UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE NORTHSHORE UNIVERSITY HEALTHSYSTEM ANTITRUST LITIGATION	)	No. 7 C 4446
	)	Judge Edmond E. Chang

ORDER

This is a long-running class action under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, and Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18.1. R. 224, Am. Consolidated Class Action Compl.[1] After extensive discovery and sharpening of the parties' litigation positions, the Court decided that the named Plaintiffs were no longer adequate to represent the class. R. 989. Plaintiffs' counsel were given time to propose new representatives, *id.*, which they did, R. 1004. After additional discovery concerning these persons, David Freedman is the sole remaining potential representative. This Order addresses (1) the prior Plaintiffs' motion to reconsider the order deeming them inadequate as representatives, R. 996, Pls.' Mot. Reconsider; and (2) Defendant NorthShore University HealthSystem's more recent motion for summary judgment against Freedman and to decertify the class because Freedman is an inadequate representative, R. 1021, Def.'s Mot. Decert./SJ. As explained below, both motions are denied, so the next step is for the Court to consider the other, non-

[1]The Court has subject matter jurisdiction under 28 U.S.C. § 1331. Citations to the record are noted as "R." followed by the docket number and the page or paragraph number.

adequacy decertification arguments presented by NorthShore, R. 896, as well as the parties' dueling cross-motions for summary judgment, R. 898, 911.

I. Background

This Order assumes familiarity with the facts set out in greater detail in *In re Evanston Nw. Corp. Antitrust Litig.*, 2013 WL 6490152 (N.D. Ill. Dec. 10, 2013), *Messner v. NorthShore Univ. HealthSys.*, 669 F.3d 802 (7th Cir. 2012), and *In re Evanston Nw. Healthcare Corp. Antitrust Litig.*, 268 F.R.D. 56 (N.D. Ill. 2010). With that foundation in place, fast forward to David Freedman and his dealings with NorthShore.[2] In April 2013, Freedman was hit by a car as he was walking. R. 1032, DSSOF ¶ 1.[3] After the accident, he received inpatient healthcare services at NorthShore. *Id.* From those inpatient services, Freedman incurred hospital charges totaling $28,854.59. R. 1025 (sealed), DSSOF ¶ 2. Because Aetna, which was Freedman's insurance provider, R. 1032, DSSOF ¶ 3, had a contract with NorthShore, the bill was reduced to $12,748.91. R. 1037 (sealed), Pls.' Resp. DSSOF ¶ 4. From that amount, Aetna paid $9,332.74, leaving the rest for Freedman to cover.[4]

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[2]In deciding the decertification motion, the Court engages in fact-finding. But in deciding the motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, which is Freedman. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[3]Citations to the parties' Local Rule 56.1 Statements of Fact are "DSSOF" for NorthShore's Supplemental Statement of Facts [R. 1025 (sealed); R. 1032]; "PSSOF" for Plaintiffs' Supplemental Statement of Additional Facts [R. 1036 (sealed); R. 1047]; "Pls.' Resp. DSSOF" for Plaintiffs' Response to NorthShore's Supplemental Statement of Facts [R. 1037 (sealed); R. 1048]; and "Def.'s Resp. PSSOF" for NorthShore's Response to Plaintiffs' Supplemental Statement of Additional Facts [R. 1052 (sealed); R. 1060]. "The notation "(sealed)" is used to indicate that the document is not public per court order.

[4]The parties dispute the amount of Freedman's final bill and the amount that Aetna paid. R. 1025 (sealed), DSSOF ¶ 4; R. 1037 (sealed), Pls.' Resp. DSSOF ¶ 4. The Court agrees with Plaintiff's characterization of both amounts based on the exhibits Plaintiffs relied on,

Id. According to Plaintiffs' expert, Dr. Russell Lamb, NorthShore overcharged Aetna members by 15% for inpatient services. *Id.* ¶ 13.

