UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: Evanston Northwestern Healthcare Corporation Antitrust Litigation	**Master File No. 07-CV-4446**
	Judge Lefkow
	Magistrate Judge Denlow
This Document Relates To:	
All Actions	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

REDACTED VERSION FOR PUBLIC FILE

Dated: December 9, 2009

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INTRODUCTION

Plaintiffs will prove, through common evidence, that ENH leveraged the market power it acquired in its merger with Highland Park Hospital into higher prices for healthcare services to members of the class. Furthermore, Plaintiffs have more than met their burden by not only establishing that there is a class-wide methodology for ascertaining injury and damages to the Class, but also demonstrating, in the latest Reply Report of Dr. David Dranove, that this methodology works.

Moreover, ENH's expert opinion by Dr. Monica Noether should be stricken for it fails to meet the requirements of Federal Rule of Evidence 702, and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). As set forth in Plaintiff's Motion To Exclude the Expert Opinion of Dr. Noether, the report suffers from a number of fatal flaws, including *inter alia* the expression of a number of incorrect legal opinions and failure to properly conduct an economic review of available data. As such, the report should not be given any weight in deciding upon class certification.

I. FACTUAL UPDATE

In its action against ENH, the Federal Trade Commission ("FTC") focused primarily on inpatient services before 2003. The instant case alleges that ENH's anticompetitive conduct continued to the present and impacted both inpatient and outpatient services. Dr. Dranove demonstrates in his Reply Report that both inpatient and outpatient pricing was, and remains, anticompetitive. Moreover, his analysis confirms that the impact of such pricing was uniform across class members: - REDACTED - (Reply Report of Dr. David Dranove Supporting Motion for Class Certification ("Dranove Reply Rep.") ¶ 8.) In fact, "such across-the-board

price increases [for both inpatient and outpatient services] are the norm" in hospital contracting. (*Id.* ¶ 9.) Common impact inheres throughout the contracts because price changes are uniform across service categories and "hospitals do not usually limit their exercise of market power to certain inpatient services [ ] or ailments [ ] or to outpatient services." (*Id.* ¶ 10.)

As an example, Dr. Dranove reviewed the ENH contract with - REDACTED - Contrary to Dr. Noether's contention that this and other ENH contracts are too complex to allow analysis of antitrust impact, analysis through a plain reading of the actual contracts, as well as established econometric methods, confirms that "the uniformity present in the - contracts is no exception." (*Id.* ¶ 39.) Moreover, as Dr. Dranove demonstrates in his Reply Report, "the implementation [of his methodology] is simple and straightforward," and "is standard within social science statistical research." (*Id.* ¶ 50.) As such, although the individuals and entities that receive and pay for services at ENH may vary, ENH "almost invariably increase[d] the prices of various service offerings at uniform rates," thus demonstrating common impact. (*Id.* ¶ 33.)

Contrary to the unsupported opinion of ENH's expert, one of the parties notably damaged by ENH's post-merger exercise of market power was Blue Cross Blue Shield of Illinois ("BCBSI"), the largest commercial insurer in the Chicago area.[1] (*Id.* ¶ 83.) Dr. Dranove's

[1] Importantly, ENH claims that BCBSI - REDACTED - (Northshore University Healthsystem's Brief in Opposition to Plaintiffs' Motion for Class Certification ("Def. Br.") at 8; Expert Report of Dr. Monica G. Noether Supporting Opposition to Plaintiffs' Motion for Class Certification ("Noether Rep.") ¶ 9.) ENH's expert, however, failed to account for the fact that BCBSI pays ENH - REDACTED - and failed to adjust her computer calculations to (continued...)

dispositive analysis of data recently produced by BCBSI itself confirms that BCBSI suffered injury in both outpatient and inpatient services in the post-merger period, (*Id.* ¶ 70.) By comparing changes in the prices BCBSI paid to ENH before and after the merger against changes in the prices paid to ENH before and after the merger by a control group of other hospitals. – the same procedure utilized in the FTC proceeding – Dr. Dranove calculated that ENH overcharged BCBSI (and the self-funded plan sponsors it represents) for inpatient and outpatient services from 2000 to 2008 in an amount over *$111.3* million. (*Id.* ¶ 121.) In contrast, the ENH expert relied upon a statement by one of BCBSI's purchasing directors claiming that ENH's conduct did not injure BCBSI. She further neglected to review the BCBSI data or to conduct any econometric analysis of her own after 2003. (*Id.* ¶ 84; Noether Dep. at 3, 64, attached hereto as Exhibit "A".)

The FTC determined that the instant merger substantially lessened competition in the relevant market, and, due to ENH's unlawful and anticompetitive conduct, Plaintiffs and the Class paid artificially inflated prices for healthcare services. Despite this clear ruling holding ENH accountable, and the data produced in this case, ENH's expert continues to deny that any anticompetitive price increase ever occurred. (Noether Rep. ¶ 51.) As Dr. Dranove's detailed Reply Report confirms, the merger resulted in anticompetitive price increases, and Plaintiffs and the Class have continued to suffer antitrust injury to the present time.

(...continued)

account for this fact. (Dranove Reply Rep. ¶ 18 n.30.) BCBSI actually accounts for approximately [redacted] of ENH's private payer revenue. (*Id.*)

II. ARGUMENT

A. THE ANTITRUST IMPACT OF ENH'S ANTICOMPETITIVE CONDUCT IS CLASS-WIDE

At the class certification stage, Plaintiffs need only demonstrate that they have a workable common method of analyzing impact and damages – the final analysis does not need to be provided at this point. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008). Yet Plaintiffs have done more than this. Plaintiffs' expert, Dr. Dranove, has already run a regression with BCBSI data confirming that his methodology is correct and reliable.

ENH's expert, Dr. Noether, advances four points regarding impact:

1. BCBS did not suffer injury;
2. Managed care contracts cannot be analyzed as simply as Dr. Dranove believes;
3. Injury must be analyzed on a treatment-by-treatment basis; and
4. The data Dr. Dranove needs does not exist.

Each of Dr. Noether's points is disproved by Dr. Dranove's expert reports. Additionally, resolution of these contested issues is inappropriate at this stage of the case. Finally, many of ENH's arguments conflate the requirement of proving common injury with the separate requirement of showing damages.

1. ENH Erroneously Conflates Damages with Injury.

While ENH and Dr. Noether often confuse and treat the concepts as identical, impact and damages are separate elements with distinct standards of proof. Once impact is demonstrated by a preponderance of the evidence, damages may be established by a reasonable estimate at a later stage. As the Supreme Court held in *Bigelow v. RKO Radio Pictures*,

> [T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act upon probable and inferential as well as direct and positive proof'. . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.

327 U.S. 251, 264-65 (1946) (citations omitted). *Bigelow* remains good law. *See Alexian Bros. Health Providers Ass'n v. Humana Health Plan, Inc.*, 608 F. Supp. 2d 1018, 1029 n.12 (N.D. Ill. 2009) ("Despite its age, *Bigelow* remains the seminal authority in this area.").

Moreover, although ENH and Dr. Noether repeatedly and talismanically contend that Plaintiffs must prove that all class members were injured in order to certify the class, the Seventh Circuit has made clear that at this stage, a class may include some parties who are ultimately determined not to have been harmed:

> A class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification, despite statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant's conduct.

Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009) (Posner, J.) (*citing Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).[2]

Dr. Noether assumes that without damages, there cannot be injury. As a result, she uses various possible individual defenses relating to *damages* as the criteria for whether injury can be proven with a common theory. This approach is wrong. As the court in *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation* makes clear,

> It is important to note at the outset that "impact" (or "injury-in-fact") and "damages" are two distinct elements of an antitrust claim – injury-in-fact is whether the plaintiffs

[2] *Accord, Blackie v. Barrack*, 524 F.2d 891, 906 n. 22 (9th Cir. 1975); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996); *Presidio Golf Club of San Francisco, Inc. v. Nat'l Linen Supply Corp.*, No. C-71-945, 1976 WL 1359, *5 (N.D. Cal. Dec. 30, 1976) ("[T]he fact that certain members of plaintiffs' class escaped injury altogether would not preclude certification or destroy the class's prima facie case of impact. Unless it is clear that no ultimate consumers were damaged, the exact amount each may have sustained is an issue to be treated at the damages phase of the litigation."). *See also* 1 Newberg on Class Actions § 2:4, at 73-75 (4th ed. 2002).

> were harmed and damages quantify by how much . . . . At times these terms have been conflated, which can lead to confusion about what a plaintiff's burden precisely is at the motion for class certification stage. . . . [O]ne way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the "but-for" level for all plaintiffs.

256 F.R.D. 82, 88 (D. Conn. 2009) (internal citations omitted).[3] While proving damages may prove impact, the perchance absence of damages as to an individual class member, which ENH tries to argue here, does not prove the absence of injury.[4] "The fact that a plaintiff may have successfully employed bargaining power to fend off the *effect* of the conspiratorial practices does not mean that it has not been put in a worse position but-for the conspiracy." *Id.* at 88-89 (emphasis in original); *see also In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 414-15 (S.D. Ind. 2001) (individual price negotiations and the lowering of prices does not disprove injury).

ENH's argument that alleged individual issues about proof or recoverability of *damages* can disprove injury fares no better here than it did in *EPDM*.[5] When a patient or end-payor is charged a supracompetitive price, that patient or end-payor has been injured. Intervening

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[3] *See also In re Urethane Antitrust Litig.*, 251 F.R.D. 629, 637 (D. Kan. 2008) ("'[T]he issue in the common impact analysis is the fact, not the amount, of injury.'") (*quoting In re Potash Antitrust Litig.*, 159 F.R.D. 682, 695 (D. Minn. 1995)).

[4] *See EPDM*, 256 F.R.D. at 88-89 ("[I]t is possible for a plaintiff to suffer antitrust injury-in-fact and yet have no damages because it has taken steps to mitigate the actual price paid through rebates, discounts, and other non-price factors such as lowered shipping costs, technical services, or any other type of purchase incentive. By expending resources to negotiate down from the supracompetitive prices established by the cartel, plaintiffs who have suffered no damages may still have suffered an injury-in-fact from the antitrust conspiracy.")

