No.

IN THE

Supreme Court of the United States

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

Petitioners,

v.

CAROLINE BEHREND, STANFORD GLABERSON,
JOAN EVANCHUK-KIND, AND ERIC BRISLAWN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court recently reiterated that district courts must engage in a "'rigorous analysis'" to ensure that the "party seeking class certification [can] affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982)). Disavowing an allegedly contrary suggestion in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), *Dukes* emphasized that district courts are required to resolve any "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [those issues] *again* at trial in order to make out their case on the merits." 131 S. Ct. at 2552 n.6. In this case, however, the Third Circuit repeatedly invoked the disavowed aspect of *Eisen* in declining to consider several "merits arguments" directly relevant to the certification analysis.

The question presented is whether a district court may certify a class action without resolving "merits arguments" that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Andrew Behrend, Caroline Cutler, Marc Dambrosio, Michael Kellman, Lawrence Rudman, Kenneth Saffren, Marc Weinberg, and Barbi J. Weinberg were plaintiffs in the district court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Comcast Corporation is the parent company of petitioners Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC, and no other publicly held company owns 10% or more of their stock. Comcast Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-88a) is reported at 655 F.3d 182. The opinion of the district court (App., *infra*, 89a-188a) is reported at 264 F.R.D. 150; an amended order (App., *infra*, 189a-194a) is unpublished. The order of the court of appeals denying rehearing en banc (*id.* at 195a-196a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2011. A timely petition for rehearing en banc was denied on September 20, 2011. Justice Alito extended the time in which to file a petition for a writ of certiorari to and including January 18, 2012. *See* No. 11A534. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in the Appendix, *infra*, at 197a-204a.

STATEMENT

A district court may certify a class action under Federal Rule of Civil Procedure 23(b)(3) only if the plaintiff establishes numerosity, commonality, typicality, and adequacy, and, in addition, "the court

finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." In *Wal-Mart Stores, Inc.* v. *Dukes*, this Court held that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis,'" that the requirements for class certification "'have been satisfied'"—an inquiry that "[f]requently" will "entail some overlap with the merits of the plaintiff's underlying claim." 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982)). Although some courts had "mistakenly" read a statement in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), as adopting a contrary approach, *Dukes* clarified that this statement was "the purest dictum" and "contradicted by [the Court's] other cases," 131 S. Ct. at 2552 n.6. Thus, the Court emphasized, district courts are required to resolve "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." *Ibid.*

In this case, however, the Third Circuit affirmed a district court's certification order after expressly declining to consider several "merits" issues necessary to determine whether, as required by Rule 23(b)(3), common questions predominate over individual ones. Declaring that *Dukes* "neither guide[d] nor govern[ed] the dispute before [it]," the Third Circuit instead invoked *Eisen*, which it believed to "preclud[e] any further inquiry" into the merits. App., *infra*, 33a, 41a n.12. The Third Circuit's view that "merits arguments" are "not properly before [the court]" at the class certification stage (*id.* at 19a) cannot be reconciled with this Court's decision in *Dukes* and breaks sharply with the Eighth and Ninth Circuits, which have correctly recognized that such

limitations on review of "merits" issues at the certification stage are no longer supportable after *Dukes*.

This Court should summarily reverse in light of *Dukes*, which leaves no room for lower courts to resuscitate now-extinguished portions of *Eisen*. At minimum, the Court should grant review to clarify whether, and to what extent, lower courts must resolve any issues bearing on class certification, even if those issues might also be relevant to the merits of the plaintiff's claims.

1. Comcast is a media, entertainment, and communications company and a provider of cable services to residential and business customers; Plaintiffs purport to represent a class of more than two million present and former Comcast cable subscribers in the Philadelphia area. App., *infra*, 6a; *see also* C.A. J.A. 217 ¶ 32. Claiming that they pay too much for cable, Plaintiffs brought suit in the Eastern District of Pennsylvania. App., *infra*, 5a, 7a. They allege that Comcast monopolized Philadelphia's cable market and excluded competition in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. App., *infra*, 5a.[1]

According to Plaintiffs, Comcast engaged in "anticompetitive 'clustering.'" App., *infra*, 6a. "'Clustering' refers to a 'strategy whereby cable [operators]

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[1] The operative complaint alleges comparable violations in the Chicago cable market. App., *infra*, 5a-6a. Plaintiffs' counsel also raised similar allegations with respect to the Boston market in a complaint that has now been transferred from the District of Massachusetts to the Eastern District of Pennsylvania. *Id.* at 8a n.5. Resolution of the Chicago and Boston claims has been stayed pending resolution of the Philadelphia claims. *Id.* at 8a & n.5.

concentrate their operations in regional geographic areas by acquiring cable systems in regions where the [operator] already has a significant presence, while giving up other holdings scattered across the country.'" *Ibid.* (quoting *In re Implementation of the Cable Tel. Consumer Prot. & Competition Act of 1992*, 22 FCC Rcd. 17791, 17810 n.134 (2007)). As the FCC has acknowledged, clustering is a common practice in the cable industry that can provide various pro-competitive benefits for the markets at issue. *See In re Adelphia Commc'ns Corp.*, 21 FCC Rcd. 8203, 8318 (2006).

Clustering is accomplished "through purchases and sales of cable systems, or by system 'swapping' among [operators]." App., *infra*, 7a (quoting 22 FCC Rcd. at 17810 n.134) (internal quotation marks omitted). Comcast is alleged to have done both—acquisitions and swaps—through which it eventually controlled a 69.5% share of subscribers in the Philadelphia Designated Marketing Area ("DMA"), which includes the city of Philadelphia and surrounding counties. *Id.* at 3a-5a & n.2.[2]

Although the transactions at issue were vetted and approved by the Federal Communications Commission and federal antitrust authorities, Plaintiffs claim that those transactions were designed to "eliminat[e] competition, rais[e] entry barriers to potential

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[2] A DMA is a "specific media research area that is used by Nielsen Media Research to identify television stations whose *broadcast* signals reach a specific area and attract the most viewers," which in turn is "used by all types of companies to target and keep track of advertising." App., *infra*, 3a n.1 (quoting *Steak n Shake Co.* v. *Burger King Corp.*, 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004)) (internal quotation marks omitted; emphasis added).

competition, maintai[n] increased prices for cable services at supra-competitive levels, and depriv[e] subscribers of the lower prices that would result from effective competition." App., *infra*, 7a. To prevail on their claims, Plaintiffs are required to prove "(1) a violation of the antitrust laws (here, sections 1 and 2 of the Sherman Act), (2) individual injury resulting from that violation [*i.e.*, so-called 'antitrust impact'], and (3) measurable damages." *Id.* at 15a.

2. The district court certified the class under Rule 23(b)(3) after concluding, as relevant here, "that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis." App., *infra*, 91a.

Although Plaintiffs offered four theories of antitrust impact, the district court rejected three of those theories in ruling on the motion for class certification. App., *infra*, 122a, 153a, 161a-162a; *see also id.* at 24a. The sole remaining theory is that Comcast's clustering deterred competition from so-called "overbuilders." *Id.* at 91a. Overbuilders are companies that "offer a competitive alternative where a telecommunications company already operates." *Id.* at 7a. Plaintiffs maintain that, in the absence of clustering, overbuilders would have extended their telecommunications services into areas serviced by Comcast. *Ibid.* Thus, the district court explained, "[p]roof of antitrust impact … shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." *Id.* at 192a-193a.

Plaintiffs' theory of antitrust impact depends on three critical propositions: (1) that the Philadelphia DMA is the relevant geographic market in which to analyze Comcast's alleged market power; (2) that Comcast's clustering deterred competition by overbuilders who would otherwise have entered that market; and (3) that the deterred competition resulted in antitrust impact across the entire class. *See*, *e.g.*, App., *infra*, 97a-99a. Comcast adduced evidence disputing that these propositions are appropriately subject to resolution in a class action.

Comcast argued that Plaintiffs' theory of how individuals were injured—"antitrust impact"—could not be established through class-wide proof because the Philadelphia DMA was not a relevant geographic market for assessing Plaintiffs' claims. Indeed, Comcast noted, the relevant market is much smaller: "[A]n individual can choose only among providers offering video programming services to his household," even if other providers offer services elsewhere in the DMA. App., *infra*, 17a; *see also supra* at 4 n.2 (noting that the DMA is defined by *broadcast*, not cable, television). The district court, however, concluded that class certification was appropriate because the "geographic market definition" offered by Plaintiffs' expert—*i.e.*, the Philadelphia DMA—"is susceptible to proof at trial through available evidence common to the class." App., *infra*, 106a.

Comcast similarly adduced evidence that any deterrence effects on overbuilding would not have been shared on a class-wide basis, particularly since there was no evidence of actual or potential overbuilding in the majority of counties in the Philadelphia DMA. App., *infra*, 25a-26a. Indeed, the only alleged overbuilder—RCN Telecom Services—was licensed to

overbuild in only five of the eighteen counties in the Philadelphia DMA. *Id.* at 61a-62a & n.16, 82a-83a (Jordan, J., concurring in the judgment in part and dissenting in part). The district court again relied on Plaintiffs' expert to conclude that the "anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class." *Id.* at 144a.

Turning to damages, the district court noted that the model presented by Plaintiffs' expert had been prepared when they were advancing multiple theories of antitrust impact. App., *infra*, 186a. On those assumptions, Plaintiffs' expert had opined that damages could be established using a common model that compared actual cable prices to hypothetical prices that would have prevailed but for Comcast's challenged conduct. Once most of Plaintiffs' theories were rejected by the court, Comcast noted that this purported common model could not be used to establish damages, because (as Plaintiffs' expert conceded) the model did not provide a basis to segregate damages attributable solely to the remaining, accepted theory. *Id.* at 40a; *see also*, *e.g.*, C.A. J.A. 715-16. The district court nonetheless concluded that the now irrelevant model remained a "common methodology available to measure and quantify damages on a class-wide basis." App., *infra*, 187a.

The district court subsequently issued an amended order confirming its earlier findings that "the appropriate relevant geographic market can be the Philadelphia Designated Marketing Area … and that this geographic market definition is susceptible to proof at trial through available evidence common to the class," that the "antitrust impact, if any, of Comcast's clustering through the challenged swaps

and acquisitions on overbuilder competition is capable of proof at trial through evidence that is common to the class," and that "the model and analyses" provided by Plaintiffs' expert "are common evidence available to measure and quantify damages on a class wide basis." App., *infra*, 190a-191a.

3. A divided panel of the Third Circuit affirmed on interlocutory appeal under Federal Rule of Civil Procedure 23(f). Relying on this Court's decision in *Eisen* and the Third Circuit's own pre-*Dukes* precedent, the majority consistently declined to address the arguments advanced by Comcast, claiming that it was "preclude[d]" from making "any further inquiry" into the merits beyond determining that Plaintiffs "*could* prove [their claims] through common evidence at trial." App., *infra*, 28a, 33a.

a. Although the Third Circuit majority noted the parties' dispute about the "relevant geographic market," it dismissed that dispute as raising "merits arguments" that were not "properly before [the court]." App., *infra*, 19a. Rather, the court believed that the critical issue is whether "the class could establish through common proof that that the relevant geographic market could be the Philadelphia DMA." *Ibid.*

The same was true for Comcast's evidence that any deterrence effects on overbuilding would not be felt on a class-wide basis. Characterizing the issue as "whether Plaintiffs actually have proven antitrust impact," the Third Circuit declined to resolve this "evidentiary" dispute. App., *infra*, 28a. The court instead thought it sufficient that "Comcast's alleged clustering conduct indeed *could have* reduced competition, raised barriers to market entry by an overbuilder, and resulted in higher cable prices to all of

its subscribers in the Philadelphia [DMA]." *Id.* at 29a (emphasis added).

Finally, while the Third Circuit acknowledged that, "[t]o satisfy … the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof" (App., *infra*, 34a) it nonetheless insisted that "[w]e have not reached the stage of determining on the merits whether the methodology [offered by Plaintiffs] is a just and reasonable inference or speculative." *Id.* at 47a. Comcast's "attacks on the merits of the methodology," the court concluded, "have no place in the class certification inquiry." *Id.* at 48a.

b. Judge Jordan would have vacated the class certification order. App., *infra*, 53a (Jordan, J., concurring in the judgment in part and dissenting in part). Although he "agree[d] with the Majority's conclusion, though not its reasoning, with respect to the question of antitrust impact," he "conclude[d] that damages cannot be proven using evidence common to th[e] entire class." *Ibid.*

On antitrust impact, Judge Jordan disagreed with the majority that it could avoid "defining the relevant geographic market" on the theory that "the task [would] tak[e] [the court] into the merits." App., *infra*, 60a. Instead, he believed that the critical issue was "whether there is some class, in this case defined geographically, that can be shown, through common evidence, to have experienced elevated prices as a result of reduced overbuilding because of Comcast's clustering." *Ibid.* Judge Jordan acknowledged a "compelling argument" that such a class would not include the entirety of the Philadelphia DMA, and expressed some "skepticism" at Plaintiffs'

theory, but he nonetheless concluded that "it was not an abuse of discretion for the District Court to hold that Plaintiffs could show, by common evidence, the antitrust impact of clustering through the Philadelphia DMA." *Id.* at 61a, 63a.

Judge Jordan "part[ed] ways with the Majority entirely, however, when it [came] to class-wide proof of damages." App., *infra*, 65a. "[B]ecause the only surviving theory of antitrust impact is that clustering reduces overbuilding," he noted, the model used by Plaintiffs' expert could establish class-wide proof of damages only by "reflect[ing] the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding." *Id.* at 69a. The expert "formulated his model at a time when Plaintiffs had four separate theories of antitrust impact," however, and thus he did not "isolate the impact of reduced overbuilding." *Id.* at 69a-70a. For this reason, "not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show … that damages can be proven using any evidence whatsoever—common or otherwise." *Id.* at 73a.

Yet even if Plaintiffs' expert were to refine his model, Judge Jordan noted, "there remains an intractable problem with any model purporting to calculate damages for all class members collectively." App., *infra*, 81a. The Philadelphia DMA includes 649 franchise areas, and the "major factors identified as influencing price … vary widely within the franchise areas across the DMA," particularly since "Comcast prices its cable service at the franchise level." *Id.* at 85a. "[N]o model can calculate class-wide damages," therefore, "because any damages—such as

they may be—are not distributed on anything like a similar basis throughout the DMA." *Id.* at 86a.

REASONS FOR GRANTING THE PETITION

The district court below certified a class estimated by Plaintiffs to include more than two million current and former cable subscribers in the Philadelphia area—larger even than the class invalidated in *Wal-Mart Stores, Inc.* v. *Dukes*, which this Court regarded as "one of the most expansive class actions ever." 131 S. Ct. 2541, 2547 (2011). Although Comcast identified several respects in which individual issues of antitrust impact and damages would overwhelm any purportedly common issues, thus foreclosing certification under Rule 23(b)(3), the Third Circuit majority affirmed the certification order after concluding that it was foreclosed from considering those issues "at this stage of the litigation." App., *infra*, 32a.

The Third Circuit reached this conclusion based on its view that, under *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), any arguments that could be characterized as addressing the "merits" of Plaintiffs' claims were "not properly before" the court. App., *infra*, 19a. But this reading of *Eisen* was squarely rejected in *Dukes*, which held that district courts *must* resolve any "merits question[s]" that bear on the "propriety of certification under Rules 23(a) and (b)." 131 S. Ct. at 2552 n.6. Under *Dukes*, the district court was required to engage in a "'rigorous analysis'" to determine whether Plaintiffs had "*in fact*" satisfied the prerequisites for class certification (*id.* at 2551 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 161 (1982)))—not, as the Third Circuit viewed the relevant inquiry, whether they "*could* prove [their claims] through common evidence at trial." App., *infra*, 28a.

The Third Circuit's reliance on *Eisen* is flatly inconsistent with *Dukes* and warrants summary reversal. In the alternative, plenary review is warranted because the Third Circuit's decision brings it into conflict with the Eighth and Ninth Circuits on the permissible scope of a district court's inquiry into "merits" issues at the class certification stage. Unlike the decision below, the Eighth and Ninth Circuits have recognized that *Dukes* requires—and *Eisen* does not limit—inquiry into the merits of the plaintiff's claims that bear on certification. Whether in the form of summary reversal or plenary review, this Court's review is warranted.

I. THE THIRD CIRCUIT'S LIMITATIONS ON REVIEW OF "MERITS" ISSUES AT THE CLASS CERTIFICATION STAGE ARE INCONSISTENT WITH THIS COURT'S PRECEDENTS AND CREATE A CIRCUIT SPLIT

Declaring that *Dukes* "neither guide[d] nor govern[ed] the dispute before [it]," the Third Circuit affirmed a class certification order while expressly refusing to resolve several "merits arguments" that bear on the propriety of certification. App., *infra*, 19a, 41a n.12. This decision cannot be reconciled with *Dukes* and conflicts with post-*Dukes* decisions from the Eighth and Ninth Circuits.

A. To obtain class certification under Rule 23, the plaintiff must satisfy each of the four prerequisites of Rule 23(a) and also demonstrate that the case fits into one of the permissible categories of class actions listed in Rule 23(b). As relevant here, Rule 23(a)(2) permits certification only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). If this commonality requirement and the others in Rule 23(a) are satisfied, then the

plaintiff may seek certification under Rule 23(b)(3) by proving (among other things) that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

1. This Court emphasized in *Dukes* that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove" that Rule 23's requirements are "*in fact*" satisfied. *Ibid.* The district court must make findings that the proponent of class certification has (or has not) carried this burden, which requires the court to engage in a "'rigorous analysis'" that "[f]requently … will entail some overlap with the merits of the plaintiff's underlying claim." *Ibid.* (quoting *Falcon*, 457 U.S. at 161).

This Court emphasized the "necessity of touching aspects of the merits in order to resolve [the] preliminary matte[r]" of class certification (*Dukes*, 131 S. Ct. at 2552) specifically to dispel confusion that had arisen in the lower courts following *Eisen*. In *Eisen*, the Court held that a district court could not examine the merits of the lawsuit in deciding whether to shift the cost of notice to the class. 417 U.S. at 177-78. In dictum, however, the Court remarked: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be *maintained* as a class action." *Id.* at 177 (emphasis added).

Most courts of appeals recognized that, notwithstanding *Eisen*, district courts were required by *Falcon* to resolve any factual inquiries bearing on class

certification, regardless of whether they overlapped with the merits. *See*, *e.g.*, *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001). But *Eisen*'s dictum nonetheless "led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits," and "led other courts to think that a judge may not do so at least with respect to a prerequisite of Rule 23 that overlaps with an aspect of the merits of the case." *In re IPO Sec. Litig.*, 471 F.3d 24, 34 (2d Cir. 2006).

Dukes clarified that these expansive readings of *Eisen* were "mistake[n]." 131 S. Ct. at 2552 n.6. "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any … pretrial purpose" *other than* shifting the cost of notice, this Court explained, "it is the purest dictum and is contradicted by our other cases." *Ibid.* In particular, the Court emphasized, *Eisen* has no applicability in "determin[ing] the propriety of certification under Rules 23(a) and (b)." *Ibid.* Instead, the district court must consider and resolve any "merits question" that bears on class certification, even if the plaintiff "will surely have to prove [the issue] *again* at trial in order to make out their case on the merits." *Ibid.*

2. *Dukes* applied this approach to the commonality inquiry under Rule 23(a)(2). The plaintiffs there sought to proceed on behalf of a nationwide class of female Wal-Mart employees, arguing that the class had been subjected to discrimination for a common reason: Wal-Mart allegedly "'operated under a general policy of discrimination.'" *Dukes*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 159 n.15). In support of this claim, the plaintiffs offered statistical evidence of discriminatory impact, as well as anecdotal

evidence of allegedly discriminatory pay and promotion decisions. Yet even though "proof of commonality necessarily overlap[ped] with [the plaintiffs'] merits contention that Wal-Mart engage[d] in a pattern or practice of discrimination," this Court analyzed the plaintiffs' evidence of company-wide discrimination to determine whether it was "convincing." *Id.* at 2552, 2556 (emphasis omitted).

The Court rejected the plaintiffs' statistical evidence, concluding that "regional and national" sex-based disparities were insufficient to establish "uniform, store-by-store disparity" and proved nothing about the "criteria" used by individual managers in making employment decisions. *Dukes*, 131 S. Ct. at 2555-56. "Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity," the Court emphasized, "d[id] not suffice." *Id.* at 2556. The anecdotal evidence "suffer[ed] from the same defects," and also was too sparse to show that "the entire company 'operat[ed] under a general policy of discrimination.'" *Ibid.* (quoting *Falcon*, 457 U.S. at 159 n.15). Concluding that the plaintiffs had provided no "convincing proof" of a "companywide discriminatory pay and promotion policy," this Court held that they had "not established the existence of any common question." *Id.* at 2556-57.

B. The Third Circuit's decision in this case cannot be reconciled with *Dukes*. Citing *Eisen* more than a half-dozen times, the Third Circuit professed itself unable even to consider, much less to resolve, Comcast's challenges to the class certification order because those "merits arguments" were "not properly before" the court. App., *infra*, 19a. Instead, the court limited its inquiry to whether "Plaintiffs had demonstrated by a preponderance of the evidence

that they *could* prove [the relevant issues] through common evidence at trial." *Id.* at 28a.

1. According to the Third Circuit, the governing precedent in this case is not *Dukes* but instead the pre-*Dukes* decision in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008). "Nothing in *Hydrogen Peroxide* requires plaintiffs to *prove* their case at the class certification stage," the Third Circuit stated; "[t]o require more contravenes *Eisen*," which purportedly "still precludes any further inquiry" into the merits. App., *infra*, 33a. *Dukes*, however, laid to rest this reading of *Eisen*, holding that courts cannot decline to address the merits of the plaintiffs' claims when they bear on the "propriety of certification." 131 S. Ct. at 2552 n.6.

According to the Third Circuit, *Dukes* "neither guides nor governs the dispute" in this case. App., *infra*, 41a n.12. In its view, "[t]he factual and legal underpinnings of [*Dukes*]—which involved a massive discrimination class action and different sections of Rule 23—are clearly distinct from those of this case." *Ibid.* That is wrong.

The Third Circuit never explained why it is significant that *Dukes* arose in the discrimination context. This Court turned to the allegations "[i]n this case" (*Dukes*, 131 S. Ct. at 2552) only *after* clarifying the proper standards under Rule 23; its analysis was not limited to discrimination but instead interpreted Rule 23 generally. *See Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) ("Rule 23 provides a one-size-fits-all formula for deciding the class-action question"). And in rejecting *Eisen*'s dictum, this Court did not remotely suggest that the dictum would still apply outside the discrimination context; indeed, because *Eisen* had involved

alleged violations of the antitrust and securities laws, the Court could simply have distinguished the case on that basis if, as the Third Circuit believed, it had intended to preserve any portion of *Eisen*'s dictum.

Moreover, *Dukes* illustrated its holding by discussing the fraud-on-the-market presumption of reliance in "class action suits for *securities* fraud." 131 S. Ct. at 2552 n.6 (emphasis added). Reliance is an element of private actions for securities fraud, and the individual inquiries necessary to prove reliance would ordinarily defeat class certification. *See*, *e.g.*, *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 229-30 (1988). The fraud-on-the-market presumption, however, permits an inference of reliance for "*all* traders who purchase stock in an efficient capital market." *Dukes*, 131 S. Ct. at 2552 n.6 (emphasis added). But while the existence of an efficient market is therefore a critical issue for both certification and the merits, "the plaintiffs seeking 23(b)(3) certification must *prove* that their shares were traded on an efficient market," even though "they will surely have to prove [the issue] *again* at trial to make out their case on the merits." *Ibid.* (first emphasis added).

Nor is it significant that *Dukes* was decided under Rule 23(a)(2)'s commonality requirement. The relevant portion of the opinion—that *Eisen* does not foreclose an inquiry into "the propriety of certification *under Rules 23(a) and (b)*" (*Dukes*, 131 S. Ct. at 2552 n.6 (emphasis added))—applies equally to Rule 23(b)(3). That undoubtedly explains why this Court specifically invoked Rule 23(b)(3) in its fraud-on-the-market example. *See ibid.*

If anything, this case follows *a fortiori* from *Dukes*. This Court noted in *Dukes* that it had "con-

sider[ed] dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* '[e]ven a *single* [common] question.'" 131 S. Ct. at 2556 (last emphasis added; alterations in original). That distinction is significant here because, even where there are common issues, the district court must still determine whether individual issues predominate—that is, predominance "is a *more demanding* criterion than the commonality inquiry under Rule 23(a)." *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (Sotomayor, J.) (emphasis added); *see also*, *e.g.*, *Amchem Prods, Inc.* v. *Windsor*, 521 U.S. 591, 623-24 (1997) ("[e]ven if Rule 23(a)'s commonality requirement may be satisfied," "the predominance criterion is far more demanding"). Under the Third Circuit's opinion, however, courts cannot resolve "merits" issues bearing on this more demanding inquiry, even though—after *Dukes*—they undoubtedly may do so in addressing commonality. There is no support for this counterintuitive view.[3]

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[3] The Third Circuit claimed that its holding was consistent with the purportedly "unifor[m]" concern about "converting certification decisions into mini trials" that had been expressed before *Dukes* by "recent scholarship." App., *infra*, 34a n.10. The Third Circuit's characterization of the four cited articles as "scholarship" is curious; at least three of them were authored in whole or part by members of the plaintiffs' class-action bar. It is similarly strange to suggest that their views were "uniformly" shared: Other scholars specializing in class actions had praised, as a "welcome step forward," the broad consensus among lower-court decisions holding (consistent with the later opinion in *Dukes*) that *Eisen* does not preclude the "weighing of competing expert submissions." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97,

[Footnote continued on next page]

2. The Third Circuit's application of the predominance requirement further confirms its departure from *Dukes*. Throughout its opinion, the Third Circuit identified disputes among the parties over issues bearing on class certification, while insisting (contrary to *Dukes*) that any attempt to resolve those disputes would "miscontru[e] our role at this stage of the litigation." App., *infra*, 32a.

The Third Circuit acknowledged, for instance, that Plaintiffs' theory depended on their claim that the "relevant geographic market," for purposes of antitrust impact, was the Philadelphia DMA. App., *infra*, 18a-19a. Defining the "relevant geographic market" was thus an essential step in determining whether common issues predominate over individual ones: If, as Comcast maintained, the relevant geographic market is narrower than the class region—and particularly if the market could be defined only based on programming choices available to individual households in different franchise areas—then the question whether Comcast possessed market power in the relevant market could not be resolved on a class-wide basis, and individual inquiries into alleged market power would overwhelm any purportedly common ones.

[Footnote continued from previous page]
111, 113 (2009); *see also*, *e.g.*, Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 Geo. Wash. L. Rev. 324, 372 (2011) ("the recent shift toward merits scrutiny at the class certification stage is a positive development"). The Court cited several of Professor Nagareda's works with approval in *Dukes* (131 S. Ct. at 2551, 2556-57), without reference to those selected by the Third Circuit; in any event, the Third Circuit was not at liberty to elevate the views expressed in "recent scholarship" above the holding of this Court in *Dukes*.

Thus, although any informed assessment of predominance necessarily would begin with market definition—and whether common proof existed of *any* market—the Third Circuit held that "[d]efining the relevant market … is an issue of the merits." App., *infra*, 18a. "The inquiry before the District Court," it believed, was simply whether "the class *could* establish through common proof that the relevant geographic market *could* be the Philadelphia DMA." *Id.* at 19a (emphases added). It was therefore sufficient, according to the Third Circuit, that "when [the issue is ultimately] addressed on the merits, the class *may* be able to prove through common evidence that the relevant market is the Philadelphia DMA." *Id.* at 23a (emphasis added). Under *Dukes*, however, the court was plainly wrong to dismiss the parties' "dispute[s] [over] whether the District Court properly defined the relevant geographic market" as "merits arguments, which are not properly before [the court]." *Id.* at 19a.

Similarly, the Third Circuit declined to "reach into the record and determine whether Plaintiffs actually have proven antitrust impact" on a class-wide basis. App., *infra*, 28a. Comcast adduced considerable evidence that any alleged deterrence of overbuilder competition could not have established "higher cable prices for the entire class," and therefore that individual issues of antitrust impact would predominate. *Ibid.* The purported overbuilder, RCN, was not licensed to overbuild in thirteen of the eighteen counties in the Philadelphia DMA, and there is no reason to believe that overbuilding in only five counties would affect prices in the entire DMA, particularly since the evidence showed that Comcast could have offered discounts targeted to overbuilt counties (or, indeed, overbuilt franchise areas within

particular counties). *See id.* at 127a; *see also*, *e.g.*, C.A. J.A. 3923-25, 3336.

Yet the Third Circuit examined only whether Plaintiffs "*could* prove antitrust impact through common evidence at trial." App., *infra*, 28a. The Third Circuit thus deemed it sufficient that the "antitrust impact Plaintiffs allege is 'plausible in theory' and 'susceptible to proof at trial through available evidence common to the class.'" *Id.* at 30a (quoting *Hydrogen Peroxide*, 552 F.3d at 325).

With respect to damages, the Third Circuit again abdicated its responsibilities under Rule 23. Characterizing the issue as "whether Plaintiffs have provided a method to measure and quantify damages on a class-wide basis," the Third Circuit accepted Plaintiffs' "assur[ance]" that "damages are capable of measurement and will not require labyrinthine individual calculations." App., *infra*, 46a-47a. And this "assur[ance]" was provided only by a "multiple regression analysis" conducted by Plaintiffs' expert, on the basis of theories that were almost entirely rejected below, "to compare actual prices in the Philadelphia DMA to the estimated 'but-for' prices." *Id.* at 37a.

Plaintiffs' expert made *no* effort to determine whether his analysis would permit calculation of class-wide damages when limited to the only remaining theory—deterrence of overbuilding. Thus, as Judge Jordan noted, Plaintiffs' expert "fail[ed] to identify the 'but for' conditions that are relevant to what is now the only impact of Comcast's allegedly anticompetitive conduct." App., *infra*, 71a (Jordan, J., concurring in the judgment in part and dissenting in part). Indeed, Comcast presented evidence, which Judge Jordan credited, that "there remains an in-

tractable problem with any model purporting to calculate damages for all class members collectively"—namely, that those damages could vary widely for the "649 unique franchise areas in the Philadelphia DMA." *Id.* at 81a-82a & n.30.

This sort of individual variance was sufficient to defeat certification in *Dukes*, but the Third Circuit simply dismissed "Comcast's arguments [as] attacks on the merits of the methodology that have no place in the class certification inquiry." App., *infra*, 48a. "We have not reached the stage of determining on the merits," the court insisted, "whether the methodology is a just and reasonable inference or speculative." *Id.* at 47a.

C. The Third Circuit's continued reliance on *Eisen* to circumscribe the scope of its "merits" inquiry at the class certification stage further brings it into conflict with the Eighth and Ninth Circuits, which have concluded after *Dukes* that district courts may—indeed, must—resolve any merits disputes bearing on the certification inquiry.

1. In *Ellis* v. *Costco Wholesale Corp.*, the district court certified a nationwide class of current and former Costco employees who had allegedly been subject to gender discrimination in promotion decisions. 657 F.3d 970, 977-78 (9th Cir. 2011). The plaintiffs sought to establish commonality under Rule 23(a) by relying on expert evidence of disparities in managerial promotions and positions, which they believed showed a "common pattern and practice" that "affect[ed] the class as a whole." *Id.* at 982-83 (emphasis omitted). Costco, in turn, adduced evidence that any disparities were present only in two regions and therefore could not establish that the "entire class was subject to the same allegedly discriminatory

practice." *Id.* at 983. The district court, however, declined to "examin[e] the merits to decide this issue." *Id.* at 984.

Relying on *Eisen*, the district court asserted that "the merits of the class members' substantive claims were generally irrelevant to its inquiry." 657 F.3d at 981. Thus, like the Third Circuit in this case, the district court concluded that it "should not inquire into the merits of the suit during the certification process." *Ibid.*

The Ninth Circuit vacated and remanded in light of *Dukes*, and it took "this opportunity to clarify the correct standard" for the district court on remand. 657 F.3d at 981. The Ninth Circuit emphasized that "the merits of the class members' substantive claims are often highly relevant when determining whether to certify a class." *Ibid.* For that reason, not only "*may* [a district court] consider the merits to the extent that they overlap with class certification issues," "a district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Ibid.*

The decision below runs directly contrary to this reasoning. The Ninth Circuit held that the district court was required to decide "[w]hether gender disparities are confined to only two regions of Costco's eight regions" because that inquiry "addresses precisely the question of whether there are common questions of law and fact among the putative class members," even though it *also* bears on the merits of the plaintiffs' claims. 657 F.3d at 983; *see also id.* at 983-94 ("If no such *nationwide* discrimination exists, Plaintiffs would face an exceedingly difficult challenge in proving that there are questions of fact and law common to the *nationwide* class"). Yet the Third Circuit believed it sufficient that Plaintiffs "*could*

prove antitrust impact through common evidence," or "have provided a method to measure and quantify damages on a class-wide basis," without any effort to decide whether the broad geographical area claimed by Plaintiffs was the correct market, whether the overbuilding theory affected that area uniformly, or whether the damages theory offered by Plaintiffs' expert could appropriately be used to prove damages on a class-wide basis. App., *infra*, 28a, 47a.

2. The Third Circuit's decision similarly cannot be reconciled with the Eighth Circuit's opinion in *Bennett* v. *Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011). Relying on *Dukes*, the Eighth Circuit emphasized that the "'rigorous analysis'" required by Rule 23 "'[f]requently … will entail some overlap with the merits of the plaintiff's underlying claim.'" *Id.* at 814 (quoting 131 S. Ct. at 2551). For that reason, "the district court may 'resolve disputes going to the factual setting of the case' if necessary to the class certification analysis." *Ibid.* (quoting *Blades* v. *Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)).

Applying this framework, the Eighth Circuit affirmed a district court's decision to deny certification of a class of employees alleging discrimination at a manufacturing plant because, the district court found, "employment practices varied substantially across the plant's various production departments." 656 F.3d at 814. The plaintiffs sought to challenge the district court's decision by invoking "statistical and anecdotal evidence" of discrimination. *Id.* at 815. But, the Eighth Circuit noted, this evidence was "insufficient to demonstrate that any disparate treatment or disparate impact present in one department was also common to all the others" given "strong evidence that employment practices varied

significantly from department to department." *Id.* at 815-16.

The Eighth Circuit's focus on whether the evidence before the district court was "insufficient to demonstrate" a particular finding bearing on class certification asks the court to engage in precisely the sort of "merits" inquiry that the Third Circuit believed was "not properly before [it]." App., *infra*, 19a. The Third Circuit's decision cannot be squared with *Bennett*.

* * *

The Third Circuit's attempt to reanimate the discredited dictum in *Eisen* just months after it was killed and buried by this Court is erroneous and warrants summary reversal. At minimum, this Court should grant review to resolve the conflict between the Third Circuit and the Eighth and Ninth Circuits over the extent to which district courts may address the merits of a plaintiff's claims in determining whether class certification is appropriate.

II. THE QUESTION PRESENTED IS IMPORTANT AND FREQUENTLY RECURRING

As this Court recognized in *Dukes*, the class certification inquiry under Rule 23 "[*f*]*requently* … will entail some overlap with the merits of the plaintiff's underlying claim." 131 S. Ct. at 2551 (emphasis added). Particularly given the importance of the certification decision to class litigation, as well as the number and size of class actions pending across the country, this Court's review is warranted to address the proper scope of a district court's inquiry in these oft-arising circumstances.

A. "A district court's ruling on the certification issue is often the most significant decision rendered in … class-action proceedings." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). That is so for obvious reasons: Given the potential damages at issue, "class certification creates insurmountable pressure on defendants to settle," regardless of the merits, "whereas individual trials would not." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, at 15 tbl. 5 (Cornell Law Faculty Working Papers, Paper No. 64, 2009) (average settlement over $100 million in certified class actions). As the district court acknowledged below, class certification is thus "'often the defining moment in class actions (for it may sound the death knell of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).'" App., *infra*, 92a-93a (quoting *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009)) (internal quotation marks omitted).

The importance of class certification is particularly pronounced in antitrust litigation. "Because of the complexity of the issues and the breadth of the discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.'" 6 James Wm. Moore *et al.*, *Moore's Federal Practice* § 26.46[1] (3d ed. 2011). "The risks associated with antitrust class actions" therefore "dictate that most cases will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Competition by Narrowing*

Noerr*: A Reply*, 18 Antitrust 77, 78 (2003); *see also* Eisenberg & Miller, *supra*, at 15 tbl. 5 (average settlement over $160 million in certified antitrust class actions).

The certification inquiry, in turn, will frequently overlap with the merits of the plaintiff's claims, as in this case. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1254, 1257 & n.12 (2002) (collecting cases where inquiry into the merits was determinative); Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 368 (1996) (same). Given the thousands of class actions filed in the federal courts every year (Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* app. B (2008)), it is hardly surprising that three courts of appeals have already squarely addressed the proper scope of "merits" inquiries in the aftermath of *Dukes*.

