UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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

BRIEF OF DEFENDANT NORTHSHORE UNIVERSITY HEALTHSYSTEM
IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION AND SUMMARY

Plaintiffs—three individuals and one employee benefit plan—challenge the twelve-year old merger between Highland Park Hospital and Defendant Evanston Northwestern Healthcare ("ENH") (now operating as NorthShore University HealthSystem). Plaintiffs have renewed their motion for class certification, and propose to litigate their antitrust claims on behalf of a single monolithic class comprised of essentially every individual and non-governmental entity who paid for any service from any ENH hospital at any time since January 1, 2000. (*See* Pls.' Mem. of Law, Dkt. No. 479 ("Mem.") at 2-3 (defining proposed class)). That motion should be denied.

Judge Lefkow denied Plaintiffs' first motion for lack of predominance. (Dkt. No. 385, reported at 268 F.R.D. 56 (N.D. Ill. 2010)). But, as to that issue, the Seventh Circuit accepted Plaintiffs' promise that their expert could "estimate the antitrust impact, if any, of Northshore's merger on the [class] members," and concluded that, "[t]ogether with the common questions and evidence on other liability issues, this was sufficient to show predominance under Rule 23(b)(3)." *Messner v. NorthShore Univ. HealthSystem*, 669 F.3d 802, 826 (7th Cir. 2012). The Seventh Circuit did not, however, order a class to be certified. Nor did it "reverse" the denial of class certification. Instead, it "vacated" Judge Lefkow's order and "remanded" for further proceedings. *Id.* (capitalization altered).

Setting predominance aside,[1] there are several fatal problems with Plaintiffs' proposed class. To start, the superiority requirement—which was not addressed by Judge Lefkow or the Seventh Circuit, 669 F.3d at 814 n.5—is not met for several reasons.

First, the claims of numerous putative class members—representing *more than 90%* of the claimed classwide injury—are subject to a contractual obligation to arbitrate. All insured

[1] If necessary, ENH will conduct further discovery and demonstrate, as part of a motion to decertify, that Plaintiffs have not established predominance. *See Messner*, 669 F.3d at 825; Fed. R. Civ. P. 23(c)(1)(C).

patients who receive services from ENH are charged rates set by a contract between ENH and a managed care organization ("MCO"). Virtually all of those MCO contracts contain an enforceable arbitration clause. And those clauses bind not only the MCOs, but also self-funded entities (like employer-sponsored health plans), all of which authorized an MCO to negotiate with ENH on their behalf and have obtained substantial, direct benefits as a result.

It would be inefficient and futile to certify a class containing MCOs and their self-funded subscribers, only for those entities to be immediately disqualified from this litigation by their arbitration obligations. It would also be contrary to Rule 23—*both* because a class action is not a "superior" method of adjudicating claims that, by contract, may not be resolved in this forum, *and* because certifying the class as proposed would abrogate the rights of ENH, the MCOs, and the self-funded subscribers. As the Supreme Court recently reaffirmed, "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)). Plaintiffs' *only* defensive argument is that ENH waived its arbitration rights. But that is wrong: Even now, a motion to compel would be premature because *putative class members are not parties*. Certification thus should be denied or, at a minimum, the class narrowed to exclude the MCOs and their self-funded subscribers.

Second, superiority is also lacking given the MCOs' established interest "in individually controlling the prosecution … of separate actions." Fed. R. Civ. P. 23(b)(3)(A). That interest is manifest in the MCOs' and ENH's substantive contract rights—which, per *Wal-Mart*, § 2072(b), and due process, simply may not be obliterated by class action procedure. It is also reflected in the large size of the MCO claims, and further demonstrated by the steps that several MCOs have already been forced to take to protect themselves in this litigation. Specifically, two MCOs

preemptively opted out of any class that might be certified here, and three others appeared in court to object to Plaintiffs' attempt to waive their bargained-for arbitration rights. The MCOs and their subscribers plainly have an interest in directly controlling any claim against ENH. And Plaintiffs' continuing disregard for the rights, interests, and obligations of those putative class members just confirms their inadequacy to represent the class as proposed.

Third, the demands of due process would render any trial on behalf of the proposed class unmanageable. *See* Fed. R. Civ. P. 23(b)(3)(D). Indeed, the facts here would require not a *single* trial, but *hundreds* of mini-trials because each MCO negotiates individual rates with ENH based on its own unique subscriber concerns and bargaining position, with multiple programs and a variety of effective time periods. ENH has a right to defend itself with respect to each contracting partner allegedly coerced, each individual contract allegedly reflecting supra-competitive rates, each period during which damages allegedly occurred, and each market allegedly monopolized. Accordingly, any adjudication of whether ENH's rates were raised and maintained above competitive levels (and by how much) would need to be undertaken *MCO-by-MCO*, and *contract-by-contract* across the *twelve-year* class period. It would also be necessary to separate *inpatient* and *outpatient* claims, because those two markets are distinct. As a result, any attempt to try the claims of the proposed class would be inefficient and unmanageable.

Certification also should be denied for lack of typicality and adequacy, which, contrary to Plaintiffs' assertion, must be addressed anew. Because Judge Lefkow's order was vacated, it is not and cannot be law of the case. Further, the discussion of topics apart from predominance was *dicta*, and has been undermined by subsequent authority. Accordingly, although superiority is dispositive of Plaintiffs' motion, if the Court disagrees, it should assess these other Rule 23 requirements as well. Most notably, none of the named Plaintiffs can adequately represent the

MCOs—as well-demonstrated by this Court's concern with adjudicating motions to compel arbitration without the MCOs' participation. Indeed, there is no better proof of inadequacy than the felt need that absent class members should appear to personally protect their own interests.

The class cannot be certified as proposed. Plaintiffs' motion should be denied.

FACTS

A. ENH and the merger

Since merging with Highland Park Hospital on January 1, 2000, ENH has operated three hospitals in the north suburbs of Chicago: Evanston Hospital, Glenbrook Hospital, and Highland Park Hospital.[2] Evanston Hospital and Highland Park Hospital are 13.7 miles from each other. At least seventeen other hospitals are closer to Evanston Hospital or Highland Park Hospital than those two are to each other, and draw patients from the same geographic area. (*See* Hospital Map, Ex. 1). Nonetheless, according to Plaintiffs, the merger gave ENH a monopoly on inpatient and outpatient healthcare services, which ENH allegedly used to impose and maintain supra-competitive rates. (Consol. Class Action Compl. Dkt. No. 224 ("Compl.") ¶¶ 43, 58).

Contrary to Plaintiffs' implication (Mem. 2), the FTC's challenge to the merger was significantly different from this civil action. For example, the FTC's complaint counsel was not required to show impact on specific individuals or ENH customers, but rather only that the effect of the merger "*may be* substantially to lessen competition, or *tend to* create a monopoly" generally. 15 U.S.C. § 18 (emphasis added). Plaintiffs, by contrast, must show that they, and all putative class members, were *actually* "injured." 15 U.S.C. § 15(a).

