UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
NO. 10-2865

CAROLINE BEHREND, ET AL.,

Plaintiffs-Appellees,

v.

COMCAST CORPORATION, COMCAST HOLDINGS CORPORATION, COMCAST CABLE COMMUNICATIONS, INC., COMCAST CABLE COMMUNICATIONS HOLDINGS, INC., AND COMCAST CABLE HOLDINGS, LLC,

Defendants-Appellants.

On Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania Granting Re-Certification of the "Philadelphia Cluster" Class in Docket No. 03-CV-6604 (JRP)

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SUBJECT MATTER AND APPELLATE JURISDICTION

Class plaintiffs (the "Class") adopt Comcast's statement of jurisdiction.[1]

STATEMENT OF THE ISSUES

Whether the district court faithfully complied with this Court's mandate in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), to conduct a rigorous analysis of the relevant Rule 23 requirements by partially vacating its original certification order in light of *Hydrogen Peroxide* and requiring the Class to establish by a preponderance of the evidence the susceptibility of antitrust impact and methodology of damages to available classwide proof at trial; receiving and analyzing extensive reports and testimony by economics and statistical experts, testimony by more than a dozen fact witnesses, multiple government reports, substantial academic research, and business records and other proof; conducting a four-day evidentiary hearing involving live testimony of expert and fact witnesses; hearing oral argument on the Class's amended motion to certify; and issuing an 81-page Memorandum that makes detailed and explicit fact findings and credibility determinations in support of its decision to recertify the original class.

[1] Under *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 197-98 (3d Cir. 2008), the Court has jurisdiction of the appeal despite its untimeliness. *See* Plaintiffs-Respondents' Opposition to Defendants-Petitioners' Petition for Permission to Appeal at 5-7.

Whether Comcast has shown that the district court clearly erred in finding that the Philadelphia DMA "can be the appropriate geographic market definition." A00048.

Whether Comcast has shown that the district court clearly erred in finding "that antitrust impact or injury is subject to proof at trial through available evidence common to the class". *Id.*

Whether Comcast has shown that the district court clearly erred in finding that "the model and analyses contained in the expert reports and testimony of Plaintiffs' expert. Dr. James McClave, are common evidence available to measure and quantify damages on a class wide basis." *Id.*

Whether the Court's decision in *Hydrogen Peroxide* precludes Comcast's merits argument, among others, that the market allocation agreements between Comcast and other cable companies do not, as a matter of law, qualify for *per se* treatment.

STATEMENT OF THE CASE

The Class brought this case in 2003 to remedy Comcast's willful obtaining and keeping of regional dominance in wireline cable services. The operative complaint alleges that, over the last decade, Comcast and other cable operators conspired to allocate multi-channel video customers in the Philadelphia and Chicago areas to Comcast and that through that and other anticompetitive conduct

Comcast monopolized and attempted to monopolize the Philadelphia and Chicago markets.

Judge Padova rejected Comcast's multiple attacks on the pleadings. (Appendix ("A") A00167, A00171-72, A00175-76 [DDE 155, 188, 220].) After extensive motion practice and appeals regarding Comcast's attempt to compel arbitration, the parties stipulated that this case and cases relating to Comcast's similar conduct in the Boston area would proceed before Judge Padova.

In May 2007, Judge Padova issued an order certifying a class of cable subscribers from the Philadelphia area to assert antitrust claims against Comcast. A00389-90. Comcast sought leave to appeal under Federal Rule of Civil Procedure 23(f), claiming errors in Judge Padova's class certification order and complaining of "hydraulic pressure" to settle. *See* Comcast 5/17/07 23(f) Petition. This Court denied Comcast's Rule 23(f) petition on June 29, 2007.[2]

Soon after the Court decided *Hydrogen Peroxide*, Comcast sought to apply *Hydrogen Peroxide* to decertify the Philadelphia and Chicago classes. A00188 [DDE 317]. After briefing and argument, the district court treated Comcast's

[2] Judge Padova later certified a class of cable subscribers from the Chicago area to bring similar claims against Comcast. A00177 [DDE 231]. Again Comcast sought interlocutory appeal claiming similar error and the same "hydraulic pressure" from the class certification order. Comcast 10/24/07 23(f) Petition. And again this Court rejected Comcast's petition. 12/11/07 Third Circuit Oder denying 23(f) Petition. Judge Padova stayed the Chicago class's claims, and the Philadelphia class began discovery. A00179 [DDE 244].

motion as a "Motion for Reconsideration" of its May 2, 2007 class certification order and granted it in part, ordering new briefing to address the requirements of *Hydrogen Peroxide*. (A00437-39.) Comcast disputed only whether the class met Rule 23(b)(3)'s requirement that common issues of law and fact predominate and solely with respect to the issues of antitrust impact and damages methodology. A00438, n.2. At Comcast's request, the district court set the matter for a hearing. A00439.

The evidentiary hearing went forward on October 13-15 and 26, 2009. A00200-202 [DDE 407, 409, 411, 423]. The district court permitted the parties to present, and it carefully considered, 32 expert reports relating to both class certification and merits issues, a great many documents, and excerpts from the depositions of more than a dozen witnesses.[3] The district court also took live testimony from fact and expert witnesses, with each side cross-examining the other's witnesses.[4] Judge Padova did not hinder or prohibit Comcast from presenting any argument, or offering any evidence, that it wished to present or

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[3] Although Judge Padova's 81-page opinion demonstrates the scope of the litigation and the extent of the record he considered (*see, e.g.*, A00034-35, A00040-42), the Class respectfully refers the Court to the full district court docket (A00118-207), which shows just how long and hard the parties have fought this case, and to the massive evidentiary record before the district court supporting its opinion, *see* Docket Entries 329-429 (A00190-203).

[4] *See* A00542-758 (10/13 Tr.), at A00714-756; A00759-1013 (10/14 Tr.), at A00759-847, A000867-875, A01014-1170 (10/15 Tr.), at A01023-1148; A01160-1163.

offer; and Comcast does not contend otherwise.[5] And Judge Padova himself closely examined the witnesses.[6]

After the mini-trial, Judge Padova issued to the parties a series of questions touching on many aspects of the antitrust impact and methodology of damages issues. A01370-72. He then heard argument to address those questions. A00202 [DDE 427]. Judge Padova then recertified the Philadelphia class. He stated:

> The experts' opinions raise substantial issues of fact and credibility that we are required to resolve to decide the pending motion. Having rigorously analyzed the expert reports, as well as the testimony presented by the parties during a four-day evidentiary hearing, we conclude that the Class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis.

A00035-36 (citing *Hydrogen Peroxide*, 552 F.3d at 316). Consistent with this Court's mandate in *Hydrogen Peroxide*, 552 F.3d at 307, 312, the court rigorously assessed all of the evidence and detailed its credibility determinations and findings

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[5] Comcast suggests in its brief that Judge Padova restricted Comcast's presentation of expert testimony at the evidentiary hearing but offers no proof. Comcast Br. at 4. Judge Padova in fact allowed Comcast to do everything it requested and in no way limited Comcast's presentation.

[6] *See* (10/13 Tr.), at A00609-611, A00667-670, A00708-709, (10/14 Tr.), at A00768-770, A00777-778, A00787-789, A00810-813, A00817-825, A00836-837, A00842-843, A00868-869, A00871-876, A00978-991; (10/15 Tr.) at A01033-1041. (10/26 Tr.) at A01180-1182, A01186-1189, A01191-1198, A01203-1209, A01224-1229, A01235-1238, A01300-1303, A01312-1316, A01337-1340, A01351-1352.

of fact (on the basis of a preponderance of the evidence standard) necessary to support the single Rule 23 requirement that remained in issue, namely whether common questions of law or fact predominated over individual questions under Rule 23(b)(3) with respect to antitrust impact and damages. The definition of the Philadelphia class (the "Class") remained the same as that of the one Judge Padova certified in May 2007. (*Compare* A00030-31, ¶ 10, *with* A00389-90, ¶ 2.)

The court's Amended Order of January 13, 2010 "reaffirm[ed] and hereby incorporate[d]" its findings "that the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy had been satisfied by the Class and that the Class satisfied the Rule 23(b)(3) requirement of superiority."[7] But the Amended Order did narrow the scope of the Class's antitrust impact proof. It provided that "[p]roof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA."[8]

Comcast filed its second petition for permission to appeal on February 17, 2010. On March 5, 2010, Comcast moved for summary judgment. A00204 [DDE 441]. The Class responded on April 29, 2010. A00205 [DDE 448]. Comcast submitted its reply in support of summary judgment on June 4, 2010. A00205-206

[7] (*See* A00029 [DDE 432])

[8] (*See* A00032 [DDE 432])

[DDE 452]. This Court granted Comcast permission to appeal on June 9, 2010. The motion for summary judgment remains pending before Judge Padova.

FACTS

From 1998 forward, Comcast became the dominant provider of multichannel video programming distribution ("MVPD") services in the Philadelphia DMA by entering into a series of contracts with competing cable providers. A00040 at n.8. In some of the contracts, Comcast "swapped" cable systems it owned in areas outside the Philadelphia DMA for systems within it. A00040 at n.8. In others, Comcast bought entire companies and, with them, the cable systems they had operated inside the Philadelphia DMA. A00040 at n.8.

The swaps and acquisitions increased Comcast's share of subscribers in the Philadelphia DMA from 23.9 percent in 1998 to 77.8 percent by 2002. A00049. The deals also raised the Herfindahl-Hirschman Index ("HHI") for the Philadelphia DMA from 1,833 in 1998 to between 6,148 and 6,178 in 2002. A00049 at n.12. The increase in the HHI indicates higher concentration of market power.

