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

Stanford Glaberson, et al.,	§	Civ. No. 03-6604
	§	The Honorable John R. Padova
Plaintiffs,	§	
	§	
v.	§	
	§	
Comcast Corporation, et al.,	§	
	§	
Defendants.	§	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF A SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

Statutes

Rules

Other Authorities

I. BACKGROUND

A. The Settlement Agreement

Plaintiff Stanford Glaberson ("Class Plaintiff" or "Plaintiff"), individually and on behalf of the Philadelphia Settlement Class defined below has entered into a Class Action Settlement Agreement ("Settlement Agreement") with Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications Inc., Comcast Cable Communications Holdings Inc. and Comcast Cable Holdings LLC (collectively "Comcast"). Comcast has agreed to provide a Settlement Fund of $50 million consisting of a settlement cash amount of $16,670,000 ("Settlement Cash Amount") and services valued at $33,330,000 (the "Settlement Credits"), in exchange for the release of claims by Plaintiff and the Philadelphia Settlement Class in this litigation.

As defined in the Settlement Agreement, the Philadelphia Settlement Class consists of:

> All cable television customers who 1) currently subscribe or 2) previously subscribed at any time from January 1, 2003 to December 31, 2008, to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates, in the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania. The Class excludes government entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

Settlement Agreement ¶ 3.1 (attached as Exhibit 1).

Under the Settlement Agreement, current subscribers of non-basic video programming services from Comcast in any of the five designated counties will be entitled to elect either a one-time credit of $15 off their bill, or from the following Comcast services: (a) six free pay-per-view movies (an estimated $35.94 value), or (b) for customers who subscribe to Xfinity® high speed internet service, four months free upgrade in internet service from Performance Level to Blast!® service (an estimated $40 value), or one free month upgrade from Blast!® service to Extreme 105 service (an estimated $38 value); or (c) two free months of The Movie Channel (an

estimated $43.90 value). *Id.* ¶ 8.2. Current subscribers who do not elect on their claim form either the $15 bill credit or from the above services will automatically receive two free months of The Movie Channel (an estimated $43.90 value). *Id.* ¶ 8.2.1. Class members who are former subscribers will be entitled, upon submission of a valid claim form, to payment of $15 cash. *Id.* ¶ 8.3. There will be no reverter of any portion of the settlement (cash or services benefits) to Comcast. *Id.* ¶ 8.1.

The Settlement Agreement provides for claims administration by a highly experienced proposed claims administrator, Rust Consulting, Inc. *Id.* ¶ 2.4. To receive benefits under the Settlement Agreement, class members who are current Comcast subscribers shall submit a claim form (Settlement Agreement, Ex. A) providing their name, address and Comcast account number. *Id.* ¶ 8.1. Former subscribers who are class members shall submit a claim form (Settlement Agreement, Ex. B) providing their name, the address where they formerly received Comcast service during the class period, their former Comcast account number, if known, and affirming, under penalty of perjury, that they subscribed to video programming services (other than solely to basic cable services) from Comcast at any time between January 1, 2003 and December 31, 2008 in any one of the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania. *Id.* ¶ 8.8.2. The Settlement Agreement further provides that a dedicated website shall be established for the submission of electronic claim forms by Class Members and that claim forms may also be submitted by mail. *Id.* ¶ 8.8.3. Claim forms are to be sent to the claims administrator no later than 210 days after any preliminary approval of the Settlement Agreement.

The settlement also provides that following any preliminary approval of the agreement, the parties shall provide notice of the proposed settlement as required by Fed. R. Civ. P. 23(e)

and subject to approval of the Court. The parties recommend to the Court a notice plan similar to that previously approved by the Court in this matter. Specifically, the Settlement Agreement provides that Comcast will provide notice of the proposed settlement to current subscribers in their monthly bill in the form either of a notice insert (Settlement Agreement, Ex. D) or an email notice to subscribers who receive paperless invoices (*id*., Ex. E). The settlement provides that Comcast bears the cost of providing notice to its current subscribers. Notice of the proposed settlement will be provided to former subscribers by publication in newspapers or magazines and on television stations. (Settlement Agreement, Ex. F). Class Counsel will manage the process of providing publication notice to former subscribers and bear the cost of such notice. *Id.* ¶¶ 4.1.1 and 4.1.2.

Additionally, notice will be provided to class members through an Internet settlement website to be set up within 30 days of any preliminary approval. *Id.*¶ 4.1.3. The website will display a notice (Settlement Agreement, Ex. G), contact information for Class Counsel, a copy of the Settlement Agreement, responses to frequently asked questions and claim forms for current and former subscribers. Class counsel agrees to manage the process of providing website notice and bear the costs of such notice. *Id.* ¶ 4.1.3. Plaintiff is submitting the Declaration of Katherine Kinsella, founder of Kinsella Media, LLC, a highly experienced notice expert. As discussed in greater detail below, Ms. Kinsella outlines the components of the proposed notice plan and supports her opinion that the notice plan and the plain language notices satisfy the requirements of Rule 23(c)(2) and due process.

Class members wishing to be excluded from the settlement may opt-out within 180 days of preliminary approval. *Id.* ¶ 6.1. The settlement further provides that the parties are to use reasonable efforts to insure that notices to the Class are provided as soon as administratively

feasible and in any event within 120 days of preliminary approval. *Id.* 4.2. Claim forms are to be submitted within 210 days of preliminary approval. *Id.* ¶ 8.8.4.