In addition, unlike the broad claims here, the FTC analyzed only (1) rates to a few select

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[2] In 2008, ENH acquired a fourth hospital, Rush North Shore Medical Center. That acquisition is not at issue in this case, and Plaintiffs' proposed class definition excludes services provided by "hospitals, predecessors, subsidiaries, or affiliates … acquired as a result of the merger with Rush North Shore Medical Center." (Mem. 3).

MCOs, (2) for inpatient services, (3) over a three-year period (2000-2003). The FTC considered customers like Plaintiffs irrelevant—calling patients' relationships with the hospitals "a marginal issue at best." (FTC Post-Tr. Reply Br. 10 n.12, No. 9315 (filed July 1, 2005)). It also excluded outpatient services as part of a different product market. 2007 WL 2286195 (FTC Aug. 6, 2007) ("FTC Op.") at *46-47. Further, only four MCOs produced reliable data, and the largest one by far—Blue Cross and Blue Shield of Illinois ("Blue Cross")—was found by the FTC to have suffered no competitive injury from the merger. *Id.* at *30. Blue Cross even filed a declaration to that effect in this litigation, and preemptively opted out of any class that may be certified here. (Arango Decl. ¶¶ 1, 3-5, Dkt. No. 212, Ex. 2; *see also* Ex. 3 (opt out letter from First Health)).

B. Plaintiffs and their proposed class

Plaintiffs nevertheless propose to litigate their claims on behalf of the following class:

> *All persons or entities* in the United States of America and Puerto Rico, except 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 *who purchased or paid for inpatient hospital services or hospital-based outpatient services directly from [ENH]*, its wholly-owned hospitals, predecessors, subsidiaries, or affiliates other than those acquired as a result of the merger with Rush North Shore Medical Center … *from at least as early as January 1, 2000 to the present*.

(Mem. 2-3 (emphasis added)). This proposed class includes essentially all individuals and private entities who paid for any service, from any of three hospitals, at any time over twelve years.

Plaintiffs, however, are *not* a cross-section of ENH's customers. Most notably, none of them is an MCO. Instead, Plaintiffs are one self-funded healthcare fund ("Painters Fund") that at all times since the merger has provided coverage to its members *through Blue Cross* (Ehrhardt Dep. 89-91, 94-95, 150-51, Ex. 4), and three individual patients who together received a handful of outpatient services, and no inpatient care whatsoever (*see* Berkowitz Dep. 198, Ex. 5; Lahmeyer Dep. 75, 112, Ex. 6; Messner Dep. 148, Ex. 7).

C. ENH's customers and rates

For private payors, ENH has two categories of rates. *First*, uninsured patients are charged retail rates, set by ENH unilaterally and listed on ENH's "chargemaster." In practice, the amounts actually paid by uninsured patients vary because of ENH's financial assistance and charity policies, and because most uninsured patients never pay or pay only in small part. (*E.g.*, Berkowitz Dep. 144, 201, Ex. 5). *Second*, all insured patients are charged rates set by bilateral negotiations between ENH and an MCO. For these patients, the *cost* of a particular treatment may ultimately be borne by the MCO, the patient's health plan (typically sponsored by the patient's employer), and/or the patient himself. But in all cases where a patient has insurance, the *rates* are set by an ENH/MCO contract.

Here is how it works: MCOs are commercial insurance providers. They offer a number of different benefit plans, including traditional indemnity as well as various managed care designs such as health maintenance organization (HMO), preferred provider organization (PPO), and point-of-service (POS) plans. MCOs create networks for these plans by negotiating discounted rates with a variety of healthcare providers (such as ENH). Some MCOs have more bargaining power than others, based upon the overall size of their subscriber base. Here, each MCO negotiated multiple separate managed care contracts with ENH covering different periods of time, for different rates. (*See* MCO Contract Timeline, Ex. 8).

MCOs sell their products to employers and other entities (who, in turn, provide health care coverage to employees and other individuals) on a fully-insured or self-funded basis. When *fully-insured*, an employer pays a monthly premium to the MCO for each enrolled employee, and the MCO pays for all covered expenses. When *self-funded* (or "*self-insured*"), the employer relies on the MCO to administer its plan and typically pays an administrative fee, but the employer itself—not the MCO—directly bears the cost of the healthcare expenses actually incurred by its

constituency of patients. In this way, self-funded subscribers bear the cost of all reimbursements to ENH, while still obtaining numerous benefits that would otherwise be unavailable to them.

As detailed in the accompanying expert report of Dale Yamamoto—the now-retired leader of the national health benefits actuarial practice at Aon Hewitt—such benefits include: (1) network access to ENH's hospitals and physicians; (2) the ability to save time, costs, and resources in relying on the MCO to contract with ENH; (3) use of the MCO's industry expertise, knowledge, and relationship with ENH; (4) the peace of mind that the credentials of ENH and its physicians have been verified by the MCO; (5) reliance on the MCO's clout and industry presence to negotiate with ENH and sell a plan to a broad group of subscribers; (6) use of the MCO to process and pay claims from ENH; and (7) a significant discount on ENH's rates. As explained more fully by Mr. Yamamoto, all self-funded groups who contract with an MCO receive these direct benefits from the contractual relationship between their MCO and ENH. (*See* Ex. 9 ("Yamamoto Rep.") at 7-9).

A prime example of an MCO subscriber enjoying these benefits is named Plaintiff Painters Fund—a self-funded entity whose plan is administered by Blue Cross. As is standard for contracts between self-funded subscribers and MCOs (*id.* at 6), Painters Fund expressly authorized Blue Cross to act on its behalf in negotiating rates with healthcare providers, like ENH.[3] Blue Cross, of course, did so—and its resulting contracts with ENH provide all of the above-listed benefits. (*See id.* at 7-9).

This raises a serious problem for Plaintiffs' proposed class definition. As explained in Argument I.B below—because MCOs and self-funded subscribers are in an agency relationship,

[3] *See* PF000332, 333, 354, Ex. 11 (authorizing Blue Cross to "manage, operate and administer [Painters Fund's] PPO," and to "[e]stablish, arrange and maintain [a] preferred provider organization physician and hospital provider network through contractual arrangements with Participating Hospitals").

and because the self-fundeds obtain substantial benefits from the ENH/MCO contracts—the arbitration provisions in the ENH/MCO contracts *also* bind the self-funded subscribers.

D. Arbitration provisions

Virtually every MCO member of Plaintiffs' proposed class has a contractual right and obligation to arbitrate.[4] (*See* ENH/MCO Contract Provisions Chart, Ex. 10). Though the specific language varies, these clauses cover all controversies, disputes, or claims "arising out of or relating to" the MCO's agreement with ENH—and *all* contemplate arbitration of the type of claims in this suit.[5] That is not disputed. In addition, among other things, the various agreements prohibit class actions, require specific pre-dispute claims procedures, and/or waive jury trials. (*See id.* at 2 (Aetna), 69 (Unicare), 77 (United)).

Significantly, despite the FTC proceeding, no MCO has sought to arbitrate or litigate the claims Plaintiffs now attempt to assert on their behalf. Nor was it clear until Plaintiffs moved for class certification that they even proposed to represent MCOs. (*See* Dkt. No. 271 at 2-3 (detailing procedural history)). As a precaution, ENH not only opposed Plaintiffs' first certification motion on the ground that the arbitration provisions precluded a finding of superiority (Dkt. No. 284), it also moved to compel arbitration as to virtually all of the MCOs (Dkt. No. 271).

