

**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**

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the court of appeals properly affirmed an order granting class certification, which the district court rendered after conducting a four-day evidentiary hearing, considering expert and fact witness testimony, reviewing documentary evidence, entertaining extensive argument and briefing, and making exhaustive fact findings on issues necessary for all live Rule 23 determinations, even when such issues overlapped with the merits, but declining to reach merits issues unnecessary to make Rule 23 determinations at the class certification stage.

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STATEMENT OF THE CASE

A. The suit. Comcast and other cable providers engaged in market “swaps” in which competitors operating within major metropolitan areas exchanged territories and subscribers like chattel. These “swaps” aimed at – and achieved – market dominance by a single cable provider for each major U.S. city’s cable market through pure market allocations. After achieving a dominant position in the Philadelphia market, Comcast abused its dominance to stifle competition from those cable providers that did not participate in the “swaps.” The record evidence stands undisputed: in the Philadelphia area, a geographic market where Comcast achieved dominance, Comcast charges significantly-higher prices for expanded basic cable service.

Plaintiffs brought suit, alleging violations of sections 1 and 2 of the Sherman Act for Comcast’s anti-trust violations. The district court certified a class of Comcast subscribers in the Philadelphia area to press these claims. Plaintiffs’ experts, based on extensive analyses and well-accepted methods, have shown (1) that Comcast’s market dominance deterred over-builders and caused higher prices throughout the Philadelphia area and (2) that the amounts of the supracompetitive prices could be estimated based on a statistical analysis common to the class. With Comcast’s explicit acquiescence, the only Rule 23 issues at recertification and on appeal involve Rule 23(b)(3)’s predominance over individualized issues for

both (1) antitrust impact and (2) class-wide proof of damages.

In its petition, Comcast mischaracterizes the rigorous analysis conducted by both the district court and the appellate court below. Despite Comcast's unsupported assertions, the district court resolved all disputes – including merits issues – necessary to conclude that the class met Rule 23's prerequisites for certification. And the Third Circuit reviewed those determinations using the stringent standard this Court first set forth in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), and reiterated in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Most importantly, at no point did the Third Circuit attempt to “resuscitate” an incorrect interpretation of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Third Circuit precedent, *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008), fully embodies the Court's demands for Rule 23. Indeed, the appellate court below noted *Hydrogen Peroxide's* conformance with *Dukes*: “[t]he Supreme Court confirmed our interpretation of the Rule 23 inquiry in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).” Petitioners' Appendix (P.A.), at 14a n.6 (citing *Dukes*, 131 S. Ct. at 2551, 2552 n.6 for the proposition 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 class certification order – the product of years of analysis by two teams of experts, multiple volumes of expert reports and depositions, extensive briefing, a multi-day mini-trial, the district court’s detailed, fact-driven analysis, and the circuit court’s comprehensive review – exceeds the most ardent applications of both *Falcon* and *Dukes*. See *Falcon*, 457 U.S. at 160 (recognizing that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification questions”); *Dukes*, 131 S. Ct. at 2251 (noting that “certification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied’” (quoting *Falcon*, at 160)).

Before certifying the class of Philadelphia cable subscribers, Judge Padova, the district judge, carefully evaluated all disputed elements of Rule 23 and found the elements satisfied. The district court did exactly what this Court has directed district courts to do in evaluating class certification motions. The road to class certification, while not direct, resulted in an order and analysis that withstands any legitimate challenge.

B. The district court. In May 2007, Judge Padova certified the Philadelphia class. Respondents’ Appendix (R.A.), at 1-2. But the initial certification order predated *Hydrogen Peroxide*. After the Third Circuit issued *Hydrogen Peroxide*, the district court granted in part Comcast’s motion to reconsider class certification. R.A., at 3-6.

In the March 2009 order decertifying the Philadelphia class, the district court noted the deficiency in its initial certification order:

In our decision certifying the Philadelphia Class – issued before the *Peroxide* decision – we did not make factual findings under the preponderance of the evidence standard or resolve the experts’ disputed opinions. . . . Because we did not require the Class to show the factual basis of its expert’s opinions by a preponderance of the evidence and did not make specific credibility determinations, our finding that the Class satisfied the requirement of Rule 23(b) must be vacated.

R.A., at 4 n.1.

At that time the district court confirmed that Comcast had limited its certification challenge to “the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages.” R.A., at 5 n.2. Accordingly, the Rule 23 requirements for this class involved *only* whether the issues of antitrust impact and damages methodology predominate over individualized issues. Comcast conceded all other aspects of Rule 23.