In this respect, "the problems in the Majority's reasoning" below are certain to "have practical repercussions far beyond this case." App., *infra*, 53a n.2 (Jordan, J., concurring in the judgment in part and dissenting in part). The Third Circuit handles a disproportionate percentage of antitrust class litigation: More than one-quarter of antitrust class actions settled in the federal courts between 1993 and 2008 were litigated there, and "the Eastern District of Pennsylvania is the leader in Antitrust" class actions. Eisenberg & Miller, *supra*, at 11. The decision below will therefore have far-reaching implications for antitrust litigation, and resolution of the proper scope of "merits" inquiry at the certification stage

will have even broader implications for class litigation generally.[4]

B. Not only does this case present the Court with an opportunity to resolve an issue of great significance to class litigation, it would further allow the Court to continue its longstanding practice of ensuring that lower courts apply procedural rules, including Rule 23, with appropriate rigor.

In *Bell Atlantic Corp.* v. *Twombly*, for example, this Court emphasized that a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief,'" under Rule 8(a)(2), "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. 544, 555 (2007) (alteration in original). The Court therefore rejected its earlier suggestion that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which

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[4] The decision below will also have significant consequences for this case. Plaintiffs' "conservative estimat[e]" of damages in the Philadelphia market alone exceeds $875 million (App., *infra*, 37a) and could (on Plaintiffs' calculation) exceed $1 billion—*before* trebling. *See* C.A. J.A. 3418; *see also* 15 U.S.C. § 15(a) (permitting treble damages). In addition, the Third Circuit's decision "will become a template for resolving similar class certification questions pending in cases involving the Chicago and Boston media markets." App., *infra*, 53a n.2 (Jordan, J., concurring in the judgment in part and dissenting in part). And because clustering is commonplace in the cable industry, "in all likelihood [the Third Circuit's decision] will be cited in other lawsuits against cable television service providers." *Ibid.* Thus, the "enormous potential liability" in this and similar cases is an additional "strong factor" favoring this Court's review. *Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in the denial of certiorari).

would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added). On a "literal reading," this Court noted, *Conley*'s inquiry would allow a "wholly conclusory statement of claim" to "survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561. But "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1950 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

Similarly, in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, this Court "again consider[ed] the standard district courts must apply when deciding whether to grant summary judgment" under Rule 56. 475 U.S. 574, 576 (1986). The Court emphasized that, under Rule 56, "the [disputed] issue of fact must be 'genuine,'" which means that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586.

In these cases, the Court insisted on faithful application of procedural rules even where doing so would require additional effort by district courts in assessing whether a pleaded cause of action is "plausible" or whether a disputed factual issue is "genuine." The same reasoning motivated this Court's rejection of *Eisen*'s dicta in *Dukes*: Although it undoubtedly imposes burdens on district courts to examine the merits to see whether the "party seeking class certification" has "affirmatively demonstrate[d] his compliance" with Rule 23, that examination is

required because "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. As the Seventh Circuit noted even before *Dukes*, Rule 23 means that "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives," to determine whether certification is appropriate. *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). This Court's review is warranted in this case—as in *Twombly*, *Iqbal*, *Matsushita*, and *Dukes*—to ensure that the lower federal courts engage in the inquiries required by procedural rules and this Court's decisions, notwithstanding the purported "concern[s]" of "recent scholarship." App., *infra*, 34a n.10; *see also supra* at 18 n.3.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 11, 2012

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-2865

CAROLINE BEHREND; STANFORD GLABERSON;
JOAN EVANCHUK-KIND; ERIC BRISLAWN

v.

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

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-03-cv-06604)
District Judge: Honorable John R. Padova

Argued on January 11, 2011

Before: FISHER, JORDAN and *ALDISERT, Circuit Judges.

(Filed: August 23, 2011)

* * *

OPINION OF THE COURT

ALDISERT, Circuit Judge.

In 2008 this Court handed down the seminal case of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 505 (3d Cir. 2008), which outlines the standards a district court should apply in deciding whether to certify a class. This appeal by Comcast requires us to decide if the District Court for the Eastern District of Pennsylvania properly satisfied *Hydrogen*'s directions in determining that questions of f or law common to class members predominate sufficiently to satisfy Rule 23(b)(3) of the Federal Rules of Civil Procedure. Appellants contend that the District Court exceeded a proper exercise of discretion and that its findings of fact were clearly erroneous. For the reasons that follow, we hold that the Court did not exceed its permissible discretion in determining that Plaintiffs established by a preponderance of evidence that they would be able to prove through common evidence (1) class-wide antitrust impact

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* Subsequent to oral argument, Judge Aldisert replaced Judge Ambro on the panel. The case was not reargued because the replacement Judge exercised his right to decide the case on the basis of the brief, the record and a transcript of the original oral argument.

(higher cost on non-basic cable programming), and (2) a common methodology to quantify damages on a class-wide basis. Accordingly, we will affirm.

I.

A.

> "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."
>
> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

Beginning in 1998, Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively "Comcast") engaged in a series of transactions that increased Comcast's share of the multichannel video programming distribution services offered in the Philadelphia Designated Market Area ("Philadelphia DMA").[1] Comcast contracted with competing cable providers to either acquire them or to "swap" cable systems it owned in areas outside the Philadelphia DMA for cable systems within the Philadelphia DMA. These transactions form the "Cable System Transactions," involving the

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[1] "A DMA is a specific media research area that is used by Nielsen Media Research to identify television stations whose broadcast signals reach a specific area and attract the most viewers. DMA boundaries are widely accepted and used by all types of companies to target and keep track of advertising." *Steak n Shake Co. v. Burger King Corp.*, 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004).

"Transaction parties."[2] As a result of the Cable System Transactions, Comcast's share of subscribers in

[2] The District Court set forth the Cable System Transactions:

- The April 1998 acquisition of Marcus Cable and its 27,000 cable subscribers located in Harrington, Delaware, which is part of the Philadelphia DMA.
- The June 1999 acquisition of Greater Philadelphia Cablevision, Inc., a subsidiary of Greater Media, Inc., and its 79,000 cable subscribers located in Philadelphia.
- The January 2000 acquisition of Lenfest Communications, Inc. and more than 1.1 million cable subscribers located in Berks, Bucks, Chester, Delaware, and Montgomery counties in Pennsylvania, and New Castle County in Delaware.
- The January 2000 acquisition of Lenfest's ownership interests in Garden State Cablevision L.P. and its 212,000 customers located in Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, and Salem counties in New Jersey, which is part of the Philadelphia DMA.
- The December 2000 swap agreement with AT & T, wherein Comcast obtained cable systems and approximately 770,000 subscribers, including subscribers located in Eastern Pennsylvania (Berks and Bucks counties) and New Jersey. In exchange, AT & T obtained cable systems and approximately 700,000 Comcast subscribers located in Chicago and elsewhere around the country.
- The January 2001 swap agreement with Adelphia Communications Corp., wherein Comcast obtained cable systems and approximately 464,000 subscribers located primarily in the Philadelphia area and adjacent New Jersey areas. In exchange, Adelphia received Comcast's cable systems and subscribers located in Palm Beach, Florida and Los Angeles, California.
- The April 2001 swap agreement with AT & T, wherein Comcast obtained cable systems and approximately 595,000 subscribers, including subscribers located in Pennsylvania and New Jersey.

[Footnote continued on next page]

the Philadelphia DMA allegedly increased from 23.9 percent in 1998 to 77.8 percent by 2002, settling at 69.5 percent in 2007. *See Behrend v. Comcast Corp.*, 264 F.R.D. 150, 160 (E.D. Pa. 2010) (setting forth Plaintiffs' expert's calculations as to Comcast's market share).

Plaintiffs, six non-basic cable television programming services customers of Comcast, brought a class action antitrust suit against Comcast in 2003. They alleged violations of section 1 of the Sherman Act, 15 U.S.C. § 1, for "imposing horizontal territory, market and customer allocations by conspiring with and entering into and implementing unlawful swap agreements, arrangements or devices," and section 2 of the Sherman Act, 15 U.S.C. § 2, on theories of monopolization and attempted monopolization.[3] App. 00232-243 (Third Am. Compl.). The Complaint

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[Footnote continued from previous page]

- The August 2006 swap agreement with Time Warner in connection with the Adelphia bankruptcy, wherein Comcast obtained cable systems and approximately 41,000 subscribers in the Philadelphia DMA.
- The August 2007 acquisition of Patriot Media and its 81,000 cable subscribers located in New Jersey, within the Philadelphia DMA.

Behrend v. Comcast Corp., 264 F.R.D. 150, 156 n.8 (E.D. Pa. 2010).

[3] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Section 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.* § 2.

alleged anticompetitive conduct in the Philadelphia area and the Chicago area. As only the alleged conduct in Philadelphia is before us, we focus on the nature of the class and the allegations in Philadelphia.

The proposed class included: "All cable television customers who subscribe or subscribed at any time since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster." App. 00217; *see id.* (excluding from the class "governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court"). The Philadelphia cluster is composed "of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey." *See Behrend*, 264 F.R.D. at 191.[4]

The Complaint alleged that Comcast had perpetrated an anticompetitive "clustering scheme." To clarify its contentions we pause to define two key terms. "Clustering" refers to a "strategy whereby cable [Multi-System Operators ("MSOs")] concentrate their operations in regional geographic areas by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This

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[4] The "Philadelphia cluster" and the "Philadelphia DMA" are separate terms. The Philadelphia DMA includes the cluster counties as well as the counties of Lehigh and Northampton, Pennsylvania. *See* App. 03614, 03795.

strategy is accomplished through purchases and sales of cable systems, or by system 'swapping' among MSOs." *Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 22 F.C.C. Rcd. 17791, 17810 n.134 (2007) (citation omitted). An "overbuilder" is a company that builds and offers customers a competitive alternative where a telecommunications company already operates. According to the Complaint, Comcast eliminated competition by (1) acquiring competitors in the Philadelphia market and (2) swapping with competitors cable systems and subscribers outside of the Philadelphia market for cable systems and subscribers within the Philadelphia market. The Complaint also alleged that Comcast engaged in conduct intended to exclude competition from overbuilder RCN Telecom Services, Inc. ("RCN"), by denying it access to "Comcast Sportsnet," requiring contractors to enter non-compete agreements, and inducing potential customers to sign up for long contracts with special discounts and penalty provisions in the areas where RCN intended to overbuild. App. 00235-239.

As a result of its clustering, Comcast allegedly harmed the class by eliminating competition, raising entry barriers to potential competition, maintaining increased prices for cable services at supra-competitive levels, and depriving subscribers of the lower prices that would result from effective competition. App. 00241-242. In other words, Comcast subscribers allegedly pay too much for their non-basic video programming cable service.

B.

On May 3, 2007, after extensive motions practice, *see* App. 00148-172 (listing 194 docket entries prior to certification), the District Court certified the pro-

posed class. App. 00354. It determined that Plaintiffs had met the requirements of Rule 23(a) of the Federal Rules of Civil Procedure (numerosity, commonality, typicality, and adequacy). App. 00366-372. It held also that Plaintiffs had met the predominance and superiority requirements of Rule 23(b). App. 00373-387. We denied on June 29, 2007, Comcast's 23(f) petition seeking interlocutory review.

The Court also certified the Chicago class's claims, but stayed them pending the outcome of the Philadelphia class. App. 00177, 00179.[5]

Following our decision in *Hydrogen Peroxide*, 552 F.3d 305, the District Court granted in part Comcast's motion to reconsider its Philadelphia certification decision (the Court denied without prejudice consideration of the Chicago class certification, again pending the outcome in Philadelphia). App. 00437-439. It vacated only the portion of the certification decision that addressed Rule 23(b)'s predominance requirement. The Court scheduled a hearing on the issue of predominance as it related to (1) antitrust impact, and (2) methodology of damages.

The District Court held an evidentiary hearing on October 13-15 and 26, 2009. During the four-day hearing, the Court heard live testimony from fact and expert witnesses, considered 32 expert reports, and examined deposition excerpts, as well as many other documents. Following the hearing, the Court issued to the parties a series of questions related to

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[5] Plaintiffs' counsel also filed a complaint in the District of Massachusetts on behalf of a "Boston cluster." That case was transferred to the Eastern District of Pennsylvania, and has been stayed pending resolution of the Chicago cluster claims. *See* App. 00179.

antitrust impact and damages methodology, and heard argument on November 16, 2009, to address its specific questions.

On January 7, 2010, the District Court recertified the Philadelphia class, and issued an amended class certification order on January 13, 2010. The Court reaffirmed and incorporated its May 2007 certification as to numerosity, commonality, typicality, and adequacy (Rule 23(a)), as well as superiority (Rule 23(b)(3)). App. 00029. On the disputed issue of predominance, the Court held that Plaintiffs had demonstrated by a preponderance of the evidence that: (1) questions of law and fact common to the members of the class predominated; (2) the relevant geographic market could be the Philadelphia Designated Market Area; (3) the class could establish antitrust impact on the theory that Comcast's clustering through the swaps and acquisitions deterred overbuilder competition; (4) the models and analyses of Plaintiffs' damages expert, Dr. James McClave, were common evidence available to measure and quantify damages on a class-wide basis; and (5) the class could establish antitrust impact through common evidence applicable to all class members. App. 00030. In certifying the class, however, the District Court narrowed the class's various theories of class-wide impact to a single theory:

> Proof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA.

App. 00032.

The Court accompanied its order with an 81-page memorandum opinion containing its analysis of the evidence presented at the evidentiary hearing. *Behrend v. Comcast Corp.*, 264 F.R.D. 150 (E.D. Pa. 2010). The Court summarized its opinion as follows:

> Having rigorously analyzed the expert reports, as well as the testimony presented by the parties during a four-day evidentiary hearing, we conclude that the class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis.

Id. at 154.

Comcast filed a Rule 23(f) petition to appeal on January 27, 2010. While that petition was pending, Comcast moved for summary judgment. The class responded, and Comcast filed a reply on June 4, 2010. We granted Comcast permission to appeal on June 9, 2010. The motion for summary judgment remains pending in the District Court.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. We have jurisdiction pursuant to 28 U.S.C. § 1292(e) and Rule 23(f) of the Federal Rules of Civil Procedure.

"We review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Hydrogen Peroxide*, 552 F.3d at 312 (ci-

tation and quotations omitted). We review de novo whether an incorrect legal standard has been used. *Id.* (citation omitted).

For a district court's finding of fact to be clearly erroneous, the standard is high. "Clearly erroneous" has been interpreted to mean that a reviewing court can upset a finding of fact, even if there is some evidence to support the finding, only if the court is "left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). This means that "[i]t is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972). Especially pertinent to the issue before us, the Supreme Court has explained:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where

> there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-574 (1985) (quotations and citations omitted); *accord PA Prison Soc'y v. Cortes*, 622 F.3d 215, 231 (3d Cir. 2010).

III.

Comcast raises three principal arguments on appeal, urging us to overturn the District Court's certification order on the grounds that: (1) the Court's finding that the class can establish class-wide antitrust impact through common evidence was incorrect for various reasons; (2) the District Court exceeded its discretion in accepting Plaintiffs' proposed methodology for damages calculation; and (3) the Court's certification of a per se antitrust claim was clear error. In response, Plaintiffs defend in all respects the District Court's certification decision. We first outline the Rule 23 legal framework and then analyze each of Comcast's contentions.

Rule 23 of the Federal Rules of Civil Procedure allows a class action if certain requirements are met. First, the class must meet the "prerequisites" of Rule 23(a): numerosity, commonality, typicality, and adequacy. Second, the class must fit one of the Rule 23(b) types of classes. Here, Plaintiffs seek certification under Rule 23(b)(3), which requires (1) "that the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3). These requirements are known as predominance and superiority.

The district court must conduct a "rigorous analysis" of the evidence and arguments in making the class certification decision. *Hydrogen Peroxide*, 552 F.3d at 318. The analysis requires "a thorough examination of the factual and legal allegations" and "may include a preliminary inquiry into the merits." *Id.* at 317 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166, 168 (3d Cir. 2001)). We explained in *Hydrogen Peroxide* the permissible extent of any inquiry into the merits:

> [T]he requirements set out in Rule 23 are not mere pleading rules. The court may delve beyond the pleadings to determine whether the requirements for class certification are satisfied. . . . An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. Some uncertainty ensued when the Supreme Court declared in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Only a few years later, in addressing whether a party may bring an interlocutory appeal when a district court denies class certification, the Supreme Court pointed out that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" [*Coopers & Lybrand v.] Livesay*, 437 U.S. [463,] 469

> [(1978)] (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). As we explained in *Newton*, 259 F.3d at 166-69, *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement. Other courts of appeals have agreed.

552 F.3d at 316-317 (quotations and citations omitted).[6] Accordingly, at the class certification stage, we are precluded from addressing any merits inquiry unnecessary to making a Rule 23 determination. *Id.* Further, any findings for the purpose of class certification "do not bind the fact-finder on the merits." *Id.* at 318.

Plaintiffs bear the burden of establishing each element of Rule 23 by a preponderance of the evidence. *Id.* at 320 ("[T]o certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.") (citation omitted). The court must also examine critically expert testimony on both sides and may be persuaded by either side as to whether a certification requirement has been met. *Id.* at 323. Indeed, "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." *Id.*

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[6] The Supreme Court confirmed our interpretation of the Rule 23 inquiry in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See id.* at 2551, 2552 n.6 (stating that "[f]requently [the Rule 23] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim," but *Eisen* still prohibits "a merits inquiry for any other pretrial purpose")

The parties dispute whether Plaintiffs have met the predominance requirement. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). It "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws," *id.* at 625, but a court may not relax its certification analysis as to each element of Rule 23, *see Hydrogen Peroxide*, 552 F.3d at 322. To assess whether common or individual issues predominate, a district court must examine the nature of the evidence and "formulate some prediction as to how specific issues will play out . . . ." *Id.* at 311 (quotations and citations omitted).

Reviewing a district court's certification of a class, we examine the elements of the class's claims "through the prism" of Rule 23. *Id.* (quoting *Newton*, 259 F.3d at 181). The elements of the claims before us are (1) a violation of the antitrust laws (here, sections 1 and 2 of the Sherman Act), (2) individual injury resulting from that violation, and (3) measurable damages. *See id.* Individual injury, also known as antitrust impact, "is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." *Id.* At the class certification stage, Plaintiffs' burden is "to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* at 311-312.

IV.

Comcast devotes much of its energy to contending that the District Court exceeded its discretion in

holding that Plaintiffs had established common evidence of antitrust impact. It attacks this issue in two ways: first, that the District Court failed to apply the correct legal standard for determining the relevant geographic market, and, second, that the District Court made clearly erroneous factual findings by relying on Plaintiffs' expert for proof of classwide antitrust impact. We address each contention in turn.

A.

Before the District Court, Plaintiffs contended that the relevant geographic market was the Philadelphia Designated Market Area, whereas Comcast countered that it was each individual's household. The District Court agreed with Plaintiffs. *Behrend*, 264 F.R.D. at 160. Plaintiffs' expert, Dr. Michael Williams, provided seven bases to support the conclusion that the relevant geographic market was the Philadelphia DMA. The District Court set forth each basis, as well as Comcast's counterarguments. 264 F.R.D. at 157-160. The Court stated that Comcast's focus on the individual household was not supported by the record, and that setting such a small market would be "impractical and inefficient." 264 F.R.D. at 160. Instead, the Court noted that the alleged conduct centered on Comcast's attempt to acquire substantially all of the cable systems in the Philadelphia DMA, and that the Federal Communications Commission aggregates relevant geographic markets in which customers face "similar competitive choices." 264 F.R.D. at 160. The Court concluded, "[T]he record evidence shows that consumers throughout the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from

Comcast's clustering conduct in the Philadelphia DMA." 264 F.R.D. at 160.

Comcast contends that the Court failed to articulate or apply the correct legal standard. According to Comcast, the geographic market is defined in terms of consumer demand substitutability—the area in which a buyer may look for the goods or services he seeks. Because an individual can choose only among providers offering video programming services to his household, Comcast asserts that the geographic market must be the household. Comcast contends additionally that the Court improperly credited Dr. Williams's seven bases for the geographic market because it later rejected three of the seven theories, and that the Court's two stated reasons for accepting the geographic market were irrelevant and erroneous.

Plaintiffs respond at three levels. First, they contend that they need not define the relevant geographic market: per se claims do not require defining the geographic market, and they offered direct evidence of market power, thereby relieving them of the obligation to define the relevant geographic market. Second, Plaintiffs state that the District Court used the commercial realities test to determine the relevant geographic market and did not ignore demand substitutability. Third, according to Plaintiffs, Comcast cannot demonstrate clear error in the Court's factual determination that "consumers throughout the [Philadelphia] DMA can face similar competitive choices." *See Behrend*, 264 F.R.D. at 160.

B.

We will affirm the District Court's conclusion that the Philadelphia DMA is a relevant geographic

market "susceptible to proof at trial through available evidence common to the class." 264 F.R.D. at 160.

The relevant geographic market is a component of substantive antitrust law. For antitrust claims analyzed through the rule of reason, plaintiffs must demonstrate that the defendant possessed market power in the relevant geographic market. *See Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984). For per se claims, plaintiffs need not establish a geographic market. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 316-317 (3d Cir. 2010) (explaining that some prohibited practices can be conclusively presumed to unreasonably restrain competition). Additionally, "direct proof of monopoly power does not require a definition of the relevant market." *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 n.3 (3d Cir. 2007).

Defining the relevant geographic market, however, is an issue of the merits. *See, e.g.*, *Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307 (3d Cir. 1982) (addressing on appeal whether jury verdict should be set aside because of allegedly erroneous definition of relevant geographic market). At the class certification stage, a court need only be satisfied that issues—including the definition of a geographic market—will be capable of proof through evidence common to the class. *See Hydrogen Peroxide*, 552 F.3d at 311; IIA Phillip E. Areeda et al., *Antitrust Law* ¶ 398b (3d ed. 2007) (describing that at the class certification stage the plaintiffs' expert typically concludes that "any significant economic issues underlying the class representative's antitrust claims, including but not limited to *issues regarding market definition* . . . will be analyzed and proven

through the use of common data and evidence that would be used to prove the claims of the other members of the proposed Class") (emphasis added). If the plaintiffs allege per se claims, they may still need to persuade the district court that, in the event defining the relevant geographic market becomes necessary, it is capable of common proof. *See* Areeda et al., *supra*, ¶ 398b.

The inquiry before the District Court, therefore, was whether Plaintiffs could demonstrate by a preponderance of the evidence that they would be able to establish a relevant geographic market capable of proof common to the class. The District Court concluded it was: "We conclude that Dr. Williams' geographic market definition is susceptible to proof at trial through available evidence common to the class." 264 F.R.D. at 160. The parties dispute whether the District Court properly defined the relevant geographic market—Comcast contends it erred as a matter of law, and Plaintiffs respond they need not establish a geographic market. These are merits arguments, which are not properly before us. Our review is limited to whether the Court exceeded its discretion in determining that the class could establish through common proof that the relevant geographic market could be the Philadelphia DMA. We conclude it did not, legally or factually.

C.

First, we perceive no legal error in the District Court's reasoning. Procedurally, it conducted the required "rigorous analysis" by examining in depth the expert opinions on both sides and setting forth its conclusions. *See Hydrogen Peroxide*, 552 F.3d at 317, 320. Substantively, the Court determined that "the record evidence shows that consumers throughout

the DMA can face similar competitive choices and suffer the same alleged antitrust impact resulting from Comcast's clustering conduct in the Philadelphia DMA." 264 F.R.D. at 160. Comcast contends that the Court failed to apply the consumer demand substitutability test, which defines the relevant geographic market as "that area in which a potential buyer may rationally look for the goods or services he seeks." *Gordon v. Lewiston Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005) (citing *Pa. Dental Ass'n*, 745 F.2d at 260). We determine otherwise: the Court's analysis of the relevant geographic market for purposes of class certification comported with our precedent.

"[I]dentification of the relevant geographic market is a matter of analyzing competition." *Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982). Defining it "is a question of fact to be determined in the context of each case in acknowledgment of the commercial realities of the industry being considered." *Gordon*, 423 F.3d at 212 (quoting *Borough of Lansdale*, 692 F.2d at 311). In these decisions of our Court, one of which has commanded our attention for almost thirty years, we relied on two Supreme Court cases to develop this standard: *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966), which held that the relevant geographic market under the Sherman Act was "not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they built and conduct their business," and *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 332 (1961), which defined the relevant geographic area for § 3 of the Clayton Act, 15 U.S.C. § 3, as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies" or as the area in which suppliers

"effectively compete." In another Clayton Act case, the Supreme Court stated: "The geographic market selected must, therefore, both correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-337 (1962) (quotations and citations omitted); *see Grinnell*, 384 U.S. at 572 (citing *Brown Shoe* as analogous to determining the relevant market for the Sherman Act).

D.

The District Court's determination—that consumers "face similar competitive choices" in the Philadelphia DMA as a result of Comcast's alleged clustering conduct—is consistent with the above standards because it considers both where a buyer may rationally look for goods and the commercial reality of the industry. Comcast's insistence that the geographic market must be the individual household (as the only place where a consumer can "comparison shop") ignores that the geographic market must be "economically significant," *Brown Shoe Co.*, 370 U.S. at 336-337, and may be premised on "the commercial realities of the industry being considered," *Borough of Lansdale*, 692 F.2d at 311, the area where suppliers "effectively compete," *Tampa Electric Co.*, 365 U.S. at 332, or the broader market reflecting the reality of conducting business, *Grinnell*, 384 U.S. at 576.[7] We therefore discern no legal error in the District Court's analysis.

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[7] We note additionally the tension between the concept of a "geographic market" and Comcast's conclusion that "the rele-

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E.

Second, we recognize ample evidence in the record supporting the District Court's factual findings underpinning its market determination, which precludes us from reversing those findings as clearly erroneous. *See, e.g.*, *EBC, Inc. v. Clark Bldg. Sys. Inc.*, 618 F.3d 253, 273 (3d Cir. 2010) ("We will not reverse '[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety' even if we would have weighed that evidence differently." (quoting *Anderson*, 470 U.S. at 573-574)). The Court cited Dr. Williams's seven bases for drawing the geographic market as the Philadelphia DMA. *Behrend*, 264 F.R.D. at 157-160. Although it rejected three of those bases, the remaining four tended to show that Comcast's clustering had anticompetitive effects in the Philadelphia DMA by deterring over-

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vant geographic market . . . is each class member's residence." Appellants' Br. 15. As of 2009, Philadelphia County alone had over 560,000 households. *See* U.S. Census Bureau, *Philadelphia County QuickFacts*, http://quickfacts.census.gov/qfd/states/42/42101.html. Nationwide, in 2010 there were over 117 million households. *See* U.S. Census Bureau, *America's Families and Living Arrangements: 2010*, http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html (Table AVG1). Taken at face value, Comcast's assertion that there are millions of geographic markets in the Philadelphia DMA (or over one hundred million geographic markets nationwide for multichannel video programming distributors) renders the phrase "geographic market" nonsensical. Perhaps for this reason, our research revealed no case—nor does Comcast provide one-in which a geographic market has been set at the individual household level. *Cf. Brown Shoe*, 370 U.S. at 337 ("Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.").

builders from entering the Designated Market Area, and that the industry itself used DMAs to focus its competition. Additional evidence in the record, reviewed in detail below, demonstrated that clustering results in fewer competitors and higher cable prices for the entire market. This evidence belies Comcast's claim that there is no change at the individual level when Comcast aggregates surrounding franchises.

Simply put, the District Court determined by a preponderance of the evidence that, when addressed on the merits, the class may be able to prove through common evidence that the relevant geographic market is the Philadelphia DMA. This determination did not exceed the Court's permissible discretion. To the extent Comcast reads the Court's opinion as actually fixing the relevant geographic market, we note that its determination was made solely for the purposes of class certification and will not be binding on the merits. *See Hydrogen Peroxide*, 552 F.3d at 318.[8]

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[8] The Concurring and Dissenting Opinion ("Concurrence-Dissent") faults the parties, the District Court and this Opinion for using "equivocally" the phrase "relevant geographic market." Slip Concurring-Dissenting Op. at 8. Specifically, it asserts that this Opinion "assumes . . . that the class is properly defined to cover the Philadelphia DMA . . . ." *Id.* at 10. The Concurrence-Dissent misunderstands an important distinction: as noted *supra* footnote 4, Plaintiffs have alleged a "class region" (to borrow from the Concurrence-Dissent's terminology) of a "Philadelphia cluster," which is distinct from the contested relevant geographic market of the "Philadelphia DMA." Our "assumption" concerning the "class region" is an uncontested piece of Plaintiffs' case: Comcast appeals only the precise issue of whether the District Court applied a correct legal standard in determining that the substantive antitrust geographic market could be established by evidence common to the class, *not*

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V.

Comcast hinges its next line of arguments on the District Court's final certification: "Proof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." App. 00032. According to Comcast, the District Court made clearly erroneous findings of fact by relying on Plaintiffs' expert, Dr. Williams, in support of the certified theory of antitrust impact.

The District Court considered in great detail the arguments presented by both sides. It rejected three of Plaintiffs' four theories of class-wide impact. *Behrend*, 264 F.R.D. at 166 (rejecting theory of direct broadcast satellite ("DBS") foreclosure); *id.* at 177-178 (rejecting benchmark theory); *id.* at 181 (rejecting bargaining power theory). Nonetheless, it accepted that Plaintiffs could establish class-wide antitrust impact on the theory of clustering and its im-

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whether the "Philadelphia cluster" is an appropriate "class region." *See* Appellants' Br. at 15 (labeling the issue as: "The District Court Failed To Apply The Correct Legal Standard In Its Ruling On Plaintiffs' Geographic Market Definition"); *id.* at 20 (summarizing that "the alleged geographic market accepted by the district court is wholly divorced from the legal standard for determining the correct geographic market"). Accordingly, when the Concurrence-Dissent states, "A compelling argument *could be made* . . .," Slip Concurring-Dissenting Op. at 11 (emphasis added), it goes beyond our role as a reviewing court by raising and addressing an argument not before us. *See, e.g.*, *AT & T v. F.C.C.*, 582 F.3d 490, 495 (3d Cir. 2009) ("An appellant waives an argument in support of reversal if he does not raise that argument in his opening brief."), *rev'd on other grounds*, 131 S. Ct. 1177 (2011).

pact on overbuilder competition. After detailing the evidence put forth by both sides, *id.* at 166-174, the Court concluded that "the Class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class," *id.* at 174. The Court found that through the model of Plaintiffs' expert, Dr. Williams, and the empirical studies conducted by governmental agencies and private researchers, the class had shown that the presence of an overbuilder constrains cable prices, and that Comcast engaged in conduct designed to deter the entry of overbuilders in the Philadelphia DMA. *Id.* at 174. It found unpersuasive the conclusions of Comcast's expert, Dr. David J. Teece, that overbuilding is not a successful business model. *Id.* at 174-175.

A.

On appeal, Comcast constructs a four-tiered argument to support its objections. First, it contends that Plaintiffs cannot show class-wide antitrust impact based on potential overbuilding by any of the "Transaction parties."[9] According to Comcast, the evidence demonstrated there was no actual competition between the Transaction parties; Plaintiffs therefore must show that the challenged conduct eliminated potential competition. In Comcast's view, the record evidence reflects that no Transaction par-

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[9] As detailed *supra* note 2, the "Transaction parties" are the parties that Comcast acquired or with which it swapped cable systems, which include: Marcus Cable; Greater Philadelphia Cablevision, Inc.; Lenfest Communications, Inc.; AT&T; Adelphia Communications Corp.; Time Warner; and Patriot Media.

ties had taken any affirmative steps to overbuild and, consequently, there was no potential competition to eliminate. Second, Comcast contends that Plaintiffs identified only RCN Telecom Services, Inc., as attempting to overbuild in the Philadelphia DMA. The evidence establishes, according to Comcast, that RCN was not going to overbuild as a result of its own financial woes, not as a result of any alleged activity on the part of Comcast. Third, as the argument goes, because there was no record evidence demonstrating actual or potential competition, the theoretical opinions indicating otherwise rendered by Plaintiffs' expert, Dr. Williams, were clearly erroneous. Comcast disputes at many levels Dr. Williams's methodology and results in his "market structure" and "market performance" opinions. Summed up, Comcast contends that theoretical expert opinions are no replacement for market facts, the record evidence showed no actual or potential overbuilding (as addressed in the first two contentions), and therefore any reliance on the expert opinions for evidence of anticompetitive behavior was clearly erroneous. Fourth, Comcast adds that any evidence of anticompetitive conduct specific to Delaware County could not serve as evidence of class-wide impact for the Philadelphia cluster.

B.

Plaintiffs respond to each level of Comcast's position. First, citing many portions of the record, they assert that there is "overwhelming" record evidence that Comcast's clustering of the Philadelphia DMA deterred and reduced overbuilding competition, resulting in antitrust impact (higher cable prices) for all class members. According to the class, the record demonstrates: clustering deters overbuilding, the

swaps and acquisitions eliminated competition, Multi-System Operators ("MSOs") actually do overbuild one another, Comcast and other MSOs look to one another's prices to set their own, and the MSOs chose affirmatively not to compete. The class adds that Comcast is raising a merits argument by asking the Court to consider the "potential competition" doctrine. Second, Plaintiffs contend that Comcast raises a merits issue by asking the Court to examine whether Comcast's conduct in fact prevented RCN from overbuilding in more areas than it did. In any event, they state that the record evidence demonstrates RCN had the intent and capital to overbuild the Philadelphia market. Third, Plaintiffs state that Dr. Williams's theoretical model plainly shows common evidence of class-wide impact; Comcast's contention that Dr. Williams's opinions do not *prove* antitrust impact is one for the jury to decide on the merits. Fourth, the evidence related to Delaware County "adds to and illustrates" the common evidence of Comcast's anticompetitive clustering conduct.

VI.

We begin the analysis of these contentions by focusing on the precise inquiry:

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

Hydrogen Peroxide, 552 F.3d at 311-312 (emphasis added). Many of Comcast's contentions ask us to reach into the record and determine whether Plaintiffs actually have proven antitrust impact. This we will not do. Instead, we inquire whether the District Court exceeded its discretion by finding that Plaintiffs had demonstrated by a preponderance of the evidence that they *could* prove antitrust impact through common evidence at trial.

This dispute therefore is evidentiary. When facts are at issue, the District Court exceeds its discretion in certifying a class only if its findings are clearly erroneous. *Id.* at 312. Comcast bears a heavy burden in convincing us that the District Court's factual findings were clearly erroneous. *See Anderson*, 470 U.S. at 573-574 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it . . . ."); *Krasnov*, 465 F.2d at 1302 ("It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.").

Comcast has not carried its burden. Plaintiffs provided evidence at the certification hearing that tended to show that Comcast's clustering (through swaps and acquisitions) reduced competition, deterred the entry of overbuilders, and resulted in higher cable prices for the entire class. This evidence displays "some hue of credibility" and bears a rational relationship to the Court's finding. *See Krasnov*, 465 F.2d at 1302.

For example, one of Plaintiffs' experts, Dr. Williams, concluded after a detailed analysis that, *inter alia*, Comcast's clustering increased its market share and, consequently, its market power, thereby raising barriers to entry for other multichannel video programming distributors and resulting in higher cable rates for all members of the class. App. 03599-3600; *see also Behrend*, 264 F.R.D. at 166-171 (providing in great detail the analyses, evidentiary support, and conclusions of Dr. Williams). Dr. Williams also cited to Federal Communications Commission reports, Government Accountability Office reports, and academic research, all of which indicated that reducing competition by clustering leads to higher cable rates. App. 03663-3668. Another expert, Dr. Hal Singer, used extensive record evidence to analyze how Comcast's clustering denied overbuilders access to the Philadelphia DMA. App. 03501-3529. Dr. Singer concluded that Comcast's actions allowed it to foreclose competitors and elevate prices. App. 03450. He also referenced multiple studies—both governmental and private, some of which overlapped with those referenced by Dr. Williams—that concluded that cable prices are lower when overbuilder competition is present. App. 03537-3548. Also in the record are specific instances of Multi-System Operators attempting to overbuild one another around the country. *See* Appellees' Br. 27 n.17 (citing 13 distinct examples in the record of MSOs overbuilding one another).

All of this evidence demonstrates that Comcast's alleged clustering conduct indeed could have reduced competition, raised barriers to market entry by an overbuilder, and resulted in higher cable prices to all of its subscribers in the Philadelphia Designated Market Area. Based on this evidence, we determine

that the antitrust impact Plaintiffs allege is "plausible in theory" and "susceptible to proof at trial through available evidence common to the class." *Hydrogen Peroxide*, 552 F.3d at 325; *see also In re Linerboard Antitrust Litig.*, 305 F.3d 145, 158 (3d Cir. 2002) (holding that common issues predominated sufficient for class certification when plaintiffs allegedly "were all affected by the increased price" they paid for linerboard). We are satisfied that the District Court's findings were supported by the evidence and were not clearly erroneous.

Comcast protests that the record demonstrates that there was no actual or potential competition among the Transaction parties. In light of the above record evidence, however, Comcast's interpretation of the evidence does not render the District Court's findings clearly erroneous. Comcast remains free to make these arguments to the jury.