Plaintiffs responded *not* with any substantive opposition to arbitration—nor do they now dispute the existence, validity, or applicability of the arbitration provisions—but rather with a cross-motion arguing that, by litigating *against the named Plaintiffs*, ENH somehow waived its

[4] The exception is one of the smallest MCOs, National Preferred Provider Network, which, on information and belief, did only approximately $10,000 in total business with ENH last year. To the best of ENH's knowledge and investigation, NPPN is the only current MCO payor not subject to arbitration.

[5] Any differences between "alternative dispute resolution" and "arbitration" are immaterial for present purposes. *See Riviera Distrib., Inc. v. Jones*, 517 F.3d 926, 929 (7th Cir. 2008) ("[A]greements to engage in alternative dispute resolution must be enforced, if they are valid as a matter of state contract law, whether or not they are aptly labeled 'arbitration.'"). For convenience, therefore, we refer to "arbitration" provisions.

right to arbitrate *against the MCOs*. (Dkt. No. 274). Counsel for three MCOs (Humana, Choicecare, and Unicare) appeared in court to object that *both* arbitration motions were "premature" because the MCOs are not parties (6/11/09 Tr. 11-14, Ex. 12), and Judge Lefkow agreed that the motions should be deferred until after it had been determined "whether the MCOs are in the class" (*id.* at 4, 14; Dkt. No. 283).

Because ENH has not waived its right to arbitrate, it can and will file all appropriate motions to protect that right—including renewing its motion to compel—if Plaintiffs' class is certified as proposed. That, however, should not be necessary. Among other problems addressed below, ENH's arbitration rights—and the Rule 23 issues they raise—warrant denying certification outright, or, at a minimum, narrowing the class definition to exclude the MCOs and their self-funded subscribers.

ARGUMENT

"Plaintiffs bear the burden of showing that a proposed class satisfies the Rule 23 requirements … by a preponderance of the evidence." *Messner*, 669 F.3d at 811. As pertinent here, Rule 23(a) requires that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if … the claims or defenses of the representative parties are typical of the claims or defenses of the class," and "the representative parties will fairly and adequately protect the interests of the class." In addition, Plaintiffs propose to certify a class under Rule 23(b)(3), which requires showing that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

In assessing these requirements, "a court may not simply assume the truth of the matters as asserted by the plaintiff. If there are material factual disputes, the court must 'receive evidence … and resolve the disputes before deciding whether to certify the class.'" *Messner*, 669 F.3d at 811 (citation omitted). "Failure to meet any one of the requirements of Rule 23 precludes

certification of a class." *Harriston v. Chi. Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993) (citation omitted). Here, as we will show, Plaintiffs cannot carry their burden with respect to the proposed class: A class action is not superior; their claims are not typical; and their representation is not adequate.

I. For Lack Of Superiority, Certification Should Be Denied, Or The Class Definition Significantly Narrowed.

A. A class action is not a superior method of resolving MCO claims, which can and must be arbitrated.

Aside from ENH's retail rates for uninsured patients, the rates challenged by Plaintiffs in this litigation are all found in (indeed, established by) ENH's contracts with individual MCOs, virtually all of which contain a broad arbitration provision that covers Plaintiffs' antitrust claims. (*See* Ex. 10). A class action is not a superior method for adjudicating claims that can and must be arbitrated, and Plaintiffs have no way to overcome this fundamental problem.

1. ENH's right to arbitrate defeats superiority.

There is no question that the arbitration provisions in the MCO contracts encompass antitrust challenges to ENH's rates.[6] In effect, then, the contracting parties (ENH and each MCO) agreed that alternative dispute mechanisms are preferred to a class action or any other form of litigation. This defeats Plaintiffs' attempt to show superiority. Quite simply, as this and numerous other courts have held, class action litigation is *not* the superior method for adjudicating claims that can and must be resolved by arbitration. *E.g.*, *Wash. Nat'l Ins. v. Jefferies & Co.*, No. 89-2216, 1990 WL 251916, at *3-4 (N.D. Ill. Dec. 20, 1990) (denying certification for lack of superiority where claims otherwise amenable to litigation were "intertwined" with claims subject

[6] Even if there were a question, "when a contract contains an arbitration clause … courts have no choice but to order arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *CK Witco Corp. v. Paper Allied Indus.*, 272 F.3d 419, 421-22 (7th Cir. 2001) (internal citations and quotations omitted).

to arbitration, because class action litigation might adversely affect "arbitrable claims of the absent class members"); *Champ v. Siegel Trading Co.*, No. 89-7148, 1990 WL 19984, at *7 (N.D. Ill. Feb. 27, 1990) (ordering arbitration and denying class certification for lack of numerosity because "any class would have to be limited to persons who did not agree to arbitration").[7]

Plaintiffs contend that Judge Lefkow already decided that the arbitration provisions should have no impact on class certification. (Mem. 8). But she did no such thing. In the class certification order, she only reached the arbitration clauses as a matter of *predominance*. (*See id.* at 9 (quoting 268 F.R.D. at 66)). The issue at hand, though, is *superiority*. Judge Lefkow did not reach ENH's showing that a class action is not a superior method of adjudication. 268 F.R.D. at 87 n.32. Nor did she "decide" the issue by postponing ENH's motion to compel arbitration until after a decision on class certification. To be sure, counsel for three MCOs advised Judge Lefkow that a motion to compel is not ripe unless and until a class is certified (6/11/09 Tr. 11-14, Ex. 12), and she agreed that the arbitration motions should be deferred until after it had been determined "whether the MCOs are in the class" (*id.* at 4, 14; Dkt. No. 283).

But the arbitration provisions are crucial to whether a class should be certified in the first place (and how any such class should be defined). *First*, as the cases cited above show, class action litigation is not superior where the defendant and putative class members have arbitration

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[7] *Accord Pablo v. ServiceMaster Global Holdings, Inc.*, No. 08-3894, 2011 WL 3476473, at *2-3 (N.D. Cal. Aug. 9, 2011) (where defendants "presented significant evidence of numerous enforceable arbitration agreements," and court had rejected waiver arguments, denying class certification for lack of superiority); *Sanders v. Robinson Humphrey/Am. Express, Inc*., 634 F. Supp. 1048, 1065 (N.D. Ga. 1986) ("To allow class certification where … arbitration agreements exist would not only be unduly burdensome and inefficient should defendants move to compel arbitration but would also violate the [superiority] requirement of Rule 23(b)(3)."), *on mot. to reconsider*, 1986 WL 10096, at *6 (N.D. Ga. July 8, 1986) (recognizing that "a number of potential class members have signed arbitration agreements," thereby providing "a better method of adjudicating a large number of claims by potential plaintiffs against defendants"), *rev'd on other grounds sub nom.*, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 & n.5 (11th Cir. 1987) (while arbitration provisions did not defeat predominance, instructing that "[t]hose purchasers whose … claims are subject to arbitration … could not be considered members of the class").

agreements. A contrary ruling could not be squared with the extraordinarily strong federal policy in favor of enforcing arbitration[8]—a policy that makes arbitration *per se* superior to litigation. Nor could a contrary ruling be squared with the express contractual affirmation by each MCO, as reflected in arbitration provisions the MCOs themselves wrote and insisted on including in their agreements with ENH, that arbitration is superior to litigation.