The settlement provides that Class Counsel shall file a motion for approval of attorney fees and costs within 30 days of any preliminary approval in a combined amount (attorney fees and costs) of up to $15 million. Any award of attorney fees and costs approved by the Court is to be paid from the settlement fund. *Id.* ¶ 8.6.

The settlement is structured to provide a simplified method of providing and maximizing benefits to Settlement Class members. Cash elections by former subscribers, any attorney fees and expenses awarded by the Court to Class Counsel, and administration costs are to be paid from the cash component of the settlement fund. *Id.* ¶ 8.7. To the extent such sums exceed the $16,670,000 cash component, Comcast agrees to contribute additional cash to the settlement fund to fund such amounts, with the amount of settlement credits for services to current subscribers ($33,330,000) correspondingly reduced. If such sums are less than the $16,670,000 cash component, Comcast shall pay the remaining cash pro rata to current subscriber members of the Class by issuing a one-time credit on their bills. *Id.* Importantly, the settlement provides that there is no reverter of cash or services to Comcast. *Id.* ¶ 8.1. These provisions ensure that cash and services benefits are fully provided to Class members as required under the settlement.

Fed. R. Civ. P. 23 contemplates a sequential process for courts evaluating class action settlements. First, a court must determine whether a class should be certified for settlement purposes. *See, e.g., Sullivan v. D.B. Inv., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011) (en banc). Second, a court must consider whether to approve the settlement preliminarily and order notice be provided to the class. *See, e.g., In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Litig.* ("*In re GMC*"), 55 F.3d 768, 787 (3d Cir. 1995). "The preliminary approval

decision is not a commitment [to] approve the final settlement; rather, it is a determination that 'there are no obvious deficiencies and the settlement falls within the range of reason.'" *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438 (E.D. Pa. 2008) (citation omitted). Third, after the class has been notified and has had the opportunity to consider the settlement, the Court must decide whether to grant final approval of the settlement as "fair, reasonable and adequate." *Id.*; Fed. R. Civ. P. 23(e); *see also, e.g., In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-0085, 2005 WL 3008808, at *4 (D.N.J. Nov. 9, 2005). District courts have broad discretion in determining whether to approve a proposed class action settlement. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 327 (E.D. Pa. 2007).

As discussed below, the Philadelphia Settlement Class satisfies all of the applicable provisions of Rule 23(a). Additionally, the Philadelphia Settlement Class meets the requirements of Rule 23(b)(3) because common questions of fact and law predominate over questions affecting only individual members and a Settlement Class is superior to other available methods for fairly and efficiently adjudicating this controversy. Additionally, there is a "strong presumption in favor of voluntary settlement agreements" that is "especially strong in class actions and other complex cases because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Sullivan*, 667 F.3d at 311 (quotation and internal edit omitted); *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 535 (noting that "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged"); and *Bradburn Parent Teacher Store, Inc.*, 513 F. Supp. 2d at 327 (stating that "'the law generally favors settlement in complex or class action cases for its conservation of judicial resources'" (citation omitted)).

The Settlement Agreement exceeds the standards governing preliminary approval. There are no obvious deficiencies and the settlement falls well within the range of reasonableness. Its terms reflect a fair and reasonable result beneficial to all Class members. The settlement was reached only after strongly contested litigation over the course of more than 10 years and arm's length, good faith negotiations between the parties, including, most recently, negotiations moderated by the highly experienced mediator Professor Eric Green. *See* Declaration of David Woodward; Declaration of Eric Green. Additionally, in light of the work they have invested in the case since its filing in 2003, and the extensive litigation that has ensued since then, the parties and all counsel are well informed and positioned to assess the risks and merits of the case. The settlement provides substantial monetary relief and other benefits to the Philadelphia Settlement Class. It is well within the range of possible approval. It was negotiated at arm's length by experienced counsel, is reasonable and appropriate and, Plaintiff respectfully submits, is deserving of preliminary approval by the Court under Fed. R. Civ. P. 23(e).

B. The Litigation.

This Court is intimately familiar with this marathon litigation. Only significant mileposts with respect to Plaintiff's Philadelphia claims are highlighted here. On December 8, 2003, Plaintiff Stanford Glaberson and other plaintiffs, on behalf of other similarly situated Comcast subscribers, filed a class action complaint alleging Comcast unlawfully restrained trade and allocated markets and unlawfully monopolized and attempted to monopolize the relevant market in the Philadelphia, Pennsylvania area in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. ECF No. 1. On January 4, 2007, Comcast answered and asserted defenses, denying that it violated any law or engaged in any wrongdoing. ECF No. 190. Following litigation surrounding Comcast's motion to compel arbitration at the district court and appellate

levels, the Court on August 31, 2006 denied Comcast's motion to dismiss. ECF No. 155. On December 19, 2006, the Court denied Comcast's motion for partial reconsideration of the Court's motion to dismiss order or, alternatively, for certification for interlocutory appeal. ECF No. 188. On May 2, 2007, the Court granted Plaintiff's motion for certification of a Philadelphia Class. *Behrend v. Comcast Corp.*, 245 F.R.D. 195 (E.D. Pa. 2007). On June 29, 2007, the United States Court of Appeals for the Third Circuit denied Comcast's petition for permission to appeal under Rule 23(f). On September 11, 2007, the Court denied Comcast's motion to certify for interlocutory appeal the Court's July 31, 2007 Order, which, *inter alia*, denied Comcast's motion for judgment on the pleadings. ECF No. 229.