The MVPD operators that swapped their Philadelphia DMA systems to Comcast had competed with Comcast for opportunities to buy non-Comcast cable systems there. A00050. As operators of adjoining or nearby cable systems, they and Comcast represented the most likely bidders for Phildelphia DMA systems they did not own. Their departures, by means of the swap agreements with Comcast, ended any competitive threat they posed to Comcast in the DMA, both as

competing bidders for area cable systems and as potential overbuilders of Comcast's own systems.

The swaps and acquisitions increased Comcast's geographic footprint in the Philadelphia DMA and created a Comcast "cluster". The growth of the Comcast cluster in turn decreased the availability of desirable potential points of entry for overbuilders and increased the economic incentive of Comcast to hinder overbuilding. *Id.* at 33-34. It also put systems that once belonged to smaller cable operators into the hands of a multi-system operator ("MSO"). *Id.* at 10-11.

Overbuilding lowers cable rates by 10 to 20 percent. *Id.* at 41 & 45. Successful deterrence of overbuilding increases rates throughout the market. *Id.*

Because the economics of overbuilding made the process less expensive and risky if the overbuilder could start from a location near its existing infrastructure, because ownership of systems by MSOs and clustering increase prices, and because owning contiguous systems enhances the incumbent's ability and incentive to prevent or limit overbuilding, the swaps and acquisitions had the effect of deterring overbuilding while raising subscribers' prices to supracompetitive levels. *Id.* at 12, 13, 16, 29-33 & 41.

Government studies and academic research support the conclusion that clustering and ownership of systems by MOSs discourage overbuilding and lead to higher prices for cable. *Id.* at 34-39.

RCN, an overbuilder, planned to overbuild five of the counties in the Philadelphia DMA. Comcast responded to RCN's plans by, among other things, targeting discounts for Comcast customers in areas where it expected RCN to enter, restricting RCN's access to regional sports programming, and entering into exclusive arrangements with cable infrastructure contractors. *Id.* at 39-40 & 43. But for Comcast's anticompetitive conduct, RCN would likely have continued overbuilding beyond the original five counties. *Id.* at 45. But in 2001, RCN withdrew from its effort to overbuild in Philadelphia.

The Class's damages expert calculated the extent of Comcast's supracompetitive prices during the class period by using a benchmark analysis. He took as his benchmark prices that Comcast charged in more competitive areas that otherwise exhibited characteristics comparable to conditions in the Philadelphia DMA. *Id.* at 61. He applied standard econometric and statistical methods to compute the difference between the supracompetitive prices Comcast actually charged in the Philadelphia DMA and the prices it would have charged there but for its anticompetitive conduct. *Id.* His analysis employed screens to identify appropriate benchmark areas. *Id.* at 63-66. It also excluded population density as a variable due to its unreliability. *Id.* at 70-71. And it accounted for discounts from list prices, *id.* at 72 & 73 n.53, and did not depend on the Class's prevailing on all grounds of liability, *id.* at 79-80.

RELATED CASES AND PROCEEDINGS

Counsel for the Class brought similar cases against Comcast in Boston. Comcast removed the state court case to the United States District Court for the District of Massachusetts and combined it with the Sherman Act case already pending there. The district court in Boston invalidated Comcast's arbitration clause in part, and the First Circuit affirmed in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006). The parties stipulated to transfer of *Kristian* to Judge Padova's court. Comcast waived any right to arbitration. Judge Padova consolidated the cases but stayed proceedings regarding the Chicago and Boston markets pending trial of claims relating to the Philadelphia market.

STANDARD OF REVIEW

This Court reviews a class certification order for abuse of discretion. *Hydrogen Peroxide*, 552 F.3d at 312. A district court abuses its discretion if its decision "'rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" *Id.* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001)).

As the Court recently noted regarding the clear error standard:

> For a finding to be clearly erroneous, we must be left with the definite and firm conviction that a mistake has been committed. *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 201 (3d Cir. 2005). We will not reverse "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety" even if we would have weighed that evidence differently. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

> "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* at 575, 105 S.Ct. 1504; *accord MacDraw, Inc. v. CIT Group Equip. Fin., Inc.,* 157 F.3d 956, 962 (2d Cir. 1998).

EBC, Inc. v. Clark Bldg. Sys., Inc., 2010 WL 3239475, at *14 (3d Cir. Aug. 18, 2010).

The Court decides whether the district court used an incorrect legal standard *de novo*. *Hydrogen Peroxide*, 552 F.3d at 312.

In *Hydrogen Peroxide*, the Court defined what plaintiffs alleging Sherman Act claims must show regarding antitrust impact as follows:

> Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is *capable of proof at trial through evidence that is common to the class* rather than individual to its members.

Hydrogen Peroxide, 552 F.3d at 311-12 (emphasis added)

But Rule 23 bars decision of any merits question that does not overlap with a certification requirement. *See id.* at 317 (interpreting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), to preclude "a merits inquiry that is not necessary to determine a Rule 23 requirement"); *see also In re Community Bank of N. Va.*, 2010 WL 3666673, at *15 (3d Cir. Sept. 22, 2010) (noting that "the extent to which a district court may consider the merits of claims in a ruling on a class-

certification motion has limits" and stating that "merits inquiry is not permissible 'when [the] merits issue is unrelated to a Rule 23 requirement'") (quoting *In re Initial Public Offering Securities Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)).

SUMMARY OF ARGUMENT

Comcast has failed to show that Judge Padova clearly erred in finding, by a preponderance of the evidence, that the Class can establish antitrust impact with available evidence common to the Class. A building block in some Sherman Act cases, market definition, does not apply to the Class's *per se* claim or to the extent, present here, that the Class will show Comcast's monopoly power by direct evidence of supracompetitive prices and exclusion of competition. Any criticism of Judge Padova's finding regarding definition of the relevant geographic market thus cannot defeat certification.

Judge Padova applied the correct legal standard for determining a relevant geographic market by looking to the commercial realities of the Philadelphia DMA and the "competitive choices" of Class members. He carefully evaluated all the evidence, including expert reports and testimony showing that Comcast injured the Class through anticompetitive conduct that deterred and eliminated overbuilding competition. Nor did Judge Padova clearly err in finding that all Class members faced similar competitive choices, by crediting the opinions of Class experts on the appropriate market definition, or in rejecting as unpersuasive Comcast's arguments regarding "demand-substitutability".

The record contains abundant evidence supporting Judge Padova's finding that the Class can demonstrate classwide antitrust impact through proof common to the Class. That evidence included almost three dozen expert reports, live and deposition testimony by experts and fact witnesses, economic and econometric studies, as well as government and academic analyses and other documentary proof. The evidence showed that Comcast deterred and eliminated overbuilding competition throughout the Philadelphia DMA by means of clustering behavior and market allocation agreements that prevented competition for existing cable systems and deterred overbuilding and a campaign to stop overbuilding competition by RCN. Judge Padova did not clearly err in finding that the Class met its burden of showing the availability of common evidence capable of establishing antitrust impact from Comcast's anticompetitive conduct classwide at trial.

Judge Padova acted well within his discretion in crediting the classwide damages methodology of Dr. James McClave, an econometrician and statistics expert who presented the Class's damages model. Judge Padova correctly rejected Comcast's arguments that Dr. McClave's model depended on whether the Class prevailed on all grounds for liability, finding that Dr. McClave's analysis isolated the price effects of anticompetitive conduct from any effects of lawful conduct. Judge Padova also rightly credited Dr. McClave's use of screens – for direct broadcast satellite ("DBS") penetration and market share – to determine the correct

benchmark for assessing the extent to which Comcast extracted supracompetitive prices from the Class. And Dr. McClave persuaded Judge Padova with compelling reasons for why thoroughly sound statistical practices invalidated population density as an appropriate variable and with a cogent explanation of how his methodology properly and accurately accounted for any effect of discounts from standard prices.

Comcast failed to establish that its market allocation agreements with other cable companies do not qualify for *per se* treatment under section 1 of the Sherman Act. *Hydrogen Peroxide* precludes such a merits inquiry as it bears no relation to the requirements of Rule 23. The Supreme Court and this Court, moreover, have confirmed that the *per se* rule applies to agreements involving allocation of markets between horizontal competitors.

Judge Padova's certification order should be affirmed in all respects.

ARGUMENT

I. AMPLE EVIDENCE SUPPORTS JUDGE PADOVA'S FINDING THAT "THE CLASS HAS DEMONSTRATED BY A PREPONDERANCE OF THE EVIDENCE THAT ANTITRUST IMPACT OR INJURY IS SUBJECT TO PROOF AT TRIAL THROUGH AVAILABLE EVIDENCE COMMON TO THE CLASS"

A. The District Court Used the Correct Legal Standard for Determining the Relevant Geographic Market

1. The Market Definition Issue Does Not Apply to the Class's *Per Se* Claim Under Section 1 or to the Class's Claims to the Extent They Provide Direct Evidence of Comcast's Market Power

Comcast disregards the fact that only some of the Class's claims require proof of a relevant geographic market. The oversight provides an independent basis to reject Comcast's market definition ground for overturning Judge Padova's class certification order.

