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

IN RE NORTHSHORE UNIVERSITY HEALTHSYSTEM ANTITRUST LITIGATION	)	No. 07-cv-4446
	)	Judge Edmond E. Chang

ORDER

Amit Berkowitz, Steven Messner, Henry Lahmeyer, and Painters District Council No. 30 Health & Welfare Fund brought this class action suit against Defendant NorthShore University HealthSystem (which used to be known as Evanston Northwestern Healthcare), alleging violations of 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.[1] The Court previously certified the class, but after extensive discovery, NorthShore now brings a motion to decertify the class, arguing (1) that Plaintiffs' altered methodology for showing class impact no longer satisfies the predominance standard of Federal Rule of Civil Procedure 23(b)(3) and (2) that there is no adequate representative for the class. R. 896; *see also* R. 897, Def. Decert. Br.[2] The first issue is a close call but the Court must hold off on answering it because on the second issue—whether there is an adequate representative—must be answered as a threshold matter, and Northshore is correct: right now, there is not. Rather than decertify the class, however, the Court will give the Plaintiffs some time to find

[1] The Court has subject matter jurisdiction under 28 U.S.C. § 1331.

[2] Citation to the docket is "R." followed by the entry number and, when necessary, the relevant page or paragraph number.

another representative, because this problem should be surmountable by Plaintiffs' counsel. The Court then will be in a position to issue a decision on the other pending motions (including NorthShore's argument that the predominance standard is no longer met).

I. Background

The Court assumes familiarity with the facts of this case, which can be found in greater detail in *In re Evanston Nw. Corp. Antitrust Litig.*, No. 07-CV-04446, 2013 WL 6490152 (N.D. Ill. Dec. 10, 2013), *Messner v. Northshore University HealthSystem*, 669 F.3d 802 (7th Cir. 2012), and in *In re Evanston Northwestern Healthcare Corp. Antitrust Litigation*, 268 F.R.D. 56 (N.D.Ill.2010). Plaintiffs brought this class action on behalf of all end-payors who purchased inpatient or outpatient healthcare services directly from NorthShore, alleging that NorthShore illegally monopolized the healthcare services market and used its resulting leverage to artificially inflate prices paid by Plaintiffs and the putative class. Am. Consolidated Class Action Compl. ¶¶ 1–3. Plaintiffs sought to certify the following class under Rule 23(b)(3):

> 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 NorthShore University Health[System] …, 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 ....

R. 240 at 1 (emphasis added). Plaintiffs were originally denied class certification by the previously assigned judge for failure to satisfy Rule 23(b)(3)'s predominance requirement. *In re Evanston Northwestern Healthcare Corp.*, 268 F.R.D. at 87. But on interlocutory appeal, the Seventh Circuit held that predominance was satisfied, vacating the district court's order and remanding for further proceedings. *Messner*, 669 F.3d at 816.

In the appeal, Plaintiffs argued that they could satisfy the predominance requirement by performing "difference-in-differences or DID analysis of the contracts between NorthShore and its insurers" to "show whether and to what extent NorthShore's post-merger price increases were the result of increased market power resulting from the merger." *Messner*, 669 F.3d at 818. Despite a few minor hiccups with Plaintiff's expert modifying some of the regressions that he thought he would need to perform to make his case, the Seventh Circuit held that the proposed methodology ultimately satisfied predominance on the issue of antitrust impact for certification under Rule 23(b)(3). The expert's "analyses all rely on common evidence—the contract setting out the non-uniform price increases—and a common methodology to show that impact." *Messner*, 669 F.3d at 819. On remand, Plaintiffs renewed their motion for class certification, R. 478, and it was granted by this Court. *In re Evanston Nw. Corp. Antitrust Litig.*, 2013 WL 6490152. Discovery commenced in earnest.

As discovery moved forward, Plaintiffs eventually changed gears on how they would prove antitrust impact. Their new expert, Dr. William Vogt, and his team at

Nathan Associates, could not use the MCO-level claim data in the price-impact analysis.[3] R. 901-2, Vogt Report ¶ 7, 10 n 1. The data sets had previously been used in the underlying FTC proceeding and by Plaintiffs' previous expert, Dr. David Dranove.[4] According to Vogt, however, despite he and his team expending enormous time and effort, there were "problems in each of these data sets [that] made their use unfeasible." DX 10 n. 1.[5]

Given this change in plans, Plaintiffs went back to the drawing board to come up with a new methodology that could employ common evidence and a common methodology to show antitrust impact. It turns out that Vogt was able to get one of the MCO-level claims data sets to work, namely, that of BCBS PPO. He thus offers difference-in-differences regressions related to that dataset, but from no other MCOs. In addition to this, Vogt ran difference-in-differences regressions using publicly available "Medicare Cost Report" data (known as MCR, for short) submitted by hospitals to estimate prices for commercial payors through an aggregate revenue figure (after attempting to subtract out Medicare payors).

