singer Depo. at 139-142, 193:10-194:11, Hearing Tr. [D.E. 285] at 88:7-13.

The second approach, the Canadian Benchmark Method, also measures class members' damages. Dr. Singer compared the prices that Canadian cable customers and Cox subscribers paid for STBs. Singer Expert Report at 65, ¶¶ 85-86. The Canadian benchmark is useful because Canadian MVPDs "do not tie [STBs] and Premium Cable, yet their customers enjoy many of the interactive features Cox customers enjoy." *Id.* at 65, ¶ 86. Two of the largest Canadian MVPDs, in particular, permit their customers the option of purchasing STBs from retail providers or renting STBs from the MVPDs themselves. Singer Class Cert. Declar. at ¶ 9.

Both of these methods use entirely common evidence to measure the overcharge that class members paid for STBs. Singer Expert Report at 63, ¶ 81 ("Because each of these methods is possible with only common evidence, they constitute common methods appropriate for the calculation of class-wide, aggregate damages."); Singer Class Cert. Declar. at ¶ 11. Plaintiffs relied on Dr. Singer's testimony, in addition to other common evidence, in the Motion for Class Certification.

A hearing was held on the Plaintiffs' Motion for Class Certification on November 16 and 17, 2011. The Court took live testimony from Dr. Singer and the Defendant's Expert, Dr. Michelle Burtis, as well as argument from the parties. The Court took the Motion under advisement.

B. DISTRICT COURT RULING AND MOTION FOR RECONSIDERATION

The District Court denied Plaintiffs' Motion for Class Certification, ruling that Plaintiffs had failed to demonstrate the Rule 23(b)(3) requirements of predominance as to two elements of their tying claims: market power (specifically the geographic market) and antitrust injury. Memorandum Opinion and Order at 27-28, 34-37 [D.E. 264]. The Court found that the Plaintiffs had satisfied each of the elements of Rule 23(a), and all of the other elements of Rule 23(b)(3). After the District Court's decision, based on a finding that an analysis of regional markets would be required, the Plaintiffs filed a Motion for Reconsideration of the Court's ruling on the basis that, among other things, Cox had not produced regional customer data it had been ordered by the Court to produce and that was now relevant to the Class Certification inquiry based on the Court's

decision.[5] As part of that Motion for Reconsideration, the Plaintiffs included a Declaration from Dr. Singer that made clear that with the production of the previously compelled data by Cox, he would be able to use "direct evidence of whether Cox possessed market power in each of its regional markets" and would "be able to estimate the elasticity of demand in each of Cox's regional markets." Declaration of Hal J. Singer, Ph.D. in Support of Plaintiffs' Motion for Reconsideration, [D.E. 266, Att. 2] at ¶¶ 4, 5. While the Court agreed that it had previously compelled the production of this data before the class certification hearing, the District Court denied reconsideration of its Class Certification Order "because Plaintiffs have not established any of the exceptional circumstances that warrant relief under Rule 60(b)." Order Denying Motion for Reconsideration [D.E. 288]. The District Court denied Plaintiffs' Motion for Reconsideration without ever addressing the merits of Plaintiffs' arguments.

VI. ARGUMENT

An interlocutory appeal pursuant to 23(f) is particularly appropriate in this case because the Class Certification Order is manifestly erroneous and the Reconsideration Order is a clear abuse of discretion. Moreover, the denial of class certification is essentially a death knell for this litigation. Finally, the Class Certification Order involves a significant legal issue that is important not only to this case but to antitrust enforcement

[5] The issue of the proper geographic market, and particularly Plaintiffs' national footprint market, was not disputed by Cox's expert in her original expert report or deposition. Cox first raised an argument about Plaintiffs' geographic market in a Supplemental Expert Report filed with its Opposition to the Motion for Class Certification that was not previously produced to plaintiffs, which adds to the inequity of the Court's Reconsideration Order.

and class actions generally. Yet, without interlocutory review, the issue, in all likelihood, will not be reviewed. Accordingly, Plaintiffs satisfy the criteria for interlocutory appeal set forth in *Vallario v. Vandehey*, 554 F.3d 1259, 1262 (10th Cir. 2009). The Court should exercise its authority to grant Plaintiffs' Petition.