On March 30, 2009, the Court granted Comcast's motion to decertify the Philadelphia Class in light of the Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 308 (3d Cir. 2008). ECF No. 326. On January 7, 2010, following a four day class certification evidentiary hearing, detailed class certification written questions posed by the Court to the parties' counsel and oral argument, the Court again certified the Philadelphia Class and limited proof of antitrust impact to the theory that Comcast engaged in anticompetitive clustering conduct deterring the entry of overbuilders in the Philadelphia DMA. *Behrend v. Comcast Corp.*, 264 F.R.D. 150 (E.D. Pa. 2010).

The Third Circuit affirmed this Court's January 13, 2010 Amended Order granting class certification. *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011). Comcast filed a petition for a writ of certiorari in the United States Supreme Court on January 11, 2012. This Court granted in part and denied in part Comcast's motion for summary judgment. *Behrend v. Comcast Corp.*, No. 03-6604, 2012 WL 1231794 (E.D. Pa. Apr. 12, 2012). On June 25, 2012, the United States Supreme Court granted Comcast's petition for a writ of certiorari. On March 27, 2013, the

Supreme Court reversed the judgment of the Third Circuit affirming this Court's Amended Order recertifying the Philadelphia Class. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

On August 19, 2013, Plaintiff moved to certify the above narrowed Philadelphia Class. ECF No. 560. On November 12, 2013, the Court denied Comcast's motion to strike Plaintiff's motion to recertify the revised Philadelphia Class and allowed Comcast to substantively respond to Plaintiff's motion. ECF No. 569. On January 15, 2014, Comcast opposed Plaintiff's motion for recertification of the revised Philadelphia Class and moved to exclude the recent opinions and testimony of Plaintiff's experts. ECF Nos. 576-583. On February 20, 2014, the Court granted Plaintiff's unopposed motion to stay the case. ECF No. 592. On April 16, 2014, Plaintiff filed the operative Fourth Amended Complaint on behalf of the narrowed Philadelphia-area class. ECF No. 599.

The parties' Settlement Agreement, reached after rigorous negotiations conducted over several years during the course of this hard-fought litigation, is now before the Court for preliminary approval consideration.

II. THE PHILADELPHIA SETTLEMENT CLASS SATISFIES THE REQUIREMENTS FOR CLASS CERTIFICATION

This case satisfies all requirements for certification of the Philadelphia Settlement Class. Plaintiff's motion is unopposed. The Third Circuit has approved class certification associated with a settlement, as long as the proposed class satisfies the requirements of Rule 23(a) and 23(b). *See Sullivan*, 667 F.3d at 296; *see also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 349 (3d Cir. 2010). A court considering certification in light of settlement need not consider "'whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.'" *See Sullivan*, 667 F.3d at 332 n. 56 (quoting *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 622 F.3d 275, 291 (3d Cir. 2010)).

The Philadelphia Settlement Class satisfies each of the requirements of Rule 23(a) (numerosity, commonality, typicality and adequacy of representation) and of Rule 23(b)(3) (predominance and superiority).

A. The Class Satisfies the Requirements of Rule 23(a).

1. Numerosity

Rule 23(a)(1) provides for class certification where, as here, the class is so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1). "'No magic number exists satisfying the numerosity requirement.'" *Jackson v. Se. Pa. Transp. Auth.*, 260 F.R.D. 168, 185-86 (E.D. Pa. 2009) (citation omitted). As this Court has recognized, "the Third Circuit generally has approved classes of forty or more." *Behrend v. Comcast Corp.*, 245 F.R.D. 195, 202 (E.D. Pa. 2007) (citing *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001)); *see also In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 273-74 (3d Cir. 2009). Plaintiff "need not precisely enumerate the potential size of the proposed class," and need not demonstrate that joinder would be impossible. *Cannon v. Cherry Hill Toyota, Inc.*, 184 F.R.D. 540, 543 (D.N.J. 1999) (citation omitted). The Court previously ruled that "[w]e find that the numerosity requirement of Rule 23(a)(1) is clearly satisfied in this case." 245 F.R.D. at 202. Here, the parties estimate that the Philadelphia Settlement Class consists of at least 800,000 persons. The numerosity requirement is plainly met.

2. Commonality

Rule 23(a)(2)'s requirement of common questions is also satisfied here. "Rule 23(a)(2)'s commonality element requires [merely] that the proposed class members share at least one question of fact or law in common with each other." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 527-28 (affirming certification of settlement class). Common questions of law and fact

are routinely found in antitrust cases like this one because class members in such cases generally use the same evidence to prove their allegations. "[I]n an antitrust action on behalf of purchasers who have bought defendants' products at prices . . . above competitive levels by unlawful conduct, the courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy the Rule 23(a)(2) prerequisite." 1 H. NEWBERG & A. CONTE NEWBERG ON CLASS ACTIONS § 3.10 (4th ed. 2011); *see also In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 205-06 (E.D. Pa. 2001), *aff'd*, 305 F.3d 145 (3d. Cir. 2002); *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, Civ. No. 12-3824, 2014 WL 631031, at *2 (E.D. Pa. Feb. 18, 2014) (commonality satisfied when plaintiffs alleged that defendant's anticompetitive conduct constitutes a restraint of trade in violation of Section 1 of the Sherman Act and monopolization in violation of Section 2 of the Sherman Act). Commonality is met so long as the plaintiff's claims depend upon a "common contention . . . [that] must be of such a nature that is capable of classwide resolution – which means that determination of its truth or falsity would resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Here, Plaintiff alleges, *inter alia*, that Comcast entered into agreements allocating markets with competitors in violation of Sherman Act § 1 and that it monopolized or attempted to monopolize the cable television market in the Philadelphia area in violation of Sherman Act § 2, causing all class members to be harmed by paying supracompetitive prices. The commonality requirement is satisfied.