The Class's complaint alleges traditional section 1 (market allocation) and section 2 (unlawful monopolization) claims under the *per se* doctrine and the rule of reason. And the Class has backed up those allegations with compelling proof. As they detailed in their opposition to Comcast's pending motion for summary judgment, the evidence demonstrates that Comcast violated section 1 by allocating markets and customers through "swap" agreements with competitors and that Comcast willfully acquired and maintained a monopoly and attempted to monopolize, in violation of section 2, by engaging in a deliberate exclusionary strategy of eliminating and deterring competition through market allocating agreements with, and acquisitions of, competitors and the unlawful suppression of overbuilding. The record also establishes that Comcast has extracted supracompetitive prices from the Class as a result of its anticompetitive conduct. A00205 [DDE 448].

The Class's *per se* claim obviates the need to prove a relevant geographic market. "Under the per se standard," which applies to horizontal market-allocation and other section 1 claims, "plaintiffs are relieved of the obligation to define a market and prove market power." *In re Ins. Brokerage Antitrust Litig.*, 2010 WL 3211147, at *8 (3d Cir. Aug. 16, 2010).

Nor does the market definition requirement apply where, as in this case, plaintiffs offer direct evidence of market power. "Because market share and barriers to entry are merely surrogates for determining the existence of monopoly power, . . . direct proof of monopoly power does not require a definition of the relevant market." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 n.3 (3d Cir. 2007) (citing 2A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 531a (2006); other citations omitted). The Class may thus establish, and have established, their section 1 and section 2 claims "through direct evidence of supracompetitive prices and restricted output." *Id.* at 309 (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)).

The Class asserts a traditional *per se* market allocation claim and offers direct proof of Comcast's market power through its charging of supracompetitive prices and exclusion of competition, including by RCN. Any error concerning

market definition (and none occurred error here) thus would not warrant overturning of the certification order.

2. Judge Padova's Focus on Class Members' "Competitive Choices" Shows that He Applied the Correct Legal Test for Determining the Relevant Geographic Market

"The geographic scope of a relevant product market is a question of fact to be determined in the context of each case in acknowledgment of the commercial realities of the industry being considered." *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005) (citing *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982)). "The relevant geographic market . . . is that area in which a potential buyer may rationally look for the goods or services he seeks." *Id.* (citing *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pa.*, 745 F.2d 248 (3d Cir. 1984)). Judge Padova used the commercial realities test, focusing on the "competitive choices" of consumers and finding:

> The conduct at issue here centers on Comcast's attempt to acquire substantially all of the cable systems in the Philadelphia DMA. Because the record evidence shows that consumers throughout the DMA can face *similar competitive choices* and suffer the same alleged antitrust impact resulting from Comcast's clustering conduct in the Philadelphia DMA, we find that it can be the appropriate geographic market definition.

(A00048) (emphasis added). The focus on "competitive choices" belies Comcast's argument that Judge Padova "ignored" demand-substitutability.[9]

3. Judge Padova Did Not Clearly Err in His "Competitive Choices" Finding

Judge Padova's use of the proper legal test reduces Comcast to insisting that "[i]t is not correct that consumers throughout the alleged geographic market face similar competitive choices." Comcast Br. at 20. But, to prevail on that assertion, Comcast must show clear error in Judge Padova's finding that "consumers throughout the DMA can face similar competitive choices". That it cannot do.

Comcast ignores a crucial point, which Judge Padova rightly accepted, that "the market allocations" between Comcast and exiting cable providers "have diminished competition in the Philadelphia DMA." A00050 (citing Williams Decl. ¶¶ 120-24). As the district court noted, expert evidence showed "that the swaps and acquisitions allocated the geographic market because Comcast *competed with* cable companies that previously operated in the Philadelphia DMA *for . . . the purchase of cable systems* in the Philadelphia DMA." *Id.* (citing Williams Decl. ¶ 121) (footnote omitted) (emphasis added). Comcast's removal of competitors for *existing cable systems* expanded its footprint and thus strengthened its power (and incentive) to deter overbuilding, including by RCN. The strategy in turn forced

[9] Judge Padova discussed Comcast's argument that "there is no demand-side substitutability between adjacent geographic markets", (A00047), but found it unpersuasive, (A00048).

Philadelphia-area consumers to buy cable from Comcast – at much higher prices than would have prevailed in the DMA had multiple cable providers in non-Comcast areas remained – or not at all. Such conduct plainly may violate section 1. *See Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1562 & 1563 (5th Cir. 1984) (affirming verdict under section 1 and noting "devastating competitive impact" in form of "lower quality, higher priced cable television" of agreement among potential cable operators not to compete for original franchises).

The Philadelphia DMA, by its nature, defines the geographic market for acquiring cable systems within it. Not even Comcast would suggest that a system in Pittsburgh (for example) has the same value to a Philadelphia DMA incumbent as a Philadelphia system would have to that incumbent. The incumbent operators that already owned systems in the DMA represented the most likely (if not the only) buyers. As Comcast picked them off one by one through market allocating swaps with and acquisitions of competitors – sometimes in big swaths – their number dwindled, progressively reducing the plausibility that any survivor could challenge Comcast for DMA dominance[10] by purchasing another survivor.

[10] For documents and testimony showing that Comcast often used DMA as its focal metric in seeking to dominate markets, see Plts. SJ Opp. Br., Docket No. 448, at 29-41; A03618, 03629-37, Williams 4/10/09 Decl. ¶¶ 33, 59-84 (expert opinion discussing and documenting that industry participants, including Comcast in its own documents, characterize competition between MVPDs as occurring in DMAs). Judge Padova referenced Dr. Williams's opinion in his discussion of the relevant geographic market at A00046.

Evidence that Philadelphia DMA incumbents allocated the DMA to Comcast abounds. A key example, Comcast's secret deal with AT&T to avoid "another round of competitive bids" for MediaOne, removed the "queen in the chess game", Lenfest Communications – then the most likely bulwark against Comcast dominance in the Philadelphia DMA.[11] Indeed, record evidence common to the Class and available at trial demonstrates that the deal made Comcast the dominant cable provider in the Philadelphia DMA through a straightforward market allocation with AT&T: Comcast agreed to stand down from competing with AT&T in a bidding contest to acquire MediaOne and its prized markets in return for AT&T's promise to deliver Lenfest – and most of the Philadelphia DMA – to Comcast.[12]

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[11] AT&T owned half of Lenfest at the time of the deal and induced the Lenfest family to sell it the other half without telling them the reason – that the deal with Comcast required AT&T to deliver Lenfest into Comcast's hands. (A05987, Lenfest Dep. 53:12-15, 53:17-19, 53:20-25; DDE 449, Plaintiffs' Appendix Vol. 3, Ex. 52, B. Roberts Dep. Ex. 6 at 2.)

[12] Deposition testimony confirms that Comcast obtained Lenfest as part of its deal with AT&T. In describing the MediaOne transaction, former AT&T executive Leo Hindery testified that "we also induced Comcast to stand down after appropriate time by swapping a system called Lenfest to Comcast." A05898, Hindery Dep. 44:17-19; *see also* A05939 at 208:22-24 ("So I have a recollection of offering Mr. Roberts the Lenfest systems to stand down from the MediaOne transaction."). Brian Roberts confirmed that Comcast got Lenfest as a result of the AT&T agreement involving MediaOne. A06419, B. Roberts Dep. 139:25-140:3 ("Q. And as a result of the MediaOne transaction, as you call it, Comcast got Lenfest, is that right? A. Yes."). Robert Pick confirmed that Comcast obtained Lenfest as a result of Comcast's agreement with AT&T concerning MediaOne.

Comcast's point that, *today*, "[c]lass members in certain franchise areas enjoy a choice of wireline cable providers (they may choose from among Comcast, RCN and/or Verizon FIOS)" makes no difference. *Id.* Comcast's success in gobbling up nearby incumbents and thwarting RCN's overbuilding campaign kept most class members from choosing between Comcast and RCN. And Verizon FIOS arrived late in the class period, after Comcast put the last brick in its DMA fortress.

The record also shows that other incumbent MSOs did pose a threat of overbuilding Comcast franchises in the Philadelphia DMA. We review pertinent evidence in the section that follows.

A06311, Pick Dep. 193:1-18. At the class certification hearing, Stephen Burke testified:

> Q. Part of the deal when AT&T Broadband and Comcast agreed that Media One was going to go to AT&T instead of Comcast part of the deal at that time was that Lenfest was going to be sold to Comcast, correct?
> A. Half of Lenfest, yes.

Hr'g Tr. 148:3-7, Oct. 14, 2009 at A00906 Harold (Gerry) Lenfest also confirmed AT&T's trade of the Lenfest systems to Comcast as an inducement for Comcast to back off from the competitive bidding for MediaOne: "I think we were the queen in the chess game for MediaOne." A05987, Lenfest Dep. 53:14-15. Asked what he meant, Mr. Lenfest explained: "I think Leo Hindery went to Comcast and said I will give you Lenfest if you back off from MediaOne." *Id.* at 53:17-19. With the allocation of Lenfest to Comcast, Comcast became the dominant cable provider in the Philadelphia DMA, gaining Lenfest's 1.25 million cable subscribers. *See* A04774, Pick Ex. 15 at COM-PA0466654 ("The acquisition of Lenfest will make Comcast the dominant CATV operator in the Philadelphia DMA (rank – 4th)"); A05900, Hindery Dep. 53:16-20 ("Q. When it attained Lenfest, did Comcast become dominant within the Philadelphia DMA? . . . A. It certainly became the largest cable operator in that market, yes.").