A. THE PETITION SHOULD BE GRANTED BECAUSE THE DISTRICT COURT'S DECISIONS DENYING CLASS CERTIFICATION AND DENYING PLAINTIFFS' MOTION TO RECONSIDER ARE MANIFESTLY ERRONEOUS.

1. The District Court Erred in Finding that Common Issues Do Not Predominate and that Trial Would be Unmanageable Because Proof of Market Power and Antitrust Injury Would Require Analysis of More than One Data Set.

Interlocutory review should be granted because the District Court made a clear and fundamental error with regard to Rule 23. The predominance inquiry under Rule 23(b)(3) requires a court to determine whether "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The District Court denied class certification because the Court determined that Plaintiffs must analyze Cox's regional data in order to establish market power and antitrust injury. Notably, the District Court did not suggest that questions related to proof of market power and antitrust injury would require individualized, class-member specific analysis. Instead, the Court denied certification because the experts in this action would be required to analyze Cox's data at the regional market level rather than aggregating the data and analyzing one national footprint market.

Clearly, the need to analyze more than one set of data, in and of itself, is not a basis for finding that individualized issues predominate and that a class trial will be

unmanageable. The plain language of Rule 23 dictates that once the District Court concluded that regional analysis was necessary, the District Court should have then analyzed whether analysis of such data utilizing a uniform methodology would, in fact, defeat predominance and render trial of the case unmanageable. Given the multitude of common issues the District Court identified, the Court's truncated predominance and manageability analysis, which failed to consider the effect of conducting, non-individualized, routine data analysis, necessarily constitutes manifest error.

The Seventh Circuit recently addressed the fallacy of the District Court's interpretation of Rule 23(b)(3) and the flaws inherent in the District Court's analysis in *Messner*, where the Court reversed a district court's denial of class certification in an antitrust action based on the need for multiple analyses. In *Messner*, the plaintiffs sought class certification on behalf of patients and third-party payors who alleged that a merger between Northshore University HealthSystem and Highland Park Hospital violated antitrust laws and resulted in higher prices for hospital care. *Id.* at 808. The plaintiffs' expert proposed to rely on the economic and statistical methods utilized by the FTC in analyzing the antitrust impact of the merger, a method known as "differences-in-differences," which "is designed to estimate the amount of Northshore's price increases that resulted from exercise of market power rather than from other factors." *Id.* The district court denied class certification, finding that common issues did not predominate because antitrust impact could not be established using common evidence. *Id.* The district court believed that plaintiffs' proposed methodology required proof that defendant raised its prices at uniform rates affecting all class members to the same

degree. *Id.* The Seventh Circuit granted interlocutory appeal "[b]ecause of the importance of this issue for this case and for private antitrust enforcement, particularly with respect to hospitals and health care providers with complex pricing systems." *Id.*

In reversing the district court's order, the Seventh Circuit explained that the need for complex data analysis in an antitrust case is not a factor that tips the predominance scale:

> Contrary to Northshore's view, Dranove's ability to use common evidence to show impact on the class did not ultimately depend on assuming the uniformity of the nominal price increases imposed under any individual contract. For reasons we explained above, such uniformity would certainly simplify matters. It would allow Dranove to plug a single percentage – the uniform price increase imposed on all patients covered under an individual contract – into his DID analysis to calculate the antitrust impact on those patients covered by that contract. But as Dranove explained in his report, a lack of uniformity would only require him to do more DID analyses for each contract – one analysis for each individual non-uniform price increase imposed under the contract being analyzed….**In a more complex world, multiple analyses would be needed to show more accurately a contract's precise impact on class members. That need does not change the fact that those analyses all rely on common evidence – the contract setting out the non-uniform price increases – and a common methodology to show that impact. The ability to use such common evidence and common methodology to prove a class's claims is sufficient to support a finding of predominance on the issue of antitrust impact under *Rule 23(b)(3)*.** See *Hydrogen Peroxide, 552 F.3d at 311-12.*

