IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

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

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

NOW INTO COURT, through undersigned counsel, come Plaintiffs Elizabeth Ann Brady, John Joseph Brady, Sharon Coughlin, Jessica Diket, Bradley Gelder, Trevor Haynes, Henry Holmes, Barksdale Hortenstine, Ernest Johnson, Sarah Prezgay, and Ron Strobo (collectively, "Plaintiffs"), who file this Motion for Class Certification and appointment of class counsel pursuant to Federal Rule of Civil Procedure 23.

Per this motion, and for the reasons provided in the accompanying memorandum, Plaintiffs seek certification of the following class: "All persons in the United States who subscribed to Cox for Premium Cable and paid Cox a monthly rental fee for an accompanying set top box." Plaintiffs Elizabeth Ann Brady, John Joseph Brady, and Sharon Coughlin also seek certification of the following subclass: "All persons in the State of California who subscribed to Cox for Premium Cable and paid Cox a monthly

rental fee for an accompanying set top box."[1] All Plaintiffs also respectfully seek an order appointing their counsel as Class Counsel.

Dated: July 29, 2011.

Respectfully submitted,

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

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

[1] Excluded from the class and subclass are Plaintiffs' counsel, employees of Cox and governmental agencies, and this Court and the Court's immediate family and staff. These exclusions differ slightly from those specified in the First Amended Complaint, as discussed in footnote 1 of the accompanying memorandum of support. While plaintiffs frequently make such alterations in their class certification pleadings, Plaintiffs here could, if the Court would prefer, file a Second Amended Complaint that addresses these exclusions.

Garrett W. Wotkyns, Esquire
Michael C. McKay, Esquire
SCHNEIDER WALLACE COTTRELL
BRAYTON & KONECKY LLP
8501 N. Scottsdale Road, Suite 270
Scottsdale, AZ 85258
480-428-0144 (Telephone)
480-505-8036 (Facsimile)

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

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

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, A. Daniel Woska, hereby certify that on this 29th day of July, 2011, Plaintiffs' Motion for Class Certification and supporting documents were served via ECF and e-mail on the following counsel for Defendant:

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

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

/s/ A. Daniel Woska

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other

INTRODUCTION

The named Plaintiffs in this case subscribe to Premium Cable provided by Defendant Cox Communications, Inc. ("Cox"). Plaintiffs filed this lawsuit on behalf of millions of similarly situated people and allege that Cox has illegally tied the provision of Premium Cable to the renting of a set-top box ("STB") from Cox. The illegal tie permits Cox to charge its customers—the class members—an inflated, illegal lease rate for their STBs. Because Plaintiffs and the proposed class members complain of a common course of conduct that harms all members of the proposed class, this case should be certified for class treatment.

Rule 23's class action requirements are easily satisfied here. The millions of proposed class members before this Court present identical claims, and they raise numerous common questions of both law and fact. Furthermore, the named Plaintiffs and their counsel will adequately represent the class. Indeed, in the two years since they filed their claims, the named Plaintiffs, through their counsel, have diligently represented their fellow class members. They will continue to do so through the conclusion of this litigation.

Given that Plaintiffs challenge Cox's common course of conduct, it is unsurprising that issues common to the class predominate over individualized concerns. As explained further below, courts routinely certify cases like the instant matter, where customers of a defendant company challenge an across-the-board company policy that harms those customers. To the extent that this action implicates any individual questions, they are overshadowed by the common questions upon which this antitrust dispute turns.

Certifying Plaintiffs' proposed class structure, moreover, would facilitate the efficient and effective adjudication of what otherwise would be, if brought individually, millions of effectively identical actions. The class proposed here would, compared to other available dispute resolution options (*e.g.*, dozens of smaller class actions or, worse still, possibly millions of functionally identical individual customer actions), impose the lightest burden possible on the judiciary, while at the same time, allowing the parties to obtain prompt resolution of their common claims. The class action device was created to accommodate this exact type of proceeding. The instant proposed class should be certified and this matter should proceed to trial forthwith.

FACTUAL BACKGROUND

Cox is one of the nation's three largest providers of cable multi-channel video programming distribution ("MVPD"). (First Amended Complaint ("FAC") ¶ 22.) It sells video content, or MVPD services, [redacted]

Cox offers MVPD services in different tiers and packages, starting with Limited Basic Cable and Expanded Basic Cable (collectively, "Basic Cable"). *See, e.g.*, Exh. 2, CCISTB130775-CCISTB130776. Cox's Limited Basic Cable package, as its name implies, provides a Cox customer access to the most rudimentary cable services: a small number of mostly network and public-access broadcasting. Exh. 3, Deposition of Cox (David Pugliese), 16:6-10; Exh. 4, Deposition of Cox (Stephen Necessary), 11:2-9. Cox's Expanded Basic Cable adds a small number of channels to the Limited Basic Cable channel lineup, but does not include features such as premium movie channels and an

interactive programming guide ("IPG"). Exh. 3, Cox Dep. (Pugliese), 16:11-16; Exh. 4, Cox Dep. (Necessary), 11:13-17. In order for Cox customers to access Basic Cable services, they must sign up for this service with Cox and merely plug the cable into the back of their televisions. Exh. 4, Cox Dep. (Necessary), 10:4-14; [redacted]

[redacted]

Cox's Basic Cable customers need not use a STB to view any of the content that accompanies their cable subscription. Exh. 6, Deposition of Dallas Clement, 21:21-23. Approximately 35% of Cox's customers take only Basic Cable service. Exh. 3, Cox Dep. (Pugliese), 62:10-15.

The remaining 65% of Cox's video customers subscribe to Premium Cable. Exh. 3, Cox Dep. (Pugliese), 62:10-15. As defined in this case, Premium Cable encompasses Cox's tiers of video service above Basic Cable. (FAC ¶¶ 26-28.) Cox refers to this service as its "digital" video programming or "Advanced TV." Exh. 6, Clement Dep., 27:12-18; Exh. 3, Cox Dep. (Pugliese), 15:19 – 16:23; Exh. 7, CCISTB129131-CCISTB129141, p. 129139; Exh. 8, CCISTB133565-CCISTB133566; Exh. 9, CCISTB132944-CCISTB132945. Cox's Premium Cable service offers substantially more channel options than Basic Cable. Exh. 7, p. 129133. While Cox Premium Cable is available in a variety of packages, *all* Cox Premium Cable customers can receive Cox's Interactive Program Guide ("IPG"), which enables subscribers to navigate quickly through their substantial channel lineup—and thus determine when and where particular programs will appear—as well as access Cox's substantial video on demand ("VOD") and pay-per-view ("PPV") programming, which permits subscribers to view a great array

of free and purchased movies, television shows and specialty events. *See, e.g.*, Exh. 7, CCISTB129131-CCISTB129141. Cox's Basic Cable customers do not receive Cox's IPG and access to Cox's VOD and PPV.

Unlike Basic Cable subscribers, Cox's Premium Cable customers must use a Cox-leased STB in order to access all of the content and services in their cable subscription. FAC ¶ 33-34; Exh. 4, Cox Dep. (Necessary), 74:2-22, 85:17-21; [redacted] Although Cox customers can view certain Premium Cable content—specifically, some Premium Cable channels—with a STB that they can purchase at retail, [redacted] Cox customers *across all areas where Cox does business* simply cannot view and utilize a significant amount of Cox's Premium Cable content and services, including certain channels, Cox's VOD, PPV movies, and IPG, among other services, *unless they rent a STB from Cox*, *see, e.g.*, Exh. 6, Clement Dep., 22:11-23; [redacted] Cox Premium Cable customers cannot access these services—part of the cable services for which they pay Cox on a monthly basis—if they fail to rent a STB from Cox. *Id.*; *see also, e.g.*, Exh. 7, CCISTB129131-CCISTB129141. This situation presents an illegal tie.

