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

In re:

COX ENTERPRISES, INC., SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION	))))	**MDL No. 09-02048-C**

OPPOSITION TO MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

The Supreme Court recently reminded us that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes et al.*, 131 S. Ct. 2541 (2011). It is only in a unique case, where the facts are such that Mary can try her case on behalf of both herself and Jane because they are both identically situated, does the exception apply (*e.g.*, "did Smith and Jones conspire to raise the price by $2.00 per gallon, thereby raising the price of milk for all buyers").

This case, which seeks to bundle millions of current and former Cox Communications cable subscribers from 19 states into a single undifferentiated mass, is an example of why the usual rule requiring individual adjudication is the correct one. No class can be certified here because the Plaintiffs' claim—and, equally importantly, Cox's defenses—depends on proof that differs from person to person. The Court should deny Plaintiffs' motion for class certification because they have not met the Rule 23(b) requirement of predominance with respect to any ascertainable class of people.

Wal-Mart makes clear that, at the class certification stage, the Plaintiffs' arguments about the appropriateness of class certification must be analyzed *based on the facts that exist in the case*, not based upon the allegations made in the complaint that were assumed to be true at the motion to dismiss stage. *Wal-Mart*, 131 S. Ct. 2551-52. The Plaintiffs can no longer ask the Court to imagine a world where their facts could be true; now, two years into this litigation, with discovery closing in less than a month and many millions of documents and over thirty depositions behind us, they must show *on the*

facts of this case that the experiences of their 14 named class representatives are so similar to the experiences of the remaining 3 million Cox subscribers that all 3 million claims can be tried based solely on the experience of those 14 people.

But where, as here, there is no common proof of coercion in the form of a written contract that is common to the class, a key element of the Plaintiffs' claim—coercion of the purchaser—may only be proven on a case-by-case, factually intensive basis. Rule 23 does not typically allow certification of "practical effect" tying cases like this one because the "practical effect" of any particular set of factors is different from consumer to consumer. *See, e.g., Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1224-1226 (3d Cir. 1976) (holding that, absent an express contract term making the tie a provision of the sale of the tying product, coercion is a question of what each buyer felt were her options, and therefore cannot be proven with common evidence under Rule 23).

In fact, several of the main elements of Plaintiffs' tying claim in this case—and several of Cox's defenses to Plaintiffs' claims—are not subject to class-wide adjudication because the evidence needed to adjudicate a given plaintiff's claim will be different from plaintiff to plaintiff. As the record regarding the 14 purported class representatives here demonstrates, the Plaintiffs' burden of proof on their antitrust tying claims, and Cox's defenses to those claims, will vary across the proposed class in several important ways, including:

Competitive choices faced by consumers depend on when the individual plaintiff was a Cox subscriber and where they lived at the time. Plaintiffs cannot adjudicate either the market power or coercion elements of their tying claim with class-wide evidence

because class members in different areas have different competitive choices. Many of Cox's competitors compete in different areas with respect to different services, and have changed their competitive service areas over time. The Plaintiffs' claims and Cox's defenses will vary from plaintiff to plaintiff depending on where a particular plaintiff lived (and when she lived there) because of these competitive differences over time. A class cannot be certified with these facts. *See, e.g., Heerwagen v. Clear Channel Comm's*, 435 F.3d 219, 227 - 228 (2d Cir. 2006) (affirming denial of certification of nationwide class and discussing need for separate geographic market analyses to reflect varying local competitive environments).

Purported class members purchased different alleged tying products at varying prices and purchased different alleged tied products at varying prices, and the antitrust analysis for each possible combination is different. In order for the Plaintiffs to prosecute a tying case against Cox as a class action, they must allege a proper antitrust tying product market that is consistent across the class. But the Plaintiffs have not presented to the Court a relevant tying product market that is based on the interchangeability test that the Tenth Circuit requires, and they cannot do so on the facts in the record because individual Cox subscribers purchase or lease many different packages of programming and equipment, at different prices, from Cox. *See, e.g., Telecomm Tech. Servs., Inc. v. Siemens Rolm Comm's., Inc.,* 172 F.R.D. 532, 548 (N.D. Ga. 1997) (denying certification where varying and specialized product market definitions would depend on what consumers purchase).

Many purported class members purchase the alleged tied product from others and use it with their Cox cable service—a practice that the FCC requires and that Cox welcomes. The Plaintiffs claim that Cox ties the lease of a set-top box from Cox to the sale of certain cable services, but the record in this case makes clear that subscribers are free to obtain set-top boxes from other sources, and in fact do so freely. These alleged class members who have taken advantage of this option cannot also pursue a tying claim against Cox. *See, e.g., N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 7 n.4 (1958) ("where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.").

Some Plaintiffs' claims are barred by law, and others are barred for a not-yet discovered portion of the class period. Cox will have a complete defense against many plaintiffs' claims because regulated rates cannot be challenged as an antitrust "overcharge." *See, e.g., Crumley v. Time Warner Cable*, 556 F.3d 879 (8th Cir. 2009) (*cited by and discussed in Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 890 (10th Cir. 2011)). Individual Cox communities have been subject to rate regulation by the Federal Communications Commission ("FCC") and by hundreds of local cable franchising authorities during different periods of time, some communities ceasing rate regulation long ago, some still being rate-regulated today, and some ceasing rate regulation at some point or another across the class period. Cox's rate regulation defense will therefore apply to different purported class members at different times and is not amenable to common proof.

At bottom, all of the flaws in the Plaintiffs' proposed class are exposed by simply looking at the record regarding the 14 named Plaintiffs in this case. The lack of common evidence in this important sample should be sufficient for the Court to conclude that proof of the Plaintiffs' claims cannot be made with common evidence. For instance:

- Plaintiff Sharon Coughlin has never ordered a movie On Demand from Cox.[1/] She does not have a Netflix account, and does not download content from the Internet.[2/] A California resident, she could potentially select from Cox, Qwest/Century Link, AT&T U-Verse, DirecTV, and DISH Network for her programming choices. She has considered switching from Cox to another provider.[3/]

- Plaintiff Barksdale Hortenstine frequently accesses Cox's video-on-demand services, testifying that "I doubt there are many people who purchase them more frequently than me."[4/] Mr. Hortenstine also frequently obtains content via movie purchases from Target and online from Amazon and that he has an extensive DVD collection.[5/] He testified that he once subscribed to Netflix DVD delivery service and "would consider in the future" subscribing to the Netflix streaming video service.[6/] He lives in New Orleans and testified that, although some of his friends and "word of mouth" informed him that AT&T's U-Verse service "is just wonderful," and that it was available in some parts of New Orleans, AT&T had not begun serving his part of the city yet.[7/]

1/ *See* Deposition of Sharon Coughlin ("Coughlin Dep.") (excerpts attached hereto as Ex. 1) at 19:21-23.

2/ Coughlin Dep. (Ex. 1) at 25-26.

3/ Coughlin Dep. (Ex. 1) at 24:7-9.

4/ *See* Deposition of Barksdale Hortenstine ("Hortenstine Dep.") (excerpts attached hereto as Ex. 2) at 47:15-23.

5/ Hortenstine Dep. (Ex. 2) at 51-52.

6/ Hortenstine Dep. (Ex. 2) at 54:11-24.

7/ Hortenstine Dep. (Ex. 2) at 46:4-14.

- Plaintiff Trevor Haynes lives elsewhere in New Orleans, and does not know whether AT&T U-Verse service is available in his part of the city or not.[8/] Mr. Haynes owns a Sony Grand WEGA flat-screen television with a CableCARD slot, although he has never looked into getting a CableCARD.[9/] He downloads video programming from Internet services on a weekly basis.[10/] He has also rented DVDs and/or VHS tapes from outlets such as Blockbuster between 25 and 75 times during the class period.[11/] He utilizes Cox's On Demand and PPV services less than five times per month.[12/]

- Plaintiff Bobby Bowick lives in Miramar Beach, Florida and has a Netflix account through which he has downloaded programs at least twice per week since becoming a Netflix subscriber in 2007.[13/]

- Plaintiff Sandra Prezgay, who currently resides in Las Vegas, Nevada, could choose, and in fact has admitted considering, DirecTV or Dish Network for her cable programming.[14/] This is in potential addition to Cox, AT&T U-Verse, and Qwest/Century Link, which also offer service in Las Vegas.

- Plaintiff Henry Holmes, a Louisiana resident, lives in a neighborhood served by AT&T U-Verse.[15/] He was a DirecTV customer until he switched to Cox.[16/] Mr. Holmes testified that he has not considered switching to AT&T because he is "satisfied with what I have."[17/]

8/ *See* Deposition of Trevor Haynes ("Haynes Dep.") (excerpts attached hereto as Ex. 3) at 28:3-5.

9/ Haynes Dep. (Ex. 3) at 10:8-12 and 35:6-24.

10/ Response of T. Haynes to Cox's First Set of Interrogatories No. 10 (attached hereto as Ex. 4).

11/ Response of T. Haynes to Cox's First Set of Interrogatories No. 15 (attached hereto as Ex. 4); Haynes Dep. (Ex. 3) at 33:19-34:23.

12/ Haynes Dep. (Ex. 3) at 30:24-31:4.

13/ Response of B. Bowick to Cox's First Set of Interrogatories Nos. 9, 10 (attached hereto as Ex. 4).

14/ *See* Deposition of Sandra Prezgay ("Prezgay Dep.") (excerpts attached hereto as Ex. 5) at 17:5-15.

15/ *See* Deposition of Henry Holmes ("Holmes Dep.") (excerpts attached hereto as Ex. 6) at 35:8-13.

16/ Holmes Dep. (Ex. 6) at 32:5-8.

17/ Holmes Dep. (Ex.6) at 35:25-36:1.

- Plaintiff Ron Strobo, who currently resides in Florida, could select from Cox, AT&T U-Verse, DirecTV, and DISH Network for his programming needs and, in fact, switched from Cox to DirecTV in November of 2010, and in addition to watching regular channels he uses his DirecTV service to watch pay-per-view and download video-on-demand content.[18/]

- Plaintiff Jessica Diket, a Louisiana resident, could potentially choose from Cox, AT&T U-Verse, DirecTV and DISH Network and EATEL (when she resided in Baton Rouge) for video service and has regularly downloaded programs via her Blockbuster Online subscription since 2008.[19/]

- Plaintiffs John and Elizabeth Brady canceled their Cox service altogether and now obtain all their programming content via online streaming through Netflix and Hulu, and through DVDs rented from Netflix and Redbox.[20/]

Each of these named Plaintiffs presents a different set of product interchangeability, competition, and coercion issues, and Cox will have different defenses against each of their claims based on the availability of substitutes for the programming services that each Plaintiff uses. For example, Cox can defend itself against Plaintiff Sharon Coughlin on the basis that she does not use video-on-demand, which is the primary alleged tying product, and she can get all of the other services in her Cox package with a TiVO (including TiVO's electronic programming guide), and therefore she has not been coerced in the manner asserted by the Plaintiffs. Cox can defend itself against Plaintiff Hortenstine on the basis that his frequent usage of DVD rentals and his consideration of Netflix alongside his Cox service show that he considers these sources to

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18/ *See* Deposition of Ron Strobo ("Strobo Dep.") (excerpts attached hereto as Ex. 7) at 29:3-35:14.

19/ *See* Deposition of Jessica Diket ("Diket Dep.") (excerpts attached hereto as Ex. 8) at 37-38.

20/ *See* Deposition of Elizabeth Brady ("E. Brady Dep.") (excerpts attached hereto as Ex. 9) at 13:15-14:3 and 35:8-39:19); *see also* Deposition of John Brady ("J. Brady Dep.") (excerpts attached hereto as Ex. 10) at 37-39.

be interchangeable with Cox's video-on-demand service, and therefore he could not be coerced. Cox can defend itself against Plaintiffs Holmes and Strobo on the basis that, because each of them chose to receive their services from DirecTV during the class period, thereby proving that they have a choice to get both the tying and tied products elsewhere, they cannot have been coerced into switching to or from Cox. For named Plaintiffs the Bradys and the thousands like them across the country who have chosen to "cut the cord" and view Internet-delivered video as a complete substitute for their entire cable package, Cox's defense will be particularly easy since they view Internet-delivered video to be a complete substitute to all of Cox's services.