3. Typicality

As this Court noted, "[t]ypicality entails an inquiry whether the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are

based differs from that upon which the claims of other class members will perforce be based." *Behrend*, 245 F.R.D. at 203 (citing *Hassine v. Jeffs*, 846 F.2d 169, 177 (3d Cir. 1988) (citations and internal quotations omitted)). Rule 23(a)(3) does not require identical claims. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998). "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001).

Here, all claims arise from the same challenged conduct and involve the "same elements the other class members would have to prove if they brought individual actions." *In re Plastic Cutlery Antitrust Litig.*, No. 96-cv-728, 1998 WL 135703, at *4 (E.D. Pa. Mar. 20, 1998). Typicality is established where the named plaintiffs allege that they and all putative class members suffered economic damages arising from artificially inflated prices as a result of the defendant's alleged anticompetitive conduct. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 261 (E.D. Pa. 2012).

Plaintiff alleges that Comcast's anticompetitive conduct, including its swaps with and acquisitions of competitor cable companies, reduced and deterred overbuilder competition, violated the Sherman Act §§ 1 and 2 and enabled Comcast to impose supracompetitive prices injuring all class members in the same manner. The typicality requirement is satisfied.

4. Adequacy of Representation

The adequacy requirement of Rule 23(a)(4) has two prongs: (1) "the interests of the named plaintiffs must be sufficiently aligned with those of the absentees," and (2) "class counsel must be qualified and must serve the interests of the entire class." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996). "Essentially, the inquiry into the adequacy of the

representative parties examines whether the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." *Processed Egg Prods.*, 284 F.R.D. at 261 (internal quotations and citations omitted). Adequacy of representation and the absence of conflict are found where "[t]he named plaintiffs share a strong interest in establishing liability of defendant, seeking the same type of damages (compensation for overpayment) for the same type of injury (overpayment for [the product at issue]). *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 251 (D. Del. 2002) (certifying settlement class).

No conflict exists between Plaintiff and other members of the Philadelphia Settlement Class. All seek overcharge damages. All have the same financial incentive to prove they were overcharged and recover damages on the basis of that overcharge. The interests of Plaintiff and the putative Class members are aligned. Mr. Glaberson is a member of the Philadelphia Settlement Class, as he was a subscriber of video programming services from Comcast, other than solely basic cable services, within the five-county class area during the relevant time period. There are no conflicts that would render Plaintiff an inadequate representative of the Class. Plaintiff and all Class members have similar interests in establishing liability against Comcast for the same kind of alleged anticompetitive conduct and recovering damages resulting from that conduct. By pursuing this litigation from its outset in December 2003, Plaintiff necessarily has advanced the common interests of all Class members.

B. Qualifications of Counsel.

This Court previously appointed the law firms of Heins Mills & Olson, P.L.C. and Susman Godfrey L.L.P. as Co-Lead Counsel for Plaintiff and the proposed class pursuant to Fed.

R. Civ. P. 23(g). Plaintiff moves pursuant to Fed. R. Civ. P. 23(g) to have the same attorneys designated to continue to serve as Co-Lead Counsel for the Philadelphia Settlement Class. These firms have devoted substantial time and resources to the case, including developing the factual bases of the claims, working with experts, filing numerous pleadings, engaging in extensive motion practice and litigating all contested issues in this case before this Court, the United States Court of Appeals for the Third Circuit and the United States Supreme Court. Proposed Co-Lead Counsel have extensive experience and expertise in antitrust, class action and complex civil litigation and have successfully prosecuted antitrust class actions and other similar cases in courts in this district and throughout the United States, including, for more than a decade, this case. All of the factors identified in Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv) support appointment of Barry Barnett of Susman Godfrey L.L.P. and David Woodward of Heins Mills & Olson, P.L.C. as Co-Lead Counsel for the Philadelphia Settlement Class.[1]

C. The Class Satisfies Rule 23(b)(3).

The Settlement Class satisfies the requirements of Rule 23(b)(3), which provides that a class should be certified if the requirements of Rule 23(a) are met and "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

[1] In appointing class counsel, courts must consider the work counsel has done in identifying or investigating potential claims in the action; counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action; counsel's knowledge of the applicable law; and the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv). Additionally, courts "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Plaintiff respectfully urges the Court to apply these factors in light of the Court's deep knowledge of the case and its observations of Co-Lead Counsel's work in prosecuting this case for more than a decade in an effort to advance and protect the best interests of the Class.