The district court then put plaintiffs to their burden. In the ensuing six months, the parties turned their respective experts to the task of evaluating a host of issues related to predominance of antitrust impact and damages methodology.

The effort yielded 32 expert reports, followed by depositions of the same experts. The parties marshaled, indexed, and submitted class-related documents to the district court. And, as directed by the district court, the parties briefed the live class certification issues and submitted both pre-hearing memoranda and annotated proposed findings and conclusions.

The district court considered all of these materials before presiding over a four-day evidentiary hearing on the class certification questions on October 13-15 and 26, 2009. During the evidentiary hearing, plaintiffs called two experts, Dr. James T. McClave on damages and Dr. Michael A. Williams on liability. Both experts faced significant questioning by Comcast – and by Judge Padova. Both of plaintiffs' experts withstood the trial of cross examination.

Comcast offered experts too. The district court accepted the experts' numerous reports as direct testimony, permitted additional direct testimony, and exposed the experts to questioning. Unlike plaintiffs' experts, Comcast's experts failed to defend their positions fully in the face of cross examination.

The class certification evidentiary hearing involved more than experts. After plaintiffs concluded their presentation, Comcast moved for a ruling (in the nature of a Rule 52(c) motion) to the effect that plaintiffs had not met their burden. The parties briefed the issues, and the district court, after considering the briefing and hearing argument, denied

Comcast's motion. The district court compiled an extensive fact record. Comcast offered live testimony from a Comcast executive at the hearing. In addition, both parties submitted a wealth of documentary evidence, post-hearing briefs, and annotated proposed findings and conclusions. Later, Judge Padova posed further questions to the parties and held additional argument on the questions.

After evaluating all of the briefing and argument, the expert reports, the documentary evidence, and the live testimony of the expert and fact witnesses, the district court applied its judgment, made credibility determinations, evaluated the evidence, and found that plaintiffs satisfied the predominance requirement of Rule 23(b)(3) – the only disputed issue – by a preponderance of the evidence. The district court's memorandum on recertification of the class explains in detail the disputed points between each party's experts and why the district court accepted the positions of plaintiffs' experts over those of Comcast's experts in connection with the key issues of predominance for antitrust impact and damages methodology.

Rather than run from "merits arguments," the district court embraced the charge to make all findings necessary to rule on class certification: "Class certification is only appropriate 'if the trial court is satisfied, after a rigorous analysis,' that each requirement of Rule 23 has been met." P.A., at 92a (quoting *Falcon*, 457 U.S. at 161). The district court's detailed memorandum reflects the "rigorous analysis" that Comcast claims never happened.

C. The circuit court. Comcast appealed from the order certifying the Philadelphia class. The Third Circuit upheld the order based on its own exacting review of the district court’s comprehensive fact findings on Rule 23 issues. Applying *Hydrogen Peroxide*, the majority explained that to certify a class the “district court must conduct a ‘rigorous analysis’ of the evidence and arguments in making the class certification decision.” P.A., at 13a. “The analysis requires ‘a thorough examination of the factual and legal allegations’ and ‘may include a preliminary inquiry into the merits.’” P.A., at 13a (quoting *Hydrogen Peroxide*, 552 F.3d at 317). The majority explained, however, at the class certifications stage, it could not address “any merits inquiry *unnecessary* to making a Rule 23 determination.” P.A., at 14a (citing *Hydrogen Peroxide*, 552 F.3d at 316-17) (emphasis added).

The Third Circuit noted that plaintiffs “bear the burden of establishing each element of Rule 23 by a preponderance of the evidence.” P.A., at 14a. For Rule 23(b)(3), the majority explained, plaintiffs needed to prove that the proposed class qualifies as “sufficiently cohesive to warrant adjudication by representation.” P.A., at 15a (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). To make the Rule 23(b)(3) predominance showing, the Third Circuit said, plaintiffs had to “demonstrate that the element of anti-trust impact is capable of proof at trial through evidence that is common to the class rather than

individual to its members.” P.A., at 15a (quoting *Hydrogen Peroxide*, 552 F.3d at 311-12).

Even though this Court has said that certain antitrust claims readily meet the predominance test, *see Amchem*, 521 U.S. at 625, the appellate court stressed that it would “not relax its certification analysis.” P.A., at 15a. The appeals court then painstakingly parsed through the voluminous record and the district court’s many factual determinations to satisfy itself of Judge Padova’s analysis.