The Supreme Court made clear in *Wal-Mart* that any competent complainant can do what the Plaintiffs have done here, which is to draw a circle around a large group of people and say that there is a common question facing all of them—for example, "[w]hether Cox is liable to Plaintiffs and the class for violations of the antitrust laws." Amended Compl. ¶ 121(a). *Wal*-Mart, 131 S. Ct. at 2551. But that is not sufficient under Rule 23. What must be shown is that the *answers* to these questions can be determined using evidence common to everyone in the class. *Id.*

To get around the reality of these facts, the Plaintiffs make their arguments based on products that do not exist—products that Cox does not sell, and that consumers do not purchase.[21/] The Plaintiffs rely principally on the various (and changing) submissions of

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21/ Plaintiffs' arguments are not based on the facts of this case, but rather require the Court to pretend as if the facts of this case do not exist. Perhaps that is why the one piece of "evidence" that the Plaintiffs cite in their memorandum more than any other is Cox's motion to the Judicial Panel on Multidistrict Litigation and associated papers, which the

their expert economist Dr. Singer, whose testimony in this case both contradicts itself and is contradicted by his own previous sworn testimony to the FCC. Dr. Singer is not entitled to have one opinion in Washington and a different opinion in Oklahoma, but that is precisely what he attempts to do in this case. He arrives at his pre-determined opinions by *assuming* that Cox has market power in all of its various local markets and by *assuming* that all Cox customers buy precisely the same combination of video services and set-top boxes at precisely the same price, which the facts make clear is not the case. He does not even include in his analysis half of the set-top boxes that people actually rent from Cox—HD, DVR, and HD DVR set-top boxes. And the work that he does perform is riddled with mathematical errors and, in at least one case, simple parlor tricks. Across his three separate expert submissions, Dr. Singer provides neither a means of determining antitrust injury (also referred to as "impact") nor a means of calculating damages on a class-wide basis.

The Tenth Circuit has instructed that the District Court must engage in its own "rigorous analysis" of whether the requirements of Rule 23 have been satisfied. *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004) ("*Shook I*"). As the Supreme Court confirmed in *Wal-Mart*, "frequently that 'rigorous analysis' will entail some overlap with

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Plaintiffs cite nine times throughout their brief. The Plaintiffs suggest that Cox somehow conceded that class certification is appropriate by asking the MDL Panel to consolidate the many cases that underlie this action into one proceeding; but Cox has made no such concession, and its arguments to the MDL Panel have nothing to do with class certification. *See, e.g., Gordon v. America's Collectibles Network*, 2010 WL 2133949, at *3 (E.D. Tenn. May 24, 2010) (rejecting precisely the same argument on the basis that consolidation and class certification are separate issues with separate considerations).

the merits of the Plaintiffs' underlying claim. That cannot be helped." *Wal-Mart*, 131 S. Ct. at 2551. After conducting the required rigorous analysis, this Court must deny the Plaintiffs' motion to certify a class in this case.

FACTUAL BACKGROUND

A. Cox's Cable Offerings

Since 2005, Cox has provided cable service to neighborhoods in parts of Arizona, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, and Virginia.[22/] The particular neighborhoods covered by Cox's systems have varied over time as Cox has acquired and sold various cable systems.[23/]

Cox offers different programming services in each of these places. For example, in 2008, Cox offered the Yes Network under its Expanded Basic package in Glastonbury, Connecticut, while in Macon, Georgia, it did not offer that channel, but did offer the Hallmark Channel.[24/] Particularly with regard to local or regional programming, such as regional sports networks, what a subscriber in Orange County sees on her Cox service

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22/ *See* http://ww2.cox.com/dispatch/462943593083029805 3/splash.cox (last visited August 26, 2011).

23/ *See, e.g.*, Cox Wide System View April 1, 2009 (CCISTBE00006803-00006804) and Cox Wide System View March 31, 2011 (CCISTB321979) (attached hereto as Ex. 11).

24/ *See* Channel Lineup Manchester, Glastonbury, Newington, Rocky Hill, South Windsor, and Wethersfield (CCISTB130651-130652) and Channel Lineup and Rates Macon, Georgia (CCISTB130515-130520) (attached hereto as Ex. 12).

will vary from what a subscriber in San Diego sees.[25/] While the names that particular tiers or packages of service are given in different cities may be the same, the contents of those packages and tiers can often vary by locality.[26/]

The price that Cox charges for its tiers and packages of video programming, and for the various types of set-top boxes that it leases to consumers, varies from place to place and has changed over time.[27/] For example, as Dr. Burtis summarizes in her attached report, the price paid by Plaintiff subscriber Sharon Coughlin for her package in San Diego for the class period differs from the price she would pay if she lived in Arizona or New Orleans during those same years.[28/] Similarly, the price Plaintiff Bradley

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25/ For instance, San Diego subscribers have access to the Padres Zone under the Digital Basic package (CCISTB130880-130881) (attached hereto as Ex. 13), while Orange County subscribers have access to The Mountain West channel as part of the Sports and Information Pak (CCISTB130831-130833) (attached hereto as Ex. 13).

26/ *See, e.g.,* Sports and Information Pak Orange County (CCISTB130831-130833) (Ex. 13) and Sports and Information Pak San Diego (CCISTB130880-130881) (Ex. 13); *see also* Expert Report of Dr. Michelle Burtis ("Burtis Report") (attached hereto as Ex. 14) at ¶ 58 (explaining that [redacted]).

27/ *See* Burtis Report (Ex. 14) at ¶ 54 ([redacted]); *see also* February 2010 Programming & Equipment Rates Fairfax County, Virginia (CCISTB133060-133061) and February 2010 Channel Lineup and Rates Hampton Roads, Virginia (CCISTB000300-000301) (attached hereto as Ex. 15).

28/ *See* Burtis Report (Ex. 14) at ¶ 57, Table 8 (noting, for example, that [redacted]).

Gelder pays for his package and set-top box in Arizona differs from the price he would pay if he lived in Cleveland or Connecticut.[29/]

The price that Cox charges for its tiers and packages of video programming, and for the various types of set-top boxes that it leases to consumers, also varies from subscriber to subscriber even within the same Cox system. For instance, in Orange County, California, in 2005, the prices paid for ten different non-basic packages (out of hundreds of different packages) in any given month varied substantially across subscribers.[30/] Even proposed class members who live near each other often pay different prices for the same set of services because they are able to take advantage of various Cox promotions to obtain lower prices.[31/] Such promotions serve to reduce the price of the non-basic packages purchased by proposed class members and/or the set-top boxes rented.

B. Competitors

1. MVPD Competitors

Cox competes with many different competitors across the country. Some of these competitors provide a complete multichannel video programming distribution ("MVPD")

29/ *See* Burtis Report (Ex. 14) at ¶ 56, Table 7.

30/ *See* Burtis Report (Ex. 14) at ¶ 61, Figure 2.

31/ *See* Burtis Report (Ex. 14) at ¶ 59. These include various promotional discounts and discounts for purchasing cable services in addition to other services, such as high speed Internet or telephone. In San Diego, for example, where Plaintiffs Sharon Coughlin and John and Elizabeth Brady reside, Cox offered promotions such as "Get 50% off ALL Cox services for 6 months" and "Get Free DVR Service for 6 mos. or Get 2 DVR's for the price of 1 for 6 mos." during the period December 28, 2009 to January 31, 2010.

service, including both packages of video programming and set-top boxes. For instance, Plaintiff Ron Strobo lives in a Florida neighborhood where he can choose from AT&T U-Verse, Cox, DirecTV, and DISH Network for video services and set-top boxes. John and Elizabeth Brady, California residents, could potentially choose from Cox, Qwest/Century Link, AT&T U-Verse, DirecTV, and DISH Network for video services and set-top boxes (in addition to the Internet and DVD services upon which they rely). Plaintiff Barksdale Hortenstine lives in a New Orleans neighborhood not served by AT&T, while Plaintiff Henry Holmes lives in a different New Orleans neighborhood that is served by AT&T. Some named Plaintiffs have actually switched to or from these other providers during the class period.

The only way to know what services are available to a particular consumer is to cross-check their street address with each provider in their local area, since coverage can vary from street to street and neighborhood to neighborhood. For example:

Verizon FiOS. Verizon FiOS provides substantially all of the services and channels that Cox provides, including electronic programming guides and video-on-demand, in parts of California, Connecticut, Delaware, Florida, Indiana, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, Washington, and Washington D.C.[32/] Verizon began providing these services at different times in different areas.[33/] Notably, in the places that it has built out its FiOS

32/ http://www.fiberexperts.com/fios-availability.html (last visited August 26, 2011).

33/ *See* Deposition of Jennifer Rich ("Rich Dep.") (excerpts attached hereto as Ex. 16) at 79:22- 81:9.

service, Verizon has not typically built out the entire Cox franchise area, but rather only particular parts of those areas.[34/]

AT&T U-Verse. AT&T U-Verse provides substantially all of the services and channels that Cox provides, including electronic programming guides and video-on-demand, in parts of Alabama, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Wisconsin.[35/] AT&T began providing these services at different times in different areas.[36/] Notably, in the places that it has built out its U-Verse service, AT&T has not typically built out the entire Cox franchise area, but rather only particular parts of those areas. [37/]

Qwest/CenturyLink. Qwest/CenturyLink provides substantially all of the services and channels that Cox provides, including electronic programming guides and video-on-demand, both through its own wires and in partnership with DirecTV and DISH Network in 33 states.[38/] Qwest/CenturyLink began providing these services at different times in different areas. [39/]

34/ *Id.*

35/ http://www.att-services.net/att-u-verse/availability (last visited August 26, 2011); *see also* Rich Dep. (Ex. 16) at 64:18-68:13.

36/ Rich Dep. (Ex. 16) at 63:11-68:17.

37/ Rich Dep. (Ex. 16) at 64:18- 68:13.

38/ *See* CenturyLink, Annual Report (Form 10-K), at 9-11 (Mar. 1, 2010).

39/ *See* http://news.centurylink.com/index.php?s=43&year=2011&category=AAB078 (last visited August 26, 2011).

EATEL. EATEL provides virtually all the same services as Cox, including electronic programming guides and video-on-demand, in Baton Rouge, Louisiana, and has competed with Cox there since at least 2005.[40/] Cox and EATEL are both available to approximately [redacted] customers in the Baton Rouge, Louisiana area.[41/]

Wide Open West. Wide Open West provides virtually all the same services as Cox, including electronic programming guides and video-on-demand, in parts of Illinois, Michigan, Ohio and Indiana.[42/] Wide Open West began providing these services at different times in different areas.[43/] Notably, in the places that it has built out service, such as in Cleveland where it competes with Cox,[44/] Wide Open West has not typically built out the entire Cox franchise area, but rather only particular parts of those areas.[45/]

LUS Fiber/ Lafeyette Utility Services. LUS Fiber is a division of Lafayette Utility Services ("LUS"), operating in Lafayette, Louisiana.[46/] LUS Fiber provides virtually all the same services as Cox, including electronic programming guides and video-on-demand.[47/] Cox and LUS Fiber/LUS compete head-to-head in Lafayette.[48/]

40/ Rich Dep. (Ex. 16) at 33:7-34:5 and 35:9-36:22.

41/ Rich Dep. (Ex. 16) at 34:24-35:1.

42/ http://www.wowway.com (last visited August 26, 2011).

43/ http://www.wowway.com/comingsoon (last visited August 26, 2011).

44/ Rich Dep. (Ex. 16) at 38:9-38:11.

45/ Rich Dep. (Ex. 16) at 40:12- 40:18.

46/ http://www.lusfiber.com/index.php/about-lus-fiber/lus (last visited August 26, 2011).

47/ http://www.lusfiber.com (last visited August 26, 2011); *see also* Rich Dep. (Ex. 16) at 92: 9 -94:7.

48/ Rich Dep. (Ex. 16) at 93:12-19.

DISH Network. DISH Network is available in all 50 states, as well as Washington D.C. and Puerto Rico. It has provided pay-per-view since the 1990s and started providing video-on-demand in March 2005.[49] DISH Network provides virtually the same services as Cox, including electronic programming guides and video-on-demand, across Cox's entire footprint.[50]

DirecTV. DirecTV is the nation's largest DBS provider and second largest MVPD.[51] It has provided either pay-per-view or video-on-demand for the entire class period, introducing pay-per-view in the 1990s and video-on-demand in 2008.[52] Like DISH Network, DirecTV is available in all 50 states, as well as Washington, D.C.[53] DirecTV provides virtually the same services as Cox, including electronic programming guides and VOD, across Cox's entire footprint.[54] While Cox and DBS companies such

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49/ http://press.dishnetwork.com/Press-Center/News-from-DISH/page/DISH-Network-Introduces-Video-On-Demand-At-Consume (last visited August 26, 2011).

50/ Rich Dep. (Ex. 16) at 26:3-14.

51/ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, MB Docket No. 06-189, FCC 07-206 (rel. Jan. 16, 2009) ("*Thirteenth Annual Video Competition Report*") (excerpt attached hereto as Ex. 17) at ¶ 76.

52/ http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=318983 (last visited August 26, 2011); *see also* Rich Dep. (Ex. 16) at 32:16-33:4.

53/ http://support.directv.com/app/answers/detail/a_id/1921/related/1 ("DIRECTV programming is available nationwide.") (last visited August 26, 2011).

54/ Rich Dep. (Ex. 16) at 26:3-14.

as DISH Network and DirecTV compete across Cox's divisions, the availability of DBS can vary due to physical limitations.[55/]

2. Non-MVPD Competitors

Others compete with Cox for less than the entire suite of MVPD services. For example, TiVO and Moxi make set top boxes, electronic programming guides, and video-on-demand interfaces that compete with Cox's set top boxes, electronic programming guides, and video-on-demand interfaces.[56/] Netflix and Amazon compete with Cox to provide video programming, and are particularly close substitutes for Cox's video-on-demand products.[57/] In fact, five of the 14 named Plaintiffs in the instant action have

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55/ *See* U.S. Gen. Accounting Office, Telecommunications: Direct Broadcast Satellite Subscribership has Grown Rapidly, but Varies across Different Types of Markets, GAO-05-257, 13-14 (Apr. 2005), available at http://www.gao.gov/new.items/d05257.pdf (last visited August 26, 2011).