VII.

Comcast's other contentions are equally unpersuasive. There is conflicting evidence as to the role Comcast played in RCN Telecom Services, Inc.'s decision to not overbuild further in the Philadelphia DMA. Plaintiffs highlight record evidence that RCN had the intent and capital necessary to overbuild the Philadelphia market. Appellees' Br. 34-35. Comcast contends instead that RCN faced financial woes, as a result of which it abandoned its plans to overbuild. Appellants' Br. 24-28. The District Court credited Plaintiffs' explanation: "What Dr. Teece considers 'unlikely,' Dr. Singer considers to be the common evidence of antitrust impact, namely that RCN was stymied in its efforts by Comcast's predatory behavior." *Behrend*, 264 F.R.D. at 175. Again, we are satisfied that the District Court's finding was not clear-

ly erroneous. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. Here there are two permissible views of the evidence and we will not disturb the District Court's finding.

Similarly, Comcast contends that Dr. Williams's analysis and methodology was flawed for various reasons, including the allegation that it was unsupported by any actual evidence. We disagree. As detailed above, there was ample evidence that clustering conduct can deter entry of overbuilders and result in higher cable prices. Dr. Williams and Dr. Singer examined evidence specific to Comcast's activities in the Philadelphia market, as well as numerous independent studies on the effects of cable clustering, to reach their conclusions. Comcast cites various cases for the proposition that "expert theory is not a substitute for market facts." *See, e.g.*, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (expert opinion rendered unreasonable by indisputable record facts); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 27 (1st Cir. 2008) (expert analysis unfinished and "purely conclusory"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999) ("An expert opinion based on . . . meager superficial information . . . is highly speculative, unreliable, and of dubious admissibility."). Although expressing a correct legal precept, those cases addressed situations in which the experts largely failed to tie their theories to any evidence; the precept therefore does not apply to this case in which the experts' theories were based on and correlated to other record evidence.

Comcast also asserts that every individual had one or two options from which to choose cable and that consequently only the name of the provider changed, not the number of options. This assertion completely overlooks the nature of the claims of the class: by clustering, Comcast was able to deter the entry of overbuilders, which resulted in higher prices for all non-basic Comcast subscribers. And Plaintiffs provided evidence that clustering can have this effect. In short, the District Court's task was to weigh expert testimony and make a determination, *Hydrogen Peroxide*, 552 F.3d at 323, and we discern no error in the Court's determination that Dr. Williams's analysis demonstrated that class-wide antitrust impact was susceptible to common proof.

As to Comcast's remaining contention that the District Court erred by crediting as evidence of class-wide impact the alleged conduct targeted at RCN Telecom Services, Inc., in Delaware County, we agree with the class that the alleged conduct is relevant to establishing class-wide impact. We have explained that "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc) (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)). Alleged specific conduct aimed at preventing the entry of an overbuilder anywhere in the Philadelphia DMA supports Plaintiffs' allegations of Comcast's ability to maintain supra-competitive prices for the entire market.

VIII.

At bottom, Comcast misconstrues our role at this stage of the litigation. Comcast would have us decide on the merits whether there was actual or po-

tential competition among the Transaction parties, the reason RCN Telecom Services, Inc., abandoned the Philadelphia market, and whether Plaintiffs' experts proved antitrust impact. We are not the jury. Although in *Hydrogen Peroxide* we heightened the inquiry a district court must perform on the issue of class certification, nothing in that opinion indicated that class certification hearings were to become actual trials in which factual disputes are to be resolved. Indeed, as we explained in *Hydrogen Peroxide*, a district court may inquire into the merits only insofar as it is "necessary" to determine whether a class certification requirement is met. 552 F.3d at 316. *Eisen* still precludes any further inquiry. *See Eisen*, 417 U.S. at 178 ("[T]he question is not whether the plaintiff or plaintiffs . . . will prevail on the merits, but rather whether the requirements of Rule 23 are met." (quoting Judge Wisdom's holding in *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971))); *Hydrogen Peroxide*, 552 F.3d at 317 ("*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement."). We allow *preliminary* merits inquiries when *necessary* for Rule 23 because of the potentially "decisive effect on litigation" of a certification decision, *Newton*, 259 F.3d at 167, but those inquiries remain limited and non-binding on the merits at trial, *Hydrogen Peroxide*, 552 F.3d at 318. Nothing in *Hydrogen Peroxide* requires plaintiffs to *prove* their case at the class certification stage; to the contrary, they must establish by a preponderance that their case is one that meets each requirement of Rule 23. To require more contravenes *Eisen* and runs dangerously close to stepping on the toes of the Seventh

Amendment by preempting the jury's factual findings with our own.[10]

In sum, we hold that the District Court's determination—that Plaintiffs have demonstrated by a preponderance of the evidence that they can establish class-wide antitrust impact through common evidence—did not exceed its discretion.

IX.

To satisfy another portion of the predominance requirement, Plaintiffs must establish that the alleged damages are capable of measurement on a class-wide basis using common proof. *See Hydrogen Peroxide*, 552 F.3d at 311, 325-326; *cf. Newton v.*

[10] Indeed, recent scholarship uniformly has expressed concern over the trend towards converting certification decisions into mini trials. *See* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 970 (2010) (contending that the "judicial tendency to impose requirements at class certification" serves no legitimate purpose and risks violating the Seventh Amendment); Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. Mich. J.L. Reform 323, 323 (2010) (stating that judicial resolution of merits at the certification stage precludes victims from obtaining redress, infringes on the Seventh Amendment, and serves no legitimate policy concerns); Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. Rev. 935, 940 (2009) (intensifying the Rule 23 analysis is inconsistent with the Rule itself and highly inefficient); J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions – Common Mistakes in Applying the Class Action Standard*, 41 Rutgers L.J. 163, 169 (2009) (contending, *inter alia*, that requiring the district court to determine by a preponderance whether plaintiffs' proposed proof is actually correct or incorrect would "substitute a court's own evaluation of key merits questions for that of the jury").

Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 187 (3d Cir. 2001) (stating that the "Herculean task" of calculating individual damages from hundreds of millions of different transactions "counsels against finding predominance"). The District Court concluded that Plaintiffs, through their expert Dr. McClave, provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis. 264 F.R.D. at 191. Comcast assails that determination as an abuse of discretion.

A.

The District Court examined the methodology, conclusions, and criticisms of the experts on both sides, before providing its conclusions. 264 F.R.D. at 181-191. (Comcast does not contest that the Court performed the "rigorous analysis" required by *Hydrogen Peroxide*.) Because on appeal Comcast renews the arguments it made to the District Court, we set forth each side's position in the District Court and the Court's response.

Plaintiffs' damages expert, Dr. McClave, concluded that the prices in the Philadelphia market were consistently and substantially higher than the prices in areas of effective competition. 264 F.R.D. at 181. His econometric analysis demonstrated that the alleged antitrust impact was class-wide, because the prices were elevated above competitive levels across all class members and for the entire time period. *Id.* For his methods, Dr. McClave constructed "but-for" prices against which to compare the prices Comcast charged in the Philadelphia DMA. "But-for" prices are those that would have existed absent the alleged anticompetitive conduct. To construct the "but-for" prices, he first selected comparable "benchmark"

counties around the country by applying two "screens" to determine whether the counties represented a level of competition similar to what Comcast would have faced in the Philadelphia market absent its alleged anticompetitive conduct. It is important to understand these two screens. The first screen—the "market share screen" or "40% screen"—required that the county have a Comcast subscriber penetration rate of less than 40%. App. 03410. Dr. McClave chose 40% because it represented the approximate midpoint of Comcast's penetration rate in the Philadelphia DMA (between approximately 20% in 1998 and 60% from 2003 through 2008). He chose this number also because it allowed for growth during the class period but focused on markets where Comcast was likely to have less market power than it does in the Philadelphia market. *Id.* The second screen—the "Direct Broadcast Satellite screen", or "DBS screen"—required that the county be in a Designated Market Area where the penetration level for Alternative Delivery Systems (which essentially includes DBS, but also master antenna systems and multipoint distribution systems) was at or higher than the national average of Alternative Delivery Systems penetration rates in Comcast markets.[11] Using data from the counties that fit the two screens,

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[11] Dr. McClave used Alternative Delivery Systems penetration rates as a proxy to measure Direct Broadcast Satellite penetration rates. App. 03410 n.11. Comcast's expert, Dr. Chipty, referred to the screen as the "DBS screen," and as measuring DBS penetration rates. App. 03834. The parties and District Court have continued using the DBS terminology. Although the screen technically measured Alternative Delivery Systems penetration rates, we will use the parties' terminology and refer to it as the "DBS screen" and as measuring Direct Broadcast Satellite penetration rates.

Dr. McClave performed a multiple regression analysis to compare actual prices in the Philadelphia DMA to the estimated "but-for" prices. He then applied the overcharge percentage to the relevant revenue obtained by Comcast for expanded basic service in the Philadelphia market during the class period to reach a final conservative estimated overcharge value: $875,576,662.

Comcast's experts, Dr. Teece and Dr. Tasneem Chipty, contested several parts of Dr. McClave's methodology, and questioned his results. 264 F.R.D. at 183. First, they challenged both benchmark screens used by Dr. McClave. Regarding the "DBS screen," Dr. Teece asserted that Dr. McClave erroneously chose the higher national Direct Broadcast Satellite penetration rate, instead of the lower regional rate predicted by Plaintiffs' experts Dr. Singer and Dr. Williams. The District Court rejected the critique, stating that Dr. McClave "used his national average DBS penetration screen as a descriptor of typical competitive market conditions," and was not attempting to predict the Direct Broadcast Satellite penetration rate of the Philadelphia DMA. *Id.* at 184. Regarding the "market share screen," Dr. Chipty contended that because Comcast was present in only a few counties in 1999, its actual market share was much higher in the counties where it was and 0% where it was not; as a result, the less-than-40% penetration rate provided an inappropriate screen. App. 03833. The District Court rejected the criticism as unsupported by the record, stating that Dr. Chipty should have presented evidentiary data to show that 40% was an incorrect midpoint estimate or average rate. 264 F.R.D. at 184. The Court also noted that the 40% screen was supported by the evidence as Comcast's approximate share of the Phila-

delphia DMA at the midpoint of the class period. *Id.* at 184 n.43.

Second, Dr. Chipty faulted Dr. McClave's model for failing to consider properly demographic variables among the counties: specifically, for omitting the variables of population density and the number and type of households. The District Court credited as well-supported Dr. McClave's response as to why he omitted population density: it is correlated with medium household income (which he included) and using it as well as household income would create confounding and unreliable results. 264 F.R.D. at 185-186. Additionally, according to Dr. McClave, adding it would mask the effects of anticompetitive influences because higher population density results in lower costs per subscriber. *Id.* at 185. The Court noted that Dr. Chipty's use of population density as a variable resulted in it being positive and statistically significant in one model but negative and statistically significant in another. *Id.* at 186. Moreover, the Court added that Federal Communications Commission and Government Accountability Office studies included population density but found it was not a statistically significant variable. *Id.*

Third, Dr. Chipty criticized Dr. McClave's model for comparing list prices for expanded basic cable in the Philadelphia DMA against the benchmark counties. She opined that Dr. McClave's model did not take into account the significant number of promotions and discounts offered to Comcast customers. *Id.* at 187. Dr. Chipty offered several rebuttal models that included population density and discounted prices, which resulted in significantly lower or even negative damages. The Court rejected Dr. Chipty's models as "suffer[ing] significant flaws." *Id.* at 188,

189. It stated that Dr. McClave's model accounted for discount prices in the formula (not model) when he multiplied anticompetitive overcharge by Comcast's relevant revenues (because Comcast receives revenue only for prices charged, the revenue side of the formula by definition includes discount prices). Accordingly, by adding discount prices to the model as well, Dr. Chipty's model doubly counted the discount. The Court also noted that, as Dr. McClave explained, more than 80% of Comcast's customers pay list price for expanded basic cable, and discounts from list prices are temporary (after which they return to list price). As to another of Dr. Chipty's models, which calculated damages through direct calculations instead of multiple regression, the Court rejected it in the words of Dr. McClave as a "novel and non-standard formula for calculating damages." *Id.* at 189.

Fourth, the District Court rejected Dr. Chipty's attempt to impeach Dr. McClave's model by using it to calculate damages for basic cable prices, instead of expanded basic cable. *Id.* at 190. The Court explained that Dr. McClave's model aimed to analyze only expanded basic cable, because Comcast alters its prices at the expanded level, so "any application of the McClave model to [basic cable prices] explains nothing." *Id.* Comcast does not contest that ruling.

Fifth and finally, the Court asked the parties after the hearing how to interpret Dr. McClave's damages model if it credited at least one, but not all, of Dr. Williams's four theories of antitrust impact. *Id.* It determined that Dr. McClave's damages model was still viable, even if it rejected some theories of antitrust impact, explaining that Dr. McClave selected benchmarks to isolate the effect of anticompet-

itive conduct, and that his use of the DBS screen was "entirely unrelated" to Dr. Williams's DBS foreclosure theory. *Id.* The Court concluded that Dr. Williams's theories of antitrust impact were not relevant to Dr. McClave's methods of choosing benchmarks because "[a]ny anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties." *Id.* at 191.

B.

Comcast contends that the District Court exceeded its discretion in accepting Plaintiffs' proposed damages calculation methodology. Its arguments are recast versions of those rejected by the District Court. First, Comcast contends that Dr. McClave's damages theory was based on all of Plaintiffs' alleged anticompetitive effects, but the District Court rejected three of Plaintiffs' four theories. Because Dr. McClave stated that his model was based on the cumulative effect and could not isolate damages for individual theories of harm, according to Comcast the District Court erred in accepting the damages model. Second, Comcast asserts that the economic assumptions underlying the damages model lack foundation in the record evidence. According to Comcast, both screens employed by Dr. McClave are factually unsupported and economically unsound: the "DBS penetration screen" because the Court rejected Dr. Williams's Direct Broadcast Satellite foreclosure theory, and the "market share screen" because it bears no relation to the conditions that would have existed in the Philadelphia region but for the complained-of conduct. Third, Comcast contends that the damages model is flawed because it fails to include population density as a variable, and because it calculates damages based on list prices, which fails

to consider the discounted prices that some subscribers actually pay.[12]

Plaintiffs remind us that the District Court already thoroughly considered and rebutted each of the points that Comcast now raises. As to the specific contentions, first, the class asserts that the District Court explicitly held that Dr. McClave's model was suitable for calculation of damages on all or individual theories of liability. Second, the class emphasizes that the damages model provides a methodology that can establish damages on a class-wide basis using common proof, and that Comcast ignores the proper inquiry at class certification and instead prematurely attacks the merits of the model. As a result, Comcast's arguments concerning the benchmarks miss the point. Third, the class asserts that Dr. McClave had ample justification to omit population density as a variable, and that the damages model incorporates discount prices.

X.

We pause to identify the forest for the trees. If allowed to proceed to trial, the class must establish that the injury it suffered from the violation of the antitrust laws is measurable. *See Hydrogen Peroxide*, 552 F.3d at 311; *see also Newton*, 259 F.3d at 188 ("Proof of injury (whether or not an injury occurred

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[12] Following the Supreme Court's decision in *Wal-Mart*, Comcast added that Dr. McClave's damages model, like the expert model in Wal-Mart, could be "safely disregard[ed]." *See Wal-Mart*, 131 S. Ct. at 2554. We disagree. The factual and legal underpinnings of *Wal-Mart*—which involved a massive discrimination class action and different sections of Rule 23—are clearly distinct from those of this case. *Wal-Mart* therefore neither guides nor governs the dispute before us.

at all) must be distinguished from calculation of damages (which determines the actual value of the injury)."). The usual measure in an overcharge case "is the difference between the illegal price that was actually charged and the price that would have been charged 'but for' the violation multiplied by the number of units purchased." Areeda *et al., supra*, ¶ 392a. Given the inherent difficulty of identifying a "but-for world," we do not require that damages be measured with certainty, but rather that they be demonstrated as "a matter of just and reasonable inference." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference . . . ."); *see also Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1273 (3d Cir. 1995) (citing *Story Parchment* and explaining that "damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts").

The inquiry for a district court at the class certification stage is whether the plaintiffs have demonstrated by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof. *See Hydrogen Peroxide*, 552 F.3d at 325. Some variation of damages among class members does not defeat certification. *See* 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1781 (3d ed. 2005) (stating for antitrust class certification that "it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate."). Complex and individual questions of damages, however, weigh

against finding predominance. *Compare Newton*, 259 F.3d at 187 (reasoning that having to examine proof of the circumstances of hundreds of millions of individual transactions counseled against finding predominance), *with Linerboard*, 305 F.3d at 157-158 (determining that, in contrast to *Newton*, all purchasers were affected by the increased price). As the Court of Appeals for the First Circuit explained:

> It is true that the validity of plaintiffs' theory is a common disputed issue. It will be for the fact finder to decide whether this theory is persuasive. At the class certification stage, however, the district court must still ensure that the plaintiffs' presentation of their case will be through means amenable to the class action mechanism. We are looking here not for hard factual proof, but for a more thorough explanation of *how* the pivotal evidence behind plaintiff's theory can be established. If there is no realistic means of proof, many resources will be wasted setting up a trial that plaintiffs cannot win.

In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 29 (1st Cir. 2008) (citation omitted); *see also Areeda et al., supra*, ¶ 331 (explaining for the issue of damages that "courts will not permit class actions unless they can devise a practical means for their litigation").[13]

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[13] In response to the Concurrence-Dissent's position that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies at the stage of class certification, *see* Slip Concurrence-Dissent Op. at 16, we make two observations. First, as the Opinion acknowledges, "in neither the District Court nor before us" did Comcast raise this issue, *id.* at 17 n.18, and it is therefore not properly before us. Second, although the Supreme

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On appeal, the inquiry narrows. Because the District Court held that Plaintiffs had established they could measure damages through common proof, we examine whether that determination was beyond the Court's discretion. Having identified the forest of law, we proceed to scrutinize the timber that Comcast faults as rotted.

A.

Comcast contends that Dr. McClave's model cannot isolate damages for individual theories of harm, and that it therefore cannot distinguish between lawful and unlawful competition. Comcast cites *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338,

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Court recently hinted that *Daubert* may apply for evaluating expert testimony at the class certification stage, it need not turn class certification into a mini-trial. *Wal-Mart*, 131 S. Ct. at 2553-54. We understand the Court's observation to require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage. This is consistent with our jurisprudence which requires that at class certification stage, we evaluate expert models to determine whether the theory of proof is plausible. *Hydrogen Peroxide*, 552 F.3d at 324. "[I]f such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence." *Id.* at 325. When plaintiffs present multiple models created by expert witnesses that can show common evidence and those models are based on data, a district court does not have to determine which model should be used at the time of class certification. *Linerboard*, 305 F.3d at 155. Here, the District Court likely determined that Dr. McClave's model could be refined between the time when class certification was granted and trial so as to comply with *Daubert*.

1353 (3d Cir. 1975), and *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000). In both cases, following adverse jury verdicts, the courts held that the experts' theories of damages were "speculation"—not "just and reasonable inferences"—because the models did not distinguish between the effects of lawful and unlawful competition. In *Coleman*, we quoted the guidepost of *Story Parchment*: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Coleman*, 525 F.2d at 1353 (quoting *Story Parchment*, 282 U.S. at 562).

We are not persuaded by Comcast's argument. To measure damages, Dr. McClave used screens to select and average benchmark counties against which to compare the actual Philadelphia market. The screens themselves were not intended to calculate damages, but instead to construct an estimated competitive "but-for" Philadelphia market (a market absent the alleged anticompetitive conduct). For example, although the screens incorporated Direct Broadcast Satellite penetration rates, those rates were included to estimate typical competitive market conditions, not to calculate liability for the foreclosure of DBS competitors.[14] The model then calcu-

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[14] The Concurrence-Dissent misreads this observation as addressing the on-the-merits validity of the DBS screen. Slip Concurring-Dissenting Op. at 25-27. We address Comcast's contention regarding the merits of the DBS screen, however, *infra* Part X. This observation indicates simply that the exclusion of the DBS foreclosure theory of liability does not render Dr. McClave's damages methodology incapable of calculating

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lates damages by comparing actual prices to the constructed "but-for" market. Differences between actual prices and "but-for" prices reflect anticompetitive impact. In other words, the model calculates supracompetitive prices regardless of the type of anticompetitive conduct. Further, the model uses standard econometric methodology to calculate damages. *See generally* Areeda et al., *supra*, ¶ 394 (detailing the basic steps in calculating antitrust damages). Indeed, as Dr. McClave highlighted, Comcast's expert Dr. Chipty employed the same methodological approach—identify a suitable benchmark and employ multiple regression analysis to control for differences—to estimate damages on a class-wide basis. App. 04041 ("Dr. Chipty and I agree that the application of multiple regression analysis to compare Philadelphia to a suitable benchmark is an appropriate methodology that can be applied on a classwide basis to quantify the amount of economic damages in this case.").

As a result, if the class proves at trial that Comcast engaged in anticompetitive behavior, it can use the constructed "but-for" market to measure the anticompetitive impact on the class members. At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations. *Cf.*

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damages on a class-wide basis if the class can prove that Comcast engaged in anticompetitive behavior.

Newton, 259 F.3d at 187. We are satisfied that Plaintiffs' damages model meets this burden.[15]

Additionally, the cases that Comcast offers are distinguishable on multiple grounds. Most to the point, those cases considered the merits of experts' theories following adverse jury verdicts; here, we address only whether Plaintiffs have provided a method to measure and quantify damages on a class-wide basis. We have not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative. And, to the extent Comcast worries about distinguishing between lawful and unlawful conduct, Dr. McClave's damages methodology does not suffer from the defects present in those cases because it constructs a competitive "but-for" world that includes lawful competition, not a hypothetical one bereft of both lawful and unlawful competition. *See Concord*, 207 F.3d at 1056-1057

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[15] The Concurrence-Dissent states that Dr. McClave's damages theory can establish damages only in the five counties where RCN attempted to overbuild. This concern misses the central theory of Plaintiffs' case: by deterring the entry of overbuilders through clustering, Comcast allegedly maintained higher prices across the *entire market area*. Dr. McClave's damages model appropriately reflected a "but-for" world by accounting for overbuilding only in the five counties where RCN attempted to overbuild, and his resulting calculations showed that—taking the limited actual overbuilding into account—"the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination." App. 03412. Additionally, the Concurrence-Dissent apparently takes up the mantle of an additional Comcast expert and raises multiple arguments against Dr. McClave's damages model not addressed by Comcast's experts at the District Court level nor advanced by Comcast on appeal. We must limit our review to the issues presented by Appellants and Appellees. We are not permitted to embark on an intellectual adventure of our own.

(model was "mere speculation" because it ignored inconvenient evidence, failed to account for external market events, and did not incorporate economic reality of market); *Coleman*, 525 F.2d at 1352-1353 (model premised on hypothetical world without even lawful competition).[16]

B.

Comcast's remaining arguments contest specific parts of Dr. McClave's damages methodology. These contentions are a renewal of those it made to the District Court, each of which the Court rejected. For those determinations to be beyond the Court's discretion, Comcast must convince us that the Court's acceptance of the pieces of Dr. McClave's methodology was clearly erroneous.

At the outset, we agree with the class that the heart of Comcast's arguments are attacks on the merits of the methodology that have no place in the class certification inquiry. Even if we were to overrule as clearly erroneous the District Court's findings on all four contested pieces of Dr. McClave's methodology—i.e., modify both of Dr. McClave's screens,[17]

[16] Comcast adds that because overbuilding occurs at the franchise level, Dr. McClave's county-to-county metric cannot calculate damages if the jury finds that only some (if any) franchises were impacted. First, Dr. McClave indicated that franchises within counties often have identical or nearly identical pricing, which assuages Comcast's concern. *See* App. 03409. Second, Comcast is attempting again to redefine the relevant market: inasmuch as Plaintiffs have established that the relevant geographic market can be the Philadelphia DMA, *see supra* Part IV.A, their damages model passes muster at this stage of the proceedings.

[17] The Concurrence-Dissent—unlike Comcast's experts, Comcast's lawyers and the District Court—identifies a "third

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add population density as a variable, and incorporate Dr. Chipty's proposed method for calculating discounts—only the final amount of estimated damages would change. *See* App. 03082 (Hr'g Ex.) (chart demonstrating differing damages amounts based on different model specifications, including Dr. Chipty's suggested specifications); App. 04557 (Dr. McClave Supplemental Decl.) (damages remain class-wide and substantial even using Dr. Chipty's proposed methodology, after correcting for two obvious errors). Comcast's assertions do not impeach the District Court's ultimate holding that damages are capable of common proof on a class-wide basis. *See Behrend*, 264 F.R.D. at 191; *see also In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 535 (6th Cir. 2008) ("Indeed, we have never required a precise mathematical calculation of damages before deeming a class worthy of certification."). All of the cases Comcast proffers examine damages models *on their merits* following adverse jury verdicts. For reasons explained above, these cases do not address the question at the class certification stage. Because Comcast's contentions do not cast doubt on the District Court's holding that Plaintiffs will be able to measure class-wide damages through a common methodology, we decline to consider them further. *See Hydrogen Peroxide*, 552 F.3d at 317 (describing the Supreme Court's rule

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screen." Slip Concurring-Dissenting Op. at 22. Again, this "screen" was not raised by the parties before us and we do not address it (we doubt additionally that it is a screen: the two screens were used to select benchmark counties, whereas the presence of overbuilders was an identification attached to the already-selected benchmark counties for purposes of performing a multiple regression analysis, *see* App. 03412, 03421 (Corrected McClave Decl.)).

prohibiting consideration of the merits if not "necessary" for purposes of Rule 23) (citing *Eisen*, 417 U.S. at 177).

Plaintiffs have provided a common methodology to measure and quantify damages on a class-wide basis. The District Court acted within its discretion in so finding.[18]

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[18] The Concurrence-Dissent expresses its additional concern over using mathematical averages across the Philadelphia DMA, given the potential variation among the franchise areas. Once again, this concern is notably absent from Comcast's briefing (except as already addressed above regarding the screens and demographic variables). Nor does the Concurrence-Dissent grapple with the abuse-of-discretion standard of review we must apply to the District Court's acceptance of Dr. McClave's damages model. We also note in passing that the Concurrence-Dissent overstates the degree of dissimilarity among the franchise areas. It recognizes that Dr. McClave's model examines actual prices on a county-by-county level, *see* Slip Concurring-Dissenting Op. at 39-40 n.36, but fails to note, as Dr. McClave explained: "Many franchises within counties often have identical or nearly identical pricing. More price variability, and thus from an econometric perspective more information about prices and their determinants, is obtained by aggregating prices at the county level." App. 03409 (Corrected McClave Decl.). Not even Comcast's expert contested this reasoning. *See* App. 03831 (Chipty Decl.); App. 03954 (Chipty Rebuttal Report). Finally, to the extent the Concurrence-Dissent questions the appropriateness of using county-level statistics to measure damages across the entire Philadelphia DMA, we observe that this question was contested strenuously and repeatedly by the experts on both sides at the District Court level. *See* App. 03410 (Corrected McClave Decl.) (explaining choice of market share screen); App. 03833 (Chipty Decl.) (contesting market share screen); App. 04066 (McClave Rebuttal Decl.) (defending market share screen); App. 03961 (Chipty Rebuttal Report) (disputing screen again); App. 04262 (McClave Reply Decl.) (responding to Dr. Chipty's criticisms of screen). After reviewing the reports and hearing careful examination of the experts on this point,

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XI.

The District Court certified the class for resolution of four claims. Comcast contends that the District Court erred by certifying the following claim:

> Whether Defendants conspired with competitors, and whether Defendants entered into and implemented agreements with competitors, to allocate markets, territories, and customers for cable television services; *and whether such conduct is a per se violation*, or whether it constitutes a restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

App. 00031 (emphasis added). According to Comcast, the District Court lacked any legal authority to certify a per se claim based on the class's allegations.

This is a merits issue beyond the scope of our Rule 23(f) jurisdiction. Comcast misconstrues the District Court's certification order. The Court certified the class and stated that one of the questions to be litigated is whether there has been a per se violation. It did not declare that a per se violation had oc-

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the District Court found that Dr. McClave's 40% county-level market-share screen was "supported by the evidence" and that Dr. Chipty's rebuttal was not supported by appropriate data. 264 F.R.D. at 184. Through a clearly erroneous lens, we may not reverse a District Court's factual finding if we would weigh the evidence differently; instead, the Court's finding must be implausible in light of the record, *Anderson*, 470 U.S. at 573-574, or completely devoid of minimum evidentiary support displaying some hue of credibility, *Krasnov*, 465 F.2d at 1302. The Concurrence-Dissent breezes past this formidable standard of review to reach its own factual finding.

curred. Appeals taken pursuant to Rule 23(f) do not furnish the proper vehicle to address the merits of Plaintiffs' antitrust claims. *See McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 390 (3d Cir. 2002) (describing the "scrupulous" limits of Rule 23(f) jurisdiction). Comcast appeals from the District Court's determination that questions of law or fact common to class members predominate, which was the only issue before the District Court. *See* App. 00029 (District Ct. Certification Order) ("The only class certification element that remained in dispute was the requirement of Fed. R. Civ. P. 23(b)(2) that common issues of law and fact predominate."). Comcast itself stipulated as much. *See* App. 00436 (Comcast Letter to the District Ct., Mar. 25, 2009) ("With respect to the issues to be addressed in a new class certification motion, Comcast is prepared to stipulate that the only issues to be resolved are those of antitrust impact and methodology of damages . . . ."). Comcast's request to have us declare on the merits that Plaintiffs cannot establish a per se antitrust violation is beyond the scope of the certification decision from which Comcast appeals pursuant to Rule 23(f). Accordingly, we do not reach this contention.

* * * * *

We have considered carefully all the contentions presented by the parties. Plaintiffs have demonstrated that this case can proceed as a class action. Comcast has not carried its burden to convince us otherwise. Accordingly, we will AFFIRM in all respects the District Court's Order certifying the class.

JORDAN, Circuit Judge, concurring in the judgment part and dissenting in part

I agree with the Majority's conclusion, though not its reasoning, with respect to the question of antitrust impact, and I therefore join in holding that the District Court did not abuse its discretion when it determined that Plaintiffs could establish antitrust impact through evidence common to a class comprising Comcast cable television customers in the Philadelphia DMA.[1] But because I conclude that damages cannot be proven using evidence common to that entire class, I would vacate the certification order to the extent it provides for a single class as to proof of damages, and I would remand the case to the District Court to consider whether the class can be divided into subclasses for the purpose of proving damages. I therefore respectfully dissent in part.[2]

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[1] I adopt the defined terms, such as "DMA," as used in the Majority opinion.

[2] Although the Majority opinion decides the question of certification for a single class comprising Comcast customers in the Philadelphia DMA, it should be noted that its decision will become a template for resolving similar class certification questions pending in cases involving the Chicago and Boston media markets (*see* Slip Op. at 10 & n.5), and in all likelihood it will be cited in other lawsuits against cable television service providers (*cf.* App. at 3652 (Williams Dec.) (explaining that, as part of Comcast's swaps and acquisitions, "Adelphia received Comcast's cable systems and subscribers located in Palm Beach, Florida and Los Angeles, California")). Thus, the problems in the Majority's reasoning will have practical repercussions far beyond this case. I therefore write not only because I cannot join the Majority in permitting Plaintiffs to pursue damages on a class-wide basis, but also to provide a counterpoint to the Majority's analysis for future consideration.

As the Majority explains, Plaintiffs' claims have three elements, (1) an antitrust violation, (2) antitrust impact, and (3) damages (*see* Slip Op. at 17 (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008)).[3] In pursuing its motion to decertify the initial class, however, Comcast effectively conceded that there was predominance with respect to the element of an antitrust violation, stipulating that it was contesting only "the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages." (App. at 438.) When the District Court granted Comcast's motion,[4] it accepted that stipulation and instructed the parties that, moving forward, they "need only address these discrete issues." (*Id.*) On appeal, after the District Court once more certified a class, Comcast has again limited its arguments to addressing predominance as to impact and damages. We are therefore faced with two related ques-

[3] Plaintiffs make separate claims for violation of both § 1 and § 2 of the Sherman Act, but each of those claims contains the three elements described above, with only the nature of the particular antitrust violation differing. *Compare Hydrogen Peroxide*, 552 F.3d at 311 (listing the elements of a § 1 claim as "(1) a violation of the antitrust laws – here, § 1 of the Sherman Act, (2) individual injury resulting from that violation, and (3) measurable damages"), *with Am. Bearing Co. v. Litton Indus.*, 729 F.2d 943, 948 (3d Cir. 1984) (listing the elements of a § 2 claim as "(1) an antitrust violation, in this case a violation of section 2 of the Sherman Act; (2) fact of damage or injury; and (3) measurable damages").

[4] Because Comcast had moved to decertify the class entirely before stipulating to all issues other than the predominance questions described above, the District Court, which construed the motion to decertify as a motion for reconsideration, granted the motion only with respect to those predominance issues and denied it with respect to all other issues. (App. at 437.)

tions: First, whether the District Court abused its discretion by holding that, as required by Federal Rule of Civil Procedure 23(b)(3), common issues of law or fact predominate with respect to the question of antitrust impact, and, second, whether the District Court abused its discretion by likewise holding that common issues of law or fact predominate with respect to the question of damages.[5]

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[5] While not expressed, the requirement that there must be predominance with respect to both antitrust impact and damages appears to be accepted by the parties and the Majority, and I likewise accept that predominance is issue specific. *See, e.g., Hydrogen Peroxide*, 552 F.3d 305 at 311 ("We examine the elements of plaintiffs' claim through the prism of Rule 23," to determine whether "proof of the essential elements of the cause of action requires individual treatment." (internal quotation marks omitted)); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001) ("To determine whether the claims alleged by the putative class meet the requirements for class certification, we must first examine the underlying cause of action . . . . If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.") Of course, where only some elements of a claim require individual treatment, while others can be litigated collectively, it may be appropriate to certify a class for those elements that can be treated collectively, while certifying subclasses or requiring individual treatment for those that cannot. *See, e.g.*, FED. R. CIV. P. 23(b)(4), advisory committee's notes (explaining that application of Rule 23(c)(4)'s provision allowing "that an action may be maintained as a class action as to particular issues only" may be appropriate where, for instance, liability can be proven class wide, but damages cannot); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 231 (2d Cir. 2006) (remanding to district court with instructions to certify a class for liability and to consider whether to also certify for damages or to, alternatively, certify subclasses for damages).

The Majority opinion skillfully lays out the legal requirements for predominance and the standard under which we must review the District Court's decision, and there is no need to repeat that legal background. I emphasize, however, the instruction from *Hydrogen Peroxide* that the question of predominance hinges on whether the elements of a class claim are "capable of proof at trial through evidence that is common to the class rather than individual to its members." 552 F.3d at 311-12. With that requirement in mind, I address the contested elements in turn.

I. Whether Antitrust Impact Can Be Proven Using Evidence Common To The Class

In seeking class certification, Plaintiffs initially presented four theories of antitrust impact.[6] The District Court rejected three of them,[7] leaving Plain-

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[6] Those theories were: (1) that Comcast's high market share resulting from clustering made it profitable for Comcast to deny Comcast SportsNet to DBS providers, which lowered DBS penetration rates and allowed Comcast to raise prices; (2) that Comcast's clustering reduced "benchmark competition" (the ability of customers to compare service and prices among competing providers), which allowed Comcast to raise prices; (3) that Comcast's market power increased its bargaining power vis-à-vis content providers, which allowed it to raise prices for its services; and (4) that Comcast's clustering deterred competition from overbuilders, allowing Comcast to raise prices.

[7] The District Court rejected the theory that clustering reduced DBS penetration because it found that Comcast's denial of Comcast SportsNet to DBS providers predated and was unrelated to clustering. It rejected the theory that clustering reduced benchmark competition because Plaintiffs had provided no evidence that television consumers actually engaged in benchmark competition. It rejected as "wholly unsupported"

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tiffs with only a single theory of antitrust impact: that Comcast's clustering reduced overbuilding[8] and, therefore, increased prices. Like the Majority, I see no abuse of discretion in the District Court's holding that antitrust impact may be proven using evidence that clustering reduced overbuilding and so caused increased prices. Thus, I agree with my colleagues in the Majority that the element of antitrust impact is at least capable of proof on behalf of some class of consumers. The more complicated question, as I see it, is whether antitrust impact is capable of proof for a class encompassing all Comcast customers in the Philadelphia DMA, through the use of common evidence.[9] On that issue too I agree with the Majority's holding that the District Court was within its discretion to conclude that the Philadelphia DMA is the appropriate geographic region within which antitrust

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the theory that increased bargaining power vis-à-vis content providers increased prices.

8 "Overbuilding," as the Majority explained, is where a second cable provider – the "overbuilder" – "builds and offers customers a competitive alternative where a telecommunications company already operates." (Slip Op. at 9.) The existing provider is often referred to as the "incumbent" provider.