1. Common Questions of Law and Fact Predominate Over Individual Questions.

The predominance inquiry tests whether the proposed class is sufficiently cohesive to warrant adjudication by the representative plaintiff. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310-11 (3d Cir. 2008) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance "does not demand unanimity of common questions, it requires that the common questions outweigh individual questions." *McCall v. Drive Fin. Servs., L.P.*, 236 F.R.D. 246, 254 (E.D. Pa. 2006) (citing *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 185 (3d Cir. 2001)). The Supreme Court has recognized that the predominance requirement is "readily met" in cases alleging violations of the antitrust laws. *Amchem*, 521 U.S. at 625; *see also Sullivan*, 667 F.3d at 300 (stating that "predominance test is readily met in certain cases alleging . . . violations of the antitrust laws") (quoting *In re: Ins. Brokerage Antitrust Litig.*, 579 F.3d at 266)).

The Supreme Court in *Amchem* also recognized that the fact of a "[s]ettlement is relevant to a class certification[,]" 521 U.S. at 619, and instructed that the portion of predominance analysis that ordinarily focuses on the management of the trial becomes unnecessary and irrelevant when a class is being certified for settlement purposes. *Id.* at 620. The Third Circuit has taken the same approach. *See Sullivan*, 667 F.3d at 305-06 (noting that court need not consider "'the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove' the disputed element at trial") (citing *Hydrogen Peroxide*, 552 F.3d at 312). Here, as is typical in cases alleging monopolization and other antitrust claims, the focus is on the defendant's conduct and not on matters pertaining to individual Settlement Class members. *See, e.g., In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03-MDL-1556, 2007 WL 4150666, at *12 (N.D. Pa. Nov. 19, 2007) (stating that "'[c]ommon issues predominate when the focus is on the defendants' conduct and not on the conduct of the individual class

members'") (citation omitted). Additionally, "'[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individual damage issues.'" *In re Cmty. Bank of No. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 306 (3d Cir. 2005) (citation omitted).

This Court previously held that Plaintiff's liability theory that Comcast's conduct reduced and deterred overbuilder competition is capable of classwide proof. *See Behrend v. Comcast Corp.*, 264 F.R.D. at 165. The Supreme Court did not disturb this finding on appeal but rather criticized Plaintiff's damages model as failing to measure only those damages attributable to that theory of antitrust impact. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 133 (2013). Additionally, this Court in its summary judgment decision ruled, *inter alia*, that "the Class can proceed to trial on Count I of the Third Amended Complaint, the Sherman Act section 1 rule of reason claim, based upon the theory that Comcast's creation of the Philadelphia cluster through its acquisition of competing cable companies and its swapping of cable assets constituted a horizontal allocation of markets." *Behrend v. Comcast Corp.*, 2012 WL 1231794, at *33. Further, the Court determined that, based on the evidentiary record, the Class could proceed to trial with their monopolization and attempted monopolization claim with respect to certain additional allegedly anticompetitive conduct. *Id.* Further, in connection with Plaintiff's renewed motion for class certification, Plaintiff has submitted additional expert reports from Dr. Williams and Dr. McClave to further support the Class's theory that Comcast's swaps and acquisitions constituted unlawful horizontal market allocations and that Comcast engaged in other anticompetitive conduct directed toward RCN that reduced overbuilder competition and caused all Class members to pay supracompetitive prices. Plaintiff submits that Plaintiff's expert reports provide common proof of antitrust injury in fact and tie damages directly to liability and Plaintiff's

theory of antitrust impact. *See* Class Plaintiffs' Memorandum in Support of Motion for Certification of Revised Philadelphia Class, ECF No. 561 at 19-25.

Based on the exhaustive record before the Court, Plaintiff submits that the predominance requirement is satisfied for settlement purposes because common questions present a significant aspect of the case and may be resolved for all Class members in a single common judgment.

2. Superiority

"The requirement that a Section (b)(3) class action be the 'superior' method of resolving the claims ensures that there is no other available method of handling it which has greater practical advantages." *Behrend v. Comcast Corp.*, 245 F.R.D. at 206 (citations omitted). Rule 23(b)(3) identifies various factors as pertinent to a superiority finding, including class members' interests in pursuing separate actions, the extent of any independent litigation already begun by class members, the desirability of concentrating the litigation in this forum, and the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3)(A-D).[2] *See also Amchem*, 521 U.S. at 615 (noting that the superiority requirement ensures that resolution by a class action will "'achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results'" (citation omitted)).

This Court previously ruled that Plaintiff, with respect to a broader proposed Philadelphia-area class, satisfied the superiority requirement of Rule 23(b)(3). *Behrend v. Comcast Corp.*, 245 F.R.D. at 212. The Court's superiority finding was not disturbed on appeal. The superiority requirement continues to be satisfied here. A class action settlement will "achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to

[2] Manageability concerns are irrelevant in a settlement certification context in light of the fact that the proposal is that the case will not proceed to trial. *See Sullivan v. DB Invs., Inc.* 657 F.3d 273, 302-03 (3d Cir. 2011).