Then, in July 2013, Freedman received a bill from NorthShore—under a single account number—that included charges for both Freedman's and his daughter's healthcare services. R. 1047, PSSOF ¶ 1. The bill included a charge for $115.58 for services provided to his daughter.[5] R. 1037 (sealed), Pls.' Resp. DSSOF ¶ 14. Freedman sent a check in the amount of $115.58 to NorthShore in response to this bill. R. 1036 (sealed), PSSOF ¶ 2. Freedman did not specify whether the check should be credited towards his personal hospital charges or his daughter's. R. 1060, Def.'s Resp. PSSOF ¶3. When NorthShore received the check, it credited the payment to *Freedman's* inpatient hospital charges, *id.* ¶ 3, reducing the amount he owed for inpatient services to $3,300.59, R. 1037 (sealed), Pls.' Resp. DSSOF ¶ 4. This attribution occurred as a matter of course, because NorthShore automatically credits payments to the oldest outstanding account if a payment does not specify which account it should be credited to, and the charges relating personally to Freedman were the oldest ones. R. 1060, Def.'s Resp. PSSOF ¶ 3.

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namely, R. 1027-7 (sealed), Def.'s Exh. 167, R. 1040-1 (sealed), Pls.' Exh. 77, and R. 1027-4 (sealed), Def.'s Exh. 164.

[5]NorthShore states that the bill for $115.58 was for outpatient services Freedman's daughter received. R. 1025 (sealed), DSSOF ¶ 14. Freedman denies that the bill was for "outpatient services," pointing out that the exhibit to which NorthShore cites, Exh. 170, does not characterize the healthcare services charged as outpatient services. R. 1037 (sealed), Pls.' Resp. DSSOF ¶ 14. The Court notes that both the sealed and public versions of Exhibit 170 are redacted. *See* R. 1027-10; R. 1032-9. The Court cannot at this time determine whether the bill was for inpatient or outpatient services.

Freedman did not pay the remaining bill right away. Instead, he waited until after he secured a settlement with the driver who caused the accident, so that he could use the settlement proceeds to pay the remainder of his charges. R. 1047, PSSOF ¶ 4. In the meantime, NorthShore, through its lien servicer, Pinnacle Management Systems (Pinnacle), imposed a $6,836.75 lien against Freedman for both his inpatient and outpatient care. R. 1025 (sealed), DSSOF ¶ 5. To resolve his claims related to the accident, including the NorthShore lien, Freedman hired attorney Dennis DeCaro of the law firm Kupets & DeCaro. R. 1032, DSSOF ¶ 6. DeCaro worked on a contingency basis and earned a percentage of Freedman's settlement, which included DeCaro's direct expenses in representing Freedman. R. 1032, DSSOF ¶ 11.

When Freedman finally reached a settlement with the driver, DeCaro deposited the settlement funds into an Illinois IOLTA account. R. 1047, PSSOF ¶ 6. DeCaro then negotiated with NorthShore on the unpaid charges, proposing a [redacted]% discount on the $6,836.75 lien. R. 1025 (sealed), DSSOF ¶ 7. Northshore accepted the proposal. R. 1036 (sealed), PSSOF ¶ 5-6. It had the effect of reducing Freedman's *inpatient* care bill by [redacted]%, or $[redacted], which brought down the total inpatient charges to $[redacted]. *Id.* In June 2014, Freedman's attorneys wrote NorthShore a check for $[redacted] from Freedman's settlement proceeds. *Id.* ¶ 6. From this payment, $[redacted] was applied to Freedman's remaining inpatient services bill. *Id.* ¶ 6.

II. Legal Standard

Plaintiffs' motion for reconsideration is governed by Federal Rule of Civil Procedure 54(b). Rule 54(b) states that a court may reconsider an interlocutory ruling "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed R. Civ. P. 54(b). Motions for reconsideration serve the narrow purpose of correcting manifest errors of law or fact or presenting newly discovered evidence. *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987). Thus, a motion to reconsider is proper when "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). But a motion for reconsideration "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000); *see also Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) ("[R]econsideration is not for rehashing previously rejected arguments.").