First, the court of appeals agreed that “the Philadelphia DMA is a relevant geographic market susceptible to proof at trial through available evidence common to the class.” P.A., at 17a-18a (internal quotation marks omitted). The majority agreed with the district court’s factual findings “that consumers face similar competitive choices in the Philadelphia DMA.” P.A., at 19a-20a (internal quotation marks omitted). Although Comcast alleged that the district court improperly defined the relevant geographic market, the majority pointed out that Comcast’s argument exceeded the Rule 23 inquiry. *See* P.A., at 18a.

In determining whether to certify a class, the majority recognized that the district court may resolve only those merits arguments *necessary* to satisfy Rule 23. *See* P.A., at 14a. Because Rule 23(b)(3) requires that common questions predominate over individual questions, the panel properly focused on whether “the class could establish through common proof that the relevant geographic market could be

the Philadelphia DMA” and not on the actual definition of the geographic market. P.A., at 19a, 22a-23a. The Third Circuit below correctly refused to go beyond the live Rule 23(b)(3) predominance inquiry.

Second, the court below sided with the district court by recognizing 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.” P.A., at 25a (internal quotation marks omitted). The district court weighed the testimony of several experts and determined that a preponderance of the evidence showed 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 area. P.A., at 29a. The Third Circuit agreed that “there was ample evidence that clustering conduct can deter entry of overbuilders and result in higher cable prices.” P.A., at 31a.

Similarly, Comcast asked the Third Circuit to reverse the district court’s findings regarding anti-trust impact because, it claimed, plaintiffs failed to establish antitrust impact. P.A., at 30a. Again, the Third Circuit pointed out that Comcast’s merits arguments exceeded Rule 23(b)(3)’s scope and reminded Comcast of the well-accepted limitation for Rule 23 inquiries: “a district court may inquire into the merits

only insofar as it is ‘necessary’ to determine whether a class certification requirement is met.” P.A., at 33a.

The Third Circuit held, as have other circuits, that the proper inquiry under Rule 23 remains whether “Plaintiffs [have] demonstrated by a preponderance of the evidence that they *could* prove anti-trust impact through common evidence at trial,” and not whether plaintiffs have actually proven antitrust impact. P.A., at 28a. To ask a district court to do the latter would turn class certification into a trial, the majority warned, and would run “dangerously close to stepping on the toes of the Seventh Amendment by preempting the jury’s factual findings” with the district court’s views. *See* P.A., at 33a-34a.

Third, the majority agreed with the district court that through the extensive expert testimony of Dr. McClave, plaintiffs had “provided a damages model based on a common methodology available to measure and quantify damages on a class-wide basis.” P.A., at 35a. The majority even noted that “Comcast does not contest that the Court performed the ‘rigorous analysis’ required by *Hydrogen Peroxide*.” P.A., at 35a. Instead, Comcast, again, attacked the district court’s findings for failing to decide merits issues extraneous to the Rule 23(b)(3) inquiry. The majority characterized Comcast’s flawed approach: “the heart of Comcast’s arguments are attacks on the merits of the methodology that have no place in the class certification inquiry.” P.A., at 48a. Even if the majority had overruled the district court’s findings regarding Dr. McClave’s methodology, the appellate court

noted that “only the final amount of estimated damages would change,” *not* the fact that plaintiffs could prove damages through common proof on a class-wide basis. P.A., at 48a-49a.

After a rigorous analysis both in the district court and in the Third Circuit, and after reaching and deciding those merits issues necessary for the Rule 23(b)(3) inquiry, Judge Padova concluded, and the Third Circuit affirmed, that plaintiffs had demonstrated by a preponderance of the evidence that the questions of law and fact common to the class predominated over individual questions. Both the approach and result conform to *Falcon*, *Dukes*, and the other circuit courts.



REASONS FOR DENYING THE PETITION

The Court should deny Comcast’s petition because the Third Circuit’s opinion properly described and applied the relevant class certification standard and because that opinion does not create a circuit split. The Third Circuit does *not* conflict with other circuits. It did *not* decline to decide all merits issues necessary to apply Rule 23. And the Third Circuit did *not* revive any misinterpretation of *Eisen*. The Court should reject Comcast’s arguments and deny the petition.