9 The geographic scope of the class is actually defined as Comcast's Philadelphia cluster, which, as noted by the Majority, excludes the DMA counties of Lehigh and Northampton. As Dr. Chipty explains, those are the two counties in which Comcast has no presence (*see* App. at 3795 & n.12 (Chipty Reply Dec.)), and, therefore, they would be excluded from the class regardless of its geographic scope. For ease of reference, I refer to the class as encompassing the Philadelphia DMA, rather than the Philadelphia Cluster, recognizing that those DMA counties in which there are no Comcast customers are not included in the class.

impact can be proven with common evidence. I do not agree, however, with the Majority's reasoning in support of that conclusion.

Much confusion has been caused in this case by the conflation of two distinct concepts: the antitrust concept of "relevant geographic market," which has traditionally been defined as the smallest area within which a monopolist can exercise market power,[10] and the class action concept of a "class definition," which gives the parameters of a set of plaintiffs as to whom the elements of a claim can be proven using common evidence.[11] Because, in this case, the class

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10 For example, the Federal Trade Commission defines "relevant geographic market" as the region in which a hypothetical monopolist "would impose at least a [small but significant nontransitory price increase] on some customers in that region" without "this price increase [being] defeated by substitution away from the relevant product or by . . . customers in the region travelling outside it to purchase the relevant product." FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES 14-15 (2010). *Cf.* PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 5-30 (2010) ("[T]he relevant inquiry" for identifying a geographic market is "how far [customers] are willing to travel in order *to avoid* paying the defendant monopoly prices.").

11 *See In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 639 n.22 (3d Cir. 2011) (explaining that, pursuant to Rule 23(c)(1)(B), the class definition describes both "which individuals and entities are included" and the "claims, issues or defenses to be treated on a class basis"). While Rule 23(c)(1)(B) does not expressly state that the class should include only those for whom the defined claims can be proven by common evidence, it is apparent that any class must be defined in a manner consistent with all Rule 23 requirements, including commonality and predominance. *Cf. id.* at 639 & n.22 (explaining that the question of whether there was predominance when it was alleged that some members of a proposed class "would be unable to demon-

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definition includes a geographic component, the term "relevant geographic market" has been used equivocally by the parties, the District Court, and the Majority to describe both the area affected by antitrust impact and the area within which potential class members reside – the latter area being what I will call, for lack of a better term, the "class region."[12] The problem with that equivocal usage is that the relevant geographic market and the class region are not necessarily coterminous. Even if we assume that, within the Philadelphia DMA, there are many distinct geographic markets that are relevant for antitrust purposes, as Comcast argues, that does not mean that Plaintiffs cannot prove, by common evidence, that Comcast's acts caused antitrust impact within all of them. As a theoretical matter, class proof can cover multiple relevant geographic markets, and, indeed, other Courts of Appeals have so held. *See, e.g., In re Sugar Antitrust Litig.*, 559 F.2d 481, 483-84 (9th Cir. 1977) (rejecting the argument that a class could not be certified "where the antitrust claims involve a variety of geographic and product markets"); *Windham v. Am. Brands Inc.*, 539 F.2d 1016, 1018 (4th Cir. 1976) (holding that a district court abused its discretion in refusing to certify

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strate loss causation," was an issue of "which individuals and entities are included in the putative class . . . primarily relevant to class definition").

12 The class region will not necessarily be the same with respect to each element of a class's claims. In fact, even in this case, the class region differs with respect to antitrust impact and damages because, for the reasons I identify *infra* Part II(B), antitrust impact can be proven using common evidence across a wider region than damages can be.

an antitrust class that encompassed "11 different geographic markets").

While the relevant geographic market and the class region are conceptually distinct,[13] the Majority, like the District Court, initially attempts to identify the class region in terms of the relevant geographic market. Unlike the District Court, however, the Majority decides that because "[d]efining the relevant geographic market . . . is an issue of the merits," the question of the relevant geographic market is "not properly before us." (Slip Op. at 20-21.)

The Majority is correct that defining the relevant geographic market is not a task we need to undertake at this stage, but that is not because the task takes us into the merits. It is rather because, regardless of whether there are one or many relevant geographic markets associated with the Philadelphia DMA, the question before us at this juncture is whether there is some class, in this case defined geographically, that can be shown, through common evidence, to have experienced elevated prices as a result of reduced overbuilding because of Comcast's clustering. Should that region include only those franchise areas involved in the Cable System Transactions?[14] Should it include only those franchise ar-

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13 That is not to say that a class region and a relevant geographic market will always be different. An antitrust violation may often affect people in only a single geographic market, in which case the relevant geographic market and the class region would be in essence the same.

14 The Cable System Transactions are, as described by the Majority, the transactions through which Comcast "clustered" its franchise areas by "contract[ing] with competing cable providers to either acquire them or to 'swap' cable systems it

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eas in which RCN was licensed to overbuild, but did not? Should it encompass the Philadelphia DMA or some lesser or greater area? The Majority does not ask those questions, but, instead, after determining that Plaintiffs can attempt to prove that the relevant geographic market is the Philadelphia DMA, the Majority assumes that that also means that the class is properly defined to cover the Philadelphia DMA and, therefore, that Plaintiffs can prove by common evidence that clustering reduced overbuilding and increased prices throughout the DMA. (*See, e.g.*, Slip Op. at 51-52 n.16 (dismissing Comcast's argument that overbuilding should be analyzed at the franchise level because "Plaintiffs have established that the relevant geographic market can be the Philadelphia DMA").) Fortunately, what the Majority assumes, namely that the Philadelphia DMA is the appropriate class region for proving antitrust impact, is supportable.

A compelling argument could be made that the class should consist only of those people living in franchise areas where RCN was licensed to overbuild, because only those franchise areas that would otherwise have been overbuilt could have been affected by the elimination of that overbuilding.[15] Be-

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owned in areas outside the Philadelphia DMA for cable systems within the Philadelphia DMA." (Slip. Op. at 5.)

15 At least, Plaintiffs have provided no evidence that persons outside of franchise areas that would otherwise have been overbuilt can be affected by the elimination of that overbuilding. Dr. Williams opines that, where some parts of a franchise area are overbuilt, the overbuilding can affect prices in other parts of that same franchise area that are not overbuilt. (App. at 3704-14 (Williams Dec.) (explaining that where competing cable

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cause RCN was licensed to overbuild only five of the eighteen Philadelphia DMA counties (*see, e.g.*, App. at 3640 (Williams Dec.); App. at 4284-85 (Singer Reply Dec.)), that would suggest limiting the class region to those five counties.[16] Nonetheless, both Dr. Williams and Dr. Singer opined that, had RCN successfully overbuilt the five counties in which it was already licensed, it would have continued overbuilding into the remainder of the Philadelphia DMA. (App. at 4285 (Singer Reply Dec.) ("[H]ad RCN entered the five counties that it intended to . . . it is likely that RCN would have expanded its footprint beyond those five counties into geographically contiguous areas throughout the Philadelphia DMA."); App. at 4306 (Williams Reply Dec.) ("RCN likely would have continued to pursue its strategy of building into other areas in the Philadelphia DMA adjacent to its existing cable infrastructure, beyond the

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companies have "alternating franchise areas," overbuilding by one company into portions of the competitor's adjacent franchise area can affect prices in the portion of the overbuilt franchise area "that remain monopolized").) As a theoretical matter, it is also plausible that, when one franchise area has been overbuilt, the threat of further expansion by that overbuilder could put downward pressure on prices in nearby franchise areas. If such an effect is described in the multitude of expert opinions, however, the parties have not identified it. Moreover, even if there is such an effect, it would likely be attenuated by distance. It seems doubtful that overbuilding in, for instance, Bucks County, Pennsylvania would influence prices in Kent County, Delaware.

16 Given that the Class's whole theory is rooted in the premise that Comcast's clustering deterred overbuilding, it is no small matter that RCN – the only entity licensed to overbuild anywhere in the Philadelphia DMA – was licensed to overbuild in just five of the eighteen counties.

five counties.").) The District Court relied on those statements in holding that Plaintiffs had shown that the anticompetitive effects of clustering could be proven throughout the Philadelphia DMA. *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 174-75 (E.D. Pa. 2010). Though one may be skeptical that RCN would have overbuilt even the five counties in which it was licensed, let alone the remainder of the Philadelphia DMA, it was not clearly erroneous for the District Court to accept that the prospect of overbuilding throughout the DMA was capable of proof. Consequently, it was not an abuse of discretion for the District Court to hold that Plaintiffs could show, by common evidence, the antitrust impact of clustering throughout the Philadelphia DMA. Accordingly, while I do not agree with the Majority's reasoning, I agree that the District Court was within its discretion in determining that an appropriate class region for proving antitrust impact is the Philadelphia DMA.[17]

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17 The Majority responds to my efforts to identify the class region by stating that I have "misunderst[ood] an important distinction," namely that Plaintiffs have identified a "'class region' . . . of a 'Philadelphia cluster' which is distinct from the contested relevant geographic market of the "'Philadelphia DMA.'" (Slip Op. at 26 n.8.) I do acknowledge that distinction. However, that does not speak to the point because, in spite of that distinction, there remains an equivocal use of the term "relevant geographic market." That equivocation is evidenced by the Majority's statement – in response to Comcast's suggestion that franchise areas might be the appropriate class region for damages – that "Comcast is attempting to redefine the relevant market: inasmuch as Plaintiffs have established that the relevant geographic market can be the Philadelphia DMA . . . their damages model passes muster." (Slip. Op. at 51-52 n.16.)

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The Majority also asserts that there is no question about the class region because Comcast does not dispute the class region but disputes only the relevant geographic market. (Slip Op. at 26 n.8) That is not correct. While Comcast does not use the term "class region," Comcast and its experts plainly argue that the scope of the class is too broad, and they dispute the District Court's conclusion that antitrust impact can be proven by common evidence across the Philadelphia DMA. (*See, e.g*, App. at 3923 (Teece Reply Dec.) ("[E]ven if RCN would have overbuilt all five counties entirely in the but-for world, this would not be sufficient to conclude that the impact of the challenged conduct would have affected all Comcast customers in the Philadelphia DMA."); *id.* at 3922 ("I have seen no evidence that RCN ever intended to build out the entire Philadelphia DMA."); Appellants Br. at 33 (arguing that Dr. Williams's models do not show that clustering "deterred overbuilding . . . in a manner affecting all class members"); *id.* at 24-25 (noting that RCN was licensed in only five counties and arguing that Plaintiffs cannot prove that RCN would have entered the Philadelphia DMA). While I do not agree with Comcast's effort to define the class region by reference to the relevant geographic market (any more than I agree with the Majority's conflating of those concepts), to say that Comcast does not dispute the contours of the class region is not accurate, as the foregoing citations indicate.

However, even if Comcast had not disputed the class region, it would still be appropriate for us to address it. The Majority faults me for, in its view, addressing problems not raised by Comcast, which the Majority asserts are, therefore, waived. (*See, e.g.*, slip op. at 43-44 n.15 ("[T]he Concurrence-Dissent . . . raises multiple arguments . . . not addressed by Comcast's expert . . . . We must limit our review to the issues presented by Appellants and Appellees."). But "there can be no waiver . . . of the Judge's duty to apply the correct legal standard. . . . This is particularly true in the class action context, where 'the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.'" *In re Cmty. Bank of N. Virginia*, 622 F.3d 275, 302 n.20 (3d Cir. 2010) (quoting *United*

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II. Whether Damages Can Be Proven Using Evidence Common To The Class

I part ways with the Majority entirely, however, when it comes to class-wide proof of damages. The only evidence supporting Plaintiffs' claim that damages can be proven using evidence common to the class is the expert opinion of Dr. McClave. But, as

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States v. Ali, 508 F.3d 136, 144 n.9 (3d Cir. 2007) and *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)). Thus, where Comcast has raised the issues of whether there is predominance with respect to antitrust impact and damages, we are required to "apply the correct legal standard," – which is to determine whether those elements can, in fact, be proven using evidence common to the class – even if that requires us "'to conduct [our] own thorough [R]ule 23[b] inquiry.'" *Id.* (quoting *Sitrman v. Exxon Corp.*, 280 F.3d 554, 563 n.7 (5th Cir. 2002)). By disregarding the problems I have endeavored to identify, the result is an overly broad class definition and, to the extent any legitimate claims are proven, a likely dilution of recovery. Our fiduciary responsibility to absent class members requires that we ensure compliance with the provisions of Rule 23, especially those "'designed to protect absentees by blocking unwarranted or overbroad class definitions.'" *Id.* at 291 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *cf. Tri-M Group, LLC v. Sharp*, 638 F.3d 406, 416 (3d Cir. 2011) ("[T]he waiver principle is only a rule of practice and may be relaxed whenever the public interest or justice so warrants.").

Moreover, we must be cognizant of "the pivotal status of class certification in large-scale litigation," which is "often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants)." *Hydrogen Peroxide*, 552 F.3d at 310 (internal quotation marks omitted). Pointing out analytical problems central to the certification question is no frolic and detour. It is our obligation.

detailed hereafter, Dr. McClave's testimony is incapable of identifying any damages caused by reduced overbuilding in the Philadelphia DMA. Consequently, his testimony is irrelevant and should be inadmissible at trial, pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as lacking fit. Thus, it cannot constitute common evidence of damages.[18]

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[18] Although we have never explicitly held that expert testimony must satisfy *Daubert* at the class certification stage, it is implicit in both Supreme Court precedent and our precedent. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court recently expressed its "doubt" about a district court's conclusion that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." 131 S. Ct. 2541, 2553-54 (2011). In *Hydrogen Peroxide*, we explained that "opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason." 552 F.3d at 323. Inherent in that statement is the conclusion that a court could, at the class certification stage, exclude expert testimony under *Daubert*.

Even without the guidance of *Dukes* and *Hydrogen Peroxide*, simple logic indicates that a court may consider the admissibility of expert testimony at least when considering predominance. A court should be hard pressed to conclude that the elements of a claim are capable of proof through evidence common to a class if the only evidence proffered would not be admissible as proof of anything.

I recognize, of course, that in neither the District Court nor before us did Comcast describe its challenge to certification as a challenge to the admissibility of Dr. McClave's testimony. Nonetheless, while it did not use the language of *Daubert*, the substance of Comcast's challenge was that Dr. McClave's damages testimony was irrelevant and, therefore, did not fit the case. (*See, e.g.*, Appellants' Br. at 37 ("Dr. McClave admitted that his damages model takes all of the anticompetitive effects of all of the complained-of conduct as a whole, and therefore

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cannot isolate damages attributable to specific conduct or effects."); *id.* at 42 ("Dr. McClave's DBS penetration screen is substantively invalid because it bears no relation to the competitive conditions that would have prevailed in the Philadelphia region."); *id.* at 43 ("Dr. McClave's 'market share' screen is likewise invalid because it bears no relation to the competitive conditions that would have prevailed in the Philadelphia region."). The Majority protests my invocation of *Daubert*, but, regardless of whether we frame the issue as a question of fit under *Daubert* or simply ask whether the District Court abused its discretion by relying on irrelevant evidence, we are effectively asking the same question. I have chosen the terminology of *Daubert* because it is particularly apt for describing the difficulty created by the change in Plaintiffs' theory of impact and the consequent disconnect between that altered theory and Dr. McClave's expert report. The short of it is, Dr. McClave's model no longer fits the case. This observation is not, as the Majority fears, either an invitation or a demand for mini-trials in conjunction with class certification motions.

I note here as well my disagreement with the Majority's claim that, at the class certification stage, we need only "evaluate expert models to determine whether the theory of proof is plausible." (Slip Op. at 47 n.13.) The Majority supports that position by quoting *Hydrogen Peroxide*'s statement that "'if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class.'" (*Id.* (quoting *Hydrogen Peroxide*, 552 F.3d at 325).) That quotation is better understood, however, if one includes the first half of the quoted sentence, which states that "*the question at class certification is whether*, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class." 552 F.3d at 325 (emphasis added). Thus, *Hydrogen Peroxide* does not suggest that we need only "evaluate expert models to determine whether the theory of proof is plausible," as the Majority claims. To the contrary, *Hydrogen Peroxide* instructs that, even where a theory is plausible, "the question at class certification is whether" that plausible theory is susceptible to common proof. *Id.* If the only common proof offered is inadmissible expert testimony, then Plaintiffs have

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Our precedent explains that Rule 702 and *Daubert* impose three requirements for admission of expert testimony: the expert must be qualified, the expert's methodology must be reliable, and the expert's proffered testimony must fit the particular case. *See United States v. Schiff*, 602 F.3d 152, 172 (3d Cir. 2010). Testimony fits when it "'is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Id.* at 173 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). Like any relevancy determination, the question of fit is reviewed for abuse of discretion. *United States v. Ford*, 481 F.3d 215, 217-18. Here, Dr. McClave's opinion fails the requirement of "fit" because it is disconnected from Plaintiffs' only viable theory of antitrust impact, i.e., reduced overbuilding, and, thus, the proffered expert testimony cannot help the jury determine whether reduced overbuilding caused damages.[19] It was, consequently, an abuse of discretion for the District Court to consider Dr. McClave's opinion as demonstrating that damages could be proven using evidence common to the class.

As explained by the Majority, Dr. McClave arrived at his damages calculation by comparing actual cable prices in the Philadelphia DMA to prices in benchmark counties outside the Philadelphia DMA. By making those comparisons, Dr. McClave sought to identify the "but for" price of cable – that is the

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not met their burden of showing that the theory – plausible or not – is capable of common proof.

[19] I need not, and do not, question whether Dr. McClave is qualified as an expert or whether his methodology is reliable.

price that would have prevailed in the Philadelphia DMA but for the alleged anticompetitive conduct of Comcast. (App. at 3407 (McClave Dec.).) For that comparison to be relevant, however, Dr. McClave's benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA in the absence of any impact from that conduct. (*Cf.* App. at 719 (McClave Cross) (stating that the goal of his bechmarking model was to identify "counties that reflect characteristics that one would find absent . . . the effects of [Comcast's alleged anticompetitive] conduct").) And because the only surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave's comparison to be relevant, his benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding. In all respects unrelated to reduced overbuilding, the benchmark counties should reflect the actual conditions in the Philadelphia DMA, or else the model will identify "damages" that are not the result of reduced overbuilding, or, in other words, that "are not the certain result of the wrong." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *see also, e.g., Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975) ("'The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong.'" (quoting *Story Parchment*, 282 U.S. at 562)); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1494 (8th Cir. 1992) (same); *Broan Mfg. Co. v. Associated Distrib., Inc.*, 923 F.2d 1232, 1235 (6th Cir. 1991) (same).

Dr. McClave's benchmark counties fail in that regard because he formulated his model at a time when Plaintiffs had four separate theories of anti-

trust impact, and so he did not select his benchmark counties to isolate the impact of reduced overbuilding. He chose them, as one would expect, to reflect the impact of other conditions in addition to reduced overbuilding. Consequently, as described in greater detail below, once the District Court rejected Plaintiffs' other theories of antitrust impact – leaving only the reduced-overbuilding theory – Dr. McClave's model no longer fits Plaintiffs' sole theory of antitrust impact and, instead, produces damages calculations that "are not the certain result of the wrong." *Story Parchment*, 282 U.S. at 562.[20]

A. Dr. McClave's Benchmark Counties Do Not Reflect "But For" Conditions in the Philadelphia DMA

To identify his benchmark counties, Dr. McClave used three "screens." First, he screened for counties where Comcast's market share was "less than 40%," because that figure identified "markets where Comcast is likely to have less market power than it has acquired in the Philadelphia market." (App. at 3410 (McClave Dec.).) Second, he screened for counties where DBS penetration[21] was "at or above the national average" because "DBS . . . penetration was allegedly constrained by the anticompetitive behavior

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[20] Whether Dr. McClave's opinion would have fit had the District Court allowed Plaintiffs to pursue all four of their theories of antitrust impact is irrelevant at this point.

[21] As noted by the Majority, "DBS" stands for "direct broadcast satellite" television service. (Slip Op. at 27.) Dr. McClave actually used penetration rates for all alternative delivery systems ("ADS"), rather than just DBS systems. He opined, however, and the parties seem to agree, that "ADS is a proxy for DBS penetration rates." (App. at 3410.)

of Comcast." (*Id.*) Third, having identified counties in which Comcast's share was less than 40 percent and DBS penetration was above the national average, Dr. McClave screened for overbuilding, identifying "each of the benchmark counties . . . as either overbuilt or not overbuilt." (App. at 3411-12 (McClave Dec.).) While those screens might, if properly employed, have helped identify relevant benchmark counties in a case involving antitrust impacts beyond limited overbuilding, they fail to identify the "but for" conditions that are relevant to what is now the only impact of Comcast's allegedly anticompetitive conduct, namely the deterrence of overbuilding. They, therefore, cannot help identify damages caused by that impact. I examine the screens in reverse order.

1. The Overbuilt Counties Screen

While there are several problems in Dr. McClave's opinion that reflect the lack of fit, nothing demonstrates it with more certainty than this: For thirteen of the eighteen counties in the Philadelphia DMA, Dr. McClave's opinion does not even attempt to show that there were elevated prices resulting from reduced overbuilding. In fact, he assumes that there was no such effect.

As noted above, after identifying his benchmark counties using the market share and DBS penetration screens, Dr. McClave used a third screen to divide those counties into two groups, identifying "each of the benchmark counties . . . as either overbuilt or not overbuilt."[22] (App. at 3411-12 (McClave Dec.).)

[22] The Majority notes that the overbuilding screen is not mentioned by the parties or the District Court. (Slip Op. at 52 n.17.) While it is true that the parties do not use the terminol-

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Having done so, Dr. McClave estimated "but for" competitive prices, by comparing, on a county by county basis, prices in the eighteen actual Philadelphia DMA counties to prices in either the "overbuilt" or "not overbuilt" benchmark counties, and – crucially – he did so "assum[ing] that only the five counties that RCN indicated it planned to enter as an overbuilder would have been overbuilt." (App. at 3412 (McClave Dec.).) At the outset, therefore, it is clear that Dr. McClave assumed that elevated prices resulting from reduced overbuilding would be present in only five of the eighteen Philadelphia counties. Dr. McClave then explained that, after making his calculations, "the overbuilt factor indicate[d] lower prices [in his model] *in counties where the overbuilding factor [was] present*." (App. at 3422 (McClave Dec.) (emphasis added).) Thus, Dr. McClave's model assumes that elevated prices from reduced overbuilding could be present only in the five counties "that

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ogy "overbuilding screen," the District Court did indeed describe the concept to which I have given that label. *See Behrend*, 264 F.R.D. at 182 ("Once a county qualified as a benchmark for a particular year by satisfying [the DBS penetration and market share screens], it was examined to determine whether or not it had been significantly overbuilt."). Whether one uses the "screen" terminology is not what is important. Dr. McClave, in fact, does not describe any of the benchmarking criteria as "screens," which is a term that appears to have been only later applied to his methods.

Regardless of the terminology, the fact remains that Dr. McClave did screen for overbuilding in an attempt to account for elevated prices resulting from reduced overbuilding. Thus, that screen cannot be ignored in any "rigorous analysis," *Hydrogen Peroxide*, 552 F.3d at 318, of whether damages resulting from reduced overbuilding can be proven by common evidence.

RCN indicated it planned to enter," and the model did, in fact, identify elevated prices from reduced overbuilding only in those counties. (App. at 3412, 22 (McClave Dec.).) For the remaining counties, while there may be some uncertainty as to what exactly caused any elevated prices, this much is certain: the elevated prices identified by Dr. McClave in those thirteen counties were, according to Dr. McClave himself, the result of something other than reduced overbuilding. Consequently, any "damages" identified by Dr. McClave with respect to those thirteen counties are "uncertain damages . . . [that] are not the certain result of [reduced overbuilding]," and "may be substantially attributable to lawful competition." *Coleman* Motor, 525 F.2d at 1353 (quoting *Story Parchment*, 282 U.S. at 562).

Because Plaintiffs have been limited by the District Court to an overbuilding theory of antitrust impact, any price elevation resulting from a source other than reduced overbuilding is simply irrelevant. Thus, not only have Plaintiffs failed to show that damages can be proven using evidence common to the class, they have failed to show, for thirteen counties in the Philadelphia DMA, that damages can be proven using any evidence whatsoever – common or otherwise. Perhaps, in those other counties, there is a way to show damages resulting from reduced overbuilding, but, if so, Plaintiffs have not identified it. As the burden lies with Plaintiffs to establish predominance, that alone should compel us to vacate the District Court's certification order with respect to class-wide proof of damages.[23]

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[23] The Majority states that, in criticizing Dr. McClave's model for identifying overbuilding damages in only five counties, I

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2. The DBS Penetration Screen

Dr. McClave screened for counties where DBS penetration was at or above the national average because "DBS . . . penetration was allegedly constrained by the anticompetitive behavior of Comcast." (App. at 3410 (McClave Dec.).) Using that screen would have been appropriate if, as Plaintiffs originally argued and as Dr. McClave was originally informed, DBS penetration had been constrained by Comcast's anticompetitive conduct. But, as the District Court explicitly held, Plaintiffs failed to tie "Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration." *Behrend*, 264 F.R.D. at 165. Consequently, there is no evidence in the record suggesting that DBS penetration in the Philadelphia DMA was in any way affected by Comcast's allegedly anticompetitive conduct. Rather, the District Court found that, while DBS penetration in

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have "misse[d] the central theory of Plaintiffs' case: by deterring the entry of overbuilders through clustering, Comcast allegedly maintained higher prices across the entire market area." (Slip Op. at 50-51 n.15.) This misperceives my reasoning. I understand Plaintiffs' theory but have pointed out that the theory, as altered by the District Court's ruling, no longer matches Dr. McClave's opinion. More precisely, Plaintiffs' claim is that by reducing overbuilding "Comcast allegedly maintained higher prices across the entire market area," (*id.*) whereas Dr. McClave attempts to show that, by reducing overbuilding, Comcast maintained higher prices in only the "five counties that RCN indicated it planned to enter as an overbuilder," (App. at 3412 (McClave Dec.)). The Majority notes that this particular problem with Dr. McClave's damages theory was not identified by Comcast, but we ought note overlook significant problems with the class certification simply because they are ones we have identified rather than ones to which our attention has been directed.

Philadelphia was well below the national average, the cause of that reduced penetration – Comcast's refusal to distribute Comcast SportsNet through DBS providers – "occurred prior to the class period," is "unrelated to clustering," is "based upon valid business considerations" and is "specifically permitted" by the FCC. *Id.*

Therefore, while DBS penetration in the Philadelphia DMA is below the national average, the cause of that reduced rate predated and is unrelated to Comcast's clustering and, thus, even in the absence of Comcast's allegedly anticompetitive conduct, DBS penetration in the Philadelphia DMA would be no different than the below average rate that has actually prevailed. As a result, any benchmark county used to identify "but for" conditions should use the actual DBS penetration rate from the Philadelphia DMA. Dr. McClave, nonetheless, used the much higher national average rate,[24] which identified benchmark counties in which cable prices were lower than in counties having DBS penetration similar to that in the Philadelphia DMA.[25] Because Dr. McClave then calculated damages by comparing prices in those benchmark counties (with national average DBS penetration and, therefore, lower prices) to actual prices in the Philadelphia counties (with below national average DBS penetration and, there-

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[24] According to Dr. McClave, national average DBS penetration during the six year period for which he calculated damages averaged 24.17%, whereas actual DBS penetration in the Philadelphia DMA averaged 12.77%. (App. at 3411 (McClave Dec.).)

[25] The District Court discussed extensively the evidence that "DBS competition constrains cable prices." *Behrend*, 264 F.R.D. at 163-65.

fore, higher prices), at least a portion of Dr. McClave's damages calculation results from the Philadelphia DMA having below national average DBS penetration. Since the cause of the below national average DBS penetration in the Philadelphia DMA is "unrelated to clustering," is "based upon valid business considerations," and is "specifically permitted" by the FCC, *id.*, that reduced DBS penetration is the result of lawful competition, and, it follows, "[t]he damage figures advanced by [Dr. McClave] may be substantially attributable to lawful competition." *Coleman Motor*, 525 F.2d at 1353.

The Majority responds to this flaw only by stating that the DBS penetration screen was "included to estimate typical competitive market conditions, not to calculate liability for the foreclosure of DBS competitors." (Slip Op. at 49.) That explanation misses the mark. In identifying benchmark counties for use in a damages analysis, the goal is not to identify "typical competitive market conditions." The goal is, and must be, to identify the conditions that would have existed "but for" Comcast's alleged anticompetitive conduct. In this case, even in the "but for" hypothetical world, the Philadelphia DMA would not have been typically competitive. Rather, given the District Court's findings, there is no question that, as a result of Comcast's *lawful* competition, DBS penetration in the Philadelphia DMA would have been well below that present in a typical competitive market. Thus, by comparing Philadelphia to benchmark counties having the much higher national average DBS penetration, Dr. McClave's model wrongly "calculate[s] liability for the foreclosure of DBS competitors," (*id.*) imposing damages based on the prices that would have prevailed had Comcast not lawfully foreclosed DBS competition.

3. The Market Share Screen

Dr. McClave screened for counties where Comcast's market share was "less than 40%," because that figure represented the midpoint between Comcast's 20 percent share before the class period and its 60 percent share during the class period and so identified "markets where Comcast is likely to have less market power than it has acquired in the Philadelphia market." (App. at 3410 (McClave Dec.).) Under Plaintiffs last viable theory of antitrust impact, however, while Comcast's market share is relevant to the question of whether there has been any reduction in overbuilding, it is not relevant – at least not in isolation – to determining the damages caused by that reduction. Instead, the relevant market share is the share that would have been held by any incumbent in the "but for" hypothetical world.

As an illustration of that point, consider a hypothetical county with two equally sized franchise areas. Assume that, prior to the class period, Comcast had a 100 percent share of one franchise area and that AT&T had a 100 percent share of the other, so that each had a 50 percent share of the county as a whole. Assume further that, as part of its clustering efforts, Comcast acquired AT&T's franchise area so that, today, Comcast has a 100 percent share of the entire county. To test the theory that clustering reduces overbuilding, a comparison between Comcast's current 100 percent share of the county and the 50 percent share that Comcast would have had but for its clustering would surely be relevant in determining whether clustering effected any reduction in overbuilding.

Next, assume that, after making that comparison, Plaintiffs could show that, had no clustering

taken place, RCN would have overbuilt 20 percent of each of the two franchise areas, so that, in the "but for" world, RCN would have a 20 percent share in each franchise area, and Comcast and AT&T would each have an 80 percent share in their respective franchise area. Pursuant to Plaintiffs' only theory – that increased overbuilding decreases prices – any damages in that scenario arise solely from the difference between RCN's 20 percent share in the "but for" franchise areas and RCN's zero percent shares in the current franchise areas. The damages resulting from that foregone overbuilding are the same whether, in the "but for" world, the remaining 80 percent of the franchise in question would have been controlled by Comcast or by AT&T. It follows, therefore, that once the antitrust impact of Comcast's clustering – i.e., the reduction in overbuilding – has been identified and accounted for as part of an overbuilding screen, any market share screen applied to isolate the "but for" conditions that would have prevailed in the Philadelphia DMA should screen not just for Comcast's share, but for the share of whatever incumbent would have been present but for the clustering.[26]

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[26] Again, this is not to say that Comcast's market share, in particular, will never be relevant. As just discussed, it is highly relevant for determining antitrust impact. Moreover, it might have been relevant to damages had the District Court not excluded three of Plaintiffs' theories of antitrust impact. In fact, the market share screen appears to be another relic of the Plaintiffs' having initially presented four theories of impact. One of those theories was that Comcast's increased market share increased its bargaining power and allowed it to reduce prices, *Behrend*, 264 F.R.D. at 178-81, and a second was that Comcast's increased market share reduced the ability of consumers to engage in benchmark pricing by comparing Comcast's prices to the prices of other cable providers in the region,

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Because Dr. McClave's model already assumes that there has been a reduction in overbuilding and screens for it, the relevant market share for damages purposes is the share of the market maintained by any incumbent – regardless of the identity of the particular incumbent. By calculating the appropriate market share screen using only Comcast's average share throughout the Philadelphia DMA, Dr. McClave has ignored any market share that, in the "but for" hypothetical world, would have been maintained by an incumbent other than Comcast. For franchise areas where Comcast was not present prior to the class period, Dr. McClave should have calculated damages by comparing Comcast's current share to the "but for" share that would have been held by any incumbents Comcast replaced. Because he instead effectively calculated damages by comparing Comcast's current share to Comcast's zero percent share prior to the class period,[27] he unfairly

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id. at 175-78. Had either of those theories survived the class certification process, it might have made sense for Dr. McClave to screen for Comcast's market share, because, under those theories, Comcast's market share directly impacted price. But the District Court rejected those theories, allowing Comcast to proceed only on a theory that clustering reduced overbuilding. Under that theory, what is relevant is the market share of all incumbent cable providers vis-a-vis overbuilders.

[27] I say he "effectively calculated damages" that way because Dr. McClave did not actually make a franchise by franchise comparison, which, as discussed *infra* Part II(B), is itself problematic. He instead calculated Comcast's market share by averaging its share throughout the Philadelphia DMA. But, because he included in that average Comcast's zero percent share in the franchises in which it had not been present prior to the class period, instead of including the share held by the incum-

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suppressed the relevant incumbent share and artificially inflated the damages calculation.

Because none of Dr. McClave's screens reflect the conditions that would have prevailed in the Philadelphia DMA "but for" any reduction in overbuilding, the damages Dr. McClave calculated are "not the certain result of the wrong," *Story Parchment*, 282 U.S. at 562. Accordingly, Dr. McClave's opinion cannot help a jury determine damages, and so would be inadmissible at trial for lacking fit. Because Dr. McClave's opinion is the only evidence Plaintiffs have offered to meet their burden of showing that damages can be proven using evidence common to the class, I would vacate the District Court's class certification with respect to class-wide proof of damages.[28]

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bent Comcast replaced, it is fair to say that he effectively calculated damages by comparing Comcast's actual share in those franchise areas to Comcast's zero percent share prior to the class period.

[28] The Majority suggests that any problems with Dr. McClave's screens are "attacks on the merits of the methodology that have no place in the class certification inquiry," because, "[e]ven if we were to overrule as clearly erroneous the District Court's findings on all four contested pieces of Dr. McClave's methodology – i.e., modify both of Dr. McClave's screens . . . only the final amount of estimated damages would change." (Slip Op. at 52.) I disagree. First, the problems I have identified with Dr. McClave's screens call into question not only the amount of damages but also whether there are any means of proving damages at all in thirteen of the eighteen Philadelphia DMA counties. *See supra* Part II(A)(1). Second, if Dr. McClave's model does not presently constitute a relevant means of calculating class-wide damages, to say that the model might be fixed, for example by "modify[ing] both of Dr. McClave's screens," (Slip Op. at 52), is no better than saying

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B. Damages Are Not Capable of Being Proven By Evidence Common to the Entire Class

While my thoughts thus far have focused on why Plaintiffs have not met their burden of showing that damages can be proven using evidence common to the class, none of the problems I have noted are necessarily irreparable. That is, Dr. McClave could conceivably redesign his model to address overbuilding throughout the Philadelphia DMA, to use actual DBS penetration rates, and to screen for the market share of all incumbents, not just Comcast. Nevertheless, there remains an intractable problem with any model purporting to calculate damages for all class members collectively.

Central to Dr. McClave's damages model is the conclusion that the price of cable television service in any given franchise area is affected by the relative market shares of at least three entities: overbuilders, DBS providers, and incumbent cable providers. All else being equal, for example, areas that are

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that Plaintiffs have made "a threshold showing" of predominance or shown a sufficient "intention to try the case in a manner that satisfies the predominance requirement" – both of which are insufficient under *Hydrogen Peroxide*, 552 F.3d at 321 (internal quotation marks omitted). Plaintiffs have the burden of establishing predominance and, until they have actually proffered a model that shows how damages can be calculated on a class-wide basis, they have not met that burden – particularly when the only evidence they have offered should be entirely inadmissible. The Majority's willingness to overlook the debilitating flaws in Dr. McClave's model in an effort to avoid an "attack on the merits," is precisely the kind talismanic invocation of "concern for merits-avoidance" that *Hydrogen Peroxide* forbids. *Id.* at 317 n.17.

overbuilt will have lower prices than areas that are not overbuilt, and areas with high DBS penetration will have lower prices than areas with low DBS penetration. For that reason, Dr. McClave's model identifies benchmark counties by screening for the relative market shares of those three entities.[29] While I do not accept the manner in which Dr. McClave has measured the relative shares of those entities in the "but for" Philadelphia DMA, I accept the premise that the relative shares have significant influence on the price of cable television service.

If price does vary with the changes in relative share within a franchise area, however, it is hard to see how those 650 franchise areas[30] can simply be treated as average for purposes of proving damages. The record indicates that, on the contrary, the "but for" market shares of overbuilders, DBS providers, and incumbent providers would vary, sometimes significantly, from franchise area to franchise area.