B. The District Court Did Not Err in Accepting Expert Opinions as Common Evidence of Antitrust Impact

1. The Evidence Shows That the Swaps and Acquisitions Eliminated Competition for Cable Systems in the Philadelphia DMA and Deterred Overbuilding There

Comcast ignores overwhelming record evidence that Comcast's "clustering" of the Philadelphia DMA through its swaps and acquisitions deterred and reduced overbuilding competition, resulting in traditional antitrust impact (higher cable prices) for all class members. The district court did not. Rather, Judge Padova exhaustively reviewed economist Dr. Michael Williams's expert opinions, his economic models, numerous FCC and GAO reports supporting "his opinion that clustering creates antitrust impact by discouraging overbuilding", and the extensive published academic research and studies relied upon by Dr. Williams. A00062-072. Judge Padova further scrutinized economist Dr. Hal Singer's expert reports, which "included a substantial analysis of how Comcast's clustering strategy denied overbuilders access to the relevant market." A00072 (citing Singer Decl. ¶¶ 95-136). The district court further discussed Dr. Singer's reliance upon academic studies showing that cable prices are lower when overbuilder competition is present, analyses conducted by the FCC and GAO, Dr. Singer's own academic studies and those of other economists and Dr. Singer's compilation of common

proof showing "that impaired overbuilder competition leads to a reduction in consumer welfare." A00074.[13] As Judge Padova explained:

> Dr. Williams, summarizing Dr. Singer's report, states that
>
> > Dr. Singer has found that, consistent with his prior empirical work and the results of the overbuilding model . . . , Comcast's conduct reduced the extent of competition provided by overbuilders in the Philadelphia DMA. Thus, Comcast's anticompetitive actions have caused subscribers to pay higher cable rates, and higher by more than a SSNIP, than those subscribers would have paid but for the effect of Comcast's anticompetitive actions on overbuilders. . . .
> >
> > In sum, economic analysis shows that Comcast's alleged anticompetitive conduct in the Philadelphia DMA reduced the extent of competition provided by overbuilders in the Philadelphia DMA. Econometric evidence shows that reductions in overbuilding cause cable rates to increase, all else equal. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA.
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> (Williams Decl. ¶¶ 55-56.) A00074.[14]

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[13] Dr. Williams collected economic evidence supporting his expert opinions in a series of charts. *See* A04635-43, A04651-53, A04658-59, A04661, A04663-65, Williams Supp. Decl. Tables 1-7, including Tbl. 5 (summarizing economic evidence that clustering reduces overbuilding).

[14] The Class's expert Dr. Hal Singer conducted regression analyses demonstrating that Comcast's acquisition of monopoly power through the challenged swaps and acquisitions reduced the probability of overbuilding in the Philadelphia DMA. A04113-127 (Singer Reply Decl. ¶¶ 42-59). Dr. Singer established that "an increase in the cluster size decreases the probability of overbuilding, and that (negative) effect increases with further increases in the size of the cluster." A04124-125 (Singer Reply Decl. ¶ 58 and n. 130). *See* A04609-10 (Singer Suppl. Reply Decl. ¶ 55) (concluding that "an increase in the size of a cluster is associated

Judge Padova then carefully analyzed the criticisms of Comcast's expert Dr. Teece of the class experts' opinions on the anticompetitive effects of clustering on overbuilding, as well as Dr. Williams's responses. A00074-78. After close analysis of both parties' experts' testimony, as this Court required in *Hydrogen Peroxide*, Judge Padova ruled, on the basis of the extensive record, "that the Class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the Class." A00078.

Comcast ignores the extensive record evidence, which Judge Padova rigorously analyzed, that supports the court's conclusion on the class certification issue before it – that the Class demonstrated the anticompetitive effect of Comcast's conduct on overbuilder competition as capable of proof at trial through common evidence. Rather, Comcast raises an unnecessary merits question by urging that the Class "must show that the Transactions eliminated potential overbuild competition". Comcast Br. at 21. The argument about the "potential competition" doctrine has nothing to do with whether Judge Padova rightly found that plaintiffs may show antitrust impact through proof – including the swaps and acquisitions – common to the Class.

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with a decrease in the probability of overbuilding, even in the case of larger clusters").

As the Court confirmed in *In re Community Bank of N. Va.*, a district court errs when it addresses a merits question that does not overlap with a requirement of Rule 23. In that case, the district court concluded that statute of limitations defenses would bar potential class claims. The conclusion allowed the district court to find that the class representatives and class counsel adequately represented the members of a settlement class despite not asserting the potential claims. This Court reversed and remanded, holding the inquiries into the "merits" of the limitations defenses "were unnecessary to evaluate the adequacy requirement under Rule 23(a)(4)." *Id.* at *22.

In this appeal, Comcast would have the Court delve into the "potential competition" doctrine, evaluate the evidence in light of it, and conclude that the record fails to show Comcast eliminated potential competitors by paying them to leave the Philadelphia DMA. *See* Comcast Br. at 21-24. But Comcast does not dispute that the swaps and acquisitions, if a jury finds that they in fact did injure competition, provide class-wide proof of antitrust impact. Going further, as Comcast asks the Court to do, would trench on the merits without helping the Court resolve the sole question before it – whether the "element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Hydrogen Peroxide*, 552 F.3d at 311-12. The Court should reject Comcast's attempt to exclude the swaps and acquisitions as common

proof of antitrust impact on the theory that they do not satisfy the requirements of the "potential competition" doctrine.[15]

Even if *Hydrogen Peroxide* and Rule 23 did allow the Court to reach the merits question and even if the Court decided the issue in Comcast's favor, the swaps and acquisitions stand as common evidence showing that Comcast eliminated competition for cable systems in the Philadelphia DMA. Section 1 prohibits agreements that thwart competition for cable franchises. *See Affiliated Capital*, 735 F.2d at 1563 (nothing "the pernicious effects" of conspiracy to eliminate competition for original franchise awards). Comcast simply ignores that aspect of the Class claims – and the substantial common evidence supporting it.

Comcast also overlooks evidence that multiple cable system operators ("MSOs") have, in fact, overbuilt one another. RCN operates both as an incumbent MSO and an overbuilder MSO.[16] Despite facing enormous obstacles

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[15] A recent decision by the Seventh Circuit highlights the difference between a merits issue that bears on predominance and one that does not. In reviewing certification of a class asserting securities fraud, the court rejected the defendants' argument that plaintiffs must prove that false statements materially affected the price of the security. The panel held that "whether statements were false, or whether the effects [of the statements on the market] were large enough to be called material, are questions on the merits" and refused to rule on them. *Schleicher v. Wendt*, 2010 WL 3271964, at *5 (7th Cir. Aug. 20, 2010) (per Easterbrook, C.J.); *see id.* ("It is possible to certify a class under Rule 23(b)(3) even though all statements turn out to have only trivial effects on stock prices. Certification is appropriate, but the class will lose on the merits.").

[16] *See* A05277, S. Burke Dep. 51:23-52:5 (describing RCN as both an MSO and an overbuilder), *id.* at 52:6-8 ("Q. So, there's some MSOs that are MSOs in some

that Comcast erected through its anticompetitive behavior, RCN overbuilt Comcast franchises in the Philadelphia DMA. Answering a question about the chances of another MSO coming in and building out the same franchise system, Leo Hindery testified: "There have been numerous examples." A05911; Hindery Dep. 95:18-23.

At his deposition, the economist Dr. Williams cited many instances of MSOs overbuilding one another. Specifically, Dr. Williams stated that he reviewed documents indicating that AT&T, Adelphia, Comcast, Charter, Cablevision, Cox, and Time Warner had all engaged in overbuilding. "I think there's certainly a potential for the incumbent MSOs in the Philadelphia DMA to overbuild each other's territories because they have done it in other places." [DDE 449] App. 100, Williams Dep. 46:21-47:4 and 47:12-16. Dr. Williams opined that MSOs in the Philadelphia DMA were potential entrants. *Id.* 52:20-53:1-17. Documents that Comcast produced in discovery provide abundant examples of overbuilding by MSOs.[17] Comcast simply ignores this record evidence; the district court did not.

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locations and overbuilders in other locations? A. That's right."); A05351, Burnside Dep. 16:17-17:14, 17:21-23 (describing RCN's business as consisting of both operating traditional legacy franchises in some areas and operating as an overbuilder in others).