I. The courts below certified the class using the same standard as *Falcon and Dukes*.

Comcast argues that this Court should grant its petition under the false claim that the Third Circuit “affirmed the certification order after concluding that it was foreclosed from considering” whether “individual issues of antitrust impact and damages would overwhelm any purportedly common issues.” Pet., at 11. But Comcast’s articulation of the issues on appeal bears no relation to the class certification record, the facts, or the analysis of both the district court and the appellate court.¹

¹ Before the four-day evidentiary hearing on class certification, Judge Padova announced to the parties the standard he planned to apply to the Rule 23 inquiry by providing a printout of the standard:

Plaintiff’s burden at the class certification stage is not to prove the element of antitrust impact. Plaintiff’s task at the class certification stage 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. This calls for the District Court to employ a rigorous assessment of the available evidence and the method by which plaintiffs propose to use the evidence to prove impact at trial. Factual determinations must be made by a preponderance of the evidence. A District Court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23. District Courts must resolve factual disputes by a preponderance of the evidence and make a finding that each Rule 23 requirement is met.

R.A., at 7. Judge Padova asked the parties for comments and invited counsel to address whether this was the correct standard.

(Continued on following page)

Affirming the district court, the Third Circuit unequivocally directed district courts to conduct “preliminary merits inquiries when necessary for Rule 23.” P.A., at 33a. As described above, Judge Padova performed the necessary inquiries. The majority correctly declined to address merits inquiries unnecessary to the class certification analysis. Having analyzed predominance, the Third Circuit properly applied the same standard used by this Court in *Falcon* and *Dukes*, by the Third Circuit in *Hydrogen Peroxide*, and by appellate courts in many other circuits.

A. *Falcon* and *Dukes*. In *Falcon*, this Court determined that a district court improperly certified a class. 457 U.S. at 159-60. The *Falcon* defendants had challenged the plaintiff’s adequacy as a class representative, but the district court disregarded the

The parties agreed on the standard. During argument, Comcast’s counsel indicated a consistent view:

Your Honor, I agree with [plaintiffs’ counsel] that plaintiffs don’t have to prove antitrust impact at this hearing but they do have to prove they can prove it. They have to prove that they can prove this by proof common to the class, they have to prove that common issues predominate on the question of antitrust impact and that they can establish damages by a common and credible and reliable damages methodology.

Hearing Tr. (Oct. 13, 2009), at 20:40-10. Comcast now contends that Judge Padova applied an incorrect standard. Comcast cannot take such inconsistent positions in successive stages of the litigation. See *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

defendants' arguments. *Id.* at 152. Instead, the district court allowed the plaintiff to maintain an "across the board" attack against all of his employer's unequal employment practices made pursuant to a policy of racial discrimination. *Id.* Ultimately, the case proceeded to trial, where the district court made separate findings on liability for the plaintiff and the class because the two suffered different discriminatory practices. *Id.* This Court pointed out that the district court's error arose from its "failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." *Id.* at 160. Because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," the Court reasoned, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.*

The Court recently revisited *Falcon* in *Dukes*. In *Dukes*, the Court reiterated that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 2551 (quoting *Falcon*, 457 U.S. at 160-61) (citations omitted).

The Third Circuit uses this same standard, both in this case and others. In *Hydrogen Peroxide*, the Third Circuit held that district courts "must resolve

all factual or legal disputes relevant to class certification, even if they overlap with the merits.” *Hydrogen Peroxide*, 552 F.3d at 307 (emphasis added). Relying on *Falcon*, the Third Circuit explained that “[c]lass certification is proper only ‘if the trial court is satisfied, after a rigorous analysis, that the prerequisites’ of Rule 23 are met.” *Id.* at 310 (quoting *Falcon*, 457 U.S. at 161).

As in *Falcon*, *Dukes*, and *Hydrogen Peroxide*, the court below required an evaluation of disputed Rule 23 issues: “The district court must conduct a ‘rigorous analysis’ of the evidence and arguments in making the class certification decision.” P.A., at 13a. “The analysis requires ‘a thorough examination of the factual and legal allegations’ and ‘may include a preliminary inquiry into the merits.’” P.A., at 13a (quoting *Hydrogen Peroxide*, 552 F.3d at 317). The majority’s opinion does not break with any precedent. To the contrary, its detailed opinion shows that the Third Circuit faithfully applied *Falcon*’s exacting standard.