Moreover, any interpretation of Rule 23 that would allow a class action in lieu of arbitration is foreclosed by the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)); *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (class certification procedures under Rule 23 "must be interpreted in keeping … with the Rules Enabling Act"); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) ("The Rules Enabling Act, 28 U.S.C. § 2072—and due process—prevents the use of class actions from abridging the substantive rights of any party.").

The right to arbitrate is precisely such a substantive right, *see Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202-05 (1956)—as are contract rights more generally, *see Sacred Heart*, 601 F.3d at 1176. Accordingly, as the Eighth Circuit has held, the "contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management." *In re Piper Funds, Inc., Inst. Gov't Income Portfolio Litig.*, 71 F.3d 298, 303 (8th Cir. 1995).

Second, the MCOs should not be made parties to this proceeding, only to be immediately jettisoned right back out of the case. That is, given the binding agreements to arbitrate, certify-

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[8] *See generally* 9 U.S.C. §§ 2, 4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); and the series of recent cases in which the Supreme Court has reaffirmed that arbitration agreements *must* be enforced, *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*, 130 S. Ct. 1758 (2010).

ing a class containing MCOs would be futile; ENH will simply renew its motion to compel. Thus, as the Eleventh Circuit stated in *Kirkpatrick*, putative class members "whose … claims are subject to arbitration … could not be considered members of the class." 827 F.2d at 725 n.5; *cf. Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003) (reversing order granting class certification for having been issued without any opportunity for opposition briefing, but holding that "[t]his issue need not be remanded for further consideration" because the parties had an enforceable arbitration agreement and "we must give full force to its terms"); *Caudle v. Am. Arbitration Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) ("A procedural device aggregating multiple persons' claims in litigation does not entitle anyone to *be* in litigation …."). Certification of the class, as Plaintiffs have proposed to define it, can and should be denied for this reason alone.

2. ENH has not waived its right to arbitrate.

In their renewed motion, Plaintiffs do not dispute that the arbitration provisions encompass antitrust claims to ENH's rates, nor do they deny that class action litigation is not a "superior" method of adjudicating claims that are subject to arbitration. (*See* Mem. 8-9). Instead, Plaintiffs' sole contention is that ENH "waived" its arbitration rights by litigating this putative class action against named Plaintiffs through motions to dismiss and initial discovery. (*Id.*).

But putative class members are not parties. *Daniels v. Bursey*, 430 F.3d 424, 428 (7th Cir. 2005). Thus in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2011 WL 1753784 (N.D. Cal. May 9, 2011), the court refused to find waiver even though "[d]efendants failed to so much as mention the arbitration clauses at issue in their multiple motions to dismiss," or (unlike here) "in their joint opposition to class certification." *Id.* at *3. The reason: "It does not appear … that defendants could have moved to compel arbitration against such entities prior to the certification of a class in this case because … 'putative class members are not parties to an action prior to class certification.'" *Id.* at *4 (citation omitted); *accord Whittington v. Taco Bell*

of Am., Inc., No. 10-1884, 2011 WL 1772401, at *5 (D. Colo. May 10, 2011) (there is "no procedure or authority under 9 U.S.C. § 4 to compel putative class members, who are not currently before the court …, to arbitrate their potential claims"). So too here.

Moreover, the only reason ENH did not file a protective motion to compel sooner is Plaintiffs' refusal to confirm or deny whether the MCOs were putative class members. No MCO has ever provided ENH with notice of a claim, sought arbitration, or pursued litigation related to the merger. Plaintiffs want to pick a fight with ENH on the MCOs' behalf—but no court has agreed that Plaintiffs are entitled to do so, nor has any MCO made the decision to allow it. Soon after this case was filed, ENH issued discovery requests asking whether MCOs were putative class members. Plaintiffs delayed responding and finally answered contemporaneously with their motion for class certification.

Plaintiffs find it convenient now to pretend otherwise (*see* Dkt. No. 273, cited at Mem. 8), but the record is clear. In fact, the Court need look no further than the July 23, 2008 hearing before Magistrate Judge Denlow: Plaintiffs' counsel declared, "*we can only hypothesize that those direct payers are members of the class*." She then responded to Judge Denlow's concern that "they [ENH] need to know whether you purport to represent those people [MCOs] as part of your class" by stating, "*[w]e'll be putting that in our motion for class certification* …." (7/23/08 Tr. 30, 37, Ex. 13 (emphasis added)). Given their flat refusal to confirm or deny the MCOs' status until formally seeking class certification, Plaintiffs' waiver argument borders on frivolous. ENH provided notice of arbitration at its earliest opportunity; it waived nothing. *See also Joseph Huber Brewing Co. v. Pamado, Inc.*, No. 05-2783, 2006 WL 2583719, at *17 (N.D. Ill. Sept. 5, 2006) (waiver of an arbitration agreement "is not lightly inferred") (citing cases).

Plaintiffs have resorted to such a weak argument for a simple reason: they have no other

answer to the arbitration provisions or the Rule 23 problems those provisions create. The MCOs cannot be part of any class certified in this action.

B. A class action is not a superior method of resolving the claims of the self-funded subscribers, which also can and must be arbitrated because those entities are bound by the MCO contracts.

Likewise, the self-funded subscribers should be excluded from any class certified in this action because they too are bound to arbitrate. "[T]he obligation to arbitrate a dispute is not limited only to those who have personally signed the written agreement." *Int'l Ins. Agency Servs., LLC v. Revios Reinsurance U.S., Inc.*, No. 04-1190, 2007 WL 951943, at *3 (N.D. Ill. March 27, 2007). In determining whether an arbitration agreement "applies to a nonsignatory," "courts look to federal precedent applying the FAA," *S. Ill. Beverage, Inc. v. Hansen Beverage Co.*, No. 07-391, 2007 WL 3046273, at *10 (S.D. Ill. Oct. 15, 2007) (citation omitted), and "ordinary principles of contract and agency," *Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 891 (2010). Here, any claims by or on behalf of the self-funded subscribers must be arbitrated as a matter of both estoppel and agency.

1. The self-funded subscribers are bound by equitable estoppel.

First, "[a] nonsignatory party is estopped from avoiding arbitration if it knowingly seeks the benefits of the contract containing the arbitration clause." *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 688 (7th Cir. 2005). This rule "prevents a party from having it both ways," *i.e.*, "from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." *S. Ill. Beverage*, 2007 WL 3046273, at *5, *11 (quoting and following *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 838-39 (7th Cir. 1981)).