With regard to Northshore's motion for decertification, there is no difference between evaluating a class-certification motion and a motion asking to decertify an already-certified class. Courts should typically decide the question of class certification before evaluating the merits of a given action. *See Weismueller v.*

Kosobucki, 513 F.3d 784, 786-87 (7th Cir. 2008). Ultimately, "Plaintiffs bear the burden of producing a record demonstrating the continued propriety of maintaining the class action." *Harper v. Yale Int'l Ins. Agency, Inc.*, 2004 WL 1080193, at *2 (N.D. Ill. May 12, 2004); *see also Binion v. Metro. Pier and Exposition Auth.*, 163 F.R.D. 517, 520 (N.D. Ill. 1995) (*citing Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("[A] court remains free to modify or vacate a certification order if it should prove necessary"). A plaintiff obtains (or maintains) class certification by satisfying each requirement of Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation—as well as one subsection of Rule 23(b). *See Harper v. Sheriff of Cook Cty.*, 581 F.3d 511, 513 (7th Cir. 2009); *see also Oshana v. Coca–Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). Plaintiff bears the burden of showing (based on a preponderance of the evidence) that each requirement is satisfied. *See Retired Chicago Police Ass'n v. City of Chi.*, 7 F.3d 584, 596 (7th Cir. 1993). "Failure to meet any of the Rule's requirements precludes class certification." *Harper*, 581 F.3d at 513; *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 916 (7th Cir. 2011) (quoting *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-51 (2011)) ("A class may be certified only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.") (cleaned up). [6]

[6]This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, Cleaning Up Quotations, 18 Journal of Appellate Practice and Process 143 (2017).

The Court "must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations overlap the merits of the case." *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010); *see also Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) ("a court may take a peek at the merits before certifying a class," but that peek is "limited to those aspects of the merits that affect the decisions essential under Rule 23").

NorthShore also seeks summary judgment against Freedman. R. 1033, Def.'s Br. at 8-12. In deciding a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating summary judgment motions, courts must "view the facts and draw reasonable inferences in the light most favorable to the" non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (cleaned up). The Court "may not weigh conflicting evidence or make credibility determinations," *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011) (cleaned up), and must consider only evidence that can "be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the

initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Village of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

III. Analysis

A. Motion to Reconsider

Plaintiffs move to reconsider the prior representative-inadequacy order, Pls.' Mot. Reconsider, which held that Painters Fund is an indirect purchaser of inpatient services, and therefore an inadequate class representative, R. 989. Plaintiffs contend that the decision contained both factual and legal errors, but ultimately the motion largely repeats the prior arguments. *Compare* Pls.' Mot. Reconsider, *with* R. 961, Pls.' SJ Br. at 41-47. The motion is denied.

The crux of Plaintiffs' argument for reconsideration is not new. They argue that BCBS acted as Painters Fund's agent, so Painters Fund was the direct purchaser, not BCBS. Pls.' Mot. Reconsider at 1. In support of this argument, Plaintiffs offers two new pieces of evidence: (1) Painters Fund participants' insurance cards stating that BCBS is an administrator that takes on no financial responsibility; and (2) NorthShore's own patient bills, which state that patients are responsible for payment. Pls.' Mot. Reconsider at 3-4. Even though Plaintiffs were aware of these facts before the prior decision, they argue that these facts were not submitted earlier

"in light of NorthShore's early concession that BCBS was Painters Fund's agent." *Id.* at 3 n.1, 4 n.2.

There are three problems with this argument. First, a motion for reconsideration "does not allow a party to introduce new evidence … that could and should have been presented to the district court prior to the judgment." *Bordelon*, 233 F.3d at 529. Plaintiffs contend that NorthShore had conceded that BCBS was Painters Fund's "agent," but that position was taken by NorthShore in a motion to compel arbitration—which NorthShore lost.[7] Second, Plaintiffs deploy this evidence in service of the same argument that they already made: that BCBS acted at the direction of Painters Fund. *Compare* Pls.' Mot. Reconsider at 3-6, *with* Pls.' SJ Br. at 42-43. But "reconsideration is not for rehashing previously rejected arguments," and that is what Plaintiffs are trying to do. *Caisse Nationale de Credit Agricole*, 90 F.3d at 1270.