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[3] "MCO" stands for Managed Care Organization. Blue Cross Blue Shield and Humana are examples of MCOs.

[4] Dr. Dranove was not available to serve as an expert for Plaintiffs going forward after switching to a new job that posed a conflict of interest. Pl. Decert. Br. at 9.

[5] *See also* Pl. Decert. Br. at 9 ("Plaintiffs served written discovery on NorthShore seeking information about how to interpret the data from the FTC proceeding, but it did not receive responses that allowed the data to be usable. … Despite spending a considerable amount of time and effort trying to get it to work, Dr. Vogt was unable to use the data produced by the MCOs in the FTC proceeding and in this proceeding because of inadequate explanations of how to interpret the data, problems with marrying multiple productions for MCOs together, and apparent errors in the data itself"); Vogt Dep. at 94, 144-146.

NorthShore now brings a motion to decertify class.[6] As explained above, NorthShore argues that the class should be decertified because Plaintiffs' new analysis on antitrust impact cannot establish predominance. R. 897, Def. Decert. Br. at 8-18. But NorthShore also presents a threshold argument: the class should be decertified because Plaintiffs have no evidence to support defining a market for hospital-based *outpatient* services and none of the Plaintiffs were direct purchasers of *inpatient* services from NorthShore. *Id.* at 19-20. Remember that the certified class is comprised of, in pertinent part, the direct purchasers or payers for inpatient hospital services or hospital-based outpatient services. If hospital-based outpatient services are removed from the class definition, then there would be no adequate class representative, because none of the Plaintiffs purchased inpatient hospital services—the named Plaintiffs purchased only outpatient services. As explained below, the record dictates that hospital-based outpatient services must be removed from the class definition, which renders the Plaintiffs inadequate class representatives.

II. Standard of Review

There is no difference between evaluating a class-certification motion and a motion asking to decertify an already-certified class. 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.*, No. 03 C 3789,

[6] The parties also filed dueling class-based motions for summary judgment (which included *Daubert* motions on the experts). R. 898, 911. It is not appropriate to decide those motions without a class representative, so for now they are terminated, but without prejudice to reinstating them if and when an adequate representative is substituted into the case.

2004 WL 1080193, at *2 (N.D. Ill. May 12, 2004); *see also Binion v. Metropolitan Pier and Exposition Authority*, 163 F.R.D. 517, 520 (N.D. Ill. 1995) (the court "remains free to modify or vacate a certification order if it should prove necessary"). 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). 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 Cnty.*, 581 F.3d 511, 513 (7th Cir. 2009); *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 Chicago*, 7 F.3d 584, 596 (7th Cir. 1993); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). "Failure to meet any of the Rule's requirements precludes class certification." *Harper*, 581 F.3d at 513 (internal quotation marks omitted); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 916 (7th Cir. 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.") (emphasis omitted) (quoting *Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011)).

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) (citing *Szabo v. Bridgeport Machs.*, 249 F.3d 672, 676 (7th Cir. 2001); *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").

If an expert's report or testimony is "critical to class certification," then the court must make a conclusive decision on any challenge to that expert's qualifications or submissions before ruling on a motion regarding class certification. *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010). An expert witness may testify or make a submission if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case." Federal Rules of Evidence Rule 702. *See also U.S. Gypsum Co. v. Lafarge N. Am. Inc.*, 670 F. Supp. 2d 748, 753 (N.D. Ill. 2009) (courts must assess "whether [expert testimony] is based on a reliable methodology").

III. Analysis

A. Outpatient Services

For both theories of liability advanced by the Plaintiffs—Section 2 of the Sherman Act and Section 7 of the Clayton Act—monopoly power in a defined market must be proven in order for the Plaintiffs to prevail. Specifically, the Section 2 of the Sherman Act makes it unlawful for anyone to "monopolize, or attempt to

monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce ...." 15 U.S.C. § 2. This section of the Sherman Act prohibits "the employment of unjustifiable means to gain that power" and requires "two elements: (1) the possession of monopoly power in the *relevant market* and (2) the willful acquisition or maintenance of that power ...." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) (emphasis added). "For purposes of § 2 of the Sherman Act, a market is defined by the reasonable interchangeability of the products and the cross-elasticity of demand for those products." *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 767 F.Supp.2d 880, 901 (N.D.Ill.2011) (citing *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-95 (1956)).