Equitable estoppel applies where the non-signatory receives "a direct benefit under the contract containing an arbitration clause." *Zurich*, 417 F.3d at 688 (emphasis omitted). Here,

the self-funded groups are all direct beneficiaries of the ENH/MCO contracts. By contracting with an MCO, they receive substantial financial benefits under the ENH/MCO contracts, including: paying lower rates (ranging from 10 to 50 percent off ENH's chargemaster rates); access to a broad network of healthcare providers (*e.g.*, hospitals, doctors, laboratories); savings in the time, costs, and resources that would otherwise be necessary to reach agreements with multiple providers; access to MCO industry expertise; the peace of mind that all healthcare providers have been credentialed by the MCO; the MCO's experience and ability to sell a plan to other subscribers; and processing and payment of all provider claims. (Yamamoto Rep. at 7-9). These benefits are "direct" since they "would not be possible but for" the MCO contracts. *See Int'l Ins.*, 2007 WL 951943, at *6 (holding non-signatory bound to arbitrate based on having "earn[ed] commissions, profits and/or agency fees," including "fees [that] would not be possible but for the [agreement providing for arbitration]").[9]

To be sure, in *Zurich*, the Seventh Circuit held that "paying lower insurance *premiums*" was "too attenuated" to be considered a direct benefit for estoppel purposes. 417 F.3d at 688 (emphasis added). But *Zurich* involved *fully-insured* subscribers; the *self-funded* subscribers at issue here do not make derivative premium payments. That is precisely what makes these entities "self-funded": unlike fully-insured subscribers that pay premiums to the MCOs, self-funded subscribers pay the full negotiated reimbursements, and thereby receive the direct benefit of the discount rates in the ENH/MCO contracts. Accordingly, as a factual matter, this situation is not akin to *Zurich*, but to *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999), where arbitration was ordered based on the non-signatory having received,

[9] Indeed, in certain ENH/MCO contracts, self-funded entities are expressly identified as third-party beneficiaries. *See, e.g.*, Ex. 10 at 21 (Choice Care), 28 (CorVel), 65 (PHCS). And a "nonsignatory may be bound to the arbitration agreements of others … if it is determined that the nonsignatory qualifies as a third-party beneficiary." *Ervin v. Nokia, Inc.*, 349 Ill. App. 3d 508, 512-14 (2004).

among other things, "the direct benefit of a lower insurance rate." *Zurich*, 417 F.3d at 688.

Moreover, Plaintiffs' own complaint makes plain that the self-funded subscribers (if made part of a certified class) would necessarily rely on the MCO contracts as the sole basis for claiming antitrust injury and damages. For example, Plaintiffs allege that, after the merger, ENH "set about negotiating a single contract for all three of its hospitals," "did not offer [customers] the option to enter into separate contracts," and "sought to raise its prices through the conversion of portions of some of its contracts from *per diem* to discount off charges." (Compl. ¶ 33). The ENH/MCO contracts, therefore, will and must "provide the factual foundation for every claim asserted" for self-funded subscribers—and those entities, therefore, are estopped from avoiding arbitration. *Int'l Ins.*, 2007 WL 951943, at *6.

2. The self-funded subscribers are bound by agency.

In addition, the self-funded subscribers are bound to arbitrate because they provided the MCOs both express and apparent authority to contract with ENH on their behalf.

First, by executing a third-party administrator ("TPA") or administrative services-only ("ASO") contract, the self-funded subscribers provided express authority to their MCO to negotiate reimbursement rates and conclude contracts with ENH. "An agent has express authority when the principal explicitly grants the agent the authority to perform a particular act." *Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc.*, 326 Ill. App. 3d 126, 135 (2001); *see also In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 795-96 (7th Cir. 1981) (principal is bound by an arbitration provision in a contract entered by an agent on the principal's behalf).

The whole point of TPA and ASO agreements is to create an express agency relationship between MCOs and self-funded subscribers. Each MCO (the agent) negotiates with ENH (a third party) on behalf of *all* of its self-funded subscribers (the principals). (Yamamoto Rep. at 4-5). Patients associated with a self-funded entity thereby gain full access to ENH as a "benefi-

ciary," "customer," or "member" of an MCO. (*See* Ex. 10 at 2 (Aetna), 38 (HFN), 80 (United)). For example, the Painters Fund's agreement with Blue Cross provides that "[Blue Cross] is *empowered to act on behalf of the [Painters] Fund* in connection with the Plan only as *expressly stated* in this Agreement." (PF000333, Ex. 11). It then expressly states that Blue Cross will "manage, operate and administer [the Fund's] PPO" and "[e]stablish, arrange and maintain" managed care contracts with hospitals. (PF000332, 354, Ex. 11). Under this authority, Blue Cross has negotiated contracts with ENH, inclusive of Painter's Fund, dating back to 2001, and admittedly benefitting Painter's Fund. (*See* Ehrhardt Dep. 150-51, Ex. 4).[10] The same is true of other self-funded plans who contracted with Blue Cross, as well as self-funded entities who contracted with other MCOs. (*See* Yamamoto Rep. at 6-7).

Moreover, "a principal can be bound by the acts of a purported agent when that person has apparent authority to act on behalf of the principal." *Curto*, 405 Ill. App. 3d at 895. In the healthcare industry, it is customary for MCOs to negotiate comprehensive, multi-year contracts with hospitals on behalf of subscribers, both self-funded and fully-insured. (Yamamoto Rep. at 3-4, 9; *see also* Ex. 10 at 78 (United) (contractual promise to ENH that the MCO would maintain binding contracts with self-funded subscribers)). ENH and similar hospitals thus expect that each MCO will come to the negotiating table representing a group of subscribers who are *indistinguishable* and *unknown* to the hospitals.[11] This places each MCO in a "situation where [it]

[10] The Agreement contains a boilerplate disclaimer of agency. (PF000343, Ex. 11). When "construing a contract," however, "courts must give effect to the more specific clause and, in so doing, should qualify or reject the more general clause as the specific clause makes necessary." *AFSME v. State Labor Relations Bd.*, 274 Ill. App. 3d 327, 337 (1995). In addition, "the legal relationship between the parties must be determined by analysis of their actual practices, and not merely by reference to the written agreement between them." *Wargel v. First Nat'l Bank of Harrisburg*, 121 Ill. App. 3d 730, 736 (1984).

[11] For any given patient, ENH must be told which MCO is providing coverage, but ENH typically does *not* know the identity or nature of any intermediate entity (like an employer or self-funded plan). It makes no difference to ENH; the applicable rates are drawn from ENH's contract with the MCO, and ENH looks to the MCO for payment of the claim—not to any intermediate entity. Plaintiffs mistakenly

may be presumed to have authority to act for [its subscribers]." *Mateyka v. Schroeder*, 152 Ill. App. 3d 854, 864 (1987) (alterations added). As one Illinois appellate court has put it:

> [A] corporation which … places an … agent in such a position … that persons of ordinary prudence, conversant with business usages and the nature of the particular business, are justified in assuming that he has authority to perform the act … is estopped as against such persons from denying the officer's or agent's authority.

Freeport Journal-Standard Publ'g Co. v. Frederic W. Ziv Co., 345 Ill. App. 337, 349-50 (1952) (citation omitted); *see also Lauhoff v. Auto. Ins. Co. of Hartford, Conn.*, 56 F. Supp. 493, 498-99 (E.D. Ill. 1944) ("The powers of the agent are, prima facie, coextensive with the business intrusted to his care ….") (quoting *Union Mut. Ins. Co. v. Wilkinson*, 80 U.S. 222, 235 (1871)).