56/ *See* Deposition of Steven M. Watkins ("Watkins Dep.") (excerpts attached hereto as Ex. 18) at 25:6-36:14.

57/ *See* Deposition of Stephen Necessary ("Necessary Dep.") (excerpts attached hereto as Ex.19) at 69:1-25 ([redacted]); 92:8-18; 100:15-102:10; Deposition of James Kelso ("Kelso Dep.") (excerpts attached hereto as Ex. 20) at 77:9-10 ([redacted]), 126: 24-25 ([redacted]); Deposition of David Pugliese ("Pugliese Dep.") (excerpts attached hereto as Ex. 21) at 45:20-47:9 ("[redacted]"); Declaration of Hal J. Singer, *In the Matter of Applications for Consent to Transfer the Control Licenses of General Electric Company to Comcast Corp.* ("Singer Comcast/NBC Report") (attached hereto as Ex. 22) ("As more network programming and movies are being made available online, software and hardware have developed to take that content from the computer screen to the television, making online delivery of video content an even closer substitute for cable's video distribution service.") at p. 73 ¶ 115-75, ¶ 117.

subscriptions to Netflix and use the service regularly for content.[58/] Traditional brick-and-mortar providers of video rentals, like Blockbuster and Red Box, and even movie theaters, have traditionally been considered by the FCC as competitors to cable video offerings. The FCC considers these products to be substitutable with cable service and with similar products provided by the satellite carriers DirecTV and DISH Network/EchoStar and with other forms of video rental, such as VHS tapes and DVDs obtained in stores, via delivery services like Netflix, or via the Internet.[59/] Named Plaintiffs John and Elizabeth Brady confirm this to be true, as they canceled their Cox service in favor of relying solely upon online services and DVD rentals.

C. A Brief Recap of Set-Top Box Development

As set forth in detail in Cox's motion to dismiss,[60/] until 2007, cable set-top boxes were typically manufactured with "integrated" security, meaning that the technology required to un-encrypt a scrambled signal was hard-wired in to the box. Pursuant to FCC rules, Cable operators like Cox began offering that security technology on a separate device—a CableCard—to customers in 2004. A CableCard allows a cable subscriber to purchase their own set-top box or other CableCARD-enabled device (such as a TV) at a retail store and use it to receive the basic and digital tiers of their Cox service.

58/ *See* Responses of Plaintiffs Bradley Gelder, John Joseph Brady, Elizabeth Brady, Bobby Bowick, and Toni Becnel to Cox Communications, Inc.'s Interrog. No. 9 (attached hereto as Ex. 4).

59/ *See* Thirteenth Annual Video Competition Report (Ex. 17) at ¶¶ 164-67.

60/ Mem. of Law in Supp. of Defs. Mot. to Dismiss First Am. Consolidated Class Action Compl. (Dkt. No. 21) at 6-12.

In July of 2007, the FCC imposed the "integration ban" on cable companies, which requires that the cable companies themselves stop purchasing integrated set-top boxes and instead purchase only set-top boxes that have CableCARD slots, and then separately purchase CableCARDs to go into those slots.[61/] The FCC's requirement that Cox purchase only set-top boxes with CableCARD slots, and that Cox insert a separate CableCARD into every set-top box that it purchases, adds at least $56 to the cost of each set-top box.[62/] Cox has not taken any steps, either contractual or otherwise, to keep set-top box manufacturers from selling boxes directly to the public.[63/]

61/ *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Second Report and Order, 20 FCC Rcd. 6794, 6810 ¶¶ 11, 31 (2005) (attached hereto as Ex. 23); Necessary Dep. (Ex. 19) at 31:5- 32:4 ([redacted]).

62/ *See, e.g., James Cable, LLC/RCN Corporation/WideOpen West Finance, LLC*, Memorandum Opinion and Order, 23 FCC Rcd 10592, n.30 (2008) (attached hereto as Ex. 24); *see also* Kelso Dep. (Ex. 20) at 149:20-151:18.

63/ Watkins Dep. (Ex. 18) at 60: 2-13 (stating that [redacted]).

ARGUMENT

I. THE STANDARDS FOR THE PLAINTIFFS' TYING CLAIM

The Plaintiffs' burden on summary judgment or at trial will be to demonstrate, based on the evidence in the near-complete record, that: (1) two separate products or services are involved; (2) the sale or agreement to sell one product or service is coerced or conditioned on the purchase of another; (3) the seller has sufficient power in the tying product market to enable it to restrain trade in the tied product market; and (4) a not insubstantial amount of interstate commerce in the tied product is affected. *See, e.g., Sports Racing Svcs. Inc. v. Sports Car Club of Am.,* 131 F.3d 874, 886 (10th Cir. 1997). The Plaintiffs' burden in this motion on class certification is to show that the evidence in this record in this case will allow them to prove each of those elements with evidence that is the same for each purported class member. *Wal-Mart*, 131 S. Ct. at 2551.

"[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works Inc. v. Indep. Ink, Inc.,* 547 U.S. 28, 46 (2006). Market power can only be examined by reference to a properly defined product market and a properly defined geographic market. *See Image Technical Servs., Inc. v. Eastman Kodak Co.,* 125 F.3d 1195, 1202-1203 (9th Cir. 1997). And even within a properly defined market, market power cannot be proven through mere reference to market shares – even high market shares. *Reazin v. Blue Cross Blue Shield of Kansas, Inc.*, 899 F.2d 951, 967-968 (10th Cir. 1990) (holding that market share is not proof of market power on its own).

II. THE FACTS UNDERLYING PLAINTIFFS' CLAIMS PRECLUDE CLASS CERTIFICATION IN THIS CASE.

A. The Court's Rigorous Analysis Must be Based on the Facts of this Case Rather Than the Allegations in the Complaint.

The Plaintiffs seek certification of a nationwide class pursuant to Rules 23(a) and (b)(3). Pls. Mem. at 26-27. As the Supreme Court recently emphasized, "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc . . . ." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original); *see also Shook I*, 386 F.3d at 968; *Vallario v. Vandehey*, 554 F.3d 1259, 1269 (10th Cir. 2009) ("In every case, the district court must conduct a careful certification inquiry to ensure the requirements of Rule 23 are met.").

Plaintiffs cite *Shook I* for the proposition that a court may not "evaluate the strength of a cause of action at the class certification stage," Pls. Mem. at 8, but that quotation does not mean that a district court should avoid facts that are relevant to the issue of class certification just because those facts also bear on the merits of plaintiffs' claims. The opposite is true, as the Supreme Court and the Tenth Circuit have held. Indeed, the Plaintiffs argue that the Rule 23 standard is akin to the accept-all-as-true approach of Rule 12(b)(6), but Rule 23 requires much more than that. As the Seventh Circuit explained in *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001), "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has

nothing to recommend it." The Supreme Court in *Wal-Mart* removed any doubt on this point, 131 S. Ct. at 2551, and any reported decisions prior to June 20, 2011 that are inconsistent with *Wal-Mart* may no longer be relied upon in this case.

Plaintiffs incredibly suggest that, because their claims arise under the antitrust laws, the Court should be more lenient in its application of the requirements of Rule 23. Pls. Mem. at 8. But in an antitrust case as with any other case, a district court may not certify a class without ruling that each Rule 23 requirement is met, even if a requirement overlaps with a merits issue. The sources that the Plaintiffs cite for the proposition that antitrust cases are particularly well-suited for class actions, *see* Pls. Mem. at 11, to the extent that they actually say that, do not apply to "practical effect" tying cases like this one. The section of *Newberg on Class Actions* that Plaintiffs cite explains this difference, distinguishing simpler questions—*e.g.*, whether the CEO of one company agreed with the CEO of another company to fix prices—from more novel or complex cases like this one.[64/] None of the sources cited by Plaintiffs discussed a "practical effects" tying claim, where one of the key elements is an individualized coercion determination that cannot typically be performed on a class-wide basis. *See infra* section II.B.

64/ The relevance of that distinction can be seen in the Third Circuit's recent decision in *Behrend v. Comcast*, No. 10-2865 (3d Cir. August 23, 2011). In that case, the district court certified a class of Comcast cable subscribers in the Philadelphia DMA on the basis that Comcast's alleged conduct—attempted monopolization of the Philadelphia DMA—could be shown with respect to all class members on the claim that "Comcast deter[red] entry of overbuilders into the Philadelphia DMA." Slip op. at 27. That was a much different claim, pursued on a much smaller scale, than the "practical effects" tying claim in this case that requires different market power analyses in different markets and that requires individualized proof of coercion.

Plaintiffs also assert that if their motion "presents a close call, [the Court] should certify the class." Pls. Mem. at 8. Not only are the cases Plaintiffs cite in support of this proposition inapposite, but this argument was put to rest by the Supreme Court in *Wal-Mart*. The Supreme Court held that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" and therefore a class cannot be certified if it would limit a defendant's ability to litigate its individualized defenses. *Wal-Mart*, 131 S. Ct. at 2561 (internal citations omitted). If there ever was precedent for a presumption in favor of class certification in a close call, *Wal-Mart* invalidates that precedent and requires that a tie go to the defendant whose Due Process rights could be violated by that presumption.

B. Plaintiffs' Tying Allegation Requires Individualized Proof of Coercion, and Therefore Class Certification Is Improper.

The Tenth Circuit held in *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249 (10th Cir. 2006) that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to *force* the buyer into the purchase of the tied product." *Abraham*, 461 F.3d at 1265 (quoting *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2, 12 (1984)) (emphasis added). A written contract that requires the purchase of the tied product in an express term is the standard evidence of coercion in a tying case. *See, e.g., N. Pac. Ry. Co.*, 356 U.S. at 7 (1958) (addressing contractual requirement tying land sales or leases to railroad shipping services); *see also Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1142-1143 (10th Cir. 1997)

(discussing tying claim as necessarily involving an "express term" in a contract in order to meet the "combination" and "contract" requirements in Sherman Act § 1).

Class certification is rarely appropriate in "practical effect" tying cases such as this one because the required element of "forcing" or "coercion" or "conditioning" (or whatever else one calls it) typically cannot be shown with common evidence. As the court in *Young v. Lehigh Corp.*, 1989 WL 117960 (N.D. Ill. Sept. 28, 1989) explained, "[I]n antitrust tying cases the main obstacle to class certification normally is the 'predominance' requirement. In other words, the named representative often has difficulty proving that the issues of two separate products, conditioning, 'coercion' (in whatever context), and market power are amenable to class-wide determination." 1989 WL 117960, at *16. Similarly, the court in *Chmieleski v. City Prods. Corp.* 71 F.R.D. 118, 174 (W.D. Mo. 1976), concluded that

> Unless the class proof of the tying arrangement is to be made entirely by the introduction of evidence which pertains to the entire class, as for example, when the *only* evidence of the tying arrangement or agreement consists of the terms of a standard written document which has been entered into between each of the class members and the defendants, the presence of the individual issues will in most circumstances defeat the motion to proceed under Rule 23.

See also Ungar, 531 F.2d at 1224-1226 (holding that, absent a contractual provision forcing the purchase of the tied product, the coercion element of a tying claim will not typically be amenable to class certification); *Response of Carolina, Inc. v. Leasco Response, Inc.,* 537 F.2d 1307, 1327 (5th Cir. 1976) ("in order to establish an illegal tie, it is not enough to show that the seller has sufficient economic power and that two products were purchased together. In addition, it must be shown that the purchaser was

coerced into purchasing an unwanted product."); *Chase Parkway Garage, Inc. v. Subaru of New England, Inc.*, 94 F.R.D. 330 (D. Mass. 1982) (denying class certification where "each plaintiff will be required to present individual proof of coercion in order to establish the existence of an illegal tie, common questions will not predominate and the requirements of Rule 23(b)(3) will not be met by these plaintiffs"); *Daniels v. Amerco*, 1983 WL 1794, at *1 (W.D.N.Y. March 10, 1983) ("any attempts to show coercion will require individualized proof") (citing *Nat'l Auto Brokers Corp. v. Gen. Motors Corp.* 60 F.R.D. 476 (S.D.N.Y. 1973) ("Class action treatment has been denied where there are substantial individual issues about coercion of individual members of the class and about other matters affecting fact of injury and quantum of damages, not susceptible to some generally applicable proof.")).

The District Court's analysis in *Freeland v. AT&T Corp. et al.*, 238 F.R.D. 130 (S.D.N.Y. 2006) provides a directly on-point application of this problem to very similar facts. In *Freeland,* wireless phone purchasers brought an antitrust tying claim against AT&T, Sprint, T-Mobile, and Verizon. The plaintiffs alleged that the wireless carriers had unlawfully tied the sale of wireless phone service to the sale of wireless telephone handsets through practical means. *Freeland*, 238 F.R.D. at 136.