[5] *See also Sulfuric Acid*, 2007 WL 898600, at *8 (holding that class certification is not "the right time to engage in a 'battle of experts.'") (*citing In re Potash*, 159 F.R.D. 682, 697 (D. Minn. 1995)); *In re Ready-Mixed Concrete Antitrust Litig.*, 05-cv-00979, 2009 WL 2913922, at *17 (S.D. Ind. Sept. 9, 2009) (rejecting the defendants' argument to "undertake to resolve a 'battle of experts' at the class certification stage in determining if common proof of impact has been established in the case."). The *Ready-Mixed* court emphasized that "the defendants are asking the court to determine which multiple regression model is *most* accurate, which is ultimately a merits decision." *Id.* (emphasis original) (citation omitted).

mechanisms, such as an out-of-pocket maximum or a stop-loss provision, may ultimately defeat the recovery of damages for some small minority of class members, but do not negate the injury-in-fact caused by the higher prices.[6]

Moreover, it is well established that the presence of individual issues or defenses regarding calculation of damages is "no barrier to class certification." *In re Visa Check/Mastermoney Antitrust Litigation*, 192 F.R.D. 68, 86 (E.D.N.Y. 2000); *see also* 7B Wright Miller & Kane § 1781, at 8-9 ("[I]t uniformly has been held that differences among the members as to the amount of damages incurred does not mean that a class action would be inappropriate.").[7]

As discussed *infra*, Plaintiffs demonstrate a common methodology for establishing injury and calculating damages. Even if ENH were correct that some class members may not have suffered damages, ENH has not rebutted Dr. Dranove's opinion that these instances would be rare, if they exist at all. As a result, ENH's arguments about recoverable damages do not disprove injury and should not affect class certification.

2. BCBSI Suffered Injury.

Throughout ENH's Brief and Dr. Noether's Report are countless dogmatic recitations that BCBSI never paid anticompetitive prices. ENH and Dr. Noether are mistaken in this view.

Using data produced by BCBSI in this lawsuit – data that Dr. Noether never reviewed for her Report – Dr. Dranove demonstrates that BCBSI suffered substantial injury. Specifically, Dr.

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[6] This is in contrast to a consumer who pays only a fixed co-pay because the fixed co-pay stays the same regardless of the price charged his insurer. Such consumers are not included in Plaintiffs' proposed class.

[7] *See also In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 95 (S.D.N.Y. 1998) ("It is well established that individual questions with respect to damages will not defeat class certification or render a proposed representative inadequate unless that issue creates a conflict which goes to the heart of the lawsuit.") (citation omitted).

Dranove determined that ENH's overcharges to BCBSI (and the self-funded plan sponsors and enrollees represented by BCBSI) from 2000 to 2008 totaled approximately $75.9 million for outpatient services, $35.4 million for inpatient services, and $111.3 million for inpatient and outpatient services combined. (Dranove Reply Rep. ¶¶ 119-121.) Moreover, Dr. Dranove pointed to analysis in the FTC proceeding – even though it was limited in temporal scope and data – which demonstrated that BCBSI was injured, particularly with respect to outpatient services. (*Id.* ¶ 19.)

In contrast, Dr. Noether did nothing to analyze BCBSI's data. She relies instead on a self-serving declaration submitted by Joseph Arango, a licensed attorney in BCBSI's contracting department. (Noether Rep. ¶ 47.) Mr. Arango submitted his declaration not in connection with class certification, but instead as part of BCBSI's effort last year to avoid producing contracts and payments previously produced in the FTC proceeding under protective order. In that declaration, Mr. Arango opined that BCBSI was not injured in three conclusory sentences:

> 2. From 1990 to the present, BCBSI paid Evanston Northwestern Healthcare, now known as NorthShore University HealthSystem, fair and reasonable process for health care services provided by Evanston Northwestern Healthcare.
> 3. BCBSI did not pay artificially inflated prices to Evanston Northwestern Healthcare for those health care services.
> 4. The conduct which Evanston Northwestern Healthcare allegedly engaged in, as stated in this case, did not cause BCBSI any injury or damage.

(Aff. of Joseph Arango, Ex. C to Def. Br.) Mr. Arango is not an economist, and admits he performed no formal analysis, econometric or otherwise, in preparing his declaration. [redacted] ACT [redacted] Indeed, the declaration is

implicitly self-serving, in that it touts his own job performance in negotiating BCBSI's contracts with ENH. This review does not satisfy *Daubert* standards, and Dr. Noether's uncritical reliance on it to such a heavy degree demonstrates that she is acting as an advocate rather than an expert.

3. ENH Negotiated Prices for Managed Care Contracts on a Uniform Basis.

Dr. Dranove demonstrated in his initial report that the presence of multiple managed care contracts did not defeat a common impact analysis. While Dr. Noether points to the variations in prices for services in MCO contracts, and theorizes that no common method can be demonstrated when so many prices are present, Dr. Dranove demonstrates that such price variations do nothing to defeat common impact.

While some contracts may appear complex, they are built on the foundation of the last contract, and almost always consist of a single percentage rate increase, which may or may not be combined with some minor tweaking to account for industry trends or changed circumstances.

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At other times, there may have been separate adjustments to selected specific services, but these adjustments neither negate the unitary approach of the negotiations; nor do they disprove common impact. While some few services may have been divided, merged, or had their reimbursement amounts reduced, Dr. Dranove finds that these changes did not occur as a

result of ENH's enhanced market power post-merger, but instead, as a result of pricing restructuring due to industry-wide trends. (Dranove Reply Rep. ¶¶ 56-57).

Dr. Noether's comparison of raw dollar prices for services does little to reveal the impact of the exercise of market power by ENH. If the cost or the reimbursement amount is decreasing throughout the marketplace for a particular service, the fact that ENH's reimbursement also went down does nothing to disprove the exercise of market power. Rather, the issue is whether ENH's price went down more or less than it would have but for the market power. The answer to that question may be captured in a DID analysis,[8] but it certainly is not captured in a comparison of raw pricing data for ENH alone, as Dr. Noether has done.

As the court noted in *In re Bromine*, varying price levels may occur during the class period, but such disparities do not warrant a denial of class certification:

> For a number of reasons, that prices were not rising uniformly is not a reason to refuse to certify a class. First, price-fixing in an effort to halt a decline is as much an antitrust violation as conspiring to raise otherwise unstable prices . . . . Second, unstable prices could indicate, as [the defendant] argues, that impact is not a classwide issue, or they could indicate that the co-conspirators simply were not very good at conspiring to stabilize prices. Most importantly, since the question is whether common issues predominate, "[p]rice fixing conspiracies, at least to the extent they succeed in fixing prices, almost invariably injure everyone who purchases the relevant goods or services." Paying unstable prices that are higher than they would have been absent a conspiracy constitutes an antitrust injury.

203 F.R.D. at 415 (citations omitted).

4. Plaintiffs Are Only Required to Propose A Workable Methodology – Not Perform a "Rigorous Analysis" – to Obtain Class Certification

ENH claims that Dr. Dranove merely relied upon the prior FTC analysis. This assertion is false. Dr. Dranove created a common analytical framework to determine impact and

[8] For a description of DID or "Differences-in-Differences" analysis, see Section VI.1 of Dr. Dranove's initial report in support of Plaintiffs' Motion for Class Certification. (Public version at Dkt. No. 247.)

performed an extensive analysis of data for the entire class period, demonstrating the effectiveness of his method. (*See, e.g.*, Dranove Reply Rep. ¶ 20.) Despite Dr. Dranove's thorough study, ENH alleges that Plaintiffs failed to conduct a "rigorous analysis," and Dr. Dranove is merely "promising" to perform an analysis at a later date. (Def. Br. at 20-21). ENH fundamentally misstates the applicable law and Dr. Dranove's work.

Rule 23 precedent is clear that to obtain class certification, plaintiffs need only present a common *methodology* for proving class wide injury and damages, not that they have already proven injury and damages. *See In re Sulfuric Acid Antitrust Litig.*, No. 03 C 4576, 2007 WL 898600, at *6 (N.D. Ill. Mar. 21, 2007) (citation omitted). "Plaintiffs' burden at the class certification stage is not to prove the element[s]" of their particular claim. *Hydrogen Peroxide,* 552 F.3d at 311. "Instead, the task for plaintiffs at class certification is to demonstrate that [those elements are] capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* at 311-12. Thus, "[t]he real question before this court is whether the plaintiffs have established a *workable* multiple regression equation, not whether plaintiffs' model actually *works,* because the issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class wide measure of damages through generalized proof." *EPDM*, 256 F.R.D. at 100. Moreover, "a court may not refuse to certify a class on the ground that it thinks the class will eventually lose on the merits." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480 (7th Cir. 2002).

When the Supreme Court referenced a "rigorous analysis" in *General Telephone Co. v. Falcon*, it directed that district courts should not rely *solely* on the allegations of a plaintiff's complaint when deciding a motion for class certification; the Court never suggested that the

plaintiffs must have conducted a rigorous merits analysis.[9] 457 U.S. 147, 158-59, 161 (1982). The Seventh Circuit further explained that "[b]efore deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Szabo v. Bridgeport Machs, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001). At the same time,

> the 'preliminary inquiry into the merits'. . . is a more limited one, that has as its focus not the substantive strength or weakness of the plaintiffs' claims, but rather whether the path that will need to be taken to decide the merits renders the case suitable for class treatment. It is in this limited sense that the Court assesses the 'merits' of plaintiffs' allegations in considering the class certification motion.

Humphrey v. Int'l Paper, No. 02 C 4147, 2003 WL 22111093, *3 (N.D. Ill. Sept. 11, 2003).[10]

Dr. Dranove's report provides more than promises. To be sure, while Dr. Dranove only needs to provide a workable methodology, he has done much more than that, already performing an analysis of the data. Dr. Dranove reviewed in detail numerous MCO contracts and correspondence with ENH, finding that the contracts imposed uniform price increases. (Dranove Reply Rep. ¶¶ 8-9.) He implemented a DID damages methodology, which compares changes in ENH's pre- and post-merger prices to MCOs against similar changes in MCO pricing at a control group of hospitals, which act as a competitive benchmark. (*Id.* ¶ 10-16.) The data relied upon was produced by ENH, the MCOs, Illinois Department of Public Health (IDPH) Discharge Data, or Medicare, and is reliable. (*Id.*) Dr. Dranove unequivocally found that ENH customers paid anticompetitive prices for medical services. Moreover, he demonstrates the reliability of his

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[9] The Court reiterated that "[Any] class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 457 U.S. at 161.