For these reasons, there can be no doubt that all three factors identified in *Curto* as necessary for a third party to properly rely on the apparent authority of an agent are present here: (1) Each self-funded entity expressly *consented* to an MCO's acting as the sole interface with ENH in securing and maintaining the contracts at issue here. (2) ENH *reasonably believed* that the MCOs had authority to act, given that the MCOs included those entities in the subscriber base for the purpose of negotiating services, discounted reimbursement rates, and other terms. And (3) ENH *relied* on the MCO's apparent authority by contracting to charge (and in fact charging) the MCO's self-funded subscribers its discounted rates, rather than the substantially higher chargemaster rates. *See Curto*, 405 Ill. App. 3d at 895.[12]

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declare that "there are thousands of members of the Class and … their identities are readily known from NorthShore's records." (Mem. at 6 (citing Dkt. No. 246 at 15, which addresses numerosity only)). In fact, patients present insurance cards which identify the MCO and group number, but ENH has no ability to translate those numbers and identify employer plans. Since the insurance cards for a self-funded or fully-insured plan look the same, NorthShore knows the patient is covered by a certain MCO, but has no way of knowing who ultimately pays the bill. (*See* Yamamoto Rep. at 4).

[12] Even if an MCO lacked actual or apparent authority to bind a self-funded subscriber, ratification has the same result: Knowing that it existed, each self-insured entity claimed the benefits of an ENH/MCO contract, including negotiated discount rates. Retention of such "benefits is tantamount to ratification." *George F. Mueller & Sons, Inc. v. N. Ill. Gas Co.*, 299 N.E.2d 601, 603 (Ill. App. 1973) (collecting cases); *see also Sphere Drake Ins. Ltd. v. Am. Gen. Life Ins. Co.*, 376 F.3d 664, 677 (7th Cir. 2004).

In sum, having expressly and apparently authorized MCOs to negotiate with ENH on their behalf, and having availed themselves of rates established in the ENH/MCO contracts—rates that are the basis of the claims here—the self-funded subscribers could not be permitted to circumvent ENH's arbitration rights. And, for the same reasons discussed above with respect to the MCOs, ENH's right to arbitrate defeats superiority: Class action litigation cannot be found "superior," as Rule 23 requires, given this substantial showing of facially valid, applicable and enforceable arbitration provisions in the very contracts at the heart of class member claims.

C. Superiority is defeated by the interest of the MCOs and their subscribers in controlling their own claims—and by the parties' substantive contract rights.

A further superiority problem is that, contrary to Plaintiffs' argument (Mem. 6), the MCOs and their self-funded subscribers have an interest in individually controlling any claim against ENH. *See* Fed. R. Civ. P. 23(b)(3)(A). That interest is not convenient speculation. It is reflected in the size of the claims, demonstrated by actions that several MCOs have already taken to protect themselves against these Plaintiffs, and embodied in the ENH/MCO contracts, which create rights and obligations that may not be abrogated or superseded by class action procedure.

Taking the latter points first: Under the Rules Enabling Act and other authorities already discussed (*supra* at 12), a class action may not be used to overthrow substantive contract rights—including the methods by which disputes are handled. Under the ENH/MCO contracts, such methods are not limited to arbitration clauses. Among other things, some agreements also include mandatory steps to precede formal dispute proceedings; some preclude class actions; others preclude jury trials. (*E.g.,* Ex. 10 at 22 (Cigna), 2 (Aetna), 77 (United)). ENH has every right to insist on respect for and enforcement of such agreed-upon methods of managing the complex relationships between itself and its contracting partners. And these provisions also show that MCOs and their self-funded subscribers have their own interest in controlling any claims against ENH.

For example, ENH and Aetna not only agreed to arbitration, but also that "any arbitration or other proceeding relating to a dispute" between them "shall be conducted solely between them. Neither party shall request, nor consent to any request, that their dispute be joined or consolidated for any purpose, including without limitation any class action or similar procedural device." (*Id.* at 2). Similarly, in the contract between United Healthcare and ENH, the parties agreed to submit "all disputes between them to arbitration," agreed that they "expressly intend that any dispute relating to the business relationship between them be resolved on an individual basis," and agreed that any "ruling … allowing class action … would be contrary to their intent and would require immediate judicial review." (*Id.* at 76-77). This same contract further provides that, even if a dispute proceeds through litigation, "the parties hereby waive any and all right to trial by jury in, or with respect to, such litigation. Such litigation would instead proceed with the judge as a finder of fact." (*Id.* at 77).

These and other similar provisions in the ENH/MCO contracts (*see generally* Ex. 10) effectively foreclose litigation on behalf of this class that Plaintiffs have proposed. As the Seventh Circuit has admonished, "[a] procedural device aggregating multiple persons' claims in litigation does not entitle anyone to *be* in litigation." *Caudle*, 230 F.3d at 921.

Actions by several MCOs in this litigation further confirm the need to exclude MCOs and their self-funded subscribers from any certified class. For example, Blue Cross and First Health each took the extraordinary step of preemptively opting out of any class that may be certified. (Ex. 2 at ¶ 5; Ex. 3).[13] Plaintiffs' insistence on attempting to represent entities that want nothing to do with them or this litigation shows the inadequacy of their representation. It also shows that

[13] The Seventh Circuit suggested that Blue Cross might reconsider, *Messner*, 669 F.3d at 824 n.13, but Blue Cross has not done so. Notably, because Blue Cross has appeared in this action (Dkt. No. 183), its counsel would have received notice of the Seventh Circuit decision by ECF when that decision was entered on this Court's docket (Dkt. No. 461).

these large putative class members are interested in "individually controlling" their own claims, Fed. R. Civ. P. 23(b)(3)(A), such that a class action is not superior.

This interest was also on full display at the hearing on the arbitration motions. After ENH filed its protective motion to compel arbitration and Plaintiffs moved for a finding of waiver, three MCOs appeared in court to ask for denial of *both* motions. As their counsel explained:

> [R]ight now no class has been certified. My clients, none of the other MCOs, are actual parties to this case.… Suddenly our rights under our contract are being litigated when we are not parties to the litigation.…
>
> The concern I have with plaintiffs' motion, that my clients have with plaintiffs' motion, is that … the first thing they ask is for this Court to declare that none of the claims asserted, not only by the plaintiffs but by the purported class members, are subject to arbitration. I don't know that my clients who, again, are not parties to this case want to take that position … or that the other MCOs, quite frankly, want to take that position.

(6/11/09 Tr. 11-12, Ex. 11). This disconnect between the MCOs and Plaintiffs over arbitration demonstrates that the MCOs have no interest in ceding control of any claims, and that (as discussed below at 28-29) the MCOs have such distinct rights and interests that Plaintiffs' attempt to represent them is utterly inadequate.

Plaintiffs cannot avoid this problem. Even if their waiver argument had any merit (and it does not), waiver is an affirmative defense that each MCO should be allowed to raise—or not—*as it chooses*. That is, giving up bargained-for procedural and forum rights is a decision that can only be made by each MCO for itself—*not* by Plaintiffs and their counsel. The same is true for the MCOs' self-funded subscribers. And, in any event, ENH has not waived its rights.