B. *Eisen*. Despite the Third Circuit’s adherence to *Falcon*, Comcast twists the majority’s citation to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), into a baseless argument. Comcast states inaccurately that “the Third Circuit professed itself, under *Eisen*, 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.” Pet., at 15. In reality, the Third Circuit announced the exact opposite: “*Eisen* is best

understood to preclude *only* a merits inquiry that is not necessary to determine a Rule 23 requirement.” P.A., at 14a (quoting *Hydrogen Peroxide*, 552 F.3d at 316-17). And the Third Circuit’s position on the level of inquiry leaves no doubt that it comports with *Falcon, Dukes*, and other circuit courts’ opinions: “a district court . . . may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits. Genuine disputes with respect to the Rule 23 requirements must be resolved, after considering all relevant evidence submitted by the parties.” *Hydrogen Peroxide*, 552 F.3d at 324 (citing, *inter alia*, *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)).

Comcast demands that plaintiffs prove *everything* at the class certification stage. By asserting that the majority did not consider “merits arguments,” Comcast makes another pass at bringing non-Rule 23 issues into class certification. Comcast contends plaintiffs must prove the relevant geographic market, that clustering deters overbuilders, that plaintiffs’ damages model prevails, and a host of other non-Rule 23 issues. *See* Pet. at 19-22. But these issues remain unnecessary for the Rule 23(b)(3) predominance questions presented below. And *Falcon, Dukes*, and *Hydrogen Peroxide* all forbid a district court from deciding these non-Rule 23 issues in the context of class certification.

C. Capable of proof. *Dukes* highlights Comcast’s error. In the context of Rule 23(a), the Court stated that plaintiffs prove commonality by showing

that their claims “depend on a common contention,” which “must be of such a nature that it is *capable* of classwide resolution.” *Dukes*, 131 S. Ct. at 2551 (emphasis added).

The panel majority applied this same standard in the Rule 23(b)(3) context, by requiring plaintiffs to prove the predominance of common questions by demonstrating that the elements of their claims are “*capable* of proof at trial through evidence that is common to the class rather than individual to its members.” P.A., at 56a (emphasis added). Even the dissent below agreed that the “Majority opinion skillfully [laid] out the legal requirements for predominance,” which asks only “whether antitrust impact is *capable* of proof . . . through the use of common evidence.” P.A., at 56a (Jordan, J., dissenting) (emphasis added). The Third Circuit’s standard, described in *Hydrogen Peroxide* and applied below, mirrors the Rule 23 inquiries in *Falcon* and *Dukes*.

II. The Third Circuit’s “rigorous analysis” puts it squarely in line with the Eighth and Ninth Circuits as well as other circuits.

The circuit courts, including the Third Circuit, speak with one voice on the nature of inquiry to certify a class under Rule 23. They agree that a district court may not certify a class without resolving merits arguments necessary to determine Rule 23’s prerequisites. *Hydrogen Peroxide* conforms to that standard. And the district court and the Third Circuit applied that standard in this case. Petitioners’

argument rests on the false premise that the Third Circuit demands anything different.

To pique the Court's attention, Comcast manufactures a non-existent circuit split between the Third Circuit and the Eighth and Ninth Circuits. Not only do the cases, which Comcast says "cannot be reconciled" with *Hydrogen Peroxide*, articulate the same standard as *Hydrogen Peroxide*, but other circuit courts use the same standard. No split exists.

A. *Ellis* and *Hydrogen Peroxide*. As its chief example of the non-existent split between the Third Circuit and the Eighth and Ninth Circuits, Comcast cites *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 977-78 (9th Cir. 2011). Pet., at 22-24. *Ellis* fails to advance Comcast's argument because the standard matches that applied by the Third Circuit and because the district court's analysis in *Ellis* contained a reversible flaw not present here.

In *Ellis*, both parties submitted expert testimony on the issue of commonality. *Id.* at 982. The district court entertained motions to strike plaintiffs' experts and applied *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), to render the expert testimony admissible. But the district court ended its inquiry at that point. *See Ellis*, 657 F.3d at 982. The problem, in the Ninth Circuit's view, flowed from the district court's failure to conduct a "rigorous analysis" of the testimony beyond admissibility:

[T]he district court seems to have confused the *Daubert* standard it correctly applied to

Costco's motions to strike with the "rigorous analysis" standard to be applied when analyzing commonality. Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible.

Ellis, 657 F.3d at 983. Similarly, the Ninth Circuit condemned the district court's acceptance of the plaintiffs' class certification position by virtue of the district court's determination that Costco had "not discredited" plaintiffs' expert. *Id.* at 984. The *Ellis* court remanded because of the district court's "fail[ure] to resolve the[se] critical factual disputes." *Id.* (noting that, "to the extent the district court limited its analysis of whether there was commonality to a determination of whether Plaintiffs' evidence on that point was admissible, it did so in error").