persons similarly situated." *Amchem*, 521 U.S. at 615. Such economies will be achieved for both litigants and the Court, avoiding hundreds of thousands of individual adjudications that would otherwise place a "potentially crushing strain on and inefficient application of judicial resources." *See Processed Egg Prods.*, 284 F.R.D. at 294; *see also In re Prudential*, 148 F.3d at 315-16; *Wellbutrin SR Direct Purchaser Antitrust Litig.*, No. 04-5525, 2008 WL 1946848, at *9 (E.D. Pa. May 2, 2008) (stating that "denying certification would require each direct purchaser to file suit individually at the expense of judicial economy and litigation costs for each party"); *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 313 (D.D.C. 2007) (reasoning that "[t]his action involves the resolution of numerous complex issues of law and fact common to all putative class members" and that "[a]s class certification provides the opportunity for an efficient resolution of these substantial issues for the entire class in a single forum, the Court concludes that the class action mechanism is a superior litigation approach in this case" (internal citation omitted)); and *In re Relafen Antitrust Litig.*, 218 F.R.D. 337, 346 (D. Mass. 2003) (finding superiority and noting that "it appears that resolution by class action would provide substantial savings in time, effort, and expense"). Additionally, class certification in this settlement context eliminates the likelihood of inconsistent rulings. *See In re Relafen Antitrust Litig.*, 218 F.R.D. at 347 (noting that "[r]esolution by class action would instead promote uniform treatment of class members—similarly situated direct purchasers who allege similar injuries resulting from the same conduct"). Therefore, a class action is superior to other available methods for fairly and efficiently adjudicating this case.

III. THE PROPOSED SETTLEMENT MEETS THE STANDARD FOR PRELIMINARY APPROVAL

The proposed Settlement easily satisfies the criteria for preliminary approval. "The preliminary approval decision is not a commitment [to] approve the final settlement; rather, it is

a determination that there are no obvious deficiencies and the settlement falls within the range of reason." *Gates*, 248 F.R.D. at 438 (internal quotations and citations omitted). A settlement is presumed fair at the preliminary approval stage when the negotiations were at arm's length, there was sufficient discovery and the proponents of the settlement are experienced in similar litigation. *See In re GMC*, 55 F.3d at 785; *Gates*, 248 F.R.D. at 444. Each of these preliminary approval factors is satisfied here.

A. The Proposed Settlement is a Result of Vigorous, Informed, Arm's-Length Negotiations.

Preliminary approval analysis "often focuses on whether the settlement is the product of 'arms-length negotiations.'" *Curiale v. Lenox Grp. Inc.*, No. 07-1432, 2008 WL 4899474, at *4 (E.D. Pa. Nov. 14, 2008) (citation omitted); *see also In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *2 (E.D. Pa. May 11, 2004) (granting preliminary approval of settlement reached "after extensive arms-length negotiation between very experienced and competent counsel"); *Gates*, 248 F.R.D. at 444 (preliminarily approving settlement where there was "nothing to indicate that the proposed settlement . . . [was] not the result of good faith, arms-length negotiations between adversaries").

Here, the parties engaged in strongly contested, arm's-length negotiations that spanned several years over the course of this litigation in which essentially all issues were tested in the crucible of the adversarial process. The negotiations included mediation settlement sessions assisted by a renowned mediation expert, Professor Eric Green. *See* Declaration of Professor Eric Green; Declaration of David Woodward. The parties' extensive arm's-length negotiations fully support a finding that the proposed settlement is fair.

B. The Late Stage of This Case Supports Preliminary Approval.

The stage at which settlement occurs demonstrates "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re GMC*, 55 F.3d at 813. "Where [the] negotiation process follows meaningful discovery, the maturity and correctness of the settlement become all the more apparent." *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 400 (D.N.J. 2006) (citing *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003)).

Here, the extensive litigation, including comprehensive discovery, informed the parties' settlement. Forty-seven depositions were taken in this litigation, including of current and former employees of Comcast, non-party witnesses, plaintiffs and the parties' experts. Class Counsel reviewed millions of pages of documents. The parties submitted 37 expert reports to the Court. Virtually all issues were strongly disputed and vigorously litigated. The litigation extended to a dispute concerning the Court's continuing jurisdiction following the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), resulting in Plaintiff's renewed motion for class certification supported by new expert reports (and actively opposed by Defendant's new expert reports). The fact that this case settled at a very late stage supports preliminary approval. In evaluating a proposed settlement, the "professional judgment of counsel involved in the litigation is entitled to significant weight." *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985); *see also Austin v. Pa. Dept. of Corr.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) (stating that significant weight should be attributed "to the belief of experienced counsel that settlement is in the best interest of the class").

The attorneys representing the Philadelphia Settlement Class are experienced litigators in antitrust class actions. Based on their experience, Plaintiff's Co-Lead Counsel believe that this

Settlement provides significant benefits to the Settlement Class, avoids the risk and delays associated with continued litigation, and is in Settlement Class members' best interests.

C. The Proposed Settlement is Well Within the Range of Possible Approval.

The Settlement is within the range of settlements worthy of final approval as fair, reasonable and adequate. *See, e.g.*, *Samuel v. Equicredit Corp.*, No. 00-6196, 2002 WL 970396, at *1 n.1 (E.D. Pa. May 6, 2002).