Third, and most importantly, this newly offered evidence does not change the fact that BCBS, not Painters Fund, directly paid Northshore. As the prior decision explained, what matters for whether a purchaser is a direct or indirect one, for purposes of antitrust law, is who made the direct payment for the service, *see* R. 989 at 12-13 (citing *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995)), as well as which entity negotiated and maintained the contract

[7]NorthShore does not dispute that it previously asserted an agency relationship, at least for purposes of its motion to compel arbitration, but argues that this Court denied that motion, and that it no longer takes this position. Def.'s Resp. at 5. The Court indeed denied NorthShore's motion, but it did not address the alleged agency relationship. *See* R. 812, Order. In any event, as explained below, Plaintiffs' argument on this point does not warrant vacatur of the prior order.

with the healthcare provider, R. 989 at 17. The bottom line here is that BCBS, not Painters Fund, paid money directly to NorthShore, and BCBS maintained and negotiated the contracts with Northshore. *Id.* Plaintiffs concede that Painters Fund *reimburses* BCBS, Pls.' Mot. Reconsider at 10, and do not dispute that BCBS negotiated and maintained the contract with Northshore. They cannot now use a motion for reconsideration as a second go-round on the same issues. *See Caisse Nationale de Credit Agricole*, 90 F.3d at 1270; *Bordelon*, 233 F.3d at 529.[8] With Plaintiffs' reconsideration motion denied, the Court turns to NorthShore's arguments specifically targeting Freedman.

B. Motion to Decertify and Supplemental Motion for Summary Judgment

NorthShore argues that the class must be decertified because Freedman is not an adequate representative, nor does he have sufficient typicality in relation to the rest of the class. With the rest of the class presumably out of the way, NorthShore then seeks summary judgment against Freedman for three reasons: (1) he lacks Article III standing; (2) he is an indirect purchaser; and (3) his claims are barred due to his insurer's (Aetna) failure to mitigate. The main issue underlying both motions is whether Freedman was injured, and thus whether he has "standing." For the reasons discussed below, both motions are denied.

[8]Plaintiffs also argue that the prior order contained a factual misunderstanding about the MCO-level data that Dr. David Dranove (their previous expert) was able to use. Pls.' Mot. Reconsider at 11-12. The Court understands that Dr. Dranove did not end-up using all of the MCO data, and in any event, that statement had no bearing on the inadequacy finding.

1. Article III Standing

Article III standing is a threshold issue for any plaintiff, including proposed class representatives. *See Payton v. Cty. of Kane*, 308 F.3d 673, 682 (7th Cir.2002) (quoting *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) ("[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs.")); *see also Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 726 (7th Cir. 2016) ("[B]ecause we conclude that [named plaintiff] lacks standing, we do not reach the certification question."); *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 750 (7th Cir. 2011) ("Before addressing the question of certification, we must consider ... [whether] plaintiffs lack standing to sue."). So first the Court addresses whether Freedman satisfies Article III standing.

NorthShore argues that Freedman lacks Article III standing because he does not have "standing" to pursue the antitrust claim.[9] R. 1033, Def.'s Br. at 9-10. The

[9]The underlying concept of Northshore's argument has often been labeled "antitrust standing" by courts in this circuit. But that terminology is somewhat of a misnomer. *See Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc.*, 902 F.3d 735, 743 (7th Cir. 2018) ("In the antitrust context, the proximate causation requirement in the past has been termed "antitrust standing," even though it has nothing to do with a plaintiff's standing to sue under Article III of the U.S. Constitution."); *see also U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003) ("Courts sometimes label this "antitrust standing," despite the potential for confusion with Article III standing."). "Antitrust standing" is not actually a "standing" inquiry in the traditional sense, but instead an inquiry of the merits. It answers the question of who is authorized to bring an action under Section 4 of the Clayton Act. *See infra* n.8. This question presents a merits and not a jurisdictional issue. *See Supreme Auto Transp.*, 902 F.3d at 743; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-128 (2014) (holding that the question of who is authorized to bring an action under a statute is one of statutory interpretation; it does not implicate Article III standing or jurisdiction).

problem with this argument is that it mixes-up Article III standing with whether a plaintiff has suffered an injury under the antitrust laws. *See Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc.*, 902 F.3d 735, 743 (7th Cir. 2018) ("In the antitrust context, the proximate causation requirement in the past has been termed 'antitrust standing,' even though it has nothing to do with a plaintiff's standing to sue under Article III."); *see also Foster v. Ctr. Twp. of LaPorte Cty.*, 798 F.2d 237, 241 (7th Cir. 1986) ("Analysis of standing under Article III focuses on the party bringing a claim, not on the claim itself.").