PROCEDURAL BACKGROUND

In 2009 numerous Cox Premium Cable subscribers filed similar class action lawsuits in different jurisdictions in which Cox operates, alleging that Cox illegally ties its Premium Cable service to the renting of a STB from Cox. Cox moved the United

States Judicial Panel on Multidistrict Litigation ("JPML") to consolidate these various actions and transfer them to a court that would consider all of the cases jointly, saying explicitly that the various actions shared the same core factual allegations, sought essentially the same relief, and involved the same discovery and witnesses, such that the most efficient use of judicial resources was to consolidate the cases before one court. Exh. 39, Cox's Memo. of Law in Supp. of Mot. to Transfer, at 3-4 (J.P.M.L. March 18, 2009). The JPML granted Cox's request and transferred the cases to this Court. Transfer Order, at 1 (J.P.M.L. June 11, 2009). Combining the cases, the JPML found, would "conserve the resources of the parties, their counsel and the judiciary." *Id.* at 1.

Before this Court, the Plaintiffs filed their FAC. The FAC alleges four claims: (1) Cox violated Section 1 of the Sherman Act by illegally tying its Premium Cable services to the renting of a STB from Cox, (2) Cox violated state antitrust laws with its illegal tie, (3) Cox was unjustly enriched by its illegal tie, and (4) Cox violated California's Unfair Competition Law ("UCL") with its illegal tie. (FAC ¶¶ 126-59.)

Cox moved to dismiss the FAC. On January 19, 2010, this Court denied Cox's motion, holding that Plaintiffs had alleged cognizable claims for relief. Order at 11 (Jan. 19, 2010). The Court concluded, among other things, that Plaintiffs had properly alleged the elements of a tying claim, namely, that (1) Premium Cable and STBs are separate products, (2) Cox conditioned the subscription to Premium Cable on the renting of a STB from Cox, (3) Cox has "sufficient economic power" in the market for Premium Cable, and (4) a "substantial volume of commerce" was affected in the tied-product market. *Id.* at 4-9. The Court further held that Plaintiffs here properly alleged their state law-based

causes of action, which turn on the same Cox conduct alleged to violate the Sherman Act. *Id.* at 10.

Ever since this Court denied Cox's motion to dismiss, Plaintiffs have diligently conducted class and merits discovery to turn their allegations into trial-ready evidence. Although Plaintiffs need not establish the merits of their claims in this class certification motion, the abundant record evidence—which, as the Court will see, is common in all important respects across the proposed class—that Plaintiffs have spent the past 18 months gathering and analyzing (and that they cite here) nonetheless reveals that the merits of Plaintiffs' tying allegations are evident and can be adjudicated on a classwide basis by this Court.

CLASS ALLEGATIONS

Plaintiffs filed the FAC on behalf of themselves and similarly situated individuals. The class definition for the Sherman Act claim ("tying class") is "[a]ll persons in the United States who subscribed to Cox for Premium Cable and paid Cox a monthly rental fee for an accompanying [STB]." (FAC ¶ 117.[1]) Plaintiffs John Brady, Elizabeth Ann

[1] Plaintiffs exclude from the class their counsel, employees of Cox and governmental agencies, and this Court and the Court's immediate family members and staff. These exclusions differ in two respects from those delineated in the FAC. First, the FAC did not specifically exclude from the class definition Plaintiffs' counsel. Second, the FAC excluded from the class those Cox Premium Cable customers who reside "at an address at which they may receive MVPD service from at least one other cable MVPD provider in addition to Cox." (FAC ¶ 117.) Plaintiffs no longer exclude such customers from the class. In most similar circumstances—where amendments to the class definition are relatively small—counsel often amend the class definition by merely informing the Court and the parties. However, if the Court would prefer, Plaintiffs could submit a Second Amended Complaint whose only variances from the FAC would be to

Brady, and Sharon Coughlin also seek certification for the UCL claim ("UCL subclass") for the following subclass: "All persons in the State of California who subscribed to Cox for Premium Cable and paid Cox a monthly rental fee for an accompanying [STB]." (FAC ¶ 118.) Both the tying class and the UCL subclass are easily ascertainable, status-based classes. Plaintiffs now respectfully move the Court to certify the tying class and the UCL subclass for trial.

LEGAL STANDARD FOR CLASS CERTIFICATION

Plaintiffs move to certify the tying class and UCL subclass pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). (FAC ¶ 119.) Rule 23(a) provides that named plaintiffs may represent a class if:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

A court may certify a class under Rule 23(b)(3) if the class satisfies Rule 23(a) and, additionally, if: (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (referring to the "predominance" and "superiority" requirements of Rule 23(b)(3)).

---

omit the aforementioned exclusion from the proposed class definition and to add the exclusion of Plaintiffs' counsel.

The Tenth Circuit has directed that district courts "may not evaluate the ***strength*** of a cause of action at the class certification stage." *Shook v. Bd. of County Comm'rs of the County of El Paso*, 543 F.3d 597, 612 (10th Cir. 2008) (emphasis in original). Nor should courts, when assessing class certification motions, consider "whether the plaintiff or plaintiffs . . . will prevail on the merits." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010) (citations omitted). Rather, they must instead conduct a "rigorous analysis" of whether Plaintiffs' alleged claims rise or fall according to a common body of proof, and thus satisfy Rule 23's requirements. *Vallario v. Vandehey*, 554 F.3d 1259, 1265 (10th Cir. 2009); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (affirming the "rigorous analysis" standard).

Finally, to the extent that this Court believes that the instant class certification motion presents a close call, it should certify the class. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968) ("[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action . . . ."); *see also, e.g.*, *Anderson v. Boeing Co.*, 222 F.R.D. 521, 531 (N.D. Okla. 2004); *Daniel v. Am. Bd. of Emergency Med.*, 269 F. Supp. 2d 159, 188-89 (W.D.N.Y. 2003). This pro-certification admonition resonates particularly in antitrust cases due to the vital role class actions play in enforcement of the Sherman Act. *In re Abbott Labs. Norvir Antitrust Litig.*, Case No. 04-1511CW, 2007 WL 1689899, at *4 (N.D. Cal. June 11, 2007) ("[I]n antitrust actions . . ., it has long been recognized that class actions play an important role in the private enforcement of antitrust laws. Accordingly, when courts are in doubt as to whether certification is warranted, courts tend to favor class certification.") (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262

(1972)); *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 378 (S.D.N.Y. 1996) (same).

ARGUMENT

I. PLAINTIFFS' TYING CLASS SHOULD BE CERTIFIED.

Plaintiffs' proposed tying class easily satisfies all of the criteria for class certification. The class, which consists of more than three million members, is sufficiently numerous that joinder of all members in one case is impracticable. These class members, moreover, advance identical legal claims and remedial theories, satisfying both the typicality and commonality requirements of Rule 23(a). Moreover, the named Plaintiffs and their counsel have represented the class members well thus far, and they, without any conflicts of interest, will continue to do so through the culmination of this litigation.

The class likewise meets the requirements of Rule 23(b). Because Plaintiffs challenge the legality of a common course of conduct—Cox's tie—they predictably, given the nature of their case, focus overwhelmingly (if not exclusively) on issues that are common to the class. To the extent that any individualized issues would arise in the trial of this case, those issues are vastly outweighed by the common elements of Plaintiffs' legal claims and the fundamentally common character (across the areas where Cox operates) of Cox's challenged conduct. This antitrust matter is the classic example of a case that should proceed on a classwide basis.

A. Rule 23(a)

1. *Numerosity*

Plaintiffs' tying class, which consists of more than three million people who receive Cox Premium Cable and rent a STB from Cox, is sufficiently numerous to warrant class certification. Joining each of these millions of Cox customers as individual parties in this case would be highly impracticable, if not impossible.