By contrast, Judge Padova took the step missing in *Ellis* and "judg[ed] the persuasiveness of the evidence presented," *Ellis*, 657 F.3d at 982, at the class certification stage to make a ruling on the live Rule 23 issues. Judge Padova's memorandum sets out a multitude of fact-based evaluations and findings, each one necessary, in the district court's view, to support the Rule 23(b)(3) ruling on predominance of antitrust impact and damages methodology. *Ellis* demands no more.

Indeed, the Ninth Circuit in *Ellis* expressly stated that the district court “was not required to resolve factual disputes” that proved unnecessary for a Rule 23 ruling. *See id.* at 983 (identifying specific merits issues not necessary for determination at the class certification stage). Far from a conflict, the approach in *Ellis* – resolving issues necessary for Rule 23 and reserving unnecessary issues – stands shoulder to shoulder with Judge Padova’s approach, the Third Circuit’s guidance on Rule 23, and this Court’s precedents in *Falcon* and *Dukes*. No conflict exists.

B. *Bennett* and *Hydrogen Peroxide*. Even less supportive of its position, Comcast attempts to generate controversy between the Third Circuit and the Eighth Circuit’s opinion in *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), cert. denied, Nos. 11-917, 11938, 2012 WL 296175, 2012 WL 297079, (U.S. Mar. 26, Apr. 2, 2012), by claiming that *Hydrogen Peroxide* “cannot be reconciled with the Eighth Circuit’s opinion.” Pet., at 24.² But *Bennett* actually tracks *Hydrogen Peroxide*’s analysis.

In both *Bennett* and this case, the parties created an extensive class certification record. *Compare* P.A., at 8a (“During the four-day hearing, the Court heard live testimony from fact and expert witnesses,

² Like *Dukes*, *Ellis* and *Bennett* turn on the Rule 23(a) issues, not the Rule 23(b)(3) predominance issue present in this case. *See Dukes*, 131 S. Ct. at 2547 (addressing commonality); *Ellis*, 657 F.3d at 980-85 (addressing commonality and typicality); *Bennett*, 656 F.3d at 813 (addressing commonality).

considered 32 expert reports, and examined deposition excerpts, as well as many other documents.”), *with Bennett*, 656 F.3d at 815 (listing “more than a thousand pages of expert reports, business records, sworn declarations, deposition transcripts, answers to interrogatories, and other evidentiary exhibits and materials”). Like Judge Padova, the *Bennett* district court faced contradictory factual assertions on class certification. *See, e.g., Bennett*, 656 F.3d at 816 (stating that “the district court was confronted with contradictory evidence in a voluminous class certification record”). And, like the Third Circuit in this case, the Eighth Circuit applied a plain error review to affirm the district court’s Rule 23 determination. *Id.* (holding that “[t]he court did not clearly err in finding [a lack of commonality]”). The chief distinguishing characteristic appears to be the outcome. After an analysis of issues pertaining to Rule 23 – the same inquiry Judge Padova conducted in this case – the *Bennett* district court denied the motion to certify while Judge Padova granted the motion to certify. But the inquiries bear no distinguishing traits.

To the extent it speaks to the contours of the “rigorous analysis” that Comcast urges the Court to probe, *Bennett* articulated the exact same “may” standard Comcast decries: “the district court *may* ‘resolve disputes going to the factual setting of the case’ if necessary to the class certification analysis.” *Id.* at 814 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)) (emphasis added). Far from causing a split, *Bennett*, like *Hydrogen Peroxide*, falls

well within the ambit of other circuit opinions on point.

C. The common standard. The circuit courts follow a common standard for Rule 23 inquiries: District courts *must* determine that the proposed class satisfies all aspects of Rule 23, even if that requires the district court to make determinations on the merits. But the district courts *may* address only those merits issues necessary for determination of Rule 23's requirements.

That well-understood position underlies *Bennett*, *Ellis*, *Hydrogen Peroxide*, and opinions from other circuit courts, such as the Second Circuit in *In re IPO Securities Litigation*, 471 F.3d 24, 41 (2d Cir. 2006) (“With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court’s obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.”), the Fourth Circuit in *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (“*Eisen* simply restricts a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail ultimately on the merits. . . . Thus, while an evaluation of the merits to determine the strength of plaintiffs’ case is not part of a Rule 23 analysis, the factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits.”), and the

Seventh Circuit in *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (“But nothing in the 1966 amendments to Rule 23, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers.”).