All that is required to demonstrate Article III standing is "injury in fact plus redressability." *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 714 (7th Cir. 2006); *see also Church of Our Lord & Savior Jesus Christ v. City of Markham, Ill.*, 913 F.3d 670, 680 (7th Cir. 2019) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). In contrast, whether a plaintiff can maintain an antirust claim requires more than that. *See supra* Section B.2 at 14. So even if Freedman might not prevail on the *merits* of the antitrust claim, that would not undermine Article III standing. *See Arreola v. Godinez*, 546 F.3d 788, 795 (7th Cir. 2008) ("[T]he law does not preclude a plaintiff from filing suit simply because some forms of relief may be unavailable, or indeed because in the end he cannot prove that he is entitled to any relief.").

The Seventh Circuit has advised that the term "standing" should be confined to the Article III inquiry and remain "separate from the plaintiff's entitlement to relief or her ability to satisfy the Rule 23 criteria." *Arreola v. Godinez*, 546 F.3d 788, 795 (7th Cir. 2008) (cleaned up). Therefore, although Northshore uses the term to mean both constitutional standing and antitrust cause of action, to avoid confusion, the Court will restrict its use to only the Article III inquiry.

For Article III standing, Freedman alleges financial injury from NorthShore's alleged overcharge for medical services. That is sufficient for purposes of Article III standing. *See Milwaukee Police Ass'n v. Flynn*, 863 F.3d 636, 639 (7th Cir. 2017) ("[C]oncrete financial injuries ... are prototypical of injuries for the purposes of Article III standing."). That injury is traceable to Northshore's alleged antitrust violation; and it can be redressed by an award of monetary damages. Article III standing is secure.

2. Adequacy

Before deciding the remainder of the summary judgment motion targeting Freedman, the Court addresses NorthShore's Rule 23 arguments on adequacy and typicality. R. 1033, Def.'s Br. at 4-8. Both of NorthShore's arguments, but particularly the argument on adequacy, focus on Freedman's alleged lack of antitrust injury. On adequacy, NorthShore argues that Freedman does not have "standing to represent the class"[10] because the [redacted]% discount, negotiated between Freedman's lawyer and NorthShore, rids him of any injury. *Id*. at 4-5. And by the same token, in NorthShore's view, the [redacted]% discount means that his claims are not typical of the class's because it subjects him to the unique defense of lack of injury. *Id*. at 5-8.

[10]Although many courts have previously used the terminology "standing to bring a class action," the Seventh Circuit has recognized that this idea "conflates the standing inquiry with the inquiry under Rule 23 about the suitability of a plaintiff to serve as a class action representative." *Arreola*, 546 F.3d at 795; *cf*. *Harriston*, 992 F.2d at 703 (quoting E*ast Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, (1977)) ("To have standing to sue as a class representative, the plaintiff must be part of the class and possess the same interest and suffer the same injury' as the class members.") (cleaned up). As explained by the Seventh Circuit, it is best to confine the term "standing" to the Article III inquiry. *Arreola*, 546 F.3d at 795.

It is true that Freedman must allege an injury personal to him in order adequately represent the class. *See Gratz v. Bollinger*, 539 U.S. 244, 289 (2003) ("[N]amed plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."). Rule 23 requires that the class representative be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). That means the named plaintiff must possess "the same interest and suffer the same injury" as the class members. *Conrad v. Boiron, Inc.*, 869 F.3d 536, 539 (7th Cir. 2017) (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997)). Here, the "injury" alleged by the class is an antitrust injury. *See* Am. Consolidated Class Action Compl. ¶¶2-3. So to determine whether Freedman "suffered the same injury" as the class requires the Court to determine whether he has suffered the same *antitrust* injury as the class.