[10] *Accord, EPDM*, 256 F.R.D. at 85 ("whether the plaintiff had established all the Rule 23 requirements is not a license to delve into all merits issues") (*citing In re Initial Public Offerings Sec. Litig.* ("*IPO*"), 471 F.3d 24, 41-42 (2d Cir. 2006)).

methodology by comparing his reports to those provided in the FTC proceedings. (*Id.* ¶¶ 18-20.) Indeed, Dr. Noether previously admitted that a DID analysis is a reliable approach. (*Id.* ¶ 18.)

5. Damages Can Be Computed Using a Common Methodology.

Because Dr. Noether believes that no common formula can apply to the contracts negotiated between ENH and MCOs, she further claims that damages must be computed individually for each service obtained during each patient visit. She is wrong as a matter of fact and a matter of law.

As discussed above, Dr. Noether illogically assumes that ENH negotiates the price of each service in each managed care contract from scratch, without using any benchmarks or generalized rates of increase. This demonstrates a fundamental misunderstanding or purposeful mischaracterization of real world MCO contracting. (Dranove Reply Rep. ¶¶ 6-9, 23-25, 41-43.) Dr. Dranove's research of the applicable MCO contracts concludes that "the terms of these contracts apply across the board to all patients, implying that if any one patient is impacted, then all patients are impacted." (*Id.* ¶ 125.)

Moreover, perhaps because she is unaware of the legal distinction between injury and damages, she presumes that damages must be proven to a level of certitude unknown in the law. While Dr. Noether fails to quantify exactly what she believes the certainty of proof of damages must be, the law is clear that an estimate is all that is required, especially in a case like this, where, as a result of ENH's misdeeds, the but-for, competitive price never charged. *Bigelow*, 327 U.S. at 264-65.

Contrary to Dr Noether's assertion, Dr. Dranove does not rely upon average price increases to demonstrate injury or impact on a class-wide basis. While Dr. Dranove's methodology computes overall overcharges by payer-plan – expressed as a uniform percentage increase – those overcharges are computed as a result of a DID analysis, rather than mere

arithmetic averaging of any price differentials between payer-plans or between class members. Inapposite to ENH's assertions, this is not an instance where averages were used to improperly mask a situation in which some class members have positive overcharges, and others have zero or negative impact.[11] *Cf. Reed v. Advocate Health Care*, No. 06 C 3337, 2009 WL 3146999, at *16 (N.D. Ill. Sept. 28, 2009) ("Measuring average base wage suppression does not indicate whether each putative class member suffered harm from the alleged conspiracy").[12]

Dr. Dranove acknowledged in his initial report that, "[i]n theory, an increase in average price does not imply that all patients pay higher prices." (Expert Report of Dr. David Dranove Supporting Motion for Class Certification ("Dranove Initial Report") ¶ 15.) At the same time, he explained that due to the nature of contracting between hospitals, the price increases calculated by the DID methodology for each payer-plan would apply uniformly to each service and patient under that payer-plan. (*Id.* ¶¶ 15-17, 30, and Section VII.) - REDACTED - [redacted] Any such overall price increase applicable to a payer-contract results in

[11] Dr. Dranove notes that common impact can be demonstrated not "solely because prices to BCBSI increased *on average* as a result of ENH's merger with HPH." (Dranove Reply Rep. ¶ 125.) "Instead, the compelling evidence of common impact stems from my separate analyses of contracts between ENH and insurers." (*Id.*)

[12] In *Reed*, the Court found the expert's approach unreliable because "the evidence presented at the class certification hearing show[ed] . . . substantial variation in the compensation of the individual [nurses]." 2009 WL 3146999, at *17. Dr. Dranove's approach is consistent with the Court's observations in *Reed*, showing that no such variation existed in ENH's across-the-board increases at uniform rates.

[13] - REDACTED - [redacted]

an identical uniform percentage price increase to every service category and patient enrolled under that payer-plan.[14]

As such, Dr. Dranove does not claim that common impact is demonstrated merely because prices increased on average. Rather, he demonstrates that any across-the-board price increase applicable to any payer-plan would, due to the nature of the contracts at issue, result in uniform price increases to all services and patients under that plan.[15] ENH argues that the DID methodology cannot show whether prices for individual services increased anticompetitively, and thus "precludes the use of common proof that every class member was impacted." (Def. Br. at 20.) In fact, the "apparent complexity does not preclude the use of a common framework[16] to study *the rate at which prices increase over time*." (Dranove Reply Rep. ¶ 156) (emphasis original). - REDACTED -

(...continued)

- REDACTED - "In my experience discussing hospital contracting with insurance and hospital executives, I have learned that such across-the-board price increases are the norm. Payers and providers think of price increases in very simple terms and typically boil down the price increase to a single number." (*Id.* ¶ 9.)

[14] "That is, because contracts tend to specify common price increases (or one increase for inpatient services and one increase for outpatient services), estimates of overall price increases for a given payer-plan are necessarily also a valid and reliable estimate of the price increases applicable to *substantially all patients*covered by that payer-plan." (Dranove Reply Rep. ¶¶ 6; *see also* Dranove Initial Rep. ¶¶ 16-17.)

[15] "To be clear, I am not claiming that there is common impact solely because prices to BCBSI increased *on average* as a result of ENH's merger with HPH. Instead, the compelling evidence of common impact stems from my separate analyses of contracts between ENH and insurers (see section III.1). - [redacted] implying that if any one patient is impacted, then all patients are impacted. Dr. Noether does not appear to appreciate this point and she seems to misconstrue my opinion as only relying on increases in average payments." (*See* Dranove Reply Rep. ¶ 125.) (footnotes omitted).

[16] The common framework applied by Dr. Dranove – the DID methodology – is a widely accepted tool in social science research for estimating impact on a class-wide basis, and was performed in much the same way by Dr. Baker on behalf of ENH in the FTC action. (Dranove Reply Rep. ¶¶ 19, 166.) Dr. Baker's analysis demonstrated that the rate of price increase for outpatient services at ENH exceeded the rate at the control hospitals. (*Id.* ¶ 19.)

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6. Dr. Noether's Fatally Flawed and Partisan DID Analysis Does Not Demonstrate that Dr. Dranove's Methodology Fails.

Dr. Noether's attempt at conducting her own DID analysis fails the test of *Daubert* and Rule 702. As Dr. Dranove explains in his Reply Report, Dr. Noether failed to control for significant explanatory variables, selected inappropriately small sample sizes that lead to statistically invalid results, and has even been misled by erroneous results, possibly generated by her software, which compared post-merger data with no data from the pre-merger period. (Dranove Reply Rep. ¶¶ 130-146.)

While a methodology need not control for all variables, a failure to consider variables that substantially influence the result can render a methodology so fundamentally flawed that it is inadmissible. That is the case with Dr. Noether's DID analysis. Dr. Noether performed this analysis at the level of diagnosis related groups, or DRGs. At this level, the data for each patient's care can vary significantly based on how long each patient stayed in the hospital. Thus if a patient had a particular operation and stayed three nights, his total bill will be significantly different than for a patient who had the same operation but was able to leave after only one night. Similarly, a change in procedure for the operation could result in reduced length of stays. Dr. Noether does not control for length of stay, and thus her results vary widely between patients.

Nor does Dr. Noether take into account contractual changes which would have occurred despite the merger, such as an insurer splitting payments for a particular set of procedures from one bundle into two, and reducing the reimbursement for one procedure, while keeping the other the same, or even increasing its price. (Dranove Reply Rep. ¶¶ 52-57.) These variations are magnified because Dr. Noether has used sample sizes that are too small to obtain a valid result.

Many of her analyses contain three or fewer pre- or post-merger observations; the vast majority contain ten or fewer pre- or post-merger observations. Such marginal sample sizes greatly amplify the distortion caused by variations in the data, and are too small to be statistically valid. Moreover, Dr. Noether actually reported results where she lacked any data whatsoever for the pre-merger period. (Dranove Reply Rep. ¶ 137.)

In *Bazemore v. Friday*, the Supreme Court held that while a regression analysis did not need to consider *every* possible variable to be admissible, "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant." 478 U.S. 385, 400 n.10 (1986). This is the sort of flawed analysis presented by ENH in its attempt to discredit Dr. Dranove. By refusing to acknowledge the variables that cause most, and perhaps all of the variation in the data, Dr. Noether has authored an inherently unreliable report. As a result, it is not fit to be relied upon, and should be ruled inadmissible.

7. Plaintiffs' Methodology Can Identify Non-Class Members.

As noted above, Plaintiffs' burden at the class certification stage with respect to predominance is to show that impact and damages can be established using evidence common to the class, which Plaintiffs have done. Although Plaintiffs demonstrated a workable common method for establishing impact and damages, ENH argues that Plaintiffs do not have a methodology to identify who is excluded from the class,[17] arguing that "the data do not report these factors, and an individual patient-by-patient analysis would be required in order to exclude

[17] Presently excluded from Plaintiffs class definition are "those who solely paid fixed amount co-pays, uninsureds who did not pay their bill, Medicaid and Traditional Medicare patients, governmental entities, defendant, other providers of healthcare services, and the present and former parents, predecessors, subsidiaries and affiliates of defendant and other providers of healthcare services." (Plaintiffs' Memorandum of Law in Support of their Motion for Class Certification at 12.)

them." (Def. Br. at 17.) This is simply not true because these factors can readily be derived from the available data on a formulaic basis.