Proposed classes generally clear the numerosity hurdle when they encompass 40 or more individuals. 1 Herbert Newberg & Alan Conte, *Newberg on Class Actions* § 3.5 at 247 (4th ed. 2002); *see also, e.g.*, *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). While the number of class members is the most significant factor bearing on numerosity, other factors include the geographic dispersement and economic sophistication of the proposed class members. *See, e.g.*, *In re Southeastern Milk Antitrust Litig.*, Case No. 2:07-CV-208, 2010 WL 3521747, at *4 (E.D. Tenn. Sept. 7, 2010); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 225 F.R.D. 208, 213 (S.D. Ohio 2003).

These factors demonstrate that the proposed class is sufficiently numerous, such that joinder is impracticable. First, more than three million people are members of the class, *see, e.g.*, Exh. 3, Cox Dep. (Pugliese), 62:4-17—well more than the presumptive cut-off of 40 class members. *Cf. Anderson*, 222 F.R.D. at 531 (finding that subclasses totaling 146 members and 117 members were sufficiently numerous to make joinder impracticable). Furthermore, these class members are dispersed throughout Cox's market footprint; they are not concentrated in one small locale, which might otherwise make

joinder practicable. Finally, the class members before this Court by and large are ordinary people, not uber-sophisticated economic entities who have enough savvy and resources to pursue individual antitrust actions against Cox on a non-class basis. *Compare Bank v. Elec. Payment Servs., Inc.*, Case No. Civ.A. 95-614-SLR, 1997 WL 811552, at *14 n.15 (D. Del. Dec. 30, 1997) (noting that defendants argued that joinder was practicable because the class members were large depository institutions who were "capable of protecting their own interests"). Accordingly, the tying class is sufficiently numerous; joinder would be impracticable.

2. *Typicality and Commonality*

Plaintiffs' tying class exemplifies typicality and commonality. The class representatives' and proposed class members' claims are based on the same legal and remedial theories. Unsurprisingly, the Plaintiffs before this Court share numerous common issues of law and fact. Nothing more is required to demonstrate both typicality and commonality.

Typicality and commonality "tend to merge." *Gen'l Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). These twin requirements concern the relationship between the claims of the named plaintiffs and those of the proposed class members. *Id.* Courts have often noted that typicality and commonality pose low barriers for class certification in antitrust cases as compared to other types of proposed class actions. *See, e.g., Southeastern Milk*, 2010 WL 3521747, at **4, 5; *Collins v. Int'l Dairy Queen, Inc.*, 168 F.R.D. 668, 674 (M.D. Ga. 1996).

Typicality in the Rule 23 sense exists when the claims of the class representatives and proposed class members are "based on the same legal or remedial theory." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). "[D]iffering fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Id.*

Typicality exists here. As Cox itself told the JPML, consistent with the FAC, all proposed class members here raise identical allegations of wrongful tying. Exh. 39, pp. 3-4. Plaintiffs and the proposed class members allege injury based on a single and common theory: Cox's conditioning of its Premium Cable on the renting of STBs from Cox, which is an illegal tie under the Sherman Act. (FAC ¶¶ 126-37.) Nothing further is required to demonstrate typicality. *Adamson*, 855 F.2d at 676. *Cf., e.g., Southeastern Milk*, 2010 WL 3521747, at *5 ("Typicality is ordinarily established in the antitrust context when the named plaintiffs and all class members allege the same antitrust violations by defendants."); *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 164 (C.D. Cal. 2002) (same).

Commonality also plainly exists here. Rule 23(a)(2) demands that "there is at least one question of law or fact common to the class." *Realmonte v. Reeves*, 169 F.3d 1280, 1285 (10th Cir. 1999). The Supreme Court's recent opinion in *Wal-Mart* affirms Tenth Circuit law on this score: "[F]or purposes of Rule 23(a)(2), even a single common question will do." 131 S. Ct. at 2556 (internal quotation marks and brackets omitted). The Court noted that commonality turns on the existence of a "common contention

[whose] truth or falsity will resolve an issue that is central to the validity of [the claims]." *Id.* at 2551.

Cox has conceded that Plaintiffs raise "the same core factual allegations . . . against the same Defendants." Exh. 39, p. 3. Indeed, Cox unambiguously has acknowledged commonality, even submitting a brief in this matter with the following bolded heading: "The Related Cases Involve Common Questions of Fact." *Id.* (emphasis omitted). Plaintiffs agree.

Greatly exceeding the requisite "single common question," the following multiple issues, including the critical questions of law and fact in this litigation, are common to all class members:

- Whether Premium Cable and STBs are separate products
- Whether Cox conditioned the accessing of its Premium Cable on the renting of STBs
- Whether Cox has sufficient economic power in the relevant market
- Whether Cox's tying conduct affects a substantial volume of commerce in the STB product market
- Whether Cox's tying conduct violates the Sherman Act.[2]

These common issues stem from what the record before this Court shows is a single challenged policy of conduct. Exh. 39, Cox's Memo. of Law in Supp. of Mot. to Transfer, at 3 (J.P.M.L. March 18, 2009). Most importantly for present purposes, all of these questions of law and fact are common among the class members. *Id. Cf. Meyers v. Southwestern Bell Tel. Co.*, 181 F.R.D. 499, 505 (W.D. Okla. 1997) (this Court finding in

[2] Cox's motion to dismiss, although unsuccessful, likewise highlighted these common questions. (Memo. of Law in Supp. of Defs' Mot to Dismiss, at 15-29 (Sept. 23, 2009).) It also raised the additional question, *likewise common to the class*, of whether *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), somehow precludes Plaintiffs' tying claim. (*Id.* at 33.)

a Sherman Act case that relevant market and market power are "clearly" common to all class members). Accordingly, Rule 23's commonality requirement is easily satisfied here.

3. *Adequacy*

The named Plaintiffs will fairly and adequately represent the class members' interests. No conflicts of interest have prevented the named Plaintiffs from representing the class members thus far, and none will arise.

Rule 23(a)'s adequacy requirement bars class certification when named plaintiffs and the class they seek to represent have conflicts of interest. *Amchem*, 521 U.S. at 625-26. Such a conflict of interest may exist when judgment in favor of the plaintiffs would benefit some class members and harm other class members. *See, e.g.*, *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, LTD.*, 247 F.R.D. 253, 268 (D. Mass. 2008) (holding that no such conflict existed because class members were "likely to gain an economic net benefit from the litigation"). On the other hand, the fact that the challenged conduct may have harmed class members to different degrees does not create a conflict of interest—and thus does not implicate adequacy concerns. *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 464 (10th Cir. 1974) ("[T]he mere fact that the various members of the class will benefit unevenly is no such conflict as will preclude the maintenance of a class action.").

Plaintiffs here present a typical tying claim, where the challenged conduct harmed all class members and benefited none. While Cox's tying conduct may have injured class members to different degrees, no class members benefited from the conduct such that

they would be adversely affected if Plaintiffs were to succeed on their claims. [redacted]

There is, therefore, no objective conflict of interest or antagonism between the interests of the putative class representatives and class members.

The named Plaintiffs have demonstrated their commitment to serving the interests of the class in this action and to pursuing the litigation diligently on behalf of the class. They have represented the proposed class members thus far through expensive and lengthy litigation, and they will continue to do so. Without any relevant conflict between the named Plaintiffs and other members of the class, Plaintiffs are adequate class representatives.[3]

B. Rule 23(b)

When a motion for class certification proceeds, as here, under Rule 23(b)(3), the court should certify a class where (1) issues common to the class predominate over individualized concerns, and (2) a class action is the superior method of adjudicating the dispute. The Supreme Court has made it clear that antitrust cases in particular are frequently viable candidates to satisfy Rule 23(b). *Amchem*, 521 U.S. at 625; *see also Southeastern Milk*, 2010 WL 3521747, at *10. So it goes here, where resolution of the merits of the case will turn overwhelmingly, if not exclusively, on facts that are common

[3] To avoid repetition, Plaintiffs address "adequacy of counsel" *infra* Part III, when discussing the appointment of class counsel.

to the class. Moreover, adjudicating the Plaintiffs' identical tying claims in this one matter is a far superior means of case management to disaggregating the claims at bar and potentially causing federal and state courts again to be flooded with many effectively identical lawsuits.