"Antitrust injury" is one of two related elements that a plaintiff must establish to maintain an antitrust cause of action. To maintain an antitrust claim, a plaintiff must (1) have suffered an antitrust injury; and (2) qualify as a proper plaintiff to maintain an antitrust action with respect to the relevant markets, often referred to as "antitrust standing."[11] *See Kochert*, 463 F.3d at 715–17. To satisfy the first

[11]The second requirement "examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction." *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir.1993); *see also Kochert*, 463 F.3d at 718. It depends on factors such as: (1) the causal connection between the antitrust violation and harm to plaintiff; (2) improper motive; (3) whether the injury is of the type Congress sought to redress; (4) speculative nature of damages; and (5) the risk of duplicative recoveries and complex

requirement, a plaintiff must demonstrate that the "claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation." *Id.* at 716; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The Seventh Circuit has recognized that "[t]he principal purpose of the antitrust laws is to prevent overcharges to consumers." *Kochert*, 463 F.3d at 715 (quoting *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 368 (7th Cir.1987)); *see also Tri–Gen Inc.*, 433 F.3d at 1031 (7th Cir. 2006) (noting that a consumer can plead an antitrust injury by sufficiently alleging that "its loss comes from acts that reduce output or raise prices to consumers.").

Even though Freedman's alleged injuries are the same as the rest of the class—an overcharge to his inpatient services—whether he actually suffered a financial loss from the alleged overcharge does require some examination, because the parties dispute whether the [redacted]% negotiated discount overrides the alleged 15% overcharge. NorthShore argues that Freedman was not injured despite the alleged 15% overcharge because Freedman received an additional [redacted]% discount due to the [redacted]% negotiated discount. R. 1023 (sealed), Def.'s Br. at 4. In response, Freedman offers two rebuttals: (1) the payment for $115.58 was not subject to the [redacted]% discount because it was made before the discount was negotiated, and (2) although the second payment for $[redacted] contained the [redacted]% discount, the negotiations for that discount

damages apportionment. *Kochert*, 463 F.3d at 718-19. NorthShore does not dispute this requirement, so the Court need not address it.

started from an inflated price and did not remove the overcharge. R. 1038 (sealed), Pls.' Resp. at 4. The Court looks at each payment in turn.[12]

On the $115.58 payment, NorthShore concedes that it was credited towards Freedman's inpatient charges. R. 1050 (sealed), Def.'s Reply. at 4-5. Yet NorthShore argues that the payment was not actually for inpatient services because Freedman *intended* to pay his daughter's outpatient care with the $115.58 check, and the only reason the charge was credited to Freedman's inpatient services was because of NorthShore's accounting practice. *Id*. But the fact of the matter is that the payment was *actually* credited against inpatient services before the [redacted]% discount was ever negotiated, let alone applied. *See* R. 1060, Def.'s Resp. PSSOF ¶ 3. This is not a situation where an "accounting" practice is merely ethereal or just for the books. Freedman actually paid for inpatient services with the $115.58. At the very least, then, this payment was subject to the alleged 15% overcharge.

Even if the $115.58 payment was subject to the alleged 15% overcharge, NorthShore argues that the overcharge was "dwarfed" by the [redacted]% discount applied to Freedman's inpatient charges. R. 1050 (sealed), Def.'s Reply at 4. In other words, NorthShore argues that even if Freedman paid a 15% overcharge incorporated into the $115.58 payment (that is, $17.34 more), ultimately he saved $[redacted] ([redacted]% of $[redacted]) due to the discount total [redacted]% negotiated discount. *See id*. at 4 n.3. In

[12]Even though courts "should not turn the class certification proceedings into a dress rehearsal for the trial on the merits," where, as here, discovery has already taken place and fact-finding is necessary for the Rule 23 determination, the Court is authorized to make (and indeed must make) factual findings as needed for Rule 23 purposes. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

response, Freedman argues that he would have paid less than $[redacted] if there had not been an initial 15% overcharge. In Freedman's view, the negotiations over the discount were based on prices containing the overcharge, so the overcharge remains in the negotiated price. R. 1046, Pls.' Resp. at 4. NorthShore replies that this argument might make sense for Section 1 price-fixing cases, but does not apply to Section 2 cases, which require that the antitrust misconduct drove "the price … above competitive levels, not just higher." R. 1059, Def.'s Reply at 2.