The Settlement Fund amount reflects a sound recovery in relation to the estimated single damages reflected in the August 19, 2013 Class Re-Certification Report of Dr. James T. McClave submitted under seal in this case in support of Plaintiff's motion to certify the revised Philadelphia Class. ECF No. 560. Defendant and its experts vigorously dispute Plaintiff's damages estimate and moved to strike both Dr. McClave's and Dr. Michael Williams' most recent reports. ECF Nos. 576 & 577. The parties' recent expert reports continue to reflect both the ongoing core litigation disputes of the parties and the inherent risks of continued litigation, reinforcing the fact that the Settlement falls within the range of reasonableness. *See In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007 and Civ. 04-5126, 2005 WL 2230314, at *24 (D.N.J. Sept. 13, 2005) (noting that "an antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement was reasonable relative to other factors, such as the risk of no recovery" and concluding that "[t]he Court is satisfied that the settlement agreement accounts for the risks inherent in this complex litigation and provides appropriate relief in light of these risks" (citation omitted)). In sum, the significant relief available under the Settlement falls well within the range of reasonableness.

D. The Proposed Form and Manner of Notice are Appropriate.

Under Rule 23(e), class members are entitled to reasonable notice of a proposed settlement. *See* MANUAL FOR COMPLEX LITIG. §§ 21.312, 21.631 (4th ed. 2011). "[T]o satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 174 (E.D. Pa. 2000) (internal quotation marks and citation omitted).

The Court previously approved a notice plan developed by a highly experienced and well regarded notice expert, Kinsella Media LLC. ECF No. 438. Plaintiffs are now submitting a substantially similar notice plan. *See* Declaration of Katherine Kinsella. Ms. Kinsella, the founder of Kinsella Media, LLC, opines that the proposed notice plan and notices fully comply with the requirements of Fed. R. Civ. P. 23(c)(2) and satisfies due process requirements. *Id.* ¶¶ 2 and 28. The notice plan includes direct notice in the form of a bill insert to current Comcast subscribers, broad notice via paid media including a statewide newspaper supplement and local cable television and electronic notice through an Internet website. Id. ¶ 11. The direct mail notice if approved by the Court, will consist of Comcast sending a Summary Notice to class members via a notice insert or email with their monthly bill informing them of their rights. *Id*. ¶ 12. The Summary Notice will provide the telephone number and settlement website where Class members may request that the Detailed Notice be sent to them by mail or may access the Detailed Notice on the website. *Id.* ¶ 13. The Detailed Notice will be available in a Spanish translation available at the dedicated website. *Id.* ¶ 27.

Ms. Kinsella explains that the proposed media notice, designed to reach former Comcast subscribers, will provide for notice in a statewide newspaper supplement (*Parade* Pennsylvania)

with an estimated circulation of 2,010,945, as well as in broadcast media, specifically a 30-second television spot to appear on local market cable channels in Philadelphia for a period of two weeks. *Id*. ¶ 21. All print advertising will include a toll-free number and website address for Class members to access or request notice. *Id*. ¶ 21. Using industry-accepted media selection and measurement tools, Ms. Kinsella opines that the media program, combined with the Direct Notice component of the notice program, will reach an estimated 87.3% of the primary target audience with an estimated frequency of 1.5 times. *Id.* ¶ 23.

Ms. Kinsella further details the various forms of notice, including the invoice notice, the email notice, the Detailed Notice, the publication notice, the television spot and the Internet notice, indicating that all notices were developed to meet the plain language requirement of Fed. R. Civ. P. 23(c)(2). *Id.* ¶ 24. The Detailed Notice clearly states in plain, easily understood language:

- The nature of the action;
- The definition of the class certified;
- The class claims, issues or defenses;
- That a class member may enter an appearance through an attorney if the member so desires;
- That the Court will exclude from the class a member who requests exclusion;
- The time and manner for requesting exclusion; and
- The binding effect of a class judgment on members under Rule 23(c)(3).

Id. ¶ 24. Ms. Kinsella concludes that the "Direct Notice to Comcast customers through bill inserts and emails ensures there is a high likelihood that current Comcast subscribers will be informed of the Settlement and their rights," that the Media Notice Program portion . . . will

provide a high number of exposure opportunities" to Class members, that the Direct Mail Notice and Paid Media Placements "will reach an estimated 87% of Settlement Class Members" and that the Notice Plan "will provide the best notice practicable under the circumstances." *Id.* ¶¶ 28 & 29.

Plaintiff respectfully submits that "this combination of individual and publication notice provides the best notice practicable." *Hall v. Best Buy Co.*, 274 F.R.D. 154, 168 (E.D. Pa. 2011) (*citing In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 527-28 (D.N.J. 1997) (combination of mailed and publication was "ideal"), *aff'd*, 148 F.3d 283 (3d Cir. 1998)).

E. The Court Should Appoint Rust Consulting as the Settlement Administrator.

Plaintiff asks that Rust Consulting be appointed as the settlement administrator to oversee the administration of the settlement. Rust is highly experienced in carrying out large public notice of payment projects. Rust has provided such services for over 35 years. Rust has been appointed as settlement administrator in many antitrust class actions, including antitrust cases filed in this District. *See, e.g., In re OSB Antitrust Litig.*, No. 06-cv-00826 (PD) (E.D. Pa.).