Id. at 818-819 (emphasis supplied). The analysis of the regional market data in this case is no different. The methodology used to analyze the data and to show market power and impact will be common. The data within each market will likewise be common. The fact that more than one market, like the multiple contracts in *Messner*, must be analyzed does

not preclude class certification.[6]

The Rule 23(b)(3) analysis necessarily requires a court to weigh issues that are common to the class against issues that require individualized determinations with regard to each class member. *See, e.g.*, *Messner* at 815 (finding that "[i]ndividual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole.") Here, the District Court identified numerous significant common issues but never undertook a predominance analysis once she determined that Plaintiffs would need to analyze Cox's regional markets. Even if regional markets must be analyzed to determine the relevant geographic market and antitrust impact, such inquiries will not be individualized. Common issues necessarily predominate and a class trial of Plaintiffs' tying claim can be easily managed. The District Court did not identify any individualized issues with regard to each class member and never addressed the question of whether the numerous common issues in this action, in fact, predominated. The District Court's analysis directly contravened the explicit mandates of Rule 23. Interlocutory review is necessary to correct the Court's inherently flawed analysis.

Because the district court in *Messner* imposed a greater burden than Rule 23

[6] Of course, as the Seventh Circuit noted in *Messner*, any individualized questions regarding damages do not prevent certification under Rule 23(b)(3). *Messner*, 669 F.3d at 815, citing *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2558 (2011). Likewise, the fact that some class members' claims may "fail on the merits if and when damages are decided" is "generally irrelevant to the district court's decision on class certification." *Id.* at 823.

demands, the Seventh Circuit held that the district court abused its discretion:

> By requiring uniformity of nominal price increases within and across contracts, the district court misread Rule 23(b)(3) to require a greater showing of common evidence than is contemplated by that rule. Under the district court's approach, Rule 23(b)(3) would require not only common evidence and methodology, but also common results for members of the class. That approach would come very close to requiring common proof of damages for class members, which is not required. To put it another way, the district court asked not for a showing of common questions, but for a showing of common answers to those questions. Rule 23(b)(3) does not impose such a heavy burden….Because the district court applied the wrong legal standard when analyzing plaintiffs' motion for class certification, the district court abused its discretion when it denied the motion.

Id. at 819. In denying class certification, the District Court likewise applied the wrong legal standard and, accordingly, abused its discretion. Interlocutory review should be granted to correct the District Court's manifestly erroneous Class Certification Order.

2. The District Court Abused Its Discretion in Denying Plaintiffs' Motion to Reconsider Where the Court Had Granted Plaintiffs' Motion to Compel the Data Necessary to Conduct the Analysis of Cox's Market Power and Antitrust Impact on a Regional Basis but Where Cox Had Not Produced the Data at the Time of the Class Certification Hearing.

The District Court likewise abused its discretion in denying Plaintiffs' Motion for Reconsideration. The District Court's Class Certification Order identified the need for additional region-specific data analysis. Plaintiffs, in their Motion for Reconsideration, responded to the District Court's concerns and reminded the District Court that Plaintiffs had been unable to fully analyze region-specific data because Cox had failed to comply with the District Court's order compelling production of the data.[7] As Dr. Singer noted