Contrary to ENH's claims, sufficient available data exists to identify who is excluded from the class. For example, Dr. Dranove testified that it was his understanding that ENH's data contained sufficient fields to determine who had fixed co-pays, who did not pay their bill, and who were Medicaid and Traditional Medicare patients. (*See* Dranove Dep. excerpts, attached as Exhibit "I" to Def. Br. at 27-29, 33-34, 42.) In fact, even ENH's own expert confirmed that the data fields referenced by Dr. Dranove to exclude non-class members exist. (*See* Noether Rep., Appx. 4, ¶ 2.) Specifically, Dr. Noether stated that "[t]he ENH data appear to report reliably the total received by ENH for each encounter and the total amount paid by insurers and individuals." (*Id.*). This is among the type of data that Dr. Dranove indicated he could use to identify set co-pays, patients who failed to pay their bill, and Medicare or Medicaid payments. Moreover, Dr, Noether impliedly confirmed that the ENH data necessary to identify Medicaid and Medicare payments exists as she was able to determine from the data that [redacted]

[redacted]E

Contrary to ENH's claim, and as confirmed by ENH's own expert, the data needed by Dr. Dranove to identify those who are excluded from the class are available.[18]

Even assuming *arguendo* that the data necessary to identify those excluded from the class was not presently available in ENH's data, discovery remains open. Moreover, ENH failed to cite any authority or articulate any reason why Plaintiffs, especially at the class certification

[18] Dr. Noether does not claim that the data Dr. Dranove needs to exclude class members on a formulaic basis do not exist as ENH's counsel argues. Instead, [redacted - REDACTED -]

stage, need to identify non-class members. To the extent ENH is concerned that Plaintiffs' computation of damages will include non-class members – such as those who solely paid fixed amount co-pays – this is an allocation issue that can best be addressed during the damages stage of the litigation. Contrary to ENH's argument, individual inquiries of Class members are allowed at the damages phase of a class action, and such inquiries do not preclude certification. *See Potash*, 159 F.R.D. at 697 ("the fact that the damages calculation may involve individualized analysis is not by itself sufficient to preclude certification [if] liability can be determined on a class-wide basis."); *Blackie*, 524 F.2d at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

Concurrently, ENH's similar concern that non-class members might try to file claims for damages once a settlement is reached or damages are awarded in this case is highly unlikely to materialize. First, Plaintiffs' class definition specifically identifies who is excluded from the class. Once a class is certified, the Court will direct an appropriate class notice that will *inter alia* indicate the nature of the action and the definition of the class certified. *See* Fed. R. Civ. P. 23(c)(2)(B)(i) and (ii). Moreover, if settlement is reached or damages awarded, a claims procedure can be set up to process the claims and obtain relevant information from class members. *See In re Nw. Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 225 n.46 (E.D. Mich. 2002) (observing that "individual 'mini-trials' are not inevitable," and "various procedural mechanisms . . . might assist in streamlining the requisite individualized inquiries"). Obviously, should any non-class members file claims, such claims can easily be screened and filtered during the claims procedure. For example, if a government entity submits a claim, the fact that they are a government entity – and thus not a member of the Class – will be evident and their claim will be denied. In any event, sufficient data exists or will exist to allow Plaintiffs' to exclude non-

class members from the damage calculations on a formulaic basis at the appropriate phase of this litigation – the damages stage.

8. The Data Exists To Reasonably Estimate Damages Post-2003

ENH argues that the MCO data only exist for 2000-2003, as produced in the FTC proceeding, that chargemasters data do not exist for ENH prior to 2002,[19] and no statistics exist for the control group hospitals at all. Thus, ENH claims Dr. Dranove cannot prove impact. This is incorrect.

As Dr. Dranove explains in his Reply Report, several sources of data exist that can be utilized to implement his methodology. (Dranove Reply Rep. ¶¶ 77-85.) First, there is the data set used by ENH's expert, Dr. Baker, in the FTC proceeding. This set contains significant detail, but only runs through 2003, which led to Dr. Noether's unsubstantiated claim that Dr. Dranove cannot perform his analysis post-2003. In reality, Dr. Dranove can perform post-2003 analysis using a number of data sets, individually or in combination with each other, including:

- Data currently subpoenaed from MCOs by Plaintiffs in this case, such as the BCBSI data;
- Data produced by ENH in this case;
- Illinois Department of Public Health (IDPH) Discharge Data;
- COMPdata from the Illinois Hospital Association, of which ENH is a member;
- Medicare Cost Reports; and
- Medicare base rates.

Dr. Dranove used the BCBSI data set in his analysis of injury to BCBSI. [redacted]

[19] Moreover, Dr. Dranove does not rely on the chargemaster data for his analysis.

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The IDPH discharge data set contains information on inpatient discharges from Illinois hospitals, *i.e.*, it contains transaction level data that Dr. Noether claims to be necessary. (*Id.* ¶¶ 81-82.) Variables in this data set include the hospital ID, patient length of stay, billed charges, Diagnosis Related Group (DRG) code, DRG weight, payer category, and discharge quarter.[20] As Dr. Dranove explains, he can identify hospitals in this data set by comparing it to the COMPdata set, which does identify hospitals. (*Id.* ¶¶ 81-82.) Similarly, he may also reliably estimate the actual payments by MCOs and their members in the IDPH data by using the Medicare Cost Reports. (*Id.* ¶ 82.)

Dr. Noether's assertion that only the FTC data set is sufficient is based upon her unrealistic demands for exactitude and ENH's distrust of any data not produced by ENH. Injury and damages can be proven in more than one fashion, and ENH has advanced no legal argument for why damages must be calculated solely by using the tedious method demanded by Dr. Noether. Additionally, while Dr. Noether insists on her preferred method as the most accurate, she notes that ENH data is flawed. (Noether Rep. ¶¶ 80-83.) Even more incredibly, Dr. Noether suggests that the destruction of ENH's chargemasters can shield it from damages. (*Id.* ¶¶ 40 n.21, 87.) Plaintiffs respectfully suggest that the opposite is true: Spoliation should lead to the relaxation of the burden of proof, and should never be the basis for a defense. It is well established that flaws caused by defendant in plaintiff's ability to estimate damages will not bar plaintiff from recovering damages. *See e.g.*, *Usher v. Corbis-Sygma*, 320 Fed. Appx. 109, at

[20] The IDPH data contain "list" charges but not data on actual payments.

*111 (2d Cir. 2009) ("[W]hen damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount.") (*citing Bigelow*, 327 U.S. at 264). Dr. Dranove both describes and demonstrates that alternate sources of data are available. Moreover, discovery is still open in this case and additional sources of data may be located.

B. PLAINTIFFS ARE ADEQUATE REPRESENTATIVES OF THE CLASS

1. Plaintiffs' Interests in Litigating This Action Coincide with the Interests of the Putative Class.

ENH contends that Plaintiffs cannot represent "any class member who received inpatient care" because the Named Plaintiffs suffered anticompetitive effects only in the outpatient market.[21] (Def. Br. at 28.) This argument is not supported by precedential case law. Under the adequacy analysis, this Court must determine that plaintiffs will "adequately protect the 'different, separate and distinct interests' of the class members." *Id.* (*citing Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993)). Plaintiffs must demonstrate that "they have sufficient interest in the outcome of the case" to "establish that they will fairly and adequately protect the interests of the class." *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 256 F.R.D. 586, 599 (N.D. Ill. 2009). In support of their argument, ENH incorrectly relies upon a case which actually supports Plaintiffs. *See Haroco, Inc. v. Amer. Nat. Bank and Trust Co. of Chicago*, 121 F.R.D. 664, 670 (N.D. Ill. 1988). There, the Court found that the plaintiff satisfied the adequacy requirement in spite of an "expansive definition of the class," which included class

[21] ENH relies upon the Supreme Court's decision in *Falcon*, 457 U.S. at 157-58, in support of this position. (*See* Def. Br. at 28.) *Falcon* is factually distinguishable because the plaintiffs in that case asserted employment discrimination claims based on racial bias. The Court's opinion entailed a thorough analysis of employment discrimination standards as applied in class litigation, and did not broach any of the antitrust issues implicated here.

members with disparate claims from the named plaintiff. The Court specifically noted that the expansive class definition "was based on good faith arguments regarding plaintiffs' claims and, further, does not indicate that [the plaintiff] would inadequately represent the class that is ultimately certified by this court." *Id.*

Here, Plaintiffs propose to litigate their claims on behalf of those who purchased both inpatient and outpatient services from ENH. Plaintiffs have "vigorously pursued plaintiffs' claims" on behalf of the entire putative class through the motion to dismiss stage, expert discovery, and the instant motion for class certification. *Haroco*, 121 F.R.D. at 670 (finding plaintiffs' litigation efforts to undermine defendants' argument of insufficient interest). Plaintiffs' interests in resolving this litigation "coincide with those of the rest of the class, and the class representative's attorney [is] prepared to prosecute the action vigorously, tenaciously and with adequate financial commitment." *Levie v. Sears Roebuck & Co.*, 496 F. Supp. 2d 944, 950 (N.D. Ill. 2007) (*citing Gilbert v. First Alert, Inc.*, 904 F. Supp. 714, 719 (N.D. Ill. 1995)). Other than a conclusory assertion, ENH advances no arguments to further their position that Plaintiffs would fail to diligently and effectively prove the claims of all class members. .

ENH argues that a class member who purchased inpatient services cannot represent a class member who purchased outpatient services, and vice-versa. ENH improperly attempts to define two separate markets – inpatient and outpatient – at the class certification stage. Plaintiffs, however, allege a single class of direct purchasers who purchased inpatient or hospital-based outpatient services from ENH. ENH assumes that inpatient and hospital-based outpatient services comprise two separate and distinct markets, but ENH fails to advance any support for this assumption. Generally, an inpatient visit is distinguishable from an outpatient visit in that inpatient services require an overnight stay at the hospital. ENH does not provide

any legal or factual support for its argument that a class member who purchased hospital based outpatient services from ENH cannot adequately represent a class member who purchased services from ENH that required an overnight stay. In fact, ENH previously argued before the FTC that the relevant product market includes both inpatient and hospital-based outpatient services. *See In the Matter of Evanston Northwestern Healthcare Corp.*, No. 9315 (Fed. Trade Comm'n, August 6, 2007), *Opinion of the Commission*, (hereinafter "FTC Op.") at 55, attached as Ex. 2 to the Appx. of Plaintiffs' Motion for Class Certification, Dkt. No. 248-3. Even if the Court finds that inpatient and outpatient services should be analyzed separately, that can easily be accomplished by creating subclasses.