F. The Proposed Schedule is Fair and Should be Approved.

The Settlement Agreement and proposed preliminary approval order contain a schedule for completing the settlement approval process that is fair to all members of the Settlement Class. Plaintiff proposes the following schedule for the activities that precede the fairness hearing:

Preliminary Approval of Settlement	Earliest date available to the Court
Mailed and email notice	Completed as soon as administratively feasible and no later than 120 days after preliminary approval
Publication Notice begins	Same as for mailed/email notice
Opt-out and objection deadlines	Within 180 days of preliminary approval

Benefits Claim Deadline	By 210 days after preliminary approval
Final Approval Hearing	To be set by the Court

The schedule provides ample time to review the preliminary approval papers, the Settlement Agreement, and fee petition before the opt-out deadline or any objections are due. This proposed schedule allows Settlement Class members at least sixty (60) days after notice by mail and email is provided to current subscribers, and after publication notice designed to reach former subscribers is begun, to request exclusion from the Settlement Class or object to the Settlement. The Court previously approved the initial class notice plan in this case providing for a minimum thirty (30) day opt-out period. ECF No. 438. Sixty days complies with due process and is a generous time period. *See McKersie v. IU Int'l*, No. 86-C-1683, 1988 WL 19586, at *4 (N.D. Ill. Feb. 26, 1988) (stating that "[t]he notice should set forth a generous time period during which the class members may opt-out" and that "[a] period between 45- 60 days is suggested").

G. The Request for a Service Award for the Proposed Class Representative is Fair and Reasonable.

Proposed Settlement Class Co-Lead Counsel request that the Court approve including in the notice to the Class a statement that the Court may award the proposed Class Representative up to $10,000 for his service as a Class Representative in this litigation. Courts recognize the purpose and appropriateness of service awards to class representatives. *See, e.g., In re Certainteed Fiber Cement Siding Litig.*, MDL No. 2270, 2014 WL 1096030, at *27 (E.D. Pa. Mar. 20, 2014) (noting that '[t]he purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws" (citing *Sullivan v. DB Investments, Inc.*, 667 F.3d at 333 n.65)); *In re Residential Doors Antitrust Litig.*, No. 94-3744, CIV. A. 96-2125, MDL 1039, 1998 WL 151804, at *9 (E.D. Pa.

Apr. 2, 1998) (approving awards of $10,000 each to four class representatives); *In re Linerboard Antitrust Litig.*, No. MDL 1261, 2004 WL 1221350, at *19 (E.D. Pa. June 2, 2004) (approving awards of $25,000 for each of five class representatives); and *Mayer v. Driver Solutions, Inc.*, No. 10-CV-1939 (JCJ), 2012 WL 3578856, at *5 (E.D. Pa. Aug. 17, 2012) (approving $15,000 service award for class representative).[3]

Stanford Glaberson, the proposed Settlement Class Representative, could have simply awaited the outcome of this litigation and received the same benefits as any other class member. Instead, Mr. Glaberson stepped up to bring this litigation, has served the Class well as a plaintiff and Class Representative, and has remained committed to and has actively participated in what proved to be a very lengthy and hard fought lawsuit against a formidable defendant on behalf of a large group of class members. Mr. Glaberson was previously appointed by the Court to serve as a class representative in this litigation. ECF Nos.195 and 431. Mr. Glaberson has provided Settlement Class Co-Lead Counsel with documents and information concerning his subscription to non-basic services from Comcast, has been deposed twice in the litigation (on January 26, 2006 and October 18, 2006), has monitored the litigation through contact with counsel and has attended a hearing before this Court in the course of the litigation. Mr. Glaberson's dedication and services over the entire course of this protracted litigation have benefited the Class. The proposed Class Representative has been made aware that approval of any service award and its amount is left solely to the Court's discretion. A service award for the proposed Settlement Class

[3] *See also.*, *Cook v. Niedart*, 142 F.3d 1004, 1016 (7th Cir. 1998) (citations omitted) (affirming $25,000 service award to plaintiff); *Lively v. Dynegy, Inc.*, No. 05-CV-0063-MJR, 2008 WL 4657792, at *2 (S.D. Ill. Sept. 30, 2008) (awarding $10,000 to each of three plaintiffs); *Meyenburg v.Exxon Mobil Corp.*, No. 3:05-CV-15-DGW, 2006 WL 2191422, at *2 (S.D. Ill. July 31, 2006) (awarding $3,000 award); *Morlan v. Universal Guar. Life Ins.*, No. 99-274-GPM, 2003 WL 22764868, at *2 (S.D. Ill. Nov. 20, 2003) (awarding $25,000, $20,000 and $5,000 respectively to class representatives); *Gaskill v. Gordon*, 942 F. Supp. 382, 384 (N.D. Ill. 1996) (awarding $6,000 to each plaintiff); *Spicer v. Chi. Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (collecting cases awarding incentive fee amounts ranging from $5,000 to $100,000 and awarding $10,000 each to named plaintiffs).

Representative would be appropriate, and the notice to Settlement Class members should inform the Class that the Court will consider such an award.

IV. CONCLUSION

For these reasons, Plaintiff respectfully requests that the Court enter an order: (1) certifying the Philadelphia Settlement Class for purposes of settlement; (2) appointing Stanford Glaberson as representative of the Settlement Class; (3) appointing Co-Lead Counsel as counsel for the Settlement Class; (4) granting preliminary approval of the proposed settlement; (5) approving the proposed form and manner of notice to the Settlement Class; (6) directing that the notice to the Settlement Class be disseminated in the manner described in the Settlement Agreement, as described herein; (7) establishing a deadline for Settlement Class members to request exclusion from the Settlement Class or file objections to the settlement; (8) appointing Rust Consulting as Settlement Administrator; and (9) setting the proposed schedule for completion of further settlement proceedings, including scheduling the final fairness hearing.

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Respectfully submitted,

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