[17] *See, e.g.,* [DDE 449] App. 27, Pick Ex. 10 at COM-PA0776597 (referring to the 500 homes having service available from both Comcast and Marcus Cable as a result of a "construction race" between Comcast's predecessor and Marcus) and A06300, Pick Dep. at 148:13-14 (confirming that Marcus Cable was an MSO); [DDE 449] App. 34, Pick Dep. Ex. 23 at COM-PA1130645 (noting that

Instead, Comcast cites testimony from its own executives that they had no intention to overbuild the franchises of other MSOs. Comcast Br. at 23. At the very most, this self-serving testimony, directly contradicting evidence in the record, creates a fact issue for the jury. In *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the district court relied on testimony of Falstaff officers that

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approximately 20%-25% of Time Warner's Terre Haute, Indiana system is overbuilt by Charter), and A06321-322, Pick Dep. 233:24-234:2 (confirming that Time Warner and Charter were MSOs); [DDE 449] App. 35, Pick Dep. Ex. 24 (noting that Adelphia's South Florida cable systems were "overbuilt with AOL/TW [Time Warner]"; A04754, Pick Dep. Ex. 30 at COM-PA1835049 (Cablevision overbuilt homes served by Adelphia), and A06331, Pick Dep. 272:10-13 (confirming that Cablevision and Adelphia were MSOs); [DDE 449] App. 45, Pick Dep. Ex. 37 (noting that Comcast anticipated DOJ scrutiny of its contemplated acquisition of Anne Arundel, MD. cable systems from Millennium and A06337, Pick Dep. 294:8-296:3 (explaining that Anne Arundel was partially overbuilt by Millennium and Comcast's predecessor AT&T or TCI and that Millennium, TCI, AT&T and Comcast were all MSOs); A04761, COM-DOJ0273975 (noting overbuilding competition between Millennium and Comcast in suburban Baltimore and areas around Seattle and noting that Millennium competes with Comcast in approximately 59 percent of Millennium's Mid-Atlantic service area, representing approximately 50,000 homes passed); A04974, COM-PA1082923 (Comcast email, July 20, 1999, noting that in the City of Aventura, "Cablevision has overbuilt us" and "[w]e have overbuilt AT&T/TCI in some areas"); [DDE 449] App. 124, COM-PA1267909 (referring to 5,300 units in Alameda, CA and noting "Comcast overbuilds 100%"); App. 124, COM-PA1267922 (Comcast document referring to Newman County, GA (approx. 18k subs) and noting "system is 57% overbuilt with Charter and 20% overbuilt with Comcast."); A04754, COM-PA1835049 (noting that Cablevision has overbuilt homes Adelphia served in Oshtemo Co., MI); [DDE 449] App. 106, COM-EM-00011036 (noting that Adelphia is overbuilt with Brighthouse in Tampa/Orlando area); [DDE 449] App. 112, COM-PA0374859 (noting that in Virginia approximately 80,000 homes are overbuilt by Adelphia and various competitors, including Comcast in Powhatan); [DDE 449] App. 125, COM-PA1382980 (indicating Time Warner overbuilt 6,500 homes in Dothan, AL, served by Comcast).

the company had no intention to enter the market to conclude that the company was not a potential competitor. The Supreme Court reversed, finding that the testimony of Falstaff's management was not dispositive. *Id.* at 533. Concurring, Justice Marshall noted that such subjective evidence "in the usual case . . . is not worthy of credit," that "any statement of future intent will be inherently self-serving", and that such statements are "strongly in management's interest." *Id.* at 567-68 (Marshall, J., concurring).

Comcast further ignores the fact that the Federal Communications Commission has recognized that an adjoining cable operator represents the most likely entrant.[18] The testimony of Comcast CEO Brian Roberts further discredits Comcast's position. He conceded that other MSOs in the Philadelphia area represented the most likely buyers of non-Comcast cable systems. A06442, B. Roberts Dep. 231:25-232:7.

The record also shows that Comcast and other MSOs looked to one another's prices in setting their own. Richard Treich, formerly senior vice president at Comcast's predecessor, AT&T Broadband, testified that he agreed that

[18] *See, e.g.,* A02551, FCC, "Thirteenth Annual Report," MB Dckt No. 06-189 (Jan. 16, 2009) at ¶ 180 (noting that "clustering can present a barrier to entry for the most likely potential overbuilder, *i.e.*, an adjacent cable operator".); *see also* A03639-40, Williams Dec. ¶ 91 (noting that the GAO "has found that overbuilders are more likely to enter areas in close proximity to their own networks" (citing GAO (2004), "Wire-based Competition Benefited Consumers in Selected Markets," GAO-04-241) at A02444-45.

cable operators offering services in neighboring communities have to keep their prices in line to avoid upsetting subscribers. A06756, Treich Dep. 26:25-27:4. ("If you do have communities served by different operators, they do have to at least look at their prices in comparison to each other."). Mr. Treich also agreed with the observation of another industry watcher, Garth Aspaugh, that, "[i]f you have Time Warner and Comcast offering services in neighboring communities and subdivisions, they need to keep their prices pretty much in line with each other. Otherwise the communities involved will be upset." A06756, Treich Dep. 26:25-27:4. Mr. Treich could not have said more clearly that removal of an adjoining MSO hurts competition:

> I know there have been instances where an adjacent MSO's rates have caused AT&T or TCI to look at whether they wanted to raise them as much or not. So, if you get rid of a competitor – not a competitor – not a direct competitor, but you get rid of another data point, and you now control the other franchise area, then you don't have the same competitive impact.

A06778 at 114:17-115:2. When he worked at AT&T Broadband, Mr. Treich considered the cable prices of other MSOs in neighboring communities. A06760 Treich Dep. 42:18-43:6.

The record includes many other examples. For instance, Comcast wanted to know about Cox's rate card for its cable systems in Tucson, when Comcast considered whether its own rate increases would make it "an outlier." A06626, Scott Dep. 157:10-15. Former CEO of TCI and AT&T Broadband Leo Hindery

testified to monitoring the performance of competitors from available public information, including other cable companies' upgrade status, capital expenditures, revenues, stock prices, penetration rates, product offerings, margins, and prices. He stated that he kept track of other MSOs' performance while at both TCI and AT&T. A05916-5917, Hindery Dep. 117:1-118:21. He also said that, when two or more MSOs occupy the same DMA, the MSOs often keep track of what the other is doing, testifying that "I kept track through publicly available information of all major cable operators. . . ." A05917 at 120:10-21.[19]

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[19] *See also, e.g.*, [DDE 449] App. 131, COM-PA1580359-365, which includes "Competitive Analysis of Video Programming Tiers" comparing Comcast, Time Warner, Charter, Cox and Cablevision video packages and prices, as well as those of DBS providers, DirecTV and DISH Network (COM-PA1580359-362), "Competitive Analysis – HSD Bundles," comparing bundled packages including video services, and prices, as between the same MSOs and DBS providers (COM-PA1580363), and "1st Quarter Promotional Offers," providing comparative prices of video promotional offers by the foregoing MSOs and DBS companies (COM-PA1580364), and "Competitive Analysis – HSD Cable vs. RBOCS" (COM-PA1580365), providing comparative information, including prices, of offerings of MSOs and Verizon, SBC, BellSouth, Qwest; [DDE 449] App. 127, COM-PA1409935-939, Comcast email dated June 1, 2006, providing comparative information on AT&T's bundled offers and prices, including AT&T U-verse offers; [DDE 449] App. 128, COM-PA1409947-953, including "Comcast vs. AT&T Triple Play Bundles – Overview – May 2006" (COM-PA1409949-950); [DDE 449] App. 111, COM-PA0361226 "Comcast, Competitive Strategy Meeting, August 2005," "HSD Competitive Product/Pricing Comparison," providing comparative monthly prices for bundled offerings by Comcast, TW, Adelphia, Cox and others; [DDE 449] App. 109, COM-PA0336948, "Basic Rate Comparison" (comparing Comcast's and Millennium's prices); and [DDE 449] App. 110, COM-PA0339304 (comparing bundled product prices among various providers, including Comcast, Time Warner, Adelphia, Cox).

Besides ignoring all this evidence of record, Comcast's invocation of the potential competition doctrine misses the target and ignores the Class's case. The Class alleges, and the record fully supports a jury finding, that Comcast: (1) unreasonably restrained trade in the Philadelphia DMA by allocating markets and acquiring competitor cable companies and (2) monopolized and attempted to monopolize the Philadelphia DMA through anticompetitive conduct, including: (a) allocating markets; (b) acquiring competitors; (c) deterring overbuilding through its cluster-creating conduct of swaps and acquisitions in the Philadelphia DMA; (d) substantially foreclosing RCN's access to Comcast customers through long-term, 18-month contracts with penalty provisions offered only in Delaware County communities RCN was entering; (e) substantially foreclosing access to needed contractors by RCN; and (f) denying long term, non-discriminatory access by RCN to essential "must have" programming, Comcast SportsNet.

The Class's claims need not and do not hinge on the potential competition doctrine or on the likelihood that Comcast or the exiting competitors might enter each other's franchise areas. As Dr. Williams made clear, all Class members suffered antitrust impact regardless of whether competitors would or would not have entered each other's franchise areas:

> The above economic analysis further explains why, as further demonstrated below, contrary to Defendants' position, Comcast's anticompetitive conduct injured all class members independent of considerations involving or focusing on whether competitors (e.g., MSOs) would or would not have entered particular franchise areas or

> planned to do so. Comcast's swaps and acquisitions removed competitors, raised entry barriers, and enabled Comcast to acquire, maintain, and exercise monopoly power throughout the Philadelphia DMA. These findings are confirmed by the econometric estimation of damages conducted by Dr. McClave.

A03650 (Williams Decl. ¶ 110).

A trier of fact may well conclude from the abundant evidence that the surviving MSOs, including Comcast, affirmatively chose not to compete by means of overbuilding and instead agreed to partition DMAs among themselves in order to maximize individual firm and group profits. That their joint strategy of not competing succeeded in no way suggests, contrary to the evidence, that overbuilding – in the absence of anticompetitive conduct – would not have occurred in Philadelphia, bringing large price and quality benefits to cable subscribers.

2. Evidence of Comcast's Assault on RCN Demonstrates Classwide Antitrust Impact

Comcast's next point fares no better. It, too, presents a pure merits issue – whether Comcast's anticompetitive conduct in fact prevented RCN from overbuilding in more areas than it did. Comcast Br. at 28 (attacking Judge Padova's finding that "RCN likely would have continued to pursue its strategy of building into other areas"). *Hydrogen Peroxide* and Rule 23 disallow such an inquiry. *See Community Bank*, 2010 WL 3666673, at *22 (holding that district

court erred in reaching merits question of whether limitations would bar class claims).