The same goes for a claim under Section 7 of the Clayton Act, which generally speaking bans any corporate acquisition that substantially reduces competition. That section makes it unlawful to "acquire ... the assets of another person ... where in any line of commerce ... in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. The statutory text thus demands that the Plaintiffs show not only the relevant geographic market (the "section of the country") but also the relevant product market (the "line of commerce"). *FTC v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016) (citing *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act.") and *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) ("The 'area of effective competition' must be

determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').")).

The problem for Plaintiffs is that they offer no record evidence to support or to analyze a market comprised of "hospital-based outpatient services." Instead, Plaintiffs' primary expert (and the only one who offered an opinion at all on the market definition), Dr. William Vogt, opined only that NorthShore competes in the product market for "acute-care inpatient services." Vogt Report ¶ 167. In his deposition testimony, Vogt confirmed that he had not defined nor tried to analyze a product market for *outpatient* services. 09/14/2016 Vogt Dep. Tr. at 17:24–18:4 (acknowledging that his report defined a relevant product market for "inpatient services" and did "not define a relevant market of outpatient services"); *id.* at 19:19–20; *id.* at 20:11–12 ("I don't have an opinion as to whether there is a relevant market for outpatient services"); 02/16/2017 Vogt Dep. Tr. at 157:17–23 ("I didn't opine that there was an outpatient market and I still don't opine, one way or another").

In response, Plaintiffs only say that, because the merger at issue has already occurred, neither a geographic nor a product market need be defined. R. 250, Pls.' Summ. J. Resp. at 17-18, 25. But Plaintiffs offer no authority for that proposition, *id.* at 17-18, 25, and as explained earlier, both the Sherman Act and the Clayton Act required a definition of the relevant product market—otherwise, how would a court evaluate the defendant's monopoly power or the anticompetitive effect of the merger? Not surprisingly, even Plaintiffs' prior expert opined that in hospital-merger cases,

the ubiquitous definition of the relevant product market is "acute inpatient care." 12/08/2009 Dranove Report ¶ 32 ("In fact, the antitrust product market definition *uniformly adopted in hospital merger cases—acute inpatient care*—implies that hospitals price collections of inpatient services as a whole.") (emphasis added). Consistent with that definition, the Seventh Circuit's review of another hospital merger employed that same definition and cited other cases that did the same:

> As in many other hospital merger cases, the parties here agree that the product market here is just such a cluster: *inpatient general acute care services*—specifically, those services sold to commercial health plans and their members. *See Federal Trade Comm'n v. Penn State Hershey Med. Center*, 838 F.3d 327, 338 (3d Cir. 2016) (parties stipulated); *Federal Trade Comm'n v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051–52 (8th Cir. 1999) (same); *Federal Trade Comm'n v. Freeman Hospital*, 69 F.3d 260, 268 (8th Cir. 1995) (same).

Advocate Health Care, 841 F.3d at 468. To be sure, perhaps it is possible to include hospital-based outpatient services in a hospital-merger market definition, but Plaintiffs here did not even attempt to supply record evidence that this is an appropriate definition. At the very least, a properly constituted record would have included an analysis of the nonhospital settings in which outpatient services can be performed, and an explanation of how nonhospital providers affects (or supposedly does not affect) the market for hospital-based outpatient services. For all of these reasons, the hospital-based outpatient services component of the class definition must be removed.

B. Direct Purchasers

With outpatient services trimmed from the class, Plaintiffs are left with no adequate class representatives. The individual Plaintiffs—Amit Berkowitz, Steven

J. Messner, Henry W. Lahmeyer—did not purchase inpatient services. Plaintiffs take a stab at arguing that Lahmeyer did, pointing to one Statement of Account for inpatient services. R. 920, PX25. But the invoice is actually (and tragically) for a family member of Lahmeyer. *Id.* Indeed, the records actually reflect that Lahmeyer disclaimed liability for the services, *id.* at 014-000080, and reflect that no payment was made for the services, *id.* at Bates 014-000082. In his deposition, Lahmeyer conceded that he does not remember making a payment for the service. Lahmeyer Dep. at 227:11-19. On this record, none of the individual Plaintiffs purchased inpatient services.