The *Freeland* court first noted that "[E]vidence of aggressive salesmanship . . . will not suffice to establish" coercion, and while an "unremitting policy of tie-in" can constitute coercion, that "unremitting policy" can be shown by an admission by the defendant of conditioned sales or a written contract requiring the tie. *Id.* at 154-155. Without such an admission or written contract, the *Freeland* plaintiffs sought to prove

coercion by implication, much as the Plaintiffs in this case do. For example, the plaintiffs in *Freeland* offered the following three "types of evidence": (1) "an admission from Sprint . . . that it has never activated a different provider's handset on its network and that no other provider has activated a Sprint handset on its own network;" (2) "concessions by all defendants that they do not offer a 'service-only' plan;" and, (3) "statistics indicating that nearly 100% of customers who purchase service plans also purchase handsets from the same defendant." *Id.* The court found that "[t]his evidence does not establish that coercion could be proven on a classwide basis." *Id.*

The court dismissed each proffer in turn. First, it held that the fact that Sprint would not activate another wireless carrier's handset on its network did not mean that Sprint customers were forced to purchase handsets from Sprint. *Id.*

Second, the court found that the fact that the defendants do not offer "service-only" plans "does not mean that they all refuse to sell only wireless service to a prospective customer. Rather, the defendants admit that they charge the same price for the service plan regardless of whether the customer buys a handset at the same time." *Id.* And the fact that the carriers offered discounts on phones when purchased in a bundle with service "does not constitute actual coercion in which consumers are forced to purchase their handsets from their service providers. The practice of subsidization is a silent condition and does not show that all consumers reasonably understood that handsets may not be obtained elsewhere." *Id.* at n.20.

Third, the court held, "'proof that a high percentage of . . . customers have purchased the allegedly tied product from a defendant in a tying suit is 'insufficient,

standing alone, to demonstrate coercion.'" *Id.* (quoting *Petrolera Caribe, Inc. v. Avis Rental Car Corp.,* 735 F.2d 636, 638 (1st Cir. 1984), and citing *Ungar,* 531 F.2d at 1225 n.14). As the *Ungar* court wrote in this context, "Establishing that buyers purchase products A and B from the seller does not establish that the seller ties the sale of product A to the purchase of product B. It merely establishes that buyers purchase products A and B from the seller." 531 F.2d at 1225. Similarly, the *Freeland* court held that "'buyers often find package sales attractive,' and these statistics simply cannot establish that any particular member of the putative class (or even any member at all) was an 'unwilling purchaser' of a handset or that a defendant made the purchase of a handset a condition for that member's purchase of wireless service." *Id.* at 155-156.

Plaintiffs do not establish that this is the unusual tying case where certification is appropriate despite the absence of a contractual tie. Plaintiffs assert only that they will prove Cox's "conditioning" of the purchase of Premium Cable on the lease of a set-top box through conclusory evidence that purportedly shows Cox's "public announcements" of the tie, and its "practical effects." Pls. Mem. at 22-24. But there is no evidence that any particular class members viewed the alleged "public announcements" that appeared in fine print on the Cox website and rate card or perceived the same "practical effects" of the supposed tie. The only way to know is to take discovery from each alleged class member.

Cox does not require subscribers to sign a contract that forced them to rent set-top boxes; to the contrary, Cox informs its customers that they <u>are not required</u> to rent a set-

top box from Cox.[65/] Cox's policy is that consumers may use set-top boxes acquired from third parties, and Cox will provide those consumers with all available Cox services, including video-on-demand, Cox's electronic programming guide, pay-per-view, switched digital video, and all other services.[66/]

Plaintiffs' tying allegation will turn on subscriber-by-subscriber proof of coercion. Proof of coercion, in turn, will depend upon each individual plaintiff's competitive choices, his or her viewing inclinations, and his or her interactions with Cox. Therefore, the element of coercion cannot be proven on a class-wide basis, and class certification in this matter would be improper.

C. Competitive Choices Faced by Consumers Depend on When the Individual Class Member was a Cox Subscriber and Where He or She Lived at the Time.

Both the market power element and the coercion element of Plaintiffs' tying claim will require them to prove that each individual class member was unable to purchase video services or set-top boxes from some other seller, such as AT&T, CenturyLink, DirecTV, TiVO, or Netflix (and many others). Because each compete with Cox for some subscribers but not for others, and because different Cox subscribers have different competitive choices, the Plaintiffs will not be able to prove either the market power

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65/ *See* Annual Customer Notice 2011 (CCISTB295511-295513) (attached hereto as Ex. 25); *see also* Channel Lineup and Pricing Guide, Sun Valley, Ketchum, Hailey, Bellevue (CCISTB292320-292321) (attached hereto as Ex. 26).

66/ *See* Deposition of Craig Smithpeters ("Smithpeters Dep.") (excerpts attached hereto as Ex. 27) at 285:13- 286:1 (stating [redacted]).

element or the coercion element of their tying claim with evidence common to the purported class.

Despite Dr. Singer's legal argument to the contrary,[67] a market power analysis can only be performed in the context of an appropriately defined relevant geographic market, the bounds of which are determined by where a consumer can turn for substitutes. *See U.S. v. Philadelphia Nat'l. Bank,* 374 U.S. 321, 356 (1963); *see also Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1026-27 (10th Cir. 2002) (The relevant geographic market is "the narrowest market which is wide enough so that products from adjacent areas cannot compete on substantial parity with those included in the market.") (citing *Westman Comm'n Co. v. Hobart Int'l, Inc.,* 796 F.2d 1216, 1222 (10th Cir.1986), *cert. denied,* 486 U.S. 1005 (1988)).

A proposed class cannot be certified if it combines different relevant geographic markets with differing competitive conditions. *See, e.g., Cash v. Arctic Circle, Inc.*, 85 F.R.D. 618, 622 (E.D. Wash. 1979) (in a tying case, certification denied because "important matters regarding economic power and the fact of damage will revolve around facts peculiar to a number of different geographic regions"); *see also Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 154 (N.D. Cal. 1991) (holding that the differences between the market for macadamia nuts in Hawaii and in other markets

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67/ *See* Singer Report (attached to Pls. Mem. at Ex. 13) at p. 96, n. 281 (citing cases). As discussed in section III below, even if Dr. Singer's legal argument were correct, he does not provide common evidence of market power across the purported class.

required an individualized analysis and was one of the factors defeating plaintiffs' request for a national class).

For cable television markets such as those at issue here, the FCC has found repeatedly that the relevant geographic markets are *local* markets because these services are received in the home, and a consumer cannot reasonably be expected to move the physical location of her home based on her choice of video service providers.[68/] This is also the analysis of the Antitrust Division of the U.S. Department of Justice,[69/] and has been adopted in a nearly identical set-top box tying case.[70/]

The Plaintiffs' expert in this case, Dr. Singer, testified under oath to the FCC last year (for a different client) that the appropriate geographic market for analyzing the anticompetitive effects of cable provider conduct is local. Specifically, he testified that the appropriate geographic markets for cable services are the 210 individual Nielsen

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68/ *See, e.g., In the Matter of Adelphia Communications and Time Warner Cable*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 64 (2006) (excerpts attached hereto as Ex. 28) ("the Commission has concluded that the relevant geographic market for MVPD services is local because consumers make decisions based on the MVPD choices available to them at their residences and are unlikely to change residences to avoid a small but significant increase in the price of MVPD service").

69/ In its January 18, 2011 Competitive Impact Statement in *United States v. Comcast Corp., et al.* Docket No. 1:11-cv-00106, at 13 (D.D.C., filed January 18, 2011) (attached hereto as Ex. 29), the Department of Justice explained its view on this matter unequivocally. It stated that "A consumer cannot purchase video programming distribution services from a wireline distributor operating outside its area because that firm does not have the facilities to reach the consumer's home. . . The markets for video programming distribution therefore are local."

70/ *See, e.g., In re Set-Top Cable Television Box Antitrust Litig.*, Slip Copy, 2011 WL 1432036, at *13-14 (S.D.N.Y. April 8, 2011) (dismissing for failure to plausibly allege market power in local geographic markets).

Designated Market Areas ("DMAs")[71/] that the FCC uses to define local television viewing markets. *See* Declaration of Hal J. Singer, *In the Matter of Consent to Transfer the Control License of General Electric Company to Comcast Corp.* ("Singer Comcast/NBC Report") (Ex. 22) at ¶¶ 52-54. He also provided testimony in a recent class action that defined the relevant cable television market at the DMA level, which definition the Third Circuit adopted as an appropriate geographic market for cable services.[72/]

Nevertheless, Plaintiffs argue for a nationwide class covering a single nationwide geographic market based solely upon the Supreme Court's holding in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), a case that did not involve class certification at all, but dealt with the question of the monopoly power of a burglar and fire alarm supplier. The defendant in that case dominated 87% of a nationwide market, *Grinnell,* 384 U.S. at 567, utilized national agreements, had a "national schedule of prices, rates and terms, though the rates may be varied to meet local conditions," followed rate-making, inspection, and certification by national insurers, and made nationwide contracts with large business customers. *Id.* at 575. There were no comparable substitutes nationally or locally. *Id.* at 574. In that context, the Court held that the relevant geographic market was a national one. *Id.* at 576.

This same attempted use of *Grinnell* to meet a plaintiff's burden of demonstrating common proof under Rule 23 was squarely rejected in an analogous situation. In

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71/ DMAs generally correspond to metropolitan areas, such as New York or Tampa-St. Petersburg or Minneapolis-St. Paul. *See, e.g.,* 2010-2011 Nielsen Media DMA Local Television Market Universe Estimates (attached hereto as Ex. 30).

72/ *Behrend v. Comcast*, No. 10-2865, at 23-24; 32 (3d Cir. August 23, 2011).

Heerwagen, 435 F.3d at 219, the Second Circuit rejected the allegation of a nationwide class across a national geographic market for the sale of concert tickets. In that case, as here, the plaintiff "insisted" that "she can prove her claims with *direct evidence* of market power that is not dependent on reference to a specific geographic market." *Id.* at 229 (emphasis added); *see also* Pls. Mem. at 31-32 (arguing that the Plaintiffs can avoid a full market power analysis by showing "direct proof" that Cox raised prices). Also in that case, as here, the plaintiff alleged that, because Clear Channel was itself a nationwide company that engaged in "nationwide conduct," the proper geographic market was national, not local. *Heerwagen*, 435 F.3d at 229-230 (summarizing plaintiff's argument that "Clear Channel's national course of alleged anticompetitive conduct alone is sufficient to render the relevant market national."); *see also* Pls. Mem. at 27-30 (arguing that the proper geographic market is nationwide because Cox makes decisions, and sets some policies and standards, from its headquarters in Atlanta).

The Second Circuit rejected these arguments, holding that a plaintiff cannot simply assert that a defendant controls prices or harms competition, or that the defendant is itself a national company, and thereby avoid the requirement of analyzing market power in an appropriately defined geographic market. *Heerwagen*, 435 F.3d at 229. And in a case where concert ticket purchasers do not view concerts in other cities as substitutes for concerts where they live, the Second Circuit held that a nationwide class could not be certified because different plaintiffs live in different geographic markets with different competitive options. *Id.*

As in this case, the plaintiff in *Heerwagen* "argue[d] that her case is similar to Grinnell" because "although Clear Channel provides a local product, in the sense that only those people in a particular region are likely to buy tickets to concerts in that region, the relevant market for analysis of its monopoly power should be national because Clear Channel operates and sets prices nationally." *Id.* at 230. The Second Circuit held that, even if it were true that Clear Channel conducts business and sets prices nationally, that fact does not resolve the essential question of what other sellers of tickets were available to a given plaintiff, which is a local question. *Id.* ("Local markets for tickets sales are not transformed into a national market simply because concert tours are coordinated nationally.").

The result here should be the same as in *Heerwagen*. The market for video services is similar to the market for concert tickets—competitive options that exist in other parts of the country are not reasonable substitutes for consumers in a particular area. And as with the concert ticket buyers in *Heerwagen*, the analysis of whether or not Cox has market power with respect to a particular product in a particular area is an individualized inquiry, and does not depend on whether or not some decisions are made at Cox headquarters in Atlanta.[73/]

[73/] *See also Lantec*, 306 F.3d at 1027 (explaining that the relevant geographic market is based on factors showing where consumers can actually turn to make substitute purchases, not on where the defendant sells its services); *Burkhalter Travel Agency*, 141 F.R.D. at 154 (when a case presents a "diversity of markets, it can hardly be said that common issues predominate"); *Cash*, 85 F.R.D. at 622 (in tying case, certification denied because "important matters regarding economic power and the fact of damage will revolve around facts peculiar to a number of different geographic regions"); *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 448-49 (M.D. Ga. 1975) (denying certification in

In *In re Set-Top Cable Television Box Antitrust Litig.*, Slip Copy, 2011 WL 1432036 (S.D.N.Y., April 8, 2011), a case similar to this one, the court applied this same geographic market analysis to Plaintiffs' alleged "Premium Cable" product definition. The court noted that, while the plaintiffs had at least alleged in their complaint that the relevant geographic markets were local, the "plaintiffs' allegations about market power treat the relevant geographic market as a national, uniform one, and do not account for local variations in the market for Premium Cable Services." *Id.* at *13. This deficiency was fatal, the court found, because the competitive conditions that a consumer faces in Dallas, Texas will be different than those faced by a consumer in Lincoln, Nebraska, and both of those sets of conditions will be different than what consumers experience in yet other parts of the country. *Id.* at *14.