The claim that Comcast's assault on RCN does not show antitrust impact also ignores evidence proving just that. Comcast would interpret the record evidence differently, as demonstrating (in Comcast's view) that factors other than Comcast's conduct stymied RCN's overbuilding efforts in the Philadelphia DMA. Comcast Br. at 26-27. That, at best, raises a genuine factual question on the merits in this case.

The evidence indicates that RCN had both the intent and the capital it needed to overbuild the Philadelphia market. *See* A03522-23, (Singer Decl. ¶ 127; and A04110-112 Singer Reply Decl. at ¶¶ 38-39). At his deposition, RCN's Scott Burnside testified to his former company's significant capitalization at the time it sought to enter the Philadelphia area: "At the time I was involved with this business, [RCN] was *without a doubt the largest and best capitalized*. . . . It was a public company. We had raised almost $4 billion dollars of investment capital from Wall Street and other outside investors." A05351, Burnside Dep. at 16:2-8 (emphasis added). Moreover, RCN already established itself as a cable operator – an MSO serving parts of New Jersey and Pennsylvania – when it started to overbuild the Philadelphia DMA. A05351 at 16:21-17:1. ("We operated those franchises in the State of Pennsylvania around the Allentown and Bethlehem and Easton market, and also we operated cable systems in the New Jersey market

around Princeton and Hillsboro, New Jersey, traditional cable TV franchises."). The evidence in the record shows that Comcast's anticompetitive conduct specifically deterred RCN's overbuilding efforts in the Philadelphia DMA. The district court recognized as much when it noted in its certification order that the parties dispute whether RCN likely would have overbuilt more extensively in the absence of Comcast's conduct: "What [Comcast expert] Dr. Teece considers 'unlikely,' [Class Plaintiffs' expert] Dr. Singer considers to be the common evidence of antitrust impact, namely that RCN was stymied in its efforts by Comcast's predatory behavior." A00079.

Even if Comcast could prove to a jury that RCN faced challenges in the Philadelphia DMA other than Comcast's anticompetitive conduct, the jury could still reasonably find that Comcast's conduct counted as "a material cause" of RCN's failure to compete more effectively and extensively with Comcast in that market. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) ("[A] plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 483 (3d Cir. 1998). Comcast's argument that its conduct did not materially cause RCN's failure to compete more effectively and extensively in the Philadelphia DMA raises a factual dispute that should go to a jury. But that question cannot deter class certification.

3. Dr. Williams's Expert Testimony Supports a Finding of Classwide Antitrust Impact

Comcast's attack on Dr. Williams's use of theoretical models has nothing to do with whether his testimony provides common evidence. It plainly does show classwide impact. And the trier of fact will either accept his opinion or reject it on the merits as to all class members and not any smaller subset of class members. Comcast instead challenges whether Dr. Williams's conclusions prove antitrust impact, a contest that this Court has specifically held concerns the merits and not class certification. *Hydrogen Peroxide*, 552 F.2d at 312.

The record shows that Judge Padova considered both the economic models Dr. Williams presented and the empirical evidence he relied upon consistent with those models and also examined in detail Comcast expert Dr. David Teece's contrary opinion.[20] Judge Padova ultimately credited (with a single exception, Dr. Hal Singer's lobbying activity discussion) Dr. Williams's opinion and explained, citing the empirical evidence, why Dr. Teece's opinion did not persuade him. A00078-79. That process reflects precisely the "rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use

[20] *See* A00062-67 (discussing Dr. Williams's two economic models); A00067-72 (discussing the empirical evidence reflected in multiple additional studies and sources consistent with and supporting Dr. Williams's conclusions, including numerous FCC and GAO reports and a host of published academic research); A00072-74 (discussing as additional bases for Dr. Williams's opinions the expert reports of Dr. Hal Singer); A00074-78 (discussing Dr. Teece's opinion).

the evidence to prove impact at trial" that this Court requires. *Hydrogen Peroxide*, 552 F.3d at 312.

In view of the extensive evidence showing that clustering decreases overbuilding competition and increases cable prices – evidence that the Class's experts detailed in their reports and that Judge Padova thoroughly discussed and credited – the cases that Comcast cites concerning expert opinion do not apply here. Comcast's Br. at 34 & 35 n.16.[21]

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[21] This case stands apart from the situations courts addressed in the cases Comcast cites. In most, the expert in question failed to tie his or her theories to any evidence at all. *See Am. Seed Co. v. Monsanto Co.*, 271 Fed. Appx. 138, 140 (3d Cir. 2008) (expert "conceded multiple times in his deposition that his theory was based solely on his assumption that all of the allegations in the complaint were true," and not on "any analysis of the data made available to appellants in discovery"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 134-35 (3d Cir. 1999) (expert assumed the existence of a conspiracy and the existence of evidence that proved a conspiracy, despite a lack of such evidence in the record); *Advo, Inc. v. Phila. Newspapers, Inc.*, 51 F.3d 1191, 1198-99 (3d Cir. 1995) (expert did not base conclusion that defendant engaged in below-cost pricing on defendant's actual costs and lacked "factual basis"); *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001) (neither expert nor plaintiff "provide[d] the hard data upon which [the expert] relied" for key conclusions). In the other cases, the expert based his or her theories on limited evidence that was as a matter of law insufficient to prove a required element of the tort being alleged. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242-43 (1993). Comcast also cites *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3d Cir. 1981), abrogated by *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56 (1982), and describes the case in a parenthetical as holding that "'mere speculation' by experts is 'not allowed to do duty for probative facts.'" Comcast Br. at 34 (quoting *Tose*, 648 F.2d at 895). But the Third Circuit's opinion in *Tose* does not involve, or even mention, experts. It offers only the general proposition that the jury is not allowed to render a verdict based on a plaintiff's speculative theory of liability. *See Tose*, 648 F.2d at 895. Here, in stark contrast, the Class's expert reports cite and analyze a tremendous volume of hard evidence of overbuilding rates and cable

After devoting careful attention to the expert and empirical evidence in the record, Judge Padova found that the class "met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class," showing "through Dr. Williams' model, as well as his citations to empirical studies conducted by governmental agencies and private researchers, that the presence of an overbuilder constrains cable prices," and that "Comcast engaged in conduct designed to deter the entry of overbuilders in the Philadelphia DMA." A00078-79. Judge Padova did not clearly err.[22]

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prices in numerous television markets across the country, including the Philadelphia DMA – evidence that Judge Padova examined at length in his class certification opinion and credited in the face of the same erroneous criticism Comcast offers here. The Class's expert reports show based on that hard evidence that an increase in clustering directly results in less overbuilding competition and higher cable prices.

[22] Comcast cites evidence appearing to suggest that RCN, the "sole overbuilder" in the Philadelphia DMA, Comcast Br. at 10, could not have posed a competitive threat to Comcast even absent Comcast's anticompetitive conduct, *id.* at 25-28. Judge Padova considered and rejected the argument in his order. A00079. Moreover, the record rebuts Comcast's position regarding RCN's status as a potential threat to Comcast. For instance, RCN executive Scott Burnside testified that RCN would have expanded beyond the core city of Philadelphia if it could just have succeeded in the core city. *See* A05353; A05358. Mr. Burnside testified that RCN operated on a "success-based formula" and "would have certainly built out the entire city, just like the other franchise holders did over a period of time, and then at the same time build over the surrounding suburban communities." A05358, Burnside Dep. 42:11-43:1.

4. Comcast's Attacks on RCN in Delaware County Evidence Classwide Antitrust Impact

Comcast criticizes Judge Padova for crediting expert testimony that evidence of Comcast's predatory conduct against RCN in Delaware County "could serve at trial as common evidence of classwide impact." Comcast Br. at 36. But "the courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc) (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Proof of predatory conduct against RCN in Delaware County adds to and illustrates the common evidence showing that Comcast's cluster-creating swaps and acquisitions deterred and reduced overbuilding and reinforces evidence of other anticompetitive behavior against RCN, helping establish with proof common to the class the conclusion "that RCN was stymied in its efforts by Comcast's predatory behavior." A00079 [DDE 430] .

II. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN ACCEPTING DR. McCLAVE'S METHODOLOGY FOR PROVING CLASSWIDE DAMAGES

At the class certification stage, the question with respect to damages concerns whether, after weighing all of the relevant evidence and specifically crediting the testimony of the plaintiffs' experts over defendants, the district court has found that the class has identified a reliable methodology to establish damages on a classwide basis using common proof. *See Hydrogen Peroxide*, 552 F.3d at

325-26. The parties devoted a substantial part of the class certification hearing to antitrust damages methodology. Dr. James T. McClave (the Class's statistical and econometrics expert on damages) testified for nearly a day and a half.[23] And throughout that time Judge Padova posed many questions to Dr. McClave, testing his process, data, and results.[24] In short, Judge Padova conducted an extensive and thorough inquiry before crediting Dr. McClave's evidence over that of Comcast's experts and concluding that the class had identified a methodology to establish damages on a classwide basis using common proof. A00093-113. Judge Padova did not err, and he certainly did not err clearly.

A. Dr. McClave's Damages Model Does Not Depend on Whether the Class Prevails on All Grounds for Liability

Comcast incorrectly and misleadingly argues that the district court accepted Dr. McClave's model "without explaining – or even considering – how the model would work (if at all) if the jury were to find" for the Class on only certain aspects of liability. Comcast Br. at 40. In fact, Judge Padova explicitly addressed this point – and held Dr. McClave's model suitable for the calculation of damages for all or part of the Class's grounds for liability.