That leaves the Painters Fund. NorthShore argues that Painters Fund cannot be a member of the class (and thus cannot be a class representative) because it is not a "direct purchaser" of the services in the litigation and is barred from pursuing antitrust damages. R. 907, Def. MSJ at 5-10; R. 944, Def. Reply Br. at 3-6; Def Decert. Resp. Br. at 10. Plaintiffs respond that Painters Fund, being a self-funded ERISA plan, is a "direct purchaser" (and the insurer merely a conduit) and is thus eligible to pursue antitrust damages. R. 932, Pl's. MSJ at 40-46; R. 953, Pl's. Reply Br. at 17-18; Pl. Decert Br. at 19-20.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977), the Supreme Court reaffirmed the distinction between "direct" and "indirect" purchasers in antitrust actions. Aiming to prevent duplicative recovery, the Court held that only direct purchasers would be allowed to claim antitrust damages resulting from an overcharge by the defendant. *Id.* at 747. Allowing indirect purchasers to claim

antitrust damages would pose the risk that the defendant would pay multiple times for the same conduct, and would threaten to mire antitrust litigation in nigh impossible valuations of the damages allegedly suffered by each indirect purchaser. *Id.* at 746-47. This doctrine has been applied in a variety of antitrust contexts. *See, e.g.*, *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990).[7]

In healthcare-services cases, the possible candidates for the mantle of "direct purchaser" could be the patient, the patient's employer (if the patient is insured under an employer-sponsored health plan), or the insurer itself—or possibly more than one of these candidates if more than one directly paid the healthcare provider. The Seventh Circuit addressed this issue for fee-for-service patients in *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995). In that case, the insurer (yet another Blue Cross entity) sued a 21-office, physician-owned clinic that allegedly wielded monopoly power in northern Wisconsin. *Id.* at 1408-09. The insureds (that is, the patients) received services on a fee-for-service basis, and Blue Cross paid the clinic "*directly* the portion of the fee that Blue Cross has agreed with its insureds to cover." *Id.* at 1414 (emphasis added). Under those circumstances, the Seventh Circuit held that Blue Cross could sue as the direct purchaser:

> If the patients paid the entire fees to the Clinic and then were reimbursed in whole or part by Blue Cross, the Clinic would be right: only the patients could sue. The Supreme Court has been emphatic that only the direct purchaser from an allegedly overcharging defendant has standing to maintain an

[7] There are a few rare exceptions to the direct-purchaser rule (arising from an ownership-control relationship between a direct purchaser and consumers, or in cases of collusion between a vendor and a direct purchaser), but they are not relevant here.

> antitrust suit. …. But here the money went directly from Blue Cross to the Clinic ….

Id. at 1414 (citations omitted). So the *direct* payment from insurer to healthcare provider was the key element to deeming the insurer as the direct purchaser.

This principle—direct payers are the direct purchasers—applies in a wide variety of antitrust cases: as *Marshfield Clinic* noted, the Supreme Court has been "emphatic" that only the direct purchaser may pursue the suit. *Id.* at 1414. Indeed, even if a purchaser passes the *entire* overcharge of a purchase to someone else down the line, *still* that original purchasing entity remains the "direct purchaser" for antitrust-suit purposes. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997) ("The only entities permitted to complain about the manufacturers' overcharging the wholesalers are the wholesalers themselves, the direct purchasers, even if every cent of the overcharge was promptly and fully passed on to the pharmacies in the form of a higher wholesale price."); *see also Utilicorp United Inc.*, 497 U.S. 199 (1990) (finding that when suppliers overcharge in violation of antitrust laws a public utility for gas, the public utility is the direct purchaser for Clayton Act cause of action purposes, even if the utility passed the overcharge onto its customers).

Against this, Plaintiffs try to distinguish *Marshfield Clinic* by pointing out that, in this case, BCBS is functioning as an Administrative Services Only (ASO) insurer, not paying on a fee-for-service basis. Pl's. MSJ at 44. Plaintiffs argue that, in this scenario, Painters Fund is "self-insured" as opposed to "fully insured" and the insurer does not actually take on any financial risk on behalf of Painters Fund's

subscribers. To support this argument, Plaintiffs cite two cases: *Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.*, 1994 WL 619288 (N.D. Cal. Oct. 26, 1994), and *City of Pontiac v. Blue Cross Blue Shield*, 2012 WL 1079885 (E.D. Mich. Mar. 30, 2012). Pls.' Reply Br. at 18.