Addressing overbuilding first, RCN – the only party licensed to overbuild any part of the Philadelphia DMA – was licensed to overbuild in only five counties. (App. at 3640 (Williams Dec.); App. at 4284-85 (Singer Reply Dec.).) While Plaintiffs' experts have opined that, had RCN successfully overbuilt those five counties, it would have continued overbuilding elsewhere, (App. at 4284-85 (Singer Re-

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[29] Or, at least, he screens for overbuilders, DBS providers, and a single incumbent provider – Comcast. I have already identified, *supra* Part II(A)(3), why he should instead screen for incumbent share.

[30] Dr. Besen, one of Comcast's experts, reports that there are 649 unique franchise areas in the Philadelphia DMA. (App. at 3782 (Besen Reply Dec.).)

ply Dec.)), any overbuilding into the other parts of the Philadelphia DMA would, it seems clear, have come later than the overbuilding of the five licensed counties. Thus, while some franchise areas might have been overbuilt early in the class period, other franchise areas would likely never have been overbuilt at all or have been overbuilt only later in the class period. There might, for instance, in the "but for" world be some franchise areas that were 50 percent overbuilt for the entire class period and other franchise areas that were only 5 percent overbuilt and only for a single year, or perhaps not overbuilt at all. That means that, both throughout the Philadelphia DMA and throughout the class period, there would probably be very significant variation in the "but for" level of overbuilding from franchise area to franchise area.

Consider next DBS penetration. Dr. McClave testified that the DBS penetration rate he used for the Philadelphia DMA was an average for the DMA, but he also said that it was his understanding that "DBS penetration varies across the cluster here" and that it was "possible that some of the counties in the Philadelphia DMA in fact have penetration that's above the national median." (App. at 729-30 (McClave Cross).) Thus, according to Dr. McClave, not only does DBS penetration vary across the Philadelphia DMA, but the variation is pronounced enough that some parts of the Philadelphia DMA have above national average DBS penetration despite the fact that the Philadelphia DMA, as a whole, has DBS penetration at only half the national average. Because DBS penetration was unaffected by Comcast's alleged anti-competitive conduct, *see supra* Part II(A)(2), DBS penetration in the "but for" Phila-

delphia DMA would likewise vary significantly from one franchise area to another.

Finally, with respect to the incumbents' market share, the record gives little information regarding what the share of any non-Comcast incumbent would be in the "but for" world. We do know, though, that Comcast's share prior to clustering varied markedly from franchise area to franchise area. (*See, e.g.*, App. at 3833 (Chipty Dec.) (stating that Comcast "had a zero percent share of housing units in the majority of counties" and, therefore, that "Comcast's share in the counties in which it was present was substantially higher than [its average market share]"); App. at 733 (McClave Cross) (testifying that, at the beginning of the class period, Comcast was present in "maybe half, maybe less of the counties" and that its share "in the counties where [it was] present" was probably higher than its average share)). And, where the other two components of market share – DBS penetration and overbuilding[31] – vary from one franchise area to another, it becomes a near mathematical certainty that the remaining portion of the franchise held by incumbent cable providers must likewise vary.[32]

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[31] While there may be other "alternative delivery systems" that have a limited share of the market, Dr. McClave includes those providers in his DBS penetration screen, *see supra* note 21, and they are, therefore, accounted for.

[32] It is possible, of course, that the variation in DBS and overbuilder shares could be such that the combined total of the two is the same in different franchise areas, and, therefore, it is not a true mathematical certainty that incumbent share must also vary. That that would occur across the 650 franchise areas, however, seems implausible in the extreme.

The wide variation in the relative market shares evidenced by the record makes it hard to imagine a means of calculating class-wide damages. Even if Dr. McClave's benchmarks were not problematic, to say that Comcast's "but for" share of the market throughout the Philadelphia DMA would be, on average, 40% is about as meaningful as saying that "with one foot on fire and the other on ice, I am, on average, comfortable."[33] Given that the three major factors identified as influencing price – overbuilding, DBS penetration, and incumbent share – vary widely within the franchise areas across the DMA, and given further that Comcast prices its cable service at the franchise level, (*see* App. at 716), I have difficulty accepting that it is appropriate to ignore those differences and take an average across the counties of the DMA.[34]

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[33] Sometimes attributed to Mark Twain, the actual source of this quote is unknown.

[34] The Majority asserts that "concern over using mathematical averages across the Philadelphia DMA . . . is notably absent from Comcast's briefing . . . ." (Slip Op. at 53-54 n.18.) But it is not absent. In fact, Comcast criticizes Dr. McClave's screens by explaining that:

> prior to the Transactions[,] Comcast did not operate in the majority of franchise areas in the DMA. By contrast, in the franchise areas where Comcast *did* operate, it is undisputed that Comcast's market share was significantly *higher* than 40%. Thus, the pre-class "20%" market share Dr. McClave employed in the creation of his screen is a mirage, arrived at solely through the artifice of averaging Comcast's greater-than-40% share of markets where it did operate with its "0% share" in hundreds of markets where it was not even present.

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This primary flaw in Dr. McClave's methodology – using a single set of assumptions for the entire Philadelphia DMA – cannot be fixed merely by altering his model. It seems to me that no model can calculate class-wide damages because any damages – such as they may be – are not distributed on anything like a similar basis throughout the DMA.[35]

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(Appellants Br. at 43.) That criticism precisely mirrors my own. Because of the significant variation in the market makeup from franchise area to franchise area, DMA-wide averages are not reliable. *See also infra* n.35.

35 This is not simply a case where there might be some variation in the amount of damages from one class member to another that can be ignored in order to gain the benefit of class treatment. Instead, due to the wide variations in the market makeup of the franchise areas across the DMA, proving damages will require some factual inquiry into the relative market shares of overbuilders, DBS providers, and incumbents in individual franchise areas (or perhaps, as subsequently noted in this dissent, groups of franchise areas). The Majority, quoting Wright's Federal Practice and Procedure, suggests that those differences in damages should not affect the certification process because "'it uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate.'" (Slip. Op. at 45-46 (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1781 (3d ed. 2005)).) I agree with the quoted statement, but would point also to the following quote from the same treatise: "Rather, the question of damages can be severed from that of liability and tried on an individual basis." *Id.* Thus, neither Wright – nor any authority I can find – suggests that where there are wide differences in damages from one class member to another, those differences can be ignored. Wright suggests instead that those differences can be accounted for by considering liability on a class-wide basis but damages on a more individualized basis – consistent with what I propose.

Rather, where some class members might reside in a franchise area that would have been 50 percent overbuilt for the entire class period and other class members might reside in a franchise area that would have been only 5 percent overbuilt and only for a single year, or not overbuilt at all, it strains credulity to believe that the damages suffered by those individuals would all be the same as a result of reduced overbuilding. Yet Dr. McClave's model treats them as though they are the same,[36] as would any model attempting to calculate damages on an average class-wide basis.

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[36] I recognize that Dr. McClave's model does not treat all franchise areas exactly the same, because he uses actual prices on a county-by-county level and, as a result, calculates a separate "but for" price for each county. (App. at 3424-26 (McClave Dec.).) But, while he uses actual prices on a county-by-county level, he calculates the "but for" prices using the same benchmark counties for the entire Philadelphia DMA (again, excepting Lehigh and Northampton, where Comcast has no presence). He treats the DMA as though the "but for" conditions would have been the same throughout.

The Majority states that this criticism "overstates the degree of dissimilarity among the franchise areas" because I fail to note that "[m]any franchise areas within counties often have identical or nearly identical pricing." (Slip Op. at 54 n.18 (quoting App. 3409 (McClave Dec.).) It may well be that there are similarities allowing for grouping of franchise areas, as I note in suggesting the possibility of subclasses. More fundamentally, however, the problem with Dr. McClave's opinion is not that it fails to account for variations in actual prices in the Philadelphia DMA, but that it fails to account for variations in the "but for" conditions that would have existed within the Philadelphia DMA. By so doing, the model is unable to distinguish between persons living in areas that may have been highly overbuilt and who, thus, would have suffered substantial damages, and persons living in areas that may never have been overbuilt and who, thus, would have suffered no damages.

The variation in conditions within the nearly 650 franchise areas in the Philadelphia DMA means that the issue of damages is more fractured than a single class can accommodate. I do not suggest that there necessarily would need to be 650 subclasses. It may well be that subclasses could be created encompassing groups of multiple franchise areas having similar demographics. *See, e.g., Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 566 (2d Cir. 1968) (explaining that where "differences among the class members bear only on the computation of damages," it "can be adequately handled . . . [by] divid[ing] the class into appropriate subclasses"). Whether that would necessitate the creation of so many subclasses as to defeat the benefit of class treatment is something I do not venture to conclude on this record. But I would remand the case to the District Court for consideration of the feasibility of subclasses.

III. Conclusion

For the foregoing reasons, I would vacate the District Court's certification order to the extent it provides for a single class as to proof of damages and remand the case for the District Court to address whether Dr. McClave's model could, in fairness, be revised to accurately reflect the conditions that would have existed in the Philadelphia DMA in the absence of any reduction in overbuilding caused by clustering. I would further ask the District Court to consider whether the class certified for proving antitrust impact can be divided into appropriate subclasses for purposes of proving damages.

APPENDIX B

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

CAROLINE BEHREND, et al.	:	CIVIL ACTION
v.	:	
COMCAST CORPORATION, et al.	:	NO. 03-6604

MEMORANDUM

Padova, J. **January 7, 2010**

I. INTRODUCTION

Presently before the Court in this antitrust suit alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, is the Plaintiffs' Amended Motion for Class Certification. On May 3, 2007, the Court granted a motion to certify the class. However, following the decision of the United States Court of Appeals for the Third Circuit in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) ("*Hydrogen Peroxide*"), we granted Comcast's motion to reconsider the certification decision and the putative Class ("the Class") filed the pending Amended Motion.

The only certification issue that remains in dispute is the requirement of Fed. R. Civ. P. 23(b)(2) that common issues of law and fact predominate.[1]

[1] In our May 23, 2007 certification decision, we determined that the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy had been satisfied by the Class. We

[Footnote continued on next page]

To support its certification arguments, the Class has propounded the expert reports of Dr. Michael Williams[2] and Dr. Hal Singer.[3] Its damages expert, Dr. James McClave, has also submitted reports to show class-wide damages.[4] Comcast has responded with the expert reports of Dr. Tasneem Chipty[5] and Dr.

[Footnote continued from previous page]
also determined that the Class had satisfied the Rule 23(b)(3) requirement of superiority. Comcast does not contest these determinations, which we incorporate by reference.

2 Dr. Williams is the director of ERS Group, an economic and financial consulting firm specializing in complex business litigation and regulation. He holds a Ph.D. in economics from the University of Chicago and was previously employed as an economist with the Antitrust Division of the Justice Department. (Expert Decl. of Michael Williams, Ph.D. ¶ 1 ("Williams Decl.").)

3 Dr. Singer is President of Empiris LLC, an economic consulting firm. He holds a Ph.D. in economics from Johns Hopkins University. His economic expertise is antitrust, industrial organization and regulation. (Class Cert. Decl. of Dr. Hal Singer ¶ 6 ("Singer Class Cert. Decl."). He has worked as an economist for the U.S. Securities and Exchange Commission and the Army Corps of Engineers, as well as for private economic consulting firms, and has taught microeconomics and international trade at the undergraduate level. (*Id.* ¶ 8.)

4 Dr. McClave has a Ph.D. in statistics and has taught at the university level for 20 years. He is an expert in the field of econometrics, which is the application of statistical and mathematical methods to economic issues. He is currently the President and CEO of Info Tech, Inc., which provides consulting and software development services associated with antitrust analysis. (Corrected Expert Decl. of Dr. James T. McClave at 1-2 ("McClave Decl.").)

5 Dr. Chipty is Vice President of CRA International, an economic and business consulting firm. She specializes in economics and industrial organization. She holds a Ph.D. in economics from the Massachusetts Institute of Technology. She has
[Footnote continued on next page]

David J. Teece.[6] The experts' opinions raise substantial issues of fact and credibility that we are required to resolve to decide the pending motion. *See Peroxide*, 552 F.3d at 316 (stating that the requirements of Rule 23 are not merely "pleading rules" and an "overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met"). Having rigorously analyzed the expert reports, as well as the testimony presented by the parties during a four-day evidentiary hearing, we conclude that the Class has met its burden to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis.

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taught at MIT, The Ohio State University, and Brandeis University and served as a consultant to the Department of Justice and the Federal Communications Commission. (Decl. of Dr. Tasneem Chipty in Reply to Plaintiffs' Amended Motion to Certify the Philadelphia Cluster Class at 1 ("Chipty Decl.").)

6 Dr. Teece holds a Ph.D. in economics from the University of Pennsylvania. He is the Tusher Professor of Global Business and Director of the Institute for Management, Innovation and Organization at the University of California at Berkley. He has also taught at Stanford University and Oxford University. He is also Director and Vice Chairman of LECG, LLC, an expert services firm specializing in the application of economic and financial analysis to legal and policy issues. (Expert Report of David J. Teece, Ph.D. at 6 ("Teece Report").)

II. STANDARD OF REVIEW

A. Class Certification

In order to obtain class certification, a party must satisfy the four prerequisites of Rule 23(a) and show that the action can be maintained under at least one of the provisions of Rule 23(b).[7] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). The Class in this case seeks certification under Rule 23(b)(3), which provides that certification is permissible if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The twin requirements of Rule 23(b)(3) are referred to as the predominance and superiority requirements. Comcast concedes that the Class satisfied the Rule 23(a) prerequisites and the Rule 23(b)(3) superiority requirement; the sole remaining issue is whether it satisfies the predominance requirement of Rule 23(b)(3).

Class certification is only appropriate "if the trial court is satisfied, after a rigorous analysis," that each requirement of Rule 23 has been met. *Gen Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). "Class certification is an especially serious decision, as it 'is of-

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[7] Rule 23(a) provides that class certification is permissible only if "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

ten the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).'" *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001)).

The United States Court of Appeals for the Third Circuit has recently clarified what is meant by "rigorous analysis." Rigorous analysis requires "'a thorough examination of the factual and legal allegations,'" *Hydrogen Peroxide*, 552 F.3d at 316 (quoting *Newton*, 259 F.3d at 167), and the resolution of all legal or factual disputes relevant to Rule 23 by a preponderance of the evidence to "make findings that each Rule 23 requirement is met or is not met," *id.* at 320. In other words, we must find, based on "all relevant evidence and arguments presented by the parties," that "the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." *Id.* The district court's findings, while conclusive with respect to class certification, do not bind the fact-finder on the merits. *Id.*; *see also In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("*In re IPO*"); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 323 (5th Cir. 2005).

Although a district court inquires into the merits of the case insofar as "arguments that go to the merits of a plaintiff's cause of action . . . also implicate the class certification decision," *Jackson v. Se. Pa. Transp. Auth.*, 260 F.R.D. 168, 184 (E.D. Pa. 2009), such an inquiry is merely preliminary. *Hydrogen*

Peroxide, 552 F.3d at 317. A plaintiff need not establish by a preponderance of the evidence the merits of its claims at the class certification stage, and any inquiry into the merits that is not necessary to a Rule 23 decision is precluded. *Jackson*, 260 F.R.D. at 184 (citing *Newton*, 259 F.3d at 166-67, and *Hydrogen Peroxide*, 552 F.3d at 317-18). However, the movant must do more than "assur[e] . . . the court that it intends or plans to meet the requirements" of Rule 23. *Hydrogen Peroxide*, 552 F.3d at 318; *see also Wachtel v. Guardian Life Ins. Co.*, 453 F.3d 179, 186 (3d Cir. 2006) (holding that there must be "full and clear articulation of the litigation's contours at the time of class certification").

As with other matters relating to Rule 23 requirements, "[e]xpert opinion . . . calls for rigorous analysis." *Hydrogen Peroxide*, 552 F.3d at 323, 325 ("Rule 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties."). A district court must not uncritically accept expert opinion testimony "as establishing a Rule 23 requirement merely because [it] holds the testimony should not be excluded, under Daubert or any reason." *Id.* at 323. Performing a rigorous analysis may require the district court to weigh conflicting expert testimony at the certification stage and determine whether an expert's opinion is persuasive or unpersuasive. *Id.* at 323, 324 (noting that "a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement, but it may not decline to resolve a genuine legal or factual dispute" relevant to class certification); *see also In re IPO*, 471 F.3d at 42 (disavowing an earlier holding "that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed");

Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005). The court must resolve expert disputes to the extent necessary to determine whether a Rule 23 requirement has been satisfied even if the dispute implicates the credibility of one or more experts. *Id.* at 324.

B. Rule 23(b)(3) Predominance Requirement

Predominance requires that "'[i]ssues common to the class must predominate over individual issues.'" *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 313-14 (3d Cir. 1998)). The district court must "consider whether plaintiff's legal claim, if plausible in theory, 'is also susceptible to proof at trial through available evidence common to the class.'" *Jackson*, 260 F.R.D. at 184 (quoting *Hydrogen Peroxide*, 552 F.3d at 325). The district court's analysis of predominance "is especially dependent upon the merits of a plaintiff's claim," *Constar*, 2009 WL 3462032 at *3, since "the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual." *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *Blades*, 400 F.3d at 566). Accordingly, "'a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.'" *Id.* (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008)).

Notwithstanding the Supreme Court's observation that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws," *Amchem*, 521 U.S. at 625, the district court should not "relax its certification analysis, or presume a requirement for certifi-

cation is met, merely because a plaintiff's claims fall within one of those substantive categories." *Hydrogen Peroxide*, 552 F.3d at 322. Therefore, "the court should not suppress 'doubt' as to whether a Rule 23 requirement is met – no matter the area of substantive law. *Id.* "'If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id.* at 311 (quoting *Newton*, 259 F.3d at 172).

To prevail on its antitrust claim, the Class must prove the following elements: (1) violation of § 1 of the Sherman Act; (2) individual injury or impact resulting from that violation; and (3) measurable damages. *Hydrogen Peroxide*, 552 F.3d at 311. At the class certification stage, the Class must establish that common proof will predominate with respect to each of these elements. *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 141 (D.N.J. 2002). With respect to antitrust impact, the Court of Appeals for the Third Circuit has explained:

> Individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certifica-

> tion is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial.

Hydrogen Peroxide, 552 F.3d at 311-12 (citations omitted).

III. COMMON EVIDENCE OF ANTITRUST IMPACT

The Class asserts that it can establish its antitrust claims through the following common evidence of antitrust impact applicable to all class members:

- Comcast's swaps and transactions in the relevant geographic market,[8] the Philadelphia

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[8] The swaps and acquisitions include the following actions taken by Comcast:

- The April 1998 acquisition of Marcus Cable and its 27,000 cable subscribers located in Harrington, Delaware, which is part of the Philadelphia DMA.
- The June 1999 acquisition of Greater Philadelphia Cablevision, Inc., a subsidiary of Greater Media, Inc., and its 79,000 cable subscribers located in Philadelphia.
- The January 2000 acquisition of Lenfest Communications, Inc. and more than 1.1 million cable subscribers located in Berks, Bucks, Chester, Delaware, and Montgomery counties in Pennsylvania, and New Castle County in Delaware.
- The January 2000 acquisition of Lenfest's ownership interests in Garden State Cablevision L.P. and its 212,000 customers located in Atlantic, Burlington, Camden, Cape May,

[Footnote continued on next page]

designated marketing area ("DMA"), eliminated competition, resulting in increased prices for expanded basic cable subscribers;

- Comcast's clustering of the Philadelphia DMA led to higher expanded basic cable rates throughout the DMA, affecting all class members;
- Comcast's clustering strategy made it profitable for Comcast to deny access to its regional

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Cumberland, Gloucester, Mercer, and Salem counties in New Jersey, which is part of the Philadelphia DMA.

- The December 2000 swap agreement with AT&T, wherein Comcast obtained cable systems and approximately 770,000 subscribers, including subscribers located in Eastern Pennsylvania (Berks and Bucks counties) and New Jersey. In exchange, AT&T obtained cable systems and approximately 700,000 Comcast subscribers located in Chicago and elsewhere around the country.
- The January 2001 swap agreement with Adelphia Communications Corp., wherein Comcast obtained cable systems and approximately 464,000 subscribers located primarily in the Philadelphia area and adjacent New Jersey areas. In exchange, Adelphia received Comcast's cable systems and subscribers located in Palm Beach, Florida and Los Angeles, California.
- The April 2001 swap agreement with AT&T, wherein Comcast obtained cable systems and approximately 595,000 subscribers, including subscribers located in Pennsylvania and New Jersey.
- The August 2006 swap agreement with Time Warner in connection with the Adelphia bankruptcy, wherein Comcast obtained cable systems and approximately 41,000 subscribers in the Philadelphia DMA.
- The August 2007 acquisition of Patriot Media and its 81,000 cable subscribers located in New Jersey, within the Philadelphia DMA.

sports programming content, Comcast SportsNet Philadelphia ("CSN Philadelphia"), to DirecTV and EchoStar, its direct broadcast satellite ("DBS") competitors, resulting in decreased DBS penetration in the Philadelphia DMA, which led to increased expanded basic cable prices to all class members;

- Comcast's clustering has impaired the ability of overbuilders (rival wireline providers of multichannel video programming service), such as competitor RCN, to effectively compete in the Philadelphia DMA, resulting in higher rates paid by all class members; and
- widely accepted common methodologies are available to measure and quantify damages on a class-wide basis.

(Mem. in Supp. of Pls' Am. Mot. for Cert. of the Philadelphia Class at 9; Williams Decl. ¶ 108.) Dr. Williams opines that the relevant product market is multichannel video programming services distributed by multichannel video programming distributors ("MVPDs"), including cable companies, local exchange carriers ("LECs")[9], and DBS providers. (Williams Decl. ¶ 22.) He states that the relevant geographic market is the Philadelphia DMA. (*Id.* ¶ 27.) Dr. Williams attempts to show that Comcast possesses market power in the relevant geographic market and product market by conducting a market structure analysis. He then conducts a market per-

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[9] LECs are traditional telephone companies such as Verizon, which offers its fiber optic video service in competition with Comcast's expanded basic cable service. They are also referred to by some of the experts as incumbent local exchange carriers or "ILECs".

formance analysis to determine the results of Comcast's attaining and maintaining its market power. In his market structure analysis, Dr. Williams examines the effects of the swaps and acquisitions on Comcast's market share, the level of market concentration in the Philadelphia DMA, and barriers to entry. (*Id.* ¶ 111.) In his market performance analysis, Dr. Williams examines Comcast's alleged ability to charge rates above those that would prevail in the absence of the alleged anticompetitive conduct. (*Id.* ¶ 126.)

A. The Geographic Market

Dr. Williams states seven bases to support his conclusion that the relevant geographic market is the Philadelphia DMA.

1. Denial of access to CSN Philadelphia is based on the Philadelphia DMA

Dr. Williams' first economic explanation for his geographic market description follows from his analysis of the effect of Comcast's denial of CSN Philadelphia to the DBS providers. Dr. Williams finds that Comcast had an economic incentive to deny CSN Philadelphia to the DBS providers because of the percentage of subscribers it maintained in the Philadelphia DMA. He reasons that if Comcast had a sufficiently small percentage of subscribers in the Philadelphia DMA, it would not be profitable for the company to deny access to the DBS providers because the loss in forgone revenue on sales of CSN Philadelphia to the DBS providers would be greater than the gain in revenue on sales of multichannel video programming service to the incremental number of subscribers who would have switched to DBS had Comcast not denied access to CSN Philadelphia. Dr. Williams finds that Comcast's increase in its per-

centage of subscribers in the Philadelphia DMA through swaps and acquisitions made it profitable for Comcast to deny DBS providers access to CSN Philadelphia. He also finds that econometric evidence shows that, all else equal, denying access to CSN Philadelphia reduced DBS penetration rates in the Philadelphia DMA, and that, all else equal, reductions in DBS penetration rates led to higher rates for expanded basic cable service throughout the Philadelphia DMA. (*Id.* ¶¶ 28-29.)

2. Effect of ownership by a large multisystem operator

Dr. Williams' second economic basis for his geographic market definition follows from his analysis of how a cable system's rates change, all else equal, when it is owned by a large multisystem operator ("MSO") or becomes part of a cluster. He states that econometric evidence shows that, all else equal, cable systems affiliated with a large MSO generally have higher rates than other cable systems. Williams contends that a number of the cable systems acquired or swapped by Comcast in the Philadelphia DMA were not affiliated with a large MSO prior to becoming affiliated with Comcast, which was a large MSO. (*Id.* ¶ 30.) He states that econometric evidence also shows that, all else equal, cable systems owned by an MSO that are located in a geographic "cluster" generally have higher rates than other cable systems. Comcast's swaps and acquisitions in the Philadelphia DMA created such a cluster. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. (*Id.*)

Comcast disputes this portion of Dr. Williams' opinion, arguing that it is not supported by fact. It asserts that large portions of the Philadelphia DMA were already controlled by clustered MSOs before the swaps and acquisitions. The class certification record demonstrates that large portions of the DMA were, in fact, already controlled by MSOs. For example, Comcast acquired substantial cable assets in the DMA through its purchase of Lenfest, itself a large, clustered MSO.[10] (Williams Reply Decl. fig.5.) Acquisitions and swaps from AT&T, Adelphia and Time Warner also brought systems into Comcast ownership that were previously part of large MSOs. *See* footnote 8, supra. This does not, however, im-

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[10] Williams conceded on cross-examination that Lenfest was already a substantial, clustered cable system before it was acquired by Comcast:

> Q But even prior to the Adelphia transaction or any of the other deals, Comcast and Lenfest (ph), closed in January of 2000, right?
> A That's correct.
> Q Comcast was a substantial cable cluster, at that time?
> A After the Lenfest acquisition?
> Q Before.
> A Sure, Comcast had substantial properties in the Philadelphia DMA before the Lenfest transaction.
> Q And Lenfest was a substantial cable cluster, at the time, right?
> A Lenfest had, yeah, they have approximately a million customers.
>
> . . .
>
> Q So, Lenfest had 1.1 million subscribers that, even just standing alone today, Lenfest would be one of the largest cable clusters today?
> A They certainly are a large cable company, yes, sir.

(N.T. 10/15/09 at 37:13-25; 38:16-19.)

peach Dr. Williams' assertion that the end result of the swaps and acquisitions created an antitrust impact in the relevant geographic market. The fact that parts of the DMA were already clustered does not eliminate the possibility that creating an even larger cluster had anticompetitive effects. As Dr. Williams asserts in his market performance analysis, consolidating the Philadelphia cluster from the cable properties previously owned by these MSOs and other smaller cable companies permitted Comcast to charge supra-competitive prices for expanded basic cable service in the geographic market.

3. Overbuilders

The third explanation that Dr. Williams provides for his geographic market definition follows from his analysis of how a cable system's rates change, all else equal, when it faces competition from overbuilders. His economic analysis shows that Comcast's alleged anticompetitive conduct in the Philadelphia DMA reduced the extent of competition provided by overbuilders in the Philadelphia DMA. He states that econometric evidence shows that reductions in overbuilding cause cable rates to increase, all else equal. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. (Williams Decl. ¶ 31.)

4. Benchmark competition

Dr. Williams' fourth basis follows from an analysis of how "benchmark competition" affects cable rates. Benchmark competition occurs when competition in a market is enhanced by the actions of regulators, firms, and/or customers in comparing the performance of different companies. He opines that both cable regulators and cable customers rely on,

and cable companies engage in, benchmark competition. In his opinion, Comcast's swaps and acquisitions in the Philadelphia DMA reduced the degree of benchmark competition. Reductions in benchmark competition, all else equal, cause cable rates to increase. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. (*Id.* ¶ 32.)

5. Industry participants use DMAs

Fifth, Dr. Williams opines that industry participants characterize competition between MVPDs as occurring in DMAs. (*Id.* ¶ 33.)

6. Clustering

The sixth basis for Dr. Williams' conclusion follows from an economic analysis that demonstrates how swaps and acquisitions by an MSO that cause clustering can reduce overbuilding and lead to higher profits and higher rates. He opines that Comcast's swaps and acquisitions in the Philadelphia DMA created such a cluster. Thus, Comcast's conduct led to rates being increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. (*Id.* ¶ 34.)

7. Increased bargaining power

Finally, Dr. Williams bases his geographic market definition on an economic analysis that demonstrates how a cable provider's increasing the number of its cable systems or clustering its cable systems can increase its bargaining power and lead to higher profits and higher rates. He opines that Comcast's swaps and acquisitions in the Philadelphia DMA increased its number of cable systems and created such a cluster. Thus, Comcast's conduct led to rates being

increased or maintained above the level that would prevail in the absence of that conduct throughout the Philadelphia DMA. He opines that a hypothetical monopolist of MVPD services in the Philadelphia DMA would find it profitable to impose a small but significant and nontransitory increase in price ("SSNIP"). (*Id.* ¶ 35.)

Comcast's expert, Dr. Teece, disagrees with Dr. Williams' opinion that the Philadelphia DMA is the proper geographic market. Dr. Teece notes that the Third Amended Complaint defines the relevant geographic market as the Comcast Philadelphia cluster, not the Philadelphia DMA. (Teece Reply Decl. To Class Cert. ¶ 8 ("Teece Reply Decl.").) He goes further to propose that the relevant geographic market for expanded basic cable service is inherently local and may be as small as individual households because, in the MVPD industry, there is no demand-side substitutability between adjacent geographic areas. This is because consumers are extremely unlikely to move to a different franchise area because of higher cable prices or lower quality service. (*Id.* ¶ 9.) However, because it is impractical to define a market at the household level, Teece opines that the FCC calculates market share using franchise area.[11] (*Id.*)

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[11] In its decision approving the sale of Adelphia cable assets to Time Warner and Comcast, the FCC stated that "[c]onsistent with our precedent, we find that the relevant geographic unit for the analysis of competition in the retail distribution market is the household." (Ex. D27 ¶ 81.) Since cable companies generally operate in non-overlapping territories and do not compete with each other in the distribution markets they serve, the FCC determined that the transactions before it would not reduce the number of competitive alternatives available to the vast majority of households. *Id.* The FCC explained, however, that "because it would be administratively impractical and inefficient to

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He concedes that the DMA level may be appropriate to assess regional sports programming, because interest in regional sports roughly approximates the DMA. However, he asserts, such issues are distinct from the allegations of the Third Amended Complaint. (*Id.* ¶ 11.)

According to Dr. Teece, six of Dr. Williams' seven economic bases for his market definition are nothing more than a restatement of the conduct that he claims is anticompetitive. (*Id.* at 16.) He opines that none of these bases provide an adequate explanation for asserting that the Philadelphia DMA is the proper geographic market because (1) there is substantial variation in the MVPD choices available to individual consumers in the Philadelphia DMA including DBS and FiOS; (2) there is substantial variation in MVPD subscriber shares across the DMA; and (3) variations in cable prices across local areas indicates variation in competitive conditions across the DMA. (*Id.* ¶¶ 19-29.)

We conclude that Dr. Williams' geographic market definition is susceptible to proof at trial through available evidence common to the class. Dr. Teece's focus on the individual household is not supported by the record. Setting the geographic market at a unit that small would be both impractical and inefficient. Thus, in its examination of cable markets, the FCC aggregates relevant geographic markets in which customers face similar competitive choices. The con-

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analyze a separate relevant geographic market for each individual customer," it aggregated relevant geographic markets in which customers face similar competitive choices." (*Id.* ¶ 81 n.282.)

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

B. Market Structure Analysis

In his market structure analysis, Dr. Williams concludes that Comcast's swaps and acquisitions in the Philadelphia DMA eliminated actual or potential competition in the relevant market. Through clustering, achieved via the swaps and acquisitions, Comcast increased its share of the relevant market, leading to higher rates throughout the Philadelphia DMA. Dr. Williams asserts that Comcast's clustering strategy made it profitable for it to deny DBS providers access to CSN Philadelphia, that the inability of DBS providers to offer CSN Philadelphia reduced their penetration rates in the Philadelphia DMA, and that the reduction in DBS penetration in the Philadelphia DMA caused increases in the rates for expanded basic cable service paid by Comcast's subscribers throughout the Philadelphia DMA. According to Dr. Williams, Comcast's clustering also created an antitrust barrier to the entry of competitors, including overbuilders, and reduced or eliminated benchmark competition, resulting in higher rates paid by Comcast's subscribers throughout the Philadelphia DMA. (Williams Decl. ¶ 108.) Williams suggests that this analysis shows that consumer harm was not limited to only those Comcast subscribers located in franchise areas in which over-

building was likely to occur but for the alleged anti-competitive conduct. Rather, he asserts that the alleged anticompetitive conduct resulted in higher rates for all Comcast subscribers throughout the Philadelphia DMA, and that Comcast's anticompetitive conduct injured all class members, because the swaps and acquisitions removed competitors, raised entry barriers, and enabled Comcast to acquire, maintain, and exercise monopoly power throughout the Philadelphia DMA. (*Id.* ¶¶ 109-10.)

Williams opines that, as a result of its swaps and acquisitions, Comcast was able to increase its market share in the Philadelphia DMA from 23.9% in 1998 to a high water mark of 77.8% in the second quarter of 2002, ending at 69.5% in 2007. As a result of Comcast's swaps and acquisitions, its Herfindahl-Hirschman Index ("HHI") increased from a value of 1,833 in 1998 to a range between 6,148 to 6,178 in the second quarter of 2002, ending in the range between 5,069 to 5,263 in 2007.[12]

Dr. Williams opines that there exist substantial antitrust barriers to entry into the relevant market because MVPD providers, both wire-based and satel-

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[12] The HHI is defined as the sum of the squares of the market shares of the firms in the relevant market. In a monopoly, there is only one firm with 100 percent market share, so the HHI equals 100x100 = 10,000. This is the largest value the HHI can attain. In a market with two equal-sized firms, HHI equals 50x50 + 50x50 = 5,000. If the two firms had shares of 80 percent and 20 percent, the HHI would equal 80x80 + 20x20 = 6,800, which is greater than the HHI with two equal-sized firms. As a general principle, for any given number of firms, the HHI is lowest when the firms are of equal size. In a market with hundreds of small firms, the HHI would be close to zero. (Williams Decl. at 29 n.57.)

lite, incur substantial sunk capital costs in building their networks and must spend significant resources on advertising. He reports that the FCC has determined that entry barriers may include: (1) strategic behavior by an incumbent designed to raise its rival's costs, (2) local and state level regulations which may cause new entrants to incur a delay in gaining access to local public rights-of-way facilities; and (3) technological limitations. (*Id.* ¶ 118.)

Finally, Dr. Williams concludes that the swaps and acquisitions allocated the geographic market because Comcast competed with cable companies that previously operated in the Philadelphia DMA for both (1) the award of original cable franchises and (2) the purchase of cable systems in the Philadelphia DMA. (*Id.* ¶ 121.)[13] He opines that the market allocations have diminished competition in the Philadelphia DMA and, because the market allocations were subject to the non-compete agreements, Comcast has the means, from an economic perspective, of enforcing the market allocations by contract, making reentry unlikely. (*Id.* ¶¶ 120-24.)

We accept in part and reject in part Dr. Williams' market structure analysis as proof of antitrust impact that can be shown by evidence common to the

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[13] Williams cites the following as examples of this competition: (1) AT&T and Comcast were competitors for the assets of Media One before the two competitors agreed to end the bidding process and enter into the agreement that resulted in Comcast acquiring Lenfest; (2) in 1995, Comcast considered Lenfest and Mediacom to be rival bidders for the Marcus' Eastern Shore Systems; and (3) in evaluating Cablevision systems in Ohio, Massachusetts, and Michigan, Comcast stated that bidders may include Charter, MediaOne, Adelphia, RCN, Time Warner, Charter, Insight, and Cox. (Williams Decl. ¶ 121.)

class. First, we reject his market allocation contention based upon the assertion that the acquired cable companies that previously operated in the Philadelphia DMA competed with Comcast for the award of original cable franchises. Dr. Williams' "elimination of competition in the award of initial franchises" theory is not relevant to a market structure analysis for this Class's claims because almost all of the original franchise bids occurred well before the commencement of the class period on December 1, 1999. (Teece Reply Decl. ¶ 148; Besen Decl. ¶¶ 24-25; N.T. 10/26/09 at 121:3-7.[14]) For example, the franchises in the City of Philadelphia were awarded in 1995. Once the franchises were awarded, which was prior to the class period, there was no further competition for these awards. Accordingly, the theory of class-wide impact based upon elimination of competition in the award of initial franchises is based on events that fall outside the class period.

Second, we reject Williams' contention that the non-compete clauses contained in the acquisition agreements made reentry by the acquired firms into the Philadelphia DMA unlikely because this theory is not fully supported by the record or the case law. While the acquisition agreements contained non-compete clauses, the swap transactions did not. Further, as Comcast points out, the time periods contained in those non-compete agreements were limited and the Class has not shown that a single counter-party ever sought to reenter the DMA after a

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[14] Dr. Teece testified that "these franchises were all given out, at least 98 percent of them were given out before the class period and so there's no fundamental change in any way because of the transactions with respect to original franchise rights." N.T. 10/26/09 at 121:3-7.

non-compete agreement expired. More significantly, non-compete agreements executed upon the sale of a business are generally not recognized as antitrust violations. *See Eichorn v. AT&T Corp.*, 248 F.3d 131, 145 (3d Cir. 2001) (stating that, as early as 1899, courts have recognized that covenants not to compete are not violations of § 1 of the Sherman Act; covenants not to compete executed upon the legitimate transfer of ownership of a business are ancillary restraints on trade and, so long as these covenants are reasonable in scope, there is no antitrust violation under the rule of reason).