This common standard governed both Judge Padova’s evaluation of the Philadelphia class and the Third Circuit’s affirmance. The Court should disregard Comcast’s attempt to gin up a circuit split because none exists.

III. At bottom, Comcast disputes the district court’s fact findings.

After *Hydrogen Peroxide*, Comcast demanded that the district court revisit class certification, take evidence, and make fact findings to support its Rule 23 determinations. The district court complied. Now Comcast disputes the district court’s fact findings and, having its fact-based challenge rejected by the Third Circuit, seeks this Court’s review. But certiorari review exists for issues bigger than a review of a trial court’s fact findings. And Comcast neither has nor can show the district court committed clear error in its findings. For both reasons, the case does not merit certiorari.

Fact disputes and fact-based determinations permeate the order re-certifying the Philadelphia class. For example, Dr. McClave performed a regression

analysis using certain benchmarks and screens. P.A., at 162a-65a. But Comcast's Dr. Chipty and Dr. Teece contended that Dr. McClave selected inappropriate screens and benchmarks to the exclusion of other screens and benchmarks. P.A., at 165a-77a, 186a-87a. Judge Padova resolved each of those disputes. P.A., at 168a-69a, 174a-77a, 187a. Dr. McClave used list prices for his evaluation. P.A., at 177a. Dr. Chipty, however, argued that Dr. McClave should have used actual prices rather than list prices. P.A., at 177a-79a. Judge Padova dealt with that too. P.A., at 179a-83a. Dr. McClave evaluated the overcharge for non-basic cable for the Philadelphia class. P.A., at 183a. Dr. Chipty, here, tried to discredit Dr. McClave's model by running it on basic cable prices and comparing the results to non-basic prices. P.A., at 183a-84a. The critique failed to persuade Judge Padova. P.A., at 184a-86a. Similarly, Dr. Williams demonstrated certain aspects of antitrust impact. P.A., at 107a-09a, 123a-31a. In response, Comcast's Dr. Teece criticized Dr. Williams's economic modeling and methods. P.A., at 139a-44a. Judge Padova addressed that disagreement and found in plaintiffs' favor. P.A., at 144a-45a. And Dr. Williams compiled studies and record evidence to support his conclusion that the entire class suffered antitrust impact. P.A., at 131a-35a. Dr. Teece responded with different studies and alternate interpretations. P.A., at 139a-40a & nn.27-28. Judge Padova resolved that conflict too. P.A., at 144a-45a.

As to each of these fact disputes, Judge Padova – a judge with decades of trial experience – dug into the

record, listened to the witnesses, learned the details, asked questions, and rendered findings that plaintiffs had satisfied Rule 23(b)(3). The record reflects the district court's lengthy questioning of both sides' experts. Judge Padova's questions – to counsel and witnesses alike – reflect the depth of district court's understanding of the disputed issues and facts. And the district court's memorandum sets out, in exacting detail, each dispute, each of the district court's evaluations of key witnesses and facts, and each conclusion.

Some issues fell for plaintiffs; others for defendants. In an alternate universe, Comcast may have prevailed on enough issues to avoid class certification. But it did not. For the Court to reverse the appellate court, it would have to reach into these complicated, fact-laden questions and second guess Judge Padova's fact findings.

But Supreme Court Rule 10 cautions that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Even if it otherwise merited review, the fact-laden nature of the district court's determinations makes this case an improper vehicle for certiorari. The Court should deny Comcast's petition.



CONCLUSION

For the foregoing reasons, the court should deny Comcast's petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Respondents

**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

ORDER

AND NOW, this [3rd] day of May 2007, upon consideration of Plaintiffs' Motion for Certification of the Philadelphia Class (Docket Entry 157), all responses thereto and the arguments of counsel at oral argument, **IT IS HEREBY ORDERED** as follows:

1. The Motion is **GRANTED**.
2. The Court **CERTIFIES** the following plaintiff class pursuant to Fed. R. Civ. P. 23(a) and (c)(4)(B):

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

Respondents' Appendix 2

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.

3. Plaintiffs Caroline Behrend and Stanford Glaberson are **APPOINTED** as representatives of the Philadelphia Class.
4. 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. The law firms of Kaplan Fox & Kilsheimer L.L.P., Keller Rohrback, L.L.P., and Cohen, Milstein, Hausfeld & Toll, P.L.L.C. are **APPOINTED** to serve on the Executive Committee of Plaintiffs' counsel.