NorthShore's argument misses the mark: with regard to an antitrust injury, a plaintiff need only show that the claimed injury is of the type that the antitrust laws were intended to prevent. *See Kochert*, 463 F.3d at 716. The fact that Freedman received a negotiated discount does not necessarily override the overcharge—which is the antitrust injury at issue. *See Kleen Prod. LLC v. Int'l Paper Co.*, 831 F.3d 919, 929 (7th Cir. 2016) ("Even for transactions where prices were negotiated individually or a longer term contract existed, the district court found, reasonably, that the starting point for those negotiations would be higher if the market price for the product was artificially inflated.") (cleaned up). At this stage of the case (that is, before trial, if the cross-motions for summary judgment are denied), for purposes of Rule 23 adequacy, the Court finds that—if there is antitrust liability for a 15% overcharge—then Freedman suffered an antitrust injury. The negotiated discount was a percentage of the amount due, so the payment from Freedman would have been even lower had the overcharge not been incorporated into the amount due in the first

place.[13] So Freedman did suffer an antitrust injury (if there is antitrust liability), and he otherwise will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

3. Typicality

The remaining Rule 23 question is whether Freedman satisfies the typicality requirement. Federal Rule of Civil Procedure 23(a) requires, among other things, "that the claims or defenses of the representative party be typical of the claims or defenses of the class." *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009) (cleaned up). "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." *Rosairo v. Livaditis*, 936 F.2d 1013, 1018 (7th Cir. 1992) (cleaned up). Even in the face of factual distinctions, it is still possible that typicality is satisfied for other reasons, such as the typicality of the legal theory and how the legal theory is impacted by (or not impacted by) the factual differences. *See De La Fuente*, 713 F.2d at 232 ("The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members."). Here, Freedman's claims are based on the same legal theory as the rest of the class: NorthShore allegedly charged anti-competitive prices for inpatient healthcare services.

For its part, NorthShore argues that legal theory alone is insufficient here because Freedman received a negotiated discount, and has not identified any other

[13] There is no need to rely on Plaintiff's submission of Dr. Lamb's Supplemental report, R. 1046, Pls.' Resp. at 4, for this common-sense point.

class member who got a discount. R. 1033, Def.'s Br. at 6. NorthShore relies primarily on *Deiter v. Microsoft Corp.*, 436 F.3d 461 (4th Cir. 2006), to support this argument. *Id* at 6. In *Deiter*, the Fourth Circuit upheld a district court's decision to confine the scope of the class on typicality grounds because the named plaintiffs had not purchased operating-system licenses in bulk through negotiations, nor had they purchased software applications through negotiated three-year agreements. *Id*. at 465. NorthShore points to the fact that the excluded plaintiffs negotiated their prices, like they argue Freedman did here. But *Deiter* did not hinge on that point. *Deiter*, *Id*. at 467. Instead, the Fourth Circuit held that the key factual dissimilarity was that the products were sold in two different competitive markets. *Id.* at 468. Because the relevant market is an element of an antitrust claim, *Dieter* held that in order to prove that Microsoft overcharged the excluded class members would require the named plaintiffs to present "new and different proof" about their negotiations in different market contexts. *Id*. The Fourth Circuit noted that "the[] differences [between the two sets of plaintiffs] *may* [have] be[en] even greater" because of the excluded plaintiffs' negotiated deals, but the key difference remained the different markets. *Id*. (emphasis added). That is not a problem for Freedman, who complains about NorthShore's prices for inpatient hospital services—charges he incurred in exactly the same market as the rest of the class. The fact that he *later* negotiated those charges down does not change the market he was in.