1. *Predominance*

Courts conducting the predominance inquiry assess whether a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Predominance requires that "whatever common issues exist . . . must at least somewhat outweigh the concern with individual issues . . . ." *Meyers*, 181 F.R.D. at 502. The predominance concept does not mean that every relevant issue before the Court be postured identically for each and every proposed class member. *Id.*; *see also, e.g., Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D. Cal. 2008) ("To establish predominance of common issues, a party seeking class certification is not required to show that the legal and factual issues raised by the claims of each class member are identical."). Rather, a court should refuse to certify a class on predominance grounds only where "it is clear that individual issues will overwhelm the common questions and render the class action valueless." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996); *see also Amchem*, 521 U.S. at 623 (stating that the predominance requirement merely asks whether the proposed class is "sufficiently cohesive to warrant adjudication by representation").

This Court, in a different case, cast the predominance standard succinctly: whether plaintiffs' claims "stem from 'a common nucleus of facts' or from 'a common course of

conduct.'" *Meyers*, 181 F.R.D. at 502 (quoting *Esplin*, 402 F.2d at 98); *see also, e.g.*, *In re Relafen Antitrust Litig.*, 218 F.R.D. 337 (D. Mass. 2003) (predominance is satisfied when the claims turn on defendants' common course of conduct); *Collins v. Int'l Dairy Queen*, 186 F.R.D. 689, 692-93 (M.D. Ga. 1999) (certifying class because plaintiffs' theory depended on defendants' tying conduct "that applies uniformly to all plaintiff class members").

Plaintiffs here easily meet this standard. The crux of Plaintiffs' tying claim is that Cox followed a policy across its market footprint of forcing its customers to rent STBs in order to access all of Cox's Premium Cable services. To prove this claim concerning Cox's policy, Plaintiffs, unsurprisingly, will rely on facts that are common across the class. In other words, Plaintiffs need not rely on much, if any, testimony from individual class members to establish that Cox wrongfully used its market power in those areas where it does business to force its Premium Cable customers to lease STBs from Cox and thereby inflict a common type of economic injury on those customers, regardless of where in the Cox universe customers reside.

In this regard, Plaintiffs' tying claim is a classic antitrust matter that should be certified. The preeminent treatise concerning class actions, *Newberg on Class Actions*, notes that the predominance requirement "has been met with relative ease by the great majority of antitrust class action plaintiffs." 6 Newberg & Conte, *supra*, § 18:25, p. 83. In such cases, "common liability issues . . . have, almost invariably, been held to predominate over individual issues." *Id.* at § 18:25, p. 84. Nothing is different about the case at bar.

Indeed, Cox has admitted as much: "The fact is that while the alleged practices at issue involving the sale of premium video services, the leasing of set-top boxes, and the provision of cable cards occur at Cox's various cable systems, these practices derive by and large from business decisions that are overseen by various corporate departments at Cox's corporate headquarters in Atlanta." Exh. 40, p. 7. Nothing further is required to satisfy predominance.

a. Sherman Act violation

The predominance inquiry often starts with a review of the elements of the claims before the Court, since those elements foreshadow whether a trial on Plaintiffs' claims, if a class is certified, will focus on a body of basically common evidence. In tying cases, a class must attempt to show on the basis of predominantly common evidence (1) a violation of the Sherman Act (*i.e.*, the substantive elements of a tying claim), and (2) antitrust injury (*i.e.*, that plaintiffs suffered some injury on account of the illegal tie). *Danny Kresky Enters. Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983); *In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 114 (S.D.N.Y. 2010).

With respect to the first prong, the Tenth Circuit has provided the following elements of a tying claim: (1) the existence of two separate products, (2) the conditioning of the sale of one product (the tying product) on the purchase of another (the tied product), (3) "sufficient economic power" held by the defendant in the tying-product market, and (4) a "substantial volume of commerce" affected in the tied-product market. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc.*, 63 F.3d 1540, 1547 (10th Cir. 1995). Appropriately rigorous analysis of the record now

before this Court indicates that Plaintiffs will be able to establish all of these elements at trial based upon a body of predominantly common proof. Put differently, any variances in Cox's practices or the economic impact of the same will not result in different liability outcomes of Plaintiffs' case against Cox, regardless of the identity or residence of the proposed class members. There simply is no evidence of any relevant variation.

1. Classwide proof shows that STBs are separate products from Premium Cable

The separate-products inquiry "turns not on the functional relation between [the tying and tied products], but rather on the character of the demand for the two items." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 (1984), *abrogation on other grounds recognized by Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006). As this Court has stated, "[t]he question is whether, from the consumer's point of view, an independent market exists for the tied product." Order at 4 (Jan. 19, 2010). The consumer's point of view is an objective, not subjective standard—or else a tying claim could never be certified— and Plaintiffs will prove this element with evidence that is common to the class.

"Premium Cable" [4] is the tying product and a STB[5] is the tied product. (FAC ¶¶ 35, 44.) These are different products: The former is a video stream that includes

[4] Before this Court in its motion to dismiss and presumably again at this stage of the proceedings, Cox will dispute the existence of Premium Cable. Cox will note again that it does not offer a product called *Premium Cable*, but instead something the Cox has variously called *Digital Cable* or *Advanced TV*. The distinction is merely semantic. Because Plaintiffs defined the tying product as "Premium Cable," they will continue to refer to it as such in this case.

services such as an IPG and access to VOD and PPV. [redacted] *see also* Exh. 14, Deposition of Consumer Electronics Association ("CEA") (Brian Markwalter), 17:3-5 (stating that Cable MVPD refers to a cable company's "multichannel video programming"). The latter is a physical box. *See, e.g.*, Exh. 14, CEA Dep., 17:10-12; [redacted] "The cable service is the video stream," this Court concluded in denying Cox's motion to dismiss, "while the [STB] is a mechanism which is required to permit viewing." Order at 4 (Jan 19, 2010). [redacted]

To the extent that Cox claims there is no such thing as Premium Cable because Cox customers can add "tiers" or "paks" (*e.g.*, a Sports Pak) to their Premium Cable subscription, Cox attempts to obfuscate a simple matter: all Premium Cable subscriptions—whether they include a Sports Pak, a Movie Pak, or no pak at all—include Cox's IPG and access to VOD, PPV, and other interactive services. *See, e.g.*, Exh. 7, CCISTB129131-CCISTB129141, Exh. 8, CCISTB133565-CCISTB133566; Exh. 9, CCISTB132944-CCISTB132945. These are the common denominators for all Premium Cable subscriptions. Regardless of whether a class member elects, say, an extra movie pak or the Zhong Tian channel, the Cox customer must lease a STB from Cox in order to access Cox's IPG and other interactive services that are included with Premium Cable. [redacted]

[5] Cox will respond that it does not offer only one STB, but rather different types of STBs, from Standard Definition (SD) STBs to High Definition (HD) STBs and Digital Video Recorders (DVRs). The distinctions, however, are immaterial to this case. All of these STBs afford access to the two-way services that are at the heart of this matter. Cox Premium Cable subscribers must rent from Cox at least a SD STB in order to have access to Cox Premium Cable's interactive features, and the subscribers may then order the additional bells and whistles of HD or DVR services. Just as with Premium Cable, for which Cox offers a lowest-common-denominator service on top of which class members may add options (*e.g.*, Paks or Tiers), the SD STB is the lowest-common-denominator STB on top of which class members may add options (HD or DVR) that are not relevant to Plaintiffs' claims. [redacted]

[redacted]

Whether people can tell the difference between the two is a matter of both common sense and common proof. *Cf.* Order at 4 (Jan. 19, 2010) ("[T]he two items are quite distinct."). For instance, a common body of evidence reflects that Cox packages separately, markets separately, prices separately, and bills separately (even if on the same bill) these tying and tied products. [redacted] Exh. 7, p. CCISTB129139 (separately listing and pricing Premium Cable and STBs). The aforementioned references are materials that Cox itself generated, demonstrating that it, too, views the two products separately. [redacted] *cf. Jefferson Parish Hosp.*, 466 U.S. at 19 (finding that the tied and tying products were separate because consumers differentiated between the two products). Common evidence clearly reveals the differing demand for Premium Cable and STBs.