2. Painters Fund Is an Adequate Class Representative and Can Represent Both Inpatient and Outpatient Claims.

Another fatal flaw in ENH's argument is the presumption that Plaintiff Painters Fund will be dismissed as a class representative based upon ENH's argument that BCBSI – and thereby Painters Fund – did not suffer any damages from ENH's anti-competitive pricing. In determining whether to certify a class, the Court is concerned with whether the Plaintiffs can prove their claims using class-wide common evidence, rather than whether Plaintiffs will ultimately prevail on their claims. *See, e.g.*, *Payton v. County of Kane*, 308 F.3d 673, 677 (7th Cir. 2002) ("[A] determination of the propriety of class certification should not turn on likelihood of success on the merits."). Regardless of whether Painters Fund is successful in proving its claims against ENH at the merits stage, it is undisputed that Painters Fund purchased and paid for both inpatient and outpatient services. Moreover, Dr. Dranove has established through a reliable methodology that BCBSI suffered antitrust impact in its payments for both inpatient and outpatient services. Even assuming *arguendo* that inpatient and outpatient services

comprise separate markets and that Painters' Fund is unable to serve as a class representative, the remaining named Plaintiffs can nonetheless fairly and adequately represent the proposed class.

3. ENH Has Failed to Show That There Are Any Fundamental Conflicts among Members of the Class.

a) Plaintiffs are not antagonistic to the class.

ENH next contends that Plaintiffs are antagonistic to class members who benefited from new services offered after the merger. (Def. Br. at 29.) This argument is both factually and legally wrong. Before the FTC, ENH similarly averred that the merger was pro-competitive, in part, because it resulted in various improvements, such as several new hospital services. *See* FTC Op. at 48-49. The FTC expressly rejected this argument, finding that most of these new services did not result from the merger and were not merger specific. *See* FTC Op. at 83 ("As we explained in our findings of fact, we find that the quality improvements asserted by ENH are not properly credited as benefits of the merger because Highland Park could, and likely would, have made similar improvements without a merger.")

ENH improperly casts the class certification analysis as requiring the Court "to individually weigh each patients' benefit against any alleged overcharge." (Def. Br. at 30.) Here, ENH continues to argue that any quality improvements – even though unrelated to the merger – are nevertheless relevant to class certification "because all benefits experienced by the class conflict with the allegations of antitrust injury, regardless of whether the benefits were caused by the merger." (*See id.* at 29 n.20.) ENH offers absolutely no supporting authority for this illogical assertion, nor does ENH attempt to show how improvements unrelated to the merger conflict with Plaintiffs' allegations of antitrust injury subsequent to the merger. In fact, as the FTC observed, ENH's empty assertions should not affect the injury analysis because any alleged quality improvements did not reduce the harm inflicted by higher post-merger prices.

ENH relies upon several cases to argue that class certification should be denied where some class members derived a benefit from the conduct alleged to be anti-competitive. (*Id.* at 30.) Yet, ENH's citations of authority belie its own position. For example, in one cited decision, the Eleventh Circuit noted that the conflict between class members must be fundamental and that "[a] fundamental conflict exists where some party members claim to have been harmed *by the same conduct that benefitted* other members of the class." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (emphasis added). Here, Plaintiffs allege they were harmed by the *supra*-competitive prices ENH succeeded in extracting due to the enhanced market power acquired from the merger. The benefits claimed by ENH did not relate to the merger or the consequent *supra*-competitive prices. As such, any benefits to class members arising from these new services cannot form the basis of a class conflict because those services did not **arise** from "the same conduct" that harmed the class members. *Id.*

Likewise, ENH's reliance on two other appellate opinions is equally misplaced. (Def. Br. at 30) (*citing Bienman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988), and *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000)). As ENH acknowledges, these cases held that the conduct benefitting some class members must be the *same* conduct alleged to be wrongful. (*See* Def. Br. at 30.) As the new services provided by the hospitals after the merger were unrelated to the conduct alleged to be wrongful – the *supra*-competitive pricing that resulted from the merger – the new services are not the same conduct alleged to be unlawful, and *Bieneman* does not preclude class certification for such hypothetical conflicts.

b) The named plaintiffs may represent both insurers and insureds.

ENH argues that class certification should be denied because Plaintiffs' putative class includes both insurers and insureds, who will allegedly assert conflicting interests over the

allocation of damages. (Def. Br. at 30-31.) As previously argued *supra*, this argument is unavailing. "Inquiry into matters of the measure of damage is not ordinarily made at the class certification stage." *Kohen v. Pacific Inv. Mgmt Co.*, 244 F.R.D. 469, 476 (N.D. Ill. 2007) (*quoting In re LTV Sec. Litig.*, 88 F.R.D. 134, 148 (N.D. Tex. 1980)). As such, ENH's concerns over the final determination of net damages for some individual members of the class should be resolved in the damages stage of the litigation," rather than at the current class certification stage. *Id.* (*citing Katz v. Comdisco, Inc.*, 117 F.R.D. 403, 412 (N.D. Ill. 1987) ("[T]he courts have not allowed individual questions of damages to prevent class certification.")).[22]

Furthermore, ENH's observation that MCOs are "sophisticated businesses," while typical patients are merely "motivated by receiving quality health care," does not undermine Plaintiffs' claims that all of the class members were similarly harmed by ENH's *supra*-competitive pricing. (Def. Br. at 31.) This action is brought on behalf of all class members injured by ENH's anti-competitive conduct, be they sophisticated businesses or regular consumers. Moreover, the MCOs, as sophisticated businesses, are acutely aware that their success is predicated upon satisfying their customer base by offering quality healthcare at competitive prices. As such, their motivation as a sophisticated business is directly correlated to their customers' interest in quality health care at fair prices. As demonstrated *supra*, Plaintiffs have and will continue to vigorously prosecute the putative class' allegations, and ENH failed to advance a cogent argument to demonstrate otherwise.

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[22] *See also Ziemack v. Centel Corp*, 163 F.R.D. 530, 541 (N.D. Ill. 1995) ("[W]hether certain class members sustained ***any damages at all*** is not a question for us to decide at the class certification stage.") (emphasis added).

C. PLAINTIFFS ESTABLISHED THAT THEIR CLAIMS ARE TYPICAL OF THE PROPOSED CLASS

Plaintiffs satisfy Rule 23(a)(3)'s requirement that the "claims or defenses of the representative parties are typical of the claims or defenses of the class."

1. Typicality Does Not Require a Named Plaintiff for Each MCO

ENH contends that Plaintiffs are atypical because "there is no class representative for MCOs," and because the named plaintiffs "do not remotely resemble the MCOs." (Def. Br. at 37-38.) Even if true, these assertions do not preclude class certification. This Court has consistently reiterated that a "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *See, e.g.*, *Walker v. Bankers Life & Cas. Co.*, No. 06 C 6906, 2007 WL 2903180, at *4 (N.D. Ill. Oct. 1, 2007) (*citing Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998)). Notwithstanding ENH's arguments to the contrary, the claims of the instant named plaintiffs and the other individual members of the Class all arise from ENH's common practice or course of conduct in charging inflated prices to the various MCOs and their insureds for medical services.

As ENH correctly asserts, the MCOs derived pricing structures for their insured clients through "bilateral negotiations" with ENH. (*See* Def. Br. at 37.) These anticompetitive negotiated prices resulted from the several factors outlined by ENH in their brief, including the MCOs' "bargaining power," "volume of members," and "extensive resources." (*Id.* at 37-38.) At the same time, the insured clients – the individual plaintiffs – were charged inflated rates based upon the same pricing structures that the MCOs derived from their negotiations on behalf of themselves and their insureds. (*See id.* at 37.) As such, their claims are entirely derivative of

and coincident with the claims accruing to the MCOs, and the individual class members suffered injury in direct correlation to the injuries suffered by the MCOs.

Unlike the factual circumstances of *In re Graphics Processing Units Antitrust Litigation*, 253 F.R.D. 478, 489 (N.D. Cal. 2008), cited by ENH, where the representative plaintiffs independently and without any relationship to the wholesale buyers purchased a small segment of products at list price – rather than at the non-list prices negotiated by the wholesale purchasers – the named plaintiffs and individual class members were charged based upon the prices and services negotiated by the MCOs on behalf of the individual insured plaintiffs. As such, the individual plaintiffs' injuries are not "detached" from the MCOs' negotiated prices, and their claims are not in a "fundamentally different position" from those asserted by the MCO plaintiffs.

The fact that the several MCOs negotiated separate contracts with ENH should not affect the typicality analysis since all were charged anticompetitive prices as a result of ENH's market power. Any differences among MCOs resulting from these negotiations relate to the amount of damages, rather than the question of typicality. "The fact that there is some factual variation among the class grievances will not defeat a class action," *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992), so long as there exists a "common question which is at the heart of [the] case," *Smith v. Aon Corp.*, 238 F.R.D. 609, 615 (N.D. Ill. 2006) (noting that "courts are directed to 'liberally construe' the typicality requirement."). Moreover, "[i]nquiry into matters of the measure of damage is not ordinarily made at the class certification stage." *Kohen*, 244 F.R.D. at 476. The named plaintiffs and the Class all purchased or paid for healthcare services directly from one or more of the hospitals owned by ENH. (Compl. ¶ 13.) Plaintiffs accordingly paid artificially inflated prices to ENH for healthcare services as a result of ENH's anticompetitive course of conduct. *Id.*

Additionally, Plaintiffs' claims are all premised on the same legal theory as those of the putative class and will focus on common facts in proving ENH's violation of the antitrust laws. Plaintiffs will prove that the price for healthcare services was detrimentally affected by the merger and ENH's resulting market power. Through negotiations conducted by the MCOs and self-insured entities, ENH's pattern of anticompetitive pricing affected both Plaintiffs and the other class members. Because the class's claims are based on the same legal theory, and arise from a uniform course of conduct, Plaintiffs "suffered a similar injury to other class members by similar means," and thus, typicality is satisfied. *Ramirez v. Palisades Collection LLC*, 250 F.R.D. 366, 372 (N.D. Ill. 2008).