The market share statistics that Plaintiffs propose, Pls. Mem. at 33, divorced from a properly defined geographic market and inaccurate as they are,[74/] do not meet their burden of demonstrating common evidence on any element of their tying claim. "Market share is relevant to the determination of the existence of market or monopoly power, but market share alone is insufficient to establish market power." *Reazin*, 899 F.2d at 967-

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tying case because plaintiff had not, among other things, established whether there were available alternatives, which was a necessary step in determining whether the defendant possessed market power over the tying product as to each customer).

74/ The "market share" percentages that Plaintiffs cite, and that Dr. Singer lists on page 108 of his Report, are not shares of any properly defined antitrust geographic market, but rather are derived from percentages of Cox subscribers who take some level of digital service in each of Cox's separate *business units*, which business units can each cover thousands of square miles and are aligned for reasons of corporate efficiency, not by consumer purchasing patterns. They are not antitrust geographic markets, so those numbers are not market shares.

968 (internal quotation marks omitted). Indeed, in a market power analysis, the on-the-ground market factors that actually face consumers in a particular geographic market are the essential building blocks of a market power analysis. *See, e.g., Lantec*, 306 F.3d at 1027-1028 (finding that plaintiffs had failed to provide evidence such as prices in various areas, consumer preferences, and the location of competitors in support of their geographic market allegations). And again, in this case, that on-the-ground analysis must be performed with regard to the particular sets of competitive options faced by consumers in particular markets.

Plaintiffs cite *Col. Interstate Gas Co. v. Natural Gas Pipeline of Am.*, 885 F.2d 683 (10th Cir. 1989) for the proposition that "41% market share typically indicates that a firm has substantial economic power in the market." But the Tenth Circuit in that case actually held that the 41% share was *not* sufficient to prove the plaintiffs' claim,[75/] and warned that "market share statistics sometimes overestimate a firm's market power," which include the presence or entry of "known competitors," the history of pricing in the market, and the persistency of the alleged market power. *Id.* at 695-697. Even if a market share statistic on its own were sufficient to demonstrate market power, as Dr. Burtis explains, the market shares for the Cox DMAs that Dr. Singer chose not to list in

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75/ *Id.* at 694 (citing *Indiana Grocery, Inc., v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989) (50% market share insufficient to show dangerous probability of successful monopolization); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 827 (6th Cir.1982) ("the real test is whether [the defendant] possessed sufficient market power to achieve its aims"); *United States v. Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir.1976), *cert. denied*, 429 U.S. 1122, 97 S. Ct. 1158, 51 L.Ed.2d 572 (1977) (50% market share insufficient to show dangerous probability of successful monopolization)).

his report show that Cox's market share varies widely from DMA to DMA, and its market share as Dr. Singer calculates it is [redacted].[76/]

Finally, we note that there is no way for the Court to identify on its own any sub-classes based on local markets. The Plaintiffs have moved only for certification of a nationwide class. Pls. Mem. at 26-27 and 31. While they ask in a footnote that they be granted leave to go find new purported class representatives in those "Cox local markets" that are currently unrepresented in this case should the Court certify "numerous subclasses that correspond to each of Cox's local markets," Pls. Mem. at 31 n.9, the Plaintiffs have not moved for certification of any such subclasses, and there is no basis for the Court to do so. The Plaintiffs have not provided any evidence that the local business units into which Cox has organized its operations,[77/] or Cox's local franchises,[78/] are appropriate antitrust geographic markets—they have provided no discussion of those issues at all. The Court should not take their off-handed suggestion as its chore.

[76/] *See* Supplemental Report of Michelle Burtis ("Burtis Suppl. Report") at ¶ 25 and Table 2 (attached hereto as Ex. 31).

[77/] [redacted] *See* Deposition of Dallas Clement ("Clement Dep.") (excerpts attached hereto as Ex. 32) at 101:6-20.

[78/] The boundaries of Cox's local franchises have changed over time as various states have abolished city and county franchises in favor of state-wide franchises. For example, the State of California abolished local cable franchising in October of 2006 in favor if a single state-wide franchising regime. http://www.cpuc.ca.gov/PUC/Telco/Information+for+providing+service/videofranchising.htm (last visited Aug. 26, 2011). The State of Connecticut did the same in October of 2007 with the passage of Public Act No. 07-253, *codified at* Conn. Gen. Stat. § 16-331e *et seq*. Many other states in which Cox operates have done the same throughout the class period.

D. Purported Class Members Purchased Different Alleged Tying Products and Different Alleged Tied Products, and the Antitrust Analysis for Each Possible Combination is Different.

A court's analysis of a product market allegation must focus upon real-world consumers and their actual views on interchangeability. *Telecor Comm'n Inc. v. Sw. Bell Tel. Co.*, 305 F.3d 1124, 1147 (10th Cir. 2002) ("[T]he relevant product market must be defined by interchangeability of products from the perspective of consumers."). Plaintiffs' basic flaw is that they ignore the consumer's perspective on interchangeability altogether. The disconnect between Plaintiffs' moving-target tying product definition and the testimony of the 14 actual Plaintiffs is telling.

The Plaintiffs call their alleged tying product market "Premium Cable," which Plaintiffs and their expert have defined at one point or another as everything from two-way services that you cannot get without a set-top box, *see, e.g.,* Complaint at ¶ 34, to just plain digital cable (*see, e.g.,* Singer Report at ¶ 98). The Declaration from Dr. Singer that Plaintiffs attached to their class certification motion is noteworthy because it is the first time that they have alleged that "Premium Cable" now expressly includes the basic tiers of cable service.[79/]

The alleged tied product in this case is set-top boxes. As described above, Cox rents multiple different types of set-top boxes, each of which performs a different set of operations and each of which is priced differently from the other (and all of which are priced differently in different areas).

79/ Supplemental Declaration of Hal Singer ("Singer Suppl. Decl."), attached to Pls. Mem., at ¶ 6 ([redacted]).

The questions of product market definition in this case will depend upon both the kind of cable service that a particular subscriber purchased and the particular set-top box or boxes that they chose to rent, the time period in which such service was available to the subscriber, and the substitutes that may have been available to that subscriber for video services, including video-on-demand, electronic programming guides, and set-top boxes at different points in time. This flaw, standing alone, precludes certification of the class.

1. Cox Customers Buy Different Things at Different Prices.

The record in this case is clear that Cox sells many different packages of video service (in addition to telephone service and high speed Internet service) and leases multiple types of set-top boxes, including standard digital boxes, HD boxes, DVR boxes, and HD DVR boxes.[80/] Different consumers in the same place buy different combinations of service and equipment,[81/] and consumers in different places buy different packages altogether due to differences in channel offerings,[82/] differences in the electronic programming guide used in different places, and differences in the types of equipment that can be used in various places, among others.

80/ *See* Burtis Report (Ex. 14) at ¶¶ 48, 49, 55, and Table 6 highlighting the different rates for set-top boxes just among the named Plaintiffs. [redacted]

81/ Burtis Report (Ex. 14) at ¶¶ 49 (Table 5), 50, 54.

82/ *See, e.g.,* Channel Lineups for San Diego (CCISTB130880-130881) and Orange County (CCISTB130831-130833) (Ex. 13).

Some consumers, such as purported class representative Barksdale Hortenstine, have a great interest in a broad variety of movies and programs and watch all sorts of both free and pay video-on-demand and pay-per-view programs.[83/] Others, like purported class representative Sharon Coughlin, have no interest in watching video-on-demand at all, and do not do so.[84/]

Consumers also rent different types of the alleged tied product—set-top boxes—and each different type of set-top box has different features and competitive substitutes. HD set-top boxes do things that "standard" set-top boxes do not; namely, they deliver hundreds of additional HD Channels.[85/] DVR boxes do things that neither standard set-top boxes or HD set-top boxes can do; namely, they can store hundreds of hours of HD content on a hard drive for later viewing, including the ability to fast forward, rewind, pause (including pause live TV), and skip through commercials, among other features.[86/] HD DVR boxes do things that neither a standard set-top box nor an HD set-top box can do; namely, they provide both the DVR features and deliver the HD channels. Because each type of box does something different, Cox charges different prices for each, and

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83/ Hortenstine Dep. (Ex. 2) at 47:15-23; Burtis Report (Ex. 14) at ¶¶ 40, 41.

84/ Coughlin Dep. (Ex. 1) at 19; Burtis Report (Ex. 14) at ¶¶ 40, 41.

85/ Deposition of Michelle Burtis ("Burtis Dep.") (excerpts attached hereto as Ex. 33) at 181:17 – 193:6 (explaining differences between standard, DVR and HD set top boxes); Pugliese Dep. (Ex. 21) at 101:4-11.

86/ Burtis Dep. (Ex. 33) at 181:17 – 193:6 (explaining differences between standard, DVR and HD set top boxes); Pugliese Dep. (Ex. 21) at 101:4-11.

those prices are different in different areas of the country.[87/] And there is no way to separate the Cox customers who rent a set-top box *because they want to* from those who could allegedly have been coerced (if any such people actually exist).[88/]

2. Cox Customers Pay Different Prices for the Same Things.

Because Cox sets prices at different levels for similar products, both for different consumers in the same area and for consumers in different areas, two consumers who purchase similar packages of service and equipment from Cox can pay substantially different prices.[89/] As an example, the price that purported class representative Sharon Coughlin pays for her package in San Diego would differ if she resided in Arizona or New Orleans:

87/ *See, e.g.,* CCISTB133266-133267 (Channel Lineup and Rates Roanoke, charging $5.25 for Advanced TV HD/DVR Receiver) (attached hereto as Ex. 34); CCISTB133061 (Rate Card Fairfax, charging $7.99 for Advanced TV HD/DVR Receiver) (Ex. 15); CCISTB132940-132941(Channel Lineup and Rates West Point, charging $5.50 for Advanced TV HD/DVR Receiver) (Ex. 34).

88/ For example, Plaintiff Henry Holmes switched to Cox from DirecTV, and knows that he could also switch to AT&T, but he chooses Cox because he is satisfied with his service. *See, e.g., Plekowski,* 68 F.R.D. at 449-451 (holding that class certification is not appropriate where some purported class members chose the product willingly based on factors other than the tie, and where a defendant will have defenses that apply to some purported class members but not others).

89/ *See, e.g.,* Cox rate cards for different markets included as Exs. 12, 13, 15, 26, 34.

[redacted]

[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]

Likewise, the price that a consumer in one part of the country will pay to rent a set-top box from Cox will differ from what a consumer in a different part of the country will pay. As Dr. Burtis demonstrates in Figure 4 of her Report (p.45), rates for the same types of boxes vary widely, with a standard set-top box ranging from $6 in Phoenix to $5.25 in Las Vegas, and the price of an HD box ranging from $12 in Phoenix to $7.99 in Northern Virginia to $5.25 in Las Vegas. Other wide price differentials are apparent as well.

These price differentials are not only apparent across Cox systems; consumers who live in the same area also pay different prices for the same services. As Dr. Burtis explains in ¶¶ 59-63, Figure 3, and Exhibit 13 of her Report, using Cox's billing system data for Orange County, California as an example, [redacted].

90/ Burtis Report (Ex. 14) at ¶ 57 (Table 8).

3. The Market Reality is that Consumers Do Not Purchase "Access" to Video Services That They Do Not Use.

In order to avoid the reality that Cox subscribers wish to purchase many different combinations of services from Cox, and that they value different portions of the services that are included in their unique combinations of packages (including consumers who do not value, and do not use, the electronic programming guide or video-on-demand), the Plaintiffs argue that what consumers are really doing when they make these purchasing decisions is buying *the ability* to use these services, whether or not they ever actually use the services. *See* Pls. Mem. at 19-20; *see also* Singer Suppl. Decl., attached to Pls. Mem., at ¶¶5-6 (stating that the tying and tied products are, in fact, certain "inframarginal features" of cable service and set-top boxes).