Finally, as Plaintiffs concede, a class action is generally superior only where "relatively small claims" "make it impractical for class members to bring individual suits and where potential plaintiffs may not be aware of their rights or be able to hire competent counsel." (Mem. 6 (citing *Amchem*)). In other words, "[a] class action is superior where potential damages may be

too insignificant to provide class members with incentive to pursue a claim individually." *Herkert v. MRC Receivables Corp.*, 254 F.R.D. 344, 352-53 (N.D. Ill. 2008) (citation omitted).

But *none of that describes the MCOs or their self-funded subscribers*. Quite the contrary, the parties agreed to individual arbitrations precisely because any damages would *not* be "insignificant," it would *not* be "impractical for members to bring individual suits," and there is *no risk* that the MCOs are not "aware of their rights" or unable "to hire competent counsel." Indeed, as alleged by Plaintiffs' expert, the purported claims of MCOs and their self-funded subscribers—which make up more than 90% of the reimbursements at issue—are huge, not small.[14] They are tens of millions of dollars each. Each MCO is a large to massive company. Each is fully capable of bringing its claims separately and representing itself fully. And each clearly contemplated doing so, as shown by the language of the contracts themselves—not to mention the fact that a number of these MCOs have been forced to appear in this litigation to protect their interests.

In a footnote, Plaintiffs cite several cases for the unremarkable proposition that class members do not need "to be destitute or to possess *de minimis* claims in order to participate in a class action." Mem. 7 n.7. But the point is not simply the sophistication of the MCOs or the size of their claims—though these are factors the Court should consider, per Plaintiffs' own statement of the law (Mem. 6) and numerous cases.[15] The point is that the MCOs and their subscribers

[14] This figure is based on previously produced revenue and claims data, ENHCA-011-000001-2, ENHCA-029-000001-3. *Also cf.* Ex. 10.

[15] *E.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1300 (7th Cir. 1995) (the existence of large individual claims undercuts the alleged superiority of the class action); *Puffer v. Allstate Ins. Co.,* 255 F.R.D. 450, 473 (N.D. Ill. 2009) ("When a class member has a sufficiently large stake in litigation to be able to afford to litigate on his own, this consideration weighs against allowing a suit to proceed as a class action."); *Birnberg v. Milk St. Residential Assocs. Ltd. P'ship*, No. 02-0978, 2003 WL 21267103, at *7 (N.D. Ill. May 29, 2003) (holding that class action was not superior method of adjudicating case where "existence of such large individual claims by sophisticated investors undercuts the alleged superiority of the class action"); *Liberty Mut. Ins. Co. v. Tribco Constr. Co.*, 185 F.R.D. 533, 541 (N.D. Ill. 1999) ("[C]ourts often find that class actions are not appropriate when the individual members are sophisticated and have large claims.").

have an interest in choosing *for themselves* whether to assert a claim against ENH and, to the extent any such claim is made, controlling its adjudication. For its part, ENH has the right to insist that any such claims are made and adjudicated consistent with contractual commitments that are both inconsistent with and superior to class action litigation.

D. The proposed class action is unmanageable because due process would require adjudicating the claims of the proposed class on an MCO-by-MCO, contract-by-contract, and market-by-market basis.

There is a third superiority problem: Adjudicating claims on behalf of the class (as Plaintiffs have proposed to define it) would require a series of burdensome mini-trials because impact and damages would need to be assessed *hundreds* of times—with distinct evidence and argument for inpatient and outpatient services, for each period of supposed monopolization, and for each MCO contract separately.

A class action is a superior method of proceeding in cases where efficiency can be achieved over other methods of adjudication—where the proofs required at trial are the same or similar for all class members such that a single, efficient trial may be had covering the principle factual issues upon which all class members rely and the defendant can defend. *E.g.*, *Puffer*, 255 F.R.D. at 471. But a class action is *not* superior where the proceeding would require numerous individualized analyses, as due process would demand here: "[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561. Indeed, due process guarantees defendants "an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see also Am. Nat'l Bank & Trust Co. v. City of Chi.*, 826 F.2d 1547, 1550 (7th Cir. 1987).

Thus in *Puffer*, for example, the court found superiority lacking where plaintiff sought to certify a class of Allstate employees alleging gender discrimination and retaliation. While the

question of whether Allstate's policies were discriminatory could be determined on a classwide basis, determining whether any individual suffered a discriminatory impact would have required individual trials into the facts of each employee's work history. 255 F.R.D. at 471. Reasoning that a class proceeding requiring individual jury trials to determine injury and damages "offers little in the way of efficiency," the court denied certification. *Id.* at 472.

So too here. Again, the relationship between ENH and each MCO is predicated on extensive, comprehensive, individual contracts produced by bilateral negotiations—negotiations that each MCO undertook from its own unique market position, based on its own concerns and subscriber base, and its own relationship with ENH. Thus, even if one MCO was harmed (together with that MCO's self-funded, individual, and other subscribers), other MCOs (and their subscribers) may not have been. For example, the FTC found that Blue Cross suffered no harm, even though (according to the FTC), other MCOs may have. According to the FTC, Blue Cross was protected by its own "substantial 'buy-side' market power." *See* FTC Op. at *52. Indeed, as the FTC explained, "[t]he potential for a merger in a bargaining market to have disparate effects on different customers" poses a "sticky and unsettled issue." *Id.* The FTC could avoid this issue, because its burden was merely to show that the merger "*may* be to substantially lessen competition, or *tend* to create a monopoly." 15 U.S.C. § 18 (emphasis added). But Plaintiffs must show *actual* monopoly, and that all class members suffered *actual* "injur[y]." 15 U.S.C. § 15(a). This is not just a question of damages; it goes to antitrust impact—an element of liability. *Id.*; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1054-55 (8th Cir. 2000). Given this mandatory, contract-specific showing, a class action cannot be superior to individual cases.

Further, inpatient and outpatient services are in separate markets, and therefore would need to be tried separately. Federal courts deciding hospital merger cases consistently limit the

relevant product market to a cluster of inpatient services, and the FTC has recognized the same distinction—including in its assessment of the ENH merger.[16] Even Plaintiffs' own expert testified to his "understanding … that there are potentially two product markets, hospital inpatient services and hospital-based outpatient services." (Dranove Dep. 55, Ex. 14).

Moreover, the contracts vary in their critical terms (like commencement and termination dates, methods of calculating reimbursements, and dispute resolution provisions). And ENH has multiple, separate contracts with each MCO for inpatient services, outpatient services, and different programs such as HMO and PPO plans. Additionally, since Plaintiffs propose a twelve-year period for impact and damages, even within a given service or program type, there are multiple applicable contracts for each MCO. The unique aspects of each contract would, of necessity, require separate proofs on a contract by contract basis. Moreover, any trial must account for the "remedy" imposed by the FTC in the middle of the class period, when it ordered ENH in 2008 to allow MCOs to renegotiate rates for Highland Park Hospital separately from ENH's other hospitals. *In re Evanston Nw. Healthcare*, 2008 WL 1991995, at *4-5 (FTC Apr. 28, 2008). With the FTC having provided a remedy designed to alleviate any merger-related market power, pre-remedy and post-remedy claims must be analyzed separately.