2. Plaintiffs Share "Essential Characteristics" with Putative Class.

ENH next contends erroneously that Plaintiffs do not share "essential characteristics" with the proposed class. (Def. Br. at 38.) ENH relies primarily on *Retired Chicago Police*, 7 F.3d 584. (*Id.* at 39.) As an initial matter, that case is distinguishable from the instant situation because the *Retired Chicago Police* plaintiff class "would have had different legal claims based on different legal theories, depending on the nature of communications received and resulting causation." *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 582 (N.D. Ill. 2005) (distinguishing *Retired Chicago Police*, 7 F.3d at 597)). Under those circumstances, the named plaintiff did not share "essential characteristics" with the proposed class. In contrast, all of the claims asserted herein assert a uniform antitrust legal theory, and common evidence will show that the class' injuries resulted from "the same alleged course of conduct." *Id.*

ENH's argument disingenuously glosses over a substantial portion of the Seventh Circuit's language in *Retired Chicago Police*. ENH mentions the "essential characteristics" language utilized in the opinion, without providing an explanation of what the court intended this phrase to mean. (Def. Br. at 39.) Quoting the court's own holding in *De La Fuente v. Stokely-*

Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983), *Retired Chicago Police* goes on to emphasize that a named representatives' claims "have the same essential characteristics as the claims of the class at large" when they "arise[ ] from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." 7 F.3d at 597. As argued above, Plaintiffs allege precisely this type of common practice or course of conduct for all proposed class members, which share the same essential characteristics with the named plaintiffs.

ENH also asserts that "even if [Plaintiffs] proved their claim it would not necessarily prove any other class member's claim." (Def. Br. at 39.) This conclusion is inapposite to the facts. As discussed *supra*, Plaintiffs' claims are derivative of the claims accruing to the MCOs. Therefore, any injury to the insured individual plaintiffs is based upon the same percent overcharge inflicted upon the MCOs, and vice-versa. By proving the named plaintiffs' allegations that ENH engaged in a common course of conduct of pricing healthcare services at anticompetitive levels, Plaintiffs will necessarily prove that the MCOs and the other individual plaintiffs were similarly injured.

Finally, Dr. Noether claims that Plaintiffs do not comprise a "sufficient sample" of the underlying class. (Noether Dep. at 53) Dr. Noether, however, appears to confuse statistical sampling for the purposes of econometric analysis with the legal concepts of adequacy and typicality for the purpose of class certification. Rule 23 does not require class representatives to consist of a sample of all class members in the statistical sense. *See e.g.*, *Elias v. Ungar's Food Prods., Inc.*, 252 F.R.D. 233, 237-38, 243-44 (D.N.J. 2008) (finding claims of class representatives in consumer fraud case typical even though they bought only three of five products included in class definition). Typicality is a "low hurdle" that "requires neither

complete coextensivity nor even substantial identity of claims. *Owner-Operator Indep. Drivers' Ass'n v. Allied van Lines*, 231 F.R.D. 280, 282 (N.D. Ill. 2005). A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members and is based on the same legal theory. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006).

Plaintiffs and the class bring uniform allegations that they all suffered from ENH's systematic anticompetitive pricing. Proving that Defendants engaged in a pattern of anticompetitive behavior would "entitle all class members to the relief sought," and Plaintiffs have therefore satisfied the typicality requirement. *Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL 4442597, at *7 (N.D. Ill. Sep. 29, 2008) (Lefkow, J.).

D. PLAINTIFFS ESTABLISHED PREDOMINANCE BECAUSE THE STATUTE OF LIMITATIONS DOES NOT NEGATIVELY AFFECT THE CLAIMS

ENH contends that the claims of Named Plaintiffs, MCOs, and other class members are barred by the four year Clayton Act statute of limitations and that individualized issues of proof relating to ENH's statute of limitations defense preclude class certification. In so arguing, ENH ignores the Court's earlier denial of ENH's motion to dismiss on statute of limitations grounds, mischaracterizes the facts, and misstates the applicable law. ENH makes no showing that the claims of Plaintiffs or any Class member are time barred or that individualized statute of limitations issues preclude a finding that common issues predominate.

1. The Claims Of Plaintiffs And Other Class Members Are Not Time Barred

The appropriate issue at the class certification stage is not whether the claims of Plaintiffs and other class members may be barred under the statute of limitations, but whether ENH's statute of limitations defense precludes a finding that common issues predominate. As discussed

below, it clearly does not. The Court need not decide at this juncture whether any claims are barred by the statute of limitations.[23] ENH's arguments are, in any event, without merit.

ENH reasserts the same argument raised in its December 2007 motion to dismiss – that Plaintiffs' claims are barred as a matter of law by the statute of limitations because the Highland Park merger occurred on January 1, 2000, more than four years prior to the filing of Plaintiffs' initial complaint. ENH also reasserts its argument that Plaintiffs' claims are barred because Plaintiffs and other class members were aware of the merger when it was consummated, and that some prices increased shortly thereafter.

In its decision denying ENH's motion to dismiss, however, the Court rejected ENH's arguments, holding, consistent with *In re Copper Antitrust Litigation*, 436 F.3d 782, 789 (7th Cir. 2006), that Plaintiffs' claims began to accrue under the "discovery rule" when Plaintiffs knew or should have known that they had been injured as a result of ENH's anticompetitive conduct. *In re Evanston Northwestern Healthcare*, No 07 CV 4446, 2008 WL 2229488, at *3-4 (N.D. Ill. May 29, 2008).[24] The Court further concluded that the FTC proceeding tolled the statute of limitations, and that determining whether Plaintiffs' claims accrued under the

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[23] Courts caution against resolving statute of limitations issues at the class certification stage. *See, e.g., In re Enron Corp. Sec. Deriv. & "ERISA" Litig.*, 529 F. Supp. 2d 644, 711(S.D. Tex. 2006) ("The reach of the statute of limitations is a fact issue that should not be resolved at class certification."). As the court in *Hydrogen Peroxide* similarly observed, courts are only permitted to inquire into the merits of a plaintiff's claim at the class certification stage to the extent "necessary to determine whether a class certification requirement is met." 552 F.3d at 316.

[24] The Court also concluded that the authorities relied upon by ENH, *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 628 (7th Cir. 2003), two Eighth Circuit cases and a treatise – the same authorities ENH cites here -- did not support ENH's position that Plaintiffs' claims could be determined as a matter of law as accruing when the merger was consummated. The Court emphasized in particular that *Gypsum* merely noted in *dicta* that a "merger may be complete at closing." 2008 WL 2229488, at *4. ENH has cited nothing to suggest that the Seventh Circuit has embraced its position or that the *Copper* discovery rule would not apply. Moreover, none of ENH's cited authorities addresses the accrual point of Sherman Section 2 claims, such as asserted by Plaintiffs here.

"discovery rule" more than four years prior to the FTC proceeding, *i.e.*, February 10, 2000, would have to await factual development. *Id.* at *5-7.

The Court's application of the *Copper* discovery rule is entirely consistent with other recent cases, which reiterate that an antitrust claim does not accrue until plaintiffs know of the anticompetitive wrongful conduct underlying any observed price increases. *In re Aftermarket Filters Antitrust Litig.*, No. 08 C 4883, 2009 WL 3754041, at *5 (N.D. Ill. Nov. 5, 2009). Citing *Copper*, the Court observed that although "plaintiffs knew [ ] that defendants began increasing the price of filters" and "may have been injured each time they purchased defendants' filters prior to March 31, 2004, plaintiffs had no *knowledge of the wrongful conduct* alleged . . . prior to Burch's statement to the FBI on January 13, 2006." *Id.* at *4 (emphasis added). As such, the claim did not accrue until the plaintiffs discovered anticompetitive injury when the government investigation became public.[25] *Id.*

Here, even if Plaintiffs and the Class were aware that some prices rose after the merger, they lacked knowledge of the anticompetitive reasons underlying those increases at least until the FTC investigation. ENH argues that named Plaintiffs' claims are time barred because they admitted in their depositions that they were either aware of the merger before or at the time of the merger or subscribed to a publication that reported on the merger, and that other class members had actual or constructive knowledge of the merger[26] by virtue of either the materials

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[25] Similarly, *In re Ready-Mixed Concrete Price Fixing Litig.*, No. 05-CV-00979, 2006 WL 2849711 (S.D. Ind. Sept. 29, 2006), noted that although "the Class was initially injured when it purchased the illegally-priced product," accrual did not occur until the time when "the U.S. Department of Justice announced the guilty plea" by the price-fixing parties, "the earliest date at which the Class could have discovered that it was injured and who caused the injury." *Id.* at *2.

[26] ENH's argument that the MCOs' knowledge of the merger is imputed to its policyholder class members is also without merit. ENH cites several inapposite cases where knowledge of an agent was imputed to a (continued...)

sent them by ENH[27] or widespread media coverage. This proves nothing since knowledge of the merger did not trigger accrual of named Plaintiffs' claims. ENH offers no justification for disregarding *Copper* and its progeny, including this Court's prior ruling that Plaintiffs' claims accrued, at the earliest, when Plaintiffs knew or should have known that ENH's anticompetitive conduct caused their injuries. ENH has not demonstrated that the claims of named Plaintiffs or any class members accrued prior to February 10, 2000.

ENH's contention that knowledge of the merger is equal to knowledge of an antitrust claim is particularly unfounded in light of the facts. The FTC did not challenge the merger when it was consummated, *see In the Matter of Evanston Northwestern Healthcare Corp.*, No. 9315 (Fed. Trade Comm'n, April 28, 2008), *Opinion of the Commission on Remedy*, at 11-12, attached as Ex. 3 to the Appx. of Plaintiffs' Motion for Class Certification, Dkt. No. 248-4, and did so

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(...continued)

principal, but makes no attempt to establish the existence of an agency relationship between MCOs and their policyholders. The requirements for such an agency relationship clearly do not exist here. *See, e.g.*, Restatement (Third) of Agency § 1.01 ("Agency is the fiduciary relationship that arises when one person (a "principal) manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to so act."). *See also Altadis USA, Inc. v. NPR, Inc.*, 162 Fed. Appx. 926, 929 n.6 (11th Cir. 2006) (noting that there is no agency relationship created between an insurer and its insured).

[27] ENH cites evidence that prior to the merger, it sent letters to all MCOs, area employers and the press, announcing the merger and attaching a copy of the press release. The materials sent by ENH to the MCOs, while informing the MCOs of the merger, did not disclose that the merger would have anticompetitive effects giving rise to an antitrust claim. To the contrary, the letters and press release operated to conceal the anticompetitive effects of the merger, touting the merger's potential for increasing efficiency and improving patient services. *See, e.g.*, Exh. R to Def. Br. (materials sent to Blue Cross Blue Shield of Illinois) (explaining that the merger would create "improvements in clinical services and other care-related benefits" and would "achieve cost efficiencies by capitalizing in synergies and economies of scale."). ENH's further suggestion that a letter sent by MCO PHCS to its clients (Exh. MM to Def. Br.) evidenced PHCS's understanding of "the effect of the merger" is also misleading. While the letter indicates that PHCS anticipated renegotiation with ENH as a result of the merger, there is nothing to suggest that PHCS was aware that the merger was anticompetitive.

only in 2004 after a lengthy and complicated investigation of the industry. The Initial Decision of the FTC administrative law judge, which first revealed the anticompetitive nature of the merger, was not released until October 17, 2005. The FTC's investigation, which entailed the review of thousands of documents produced by ENH and MCOs, was not begun or disclosed until 2002. As such, ENH's contention that named Plaintiffs' and class members' knowledge of their antitrust claim occurred when they first learned of the merger is without credibility.