There is no record evidence in this case that consumers purchase "access" to video-on-demand or electronic programming guides as "inframarginal features," and Plaintiffs cite to none. To the contrary, the record demonstrates that consumers value a wide range of products and services that Cox sells, and that some consumers do and some consumers do not value video-on-demand or the electronic programming guide. The record shows that there is a portion of Cox subscribers who want the digital tiers of programming that Cox provides and that are available with a CableCARD, but who do not want access to video-on-demand or to the electronic programming guide, which are the only products that cannot be received with a CableCARD.[91/]

[91/] Watkins Dep. (Ex. 18) at 107:13-18. [redacted]

The testimony of the named Plaintiffs in this case demonstrates these flaws in the Plaintiffs' alleged market definitions. For example, Plaintiff Sharon Coughlin testified that she does not download movies or shows from Cox's video-on-demand service at all,[92/] so video-on-demand is not within the relevant product that she purchases when viewed, as it must be, from her perspective as a consumer. Not surprisingly, then, Ms. Coughlin also does not purchase movies or shows from Internet providers like Amazon or Netflix.[93/] On the other hand, Plaintiff Barksdale Hortenstine testified that he downloads movies on Cox's video-on-demand so frequently that "I doubt there are many people who purchase them more frequently than me."[94/] As one would expect based on his frequent downloading of movies from his Cox account, Mr. Hortenstine also believes that Netflix is an option for him.[95/] Plaintiffs John and Elizabeth Brady canceled their Cox service altogether and now obtain all their programming content via Netflix, Hulu, and Redbox, making clear that they consider them to be fully interchangeable with all of the elements of their Cox service. [96/]

Different class members in this case purchase varying products from one or more of these product markets, each of which have different sets of competitors. These kinds

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[redacted]. *Id.* at 105:14-106:7, 112-114.

92/ Coughlin Dep. (Ex. 1) at 19.

93/ Coughlin Dep. (Ex. 1) at 25-26.

94/ Hortenstine Dep. (Ex. 2) at 47:15-23.

95/ Hortenstine Dep. (Ex. 2) at 54:23-24.

96/ E. Brady Dep. (Ex. 9) at 39-40; J. Brady Dep. (Ex. 10) at 37-39.

of individualized and fact-specific questions of product market definition often preclude class certification. In *Telecomm Tech. Servs.* 172 F.R.D. at 548, for example, where the plaintiffs alleged an illegal tie between business telephone service and the necessary equipment and software, the court found that "there are *a number of separate relevant product markets for the sale of parts* for [defendant's product]," and the defendant "licenses or sells . . . proprietary software in distinct and separate software relevant markets." *Id.* at 547-48 (emphasis in original). Given that state of affairs, the court denied class certification because "there are going to be highly specialized questions regarding the definition of particular markets." *Id.* at 548; *see also Plekowski,* 68 F.R.D. at 448-49 (denying certification in tying case because plaintiff had not, among other things, established whether there were available alternatives, a necessary step in the tying product market power analysis).

The Plaintiffs' allegations rely heavily on Cox's video-on-demand offering, and in footnote 4 of their Memorandum they state that video-on-demand is one of the three "common denominators for all Premium Cable subscriptions" across the proposed class. But that assertion is factually inaccurate. [redacted]. As Dr. Burtis summarizes in her Report at paragraph 39 and Table 3, [redacted]

[redacted]

Furthermore, even where it has been available, [redacted] *See* Burtis Report (Ex. 14) at ¶¶ 36-38 and Figure 1. That proportion remains accurate even when free on-demand content is included.[97]

Any certification of a class in light of these dissimilarities in the market and consumers' experiences would ignore significant differences in the kinds of proof available to different plaintiffs and defenses available to Cox. Indeed, it is just this kind of variability that the Courts in *Freeland* and *Ungar* determined made the coercion analysis an individualized one, and that the courts in *Heerwagen* and *Telecomm Tech. Servs., Inc.* determined made the market definition and market power analysis an individualized one. This Court should deny these Plaintiffs' request for class certification for the same reasons.

E. Many Purported Class Members Purchase the Alleged Tied Product from Others and Use it With Their Cox "Premium Cable" Service—a Practice That the FCC Requires and that Cox Welcomes.

The Plaintiffs claim that Cox ties the lease of a set-top box from Cox to the sale of certain cable services, but the record in this case makes clear that subscribers are free to obtain set-top boxes from other sources, and in fact do so freely. Cox subscribers are welcome to bring their own set-top box and connect it to the Cox cable system, including

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97/ *See, e.g.,* CCISTBE00515529(On Demand Update for Greater LA, September 13, 2006 - Slide 14 "Percent Unique Users of On Demand") (attached hereto as Ex. 36).

two-way set-top boxes that are fully capable of receiving, and to which Cox would provide, video-on-demand and the electronic programming guide.[98/]

Cox subscribers regularly obtain their own set-top boxes and similar equipment from other sellers, such as TiVO or Moxi or Ceton or Panasonic or any of a number of other manufacturers of CableCARD-enabled set-top boxes, televisions, and other devices, and to use those devices to fully enjoy their Cox cable service.[99/] Many of these subscribers have also leased a set-top box from Cox during the class period, or also rent a set-top box for one or more other televisions in their home, and therefore are within the proposed class. Cox has the right to defend itself against any plaintiff who has ever owned a TiVO or Moxi or any one of these other substitutes for a set-top box on the basis that their purchasing decision proved that Cox lacks market power over them and did not, as a matter of fact, coerce them into renting a set-top box from Cox.[100/] A class cannot be certified with these facts.

98/ *See* Clement Dep. (Ex. 32) at 26:11–19 ("[redacted]"); Clement Dep. (Ex. 32) at 46:6 - 47:1("[redacted]"); Smithpeters Dep. (Ex. 27) at 51:2 - 51:20 (stating [redacted]); Smithpeters Dep. (Ex. 27) at 285:13- 286:1 (stating [redacted]).

99/ *See* Watkins Dep. (Ex. 18) at 151:16-19 ([redacted]).

100/ *See, e.g., Marchese v. Cablevision Sys. Corp.*, 2011 U.S. Dist. LEXIS 80117, *8-9 (D.N.J. July 21, 2011) (holding that coercion could not be shown where the one-way portion of "Premium Cable" was available with a TiVO or a Moxi set-top box).

F. Individual Discovery Will be Required to Determine Whether and to What Extent a Plaintiff's Claim is Barred by Law.

The Federal Communications Act and the FCC's rules regulate the prices that cable operators—including Cox—can charge subscribers for set-top boxes, installation, network upgrades, and the basic tier of video service, among other things.[101/] The "Maximum Permitted Rate" that Cox can charge for a set-top box under the FCC's rules is calculated on FCC Form 1205, and other FCC forms are used to calculate the rates for other services, such as Form 1235 (network upgrades) and Form 1240 (basic cable rates).[102/] Cable operators then submit these forms to the various local franchising authorities that also have concurrent regulatory authority over rates for set-top boxes, other equipment, and rates for approval. 47 C.F.R. §§ 76.933 and 76.910. For example, in Oklahoma City, Cox has over time filed its Form 1205 and related forms with the City of Oklahoma City, which the City has then examined in a public proceeding and approved where applicable via resolution after a public hearing. *See, e.g.,* Oklahoma City 2006 Cox Rate Docket, including Cox Form 1205 (attached hereto as Ex. 35).

Cable rates are not regulated under these rules in every community. "Only the rates of cable systems that are not subject to effective competition may be regulated." 47

101/ *See, e.g.,* 47 U.S.C. § 543(b)(3) (directing the FCC to regulate rates for equipment, including set-top boxes); 47 C.F.R. § 76.923 (establishing complex rules for regulating rates for set-top boxes and other equipment). The rule applies to equipment "used to receive the basic service tier," which in practice means "all equipment" because the Communications Act requires all customers to purchase the basic service tier before purchasing any other service, so all set-top boxes are used to receive the basic service tier. 47 C.F.R. § 76.923(a)(1); 47 U.S.C. § 543(b)(7)(A).

102/ *See* http://www.fcc.gov/forms (last visited August 26, 2011).

C.F.R. § 76.905(a). In this context, "effective competition" is defined community-by-community according to certain thresholds set forth in the FCC's rules. 47 C.F.R. § 76.905(b) - (i). Rates are not regulated in those communities for which the FCC has issued an order finding that the cable operator in that community faces "effective competition."[103/] A comprehensive discussion of cable rate regulation can be found in *Time Warner Entertainment v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

The FCC does not issue effective competition orders for a cable provider's entire national service footprint, for the entire metropolitan area covered by a single cable system, or even in some circumstances for an entire cable franchise. Instead, the FCC makes effective competition determinations on the basis of individual "community unit identifiers," or "CUIDs."[104/] Residents in one part of a metropolitan area—for example, Phoenix—might be subject to a finding of effective competition on one date, but other residents of that same area would not be covered by an effective competition order until years later depending on how the CUIDs are split up and the petitions are handled.[105/]

103/ *Id.*; *see also* City of Laguna Hills, California City Council Regular Meeting Minutes, Feb. 23, 2010 (attached hereto as Ex. 37) at 5-6 (approving Cox's rate regulation filings and discussing continued applicability of rate regulation after Cox had petitioned for effective competition for Laguna Hills but before the FCC had decided the issue).

104/ *See, e.g., In the Matter of CoxCom, Inc. d/b/a Cox Communications Gainesville-Ocala*, 22 FCC Rcd 4041, ¶¶ 5-14 (2007) (discussing what CUIDs usually cover) (attached hereto as Ex. 38).

105/ *See, e.g., In the Matter of CoxCom, Inc. d/b/a Cox Communications Phoenix*, 17 FCC Rcd 22183 (2002) (attached hereto as Ex. 39) (granting effective competition for certain Arizona communities in and around greater Phoenix); *In the Matter of CoxCom, Inc. d/b/a Cox Communications Phoenix*, 25 FCC Rcd 16275 (2010)) (attached hereto as Ex. 40) (same).

The FCC has issued at least 33 separate effective competition orders covering 438 different communities served by Cox on dates that span the class period and in some cases predate the class period.[106/] Other Cox communities are still rate regulated—for example, rates for set-top boxes are still regulated in Bethany, Dell City, and Nichols, Oklahoma, while the FCC found effective competition in Oklahoma City in 2008 and some other Oklahoma communities in 2010.[107/]

Cox has the right to defend itself from a particular plaintiff's claim in this case on the basis that, because its rates for set-top boxes and basic cable services were regulated by the FCC and by that plaintiff's local franchising authority under federal law, there can be no allegation that Cox over-charged him for his set-top box, which is what Plaintiffs allege is the "antitrust impact" in this case and is why they claim to be owed millions of dollars in treble damages.[108/] *See, e.g., Crumley*, 556 F.3d at 879. *Crumley* involved a putative class action in which the plaintiffs alleged that Time Warner Cable overcharged its customers for cable television services, just as the plaintiffs allege in this case. *Id.* at

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106/ *See e.g.,* FCC Effective Competition Orders at Exs. 39, 40, 42, 43; *see also, e.g., In the Matter of CoxCom, Inc. d/b/a Cox Communications Phoenix*, 17 FCC Rcd 17188 (2002); *In the Matter of CoxCom, Inc., Comcast Cable Communications, LLC, Petitions for Determination of Effective Competition in various Arizona, Georgia, and Illinois Communities*, 22 FCC Rcd 10101 (2007); *In the Matter of CoxCom, Inc. d/b/a Cox Communications Tucson*, 22 FCC Rcd 4663 (2007) (attached hereto as Ex. 41).

107/ *See In the Matter of CoxCom, Inc. d/b/a Cox Communications Oklahoma City*, 23 FCC Rcd 5737 (2008) (attached hereto as Ex. 42); *In the Matter of CoxCom, Inc. d/b/a Cox Communications Oklahoma City and Cox Communications Tulsa*, 25 FCC Rcd 4936 (2010) (attached hereto as Ex. 43).

108/ *See* Pls. Mem. at 37-38; *see also* Am. Answer of Def. Cox Communications, Inc. to Plaintiffs' First Am. Consolidated Class Action Compl. at p. 25, Fifth Affirmative Defense (filed Feb. 3, 2010) (Dkt. No. 31).

880. Because the rate that the plaintiffs paid in that case—a network upgrade fee calculated on FCC Form 1235—was filed with the appropriate regulatory authority, the court held that it could not be challenged as an "overcharge," and no part of the rate could be recovered as damages, under the filed rate doctrine which "prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *Id.* at 881 (internal quotation marks omitted). The *Crumley* court's reasoning and application of the filed rate doctrine was adopted by the Tenth Circuit in April of this year, in *Coll*, 642 F.3d at 890 (discussing application of filed rate doctrine).

A class cannot be certified on these facts. *See, e.g., Plekowski,* 68 F.R.D. at 451-452 (where defendant's affirmative defenses apply to different purported class members in different ways, a class cannot be certified). It is no solution to simply declare that residents subject to rate regulation are excluded from the class. There is no way that the Court could ascertain which individual purported class members would need to be excluded, and for what period of time, without conducting thousands of mini-trials to determine where each plaintiff lived and when, and whether they moved in between regulated and non-regulated areas during the class period. *See, e.g., Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 683 (D. Colo. 1997) (discussing Rule 23 requirement that it must be readily ascertainable who is a class member and who is not). That is not what Rule 23 exists to accomplish. And Rule 23 cannot be applied to negate Cox's substantive right to demand such proof from every single purported plaintiff. *See, e.g., Wal-Mart,* 131 S. Ct. at 2561.

III. DR. SINGER'S UNFOUNDED CONCLUSIONS DO NOT SUPPORT CLASS CERTIFICATION.

The Plaintiffs' expert economist Dr. Hal Singer knows how to perform the type of real-world analysis, from the point of view of the consumer, required to define the relevant product and geographic markets for an antitrust inquiry concerning cable television services. That analysis is the essential building block of any subsequent analysis of market power, coercion, antitrust injury, or damages.