Courts uniformly hold that the separate-products element can be adjudicated on a basis common to all proposed class members. *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 87 (E.D.N.Y. 2000), *abrogation on other grounds recognized by Taylor v. The Housing Auth. of New Haven*, 267 F.R.D. 36, 62 (D. Conn. 2010); *see also* John H. Matheson, *Class Action Tying Cases: A Framework for Certification Decisions*, 76 Nw. U. L. Rev. 855, 861 (1982) (observing that evidence related to the separate-

products inquiry "will affect all prospective members of a class in a common manner"). Here, Plaintiffs propose to use at trial common evidence to demonstrate that Premium Cable and STBs are separate products. To do so, Plaintiffs need not offer unique testimony from proposed class members (or anyone else, for that matter) about personally observing differences between a video stream (Premium Cable) and a physical box (STB).

2. Classwide proof shows Cox conditions the sale of Premium Cable on the renting of a STB

A company ties two separate products when it conditions purchases of the tying product upon purchases of the tied product. *Multistate Legal*, 63 F.3d at 1548. It can enforce or effectuate the tie via various means, including publicly announcing the tie, *see, e.g.*, X Phillip Areeda & Herbert Hovenkamp *Antitrust Law* §§ 1754b, 1754d (2d ed. 2000), or creating a situation where the "practical economic effect" coerces people to acquire the tied product, *see, e.g.*, *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 452 (3d Cir. 1977), *abrogation on other grounds recognized by In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 325 n.25 (3d Cir. 2010); *Tic-X Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407, 1418 (11th Cir. 1987) ("It is well established that coercion may be established by showing that the facts and circumstances surrounding the transaction as a practical matter forced the buyer into purchasing the tied product.").

Plaintiffs allege that Cox coerced them to rent a STB from Cox. They assert that Cox effectuated its tie through both public pronouncements and practical economic effects common to all class members where Cox sells Premium Cable services. For

example, Cox repeatedly stated in its promotional materials across its national footprint, as well as on its website, that interactive Premium Cable services required the renting of a STB from Cox. *See, e.g.*, Exh. 18, CCISTB130545-CCISTB130546 ("On DEMAND, Pay-Per-View and certain other services are not available with a CableCARD."); Exh. 19, Deposition of Colleen Langner, Exh. 1 (Cox-California website reporting same); [redacted] Indeed, Cox has conceded its tie-in, acknowledging that Cox customers needed to rent a STB from Cox in order to access all of the Premium Cable Services for which the proposed class members have paid. *See, e.g.*, Exh. 6, Clement Dep., 22:11-23; Exh. 18, CCISTB130545-CCISTB130546 ("On DEMAND, Pay-Per-View and certain other services are not available with a CableCARD."); *see also* Order at 5-6 (Jan. 19, 2010) ("[C]ustomers wishing to receive the full benefit of their premium cable subscription have no choice but to rent a [STB] from Cox. Indeed, as the [FAC] demonstrates, Cox's own advertising and consumer communication establishes this relationship."). Without a Cox-leased STB, Cox's Premium Cable customers cannot access Cox's VOD, PPV movies, IPG, and a host of other services.[6] *See, e.g., id.* As is apparent from the nature of this evidence, Plaintiffs' argument turns entirely on common proof.

---

[6] Plaintiffs presume that Cox at this point will again raise the issue of a CableCARD—claiming that class members were not coerced to rent a STB from Cox because the class members could have rented from Cox a CableCARD in lieu of a STB. However, as this Court held in denying Cox's motion to dismiss, Cox's argument is

[redacted]

Accordingly, Plaintiffs will prove that Cox conditioned Premium Cable on the renting of a STB from Cox through two methods: public pronouncements and practical economic effects. Proof for both methods is exclusively common evidence; the coercion element of Plaintiffs' case can be tried on a classwide basis.

"disingenuous." Order at 5 (Jan. 19, 2010). A CableCARD without a Cox-leased STB does not provide access to the aforementioned Premium Cable services. *See, e.g.*, Exh. 4, Cox Dep. (Necessary), 32:13-19; [redacted] Regardless, the relevance, or lack thereof, of CableCARDs is an issue that is common to the class and that does not defeat class certification.

3. Classwide proof shows Cox has "sufficient economic power" in the Premium Cable market

To obtain certification here for Plaintiffs' tying claim, Plaintiffs must demonstrate to the Court that a body of common evidence shows that Cox "possess[ed] sufficient power in the tying market to compel acceptance of the tied product." *Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc.*, 806 F.2d 953, 957 (10th Cir. 1986). The initial steps of this inquiry are to identify the relevant product market and geographic market. *United States v. Marine Bancorp*, 418 U.S. 602, 618 (1974); *Campfield v. State Farm Mutual Auto. Ins. Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008). The final step is to demonstrate that Cox had "sufficient economic power" in this relevant market, or the "power to control prices or exclude competition." *United States v. E.I. Dupont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The record before the Court shows Plaintiffs can take these steps to trial on the basis of a common body of evidence.

i. Product market

The relevant product market turns on "which commodities are reasonably interchangeable by consumers for the same purposes." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1221 (10th Cir. 1986) (internal quotation marks omitted); *see also, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997) ("Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively."). Plaintiffs allege and still maintain that Premium Cable televisions services are not truly interchangeable with satellite (*e.g.*, Dish

Network) MVPD services. (FAC ¶¶ 74-80.) [redacted] However, even assuming *arguendo* for purposes of this motion that the relevant product market includes cable, satellite and "telco" (*e.g.*, Verizon) MVPD,[7] Plaintiffs are quite able to satisfy this element of their tying claim, and they will do so with common proof. Again, nothing in the record suggests that the "product market" inquiry will be different at a trial of this matter for those Cox Premium Cable customers who live in, say, Oklahoma City and those who reside in New Orleans.

ii. Geographic market

A proper "geographic market" for a particular case must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (internal quotation marks omitted). The FAC proposes two alternative geographic markets: First, Cox's national footprint, which includes portions of Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, and Virginia. (FAC ¶¶ 102-03); *see also, e.g.*, Exh. 41.

---

[7] Plaintiffs anticipate that Cox may again attempt to claim—as it did in its motion to dismiss—that Netflix, among other movie providers, may be in the product market of Premium Cable. This Court rejected Cox's argument when denying Cox's motion to dismiss, *see* Order at 7 (Jan. 19, 2010) (adopting Plaintiffs' market-power definition of "Premium Cable"), and the argument fares no better today. Companies like Netflix do not provide anywhere close to the service of Cox Premium Cable and are hardly interchangeable with Cox Premium Cable. [redacted] Regardless, because everyone in the country has access to a service like Netflix, the issues raised by Cox's argument are once again common to the class.