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[23] 10/13 Tr. at A000582-756; 10/14 Tr., at A000761-877.

[24] 10/13 Tr. at A00609-611, A00666-670, A00708-709, 10/14 Tr. at A00768-769, A00777-778, A00787-789, A00810-813, A00817-825, A00836-837, A00842-843, A00868-869, A00871-878.

Judge Padova found that his decision not to credit Dr. Williams's DBS foreclosure theory of antitrust impact "does not impeach Dr. McClave's damage model." A00112. He explained that Dr. McClave's "selection of the DBS screen to serve this purpose is entirely unrelated to Dr. Williams' DBS foreclosure theory." *Id.* Judge Padova continued:

> It was merely [Dr. McClave's] method of choosing counties to serve as comparators. ***Any anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of comparison counties.*** Thus, whether or not we accepted all of Dr. Williams' theories of antitrust impact is inapposite to Dr. McClave's method of choosing benchmarks. Because we have determined that the national average DBS penetration rate for Comcast markets is a valid screen, we concluded that the McClave model is a common methodology available to measure and quantify damages on an class-wide basis.

A00112-13 (emphasis added). Thus, Judge Padova not only addressed the soundness of Dr. McClave's methodology but also specifically found that it passed the test.

Comcast cannot overcome Judge Padova's ruling on this issue. The district court concluded, rightly, that Philadelphia DMA prices reflect the impact of any anticompetitive conduct there and that Dr. McClave's methodology compares those Philadelphia prices to Comcast's own prices in more competitive markets to isolate the effect of the anticompetitive conduct in the Philadelphia DMA. And Dr. McClave has consistently stated that his selection of the benchmark counties does not depend any one ground for liability and that he used screens as proxy for relatively competitive markets. A00615-19. His use of "relatively competitive

markets" as a benchmark in conjunction with standard econometric methodology to compute damages resulting from Comcast's anticompetitive conduct in the Philadelphia DMA accords with standard econometric practice and provides, as Judge Padova found, "a common methodology available to measure and quantify damages on an class-wide basis." A00113.

B. Comcast's Criticisms Regarding the DBS Penetration and Market Share Screens Do Not Negate the Reliability of Dr. McClave's Damages Methodology

Comcast's chief complaint about Dr. McClave's damages model focuses on his benchmark. In particular, Comcast complains that Dr. McClave created the benchmark using screens that identify areas (a) where Comcast's penetration falls below 40 percent and (b) where satellite penetration exceeds national average satellite penetration in Comcast systems in that year. These criticisms miss the mark. And Judge Padova heard and rejected the same arguments.

The district court properly found on the basis of weighing all of the expert and other evidence that the class has identified, and successfully used, a reliable methodology that establishes damages on a classwide basis using common proof. As Dr. McClave explained in his extensive live testimony, econometricians build benchmarks to collect data from areas "relatively free" from the effects of alleged anticompetitive behavior. (10/13 Tr. at A00605.) The quality of the data (*i.e.*, the elimination of prices that reflect anticompetitive behavior) and the sample size drive proper benchmark creation and do not reflect an effort to capture data from

every place that may be free of the challenged behavior. (10/13 Tr. at A00723.) "[W]hen you say we're looking for the but-for world," explained Dr. McClave on cross-examination, "I think what we're all really looking for is the but-for prices." (10/13 Tr. at A00735.) Judge Padova agreed, in light of his extensive knowledge of the record, that Dr. McClave properly gathered benchmark prices from typical competitive markets. A00096-99; *see also* A00099, n.43 (finding the use of the below-40 percent screen to be "supported by the evidence that it represents Comcast's approximate share of the Philadelphia DMA at the midpoint of the class period," and "it allowed for some growth during the class period" while also "allow[ing] [Dr. McClave] to focus on markets where Comcast was less likely to have market power than it acquired in the Philadelphia market due to the alleged anticompetitive clustering conduct).

Nor would changing or discarding the two screens that Comcast criticizes render Dr. McClave's damages model unsuitable for proving damages on a class-wide basis using common proof. It would merely change the benchmark and thus result in a different damages total. For instance, using a screen for Comcast penetration of 60 percent (instead of 40 percent) decreased Dr. McClave's estimate of damages by a mere three percent. (*Compare* A00094 *with* McClave 6/3/09 Testimony at RA142-45 in 2/12/10 Plf. Appendix in Opposition to 23(f) Petition.) In fact, ***damages remain class-wide and substantial even using the allegedly flawed econometric model, with a nationwide benchmark and average prices,***

that Comcast's own expert Dr. Chipty proposed (after correcting for obvious errors in Dr. Chipty's model, such as including $0 prices and excluding B3 components). A04557. It is thus clear even from evidence that Comcast's own expert presented that the Class can prove damages on a classwide basis using common proof. There is no error here.

Comcast also wrongly contends that Judge Padova erred in accepting Dr. McClave's damages model after he declined to credit some of Dr. Williams's economic theories. Once more Comcast blows right by any consideration of whether Dr. McClave's model offers a methodology that can establish damages on a class-wide basis using common proof — the only question that matters at this stage, *Hydrogen Peroxide*, 550 F.3d at 312 — and instead impermissibly mounts an attack on the merits of the Class's damages model.

As before, Comcast's argument is not just immaterial but also wrong, as Judge Padova carefully considered and cogently explained at length in his opinion. A00112-113. Comcast has provided the Court with no record basis to overturn the district court's well-reasoned and evidence-supported fact finding in this regard.

C. Dr. McClave Accounted for Demographics and Discounts

1. Population Density

Comcast once again attempts to impeach Dr. McClave's damages methodology by pointing out his omission of population density from his damages model. And, once again, Comcast misses the mark. As Dr. McClave validated

numerous times in his expert reports, in his deposition testimony, and in his live testimony at the class certification hearing, he carefully considered and ultimately determined (for thoroughly sound statistical reasons) that he should exclude population density as a variable in his damages model. Judge Padova considered this issue thoroughly and correctly concluded that "Dr. McClave's decision not to include population density is well supported." A00103.

Comcast cites a GAO 2006 report finding a positive and statistically significant relationship between population density and price, but it fails to acknowledge the multitude of reports and academic papers, including every example Comcast showed to Dr. McClave during the class certification hearing, from the FCC, GAO, or academic researchers, that resulted in either a negative relationship between population density and price or no statistical significance between population density and price. [references listed in the opposition to judgment on partial findings]. In fact, the FCC as recently as 2009 anticipated the same negative relationship between population density and price:

> The 'density' variable represents a cost factor. In higher areas, fixed costs are spread across a greater number of households. Given cable operator behavior in clustering around major metropolitan areas, it is likely that economies of scale are associated with clustering, and thus that economies of scale overwhelm the marginal cost associated with serving more customers in higher density areas. This would be represented by a negative sign on the density coefficient.

A01668.

Additionally, as Dr. McClave testified and Judge Padova noted, the FCC's purpose in specifying a model differs from Dr. McClave's purpose:

> [Dr. McClave] testified that the FCC's purpose in specifying its regression model was different from his purpose: "These FCC studies in my view, and I think you'll find it in the studies, are exploratory. What is it that's affecting cable prices? They don't go to the next step of saying, and I'm going to use this model to estimate cable prices in some region." N.T. 10/13/09 at 10:23-11:2. He added, "If [his model demonstrates a] wrong sign, then one thing I have to think about that the FCC doesn't is what's the reason for that? I concluded that it may well be, given all the studies about clustering and what Mr. Korpus just asked me about, that it's because of the alleged anti-competitive conduct."

A00104.

Comcast's expert, Dr. Chipty, specified many models that demonstrate the inconsistency and unreliability of including population density in a damages model (10/13 Tr., A00753-55 at 212:24-214:22; see also McClave Supp., at A04565 (describing the inconsistent and statistically insignificant results of Dr. Chipty's use of population density)). As Dr. McClave explained: "The problem with population density it's so inconsistent in [Dr. Chipty's] models that you have to make up a different explanation depending on the model." (10/13 Tr., A00755 at 214:19-22.)

Not only does the use of population density produce results that conflict with *a priori* expectations, but their use also violates the statistical principle of extrapolation. Judge Padova recognized the problem in his opinion:

> Dr. McClave also opines that the inclusion of population density in Dr. Chipty's competing regression models violates an important statistical principle: As Dr. Chipty points out, Philadelphia's population density is significantly greater than in the benchmark. Importantly, the maximum population density in the benchmark is 3,600 population per square mile, while Philadelphia's maximum is more than 11,000 per square mile. This is a consequence of defining a benchmark that is relatively free of clustering, but creates a statistical problem when included in Dr. Chipty's multiple regression models. The problem is that when using the models to estimate the Philadelphia "but for" prices, the models are being used to extrapolate far outside the range of values used to estimate the benchmark. That is, the models are used to estimate prices for counties with population density more than 300% larger than the highest population density in the benchmark. This violates a basic statistical principle of multiple regression analysis that advises against such extrapolation, since it can result in unreliable estimates. This problem is avoided by using median income as the demand factor in the models (as I did), since all counties in the Philadelphia market have median incomes that are within the range of the benchmark sample's median incomes.
>
> Finally, this criticism is ultimately immaterial, as Judge Padova states:
>
> At the evidentiary hearing, the Class introduced an exhibit comparing the McClave damages model with various iterations either suggested by Dr. Chipty's criticisms or models that Dr. Chipty herself specified. McClave's model with the population density variable added still reflected damages in excess of $655 million.