Plaintiffs, moreover, allege a continuing antitrust violation, asserting that ENH's anticompetitive conduct continued from January 1, 2000 through the present, causing Plaintiffs and other class members to repeatedly pay artificially high prices throughout the Class Period. (Compl. ¶¶ 1-2, 13, 32.)[28] "The period of limitations for antitrust litigation runs from the most recent injury caused by the defendant's activities rather than from the violation's inception." *Xechem, Inc. v. Bristol Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir. 2004). "Each discrete act with fresh adverse consequences starts its own period of limitations." *Id.*; *see also In re SE Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 946-47 (E.D. Tenn. 2008) ("An antitrust cause of action accrues and the limitation period commences each time a defendant commits an act that injures the plaintiff's business . . . . A continuing antitrust violation is one in which the plaintiff's interests are repeatedly invaded.") (citations omitted).[29] Regardless of the initial accrual date for

[28] Plaintiffs also asserted a continuing violation argument in response to ENH's motion to dismiss. The Court concluded that it was unnecessary to reach the issue in light of its ruling. *In re Evanston Northwestern Healthcare*, 2008 WL 2229488, at *7 n.3.

[29] To the extent the Eighth Circuit in *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 269 (8th Cir. 2004), and *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1050 (8th Cir. 2000), held the continuing violation theory inapplicable based on the facts developed in those cases through discovery, those rulings appear incompatible with the Seventh Circuit's decision in *Xechem*. Moreover, both cases concerned only Section 7 claims, not Sherman Section 2 monopolization claims. *Midwestern Mach.*, in fact, distinguished Section 2 claims from Section 7 claims and referred approvingly to the application of the continuing violation theory to monopolization claims. 392 F.3d at 270-71.

Plaintiffs' claims, the limitations period would accrue anew with each antitrust injury. ENH has made no showing that any claims would be time barred.[30]

2. The Statute of Limitations Is A Common Issue For Class Certification

ENH's central presumption that the existence of any individualized issues relating to its statute of limitations defense preclude class certification is incorrect, as even authority cited by ENH makes clear. (Def. Br. at 31-32 (*citing Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998), and *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000)).)[31] In *Mowbray*, the court actually rejected ENH's position, holding that class certification was proper despite individualized issues relating to the defendant's statute of limitations defense. 208 F.3d at 296. The court emphasized,

> [T]he mere fact that [individualized statute of limitations determinations] may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3).

Id. The court also rejected the holding in *Broussard* to the extent it imposed a *per se* rule, observing that it "contradicts the weight of authority and ignores the essence of the predominance inquiry." *Id.*[32]

Mowbray's analysis has found widespread support throughout the judiciary. *See, e.g., In*

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[30] Plaintiffs also assert equitable relief claims which are not subject to the four year statute of limitations. *See* 15 U.S.C. § 15b (specifying the limitations period for antitrust damage claims only).

[31] ENH also cites *Falcon*, 457 U.S. at 156, and *Sample v. Aldi Inc.*, No. 93 C 3094, 1994 WL 48780 (N.D. Ill. Feb. 15, 1994), as requiring that Plaintiffs prove that no class members' claims are time-barred. *Falcon* did not address the issue at all, and *Aldi* held only that where plaintiffs admitted that certain class members' claims were time barred, it was appropriate to exclude them from the class definition.

[32] *Broussard* is also distinguishable. In that case, unlike here, statute of limitations issues were unique to each class member because tolling was based on representations by individual representatives of the defendant company.

re Linerboard Antitrust Litigation, 305 F.3d 145, 162 (3d Cir. 2002) ("Challenges based on the statute of limitations . . . have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability.") (citation and internal quotation marks omitted); *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 486 (N.D. Ill. 2009) ("the presence of unresolved individual issues of compliance with the statute of limitations does not prevent class actions from proceeding").[33]

Despite ENH's attempt to manufacture individualized issues relating to its statute of limitations defense, "a sufficient constellation of common issues" binding Plaintiffs and class members clearly exists. ENH intends to prove its statute of limitations defense by asserting that Plaintiffs' claims accrued as a matter of law on January 1, 2000 when the merger was consummated, and that Plaintiffs and other class members were on actual or constructive notice of the merger before or at the time the merger was consummated. As already discussed, ENH's contention that the claims are barred as a matter of law because they accrued on January 1, 2000 is legally incorrect and knowledge of the merger did not trigger accrual of Plaintiffs' claims. Accordingly, the argument that individual class members must prove that they did not receive notice of the merger is baseless.

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[33] *See also In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, No. 05-MD-527, 2007 WL 3027405, at *26 (N.D. Ind. Oct. 15, 2007) (granting motion to certify class despite individual statute of limitations issues, noting that such issues "can and should be addressed separately with damages"); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 303-04 (S.D.N.Y. 2003) (noting that "the existence of even a meritorious statute of limitations defense does not necessarily defeat certification," and certification is appropriate where "despite the presence of statute of limitations defenses, class members . . . are bound by a 'constellation of common issues' that predominate over any individual questions"); *see also* 7 *Newberg on Class Actions* § 22:55 (4th Ed. 2002) ("Possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, relate to the merits of individual claims and do not preclude certification of a Rule 23(b)(3) class action when the necessary commonality and predominance are otherwise present.").

Even assuming *arguendo* that notice of the merger is relevant, whether knowledge of the merger triggered accrual of Plaintiffs' claims is susceptible to common proof because the focus would fall on ENH's actions, rather than upon the behavior of any individual Plaintiff or class member. ENH claims, for example, that it sent materials to every MCO and area employers informing them of the upcoming merger, and that the merger received widespread press coverage. Whether this would constitute sufficient notice under ENH's theory is a common issue. *See, e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 421 (5th Cir. 2004) (finding "widespread publicity" provided plaintiffs with "constructive notice is an issue that can be decided on a classwide basis"); *Kennedy v. United Healthcare of Ohio, Inc.*, 206 F.R.D. 191, 199 (S.D. Ohio 2002) (noting that "the matter of the timing of discovery [of plaintiff's claims] may be amenable to a common proffer, since the basis for discovery may entail published newspaper articles and the like").

More importantly, the *relevant* issue to ENH's statute of limitations defense -- when Plaintiffs knew or should have known that they had a legally cognizable claim – is subject to class-wide proof. As discussed *supra*, the FTC Initial Decision revealing the anticompetitive nature of the merger was not issued until 2005. The FTC did not file its complaint challenging the merger until February 10, 2004, and did not begin its investigation until 2002. These are the only conceivable points at which Plaintiffs and the class may have been put on notice of the anticompetitive merger. Whether, or which of these events triggered accrual of Plaintiffs' claims – a determination the Court need not make at this juncture – is an issue common to the class. *See, e.g.*, *Marwil v. Ent & Imbler CPA Group, PC*, No. 03CV0678, 2005 WL 1115960, at *6 (S.D. Ind. May 9, 2005) (holding the statute of limitations defense subject to "class-wide

proof" where plaintiffs contended they could not have been placed on notice as to its securities claim until the SEC brought its action against defendant).

As already mentioned, the materials ENH issued to class members revealing the merger included efforts to conceal the anticompetitive nature of the merger, rather than alerting class members of a potential claim.[34] Courts regularly find the existence of such fraudulent concealment on the part of a defendant to constitute a common issue. *See, e.g.*, *In re Monumental Life*, 365 F.3d at 421 (holding that common issues predominated despite the existence of individual statute of limitations issues, "particularly in the face of defendant's common scheme of fraudulent concealment"); *In re Linerboard*, 305 F.3d at 162 (noting that "common issues of concealment predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did") (citation and internal quotation marks omitted).

In addition, the continuing violation asserted by Plaintiffs, pursuant to which the statute of limitations begins to run anew with each injury to Plaintiffs and the class, also constitutes a common issue, as it focuses on ENH's conduct, rather than that of individual class members. *See SE Milk*, 555 F. Supp. 2d at 947 ("For statute of limitations purposes, . . . the focus is on the timing of the causes of injury, i.e., the defendant's overt acts, as opposed to the effects of the overt acts.") (citations and internal quotation marks omitted).

Common issues relating to ENH's liability and conduct clearly predominate and ENH failed to demonstrate that its statute of limitations defense alters that conclusion.

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[34] As Plaintiffs highlighted in their response to ENH's motion to dismiss, there is also evidence in ENH's public statements of its efforts to conceal the anticompetitive consequences of the merger.

E. THE ISSUE OF ARBITRATION DOES NOT DEFEAT CLASS CERTIFICATION

1. The Enforceability of Arbitration Clauses in the Agreements between ENH and MCOs Is a Common Issue.

While ENH contends that arbitration clauses in its contracts with the MCOs are a reason to deny class certification, the enforceability of the alleged clauses is actually another common issue of fact and law. Indeed, ENH waived the purported ADR provisions in the contracts at issue in a manner common to the class;[35] thus, they are of no effect and cannot destroy predominance. ENH neglects to address this fact and instead attempts to marginalize its own failure to assert the arbitration provisions by incorrectly placing the onus upon the putative class. (Def. Br. at 8-9.) Rather than timely seeking arbitration, as was its burden, ENH instead chose to litigate for nearly 2 years, engaging in motion practice (including a motion to dismiss on statute of limitations grounds) and protracted discovery, thereby waiving the issue of arbitration under the controlling law in this Circuit. *See Cabinetree of Wisconsin, Inc. v. Kraftsmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (finding party's removal of an action to federal court and participation in several months of litigation inconsistent with intent to arbitrate).