Second, and in the alternative, each of these local areas individually. (FAC ¶ 107.[8]) Rigorous analysis of the evidence produced in this case shows that the former is the proper geographic market because Cox's conduct has been common and unvarying in all material respects across that market.

United States v. Grinnell Corporation, 384 U.S. 563 (1966), is the leading authority concerning when a national market is the analytically appropriate geographic market in an antitrust matter. In that case, the Supreme Court determined that a national geographic market was the applicable one, even though certain regional differences existed across that market footprint, because the defendant company operated the challenged portion of its business "on a national level." *Id.* at 575. The *Grinnell* Court noted the defendant companies' "national planning"; the defendant companies' dealing with "multistate businesses on the basis of nationwide contracts"; the defendant companies' agreements with other companies regarding their activities in different states; inspection, certification, and rate-making conducted by national insurers; and a "national schedule of prices, rates, and terms, though the rates may be varied to meet local conditions." *Id.*; *see also Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236, 264-65 (E.D. Mich. 1997) (discussing numerous cases where courts certified national classes, despite the existence of "regional variances" and region-specific differences in damages).

Here, the record shows Cox making all relevant decisions from its national headquarters in Atlanta, Georgia. Most importantly, Cox has admitted that the course of

---

[8] Discovery has revealed that Cox has consolidated its regional markets from approximately 22 to 9, and it may consolidate further in the future. Exh. 3, Cox Dep. (Pugliese), 32:9-24; Exh. 6, Clement Dep., 57:16-21, 101:6-20.

conduct that Plaintiffs challenge here is a policy instituted and implemented by Cox's national headquarters. Exh. 42, Cox's Resp. to Pls.' Interrog. No. 28, part ii (confirming that Cox sets its policy from its headquarters regarding whether to permit customers to use STBs obtained from third parties on Cox's cable system). Cox has projected this policy across its entire footprint; not a single regional market was able to opt out of this Cox policy, which is the gravamen of this litigation. Proof of Cox's across-the-board policy appears in promotional materials with standardized language—indeed, identical text—across its entire national footprint. *See, e.g.*, Exh. 26, CCISTB132516-CCISTB132519; Exh. 27, CCISTB132593-CCISTB132594; Exh. 28, CCISTB288660-CCISTB288662; [redacted] Moreover, Cox picked from its national headquarters two STB manufacturers from which all of Cox's Premium Cable customers would receive STBs, *see, e.g.*, Exh. 42, Cox's Resp. to Pls.' Interrog. No. 28, part i, as well as the features that those STBs would contain, Exh. 30, Deposition of Cox (Steven Watkins), 133:1-15; [redacted] Again from its headquarters, Cox negotiated with these two STB manufacturers the price that Cox would pay for the STBs that would end

up in its Premium Cable customers' homes across its national footprint. *See* Exh. 31, Deposition of James Kelso, 74:11-18; [redacted]

Cox also conducted its relevant standard-setting from a national perspective. Each local market, for instance, had no input regarding whether Cox's customers would access Premium Cable using Tru2Way, which Cox supported, or, for example, a retail-oriented system known as DCR+, which the consumer electronics companies proposed. [redacted]

Additionally, through its headquarters Cox produced sales guidelines that apply when customers and prospective customers contact a Cox customer service center. Exh. 33, Deposition of Cox (Charles Wise), 36:22 – 38:22; [redacted]

[redacted] Finally, although Cox did not produce a witness who had knowledge of Cox's insurance, Plaintiffs reasonably believe, in light of the structure of the corporation, that Cox negotiated for and carries insurance on a national scale.

Cox, then, has admitted the fundamentally national scale and character of the policies that Plaintiffs challenge in this case. To drive the point home, Cox acknowledged before the JPML in this matter that the practices of which Plaintiffs complain "derive by and large from business decisions that are overseen by various corporate departments at Cox's corporate headquarters in Atlanta." Exh. 40, Cox's Reply to Pls.' Resp. to Mot. to Transfer, p. 7 (J.P.M.L. Apr. 21, 2009).

Of course, variance of one sort or another may exist among the various locales in which Cox operates. However, any such regional differences play a minor role, if any at all (Plaintiffs cannot perceive any), in this case, and in any event are dwarfed by overwhelming evidence of Cox's centralized decisionmaking regarding the relevant issues in this matter—evidence that, again, will not vary in impact or import from class member to class member in this case.

Plaintiffs seek the certification of a class that subscribed to Premium Cable across Cox's national footprint because this geographic market is correct under the law and would be administratively more convenient for the parties and the judiciary. In light of the common course of conduct of which Plaintiffs complain, there is no reason to atomize

the class into the locales in which they reside or otherwise deny certification on the current record.[9]

iii. Classwide proof shows Cox has sufficient economic power

Cox possessed "sufficient market power" both over its national footprint and in each of its regional markets. That is, regardless of the geographic market definition, rigorous analysis of the record shows that Plaintiffs will satisfy this element of their tying claim. Most importantly for present purposes, Plaintiffs can and, if given the opportunity, will at trial prove this element with evidence that is common to the class.

"Sufficient economic power" is the "power to control prices or exclude competition." *E.I. Dupont*, 351 U.S. at 391. Sufficient power can be far less than monopolistic power, *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 890 (10th Cir. 1997), and depends on market-share percentage, the number and strength of competitors, the difficulty in entering the market, consumer sensitivity to price changes, market developments, and multimarketing by the defendant, *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc.*, 783 F.2d 159, 162 (10th Cir. 1986).

Evidence common to each class member will prove Cox's sufficient economic power in this case. There is overwhelming *direct* proof of Cox's ability to raise prices without losing a significant percentage of customers. [redacted]

[9] As noted above, Plaintiffs believe that one class that covers Cox's footprint is both the proper class to be certified and the most convenient. However, should the Court certify numerous classes that correspond to each of Cox's local markets, Plaintiffs respectfully request the opportunity to add class representatives who reside in those markets in which Plaintiffs have not yet named a class representative.

[redacted] And the evidence that Plaintiffs intend to use in order to establish this direct proof of market power is common to the class.

While *indirect* proof of market power is unnecessary in light of the direct proof, the indirect proof, too, demonstrates Cox's sufficient market power. Indirect proof of sufficient market power typically concerns market-share percentage. The presumptive market-share cut-off to establish "sufficient economic power" is between thirty and forty percent. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its*

[redacted]

Practice § 7.6c (3d ed. 2005) (concluding that "the minimum market share" for successful tying claims "hovers in the range of 30-40%"); *see also Col. Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d 683, 694 (10th Cir. 1989) (noting, in a Section 2 monopolization case, that "41% market share typically indicates that a firm has substantial economic power in the market"). Plaintiffs are unaware of any recent judicial opinion holding that market share is insufficiently small when it rises above 35%.

Here, Cox's market shares for Premium Cable are significantly higher than the 35% threshold across both its national footprint and all of the individual areas in which Cox does business. [redacted] Here, too, this indirect evidence of Cox's market power does not depend on the testimony of individual proposed class members.

Cox's high market shares for Premium Cable are unsurprising in light of the formidable entry barriers to providing MVPD service and Cox's correspondingly small number of competitors for MVPD subscribers. Cox's most well-known competitor

service, satellite (also known as DBS, or "direct broadcast satellite"),[11] [redacted]

Any potential competitors to Cox for MVPD service face tremendous entry barriers. [redacted] The challenges to providing such service are Herculean. No wonder Cox faces such minimal competition for Premium Cable within its footprint. Again, this factor, like all of the evidence that

[11] This assumes *arguendo* that satellite is a competitor of cable MVPD. For the reasons specified in the FAC (¶¶ 74-80) and referenced *supra* pp. 25-26, Plaintiffs contend that satellite is not interchangeable with cable. *See also* Order at 7 (Jan. 19, 2011) (acknowledging the relevance to the product market of the alleged material differences between cable MVPD and satellite service). However, for purposes of this motion only, Plaintiffs assume *arguendo* that satellite is reasonably interchangeable with satellite. To that end, the market-share percentages discussed herein account for satellite customers. Of course, if satellite were excluded from the market, Cox's market share would be even higher.