A03082, A00104-05. In fact, the damages remain class-wide and substantial even with the erroneous addition of population density to the model.

2. Discounts

Dr. McClave's damages methodology correctly takes into account discounted prices including Triple Play. While the regression model employs list prices, it takes discounts explicitly into account in the damages calculation where it

applies the overcharge percentage to actual revenues, which include the discount prices. Once again, Judge Padova thoroughly addressed and considered the issue. A00105-109. As Judge Padova states:

> [Dr. McClave's] justifications for using list prices [in his regression model], as opposed to discount prices offered by Comcast for short periods to customers that, for example, package video, internet, and cable services into Comcast's Triple Play plan, is that more than 80% of Comcast's customers continue to pay its list prices for expanded basic cable (N.T. 10/13/09 at 53:9-10). Further discounts are reductions from list prices, and are only offered for temporary periods, after which the price returns to the list price. (Id at 55:18-21.)

A00105.

Dr. McClave demonstrated multiple times in reports and testimony that list prices best represented the price class members actually paid and thus the most appropriate measure to use in the regression model. *See, e.g.,* A04051 McClave Rebuttal Report, p. 13; A03407-09 McClave Class Certification Report, pp. 3-5; A04559-60 McClave Supplemental Report, pp. 15-16; A00764-772 Transcript 10/14, pp. 6-11. He included in his reasons the use of list prices in all of the FCC, GAO, and academic papers studying cable prices, Comcast expert Dr. Chipty's own use of list prices in many of her regression models, and the use of list prices in Comcast's own budgeting process (McClave Rebuttal, at A04051).

Comcast argues that, because the but-for list price exceeds the $33 Triple Play "price," those customers did not suffer injury. Comcast Br. at 52. But the example is erroneous and misleading. Dr. McClave did not calculate damages on

the assumption everyone paid list price: "We don't, we don't pretend that everybody is paying list. We take explicitly into account what people are paying, including the Triple Play." (10/14 Tr., A00859 at 101:6-11.) Judge Padova considers this argument and agrees with Dr. McClave:

> The fact that discounts are not percentage discounts off of list price does not change the fact that they are discounts from list prices. While Comcast attempted to impeach Dr. McClave by pointing to the fact that its Triple Play price is a flat price, rather than a percentage discount off list, we find this distinction insignificant. It was undisputed that once a discount program ends, the subscriber's fee for expanded basic cable service returns to list price, barring some other discount they are able to negotiate. Even though the Triple Play price is not a percentage discount, it remains that the program is of limited duration and the subscriber eventually will pay Comcast's list price when the promotional period ends.

A00106 at fn53.

Notwithstanding Comcast's arguments to the contrary, the fact remains that Dr. McClave used the most accurate and reliable measure of expanded basic cable prices for the regression model and correctly adjusted for discounts off list in the damages calculation. The parties exhaustively addressed the issue through expert reports, testimony, and argument. Judge Padova carefully considered the arguments and determined that Dr. McClave's methodology provides a valid and reliable methodology for calculating damages on a class-wide basis.[25] Comcast has shown no error.

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[25] Case law fully supports Judge Padova's analysis. This Court in *Hydrogen Peroxide* expressly concluded that price variations, including decreases in prices,

III. JUDGE PADOVA DID NOT ERR IN CERTIFYING A SECTION 1 CLAIM UNDER THE *PER SE* RULE AGAINST HORIZONTAL MARKET ALLOCATIONS

Just as it did in its 2007 Rule 23(f) petition and in its second Rule 23(f) petition addressing certification of the Chicago class, Comcast argues to this Court – for a third time – that the district court should not have permitted the class to assert a claim of a *per se* violation under section 1 of the Sherman Act. The district court correctly decided this merits issue against Comcast in previous orders

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do not bar class certification as long as plaintiffs may prove impact to the entire class through common evidence. *Hydrogen Peroxide,* 552 F.3d at 325. Courts have time and again certified class actions, despite discounts or other price variations, where plaintiffs can show impact to the entire class through common proof at trial. *See, e.g., McDonough v. Toys R Us, Inc.*, No. 06-0242, 2009 WL 2055168 (E.D. Pa. Jul. 15, 2009) ("In other words, the presence of coupons or sales does not disprove impact because when list prices have been artificially inflated, fixed or proportional discounts from them are equally inflated."); *In re Plastics Additives Antitrust Litig.*, No. 03-2038, 2006 WL 6172035, at *12 (E.D. Pa. Aug. 31, 2006) (certifying class despite "defendants' arguments [about] the diversity of products, pricing, suppliers, supply and demand considerations, and consumers"); *In re Bulk (Extruded) Graphite Products Antitrust Litig.*, No. 02-6030, 2006 WL 891362, *11 (D.N.J. Apr. 4, 2006) ("Indeed, courts have frequently found common impact in cases alleging price-fixing, despite the presence of individual negotiations, varied purchase methods and different amounts, prices, and types of products purchased."); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486 (W.D. Pa. 1999) ("Therefore, even though some plaintiffs negotiated prices, if plaintiffs can establish that the base price from which these negotiations occurred was inflated, this would establish at least the fact of damage, even if the extent of the damage by each plaintiff varied."). Plaintiffs have established, through Dr. McClave's econometric analysis, that "prices were elevated above competitive levels across all class members" and for the entire class period, despite price variations or discounts. (McClave Corr. Decl., at 15.) Dr. McClave's damages analysis, in particular, indicates that each member of the Philadelphia Class has suffered damages, including those class members who received discounts or promotions.

denying Comcast's motion to dismiss (A00167 [DDE 155, 188]), and a Rule 23(f) appeal does not furnish the appropriate vehicle to challenge such merits determinations. *See McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 389-90 (3d Cir. 2002) (Rule 23(f) extends only to class certification orders). This Court should reject Comcast's third attempt to smuggle a merits issue into a Rule 23(f) appeal.

In any event, Comcast's arguments on this merits issue miss the mark on the merits. Ample common evidence shows that Comcast and its counterparties in the transactions that the Class challenges competed. (*See, e.g.*, A00380-82; *see also* Class Plts.' Mem. In Opp. to Defs.' Motion for Summary Judgment, DDE No. 448, at 4-22 (reviewing evidence showing Comcast's market and customer allocation agreements were between competitors). The multiple cable system swaps between Comcast and several of its competitors fit within a hundred years of antitrust jurisprudence condemning market allocations among horizontal competitors as naked restraints of trade and treating them therefore as *per se* illegal. *See, e.g., Palmer v. BRG of Ga., Inc.,* 498 U.S. 46 (1990); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.,* 388 U.S. 350 (1967); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). The Supreme Court reaffirmed its historical treatment of horizontal agreements among competitors dividing markets as *per se* section 1 violations in *Leegin Creative*

Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (citing *Palmer*, 498 U.S. at 49-50), stating that "[r]estraints that are *per se* unlawful include horizontal agreements among competitors to fix prices . . . or to divide markets". So, too, did this Court. *See In re Ins. Brokerage Antitrust Litig.*, 2010 WL 3211147 at *7 & *41 (characterizing as "paradigmatic examples" of *per se* violations agreements among competitors to fix prices or divide markets and further noting that "[t]his agreement to divide the market, if proven, would be a naked restraint of trade subject to *per se* condemnation") (citations omitted). And Supreme Court decisions have over and over held that governmental approval of (or failure to challenge) a transaction does not bar a later antitrust challenge such as this. *See, e.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Radio Corp. of Am.*, 358 U.S. 334 (1959).

CONCLUSION

The district court has considered multiple challenges at the motion to dismiss stage and denied them. The parties have concluded extensive discovery. They have also submitted, and Judge Padova has carefully scrutinized, enough expert reports to fill a bookshelf. Following the *Hydrogen Peroxide* decision, Judge Padova agreed to reconsider his earlier class certification decision and gave Comcast every opportunity to reargue many of the same points he had decided against them years before. The parties compiled a mountain of evidence for that proceeding, and they presented four days' worth of live testimony. No one can

seriously dispute that Judge Padova carried out precisely the "rigorous assessment" that *Hydrogen Peroxide* demanded and far more. And Judge Padova has before him today Comcast's summary judgment motion – and the Class's vigorous and, we believe, compelling response.

The Class respectfully requests that the Court affirm Judge Padova's class certification order and let this case move forward, at last, to its final stages, whether by way of summary judgment or trial before a Philadelphia jury.

Respectfully submitted,

Dated: September 29, 2010

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to 3d Cir. LAR 46.1 (1997) that Barry Barnett, whose name appears on this Petition, is a member of the bar of this Court.

Dated: September 29, 2010

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on this the 29th day of September, 2010, he caused to be served copies of foregoing document on the following counsel as indicated below.

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CERTIFICATE OF COMPLIANCE WITH LAR 31.1(c)

This Response complies with the requirements of 3d Cir. LAR 31.1 (2008). The text of the electronic brief is identical to the text in the paper copies. A virus protection program, Trend Micro, has been run on the electronic files being submitted, and no virus was detected.

Dated: September 29, 2010

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

This Response complies with the requirements of 3d Cir. LAR 32.1 (1997), the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it has been prepared in 14 point font, Times New Roman, a proportionally spaced typeface.

This brief contains 10,611 words, in compliance with the page limit set forth in Fed. R. App. P. 32(a)(7)(B).

Dated: September 29, 2010

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