BY THE COURT:

S/ John R. Padova, J.
John R. Padova, J.

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

ORDER

AND NOW, this 30th day of March, 2009, upon consideration of the Defendants' Motion to Decertify Classes (Docket Entry No. 317), all responses thereto, and arguments presented at the Court's status conference of February 24, 2009, **IT IS HEREBY ORDERED** that:

1. The Motion to Decertify Classes is treated as a Motion for Reconsideration of the Court's Order of May 2, 2007 (granting Plaintiffs' Motion to Certify Philadelphia Class) and the Court's Order of October 10, 2007 (granting Plaintiffs' Motion to Certify Chicago Class).
2. The Motion, as construed, is **GRANTED IN PART AND DENIED IN PART** as follows:
 - a. The Motion is **GRANTED** as to that portion of the Court's May 2, 2007 Memorandum Opinion and Order finding, pursuant to Fed. R. Civ. P. 23(b), that

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Plaintiffs had demonstrated that common questions predominate.¹

- b. The Motion is **DENIED** as to all other portions of the Court's May 2, 2007 Memorandum Opinion and Order.
- c. The Motion is **DENIED WITHOUT PREJUDICE** as to the Court's Order of October 10, 2007. Defendants are **GRANTED** leave to renew the Motion

¹ On December 30, 2008, the United States Court of Appeals for the Third Circuit issued an opinion in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), determining that the "rigorous analysis" necessary when a district court decides whether to certify a Rule 23(b) class "may include a preliminary inquiry into the merits," *id.* at 317, that a district court "errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [Rule 23] requirements," *id.* at 320, and that "[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence." *Id.* In addition, the Court of Appeals made clear that "[r]esolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court – no matter whether a dispute might appear to implicate the 'credibility' of one or more experts. . . ." *Id.* at 324.

In our decision certifying the Philadelphia Class – issued before the *Peroxide* decision – we did not make factual findings under the preponderance of the evidence standard or resolve the experts' disputed opinions. We merely found that the Class's expert's report was sufficient to establish that common issues predominated. Because we did not require the Class to show the factual basis of its expert's opinions by a preponderance of the evidence and did not make specific credibility determinations, our finding that the Class satisfied the requirement of Rule 23(b) must be vacated.

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in this regard if and when the Court's Order of November 16, 2007, staying the Chicago Class proceedings, is modified.

3. The Court's Order of May 2, 2007 is **VACATED**.
4. Plaintiffs are **GRANTED** leave to file an Amended Motion for Certification of the Philadelphia Class, as it pertains to the Fed. R. Civ. P. 23(b) issue of the predominance of the common questions of (1) antitrust impact and (2) methodology of damages, along with declarations from all witnesses Plaintiffs intend to rely upon in support thereof, by April 15, 2009.²
5. Defendants shall file their opposition and opposing declarations by May 6, 2009.
6. Any additional expert depositions shall be held between May 13, 2009 and May 27, 2009.
7. An evidentiary hearing on the Amended Motion shall take place on June 10-11, 2009 at 10:00 a.m. in Courtroom 17B.

² In its letter to the Court dated March 25, 2009, Comcast indicates its willingness to stipulate that the only issues that need to be resolved through further class action motions practice are the Rule 23(b) issues of predominance of the common issues of (1) antitrust impact and (2) methodology of damages, and that it will not seek to revisit any other class certification issue. Accordingly, the Class's Amended Motion for Certification, and the parties' declarations, need only address these discrete issues.

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8. The parties shall submit a hearing memo and proposed findings of fact and conclusions of law pertinent to the Rule 23(b) issue by June 3, 2009.

BY THE COURT:

s/ John R. Padova, J.

John R. Padova, J.

Respondents' Appendix 7

[Handout expressing the Rule 23 hearing's standard, provided October 9, 2009, from Judge Padova to parties for comment in pre-hearing conference.]

Plaintiff's burden at the class certification stage is not to prove the element of antitrust impact. Plaintiff's task at the class certification stage 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. This calls for the District Court to employ a rigorous assessment of the available evidence and the method by which plaintiffs propose to use the evidence to prove impact at trial. Factual determinations must be made by a preponderance of the evidence. A District Court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23. District Courts must resolve factual disputes by a preponderance of the evidence and make a finding that each Rule 23 requirement is met.