[12] Satellite penetration was similarly relatively small in each of Cox's local markets. [redacted]

Plaintiffs intend to employ in order to prove Cox's market power, is common across the class.

Accordingly, even if direct evidence did not clearly show that Cox held sufficient market power in the Premium Cable market, the indirect evidence clearly demonstrates Cox's sufficient market power. Of course, at this stage of the proceedings, Plaintiffs need not prove this element definitively. At the very least, they have shown that they can prove this issue at trial using evidence that is common to the class.

4. Classwide proof shows that a "substantial volume of commerce" is affected in the STB market

The last element of a tying claim is that the tie "affects a substantial volume of commerce in the tied product market." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462 (1992). "The controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie." *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969). Plaintiffs' burden regarding this element is slight; it is generally satisfied where the value of implicated commerce is greater than $10,000. *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1578 (11th Cir. 1991).

The record is replete with evidence showing that the value of implicated commerce vastly exceeds $10,000. [redacted] Indeed, Cox alone received substantially more than $250 million in STB revenue *each year* since 2006. Exh. 42, Cox's Resp. to Pls.' Interrog. No. 28. [redacted]

[redacted] *see also infra* p. 39. Any way one considers this, the value of commerce is significantly larger than the $10,000 threshold; it is in no way *de minimis*.

The information that Plaintiffs ultimately will employ to prove this element, of course, is common across the class. *See generally* Matheson, 76 Nw. U. L. Rev. at 860-61 (noting that the substantial-volume-of-commerce element "does not depend on a particular class member's position"). That is consistent with the evidence upon which Plaintiffs will rely to prove all of the elements of their Sherman Act claim: the proof will be applicable to all of the class members. The predominance inquiry requires nothing further.

b. Antitrust injury

Common issues likewise predominate with respect to antitrust injury. The evidence in this case regarding impact, damages, and causation is both strong and common to the class.

At the class certification stage in tying cases, courts assess whether plaintiffs can prove the "fact of damage" via common proof. *See, e.g.*, *Bafus v. Aspen Realty, Inc.*, 236 F.R.D. 652, 658 (D. Idaho 2007) (certifying a class because, in part, the court was satisfied that plaintiffs could attempt to calculate the plaintiffs' injuries through resort to common proof). Fact of damage is quite different from the quantum of damage, which can vary from class member to class member and which generally does not bear on class certification. 6 Newberg & Conte, *supra*, § 18:27, p. 91; 7A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1781 (2d ed. 1986) ("[I]t uniformly has been held that

differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate."); *see also, e.g.*, *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796 n.9, 798 (10th Cir. 1970) (affirming order certifying a class, notwithstanding the fact that individualized questions may arise concerning the quantum of damages that each plaintiff suffered); *Little Caesar*, 172 F.R.D. at 266 n.29 (holding that a class need not be divided into regional subclasses when defendant's tying conduct injured plaintiffs in certain regions more than in other regions, since different quanta of damages is not a relevant consideration for class certification).

Dr. Singer has proposed two possible methods of assessing damages that class members have suffered. These methods, consonant with Plaintiffs' legal theory, consider whether class members paid overcharges on the STBs they rented from Cox. [redacted] More importantly for this motion, Dr. Singer's analysis relies on common proof. *See infra* p. 38.

[redacted]

[redacted]

Both of these methods use entirely common evidence to measure the overcharge that class members paid for STBs. [redacted] The analysis also demonstrates that all class members suffered antitrust impact—in the form of an overcharge imposed by Cox. [redacted]

[redacted]

[redacted]

Likewise, Plaintiffs employ solely common evidence to demonstrate causation. Causation depends on Cox's actions and omissions, not the conduct of any class member. Plaintiffs will not catalog all of Cox's actions and omissions that inhibited the market for suitable alternatives for leasing a STB from Cox, but among those actions and omissions are the following: [redacted] His conclusion on this point, however, is not at issue in this class-certification proceeding; what does matter is that the basis for that conclusion is evidence (including that which is cited above) that is obviously common to the class.

Plaintiffs have demonstrated—well beyond that which is required—that common issues will predominate with respect to antitrust injury. At the class-certification stage,

[redacted]

"the Court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs . . . make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." *Lumco Indus., Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 173-74 (E.D. Pa. 1997); *see also In re Bulk (Extruded) Graphite Prods. Antitrust Litig.*, Case No. Civ. 02-6030 (WHW), 2006 WL 891362, at *10 (D. N.J. Apr. 4, 2006) ("The operative question here is not whether the plaintiffs can establish class-wide impact, but whether class-wide impact may be proven by evidence common to all class members."). Here, Plaintiffs have well surpassed this minimal showing. *Cf. In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, Case No. M 02-1486-PJH, 2006 WL 1530166, at *10 (N.D. Cal. June 5, 2006) ("Plaintiffs need not supply a precise damage formula, but must simply offer a proposed method for determining damages that is not so insubstantial as to amount to no method at all.") (internal quotation marks omitted).

As with the rest of the predominance inquiry, Plaintiffs have demonstrated that common issues predominate over generalized issues. Plaintiffs' tying claim is susceptible to common proof, where all named Plaintiffs and class members mount the same challenge to Cox's common course of conduct that led to similar injuries across the entire class. To the extent that Plaintiffs' tying claim implicates any relevant individual issues at all, those issues are *vastly* overshadowed by the common facts that Plaintiffs will employ to prove their claim.

2. *Superiority*

Plaintiffs' tying claim is a classic example of a claim that should be certified as a class action for fair and efficient adjudication. Millions of people stand before this Court, complaining that Defendant's common course of illegal conduct has injured them. This claim involves complicated material, and prosecuting it well has required—and will continue to demand—a significant expenditure of resources. In order to employ the judiciary's and parties' resources most efficiently, as well as to ensure that each class member is best represented, a class action is the superior way to resolve Plaintiffs' tying claim.

The superiority element for class certification asks whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To that end, Federal Rule of Civil Procedure 23(b)(3) provides a list of pertinent factors for assessing superiority:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> *(D)* the likely difficulties in managing a class action.

All of these factors underscore how a class action is a superior method of adjudicating Plaintiffs' tying claim. First, no class member has expressed an interest in individually controlling the prosecution of his or her own action. In light of the fact that each class member has a relatively small damage claim, combined with the fact that

antitrust proceedings are notoriously complicated and lengthy, this is not surprising. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.") (emphasis omitted).

Second, beside the present matter, no class member has commenced a different lawsuit against Cox for its allegedly illegal tie. Third, as all parties—including Cox— argued and the JPML found, concentrating the litigation of class members' tying claims is desirable. *See, e.g.*, Exh. 39, p. 4 (Cox stating to the JPML: "[C]onsolidating these actions will further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions . . . .").

Fourth, the potential difficulties, if any, in managing this case as a class action are far outweighed by the advantages of certifying a class. This is due in large part to the considerable resources that the judiciary and the parties would expend if such matters were handled not as one consolidated MDL class action, but as many overlapping class actions running at their own speeds in different fora. *Id.* at 5 (Cox's brief explaining: "Judicial economy is best served by consolidating [the actions] . . . so that multiple courts are not required to become familiar with and address these multiple complex issues."). The class, as discussed above, is comprised of more than three million people. Individual class members prosecuting separate class or even non-class cases would waste valuable judicial resources (in stark contrast to the instant consolidated proceeding) and would require the parties to expend an enormous amount of litigation resources. Of course, at

the end of the day, that scenario would leave the risk of numerous and inconsistent judgments concerning the matters now before this Court.