Through an interchangeability analysis, Dr. Singer has previously (but not in this case) defined the relevant product market for cable services as including, at minimum, the offerings of satellite providers like DirecTV and DISH Network, competitive cable operators like Wide Open West, telephone companies like Verizon, AT&T, and Qwest/CenturyLink, and online video providers such as Netflix, Hulu, and others. That is precisely the type of interchangeability analysis that is required for a product market analysis. *See, e.g., Telecor Comm's, Inc.*, 305 F.3d at 1131 ("The basic product market test is 'reasonable interchangeability.'").

Through an analysis of where consumers of cable television services can realistically turn for alternate sources of supply, Dr. Singer has previously (but not in this case) defined the relevant geographic market for cable services as limited to local television markets in which consumers face the same set of viewing choices among those providers. That is precisely the type of consumer perspective analysis that is required for a geographic market analysis. *See, e.g., Heerwagen*, 435 F.3d at 228-231 (summarizing

cases and holding that geographic market should be based on where consumers can reasonably be expected to turn for substitutes).

The problem with Dr. Singer's testimony on these points is that he provided it to the FCC in 2010 for a different client. In this case, he skips the necessary steps of performing the interchangeability analysis required for a product market definition and the consumer substitution analysis required for a geographic market definition. While his expert report tosses around the phrases "product market" and geographic market" and other buzzwords, he does not actually perform the analyses that the case law requires and that he himself testified to the FCC was appropriate.

As discussed below, Dr. Singer goes to great lengths—149 pages of an initial report plus two supplemental reports—to avoid performing these basic, workaday steps of market definition and market power analysis that he has previously testified are appropriate, and that he has previously testified produce results contrary to his testimony in this case.

Dr. Singer's failures do not stop there. Freed from the reality of a properly defined product market and a properly defined geographic market, Dr. Singer conjures products that do not exist, he assumes monopoly power that Cox does not have, he assumes that consumers behave in ways that the record makes clear that they do not, and he ignores the practical realities that contradict his conclusions, all so that he can conclude from these false premises that Cox coerces consumers. But once one corrects

all of his mathematical errors[109/] and performs the actual calculations that he opines are appropriate, the alleged effects go away. Dr. Singer provides only obfuscation and parlor tricks,[110/] untethered from the facts upon which Plaintiffs must prove that their tying claim is provable by common evidence.

Let us be clear: we are not suggesting that the Court judge the substance of Dr. Singer's claims on the merits. We rather assert that Dr. Singer does not provide a reliable methodology to support the elements of the Plaintiffs' claims with proof common to the class. The Plaintiffs' burden of demonstrating that each element of their claim is susceptible to common proof cannot be satisfied by simply hiring someone to state baseless conclusions.

We encourage the Court to review Dr. Singer's Report, his Supplemental Declaration, and his Erratum Report, focusing on the question of whether Dr. Singer's testimony actually demonstrates how the relevant product market, the relevant geographic market, market power, coercion, antitrust injury/impact, and damages can all be proven with evidence common to every single Cox subscriber nationwide. On that question, we suggest that the Expert Report of Dr. Michelle Burtis, attached hereto as Ex. 14, and the Supplemental Report of Michelle Burtis, attached hereto as Ex. 31, confirms that he has not so demonstrated. On the questions raised in Plaintiffs' motion, Dr. Singer

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109/ Dr. Singer's submissions in this case are riddled with mathematical errors. *See* Burtis Report (Ex. 14) at ¶¶ 21, 24, 116-117, 119-123, 131, n.18, n.183 and App. B; Burtis Suppl. Report (Ex. 31) at ¶¶ 19-21, 27-28, n. 40, n. 47.

110/ For instance, Dr. Singer toys with the ranges on some of his graphs to skew the picture presented to the Court by the data. *See* Burtis Suppl. Report (Ex. 31) at ¶ 5, n. 11.

fails to carry Plaintiffs' burden that each substantive element of their tying claim can be proven by common evidence.

A. Dr. Singer Does Not Provide Any Product or Geographic Market Analysis in Support of his Baseless Opinion That Market Power and Coercion Can be Proven with Common Evidence in a National Market.

As described above at p. 30, Dr. Singer testified to the FCC in the Comcast/NBC merger proceeding that cable television markets are local because consumers will not generally move their homes in order to change their options for MVPD services. That is the analysis that the FCC and the Antitrust Division of the DOJ apply to cable television markets, and it is the analysis required by the precedents that rule this case.

But in this case, Dr. Singer turns his back on his past testimony in two sentences: in paragraph 105 of his Report, Dr. Singer says that, notwithstanding everything that the FCC and the DOJ and he himself have said about the relevant geographic market for cable services, there is "[redacted]" that the Plaintiffs' alleged national geographic market could not be "[redacted]" *if* the same competitive conditions exist in every market. He then admits in paragraph 106 that [redacted] and he shrugs off all of these different local market conditions by saying that Cox competes with AT&T and Verizon in "[redacted]." Singer Report ¶106. Even if that were true, that [redacted]% precludes class certification, and it does not even account for all of the other competitors who likewise compete in varying geographic areas.

At that point, Dr. Singer simply stops discussing geographic market definition. *He never actually goes so far as opining that a nationwide geographic market is the proper one.*[111/] He does not resolve the fatal flaw that he himself points out—that different markets have different competitive conditions—with the Plaintiffs' alleged national market. He does not provide a reason to depart from the plain facts of the case, which show that consumers in different areas served by Cox have different choices and can choose from among different combinations of sellers depending on where they live. He does not support Plaintiffs' assertion that a nationwide geographic market can be proven with common evidence.

Similarly, Dr. Singer testifies that the alleged product market for "Premium Cable" is made up of least-common denominator, "inframarginal" services that Cox does not sell and consumers do not purchase.[112/] Singer Suppl. Decl., attached to Pls. Mem., at ¶¶ 5-6. Dr. Singer provides no interchangeability analysis to show how or whether these least-common denominator, "inframarginal" services are or are not viewed by some or all potential class members as substitutes for similar offerings from DirecTV or Verizon or Netflix or any other competitor—a step that he (appropriately) included in his testimony

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111/ *See* Burtis Suppl. Report (Ex. 31) at ¶¶ 24-25.

112/ Presumably, the Plaintiffs will use the nonsensical concept of "inframarginal" services to argue that the tying product is, in fact, *just plain digital cable* (*e.g.*, Cox's "Advanced TV") in order to avoid the fact that "Premium Cable" is not a product that Cox sells or any Plaintiff buys. But that would not cure the fatal defect in their class certification request—that Cox sells Advanced TV freely to customers without set-top boxes, and that Advanced TV can be received using a TiVO or a Moxi or other CableCARD device, and thousands of proposed class members do just that. *See supra* section II.C.

to the FCC in the Comcast/NBC matter.[113/] Dr. Singer's opinion that the relevant product market and relevant geographic market can be proven by common evidence cannot be accepted by the Court.

B. Dr. Singer Does Not Demonstrate That Market Power Can Be Demonstrated With Common Evidence.

Dr. Singer's class certification testimony concerning his ability to demonstrate market power with common evidence covers less than a page of text, in only one paragraph. *See* Singer Report ¶ 36. In the single sentence relevant to class certification, Dr. Singer states that proving market power turns on common evidence such as "[redacted]" He then refers to "Merits Section 3" of his report for the rest of his analysis.

But Merits Section 3 of Dr. Singer's Report does not perform an analysis of market power in a nationwide geographic market. Instead, Merits Section 3 of Dr. Singer's report discusses lots of different Cox areas, and asserts that Cox has "power over price" in all of them. As discussed above, Dr. Singer's discussion of market share in Merits Section 3, cited by Plaintiffs, is just incorrect. And as Dr. Burtis points out, [redacted]

113/ Singer Comcast/NBC Report (Ex. 22) at ¶¶ 114-117.

[redacted][redacted][114/]

In his Comcast/NBC Report, Dr. Singer set out to show that a cable operator's ability to set prices as it wished—in other words, its "power over price"—varied greatly from market to market. Dr. Singer testified that "[t]here is ample evidence that competition from cable overbuilders, DBS providers and the recent entry of telco competitors in certain local markets exerts downward pressure on the prices charged by cable companies for video service." Singer Comcast/NBC Report (Ex. 22) at ¶ 85.

Dr. Singer testified that the difference in cable prices between areas served by an "overbuilder"[115/] and those served only by one cable company and the two DBS providers "are significant," with rates in non-overbuilt areas tending to be 20.6 percent higher than the rates in areas where AT&T or Verizon or another overbuilder provides service. Singer Comcast/NBC Report (Ex. 22) at ¶ 94. Dr. Singer stated that this price differential has been calculated to amount to approximately $7.32 per month per subscriber. *Id.* at ¶ 97. He went so far as to testify that the mere *possibility* that Verizon or AT&T or some other overbuilder *might* enter a particular market results in higher product quality and lower prices in that market. *Id.* at ¶ 99. In other words, in those

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114/ *See* Burtis Suppl. Report (Ex. 31) at ¶ 25 and Table 2.

115/ An "overbuilder" simply means a second (or third, or fourth) wireline video provider, such as Wide Open West or Verizon or AT&T or Qwest/CenturyLink or EATEL or Lafayette Utilities Service. DirecTV and DISH Network would not be considered "overbuilders" because they use satellites instead of wires to deliver service.

markets where a cable operator faces competition from an "overbuilder," the cable operator does not have "power over price."

One of the examples of the price-lowering effect of overbuilder competition that Dr. Singer used in his Comcast/NBC Report was Cox's lowering of prices by 43 percent in the Herndon community of Fairfax County, Virginia when Verizon began to offer video service there in early 2007. *Id.* at ¶ 87. He later cites to the competitive reaction of Cox's San Diego system to the rollout of AT&T U-Verse in 2007. *Id.* at ¶ 87. Both of those communities are within the Plaintiffs' purported nationwide class. Dr. Singer does not address them in this case.

The fact that, as Dr. Singer himself recognizes, Cox does not have "power over price" in those markets where AT&T or Verizon or Qwest/CenturyLink or EATEL or Wide Open West or Lafayette Utilities Service provide service means that the elements of market power and coercion cannot be proven with common evidence in this case.

C. Dr. Singer Does Not Demonstrate that Coercion Can Be Proven With Common Evidence.

Dr. Singer's opinion on coercion is simple: he testifies that [redacted]. [116/] Singer Report ¶ 33. As a result, he

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[116/] Dr. Singer has failed to educate himself on the record concerning SDV and pay-per-view. SDV channels are available to users with, e.g., TiVO boxes or Moxi boxes through use of a digital tuning adapter that Cox provides for free to those customers. *See* Watkins Dep. (Ex. 18) at 151:24-152:22. And pay-per-view events can be ordered by telephone by any Cox subscriber whether or not they also have a set-top box. *See*

says, Cox imposes a "penalty" on anyone who tries to use one of the other available methods of watching all of the other channels that are available with a TiVO or a CableCard-equipped television. *Id.*

The problem with Dr. Singer's testimony, aside from the fact that it is incorrect, is that it is not evidence that all class members were coerced. At best, it is evidence that those class members who *actually watch* video-on-demand and use the electronic programming guide *could* theoretically have been coerced *if* they did not have access to similar services from DirecTV or DISH Network or Verizon or AT&T or one of the other overbuilders *and* they did not independently desire a box from Cox because of the range of features offered or the low monthly rental price (as compared to purchasing a box of their own for hundreds of dollars). Certainly Plaintiff Sharon Coughlin, who does not watch video-on-demand at all, was not coerced. Even if she were to use Cox's electronic programming guide, that product is available from TiVO along with all of the other Cox services that she does use.[117/] Certainly Plaintiffs John and Elizabeth Brady were not coerced, as they decided that online services and DVD rentals are a complete substitute for *all* of their Cox services. And certainly Plaintiff Henry Holmes was not coerced, as he switched to Cox from DirecTV, and knows that he could also switch to AT&T, but he chooses Cox because he is satisfied with his service.

Smithpeters Dep. (Ex. 27) at 287:14-20. They cannot be within Dr. Singer's definition of coercion.

117/ *See* Smithpeters Dep. (Ex. 27) at 193:5-194:25 ([redacted]).

Moreover, as described above, [redacted]. *See supra* pp. 41-44. Dr. Singer provides no evidence for how these people could have been coerced, even when he later tries in his Supplemental Declaration to re-define the tying product as some ethereal set of "inframarginal" services that Cox doesn't sell and no one buys.

Dr. Singer's opinion that coercion can be proven by common evidence cannot be accepted by the Court.

D. Dr. Singer's Method for Determining Common Impact Requires Person-by-Person Fact Finding and Analysis; It Does Not Show that All Class Members were Injured.

For the Plaintiffs' alleged class to be certified, they must demonstrate through common proof that every Cox subscriber in America who has a set-top has suffered a real injury, and that none of those people would be better off or neutral the way things are today. "[W]here the fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance." *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003); *Blades v. Monsanto Co.*, 400 F.3d 562, 574 (8th Cir. 2005) (no class certification where plaintiffs' expert "did not show that injury could be proven on a class-wide basis with common proof"); *see also* II P. Areeda, H. Hovenkamp & R. Blair, *Antitrust Law*, ¶ 331d, at 282 (2d ed. 2000) ("[T]he fact that some class members have not been damaged at all generally defeats certification, because the fact of injury, or 'impact' must be established by common proof.").