[7] The issue of Cox's regional market data had previously been brought before the Court in Plaintiffs' Motion to Compel Defendant's Customer Database. [D.E. 173.] Finding this data to be relevant to Plaintiffs' claims, the Court ordered Cox to produce its customer

in his expert report, and as he reiterated in his declaration submitted in support of the motion, Cox had previously submitted only a sliver of its customer database (covering merely Orange County, California and Oklahoma City, Oklahoma). Declaration of Hal J. Singer, Ph.D. in Support of Plaintiffs' Motion for Reconsideration, ¶ 3. Dr. Singer indicated that, once he was given access to the remaining database, he would "be able to consider the direct evidence of whether Cox possessed market power in each of its regional markets" and would "be able to estimate the elasticity of demand in each of Cox's regional markets." Declaration of Hal J. Singer, Ph.D. in Support of Plaintiffs' Motion for Reconsideration, ¶¶ 4, 5. Plaintiffs asked the Court to Order Cox to produce the required data by a date certain in order to permit analysis of the data and then to submit additional briefing on the issues of market power and antitrust injury on a regional-market basis for purposes of certification of regional markets. The District Court denied Plaintiffs' Motion for Reconsideration without ever addressing the merits of Plaintiffs' arguments.

The Court's Reconsideration Order appears to imply that once a plaintiff moves for class certification and the court rules on the motion, reconsideration or revision of the Order is neither appropriate nor feasible. Yet, Rule 23(c)(1)(C) specifically provides that an order that grants or denies class certification may be altered or amended at any time before final judgment. Given the District Court's denial of Plaintiffs' motion for class certification based on a perceived need for regionalized data, the District Court abused its

---

database to Plaintiffs. [D.E. 233.] Cox did not, and has not, complied with the Court's Order.

discretion by denying Plaintiffs' Motion for Reconsideration wherein Plaintiffs sought the necessary data that had already been the subject of an order compelling production. Interlocutory appeal to address the Court's Reconsideration Order is appropriate.

3. The District Court Erred in Finding that Common Issues Do Not Predominate with Respect to Relevant Geographic Market and Antitrust Injury.

The District Court's conclusion that regional market analysis was necessary for purposes of determining the relevant geographic market and antitrust impact was further error. Plaintiffs' presented both direct and indirect evidence of Cox's market power – all of it common in nature.[8] Plaintiffs' evidence showed that Cox possessed market power both in its regional markets and in its national footprint market, as the aggregation of Cox's regional markets, which is an accepted standard for defining a relative geographic market. Similarly, Dr. Singer's common impact analysis, the GRS Test, relied on common inputs, including Cox's marginal costs and elasticity of demand, neither of which varies by customer or geography. Most importantly, both the relevant geographic market analysis and the antitrust impact analysis are based on common methodology, which is all that is required for class certification.

Nevertheless, despite Dr. Singer's testimony and the supporting documents

[8] Plaintiffs' direct evidence of market power was presented through Dr. Singer, who, relying on Cox's own documents and data, concluded that Cox had the power to control the price of Premium Cable without losing a significant percentage of customers. Plaintiffs' indirect evidence of market power consisted of Cox's relatively large market share in the markets where Cox operates and the significant barriers to timely entry into those markets faced by potential rivals, both of which were derived from Cox's own documents and data.

presented by Plaintiffs, for these two elements of Plaintiffs' claim – geographic market and antitrust impact – the District Court erroneously concluded that an analysis of the competitors on a regional market level was necessary thereby precluding certification. In reaching this conclusion, the District Court erroneously relied on Cox's expert Dr. Burtis. Moreover, although the District Court seemingly applied a *Daubert* analysis to Plaintiffs' expert, the District Court accepted Cox's expert's criticisms and opinions to the contrary without any scrutiny of the expert or her methodology. Cox presented no evidence that the presence or absence of a telco within a particular regional market affected Cox's market power. Plaintiffs on the other hand presented evidence in the form of an FCC Pricing Report that the presence or absence of a telco had no material effect on market power, as well as Cox's own internal documents regarding its market power. Nevertheless, the District Court accepted Cox's expert's unsupported opinion that differences in competition *could* make a difference. Additionally, while Dr. Singer conceded that, in theory, the elasticity of demand for purposes of his common impact analysis might vary by geographic market, neither Cox nor its expert presented any evidence of a variation. Yet, the District Court relied on Cox's expert's unsupported opinion that there *could* be variations in the elasticity of demand based on geography and competition. The District Court further ignored Dr. Singer's solution to Cox's theoretical differences created by varying competition among its markets, wherein Dr. Singer concluded that he could address any potential differences created by the presence of a telco by doing his analysis twice – once for the markets without telcos and once for the markets with telcos. While antitrust litigation typically involves a battle of the experts,