With those caveats, we conclude that the Class has demonstrated that Dr. Williams' market structure analysis is susceptible to proof at trial through available evidence common to the class.

C. Market Performance Analysis

In his market performance analysis, Dr. Williams concludes that Comcast's rates for expanded basic cable are higher in the Philadelphia DMA than in other, more competitive DMAs, all else equal. (Williams Decl. ¶ 129.) Williams offers four economic explanations for Comcast's ability to charge higher prices. First, he contends that his economic analysis shows that Comcast's clustering activity made it economically feasible for Comcast to withhold regional sports programming from its competitors, which resulted in reduced penetration rates by DBS firms in the Philadelphia DMA and that reductions in DBS penetration rates cause cable rates to increase, all else equal. (*Id.* ¶ 128.) Second, he opines that Comcast's clustering activity reduced the extent of competition provided by overbuilders in the Philadelphia DMA, and that a reduction in overbuilding and the threat of overbuilding cause cable rates to

increase, all else equal. (*Id.* ¶ 131.) Third, he asserts that Comcast's clustering activity reduced "benchmark" competition, on which cable customers rely to compare the prices charged by competitors in a market. (*Id.* ¶¶ 144-62.) Fourth, he asserts that clustering increased Comcast's bargaining power in its negotiations with its content providers such as cable networks, which allowed Comcast to negotiate lower prices for its content and allowed it to increase cable subscriber rates. (*Id.* App'x at 2.)

1. Clustering and its effects on the ability of DBS competitors to access regional sports programming

Dr. Williams relies on Dr. Singer's report as a basis for his conclusion that Comcast had an economic incentive to deny CSN Philadelphia to DBS providers because of its percentage of subscribers in the Philadelphia DMA. In his April 10, 2009 report, Dr. Singer opines that "Comcast's unilateral exclusionary conduct with respect to three localized inputs" in the production of MVPD services constituted anti-competitive conduct. (Singer Decl. ¶ 13.) One of the three localized inputs he identifies is Comcast's alleged imposed exclusivity with regard to CSN Philadelphia's programming of local sports.[15]

Dr. Singer's report identifies regional sports programming as a relevant upstream product market, or an "input market." (*Id.* ¶ 32.) He defines this upstream market as the right to carry televised professional regional sports events such as the Philadelph-

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[15] The other two concern Comcast's conduct denying overbuilders access to construction contractors and interfering with their efforts to obtain local permits. We discuss these inputs in our discussion, infra, of overbuilder competition.

ia 76ers, Flyers and Phillies games. (*Id.* ¶ 29.) This content, he opines, is impossible to duplicate because there is only one professional franchise for each sport; fans generally follow their local team; and regional sports programming is not interchangeable with national sports programming, such as the NCAA basketball tournament, sports programming from another region, or non-sports programming. (*Id.*)

According to Dr. Singer, using its control of upstream inputs, "which Comcast secured by virtue of its clustering strategy," Comcast denies downstream rivals, principally the two DBS operators, access to Comcast's affiliated sports programming in the Philadelphia DMA and other markets. (*Id.* ¶ 64.) This forecloses DBS competitors from regional sports programming, and causes DBS providers to experience significantly lower than expected penetration rates in the Philadelphia DMA.[16] (*Id.* ¶ 66.) According to Dr. Singer, this demonstrates clear anticompetitive motivation to stifle competition in the downstream market by using market power in the upstream market. (*Id.* ¶ 68.) He points to evidence that Comcast does not seek to maximize profit in the upstream regional sports network market, but rather restricts output to gain market power vis-a-vis DBS competitors. (*Id.* ¶ 68.)

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[16] According to Dr. Singer, the actual DBS penetration for Philadelphia as of March 2005 was 10.35%, while the predicted DBS penetration rate was 20.89%. (Singer Decl. ¶ 80 tbl.4.) However, as we discuss below, Dr. Teece shows that the actual DBS penetration rate was 19.2% by the first quarter of 2008. (Teece Report ¶ 48 ex. 4.)

Dr. Williams believes that if Comcast had a sufficiently small percentage of subscribers in the Philadelphia DMA, it would not be profitable for the company to deny access to DBS providers because (1) the forgone revenue on sales of CSN Philadelphia to DBS providers would be greater than (2) the gain in revenue on sales of multichannel video programming service to the incremental number of subscribers who would have switched to DBS had Comcast not denied access to CSN Philadelphia. Dr. Williams finds that Comcast's clustering of the Philadelphia DMA made it profitable for Comcast to deny DBS providers access to CSN Philadelphia. (Williams Decl. ¶¶ 28-29.) The resulting reductions in DBS penetration rates in the DMA caused cable rates to increase, all else equal.

Several reports generated by the Federal Communications Commission ("FCC") and the General Accounting Office ("GAO"), as well as academic studies, speak to the issue of whether DBS competition constrains cable prices; however, their results are not uniform. In its January 16, 2009 "Report on Cable Industry Prices," the FCC determined that, while "cable prices decrease substantially when a second wireline cable operator [an overbuilder] enters the market," it does not appear "that DBS effectively constrains cable prices." (Ex. D2 ¶ 3.[17]) The GAO, however, reached a different result in 2003, finding:

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[17] The data presented to support this assertion are comparisons in a bar graph of average prices for basic cable service in areas with no competition, areas of DBS competition, areas of wireless MVPD competition, areas of low cable penetration, and areas of competition from an overbuilder. While there was little difference between average cable prices in areas of no competition and areas of DBS competition, the study does find lower

[Footnote continued on next page]

DBS competition is associated with a slight reduction in cable rates as well as improved quality and service. In terms of rates, we found that a 10 percent higher DBS penetration rate in a franchise area is associated with a slight rate reduction – about 15 cents per month. Also, in areas where both primary DBS operators provide local broadcast stations, we found that the cable operators offer subscribers approximately 5 percent more cable networks than cable operators in areas where this is not the case. These results indicate that cable operators are responding to DBS competition and the provision of local broadcast stations by lowering rates slightly and improving their quality. During our interviews with cable operators, most operators told us that they responded to DBS competition through one or more of the following

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[Footnote continued from previous page]
average cable prices in areas of overbuilder competition. (Ex. D2 at 5.) Dr. Williams criticized this result because the bar graph contains only raw data and does not represent a regression analysis:

> Q Can I ask – can I interrupt you for a second? Are those bar charts that are found on Page 5, are those a good starting point rather than an ending point?
>
> A I would say, yeah, sure, they're a good starting point. I think any – in any statistical analysis you want to look at the raw data and that's what this is, it's the raw data. But when you actually want to draw a scientifically based inference you don't just look at raw tables like this, you conduct a regression analysis.

(N.T. 10/15/09 at 144:3-11.)

> strategies: focusing on customer service, providing bundles of services to subscribers, and lowering prices and providing discounts.

(GAO "Issues Related to Competition and Subscriber Rates in the Cable Television Industry," (Oct. 2003) at 11.)

Other GAO reports, issued both before and after the 2003 report, while not making the same claim about DBS competition constraining cable prices, shed further light on the ability of DBS providers to compete with wireline cable companies, the crux of Dr. Singer's theories. In its October 2002 report entitled "Issues in Providing Cable and Satellite Television Services," the GAO concluded that the ability of the DBS companies to provide local broadcast channels was "associated with significantly higher DBS penetration rates." (Ex. D13 at 44; N.T. 10/26/09 at 29:17-30:17.) It found the DBS penetration rate was 32% higher in areas where local channels were available, suggesting "that in areas where local channels are available from both DBS providers, consumers are more likely to subscribe to DBS service, and therefore DBS appears to be more able to compete effectively for subscribers than in areas where local channels are not available from both DBS providers."[18] (*Id.*) The GAO did not find, however, that DBS companies' provision of local broadcast channels was associated with lower cable prices

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[18] The GAO also found that DBS penetration rates were higher in areas that require a relatively higher angle or elevation at which the satellite dish is mounted and is lower in areas where there are more multiple-dwelling units, which are associated with the need of DBS satellites dishes to "see" the satellite. (Ex. D13 at 45.)

and, thus, could not reject the hypothesis that provision of local channels has no impact on cable prices.[19] (*Id.* at 45.) In the GAO's next follow up report published in April 2005, it again focused on the availability of local channels, determining that it made DBS penetration rates significantly higher. (Ex. D3 at 32.) This report also found that DBS penetration rates are likely to be significantly higher in non-metropolitan areas, a factor the GAO associated with the historical development of satellite service, which had been marketed for many years in smaller and more rural areas. (*Id.*) As in its 2002 report, in 2005 the GAO found no correlation between DBS companies having access to local stations and lower cable prices. (*Id.* at 33.)

By analogy, these reports lend some support to Dr. Singer's theory that the foreclosure of DBS competitors to access to regional sports programming caused DBS providers to experience significantly lower than expected penetration rates in the Philadelphia DMA. Regional sports programming, like local broadcast channels, appeals to local audiences. While the reports do not study the effect of DBS foreclosure of access to regional sports programming (or the effect of clustering), if the ability of the DBS companies to provide local broadcast channels is associated with significantly higher DBS penetration rates, it seems appropriate to theorize that the abil-

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[19] However, in the same report, the GAO did find that cable prices were approximately 17% lower in areas where there was overbuilder competition and that higher cable prices are also associated with higher cable channel choice and with whether a cable company is affiliated with one of the ten largest MSOs. (*Id.* at 45.) We discuss the impact of overbuilder competition on cable prices infra.

ity to provide local sports coverage would have similar effects.

Surprisingly, this result is supported by Comcast's expert Dr. Teece. In his initial expert report – issued before Comcast had the benefit of examining the Class's DBS foreclosure theory – Dr. Teece reported that

> There have been several economic studies of competition between MVPDs that serve customers in the same geographic area. Many of these studies have concluded that there is significant competition between incumbent cable firms, DBS providers, and ILECs. Some studies have estimated empirically the competitive constraint that DBS imposes on cable system pricing. For example, [the October 2003] GAO study concluded that DBS competition has restricted cable prices. The study found that "as more households subscribe to DBS service, cable operators will ultimately respond by reducing rates." In another study, FCC economists Andrew Wise and Kiran Duwadi performed an econometric study of cable system pricing and found that "DBS providers are a constraining factor on quality-adjusted price increases for basic cable services by cable firms." Similarly, an empirical study by Austan Goolsbee and Amil Petrin indicates that "more competition from DBS is correlated with lower cable prices."
>
> Studies have also found evidence of non-price competition between cable and DBS, wireline overbuilders, and ILECs. A GAO study in 2000 found that cable companies re-

> sponded to competition from DBS by increasing the number of channels offered. Another GAO study found that in areas where both DBS competitors offered local-into-local via satellite the cable provider offered 5 percent more channels. This same study reported that in response to DBS competition, cable operators increased their focus on customer service and provided packages of services for customers. As noted above in Section II.B, Goolsbee and Petrin estimated an annual consumer surplus of $1 billion resulting from quality improvements by cable operators in response to DBS entry.

(Teece Expert Report ¶¶ 68-69.)

The proposition that DBS competition constrains cable prices is supported by the academic articles mentioned by Dr. Teece. Wise and Duwadi conclude that "DBS providers are a constraining factor on quality-adjusted price increases for basic cable services by cable firms." Andrew Stewart Wise and Kiran Duwadi, "Competition Between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks," J. Competition L. & E. 694, 701 (2005). Goolsbee and Petrin conclude that the data they examined "suggest that more competition from DBS is correlated with lower cable prices and somewhat higher quality cable." Austan Goolsbee and Amil Petrin, "The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV," 72 Econometrica 351, 377 (2004).

Notwithstanding the evidence supporting the theory that DBS competition can constrain cable prices, we conclude that the Class has not demon-

strated that Dr. Williams' and Dr. Singer's resulting opinion tying Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration rates is susceptible to proof at trial through available evidence common to the class. First, the decision not to license CSN Philadelphia to DBS providers occurred before the class period. Comcast established that it never licensed CSN Philadelphia to DBS companies, either before it established its cluster, during the formation of the cluster, or after clustering had been achieved. At all times since its debut on October 1, 1997, Comcast has distributed CSN Philadelphia programming via a terrestrial delivery network and has never distributed it via a satellite distribution system. *See DirecTV, Inc. v. Comcast Corp.*, 13 F.C.C. 21,822, 21,826 (1998); *EchoStar Commc'n Corp. v. Comcast, Corp.*, 14 F.C.C. 2089, 2093 (1999). Comcast's DBS competitors, DirecTV and EchoStar, sought to negotiate licenses to carry SportsNet between July and December 1997. *See id.* The decision not to license CSN Philadelphia to DirecTV occurred on September 8, 1997. *DirecTV*, 13 FCC Rcd at 21826-27. The decision not to license CSN Philadelphia to EchoStar occurred on January 7, 1998. *EchoStar*, 14 F.C.C. at 2093. Both decisions occurred prior to the class period and before Comcast began clustering cable systems in the Philadelphia region.

Second, the class certification record shows that Comcast's decision to deny access to regional sports programming to DBS competitors was based upon two factors unrelated to clustering. The first factor is that the FCC had specifically permitted Comcast to refuse to supply its DBS competitors with CSN Philadelphia pursuant to the terrestrial exception contained in the Program Access Rules of Section 628 of the Communications Act of 1934, 47 U.S.C.

§ 548(b).[20] The FCC determined that Comcast's decision to distribute CSN Philadelphia terrestrially was based upon valid business considerations, namely that the cost of terrestrial delivery was significantly less expensive. *See DirecTV, Inc. v. Comcast Corp.*, 15 F.C.C. 22,802, 22,808 (2000); *DirecTV*, 13 F.C.C. at 21,836; *EchoStar*, 14 F.C.C. at 2101. The second factor involved Comcast's own competitive disadvantage. Comcast declined to license CSN Philadelphia to its DBS competitors to counter its perceived competitive disadvantage arising from DirecTV's refusal to license NFL Sunday Ticket and other satellite-exclusive content, and attempted to maintain competitive balance by presenting CSN Philadelphia as a cable-only exclusive offering in the Philadelphia DMA. (Chipty Reply Decl. ¶ 19; Teece Decl. ¶ 63 (stating that unique content allows service providers to differentiate their offerings and to provide a more valuable service to consumers, thereby allowing them to compete more effectively for customers).)

Dr. Singer's opinion fails to recognize that Comcast has maintained its policy of distributing CSN

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[20] We recognize that, in making its decision interpreting the Program Access Rules, the FCC was not engaged in an antitrust analysis of Comcast's decision not to license CSN Philadelphia to the DBS providers and that its regulatory approval does not displace the antitrust laws. *See United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) (holding that the FCC was not given the power to decide antitrust issues and that its actions do not prevent enforcement of the antitrust laws in federal courts). Thus, the FCC's determination does not in any way control our antitrust analysis. We cite the FCC's decision only to show that Comcast organized its business relations knowing that it was not required under the Program Access Rules to provide CSN Philadelphia to satellite competitors.

Philadelphia only to wireline providers of video services since launching CSN Philadelphia in 1997, well before formation of the Philadelphia cluster. (Chipty Reply Decl. ¶¶ 16-17.) Dr. Singer also fails to recognize that Comcast **does** license CSN Philadelphia – as the Program Access Rules mandate – to other wireline MSOs, including RCN and Verizon, its primary non-satellite competitors in the Philadelphia DMA. Comcast never sought to maintain absolute exclusivity over regional sports programming and has always permitted its non-satellite competitors to license CSN Philadelphia under the Program Access Rules before, during, and once it achieved its cluster. (Teece Reply Decl. ¶¶ 34-36.) Because the DBS providers had no access to CSN Philadelphia before the cluster was formed, while subscribers of the MSOs that Comcast acquired in the swaps and transactions to create the cluster already had access to CSN Philadelphia, the Class has not demonstrated that Dr. Singer's and Dr. Williams' opinions tying Comcast's clustering activity in the Philadelphia DMA to reduced DBS penetration rates are susceptible to proof at trial through available evidence common to the class.

Finally, our conclusion that, on this record, the antitrust impact theory of clustering based on DBS foreclosure is not susceptible to proof at trial through available evidence common to the class is also supported by the data on DBS penetration rates in Philadelphia. Dr. Singer reports that the actual DBS penetration rate for Philadelphia as of March 2005 (the approximate midpoint of the class period) was 10.35%, while the predicted DBS penetration rate was 20.89%. (Singer Report ¶ 80 tbl. 4.) He bases his clustering/DBS foreclosure opinion on this discrepancy. However, Dr. Teece shows that, by the

first quarter of 2008, the actual DBS penetration rate was 19.2% , quite close to the predicted rate cited by Dr. Singer. (Teece Reply Decl. ¶ 48 ex. 4.) Dr. Teece's data also show that DBS penetration has experienced higher than average growth during the class period, increasing more rapidly in the Philadelphia DMA (327%) than in the nation as a whole (155%) **after** Comcast's clustering activity had already occurred.[21] (Teece Reply Decl. ¶ 49.) Dr. Teece concludes from this data that the "ability of DBS providers to compete successfully with Philadelphia SportsNet suggests that Philadelphia SportsNet may not be essential for DBS providers to compete effectively. It also indicates that Comcast's decision not to license Philadelphia SportsNet to DBS providers did not anticompetitively foreclose DBS providers from competing effectively in the Philadelphia DMA." (*Id.* ¶ 50).

2. Clustering and its antitrust impact on overbuilder competition

According to Dr. Williams, Comcast's clustering strategy, achieved by acquiring competing cable operators, changed the Philadelphia DMA from one previously not owned by a large MSO, to one that was dominated by a large MSO. He theorizes that

> Econometric studies show that, all else equal, ownership of a cable system by a large MSO

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[21] The FCC reports that, nationwide, cable operators' share of all MVPD subscribers has also declined relative to the share attained by DBS providers. As of June 30, 2006, cable operators served 68.2% of MVPD subscribers, compared to 69.4% one year earlier. DBS providers saw their share of MVPD subscribers grow during the same period from 27.7% to 29.2%. (Thirteenth Annual Report, Ex. D37 ¶ 169.)

> (typically defined as one of the ten largest MSOs) generally results in higher rates of approximately 5% to 10%. . . . Excluding swaps, a number of Comcast's acquisitions in the Philadelphia DMA had the effect of changing the ownership of the acquired cable systems from (1) not being owned by a large MSO to (2) being owned by a large MSO. Empirically, since large MSOs are generally clustered, the MSO variable picks up clustering effects.

(Williams Decl. ¶ 52.) He goes on to discuss the clustering effects resulting from the switch to domination by a large MSO as part of his discussion of the relevant geographic market:

> Based on the empirical literature regarding the MSO and clustering effects, Comcast's swaps and acquisitions have caused subscribers to pay higher rates of approximately 7.5% to 14%. These results provide empirical support for the conclusion reached in both the overbuilding and clustering models . . . that clusters lead to higher cable rates. These rate increases are more than a SSNIP [a small but significant and nontransitory increase in price] (generally evaluated with a 5% price increase), despite the fact that Comcast is not the only provider of multichannel video programming service in the Philadelphia DMA, and consequently has less (or at least no more) market power than would a hypothetical monopolist of multichannel video programming service in the Philadelphia DMA to which the SSNIP test applies. Therefore, relative to the rates that would be

> paid by Comcast's subscribers in the Philadelphia DMA but for the swaps and acquisitions, a hypothetical monopolist of multichannel video programming service in the Philadelphia DMA would profitably impose a SSNIP. The relevant geographic market for analyzing Comcast's alleged anticompetitive conduct is, therefore, the Philadelphia DMA.

(*Id.* ¶ 54.) He concludes that an MSO

> can increase its profits by clustering its cable systems so that they share their boundaries with one another and share as little total boundary as possible with other cable providers serving adjacent areas. Such contiguous clustering is profit-enhancing for an MSO because it reduces the likelihood or amount of overbuilding into its franchise areas.
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> . . .
>
> Clustering also deters overbuilding by enhancing the clustering incumbent's ability to increase the cost and reduce the benefits of overbuilding. Savings from consolidation of plant and equipment and from operating efficiencies flow to the clustering incumbent. Clustering additionally allows the incumbent to charge higher advertising fees. These benefits to clustering increase the incumbent's incentives as well as its financial capacity to expend resources on strategies to block sustainable overbuilding.

(*Id.* ¶¶ 88, 90.) To reduce the incentive for competitors to overbuild, Williams finds it is optimal for an MSO to arrange its cable systems to minimize boundaries, and the optimal way to accomplish this

is to "cluster," i.e. acquire contiguous cable systems. (*Id.* ¶ 92.)

He goes on to opine that there are several consequences arising from the resulting reduction in overbuilding within the MSO's franchise areas:

- the MSO's total profits are typically higher when there is less overbuilding;
- the monthly rate for cable services paid by a household will typically be higher when (1) an overbuilder does not pass by the household as compared to when (2) an overbuilder does pass by the household due to the reduction in head-to-head competition faced by the MSO;
- the absence of overbuilding within a franchise area can lead to higher rates even for households in that franchise area that would not have been passed by the overbuilder; and
- the incumbent cable system will optimally reduce the rate it charges subscribers without access to an overbuilder (though by less than it reduces the rates to customers in homes passed by the overbuilder) because the marginal cost of providing service to them is lower than that of the overbuilt households. Accordingly, even partial overbuilding in a franchise area can lead to lower rates throughout the franchise area.

(*Id.* ¶¶ 93-94.)

Dr. Williams supports his opinions by presenting two economic models of overbuilding. (Williams Decl. App'x II at 107-25; Williams Cl. Reply Decl. App'x I at 13-18.) His first model attempts to analyze the effect of clustering on the impact of over-

building on profits and prices by comparing situations where incumbent cable franchise areas are interspersed and where they are contiguous. (Williams Decl. ¶ 168.) He asserts that economic evidence supports the assumption that, where franchises areas are interspersed, an incumbent monopolist cable company can drop its rate in areas where it experiences overbuilder competition from an operator in a neighboring franchise, but charge a different price in non-overbuilt areas. (*Id.* ¶ 181.) He supports his conclusion with evidence that Comcast has instituted a discount called the Comcast Advantage Plan to offer discounts or rate freezes to consumers who agreed not to switch their service to RCN. (*Id.*) Dr. Williams also theorizes that prices paid by consumers in areas that remain monopolized also fall; this price reduction occurs because the portion of the incumbent cable firm's franchise area that it monopolizes is now shorter in length and so the marginal cost of servicing that portion has fallen, leading to a reduction in the monopoly price. (*Id.* ¶ 182.) He opines that the lowest price is achieved with complete overbuilding, i.e., where the entirety of the incumbent cable firm's region is served by both the incumbent firm and an overbuilder. (*Id.* ¶ 184.) He concludes that it is economically optimal for an overbuilder to overbuild into the incumbent operator's regions because, for small amounts of overbuilding, the incumbent's profits will strictly decrease, the overbuilder's profits will strictly increase, and the prices paid by households will strictly fall, both in the overbuilt region and in the region that remains monopolized. (*Id.* ¶ 185.)

Because it is easier for an overbuilder to affect the monopolist's price where the monopolist's franchise areas are interspersed, Dr. Williams asserts

that the incumbent cable firm will enjoy substantial benefits from clustering its franchise areas through purchases or swaps so that they are contiguous. Where franchise areas are contiguous, Dr. Williams asserts that the incumbent cable firm's decrease in profits is roughly four times lower than where the franchise areas are interspersed. Clustering, he asserts, reduces competition that would otherwise result from optimal overbuilding and, as a consequence, leads to higher profits and higher prices not only in areas where competition is precluded, but also in areas where the incumbent cable firm would have remained a monopolist. This occurs because, given nearby overbuilding, the marginal cost of servicing the non-overbuilt areas falls and the incumbent cable firm is able to price discriminate between the non-overbuilt and overbuilt areas. (*Id.* ¶ 188.)

In response to Dr. Teece's criticisms of Dr. Williams' first model, which concerns itself only with overbuilding by an incumbent adjacent cable operator,[22] Dr. Williams created a second model more specifically addressing the experience of overbuilding revealed by the record in this case. In his second

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22 Dr. Teece faulted Dr. Williams' premise that adjacent cable operators would overbuild into another's territory, because it has never in fact happened and the Class offered no proof that it ever happened. He adds that cable overbuilding by a dedicated overbuilder is also rare. Dr. Teece cites data on cable overbuilding in Pennsylvania, New Jersey and Delaware suggesting that when overbuilding does occur, it occurs at similar rates in unclustered cable systems as in large cable clusters during the relevant period. (Teece Reply Decl. ¶¶ 142-45.) He asserts that the data are inconsistent with a theory that clustering deters overbuilding because the data on actual overbuilding does not support the existence of a negative relationship between clustering and overbuilding. (*Id.* ¶ 147.)

model, Dr. Williams provides an economic theory of overbuilding that applies to an overbuilder, such as RCN, whose existing facilities overlay a franchise area served by an incumbent operator, examining the two alternative scenarios of where franchise areas are interspersed and where they are clustered. Williams assumes that an existing cable operator that wishes to overbuild into a neighboring franchise area will build out from its boundary to minimize the cost of building into and servicing the new area. Because an overbuilder entrant has no existing infrastructure, unlike a neighboring MSO that decides to overbuild a neighboring franchise area, it will optimally choose a location from which to begin overbuilding, and it will build outward, in a contiguous fashion, from that point.[23] This "buildout" effect, Williams asserts, gives an incumbent cable operator the incentive to cluster. (Williams Cl. Reply Decl. App'x I at 13.)

Williams' model assumes an operator who is a monopolist within each of two geographically separated franchise areas within a single DMA, that these areas are identical, and that the monopolist's profits in each area are equal. Because the two areas are geographically separated, an overbuilder that begins in one area will not reach the other area for some time, if at all, by the buildout effect. For simplicity, Williams assumes that the overbuilder would not reach the second area at all. Consequently, the monopolist would be willing to pay up to the difference between its monopoly profit and its competitive prof-

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[23] The GAO has recognized that cable overbuilders tend to enter markets that are geographically close in proximity to its other key facilities, such as its headquarters, existing network, or other needed infrastructure. (Ex. D29 at 5.)

it to keep the overbuilder out of the franchise area it is threatening to enter, where its competitive profit is the (lower) profit the monopolist would earn if the overbuilder successfully entered and they competed with the aim to maximize profits.

If, on the other hand, the monopolist's two franchise areas are contiguous, i.e., clustered, Dr. Williams theorizes that the monopolist would be willing to pay up to twice the difference between its monopoly profit and its competitive profit to keep the overbuilder entrant out. This is because a successful entrant that builds outward may well overbuild the incumbent's two contiguous franchise areas, reducing profits from monopoly profit in each area to competitive profit in each area. Because its monopoly profit will be threatened in more areas, Williams theorizes that the amount the monopolist will expend to fight the entry of an overbuilder will always be higher where its franchise areas are clustered than where its franchises are interspersed. (*Id.* App'x I at 16.) From these assumptions, Dr. Williams asserts that his model demonstrates that

> the monopolist may strictly prefer to cluster its franchise areas. When this occurs, there are several effects. First, clustering its franchise areas reduces the likelihood that an entrant attempts to enter. Second, given that an entrant does attempt to enter, clustering its franchise areas reduces the likelihood that the entrant's attempt is successful. Third, clustering its franchise areas increases the monopolist's expected profits without any increase in efficiency. Fourth, under the assumption that successful entry reduces prices, clustering its franchise areas increas-

> es the price the monopolist charges its customers on average.

(*Id.* App'x I at 18.)

Dr. Williams also cites to reports issued by the FCC and the GAO to support his opinion that clustering creates antitrust impact by discouraging overbuilding. The 1992 Cable Act requires the FCC to issue annual reports that compare rates charged by cable systems facing effective competition with those not facing effective competition. In its annual reports on cable industry rates, the FCC has performed a number of regression analyses on cable rates, using data from 1995 to 2008. Williams asserts that this econometric research provides support for Dr. McClave's damages analysis and his own theories of antitrust impact and market definitions.[24] (Williams Decl. ¶ 133.) He contends that this research also explains in part how Comcast's conduct in this case resulted in cable subscribers in the Philadelphia DMA paying higher rates. Dr. Williams summarizes the reports as follows:

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[24] It is undisputed by the experts that multiple regression analysis is an acceptable and widely recognized statistical tool for measuring antitrust impact. (Chipty Report ¶ 62 ("A regression is the standard econometric technique used in problems like this one, i.e., to adjust for observable differences across cable systems so as to evaluate whether, all else equal, overbuilding is less common or prices are higher in Philadelphia than in otherwise comparable areas."); McClave 5/11/09 Merits Rebuttal Decl. at 2 ("There is one area on which Dr. Chipty and I agree. In my initial Declaration, I showed that damages could be estimated for the class employing the commonly accepted methodology of multiple regression analysis. Dr. Chipty appears to agree, since she also employs a similar methodological approach to estimating damages on a class-wide basis.").)

- The FCC reports find that, all else equal, a cable system facing competition from an overbuilder has rates that are generally 5% to 15% lower than rates for cable systems that do not face competition from an overbuilder. This supports the conclusion that Comcast's actions, which reduced the extent of competition provided by overbuilders in the Philadelphia DMA, caused cable rates to increase, all else equal.[25]
- The FCC reports find that, all else equal, a 10% increase in an MSO's total number of national subscribers leads to rate increases of approximately 2% to 3%, supporting the conclusion of Dr. Williams' clustering model that increases in the number of cable systems owned by an MSO lead to higher rates.
- The FCC reports find that, all else equal, a cable system in a cluster of cable systems owned by an MSO has rates that are approximately 2.5% higher than rates for cable systems not in such a cluster, supporting the conclusion that Comcast's actions caused cable rates to increase, all else equal.

(*Id.* ¶ 133.) Dr. Williams also cites to reports issued by the GAO evaluating the effects of several key factors affecting cable rates, using data from 1998 to 2004:

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[25] For example, in the FCC's Thirteenth Annual Report on the cable industry, published January 16, 2009, it found that prices charged by cable systems that did not have effective competition were on average 7.9% higher. (Ex. D37 ¶ 45.)

- The GAO reports find that, all else equal, a cable system facing competition from an overbuilder (including LECs) has rates that are approximately 7% to 18% lower than rates for cable systems that do not face competition from an overbuilder. This supports the conclusion that Comcast's actions, which reduced the extent of competition provided by overbuilders in the Philadelphia DMA, caused cable rates to increase, all else equal.
- The GAO reports find that, all else equal, a cable system affiliated with a large MSO has rates that are generally 5% to 9% higher than rates for cable systems not affiliated with a large MSO, supporting the conclusion that Comcast's actions caused cable rates to increase, all else equal.

(*Id.* ¶ 134.)

Finally, Dr. Williams relies on the following published academic research to support his opinion that clustering creates antitrust impact by discouraging overbuilding:

- An empirical analysis by Clements and Brown (2006) of factors affecting cable rates using data from 2001. They assert that their analysis models cable rates as a function of several independent variables, including whether a cable system is affiliated with one of the ten largest MSOs in the country, the presence of a second wire-based MVPD provider such as an overbuilder or an LEC, per capita income, population density, and the capacity of the cable system in megahertz, and determine that affiliation with a large MSO led to higher cable rates. Specifically, all else equal, the re-

searchers find that a cable system that is affiliated with one of the ten largest MSOs has monthly rates that are on average $2.48 higher (6.9% evaluated at the average monthly rate) than similar systems not affiliated with such an MSO. The authors also find that the presence of a second wire-based MVPD provider lowered monthly rates, all else equal, by $5.63 (approximately 15.7% evaluated at the average monthly rate) relative to similar systems without such competition. (*Id.* ¶ 135.) Williams asserts that this result is consistent with his own clustering model.

- A study by Savage and Wirth (2005) examining the effect of potential competition from a wire-based MVPD provider such as an overbuilder or ILEC on cable rates and on the number of channels offered by incumbent cable operators. Williams states that Savage and Wirth find that when the probability of entry of an overbuilder rises to 42%, the average cable system provides six more channels, and the monthly revenue per channel declines from $0.77 to $0.66 (a decline of 8.6%), supporting Williams' conclusion that clustering raises rates or reduces the number of channels, all else equal. (*Id.* ¶ 136.)
- A study by Karikari, Brown, and Abramowitz (2003) examining factors that affect DBS penetration rates and cable rates. Williams asserts that, consistent with the Clements and Brown study, these researchers find that when a cable system is owned by one of the ten largest MSOs, its monthly rates are approximately 5% higher than similar systems not affiliated

with such an MSO, all else equal, again supporting the results of his own clustering model. They also find that the presence of a second wire-based MVPD provider lowers monthly rates, all else equal, by approximately 10% compared to similar systems without such competition. (*Id.* ¶ 137.)

- A study by Dr. Singer (2002) analyzing whether clustering reduces the likelihood of entry by an overbuilder. Singer finds that the presence of a cluster makes an overbuilder entry less likely, supporting Williams' overbuilding model showing that clusters reduce the likelihood of entry by wire-based MVPD providers, resulting in higher rates, all else equal. (*Id.* ¶ 138.)
- A study by Emmons and Prager (1997) also examining the effect of competition on cable rates and finding that when an incumbent cable system faces competition from a wire-based rival, its rates are lower, all else equal, by approximately 20%. They also find that as the number of cable systems owned by an MSO increased, its rates increased as well, by approximately 2%, supporting Williams' clustering model. (*Id.* ¶ 139.)
- A study by Beil, Dazzio, Ekelund, and Jackson (1993) examining factors affecting cable penetration rates and basic cable rates, and determining that wire-based competition lowers basic monthly cable rates by $3.21 and pay channel rates by $1.15. (*Id.* ¶ 140.)

Together, Williams asserts, these studies provide empirical support for his conclusion that Comcast's conduct resulted in subscribers paying higher cable

rates in the Philadelphia DMA and provide empirical support for his overbuilding and clustering models.[26]

Dr. Williams also bases his opinions on the expert reports submitted by Dr. Singer. In his report, Dr. Singer included a substantial analysis of how Comcast's clustering strategy denied overbuilders access to the relevant market. (Singer Decl. ¶¶ 95-136.) This analysis includes discussion of Comcast's alleged strategy initially to deny overbuilders access to CSN Philadelphia and then, after the FCC ruled it was required to offer CSN Philadelphia to wireline but not satellite competitors, to artificially inflate the price of CSN Philadelphia to those competitors. (*Id.* ¶¶ 97-110.) Dr. Singer also has analyzed Comcast's alleged interference with overbuilder RCN's efforts to construct rival systems by limiting RCN's access to local contractors through the enforcement of non-compete clauses. (*Id.* ¶¶ 62-63, 111-12.) Finally, Dr. Singer has analyzed the effect on customers of the Comcast Advantage Plan, through which Comcast offered discounts or rate freezes to consumers who agreed not to switch to RCN, noting that this offer was never made to customers before RCN began to enter the area, or to customers in areas not served by RCN. (*Id.* ¶¶ 113-18.) Dr. Singer opines that Comcast denied overbuilders such as RCN and Verizon access to"critical local inputs," by restricting access to regional sports programming, entering into exclusive arrangements with cable infrastructure

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[26] In addition to the government and academic resources he cites to support his theories, Dr. Williams tabulates data on the responses of incumbent cable operators to entry by an overbuilder, cataloging 26 incidents nationwide of price reductions by cable operators faced with the entry of an overbuilder. (Williams Decl. ¶ 143 tbl.6.)

contractors, and interfering with local franchising processes, which impaired the overbuilders' ability to compete effectively with Comcast for MVPD service in the Philadelphia DMA. (*Id.* ¶ 77.)

With regard to contractors, Singer states that Comcast sought to interfere with RCN's efforts to construct systems in the Philadelphia suburbs by limiting RCN's access to the local contractors upon which RCN relied to construct, operate, and maintain its competing infrastructure. (*Id.* ¶ 93.) It did so by entering into and enforcing non-compete clauses with its Philadelphia-area contractors, threatening its contractors with a loss of work in the event that they performed services for Comcast's competitors, and included explicit provisions in its contract that installers not "perform any Contractor Services" in areas where Bell Atlantic, GTE, Conestoga, Commonwealth, or RCN competed with Comcast. (*Id.*) He opines that there was no compelling justification for this conduct other than as part of a strategy to impede competition in the Philadelphia DMA. (*Id.* ¶ 94.)