In fact, ENH never even raised the issue of arbitration as an affirmative defense to any of the Complaints filed in this case. (*See* ENH's Affirmative Defenses, Dkt Nos. 110–13, 228, 239.) Instead, as detailed at length in Plaintiffs' prior Motion concerning waiver (*see* Dkt No. 273), ENH raised the arbitration issue for the first time on June 1, 2009, when it sent letters requesting arbitration nearly a full two years after this suit was first filed. As such, ENH waived its right to enforce any applicable contractual provisions. *See id.* at 391 ("Selection of a forum in

[35] (*See* Pls.' Mot. for Entry of Order Finding Waiver of Arbitration by Def. and to Limit Improper Def. Contact with Putative Class (Dkt. No. 273).)

which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution.").

ENH's reliance on *Christie Clinic, P.C. v. Multiplan, Inc.*, No. 08-CV-2065, 2009 WL 175030 (C.D. Ill. Jan. 26, 2009), is also misplaced. In *Christie Clinic*, the court found "the contracts between MultiPlan and the proposed class members materially different from the contract between MultiPlan and Plaintiff," and therefore did not qualify for class treatment. *Id.* In this case, ENH does not argue that the arbitration provisions are materially different, but rather that they are materially the same. Specifically, ENH claims "[w]hether the MCO is large like Blue Cross, or small, a common feature of the contracts with ENH are alternative dispute resolution ("ADR") mechanisms, such as mediation and arbitration." (*See* Def. Br. at 8; *see also* ENH's Mem. of Law in Support of Mot. to Compel Arbitration (Dkt. No. 271).

Finally, ENH failed to show how the handful of ADR provisions destroy predominance and superiority. To the contrary, ENH brought a motion to compel arbitration and Plaintiffs filed a counter-motion for entry of an order finding waiver of arbitration by ENH. The Court ruled that it would resolve these motions ***after*** deciding class certification. The fact that the issue can be determined by simple motion practice separate from the class certification determination confirms that the issue of arbitration and waiver of arbitration does not in any way threaten to consume or predominate over common issues in this litigation.

Whether ENH waived the arbitration clauses at issue is a class-wide issue whose determination can be made by utilizing class-wide common evidence, consisting entirely of ENH's own conduct in litigating this case and failing to timely enforce its arbitration rights. Accordingly, the issue of arbitration does not destroy the predominance or superiority requirements under Rule 23.

2. The FTC Final Order on Remedy Does Not Require MCOs to Arbitrate their Antitrust Claims Against ENH.

ENH incorrectly asserts that the FTC's Final Order mandates mediation and arbitration. (Def. Br. at 26.) Contrary to ENH's assertion, while the FTC's Final Order provides payors with the option of requesting mediation and arbitration, it does not mandate that they do so:

> IT IS FURTHER ORDERED that Respondent [ENH] shall ...
>
> D. *At the request of the Payor*, submit any disputes as to prices and/or terms arising out of the separate and independent negotiations required by Paragraphs II.A.- C. of this Order:
>
> 1. First to mediation under the Commercial Mediation Rules of the American Arbitration Association ("AAA"), and, if the dispute cannot be settled by mediation, *at the request of the Payor* to a single arbitrator, mutually agreed upon by ENH and the Payor, who shall conduct binding arbitration in accordance with the Commercial Arbitration Rules of the AAA at a location mutually agreed upon by ENH and the Payor, in order to determine fair and reasonable prices and/or terms assuming competition between the hospitals as would exist but for the Merger;

See In re Evanston Northwestern Healthcare, No. 9315, at 4 (Fed. Trade Comm'n.), Final Order, April 24, 2008, attached hereto as Exhibit "D") (emphasis added). Thus, ENH is only required to mediate those disputes, if any, where mediation and/or arbitration is requested at the option of the Payor. The FTC intended to remedy harms caused to the payors – not ENH. ENH's argument urges the Court to read the FTC's decision illogically by interpreting the ruling in a manner that limits the payors' options for seeking redress.

ENH further fails to disclose that the FTC's Final Order only applies to disputes arising from ENH's duty to separately negotiate on behalf of the ENH and Highland Park hospitals beginning on June 24, 2008.[36] Specifically, the FTC order was entered to restore competition

[36] 15 U.S.C. § 21(b) allows a party 60 days to appeal an FTC Final Order, thus, the FTC's order did not become final until on or about June 24, 2008.

through separate negotiation for the ENH and Highland Park Hospitals. Since the separate negotiating requirement did not become effective until the FTC Final Order became final on or about June 24, 2008, it is disingenuous for ENH to contend that the FTC order requires ENH to arbitrate "any disputes" relating to prices and other terms of the payor contract negotiations" (Def. Br. at 26) that previously arose.

3. The Existence of a Small Number of Class Members with Large Claims Does Not Preclude a Finding of Predominance and Superiority.

Although the point is entirely unrelated to the issue of arbitration, ENH also argues in the arbitration section of its brief that "MCOs are multimillion (or billion) dollar corporations" that should not be allowed to participate in class actions because "[t]he MCOs can represent themselves." (*See* Def. Br. at 25-26.) Contrary to ENH's assertion, Rule 23 does not require class members to be destitute or to possess *de minimis* claims in order to participate in a class action or to establish predominance and superiority. *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 351 (E.D. Mich. 2001) (*quoting Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196 (6th Cir. 1988) ("The procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather to achieve the economies of time, effort, and expense.")); *In re Synthroid Mktg Litig.*, 188 F.R.D. 287, 294-95 (N.D. Ill. 1999) (rejecting argument that "a class action is not a superior method of litigation because the potential class members are sophisticated . . . companies with substantial financial incentive to sue individually").

The presence of some class members with large claims does not preclude a finding of superiority, particularly in antitrust actions, which are notably complex and costly to litigate.

This is especially true where class members with large claims cannot afford the loss of goodwill associated with suing a supplier of a product necessary to business operations.[37] In the Seventh Circuit, "the presence of large claimants in a proposed antitrust class and the possibility that some of them might proceed on their own does not militate against class certification." *Paper Sys. Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 605 (E.D. Wis. 2000) (citing *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727, 732 (N.D. Ill. 1977)). Accordingly, this Court has previously observed that "although some class members . . . may have 'large' claims . . . this will not defeat class certification." *Scholes v. Moore*, 150 F.R.D. 133, 138 (N.D. Ill. 1993); *see also* 4 Newberg on Class Actions, § 18.40 at 18-138 (3d ed. 1992) (commenting that "it is important to note that though the existence of small claims may be a strong factor in upholding a class, the class should not be denied merely because individual claims are large").[38]

ENH's reliance on entirely distinguishable case law is misplaced. (*See* Def. Br. at 26) (*citing In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *Birnberg v. Milk St. Residential Assocs. Ltd. P'ship*, 2003 WL 21267103 (N.D. Ill. May 29, 2003), and *Liberty Mut.*

[37] Here, the MCOs involved in this case could not exclude ENH from their provider network and needed ENH in their insurance networks. There is no evidence that any class member has a strong interest in individually pursuing a separate action against ENH. *See* FTC Op. at 18–25; *Windham v. Amer. Brands, Inc.*, 565 F.2d 59, 69 (4th Cir. 1977) (en banc) (finding a plaintiff's financial ability and committed intent to pursue individual suit an important factor in certifying class).

[38] In *Mitsubishi*, as in the instant case, the defendants argued that since some of the approximately 80 class members were large businesses with large claims – and considerable diversity existed in the size of businesses and claims – class treatment was not the superior method of adjudication. 193 F.R.D. at 605. The court rejected this argument, noting that "even where parties can afford to bring suit on their own, it is frequently economically unfeasible or imprudent for them to bring . . . claims individually. . . [particularly where] treble damages are not sufficient to outweigh the cost in good will of suing their suppliers." *Id.* "Given the complexities of antitrust litigation, it is not obvious that all members of the class could economically bring suits on their own," thereby rendering class action the superior method of adjudication. *Id.* at 605. This reality, along with the predominance of common questions, militate against a finding that there is a strong interest for members of the class to individually control the prosecution or defense of separate actions.

Ins. Co. v. Tribco Constr. Co., 185 F.R.D. 533 (N.D. Ill. 1999)). In *Rhone-Poulenc*, victims of tainted blood transfusions sought to proceed with class claims sounding in negligence where the class consisted of 300 claimants and ***every*** claim was sufficiently large enough to warrant the separate pursuit of the individual claims. 51 F.3d 1298-99. Moreover, the court found notable "the demonstrated great likelihood that the plaintiffs' claims . . . lack[ed] legal merit," as demonstrated by the *Rhone* plaintiffs' previous losses in each of a dozen individual related cases. *Id.* at 1299. Here, ENH focuses on only a handful of Plaintiffs (*i.e.* less than 40 MCOs out of the thousands of class members with claims against ENH), who ENH asserts have the financial resources to pursue their own claims. Unlike the class alleged in *Rhone Poulenc*, where ***every*** class member held a substantial financial claim, here, the majority of class members possess relatively small claims that are too minor to be pursued individually and warrant proceeding as a class action.

Likewise, the *Birnberg* facts are distinguishable because the ***entire*** *Birnberg* class consisted of limited partners with large financial interests in a large commercial and residential building in Chicago. 2003 WL 21267103. Superiority was not shown in that case because the class consisted of "limited partners [with] over $170,000 at stake." *Id.* Likewise, in *Tribco*, this Court found that a class action was not superior because, *inter alia*, ***all*** of the 220 *Tribco* class members were sophisticated businesses with an average retrospective premium in the amount of $690,000. 185 F.R.D at 541. Moreover, neither *Birnberg* nor *Tribco* involved antitrust claims where, as in this case, potential class members may have reason to fear suing their suppliers.

Where, as here, the number of class members who hold large claims constitutes a very small percentage of the overall class, the superiority of a class action device to litigate the Plaintiffs' antitrust claims is readily established. *See Scholes*, 150 F.R.D. at 138 (rejecting

argument that existence of large claims defeats superiority where small claims are included in the class that would not be pursued individually).

III. CONCLUSION

For the foregoing reasons and for the reasons stated in Plaintiffs' Memorandum in Support of Their Motion for Class Certification, Plaintiffs' Motion for Class Certification should be granted.

Dated: December 9, 2009

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Mary Jane Fait, hereby certify that on December 14, 2009, service of the foregoing document was served on all counsel of record and was accomplished pursuant to ECF as to Filing Users.

/s/ Mary Jane Fait
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