Although Plaintiffs' expert contends that he has a methodology to address impact on a class-wide basis, the story does not and cannot end there. In *Wal-Mart*, the Ninth Circuit adopted a "Trial by Formula" approach in its attempt to ensure the case "could be manageably tried as a class action." 131 S. Ct. at 2550, 2561. Under this approach, a special master would

[16] *E.g.*, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 (11th Cir. 1991); *United States v. Rockford Mem. Corp.*, 717 F. Supp. 1251, 1260-61 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 138-40 (E.D.N.Y. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1290-91 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997); *In re ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *14-15 (March 28, 2012); FTC Op. at *46-47.

have determined the validity and value of a randomly selected sample of individual claims, which the court could extrapolate to the remaining, untested class claims. *Id.* at 2550. But the Supreme Court struck down this "novel project" because it deprived the defendant of the opportunity to litigate its *defense* to each individual claim. *Id.* at 2561; *see also In re Fibreboard Corp.*, 893 F.2d 706, 710-12 (5th Cir. 1990). Here, even if Plaintiffs' expert's testimony proves admissible—and even if the Seventh Circuit correctly predicted that it will satisfy predominance—ENH still has the right to contest that evidence at trial and disprove Plaintiffs' theories. Of necessity, ENH can only do so by addressing each set of rates to show that it was competitive.

A trial of Plaintiffs' proposed class, therefore, would involve distinct evidence, proof, and defense on inpatient and outpatient services, as well as separate assessments for each MCO and each contract to analyze the MCO's negotiations with ENH, its market power in those negotiations, its unique rates and other contract terms, and any alleged damages that may have resulted. Any attempt to "manageably tr[y]" this case as a class action would require the same "novel[ty]" rejected by *Wal-Mart*, 131 S. Ct. at 2550, 2561, and would destroy ENH's due process rights to "present every available defense," *Lindsey*, 405 U.S. at 66 (citation omitted). And any procedure that preserved ENH's due process right would inevitably devolve into an endless series of mini-trials, thus destroying superiority.

II. For Lack Of Typicality And Adequacy, Certification Should Be Denied, Or The Class Definition Substantially Narrowed.

Certification also should be denied because Plaintiffs have atypical claims, and are inadequate to represent the class as proposed.

A. The Court should not certify a class without determining whether Plaintiffs have established adequacy and typicality.

Preliminarily, and contrary to Plaintiffs' unsupported assertion (Mem. 5), this Court should consider and decide all disputed class certification requirements, not merely superiority.

Because Judge Lefkow's order was vacated by the Seventh Circuit, it is not and cannot be law of the case. *See O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case."). Even if Judge Lefkow's decision had not been vacated, moreover, that decision (denial of class certification) turned solely on lack of predominance—therefore, her discussion of adequacy and typicality is *dicta* and not binding as law of the case. *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998); *Abbott Labs v. TorPharm, Inc*., No. 97-7515, 2003 WL 22462614, at *2 (N.D. Ill. Oct. 29, 2003). Further, prior rulings always may be revisited for "manifest error or a change in the law," *Minch v. City of Chi.*, 486 F.3d 294, 301 (7th Cir. 2007), and here, Judge Lefkow lacked the benefit of subsequent Seventh Circuit authority. *See infra* at 29-30. In short, Plaintiffs' attempt to declare victory on these Rule 23 requirements is premature.

B. Plaintiffs may not represent the MCOs.

That is particularly true as to Plaintiffs' effort to represent the MCOs. "[T]he class representative must, at a meaningful level of detail, stand in the same position as the absentee members of the class." *Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011). But here, Plaintiffs are three individuals and one self-funded healthcare fund who, *together* consumed only a handful of ENH services, at rates they did not personally negotiate. By contrast, MCOs are multi-million (or billion) dollar companies who pay for all manner of services at each of ENH's hospitals, year in and year out, at rates that are set by bilateral negotiations with ENH and embodied in unique, complex, multi-year contracts. Plaintiffs are thus in a very different position than the MCOs.

For example, as the Court recently noted, the MCOs would need to be "hear[d] from" before motions to compel arbitration could be granted. (6/12/12 Tr. 10, Ex. 15). If any of Plain-

tiffs were an adequate MCO representative, that would not be necessary.[17] Indeed, it is difficult to imagine a clearer case of inadequacy than here. As a matter of due process, a named plaintiff "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent" is inadequate. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940); *see also Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 801 (1996). If the MCOs' interests cannot be protected by named Plaintiffs (and they can't), then there is only one solution: the MCOs need to be excluded.

Noting that named Plaintiffs were charged MCO-negotiated rates, Judge Lefkow reasoned that Plaintiffs could effectively establish impact on the MCOs by proving their claims. *See* 268 F.R.D. at 61-62. This, however, neglects the arbitration problem just noted. It also neglects that each MCO purchased *thousands* of services from ENH, and most purchased services under more than one contract during the class period. *Compare Deiter v. Microsoft Corp.*, 436 F.3d 461, 467-68 (4th Cir. 2006) (finding atypicality where plaintiffs purchased one product at a retail rate, while group of putative class members purchased multiple products through negotiated deals embodied in unique contracts).

C. The Court should not certify a class for additional reasons set forth in ENH's first opposition.

Finally, the class should not be certified for additional reasons stated in our first opposition and incorrectly rejected by Judge Lefkow. In particular, there are irreconcilable conflicts of interest within the proposed class (Dkt. No. 284 at 28-31; *contra* 268 F.R.D. at 63-65), and Plaintiffs' claims are not typical of the broad and varied class they propose to represent (Dkt. No. 284 at 37-40; *contra* 268 F.R.D. at 61-63). *See also Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824

[17] Although, as discussed above, Painters Fund is subject to the Blue Cross arbitration clause by agency and estoppel, it did not negotiate that provision, and it has no right or ability to demand (or thwart) enforcement of that provision with respect to Blue Cross (much less any other MCO).

(7th Cir. 2011) (intervening Seventh Circuit authority explaining "the usual practical significance of lack of typicality … is that it undermines the adequacy of the named plaintiff as a representative of the entire class").

In addition, Painters Fund may not represent the class because it must overcome the fact that Blue Cross (the MCO that negotiated the rates paid by Painters Fund) has taken the position that it suffered no harm from the merger—and without Painters Fund, the class has no representative for purchasers of inpatient services because the other three Plaintiffs received outpatient services only. (Dkt. No. 284 at 26-27). The sole reason given by Judge Lefkow for rejecting this point is that it remained to be determined "whether BCBSI and, by association, Painters Fund suffered injury." 268 F.R.D. at 63. In an intervening decision, however, the Seventh Circuit underscored that "*even an arguable defense* … may … bring into question the adequacy of the named plaintiff's representation." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) (emphasis added) (citation omitted). That is the case here, and that too requires denial of Plaintiffs' motion.

CONCLUSION

For these reasons, the class cannot be certified as proposed. Plaintiffs' renewed motion for class certification should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David E. Dahlquist, an attorney, hereby certify that I caused a copy of the foregoing document to be served by electronic means on all Electronic Filing Users of record, this 12th day of July 2012, and that all parties required to be served have been served.

/s/ David E. Dahlquist