With regard to local franchising processes, Singer states that, despite obtaining approval from the FCC and from nine Philadelphia suburbs, RCN could not obtain approval from the City of Philadelphia to begin construction. He states that Comcast played a central role in pressuring City officials to delay or deny RCN's entry into the Philadelphia market. Citing newspaper and periodical stories as the factual basis for his discussion, Singer states that Comcast lobbied both the Mayor and City Council to block or delay RCN's permit approvals in the City, imploring the City to "use its substantial regulatory powers to monitor and mitigate conditions which might other-

wise allow RCN to cherry-pick its way to profitability." (*Id.* ¶ 130.) Singer reports that these efforts delayed Council action on RCN's application for two and one half years, until RCN considered filing a federal lawsuit or a complaint with the FCC, and leading shortly thereafter to RCN's announcement that it was withdrawing its application to build a competitive cable system in the City of Philadelphia. Finally, Singer cites as evidence that Comcast lobbied against state-wide franchise licensing in Pennsylvania by meeting with lawmakers in March 2006, arguing that a state-wide license would strip local communities of their power.

Having shown that Comcast acted to limit overbuilder competition, Dr. Singer opines that many academic studies have found that cable prices are lower when overbuilder competition is present. He also describes the analyses conducted by the FCC and the GAO discussed supra, as well as his own academic studies and those of other economists who have studied the effect of overbuilder competition. (*Id.* ¶¶ 107-08.) Dr. Singer has also compiled sources that he asserts the Class may use as common proof that impaired overbuilder competition leads to a reduction in consumer welfare. (Singer Cl. Decl. at 13 tbl. 5.) He asserts that this evidence indicates that exclusionary conduct toward overbuilders results in higher prices for consumers, and represents evidence common to the class that is relevant for cable customers for whom an incumbent cable company has impaired or thwarted competition from overbuilders and hence caused prices to be elevated above otherwise equilibrium prices. (*Id.* ¶ 15.)

Dr. Williams, summarizing Dr. Singer's report, states that

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

(Williams Decl. ¶ 55-56.)

Dr. Teece challenges the class experts' opinions regarding the effect of clustering on overbuilding.[27]

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[27] Dr. Teece also challenges the class experts' assumptions that clustering is itself anticompetitive. According to Dr. Teece, rather than being anticompetitive, clustering lowers the cost of deploying advanced services and operating a cable system because more subscribers can be served from a particular headend or other central facility such as a customer service center. This makes a clustered operator a more effective competitor because it can offer consumers better services at lower cost. (Teece Reply Decl. ¶ 141.) Dr. Williams responds that his report demonstrates that clustering is anticompetitive because it

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Dr. Teece opines that cable overbuilding has been limited, not because of clustering activity by incumbent operators, but because it is not a viable business model.[28] Overbuilding, he explains, requires a large fixed capital investment, including head-end equipment, deploying cable networks, and expenses related to acquiring franchises. Also, the overbuilder must offer superior prices or quality compared to the incumbent to attract customers. Taken together, Dr. Teece asserts that these factors imply that overbuilders must achieve significant penetration in the overbuilt area merely to break even. He cites testimony from Gerry Lenfest of Lenfest Communications

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reduces the shared boundaries between two cable companies, a conclusion that Dr. Teece's report supports, since he also finds that overbuilders tend to build in adjacent areas. (Williams Cl. Reply Decl. ¶ 65 (citing Teece Reply Decl. ¶¶ 107-08).) Dr. Williams also notes that the FCC has reached the conclusion that "clustering can present a barrier to entry for the most likely potential overbuilder (i.e., an adjacent cable operator)." (*Id.* (quoting FCC Thirteenth Annual Report).)

[28] In its 2004 Report on competition from overbuilders, the GAO reported that, in addition to demographic factors, financial obstacles hindered the success of overbuilders. (Ex. D29 at 1.) Its survey of overbuilders determined that they were experiencing financial difficulties, that they were putting off network expansion, and that two companies lacked the resources necessary to adequately service their existing markets. (*Id.*) The GAO also found that the overbuilder business strategy can be difficult to implement because of their inability to gain access to certain cable networks, difficulty in gaining access to residents of multi-dwelling structures, and difficulties securing continued access to adequate financial resources needed for rap id construction of their networks and to market their services. (*Id.* at 5.) The GAO concluded that the long-term viability of overbuilders was not clear. (*Id.* at 28.)

that an overbuilder needs to acquire half of the incumbent's subscribers to be viable. (Teece Reply Decl. ¶ 148.) He also asserts that this view is consistent with the actual experience of overbuilders in the past few years, namely that no overbuilder has ever succeeded in the United States. (*Id.* ¶ 151.)

In contrast, Dr. Teece explains that large scale overbuilding by LECs in clustered areas has been successful, which further calls into question Dr. Williams' theory that clustering negatively impacts overbuilders. Verizon and AT&T have begun offering video service in many areas across the country in competition with incumbent cable operators and DBS providers. (*Id.* ¶ 153.) Dr. Teece asserts that this large-scale overbuilding by LECs in already clustered areas indicates that clustering does not anticompetitively deter entry by MVPD competitors.[29] (*Id.* ¶ 154.)

Dr. Teece also opines that Dr. Williams' and Dr. Singer's conclusions with regard to antitrust impact of overbuilding in the Philadelphia DMA are not based on actual fact. He states that, "even accepting plaintiffs' claim that RCN would have entered addi-

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[29] Dr. Teece identifies several reasons why overbuilding by LECs has been more successful than cable overbuilding. First, LECs do not build an entire new network from scratch, but rather upgrade their existing networks to provide the additional data and video services. Second, LECs have no requirement to build out an entire franchise area, but can pick and choose where to most profitably expand their service. Third, LECs have strong economic incentives to overbuild because cable companies have begun to offer competing voice service, and they risk losing telephone customers to cable companies offering to package voice, video and data services. (Teece Reply Decl. ¶ 155.)

tional areas in the but-for world, I have seen no evidence that RCN ever intended to build out the entire Philadelphia DMA. Indeed, Dr. Singer, Dr. Williams, and Dr. McClave all assume that but-for the challenged conduct, RCN would have only overbuilt in five counties—Bucks, Chester, Delaware, Montgomery, and Philadelphia." (Teece Cl. Reply Decl. ¶ 119.) Teece notes that while RCN filed with the FCC to operate an Open Video System ("OVS"), an OVS certification filing is an inadequate basis for assuming that RCN would have entered into these five counties (let alone that RCN would have overbuilt the entire counties). He contends that such a filing does not necessarily indicate the ability to actually overbuild those areas. Thus, a company may file a certification, but never actually proceed. For example, RCN submitted filings to the FCC for OVS certification in Portland, Oregon (and surrounding communities), Seattle, Washington (and surrounding communities), Phoenix, Arizona (and surrounding communities) and South Florida, but has not actually entered any of those areas. (*Id.* ¶ 120.)

Dr. Teece contends that it is unlikely that RCN would have overbuilt in each of these five counties in the but-for world[30] (much less in all five in their entirety). He bases this contention on the fact that RCN faced financial difficulties during the class period that were unrelated to the challenged conduct, and filed for bankruptcy in 2004; even prior to its bankruptcy, RCN announced in 2001 it was halting expansion plans in Philadelphia, citing softening

30 The experts use the term "but-for world" to describe the hypothetical conditions that would have prevailed had Comcast not engaged in the allegedly anticompetitive conduct at issue in the case.

capital markets; and the record shows that RCN never intended to build out the entire Philadelphia County, and in fact protested when the City of Philadelphia was considering requiring RCN to do so. (*Id.* ¶ 121.)

Dr. Teece also opines that, even if RCN would have overbuilt all five counties entirely in the but-for world, this would not be sufficient to conclude that the antitrust impact of the challenged conduct would have affected all Comcast customers in the Philadelphia DMA. This is because the five counties account for just a portion of the 18-county Philadelphia DMA; even if RCN would have overbuilt all five counties in their entirety, it would still have offered service to just 20 percent of total households in the DMA. (*Id.* ¶ 122.) Accordingly, he concludes that "even accepting plaintiffs' theories, the impact of the alleged anticompetitive conduct would vary within the DMA, depending on the presence (or absence) of RCN overbuilding. Individualized analysis therefore would be required to determine the competitive impact in a local area." (*Id.* ¶ 123.)

Dr. Williams responds to Dr. Teece by asserting that but for Comcast's alleged anticompetitive conduct, RCN likely would have continued to pursue its strategy of building into other areas in the Philadelphia DMA adjacent to its existing cable infrastructure, beyond the five counties to which he and Dr. Singer conservatively limited their examination. (Williams Cl. Reply Decl. ¶ 13.) Moreover, he reiterates, the economic theories of overbuilding and the empirical evidence presented in his declarations indicate that clustering deters overbuilding. He also refers to econometric evidence showing that, all else equal, (1) competition from overbuilders lowers rates

by approximately 10% to 20%; (2) Comcast's conduct reduced the extent of competition provided by overbuilders in the Philadelphia DMA; thus, (3) its anticompetitive actions have caused subscribers to pay higher cable rates, and higher by more than a SSNIP than those subscribers would have paid but for the effect of Comcast's anticompetitive actions on overbuilders; and (4) these rate increases are more than a SSNIP, despite the fact that Comcast is not the only provider of multichannel video programming service in the Philadelphia area, and consequently has less (or at least no more) market power than would a hypothetical monopolist of multichannel video programming service in the Philadelphia area to which the SSNIP test applies. (*Id.* ¶ 14.)

We conclude, with one caveat, that the Class has met its burden to demonstrate that the anticompetitive effect of clustering on overbuilder competition is capable of proof at trial through evidence that is common to the class. The Class has successfully shown, through Dr. Williams' model, as well as his citations to empirical studies conducted by governmental agencies and private researchers, that the presence of an overbuilder constrains cable prices. The Class has also shown that Comcast engaged in conduct designed to deter the entry of overbuilders in the Philadelphia DMA, including denying RCN access to the services of cable installation contractors.

We are not persuaded by Dr. Teece's criticism of the overbuilder model based on his assertion that the Class cannot demonstrate that overbuilding is a successful business model. The evidence demonstrates that there has been a historic and continuing presence of overbuilders in the wireline cable industry, and governmental studies finding that overbuilder

competition constrains cable prices are further proof that it has been a viable business model. We also are not persuaded by his criticisms based on his assertions that it is unlikely that RCN would have overbuilt in each of these five counties in the but-for world, that its efforts in each of the five counties was limited, and that its efforts in these five counties cannot establish common evidence of impact in the entire eighteen county DMA. What Dr. Teece considers "unlikely," Dr. Singer considers to be the common evidence of antitrust impact, namely that RCN was stymied in its efforts by Comcast's predatory behavior.

In reaching our conclusion on the common impact of clustering on overbuilding, however, we place no reliance on Dr. Singer's opinions regarding Comcast's lobbying activities. Comcast argues that Singer's theory is at odds with the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965) (holding that an individual is immune from antitrust liability for exercising First Amendment right to petition the government). For purposes of class certification, we must consider both whether plaintiff's legal claim is plausible in theory, and, if so, whether it is also susceptible to proof at trial through available evidence common to the class. *Jackson*, 260 F.R.D. at 184 (quoting *Hydrogen Peroxide*, 552 F.3d at 325).

Any aspect of the Class's overbuilder theory of antitrust impact based upon Comcast's lobbying activity is not plausible. While Class counsel contended during his closing argument that Dr. Singer properly considered Comcast's lobbying activities as

evidence of its anti-competitive purpose and motives (N.T. 11/16/2009 at 30:15-31:19), "parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent." *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1082 (5th Cir. 1988); *see also Westmac, Inc. v. Smith*, 797 F.2d 313, 315 (6th Cir. 1986) ("[G]enuine attempts to influence passage or enforcement of laws are immune from antitrust scrutiny, regardless of the anticompetitive purpose behind such attempts."); *Tal v. Hogan*, 453 F.3d 1244, 1259 (10th Cir. 2006) (holding that *Noerr-Pennington* doctrine "exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition") (quoting *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503 (10th Cir. 1997)).

3. Clustering and its effects on benchmark competition

Dr. Williams also attempts to establish, through common evidence, that Comcast's clustering activity eliminated "benchmark" competition in the Philadelphia DMA. According to Dr. Williams,

> The theory of benchmark (or yardstick) competition as a means of regulating public utilities was developed in a seminal paper by Andrei Shleifer. Professor Shleifer noted that the practice of benchmark regulation, as exemplified by Medicare's policy of reimbursing a hospital based on the average costs of comparable hospitals, predated his theoretical work, as did other regulatory approaches based on cost comparisons across firms. Pro-

> fessor Shleifer's work gave rise to a substantial literature on benchmark competition and contributed to the further development of regulatory practices based on comparative evaluations. The economics literature recognizes that benchmark competition can cause firms to offer lower prices and/or improved service quality.

(Williams Decl. ¶ 144.) In order for benchmark competition to cause firms to lower prices and improve service, there must be comparable firms against which comparisons can be made. Dr. Williams opines that "[s]waps and acquisitions that reduce the number of comparable firms diminish the effectiveness of benchmark competition and can result in an increase in rates." (*Id.* ¶ 145.) He asserts that both regulators and consumers can and do rely on benchmarks. (*Id.* ¶¶ 146, 154.) He theorizes, based on a survey showing that cable customers in the Philadelphia DMA reported lower awareness of alternative cable providers in their neighborhoods, that the relative lack of benchmarking information for cable subscribers in the Philadelphia DMA reflects a reduction in benchmark competition. (*Id.* ¶ 155.) Based on evidence that (1) the FCC recognizes benchmark competition; (2) Comcast monitors the rates of other MSOs and is mindful of how its rate increases are perceived by government officials; (3) local franchise area officials in Los Angeles were concerned with the reduction in benchmark comparisons due to Time Warner's consolidation of the Los Angeles area cable market via the swap transactions with Comcast; (4) the above mentioned survey of cable subscribers' awareness of alternative cable providers shows a lower awareness rate in Philadelphia; (5) customer complaints indicating that when cus-

tomers are aware of prices charged by other operators in their market they will act on that awareness by complaining to Comcast; and (6) internal Comcast documents showing that Comcast executives use benchmarks; *id.* ¶ 146-61; Williams concludes that

> Cable regulators and cable customers rely on, and cable operators engage in, benchmark competition. Comcast's swaps and acquisitions in the Philadelphia DMA had the effect of removing eight firms that offered comparable benchmarks in terms of rates and service quality. Thus, Comcast's swaps and acquisitions resulted in a reduction in benchmark competition.

(*Id.* ¶ 162.)

Comcast and its experts dispute the evidence Dr. Williams uses to support his benchmark competition theory. Dr. Teece contends that Dr. Williams' theory that clustering reduces benchmarking and therefore leads to higher cable rates lacks any economic or empirical basis. He explains that there is an implicit assumption in Dr. Williams' theory that benchmarks must be nearby (or even adjacent to a customer's cable system) and that the value of the benchmark depreciates the further one gets from it.[31] However, he

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[31] We agree with Dr. Teece that Dr. Williams' theory assumes that, to be effective, benchmarks must be local. Dr. Williams' entire clustering theory of antitrust impact is based on the elimination of adjacent cable companies. His assumption that the importance of benchmarks depreciates with distance is unsupported by empirical evidence. As Dr. Teece explains, if "'benchmarking' leads to lower cable rates and the value of the 'benchmark' depreciates with distance, areas near an adjacent cable operator with lower rates should have lower cable rates than areas towards the center of a cluster. Such areas should

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contends, Dr. Williams provides no economic or empirical basis for this assumption. (Teece Cl. Reply Decl. ¶ 134.) Further, if benchmarking only depends on the availability of comparable systems, regardless of distance, Dr. Williams does not explain how the challenged transactions removed enough comparable systems such that the ability to benchmark prices is impaired. (*Id.*)

We agree that Dr. Williams has not provided adequate support for his theory that clustering eliminates benchmarking opportunities for consumers and therefore that elimination of such benchmarks constitutes an anticompetitive effect of clustering that is capable of proof at trial through evidence that is common to the class. The academic support Dr. Williams provides for his benchmarking theory is taken from the literature on the regulation of franchised monopolies such as public utilities. *See* Andrei Shleifer, "A Theory of Yardstick Competition," 16 Rand J. Econ. 319 (1985). Dr. Williams' citations to FCC studies concern the reduction in benchmarking opportunities for regulators in the context of the rates of phone companies. (Williams Decl. ¶ 147.[32]) He cites no empirical evidence of similar benchmark-

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also exhibit prices similar to the adjacent cable operator. Dr. Williams has provided no such empirical evidence and I am unaware of any such evidence." (Teece Cl. Reply Decl. ¶ 141.)

32 He also cites a study from the United Kingdom concerning the reduction in benchmarking opportunity for regulators of water utilities. (Williams Decl. ¶ 148 (citing Simon Cowan, "Competition in the Water Industry," 13 Oxford Rev. Econ. Policy 83, 85 (1997).)

ing behavior by consumers.[33] While he states that the FCC has "discussed the application of benchmark competition in the cable industry," his quote from his source shows that the FCC discussed benchmark competition in terms of local franchise agencies using benchmark competition, not consumers.[34] (*Id.*

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[33] According to Dr. Teece, there is no empirical evidence of the elimination of consumer benchmark competition because it is not a recognized economic theory. He testified,

> I find the whole, this whole argument, your Honor, extremely curious. In the textbooks we recognize actual competition and we recognize potential competition. Now what Dr. Williams has done is create a third category, I believe, for purposes of this case, called benchmark competition. It's true that regulators occasionally benchmark one area against another, but there's no evidence here that there can be competition because if consumers don't know about – even if consumers know about what's going on in another franchise area, they don't have a choice. So it doesn't impact their decisions in any significant way. So this whole notion of elimination of benchmark competition is a new one to me and I believe it doesn't have a proper foundation in antitrust economics and there is no evidence to support that it makes a whit of difference."

(N.T. 10/26/09 at 121:22-122:12.)

[34] Furthermore Dr. Williams' quote from the FCC lacks context. In reviewing the assignment of Adelphia assets to Time Warner, the FCC stated that:

> adjacent service areas can provide a useful benchmark for consumers to compare price and service. . . . We recognized . . . that regulatory efficacy is enhanced when there are a "sufficient number of independent sources of observation available for comparison." We believe that not only regulators, but also consumers, can benefit from the ability to observe how different

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¶ 149.) In the MVPD industry, however, prices are not regulated by local franchise agencies, except for the price of basic cable services, which is not at issue in this case.[35] (Teece Cl. Reply Decl. ¶ 136.) Since Dr. Williams' antitrust impact theory of reduced benchmarking pertains to consumers using cable rates of adjacent cable operators as a basis for comparison, and not regulators, whether local franchise area regulators use the rates of other areas as benchmarks does not support his theory.[36]

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> cable operators are serving proximate areas. **Although benchmarking opportunities may be diminished in certain areas as a result of these transactions, we are unable, based on the record, to quantify any effects on competition that may occur**.

(Ex. D27 ¶ 83 (emphasis added) (internal footnotes omitted).)

[35] While contending that benchmarks have been used by both federal and local regulators to regulate cable rates, Dr. Williams recognizes that federal regulators no longer regulate cable rates. (Williams Decl. ¶ 152.) While he cryptically asserts that local franchise agencies "continue to regulate various aspects of the cable industry, including the renewal of incumbents' franchises and competitive entry" (*see id.*), he elides over the undisputed fact that local franchise agencies have no authority to regulate expanded basic cable rates.

[36] To the extent there is evidence of consumer benchmarking, it appears to refute rather than support Dr. Williams. He provides an example of Comcast customers comparing their own prices and service quality to other Comcast customers, not to other adjacent cable providers. (Williams Decl. ¶ 159.) His other example pertains to Comcast customers comparing their own service quality to that received by RCN and Verizon FiOS customers, not adjacent MVPDs. (*Id.* ¶ 160.) As Dr. Teece notes, to the extent that RCN and FiOS constitute benchmarks, they remain in the Philadelphia DMA despite the alleged anti-

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The survey Dr. Williams conducted to gauge consumer benchmarking behavior is also problematic. A research group conducted a survey of 400 respondents in each of the DMAs for Los Angeles, New York, Philadelphia, and Washington. The results showed that cable customers in the Philadelphia DMA reported only a 12% awareness of alternative cable providers versus 18% for Los Angeles, 39% for New York, and 42% for Washington. Dr. Williams opines that because of the lower concentration of cable system ownership in the non-Philadelphia areas, the survey suggests that the lower awareness of **benchmarking information** possessed by cable subscribers in the Philadelphia DMA reflects a reduction in **benchmark competition**. (Williams Decl. ¶ 155.) However, Dr. Williams does not explain in his report how the lack of knowledge of other cable companies necessarily establishes a reduction in benchmark competition. Nor does the survey provide empirical evidence of the level of consumer benchmarking behavior both before and after Comcast's clustering activity began, to examine any reduction due to clustering. He testified on cross-examination that, other than his survey, he conducted no empirical study showing that consumer benchmarking behavior is reduced by clustering, and conceded that Comcast customers still could and did benchmark against Comcast rates charged in other areas. (N.T. 10/15/2009 at 94:6-14, 17-25; 95:1-6.)

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competitive effects of clustering. (Teece Cl. Reply Decl. ¶ 137.) We find that these examples contradict Dr. Williams' contention that only adjacent cable operators serve as valuable benchmarks for Comcast customers.

Finally, Dr. Williams' reliance on internal Comcast documents in which Comcast executives compare Comcast rates to immediately adjacent cable operators, to others in the region, and also with national benchmarks (*see* Williams Decl. ¶ 161), does not provide common evidence supporting his consumer benchmarking theory of antitrust impact. According to Dr. Teece, it is common for any firm to track general industry information, including the prices that other firms charge. (Teece Cl. Reply Decl. ¶ 138.) More importantly, these documents are only evidence that **Comcast itself** tracks the prices of other cable firms, not that consumers do so. Also, the documentary evidence, comparing regional and national benchmarks, appears to conflict with Dr. Williams' premise that only adjacent cable operators can provide consumer benchmarks.

Accordingly, we conclude that the Class has not demonstrated that the alleged anticompetitive effect of clustering on consumer benchmarking is capable of proof at trial through common evidence.

4. Clustering and its effects on bargaining power

As part of his discussion of the geographic market, Dr. Williams attempted to demonstrate how increasing the number of cable systems or clustering its cable systems in a DMA can increase an MSO's bargaining power with programming content providers (such as television networks) and lead to higher profits and higher rates. He opined that

> swaps and acquisitions can increase the bargaining power of a cable operator relative to the bargaining power of a network. This occurs because the swaps and acquisitions have the effect of decreasing the percentage of the

> cable operator's revenues attributable to any individual network and increasing the percentage of any individual network's revenues attributable to the cable operator. As a consequence of this enhanced bargaining power, the cable operator becomes more patient and more willing to break off negotiations relative to an individual network.

(Williams Decl. ¶ 100.) As a result, he continues,

> when bargaining power shifts to the cable operator, offers that previously would have been rejected by the network will now be accepted (lowering the cable operator's costs of acquiring programming from the network), and therefore a larger share of the gains from trade in the negotiation will accrue to the cable operator. (In a competitive market, these cost reductions would be passed through to subscribers in the form of lower prices. As discussed below, the FCC has determined that any programming cost reductions that may be associated with clustering have not been passed through to consumers.) Consequently, an immediate implication of an increase in the cable operator's bargaining power is that its profits are expected to increase. Cable rates also can increase as a consequence of an increase in the cable operator's bargaining power.

(*Id.* ¶ 102.[37])

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[37] We note that in the last sentence of Williams' conclusion that he states only that cable rates "can" increase as a consequence of an increase in the cable operator's bargaining power, and not that he has shown that they actually do. Merely as-

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Dr. Williams supports his bargaining theory of antitrust impact in his clustering model. He theorizes that when a cable operator increases its footprint by increasing the number of franchise areas it operates or when it increases the clustering of its franchises (1) a cable network it negotiates with may become relatively less patient during their negotiations and relatively less likely to break off their negotiations, and (2) the cable operator may become relatively more patient and relatively more likely to break off their negotiations. (*Id.* ¶ 210.) Where a cable operator swaps a geographically distant franchise for a local franchise, one result might be that the cable operator negotiates over a larger share of its revenue with local networks because it now owns more franchises involved with these local networks. At the same time however, the swap will also increase the fraction of the local networks' revenues involved in the negotiations with the cable operator. To the extent that the cable operator's total revenues are large relative to its revenues involved in local network negotiations, the increase in the fraction of the operator's revenues involved in negotiations with any one local network will be small relative to the increase in the fraction of the local network's revenues that are involved in the negotiations. Consequently, while both the operator and local networks may become less patient during their negotiations, an operator whose total revenues are large relative to its revenues generated through any single local network

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serting that conduct can cause antitrust impact is insufficient. *See Hydrogen Peroxide*, 552 F.3d at 318 (stating that the movant must do more than "assur[e] . . . the court that it intends or plans to meet the requirements" of Rule 23).

will likely become relatively more patient than any of the local networks with whom it negotiates. (*Id.* ¶ 215.) Therefore, Williams asserts, clustering alone can lead the cable operator to become relatively more patient and relatively more likely to break off negotiations with any network, and can lead local networks to become relatively less patient and relatively less likely to break off negotiations. Given any one of these changes, the bargaining model predicts that a larger share of the surplus will go to the cable operator as its franchises become more clustered. (*Id.* ¶ 216 (citing Ken Binmore, Ariel Rubinstein and Asher Wolinsky "The Nash Bargaining Solution in Economic Modeling," 17 Rand J. Econ. 176 (1986).) Dr. Williams concludes that by either (1) increasing its footprint or (2) by increasing the clustering of its franchises holding its footprint constant, a cable operator can increase its bargaining power over a cable network. (*Id.* ¶ 217.)

From these premises, Williams attempts to show that increased bargaining power on the part of a clustered cable operator leads to both higher profits and higher consumer rates. He assumes two scenarios: in the first, the cable network has all of the bargaining power and, as such, can make the cable operator a take-it-or-leave-it offer. In the second, the cable operator has all of the bargaining power and can make the network a take-it-or-leave-it offer. (*Id.* ¶ 219.) Williams then attempts to demonstrate that both the cable operator's profits and average cable rates are higher when the cable operator has all of the bargaining power than when it has none. To understand why a shift in bargaining power to the cable operator increases subscription rates, he analyzes the gains from trade between the network and the operator.

Dr. Williams theorizes that the gains from trade between the network and the operator depend upon information the cable operator does not have, namely whether the terms secured by the network with its advertisers are favorable or unfavorable for the network, and advances the following argument:

1. Because the gains from trade between the operator and the network are highest when the network's advertising rates are relatively high, the cable operator must be wary of the network's incentive to falsely claim that its advertising rates are relatively low, a ploy that can allow the network to hide advertising revenue for itself.

2. Consequently, any agreement that the operator and network might be expected to reach when the network's advertising rates are relatively low cannot, when its advertising rates are in fact relatively high, be more attractive to the network than the agreement they are expected to reach when the advertising rates are relatively high; otherwise the network will behave as if its advertising rates were relatively low even when they are not.

3. One way for the operator to ensure honesty from the network during negotiations is to insist on a reduction in the number of households receiving the network's programming when the network claims its advertising rates are relatively low, because such reductions are more costly for the network to accept when its advertising rates are relatively high than when they are relatively low.

4. To the extent that the cable operator has relatively more bargaining power, it will extract additional surplus from the network, both when the network's advertising rates are relatively low

and when they are relatively high. But because there is less surplus to extract when the network's advertising rates are relatively low, eventually the additional surplus will be extracted only when the advertising rates are relatively high.

5. Consequently, all else equal, the incentives for the network to falsely claim that its advertising rates are relatively low generally increase with the surplus the cable operator attempts to extract.

6. But all else is not equal. When the cable operator has more bargaining power, it can increase its surplus while maintaining the network's incentives to honestly reveal when its advertising rates are relatively high. The cable operator can do this by insisting on further reductions in the number of subscribers receiving the network's programming when the network claims its advertising rates are relatively low.

7. As a result, Williams concludes, the more bargaining power the operator has, the fewer subscribers there will be of the network's programming when the network's advertising terms are relatively low. Because profit maximization by the cable operator implies that fewer subscribers are obtained by charging higher monthly subscription rates, Williams claims he has demonstrated that the more bargaining power the operator has, the higher will be the cable operator's subscription rates when the cable operator does not know with certainty the advertising rates paid by advertisers to the network.

(*Id.* ¶¶ 243-45.)

Dr. Williams' bargaining power model has been criticized by both Dr. Teece and Dr. Chipty. Dr. Teece opines that Dr. Williams' model is based on untested and unverified assumptions. (Teece Cl. Reply Decl. ¶ 155.) He contends that Dr. Williams' assumptions regarding uncertainties about the network's advertising revenue, which are the crux of the model's basis for asserting that **lower** programming costs will lead to **higher** prices to cable subscribers, is wholly unsupported. Dr. Teece labels Dr. Williams' result "perverse and unrealistic," as well as contrary to the assertion contained in Williams' discussion of the effect of clustering on overbuilding, where he claimed that **lower** costs will lead to **lower** prices for cable customers not passed by an overbuilder. (Teece Reply Decl. ¶ 155 (citing Williams Decl. ¶ 94).)[38]

Dr. Chipty opines that, contrary to Williams' conclusions, bargaining power, if it exists, will serve to benefit consumers through a reduction in Comcast's programming costs, which will be passed on to consumers in the form of either lower prices or improved service. (Chipty Cl. Reply Decl. ¶ 9.c.i.) Bargaining power, Dr. Chipty explains, refers to the leverage in a bilateral bargaining negotiation between a buyer and seller. It is widely believed in the cable television industry that as MSOs become larger and more clustered, they have gained greater power to extract favorable pricing and other terms from unaffiliated suppliers of video programming. She contends, however, that it is far from clear how this

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[38] Dr. Teece also notes that, once confronted with criticisms to his model, Dr. Williams offered no empirical evidence in his subsequently filed Reply Declaration to support his theoretical model. (Teece Supp. Cl. Decl. ¶ 58.)

phenomenon, even if true, has created any competitive harm to Comcast customers in the Philadelphia Cluster due to Comcast's clustering activity. (Chipty Cl. Reply Decl. ¶ 45.)

First, Dr. Chipty reasons that, in most cases, an MSO's bargaining power is likely to be related to the size of the MSO's total subscriber base, rather than its regional size, as reflected by how those subscribers might be clustered geographically.[39] (*Id.*) Second, enhanced MSO bargaining power with respect to program service is, she opines, an unlikely source of harm to cable subscribers. To the contrary, the most likely consequence of MSO bargaining power is lower prices to consumers, in the form of some pass through of cost savings. (*Id.* ¶ 46.) She does not disagree that greater bargaining power leads to greater profits for the MSO; however, she agrees with Dr. Teece that the claim that greater bargaining power is a factor "allowing the cable company to increase its prices" is highly counterintuitive, rests entirely on the particular assumptions adopted by Dr. Williams, and is unlikely to be particularly robust to even relatively minor changes in these assumptions. She notes that, perhaps for this reason, Dr. Williams himself is more modest in his claims about his model, concluding in the main body of his report only that he demonstrates that "[c]able rates also can increase as a consequence of an increase in the cable operator's bargaining power." (*Id.* (quoting Williams Decl. ¶ 102).)

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[39] Dr. Chipty does concede that the way an MSO's subscriber base is clustered is likely to be relevant to negotiations between MSOs and local or regional programmers, while contending that it has no relevance to negotiations with national programmers. (Chipty Cl. Reply Decl. ¶ 45.)

We find that the criticisms of Dr. Williams' bargaining power model are aptly drawn. His initial assumption, that cable operators must negotiate with content providers without any knowledge of whether the network's advertizing rates are favorable or unfavorable for the network, is wholly unsupported. His model also appears to imply that this knowledge deficit is unilateral; the model does not consider the possibility that networks may not be fully informed about a cable operator's profitability within its cluster. Dr. Williams' assumption that a cable operator will seek to ensure honesty from a network by insisting on a reduction in the number of households receiving the network's programming when the network claims its advertising rates are relatively low is also unsupported by any evidence that cable operators actually engage in this negotiating conduct. Finally, Dr. Williams' theoretical conclusion that the more bargaining power the operator has, the fewer subscribers there will be of the network's programming when the network's advertising terms are relatively low is unsupported by any empirical evidence.[40] For these reasons, we conclude that the

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[40] The only authorities Dr. Williams cites to support his bargaining theory and model are the Binmore, Rubinstein and Wolinsky article, which concerns only the first part of the Williams model, and the 13 Annual FCC Report on the status of competition in the MVPD market. Dr. Williams quotes from the 13 Annual Report's discussion of the impact of clustering on overbuilding, that "clustering can present a barrier to entry for the most likely potential overbuilder (i.e., an adjacent cable operator). . . . [W]hile clustering may help reduce programming costs and other expenses, the Commission's findings reflect that these lower costs are not being passed along to subscribers in the form of lower monthly rates." (Ex. D37 ¶ 180.) The FCC's finding that lower programming costs are not being passed

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Class has not met its burden to demonstrate that the anticompetitive effect of clustering on bargaining power is capable of proof at trial through evidence that is common to the class.

VI. COMMON METHODOLOGY FOR DETERMINING DAMAGES

A. Dr. McClave's Report

In his report, the Class's damages expert Dr. James T. McClave opines, based on various studies, that prices in areas of effective competition prove to be consistently and substantially less than the prices paid by class members in the Philadelphia market. (McClave Decl. at 15.) He claims that the results of his analysis are consistent with the Plaintiffs' allegations that the alleged anticompetitive acts had the effect of elevating prices above competitive levels over the entire Philadelphia market and throughout the class period. He states that his analyses establish that the impact of Comcast's anticompetitive conduct was class-wide, since his econometric analysis shows that prices were elevated above competi-

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along to subscribers does not provide empirical evidence supporting Williams' bargaining theory. The FCC reported that the lower costs associated with clustering were possibly due to the fact that clustering makes cable operators more effective competitors **to LECs**, not better negotiators with content providers, and that clustering can provide a means of improving efficiency, reducing costs, and attracting increased advertising. (*Id.*) Other than its reference to "lower costs," which is not detailed, the Report does not shed light on Williams' assertion that clustering enhances a cable operator's ability to negotiate with content providers. We read this section of the report only to refer to the competitive advantages of cable operators and LECs.

tive levels across all class members and for the entire time period. Based on his econometric analysis, he opines that "a conservative estimate of the total economic damages suffered by the class plaintiffs is $875,576,662." (*Id.*)

McClave conducted his analysis by estimating "benchmark" prices against which to compare actual prices charged during the relevant period in the Philadelphia DMA. "Benchmark prices, also referred to as 'but-for' prices, are prices that are unaffected by the alleged anticompetitive conduct, and, as such, can be used to determine whether the conduct did have the effect of elevating prices, and if so, to what extent." (*Id.* at 3.) He calculated his benchmark prices by creating a database of Comcast cable prices for expanded basic cable for franchises throughout the United States. (*Id.* at 4.) He then applied standard econometric methodology to the benchmark sample in order to calculate the benchmark prices to be compared to the Philadelphia market prices. He estimated prices based on a multiple regression model of the benchmark data relating the prices in the benchmark sample to several factors found to influence price. He claims "this analysis tells us what factors influence a competitive price for this video service in circumstances reasonably comparable to those presented here 'but for' the challenged anticompetitive conduct." (*Id.*)

He reports that his objective was to select a benchmark against which to compare the actual Philadelphia prices by finding a sample of counties that represented a level of competition similar to that which Comcast likely would have faced in the Philadelphia DMA absent its alleged anticompetitive conduct. He therefore identified counties that re-

flected competitive characteristics he would expect to see in the Philadelphia DMA absent the conduct challenged by the Class. Because the Class alleged that the effects of Comcast's anticompetitive conduct were to deter the entry and constrain the penetration of competitors in the Philadelphia market, including overbuilders, other cable providers, and DBS providers, he focused on Comcast's level of subscriber penetration, the level of DBS penetration in the market, and the presence of overbuilders in the market. (*Id.* at 5.) He included counties in his benchmark that: (1) reflected Comcast's alleged national subscriber penetration rate of 40% (which was its approximate midpoint penetration rate in the Philadelphia DMA between its 20% rate in 1998 and its 60% rate in 2008); and (2) were in DMAs where the penetration level for alternative delivery systems ("ADS," defined as DBS, and to a much smaller extent, master antenna systems, and multipoint distribution systems) was at or above the national average of ADS penetration rates in Comcast markets. (*Id.* at 6-7.) Once a county qualified as a benchmark for a particular year by satisfying these two "screens," it was examined to determine whether or not it had been significantly overbuilt, defined as having two or more wireline companies, each having at least 15% of cable subscribers in the overbuilt area. (*Id.* at 7.) If the percentage was greater than 15%, then he identified the county as overbuilt. (*Id.* at 7-8.)

McClave used the benchmark county data to estimate "but-for" prices to compare with actual prices in the Philadelphia DMA using a multiple regression analysis. McClave opines that

> Multiple regression analysis enables one to estimate the relationship between price and

> other factors found to influence price in the benchmark data, and then to use that relationship to estimate prices in the Philadelphia market as if it shared the properties of the benchmark sample; that is, as if Comcast's subscribers continued to represent less than 40% of households, as if the ADS penetration were at least average, and, in at least five counties, as if Comcast faced competition, as described above.