NorthShore's final point on typicality is that the negotiated discount gives it a unique defense against Freedman. But the presence of a unique defense alone does

not undermine typicality unless it will consume the merits of the case. *See Koos v. First Nat'l Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974) ("Rule 23(a)(3) mandates the typicality of the named plaintiffs' claims—not defenses.... It is only when a unique defense will consume the merits of a case that a class should not be certified.") (cleaned up); *see, e.g.*, *Sadowski v. Med1 Online, LLC*, 2008 WL 2224892, at *4 (N.D. Ill. May 27, 2008); *In re Synthroid Mktg. Litig.*, 188 F.R.D. 287, 291 (N.D. Ill. 1999). There is little reason to believe that the discount issue will consume the litigation when very many other merits issues remain to be decided, all for which Freedman stands as a typical plaintiff.[14] The motion to decertify targeting Freedman specifically is denied.

4. Summary Judgment as to Freedman

Moving back to the summary judgment motion specifically targeting Freedman, beyond the Article III argument, NorthShore offers two others. First, it argues that Freedman's car-accident attorneys, not Freedman, are the direct purchasers because they purportedly "negotiated and paid" for Freedman's inpatient services. R. 1033, Def.'s Br. at 9-10. But all that attorney DeCaro did was write the check. R. 1036 (sealed), PSSOF ¶ 6. The money itself came from Freedman's settlement money. That money was being held in the IOLTA account, which was

[14]The cases that NorthShore cites are distinguishable. In *S. Ferry LP No. 2 v. Killinger*, there were complex and serious doubts about the validity of assignments of the asserted claim to a named plaintiff. 271 F.R.D 653, 657-59 (W.D. Wash. 2011). In the second cited case, the named plaintiffs outright could not prove a required element of the claim. *Ctr. City Periodontists, P.C. v. Dentsply Int'l, Inc.*, 321 F.R.D. 193, 207 (E.D. Pa. 2017) ("Because awareness of a seller's affirmations is a basic element of a breach of warranty claim … Plaintiffs who were not aware of the [defendant's] relevant content cannot be typical representatives of a class that was allegedly misled.").

comprised of *client* funds. *Id*. NorthShore also misunderstands Freedman's deposition testimony to argue that Freedman "reimbursed" his attorneys for the payment to NorthShore. R. 1059, Def.'s Reply at 8. It is true that Freedman testified that he "reimbursed [DeCaro] for whatever costs [DeCaro] incurred representing him." R. 1032-4, Exh. 165, Freedman Dep. Tr. 64:4-6. But Freedman did not testify that he reimbursed DeCaro specifically for the inpatient-services payment. Indeed, when asked to clarify the "reimbursement," Freedman testified that the reimbursements were for payments that the law firm made "directly." *Id*. at 64:11-12. Viewing Freedman's testimony in the light most favorable to him, "directly" means payments that DeCaro made out of the firm's own account. But the NorthShore payments were *not* made out of the law firm's pocket; they were from Freedman's settlement money. R. 1036 (sealed), PSSOF ¶ 6. So Freedman provided the *direct* payment from his own funds. (Unlike BCBS, DeCaro actually was a mere conduit of payment. *See* R. 989 at 17.)

NorthShore presents two final arguments. First, NorthShore argues that Freedman's $115.58 payment was for outpatient services, and therefore he never directly paid for inpatient services. R. 1023 (sealed), Def.'s Br. at 11. This argument was already discussed and rejected earlier in this Order. And, last, NorthShore argues that under the FTC's 2008 Final Order, Aetna could have and should have renegotiated the contract under which Freedman was provided services, and Aetna's failure to do so now binds Freedman. R. 1059, Def.'s Reply. at 11-12. But the FTC's 2008 Order only gave *MCOs* the right to renegotiate their contracts with NorthShore.

See R. 906, DSSOF ¶¶ 62-67. NorthShore presents no authority for the legal proposition that Aetna somehow waived or forfeited *Freedman*'s claims. The summary judgment motion against Freedman is denied.

IV. Conclusion

For the reasons set forth above, the Court denies the prior Plaintiffs' motion for reconsideration, and also denies NorthShore's motion for decertification and summary judgment specifically targeting Freedman. In a separate order under advisement, the Court will address the remaining issues in Northshore's renewed motion for decertification, R. 896, and renewed motion for summary judgment and *Daubert* motions, R. 898, as well as now-Freedman's cross-motion for summary judgment, R. 911. The status hearing of April 4, 2019, is reset to May 7, 2019, at 11 a.m.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: March 29, 2019