and a district court has the discretion to rely on one expert over another, here, the District Court chose to rely on Cox's expert for these two issues, ignoring the evidentiary support for Dr. Singer's opinions and the lack of support for Cox's expert's opinions. The District Court erred when it accepted Cox's red herring argument that theoretical variations in competition among Cox's regional markets precluded class certification.

B. THE PETITION SHOULD BE GRANTED BECAUSE DENIAL OF CLASS CERTIFICATION SOUNDS THE DEATH KNELL OF THIS LITIGATION, WHERE THE REPRESENTATIVE PLAINTIFFS' CLAIMS ARE SIMPLY TOO SMALL TO JUSTIFY THE EXPENSE OF CONTINUED INDIVIDUAL LITIGATION.

"'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Likewise, the denial of a class certification motion will often sound the death knell where the class representative's potential recovery does not justify the expense of individual litigation. The cost of *individual* litigation related to Cox's tying arrangement will far exceed any potential recovery. The claims of the individual plaintiffs are likely worth between one and two hundred dollars. *See, e.g.*, Report of Hal Singer at 72-74 (estimating Plaintiffs' damages at $1-4 a month); Plaintiffs Class Cert. Brief at 41. The continuing prosecution of these claims on an individual basis is extremely unlikely, as the fees and expenses involved in litigating the case will greatly outweigh the likely recovery. As the Court is well aware, the expert costs alone in an antitrust class action make the prosecution of individual consumer antitrust claims impracticable. Thus, the

denial of Plaintiffs' Motion for Class Certification will likely lead to the resolution of the case on terms other than the merits of the claims, and will mean this Court is not likely to hear an appeal of these issues upon finality.

This is clearly a situation where a "questionable class certification order is likely to force" Plaintiffs "to resolve the case based on consideration independent of the merits." *Vallario*, 554 F.3d at 1263. Accordingly, interlocutory appeal to address the District Court's orders is appropriate.

C. THE DISTICT COURT'S CLASS CERTIFICATION DECISION PRESENTS ISSUES THAT ARE IMPORTANT TO THIS CASE BUT WHICH ARE ALSO SIGNIFICANT WITH REGARD TO CLASS ACTIONS GENERALLY AND ANTITRUST CLASS ACTIONS SPECIFICALLY.

Interlocutory appeal of the District Court's decision will facilitate the development of significant legal principles related to the proper consideration of complex data analyses in the context of class certification decisions, especially in the context of antitrust litigation. As the Seventh Circuit indicated in *Messner*, resolution of this issue is important not only for this case but for enforcement of the antitrust laws generally. *Messner*, 669 F.3d at 808. Because individual litigation is not economically feasible, the District Court's Class Certification Order will, in all likelihood, evade review unless Plaintiffs' Petition for Leave to Appeal is granted.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Court should grant review of the District Court's Class Certification Order and Reconsideration Order under Rule 23(f).

DATED: April 11, 2012

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)

Joe R. Whatley, Jr.
WHATLEY DRAKE & KALLAS LLC
380 Madison Avenue, 23rd Floor
New York, NY 10017
212-447-7070 (Telephone)
212-447-7077 (Facsimile)

Allan Kanner, OBA No. 20948
Cynthia St. Amant
KANNER & WHITELEY, L.L.C.
701 Camp Street
New Orleans, LA 70130
504-524-5777 (Telephone)
504-524-5763 (Facsimile)

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served via electronic mail and Federal Express, shipping prepaid and properly addressed, on April 11, 2012, to the following:

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

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

/s/*A. Daniel Woska*
Of Counsel