(*Id.* at 8.) In his comparison, McClave "assumed that only the five counties that RCN indicated it planned to enter as an overbuilder would have been overbuilt: Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties. The model indicates that the Philadelphia DMA market prices were elevated above the but-for prices in every county-year combination." (*Id.*) He found that Philadelphia DMA market prices were elevated above the competitive prices by between 11% and 17% over the relevant period. (*Id.*) He then compared his results to FCC surveys of prices and concluded that his model was a conservative estimate of the price differentiation. (*Id.* at 9-13.) He calculated the $875,576,662 amount by which class members were overcharged by applying the appropriate overcharge percentage to the appropriate relevant revenue obtained by Comcast for the expanded basic service in Philadelphia for the class period. (*Id.* at 13.)

B. Comcast's Experts' Rebuttal

Comcast responds that Dr. McClave's model is unsuitable, from an economic perspective, for estimating alleged damages on a class-wide basis because (1) his damages analysis makes assumptions regarding competitive conditions that would have ex-

isted but for the challenged conduct that are unreasonable and inconsistent with the economic evidence, and (2) his analysis does not and cannot take into account relevant differences across members of the class.

1. Whether McClave's use of benchmark counties is appropriate

According to Dr. Teece, Dr. McClave does not explain how his screens of counties representing (1) a Comcast penetration rate of no more than 40% and (2) an ADS penetration rate at or above the national average for other Comcast markets, relate to any of the allegations in the Third Amended Complaint. Dr. Teece assumes that the criteria relate to Dr. Singer's theory that foreclosure of regional sports programming impeded DBS penetration, but opines that Dr. McClave's benchmark counties are not a reliable basis for estimating the alleged impact of Comcast's challenged conduct because there is no economic basis for choosing counties with greater DBS penetration than the national average. Dr. Teece faults Dr. McClave for not identifying counties at a level similar to that which would have occurred in the Philadelphia DMA in the "but-for" world. He also faults McClave for not considering other factors that likely affect DBS penetration in choosing his benchmark counties. (Teece Class Decl. ¶¶ 167-68.)

Dr. Teece specifically takes issue with Dr. McClave's choice of the national DBS penetration rate as one of the screens for his model. He asks why, if the model is designed to forecast the competitive conditions in the Philadelphia DMA absent the alleged anticompetitive conduct, McClave did not use the far lower prediction of DBS penetration stated by

Dr. Singer and adopted by Dr. Williams.[41] According to Dr. Singer, DBS penetration in the Philadelphia DMA would have been only 15.4% in 2005 (compared to DBS's actual penetration of 9.4%) if DBS providers had access to CSN Philadelphia, not the far higher national average. (*Id.* ¶ 169.) Dr. Chipty also argues that using the national average of DBS penetration rates in other Comcast markets is not appropriate.[42]

Dr. McClave did not specifically address this critique in his subsequent expert submissions. We

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41 Dr. Teece testified:

> Now, I can speak a little bit more specifically to what Dr. McClave did. As I said, he started off with his benchmarks and those benchmarks though, your Honor, are not but-for worlds that were specified by Dr. Williams. They are basically, in my view, arbitrarily chosen and they don't link to the theories put forward on the liabilities side. For instance, the notion that somehow rather DBS penetration should be at the national level, even Dr. Singer's predictions for the Philadelphia DMA don't even show that. So, I find that that is a serious flaw. It was before and what's been done here.

(N.T. 10/26/09 at 137:9-19.)

42 Dr. Chipty states that there are only two areas in the country where the incumbent cable operator (1) owns the regional sports network (Philadelphia and San Diego); (2) has the right under FCC regulations to maintain cable exclusivity; and (3) has chosen to do so. (Chipty Reply Decl. ¶ 87.) Rather than acknowledge that the Philadelphia situation is only comparable to San Diego, Dr. McClave's study removes all counties where DBS penetration is below the national average, whatever the reason. Thus, Chipty concludes, McClave has inappropriately removed counties that have low DBS penetration for reasons that have nothing to do with DBS access to regional sports programming. (*Id.*)

cannot agree, however, that this critique is aptly drawn. There is no disconnect between Dr. McClave's choice of the national DBS penetration rate of Comcast markets, rather than the predicted DBS penetration rate for the Philadelphia market absent the alleged anticompetitive conduct. Dr. Singer's theory that foreclosure of regional sports programming kept the DBS penetration rate in Philadelphia below its predicted level – as opposed to the much higher national average – represents an entirely different concept from the one used by Dr. McClave. McClave used his national average DBS penetration screen as a descriptor of typical competitive market conditions. The fact that DBS penetration would not have reached the level of national average for Comcast markets in the Philadelphia DMA does not mean that national average DBS penetration, combined with median Comcast share during the class period, do not demonstrate a typical competitive market. Typical competitive markets that would satisfy Dr. McClave's benchmark screens do not have Philadelphia's predicted DBS penetration; by definition they have national average DBS penetration levels for Comcast markets.

With regard to the selection of the less-than-40% Comcast penetration rate screen, Dr. Chipty claims that McClave ignores the fact that, as late as 1999, Comcast was only present in a handful of counties in the DMA, and its overall share of subscribers was only 25%. We find that this criticism is not supported by the record. Chipty chooses 1999 data to attack McClave's use of the less-than-40% figure, but 1999 is only one year after McClave's start point of 1998, when he acknowledges Comcast's share was 20%. That figure grew to 60% over the next ten years. If Dr. Chipty wanted to show that the 40% figure was

an overestimate, her assertion would have been stronger if she could have shown that data from the midpoint of the time frame, 2003, or the average rate over the entire time period, did not correspond to the 40% figure. Dr. Chipty makes no such attempt.[43]

2. McClave's omission of population density from the benchmark model

Dr. Chipty opines that McClave's model overestimates damages because McClave fails to account for differences in demographic characteristics between benchmark counties and Philadelphia, including, for example, population density, and percentage of rental units and detached homes. (Chipty Reply Cl. Decl. ¶ 88.) Dr. McClave stated in his report that

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[43] Dr. Teece also attacks McClave's choice of the less-than-40% penetration rate sign to identify benchmark counties, asserting that it bears no apparent relationship to the Class's claim that the challenged transactions were anticompetitive. He stated that, while Dr. Williams bases his opinion that clustering was anticompetitive on the ground that clustering minimized boundaries that Comcast shared with other MSOs that could possibly become overbuilders in adjacent areas, Dr. McClave makes no attempt to estimate the likelihood of such entry by adjacent cable operators or the effect that such entry would have had on cable prices. Thus, Dr. Teece suggests, Dr. McClave's benchmark counties methodology bears no relation to the Class's allegation that the swap transactions constituted unlawful horizontal restraint on competition. (Teece Class Decl. ¶¶ 174-75.) We reject this criticism. McClave's use of the less-than-40% Comcast share screen is supported by the evidence that it represents Comcast's approximate share of the Philadelphia DMA at the midpoint of the class period. McClave chose this screen because it allowed for some growth during the class period, but allowed him to focus on markets where Comcast was less likely to have market power than it acquired in the Philadelphia market due to the alleged anticompetitive clustering conduct. (McClave Decl. at 6.)

he considered using population density, as well as the number of households, as additional cost variables, with higher levels expected to decrease per subscriber costs, but when included in the model these factors

> were either wrong signed (having positive associations with price) or statistically insignificant. This may be attributable to their high degree of correlation with the income factor (in statistical parlance, "multicollinearity"), or residual anti-competitive effects that remain in the benchmark, or some combination of both. I therefore did not include them in the final model specification.

(McClave Decl. App'x A at 1 n.3.) Chipty criticizes this decision because, from "an industry viewpoint, these variables are widely thought to capture both supply and demand side features of the market, and as such there is no a priori expectation about the direction of effect (or sign on the coefficient). . . ."[44] (Chipty Reply Cl. Decl. ¶ 93.)

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44 We note that the GAO, in studying wire-based competition from broadband service providers ("BSPs") stated that "[s]ome of the rate impacts that we found may be due to factors other than the BSP entry, such as population density." (GAO 2004 Report at 5.) However, the report goes on to state that "although [a]ll 6 of the BSPs we interviewed mentioned the size of the market as a key factor that they considered in market selection. . . [o]nly 1 BSP focused its business development toward larger cities. . . . Five BSPs built new infrastructure in medium and smaller cities. They told us they took this approach, in part, because they recognized how difficult it would be to meet construction requirements in a large city." *Id.* at 17-18. "As a result, nationwide, BSPs serve only about 1 percent of the subscription television market. . . ." (*Id.* at 28.)

In response to Dr. Chipty's criticism, McClave states that population density, which is a demographic variable, is positively correlated with income, a variable he had already included in his model. He opines that including population density leads to a result that is unreliable and counter-intuitive to its relationship to price. (McClave Rebuttal Decl. at 18.) McClave criticizes Chipty's inclusion of the variable in her competing damage models[45] because her population density explanatory variable coefficient has a counter-intuitive positive sign, particularly when median household income has already been included. He reasons that since clustering tends to occur in higher income areas, it may also be capturing some clustering effects. As Comcast itself has argued, and as has appeared in the published literature, higher population density results in lower costs per subscriber. Thus, he would expect a negative relationship between price and population density, particularly with median household income already accounting for demand's effect on price. He contends that the addition of population density in Dr. Chipty's models only masks the effects of anti-competitive influences on price.[46] (*Id.* at 30-31.)[47]

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[45] We note that Dr. Chipty has specified numerous models to support her own conclusions on the issue of antitrust impact as well as to impeach Dr. McClave's conclusions. Several of Dr. Chipty's models are variations on the McClave model incorporating alternate variables. Others use different data sources. We do not specifically address each of Dr. Chipty's models, but rather focus on her major criticisms of Dr. McClave's results.

[46] Dr. McClave similarly testified:

> Q And did you look at the issue of population density as a possible variable?

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A I would say [] population density has been probably the most discussed variable between experts in this case, that there is. I certainly did look at it.

Q Did you determine that it should not be used?

A I did.

Q Why did you determine it should not be used?

A There were basically three reasons. The first several are purely statistical. When population density, when I put it into the model to see whether it was important or not, I had an a priori [] understanding that from, for example, Comcast's submissions to the FCC, that in places where there were lots of people, efficiencies should exist and costs should be less than where there are few people. And so, my a priori expectation, which econometricians have when they're putting models together, was that the relationship between population density and price would be inverse, a negative one. That is, as population density went up, costs would go down and so price would go down.

Q Let me stop you for a second.

A Sure.

Q You talk about having an a priori intuition and expectation. Is that unusual for statisticians, econometricians to approach specifying a model with a priori expectations?

A No, it's not unusual at all. In fact, there are econometrics texts that say that it's something akin to moral obligation for an econometrician to establish such hypotheses and expectations. And then, if the data don't live up to that, to try to understand why.

Q So, now, I interrupted you and I'm sorry, Dr. McClave. Please go on and explain to the Judge why you didn't include the population density?

A When I added population density to the model, it had the opposite sign, it had a positive sign, indicating that prices were going up as population density increased. The concern I had, when I saw that, was number one, it didn't conform to what I ex-

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> pected. And number two, I was concerned that one of the reasons that that might have been the case was the challenged behavior in this case. In other words, the cluster. And so, the concern I had about leaving population density in the model is, number one, it didn't conform to economic expectation. And number two, it may be tainted by the very behavior that I am assuming was illegal for the purpose of my analysis, was anti-competitive. And then finally, the last reason, your Honor, was the benchmark and we're going to get into this, I know. But the benchmark that I was using in order to estimate prices into Philadelphia, turned out not to have – turned out that the population density in Philadelphia was somewhat greater than that in most of the benchmark. And so, we call that needing to extrapolate in statistics and it's something we try to avoid. And so, I preferred the median income variable, because median income was a variable that captured all of Philadelphia, that is my benchmark median incomes range captured all the median income for the counties in this area and Philadelphia. And it had the expected sign. Namely, as median income went up, it had a positive relationship with price. Which again, from my reading and my own expectations of the work in this industry, median income, higher median income probably is correlated or a proxy for more demand for cable. And also, higher median income probably means that the cable companies are having to pay more for their labor. So there are several reasons why median income, to me, made much more sense than population density and that's why it ended up in my model and population density didn't. It had nothing to do, Mr. Goldberg, with whether the damages were higher or lower.

(N.T. 10/13/09 at 58:14-61:7.)

We find that Dr. McClave's decision not to include population density is well supported. In addition to his report's explanations and his testimony, he shows that population density is improper by looking at what happens when Dr. Chipty includes demographic variables like population density in her

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47 Dr. McClave also opines that the inclusion of population density in Dr. Chipty's competing regression models violates an important statistical principle:

> As Dr. Chipty points out, Philadelphia's population density is significantly greater than in the benchmark. Importantly, the maximum population density in the benchmark is 3,600 population per square mile, while Philadelphia's maximum is more than 11,000 per square mile. This is a consequence of defining a benchmark that is relatively free of clustering, but creates a statistical problem when included in Dr. Chipty's multiple regression models. The problem is that when using the models to estimate the Philadelphia "but for" prices, the models are being used to extrapolate far outside the range of values used to estimate the benchmark. That is, the models are used to estimate prices for counties with population density more than 300% larger than the highest population density in the benchmark. This violates a basic statistical principle of multiple regression analysis that advises against such extrapolation, since it can result in unreliable estimates. This problem is avoided by using median income as the demand factor in the models (as I did), since all counties in the Philadelphia market have median incomes that are within the range of the benchmark sample's median incomes.

(McClave Rebuttal Decl. at 31.) He concludes that, as a result of including population density, Dr. Chipty's models produce unreliable estimates of "but-for" prices in the Philadelphia market, and therefore result in unreliable estimates of economic damages there.

regression models, while also including an income variable. For example, because of demographic variables Dr. Chipty's model shows that, other factors equal, markets with a higher percentage of white non-Hispanic population pay lower cable rates. More importantly, her population density variable shows as positive and statistically significant in one model, and negative and statistically significant in another. (*Id.* at 19; Ex. P86.)

McClave's decision was also supported by FCC and GAO studies which included population density, but found that the variable was not shown to be statistically significant.[48] (Ex. D2 at 81; Ex. D3 at 24,

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[48] When Dr. McClave used the term "not statistically significant," we asked him:

THE COURT: What does that mean, not statistically significant? Does that mean that if we lifted that variable out completely, population density, the result wouldn't be different to any significant –

THE WITNESS: Certainly in terms of using it to predict prices, yes. What it literally means, your Honor, you can't reject the hypothesis that the true coefficient, the true weight is zero, that it's in there, but explaining nothing more than random variation.

THE COURT: Okay. That's the engineering aspect of it. A guy like me from the street, what am I to conclude with respect to that? Am I to conclude that although population density was included by the GAO in 2002 and 2003, the result would have been the same had it not been included? When I say the same, I mean no significant difference.

THE WITNESS: Right. That's right.

THE COURT: I can conclude that?

[Footnote continued on next page]

32; Ex. D13 at 47.) In the FCC study, two regression models examining cable prices in overbuilt markets showed that density and density squared had a coefficient of zero and a t-statistic ranging from only 0.03 to 0.87.[49] (Ex. D2 at 81.) In the GAO studies, regression models from 2002 and 2005 examining the influence of various factors on DBS penetration rates showed that population density had coefficients ranging from -0.0973 to 0.0015 and t-statistics ranging from only 0.0001 to 0.8090. While Dr. McClave conceded on cross-examination that the FCC and GAO had indeed included the variable,[50] it was not statistically significant, and accordingly we find that

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[Footnote continued from previous page]
THE WITNESS: Absolutely.

(N.T. 10/13/09 at 19:25-20:17.)

[49] The t-statistic, or test statistic, tests whether a variable is statistically significant, i.e., whether it is "just random from the data. As opposed to a real relationship, something that's indicated to be statistically significant. So, there are ways we measure that, they're called T-statistics." (N.T. 10/13/09 at 98:9-12.)

[50] He testified that the FCC's purpose in specifying its regression model was different from his purpose: "These FCC studies in my view, and I think you'll find it in the studies, are exploratory. What is it that's affecting cable prices? They don't go to the next step of saying, and I'm going to use this model to estimate cable prices in some region." N.T. 10/13/09 at 10:23-11:2. He added, "If [his model demonstrates a] wrong sign, then one thing I have to think about that the FCC doesn't is what's the reason for that? I concluded that it may well be, given all the studies about clustering and what Mr. Korpus just asked me about, that it's because of the alleged anti-competitive conduct." (N.T. 10/13/09 at 11:17-22.)

its inclusion in the governmental studies does not impeach Dr. McClave's decision to omit it.[51]

3. McClave's use of list prices rather than actual prices

In creating his damages model, Dr. McClave compared list prices for expanded basic cable in the Philadelphia DMA with list prices for expanded basic cable in the benchmark counties.[52] Dr. Chipty criticizes McClave's model because it does not take into account the significant amounts of promotions and discounts offered to Comcast customers that effectively lower their price for service below the list price that McClave uses in his model. (Chipty Reply Cl. Decl. ¶ 92.) His justification for using list prices, as opposed to discounted prices offered by Comcast for short periods to customers that, for example, package video, internet and cable services into Comcast's Triple Play plan, is that more than 80% of Comcast's customers continue to pay its list prices for expanded

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[51] At the evidentiary hearing, the Class introduced an exhibit comparing the McClave damages model with various iterations either suggested by Dr. Chipty's criticisms or models that Dr. Chipty herself specified. McClave's model with the population density variable added still reflected damages in excess of $655 million. (Ex. P82.)

[52] McClave testified:

> Q Now, in your model, you used the Comcast list price, right?
> A That was my attempt, yes.
> Q And the price you used to work out the overcharge does not take any customer discounts into account, right?
> A The comparison is list price to list price.

(N.T. 10/13/09 at 52:5-10.)

basic cable. (N.T. 10/13/09 at 53:9-10.) Further, discounts are reductions from list prices, and are only offered for temporary periods, after which the price returns to the list price. (*Id.* at 55:18-21.) McClave testified that:

> So, to get a true picture of price and what was happening to the price, we felt as all of these papers that he cited today, also feel that the only way you're going to get a true picture of price is list price. And there is an assumption, your Honor and I've stated it many times, that these discounts are limited in nature and that they're off list price. So that, if the list price were elevated, the discount prices would have been elevated. There is an assumption in my analysis to that affect [sic].

(*Id.* at 55:15-23.)[53]

To show why her criticism of using list prices affects whether McClave's model is common evidence of antitrust impact, Dr. Chipty specified several regression models of her own. In one model, she reworked McClave's model, allegedly adding as addi-

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

tional factors (1) discounts off list price and (2) population density. (Chipty Reply Cl. Decl. ¶ 92.) To correct for discounts, Chipty substituted a weighted average price for list price.[54] (*Id.*) She claims that the introduction of these two additional pieces of information more than halved the magnitude of McClave's findings. (*Id.* ¶ 94.) In some counties, Chipty's model finds that actual prices are less than the "but-for" price that McClave's model predicts. (*Id.* ¶ 95.) Thus, she opines that McClave's model, as modified, predicts negative damages. For 2007, her modified model finds that 12 of the 16 counties chosen by McClave would have negative damages, and for 2008 all but one had negative damages. Over the entire scope of the modified model, negative damages are predicted for over one-third of the county-years.[55] (*Id.* ¶ 96.) Chipty opines that this information serves to expose the unreliability of McClave's methodology for measuring class-wide impact and damages.

We find that this rebuttal model suffers significant flaws. Dr. Chipty's use of weighted average prices (regardless of their source), rather than list prices in a model to estimate damages, is inappropri-

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[54] Dr. Chipty took her data from the 2008 "Television and Cable Factbook" published by Warren Communications News. (Chipty Reply Decl. at 3 n.9.) Dr. McClave criticized Chipty for using this data, which he asserted was not reliably accurate. (McClave Rebuttal Decl. at 4.) While not accepting McClave's criticism, she nonetheless reworked the model using Comcast billing data rather than Factbook data. (Chipty Supp. Decl. ¶¶ 17-18.) She asserts that using the same Comcast billing data that Dr. McClave used yielded the same results. (*Id.*)

[55] Nonetheless, this model does report positive damages over the class period. (Ex. P82.)

ate. The model Dr. McClave specified is designed to determine the difference between the list price of expanded basic cable prices in the Philadelphia DMA and the list prices in the benchmark counties. He then uses that difference in list price in a formula he applies to Comcast's revenues to determine the Class's alleged damages. Any discount from list price that Comcast subscribers receive is not accounted for in his model, but rather in his formula when the anticompetitive overcharge is multiplied by Comcast's relevant revenues.[56] Dr. Chipty's use of

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56 McClave testified:

> Q Does your formula account for the discounts that are given to the class members?
> A Yes.
> Q Explain to the Judge how your formula and I'm being careful, I'm not talking about the multiple regression model, I'm talking about the formula, because it tests their formulaic way of estimating damages class wide.
> A Right.
> Q So, let me step back a second. From your expert opinion, is your formula an appropriate way to reliably estimate damages class wide?
> A Yes.
> Q All right, now, explain to the Judge how your formula takes into account the discounts that are given some of which, Mr. Korpus discussed with you on your cross-24 examination?
> A The short answer is it does it in the revenue.
>
> . . .
>
> So, when I said in answers to questions on cross, what I was trying to say is discounts are taken into account at the multiplication stage. At the stage at which we do this. We don't, we don't pretend that everybody is

[Footnote continued on next page]

weighted average prices in her model disrupts this equilibrium because she then, like Dr. McClave, uses the resulting overcharge to calculate damages based on Comcast's revenue. The revenue side of the formula, however, already takes into account any discount from list price because that is revenue that Comcast never received. Because Dr. Chipty's weighted average prices double count the discount, we find it does not impeach Dr. McClave's model.

Chipty has also modified McClave's model by (1) dropping counties outside the Philadelphia DMA where an incumbent cable operator offers CSN Philadelphia, because, she contends, they are the only Comcast counties where the Class's experts would say that DBS competition has been unfairly impaired; and (2) adding two additional explanatory variables into the model, Comcast's share of households measured at the DMA level rather than the county level, and the total number of subscribers served by Comcast in the DMA. (Chipty Reply Cl. Decl. Ex. 7 ("the Exhibit 7 model").) Chipty explains that these two variables reflect different aspects of cluster size. (*Id.* ¶ 100, Ex. 7.) Chipty then uses the Exhibit 7 model's estimation to attempt to directly calculate the extent of the monopoly overcharge associated with clustering by adding the marginal effect of the total number of Comcast subscribers in the DMA on price and the marginal effect of Comcast's share of DMA subscribers on price for each county-year, using 1999 as a base year. (*Id.* ¶ 102.)

[Footnote continued from previous page]

paying list. We take explicitly into account what people are paying, including the Triple Play.

(N.T. 10/13/09 at 98:9-25; 101:6-11.)

Using this method, the damage results she obtained are either statistically indistinguishable from zero, or they are negative. (*Id.* ¶ 103.)

We find that the Exhibit 7 model also suffers significant flaws. First, this model is not a multiple regression model based on comparing benchmarks to estimate "but-for" prices. It purports to be a direct calculation of the competitive overcharge. Dr. McClave, the only statistician expert either side presented,[57] remarks that this method of measuring a competitive overcharge is a "novel and non-standard formula for calculating damages," which he has never seen applied in any similar form to a calculation of damages.[58] (McClave Cl. Reply Decl. at 13.) He calculates that if the Exhibit 7 model is used correctly to estimate "but-for" prices and damages in

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[57] Dr. Chipty's expertise is in economics and econometrics, which she defined as the application of statistics to economic issues. (N.T. 10/26/09 at 73:12-15.)

[58] McClave criticizes Chipty's use of the two explanatory variables because they are confounded with other factors in the model:

> Her claim that the two explanatory variables used in her formula – Comcast's number of subscribers and DMA market share – are not confounded with the other factors in the model is demonstrably false. One of the factors in her model is Year, and we know that Comcast's number of subscribers and market share has grown over time. Thus, the Year effect in her model is hopelessly confounded with the two subscriber and market share effects, meaning that the estimates she assumes are un-confounded measures of clustering are not. In fact, the clustering effects are also contained in and measured by the Year effect.

(McClave Cl. Reply Decl. at 14.)

the standard manner, her damage estimate would have been $1.186 billion, which is greater than his own damage calculation. (*Id.* at 14; Ex. P82 (red graph).) Accordingly, we find it does not impeach Dr. McClave's model.

4. Dr. Chipty's B1 model

Basic cable prices are referred to as B1 prices, while expanded basic cable, which includes the B1 service, are referred to as B1/B2/B3 prices. Dr. Chipty next tries to impeach Dr. McClave's model by examining what result would obtain if the McClave model were used to examine the regulated prices of basic cable. She explains:

> Since B1 prices are largely determined by regulation (and excluded from Plaintiffs' product market definition), in reality the putative anticompetitive conduct alleged in the Complaint can have no effect on B1 price. As such, an appropriate damages model would not yield any "overcharge" damages associated with the B1 component of prices. Indeed, any differences between B1 prices in Philadelphia and the rest of Dr. McClave's benchmark sample must be due entirely to differences in costs, demographics, and service offerings that are not captured in Dr. McClave's model (unless of course, Plaintiffs are suggesting that the local franchise authorities in the Philadelphia Cluster are themselves harming consumers by unfairly setting higher B1 prices). Thus, applying Dr. McClave' regression model to B1 prices provides a powerful "falsification" test.
>
> In fact, limiting Dr. McClave's benchmark sample to areas in which B1 rates are

> regulated (i.e., eliminating the areas that have received an effective competition designation from the FCC) and using his methodology for B1 prices only, Dr. McClave's model "finds" significant overcharges! His analysis run using all prices (B1, B2, and where available B3) purports to show overcharges that range between 11.1 and 17.2 percent over the years 2003 to 2008, with an overall (2000 to 2008) average surcharge of 13.1 percent. By comparison, his analysis, when run using B1 prices only shows overcharges that range between -1.9 and 17.0 percent over the years 2003 to 2008, with an overall (2000 to 2008) average surcharge of 9.8 percent.

(Chipty Supp. Decl. ¶¶ 61-62.) Applying the 9.8% overcharge, she concludes that the McClave model, applied to only B1 prices, would result in $675 million in damages to the Class, accounting for 77% of the total damages found by Dr. McClave. (*Id.* ¶ 63.) Because, she claims, a properly specified model should find no damages associated with the regulated B1 prices, she concludes that Dr. McClave's methodology fails to capture significant differences between his benchmark sample and the Philadelphia Cluster, and that his damage estimates are divorced from the allegations in the Complaint. (*Id.*)

We find that Dr. Chipty's B1 model does not impeach the McClave model. First, McClave specified a regression model to test expanded basic cable prices, not basic cable prices. Using his model to test B1 prices is irrelevant.[59] Second, Dr. Chipty admitted

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[59] Dr. McClave testified that "I don't expect this model to estimate prices other than the expanded basic prices. If you

[Footnote continued on next page]

on cross-examination that she applied her model's 9.8% overcharge to Comcast's total relevant revenue, not Comcast's relevant B1 revenue, to come up with her $675 million damage calculation.[60] Moreover, the record demonstrates that, while B1 prices may vary from franchise area to franchise area because they are regulated by each individual local franchise agency, the total price that Comcast charges for B1/B2/B3 services across the Philadelphia DMA remains largely unchanged from franchise area to franchise area. (Ex. P87.) Comcast alters the price of B2/B3 component of its services from franchise area to franchise area to equalize the total price of its

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[Footnote continued from previous page]
changed the price to the regulated price, then I would expect other variables to be important and so, it's not my model. (N.T. 10/14/09 at 90:20-23.)

60 Dr. Chipty testified:

> Q What you're showing, I think what you said right at the end of your discussions, "I was shocked to find," you used the word "shock" "that Dr. McClave's model," which of course he says is not his model, "that Dr. McClave's model shows $675 million worth of damages based on B1 prices only.
> A Based on an overcharge calculated in B1 prices, yes.
> Q You didn't multiply that overcharge on B1 revenues only, did you?
> A No, of course not.

(N.T. 10/26/09 at 104:1-9.)

combined B1/B2/B3 expanded basic cable service.[61] It is within the B2/B3 section of the total price that the anticompetitive overcharge occurs. Accordingly, any application of the McClave model to B1 prices explains nothing.

5. McClave's use of DBS penetration as a screen without separately testing each of Dr. Williams' hypotheses

Finally, we address an issue we raised after the close of evidence for the parties to address in their final arguments: how do we interpret Dr. McClave's damages model if, as we anticipated would occur, we credited at least one but not all of Dr. Williams' four bases for antitrust impact? Having reviewed Dr. McClave's methodology more closely, we are convinced that our decision not to credit William's DBS foreclosure theory of antitrust impact does not impeach Dr. McClave's damages model.

As we explained above, Dr. McClave used the average DBS penetration rate for Comcast markets as

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61 Dr. McClave testified that Ex. P87 shows this equalization process:

> If you look now at the lower blue – light blue bars, that's the regulated and it turns out both of these are regulated franchises. So, $11.75 is the regulated price or at least, what Comcast charges. It may be actually less than the regulated price for Haverford and $17.85 is the regulated or basic price in Upper Darby. And the point I'm making with this is the B-1 price doesn't matter, because what Comcast does is add whatever it needs to add to get to its list price. So, it would have had to add a different amount to the $17.85, whatever the difference between that and $52.25 is, then it did when it had to add $11.75 to the $52.25.

(N.T. 10/14/09 at 94:10-21.)

a screen to select which counties could serve as benchmarks so that he could compare other Comcast prices with the prices charged in the Philadelphia DMA. Once a county passed his two screens, signifying that it qualified as a proper source for pricing data, McClave then applied his regression model's variables to equalize the county's benchmark data in order to isolate the effect of the anticompetitive conduct on price. His selection of the DBS screen to serve this purpose is entirely unrelated to Dr. Williams' DBS foreclosure theory. It was merely his method of choosing counties to serve as comparators. Any anticompetitive conduct is reflected in the Philadelphia DMA price, not in the selection of the comparison counties. Thus, whether or not we accepted all of Dr. Williams' theories of antitrust impact is inapposite to Dr. McClave's methods of choosing benchmarks. Because we have determined that the national average DBS penetration rate for Comcast markets is a valid screen, we conclude that the McClave model is a common methodology available to measure and quantify damages on a class-wide basis.

IV. CONCLUSION

The Class has demonstrated that the appropriate geographic market can be the Philadelphia DMA, as well as at least one theory of antitrust impact, and a common damages methodology. Having found that the Class has demonstrated that it can establish its antitrust claims through common evidence of antitrust impact applicable to all class members, we accordingly grant the Amended Motion to certify the Philadelphia Class. We conclude that the following class should be certified:

> all cable television customers who subscribe or subscribed at any time since December 1, 1999 to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

For the purposes of this class definition, the term "Comcast's Philadelphia cluster" is defined to mean:

> those areas covered by Comcast's cable franchises or any of its subsidiaries or affiliates, located in Philadelphia, Pennsylvania and geographically contiguous areas, or areas in close geographic proximity to Philadelphia, Pennsylvania, which is comprised of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey.

An appropriate Order will be entered.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

APPENDIX C

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

CAROLINE BEHREND, et al.	:	CIVIL ACTION
v.	:	
COMCAST CORPORATION, et al.	:	NO. 03-6604

AMENDED ORDER

AND NOW, this 13th day of January, 2010, upon consideration of Plaintiffs' Amended Motion for Certification of the Philadelphia Class (Docket Entry 330), all responses thereto, the testimony heard by the Court, and the arguments of counsel, including the letters of counsel dated January 12, 2010, **IT IS HEREBY ORDERED** that the Court's Order of January 7, 2010 (Docket Entry 430) is **VACATED**. In its stead, **IT IS HEREBY ORDERED** as follows:

1. On May 3, 2007, the Court granted Plaintiffs' motion for certification of the Philadelphia class.

2. On March 30, 2009, following the decision of the United States Court of Appeals for the Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), the Court granted Comcast's motion to reconsider the certification decision. Plaintiffs filed an Amended Motion for Class Certification.

3. The only class certification element that remained in dispute was the requirement of Fed.

R. Civ. P. 23(b)(2) that common issues of law and fact predominate. In our May 3, 2007 certification decision, the Court determined that the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy had been satisfied by the Class and that the Class satisfied the Rule 23(b)(3) requirement of superiority. The Court reaffirms and hereby incorporates those findings.

4. Pursuant to Rule 23(b)(3), the Court finds that the Class has demonstrated by a preponderance of the evidence that questions of law and fact common to the members of the class predominate over any question affecting individual members of the class.

5. The Court finds that the Class has demonstrated by a preponderance of the evidence that the appropriate relevant geographic market can be the Philadelphia Designated Marketing Area ("DMA") and that this geographic market definition is susceptible to proof at trial through available evidence common to the class.

6. The Court finds that the Class has demonstrated by a preponderance of the evidence that antitrust impact or injury is subject to proof at trial through available evidence common to the class on one of Plaintiffs' theories of antitrust impact; namely that antitrust impact, if any, of Comcast's clustering through the challenged swaps and acquisitions on overbuilder competition is capable of proof at trial through evidence that is common to the class.

7. The Court finds that the Class has demonstrated by a preponderance of the evidence that the model and analyses contained in the expert reports and testimony of Plaintiffs' expert,

Dr. James McClave, are common evidence available to measure and quantify damages on a class wide basis.

8. The Court finds that the Class has demonstrated by a preponderance of the evidence that it can seek to establish the antitrust impact element of its claims that Comcast has violated §§ 1 and 2 of the Sherman Act through common evidence of antitrust impact applicable to all class members.

9. Plaintiffs' Amended Motion for Certification of the Philadelphia Class is again **GRANTED**.

10. The Court **CERTIFIES** the following plaintiff class pursuant to Fed. R. Civ. P. 23(a) and (b)(3):

> All cable television customers who subscribe or subscribed at any time from December 1, 1999 to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster. The class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.
>
> For purposes of this class definition, the term "Comcast's Philadelphia cluster" is defined to mean:
>
> those areas covered by Comcast's cable franchises or any of its subsidiaries or affiliates, located in Philadelphia, Pennsylvania and geographically contiguous areas, or areas in close geographic proximity to Philadelphia, Pennsylvania, which is composed of the areas covered by Comcast's cable franchises, or any of its subsidiaries or affiliates, located in the following counties: Berks, Bucks, Chester,

Delaware, Montgomery and Philadelphia, Pennsylvania; Kent and New Castle, Delaware; and Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer and Salem, New Jersey.

11. The Class is certified for resolution of the following claims:

    a. Whether Defendants conspired with competitors, and whether Defendants entered into and implemented agreements with competitors, to allocate markets, territories, and customers for cable television services; and whether such conduct is a per se violation, or whether it constitutes a restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

    b. Whether Defendants unlawfully attempted to monopolize, or unlawfully possess and willfully acquired or maintained monopoly power in, the Philadelphia area cable market with respect to cable television services in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;

    c. Whether Defendants' acts alleged to violate Sections 1 and 2 of the Sherman Act caused prices for cable television services in the relevant markets to be artificially high and not competitive; and

    d. Whether Plaintiffs and members of the class were injured by Defendants' alleged conduct in violation of Sections 1 and 2 of the Sherman Act.

Proof of antitrust impact relative to such claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which

was to deter the entry of overbuilders in the Philadelphia DMA.

12. The Court's Memorandum dated January 7, 2010 is incorporated herein by reference.

13. The Class is further certified for resolution of the following issues and affirmative defenses:

    a. The measure of damages by which Defendants' alleged conduct injured Plaintiffs and members of the Philadelphia Class;

    b. Whether Plaintiffs and members of the Philadelphia Class are entitled to injunctive relief as a result of Defendants' alleged conduct in violation of the Sherman Act; and

    c. Whether Affirmative Defenses One through Fourteen asserted in Defendants' Answer and Affirmative Defenses are valid.

14. Plaintiffs Caroline Behrend and Stanford Glaberson are **APPOINTED** as representatives of the Philadelphia Class.

15. Pursuant to Fed. R. Civ. P. 23(g), the law firms of Heins Mills & Olson, P.L.C. and Susman Godfrey, L.L.P. are **APPOINTED** Co-Lead Counsel for the Philadelphia Class.

16. Defendants' Motion for Partial Findings Pursuant to Fed. R. Civ. P. 52(c) (Docket Entry 412) is **DENIED**.

16. Plaintiffs' Motion to Seal Document (Docket Entry 418) is **GRANTED**.

BY THE COURT:

/s/ John R. Padova
John R. Padova, J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-2865

CAROLINE BEHREND; STANFORD GLABERSON;
JOAN EVANCHUK-KIND; ERIC BRISLAWN

v.

COMCAST CORPORATION;
COMCAST HOLDINGS CORPORATION;
COMCAST CABLE COMMUNICATIONS, INC.;
COMCAST CABLECOMMUNICATIONS
HOLDINGS, INC.; COMCAST
CABLE HOLDINGS, LLC,

Appellants

BEFORE: McKee, Chief Judge, SLOVITER,
SCIRICA, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, VANASKIE, ALDISERT,*
Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED. Judge Jordan would grant rehearing *en banc*.

BY THE COURT:

/s/ Ruggero J. Aldisert
United States Circuit Judge

DATED: September 20, 2011

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* As to panel rehearing only

APPENDIX E

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice*.

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are

authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).