The superiority rule—and the class action device more generally—is designed to discourage, not promote, such results. Certifying the tying class here will conserve substantial and important resources for this Court and the parties. *Cf. Ponca Tribe of Indians of Oklahoma v. Continental Carbon Co.*, Case No. CIV-05-445-C, 2007 WL 28243, at *9 (W.D. Okla. Jan. 3, 2007) (Cauthron, J.) (noting that denying class certification would be a "clear waste of judicial resources" because it would result in hundreds of class members filing the same action against the same defendants for the same allegedly wrongful conduct). For purposes of fairly and efficiently adjudicating the proposed class members' identical tying claims, the tying class should be certified for class treatment.

II. THE UCL SUBCLASS SHOULD BE CERTIFIED.

Certification of the California Plaintiffs' UCL subclass flows ineluctably from the certification of the tying class. Whereas the California UCL claim is premised on a violation of the Sherman Act, there are no material differences between the class certification analysis for the tying claim and UCL claim. Accordingly, the California Plaintiffs' UCL subclass should be certified, as well.

California's UCL proscribes "any unlawful, unfair or fraudulent business act or practice . . . ." CAL. BUS. & PROF. CODE § 17200. Its purpose is to "encourage competition[] by prohibiting unfair . . . practices by which fair and honest competition is destroyed or prevented." CAL. BUS. & PROF. CODE § 17001. The UCL provides a cause

of action by predicating the offending business act or practice on the violation of other state or federal laws. *See, e.g.*, *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1122 (9th Cir. 2009); *Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2002).

While UCL liability is not limited to otherwise illegal actions, *see, e.g.*, *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal.App.4th 1235, 1255 (Cal. Ct. App. 2009), Plaintiffs premise their UCL claim on Cox's allegedly violating the Sherman Act. Therefore, certifying Plaintiffs' UCL subclass precisely tracks the certification of Plaintiffs' tying class.

The only relevant difference between certification of the tying class and UCL subclass is numerosity. After all, the UCL subclass contains a smaller number of class members than the tying class. Here, too, however, the class easily clears the numerosity hurdle. The UCL subclass consists of more than [redacted]—well above the generally accepted threshold of 40 class members, *see* 1 Newberg & Conte, *supra*, § 3.5, p. 247. Moreover, the class members are not geographically limited to one tightly bound locale. Rather, they reside in the different local markets that Cox services in California. Finally, as with members of the tying class, UCL subclass members are not highly sophisticated financial entities who could deftly navigate the thicket of antitrust law. Accordingly, Plaintiffs' UCL subclass is sufficiently numerous such that joinder of all members would be impracticable. Fed. R. Civ. P. 23(a)(1).

As with the tying class, Plaintiffs' UCL subclass should be certified for the fair and efficient adjudication of the tying-based UCL claim. Plaintiffs' UCL claim is

brought by more than 550,000 of similarly situated people who complain of common conduct and who, like all parties and the judiciary, would benefit from a single disposition of their claim.

III. INTERIM CLASS COUNSEL SHOULD BE APPOINTED CLASS COUNSEL.

Plaintiffs respectfully request that their interim class counsel be appointed class counsel for this matter. Counsel have represented their clients well in this matter thus far, and they have the knowledge, experience, and resources to continue this work on behalf of the class.

Federal Rule of Civil Procedure 23(c)(1)(B) provides that "[a]n order that certifies a class action . . . must appoint class counsel under Rule 23(g)." Rule 23(g), in turns, lists the factors that district courts should consider when appointing class counsel: "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 claims of the type 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).

These factors weigh in favor of appointing the undersigned as class counsel. First, Plaintiffs' counsel have worked exhaustively to identify and investigate the claims in this case. They have propounded discovery upon Cox and more than one dozen third parties; received, catalogued, reviewed, and annotated approximately 6,250,000 pages of documents; taken and defended more than 25 depositions; secured two experts who

submitted extensive expert reports for this matter; and responded to discovery that Cox has propounded. Declaration of Adam B. Wolf ¶ 4 (July 29, 2011).

Second, Plaintiffs' counsel have significant experience litigating class actions and other complex litigation, including the types of claims asserted in this case. *Id.* at ¶ 5. Counsel and their respective law firms are nationally recognized for the exceptional results they have secured for their clients: obtaining industry-changing injunctions, as well as judgments and settlements totaling billions of dollars. *Id.* Many of Plaintiffs' counsel regularly lecture about class actions and antitrust concerns (including illegal tying), three of them have argued cases before the United States Supreme Court, and nearly all of them have earned awards for their effective advocacy. *Id.* at ¶ 6. With a demonstrated record of success in class actions, including antitrust matters, Plaintiffs' counsel are well situated to gauge the merits of the claims asserted in this case and to litigate them in the best interest of the class. *Id.*

Third, Plaintiffs' counsel are committed to expending as many resources as this case requires. *Id.* at ¶ 7. Counsel already have devoted substantial resources to this case thus far. *Id.* They will continue to do so in order to ensure the best results for the class. *Id.*

CONCLUSION

For these reasons, Plaintiffs respectfully submit that their tying class and UCL subclass should be certified. They further request that this Court appoint their attorneys as class counsel to diligently represent the class through the conclusion of this case.

Dated: July 29, 2011

Respectfully submitted,

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

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

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

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

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

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, A. Daniel Woska, hereby certify that on this 29th day of July, 2011, Plaintiffs' Class Certification and supporting documents were served via ECF and email, on the following counsel for Defendant:

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

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

/s/ A. Daniel Woska

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

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

DECLARATION OF HAL J. SINGER, PH.D. IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

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

DECLARATION OF ADAM B. WOLF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I, ADAM B. WOLF, hereby declare under penalty of perjury, in accordance with 28 U.S.C. § 1746, as follows:

1. I am a member in good standing of the bar of the State of California, and I respectfully appear in this matter *pro hac vice*. I am an attorney with the law firm Schneider Wallace Cottrell Brayton Konecky, LLP, which represents the Plaintiffs in the above-captioned case.

2. I have personal knowledge of the matters stated herein, and would testify accordingly if called upon to testify as to these matters.

3. The documents that Plaintiffs file in support of their Motion for Class Certification are true and correct copies. For the sake of minimizing the volume of documents submitted, Plaintiffs have submitted excerpts of these documents, where appropriate.

4. Plaintiffs' counsel have worked exhaustively to identify and investigate the claims in this case. Plaintiffs' counsel have propounded discovery upon Cox and more than one dozen third parties; received, catalogued, reviewed, and annotated approximately 6,250,000 pages of documents; taken and defended more than 25

depositions; secured two experts who submitted extensive expert reports for this matter; and responded to discovery that Cox has propounded.

5. Plaintiffs' counsel have significant experience litigating class actions and other complex litigation, including the types of claims asserted in this case. Counsel and their respective law firms are nationally recognized for the exceptional results they have secured for their clients—obtaining industry-changing injunctions, as well as judgments and settlements totaling billions of dollars.

6. Many of Plaintiffs' counsel regularly lecture about class actions and antitrust concerns (including illegal tying); three of Plaintiffs' attorneys, myself included, have argued cases before the United States Supreme Court; and nearly all of Plaintiffs' counsel have earned awards for their effective advocacy. With a demonstrated record of success in class actions, including antitrust matters, Plaintiffs' counsel are well situated to gauge the merits of the claims asserted in this case and to litigate them in the best interests of the class.

7. Plaintiffs' counsel are committed to expending as many resources—both time and money—as this case requires. Counsel already have devoted substantial resources to this case thus far. We will continue to do so in order to ensure the best results for the class.

Dated this 29th day of July 2011.

Adam B. Wolf