The starting point of Dr. Singer's impact analysis is his assumption that Cox has not just market power, but monopoly power—which is very high market power—with regard to every member of the class. *See, e.g., Reazin*, 899 F.2d at 966-67 ("market power and monopoly power only differ in degree—monopoly power is commonly thought of as 'substantial' market power."). The model that Dr. Singer relies on—the "GRS Test"—only applies where the firm being analyzed is a monopolist.[118/] Dr. Singer therefore skips over the market power element of Plaintiffs' tying claim and simply assumes it is met, with no basis. As Dr. Burtis explains, "[redacted]" Burtis Report (Ex. 14) at ¶ 100. The consequences of Dr. Singer's assumptions are explained by Dr. Burtis in ¶¶ 2-17 of her Supplemental Report.

Dr. Singer's attempt to demonstrate class-wide injury using the "GRS Test" is a confusing hocus-pocus that, when analyzed, turns out to be nothing more than a formula that must be applied to each purported class member individually after a factual inquiry into what products and tiers of service each has purchased from Cox. Dr. Singer's formula mixes products that Dr. Singer said in his original Report are not part of the "Premium Cable" product market (limited basic and expanded basic) with services that are available without a set-top box (regular digital cable channels) and with video-on-

118/ *See* Burtis Report (Ex. 14) at ¶ 100.

demand and the electronic programming guide. *See* Burtis Report (Ex. 14) at ¶ 104 (discussing [redacted]). Dr. Singer later amends his product market definition to *include* basic cable as part of "Premium Cable" in an attempt to resurrect his faulty opinion, *See* Singer Suppl. Decl., attached to Pls. Mem., at ¶ 6, but that only exposes how far from reality Dr. Singer's exercise has strayed. *See* Burtis Suppl. Report (Ex. 31) at ¶¶ 20-22.

The problem with Dr. Singer's impact methodology—the "GRS Test"—is that it is not a common impact methodology. It only provides a result for the particular combination of services and prices that you plug into it, and Cox customers purchase many different combinations of products and services at many different prices under many different competitive conditions. As Dr. Burtis demonstrates, when you insert actual prices paid by consumers into the formula, the results show that impact cannot be demonstrated with common evidence. *See* Burtis Suppl. Report (Ex. 31) at ¶¶ 5-9 and Fig. 1. In fact, the numbers that result from the application of Dr. Singer's formula prove that his methodology is unsound, and that he has mis-applied the theory that he claims to rely upon. Burtis Suppl. Report (Ex. 31) at ¶¶ 13-17.

When Dr. Singer asks the Court to "suppose" that his application of the test shows impact on a class-wide basis for purposes of class certification, *see* Singer Report at ¶¶ 72, 73, and 74, and then promises to prove it later in the damages section of his Report ("Section IV.A.5"), *id.* at ¶75, he never delivers on that promise. As discussed in the next section, when one turns to "Section IV.A.5" of his report, the calculation that he performs is not a common damages methodology.

Dr. Singer's Report is a shell game in which he promises to show that antitrust injury is common to the class by relying on his damages methodology, and then provides a damages methodology which in turn assumes that all class members were injured, and does not itself show anything with common evidence. It does not satisfy Rule 23. Dr. Singer's opinion that impact/injury can be proven by common evidence cannot be accepted by the Court.

E. Dr. Singer Does Not Provide a Reliable Method For Proving Damages on a Class-Wide Basis.

Dr. Singer proposes two different "aggregate damages" methodologies to calculate class-wide damages –a "benchmark" model whereby he compares certain Cox prices to certain prices charged in Canada, and a so-called "squeezing surplus" model that he bases on the "GRS Test." Pls. Mem. ¶¶ 81-93. As Dr. Burtis explains, Dr. Singer's damages method "is not a common damages methodology." Burtis Report (Ex. 14) at ¶ 25.

Furthermore, as Dr. Burtis points out, Dr. Singer's damages calculations assume common impact, which in turn assumes damages. Burtis Report (Ex. 14) at ¶118. That is important because, while in most cases it would not be unusual that a damages calculation assumes the result of the liability analysis, back at paragraph 75 of his Report, Dr. Singer told us that he would prove that antitrust injury can be proven with common evidence by showing with his damages calculation that everyone was in fact injured. In other words, his damages calculation is his impact calculation. But it is does not *show* common impact; it rather *assumes* common impact, and it does not provide a methodology for calculating damages on a class-wide basis.

Moreover, Dr. Singer's aggregate damages methodologies are insufficient because, in the case of the "surplus squeeze" arguments that he constructs, "[redacted]." Burtis Report (Ex. 14) at ¶118.

Dr. Singer performs his damages calculation for one consumer's price for [redacted]. Singer Report at ¶ 92, Table 2 & n.1. He then adds to that [redacted], and then inserts and elasticity of demand that he pulled from a seven-year-old research paper about DBS substitution. *Id.* Dr. Singer's analysis completely ignores the fact that the price for [redacted] will differ from the price of other packages of service, that the prices of all of those services will differ from Cox system to Cox system, that different Cox areas have different demand elasticities, and that the price of set-top boxes varies both within and among each of those different Cox areas. *See* Burtis Report (Ex. 14) at ¶126.

Courts have regularly found that such circumstances defeat requests for class certification. *See, e.g., Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (denying class certification where damages calculations "would be complicated by the scores of different products involved, varying local market conditions, fluctuations over time, and the difficulties of proving consumer purchases after a lapse of five or ten years"); *Jackshaw Pontiac, Inc. v. Cleveland Press Publ'g Co.*, 102 F.R.D. 183, 194 (N.D. Ohio 1984) (individual issues predominated where defendant newspaper "offers a plethora of

different rates to different advertisers"); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743, 749 (D. Ohio 1975) (denying certification in part because, since some received discounts, each "transaction would have to be examined").

Dr. Singer's "surplus squeeze" methodology also improperly relies on average values for the elasticity of demand variable that he uses in his formula in order to avoid the inconsistent results that would occur if he were to use actual numbers. Dr. Burtis explains this issue best in ¶¶ 109-113 of her Report, but the bottom line is that, were Dr. Singer to use the actual and varying elasticities of demand that occur across Cox markets, variability that he himself acknowledged in his testimony in the Comcast/NBC matter, sometimes his formula would show damages and sometimes it would not. Courts across the country have refused to credit such analyses given similar circumstances. *See, e.g., In Re Graphics Processing Units Antitrust Litig.,* 253 F.R.D. 478, 493-494 (N.D. Cal. 2008) (denying class certification where plaintiffs' proposed to use aggregate damages data because it "evaded the very burden that he was supposed to shoulder . . . Averaging masks the differences and by definition glides over what may be important differences); *see also Bell Atl. Corp.,* 339 F.3d at 294; *Freeland,* 238 F.R.D. at 151.[119/]

[119/] As one court has described the problem with Dr. Singer's use of averages to hide the variances underneath his calculation, "If Microsoft-founder Bill Gates and nine monks are together in a room, it is accurate to say that on average the people in the room are extremely well-to-do, but this kind of aggregate analysis obscures the fact that 90% of the people in the room have taken a vow of poverty." *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 431 (E.D. Wis. 2001) (denying certification). *See also* ABA Section of Antitrust Law, Econometrics: Legal, Practical, and Technical Issues 220 (ABA Publishing 2005) ("averages can hide substantial variation across individual cases, which may be key to determining whether there is a common impact").

In the other half of his damages analysis, Dr. Singer's repeated attempts to use Canadian prices as a "benchmark" actually show that most if not all Cox customers saw no impact as Dr. Singer has defined impact. The first time that Dr. Singer attempted to use Canada as a benchmark, he looked at the prices at which Canadian DBS providers and cable companies sell their boxes in retail stores, tried to perform some calculations to convert those sale prices into equivalent rental rates, and then testified that Cox's rates for set-top boxes in three markets were higher than those rates, and that class certification was therefore appropriate. *See* Singer Report ¶¶ 88-92. Analyzing Dr. Singer's work product, Dr. Burtis discovered that not only did Dr. Singer (a) fail to compare the prices of the products that he testified are impacted by the alleged tie, Burtis Report (Ex. 14) at ¶ 120, (b) ignore the obvious question of whether Canadian set-top box manufacturers have the same costs as U.S. providers do, Burtis Report (Ex. 14) at ¶ 121, and (c) ignore the prices for HD boxes, DVR boxes, and HD DVR boxes that account for nearly half of the set-top boxes deployed by Cox, Burtis Report (Ex. 14) at ¶ 122, Dr. Singer also did his math wrong, and it turns out that Cox's set-top box prices are consistently priced less than the benchmark that Dr. Singer chose. Burtis Report (Ex. 14) at ¶ 123 and App. B.

Dr. Singer admitted this mistake in his "Erratum Re: Expert Report of Hal J. Singer," (attached hereto as Ex. 44) which Plaintiffs served on Cox shortly after filing their motion for class certification. In this, his third expert report so far in this case, Dr. Singer abandons his prior methodology because its outcome no longer supports his

opinion.[120/] Now, using a new method, Dr. Singer claims that Cox's set-top box prices were higher than one Canadian cable operator's box rental prices for part of the class period, and higher than one Canadian satellite provider's box price for the entire class period. Singer Erratum Report (Ex. 44) at Figures 1, 2, and 3. But Dr. Singer's new method has some of the same flaws as his first attempt did, and it does not support his conclusion that all proposed class members were affected.[121/]

Dr. Singer completely ignores the fact that telecommunications and cable television services are, in general, less expensive in Canada than they are in the United States across all providers.[122/] He also ignores the fact that Canadian cable companies enjoy much lower costs for set-top boxes than do U.S. cable operators such as Cox.[123/] Canadian cable operators are not subject to the U.S. FCC's rules requiring that, as July, 2007, all set-top boxes purchased by U.S. cable companies must include both an external hardware slot for a CableCARD and a CableCARD.[124/] Cox must therefore pay extra for

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120/ *See* Burtis Suppl. Report (Ex. 31) at ¶¶ 27-28.

121/ *See* Burtis Suppl. Report (Ex. 31) at ¶¶ 29-33.

122/ *See* Canadian Radio-Television and Telecommunications Commission Communications Monitoring Report, July 2011, at p. 168 Table 6.1.1 (excerpts attached hereto as Ex. 45) (comparing prices for various bundles of services in Canada, the U.S., and other countries).

123/ *See* Burtis Suppl. Report (Ex. 31) at ¶ 31.

124/ *See Implementation of Section 304 of the Telecommunications Act of 1996 - Commercial Availability of Navigation Devices,* Second Report and Order, 20 FCC Rcd. 6794, 6810 11, 31 (2005)(Ex. 23); Burtis Suppl. Report (Ex. 31) at ¶ 28.

the CableCARD slot itself, and then purchase a separate CableCARD for each box at a price of around $50 or more.[125/]

Dr. Singer's own charts furthermore show that Cox's rates for set-top boxes were in fact lower than the Canadian cable company's rates for that part of the class period that predates the FCC's July 2007 implementation of the integration ban.[126/] By definition, then, Dr. Singer's analysis proves that impact *cannot* be shown for all class members across the class period.[127/] Dr. Singer's reliance on Canadian set-top box prices has no basis in fact, it is contradicted by his own previous methodology, and it does not provide a way to prove that all Cox subscribers overpaid by the same amount even though they rented many different kinds of boxes at many different prices.

Once again, Dr. Singer's opinion that damages can be proven by common evidence cannot be accepted by the Court.

IV. THERE IS NO BASIS TO CERTIFY A CALIFORNIA SUBCLASS.

The Plaintiffs expend less than two pages arguing for a California UCL Subclass. They provide no analysis of what the relevant geographic market or the relevant product market would be, nor of market power, nor of coercion or injury or damages. The Plaintiffs do, however, recite that the members of the alleged California subclass "reside in the different local markets that Cox serves in California." Pls. Mem. at 44. As

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125/ Kelso Dep. (Ex. 20) at 149:20-150:5.

126/ Singer Erratum Report (Ex. 44) at Figures 1, 2, and 3.

127/ Burtis Suppl. Report (Ex. 31) at ¶ 29.

discussed above, there is no basis to certify a class that crosses local markets, and therefore certification of the California class is equally improper.

CONCLUSION

Each one of the issues identified above are, standing alone, independent and sufficient reasons why the Plaintiffs' motion for class certification must be denied. Predominance must be shown with respect to each element of the Plaintiffs' tying claim; in this case, common issues do not even predominate across the 14 named Plaintiffs. They certainly do not predominate across 3 million people in 19 states. There is no basis for the Court to certify the proposed class.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2011, I electronically transmitted the attached document to the Clerk of the Court using the CM/ECF system for filing to all ECF registrants pursuant to the Order of the Court dated July 24, 2009 (Docket No. 10).

/s/D. Kent Meyers .
D. Kent Meyers