Neither case is persuasive. Taking the second case first, *City of Pontiac* is not helpful because it is merely a decision at the *pleading* stage on a dismissal motion, when the district court was required to accept the plaintiff's allegations as true. In the complaint, City of Pontiac pled that, despite contracting with Humana for administrative services, "[the City of Pontiac] made payments to each of the Hospitals *directly*." 2012 WL 1079885 at *7 (E.D. Mich. Mar. 30, 2012) (emphasis added); *see also id.* (complaint alleged that "City of Pontiac is a 'self-insured' municipality which paid for hospital services directly to the Hospital Defendants"). With that allegation of direct payment taken as true, not surprisingly the district court held that Pontiac was the direct purchaser. *Id.* Here, with the pleading stage well in the rearview mirror, Painters Fund offers no facts to support that it *directly* paid NorthShore (or its former incarnation, Evanston Northwestern Healthcare).

The other case cited by Plaintiffs also is not persuasive, and its facts are muddy and probably different from what happens with Painters Fund and BCBS. In the cited case, one plaintiff was Santa Cruz Medical Clinic, "a partnership of physicians and other medical practitioners." *Santa Cruz Med. Clinic*, 1994 WL 619288, at *1. The other plaintiff was Derjjan Associates, Inc., "a corporation which manages and provides some non-physician personnel services to the Clinic." *Id.*

Santa Cruz and Derjjan described themselves as a "'self-insured' employer who purchases hospital services directly for its employees." *Id.* at *2. The plaintiffs "hired a third party administrator to process claims, but the bills themselves are paid *directly* to hospitals out of the revenues of Santa Cruz and Derjjan." *Id.* (emphasis added). That is a key factual difference: the plaintiffs in *Santa Cruz Medical* paid the bills *directly* from their revenues, and that is not so with Painters Fund. It is true that *Santa Cruz Medical* quoted a Seventh Circuit case, *Ball Memorial Hosp., Inc. v. Mutual Hosp. Insur.,* 784 F.2d 1325, 1330 (7th Cir.1986), in support of its conclusion that the plaintiffs were direct purchasers, 1994 WL 619288, at *3. But *Ball Memorial* did not address the direct-purchaser issue and the quotation only described as a factual matter (and very generally at that) what employers and insurance administrators do when supplying health benefits and processing claims. 784 F.2d at 1330. *Ball Memorial* says nothing about what a direct purchaser is for an antitrust case. And here the fact remains that BCBS—not Painters Fund—is the entity actually sending money to NorthShore for payment. DX 7 Ex. 2 at I.E; DX 8 Anderson Dep. at 181; DX 5 Ehrhard Dep. at 218, 298.

For the sake of completeness, the Court posed an inquiry to the parties, asking them to identify the contract between NorthShore and BCBS under which Painters Fund's members are covered and also to highlight any provision in the contract on what entity is liable if Painters Fund does not pay BCBS. R. 981, Minute Entry (Dec. 6, 2017). After receiving responses from both parties, it is clear that BCBS should be considered the "direct purchaser" in this case. NorthShore's

contract with BCBS dates back to 1987 and has been continuously updated via amendments. R. 985, Joint Response at 1. The contract demonstrates the lack of connection between Painters Fund and NorthShore: Painters Fund is not even listed specifically in the contract or any of its amendments. NorthShore and BCBS are the only parties to the agreement. The contract provides that "Hospital shall provide" services to "PPO Covered Persons," that is, members of entities with whom *BCBS*, not NorthShore, has contracted. R. 985, Ex. 1 at Bates 004-007273-74. In exchange, "Hospital shall bill Blue Cross in a manner acceptable to Blue Cross," *id.* at Bates 004-007277, and "*Blue Cross* shall pay Hospital for the provision of" such services, *id.* at Bates 004-007276 (emphasis added). So it is BCBS that must pay NorthShore, and nothing in the contract suggests that NorthShore can go after an entity like Painters Fund if there is ever a shortfall in payment.

In response, Plaintiffs point to clauses in the BCBS-Painters Fund contract, which requires Painters Fund to pay BCBS and to determine what payment amounts for claims. But that contract governs the relationship between BCBS and Painters Fund, not BCBS and *NorthShore*. In this contractual context, Painters Fund's determinations on what it will pay has nothing to do with setting the prices for services; the Fund is only looking at the bills sent to it for its employees and deciding how much payment to make at any given time. That determination has no direct connection to purchasing services or letting BCBS off the hook as the purchaser of services from NorthShore. Nor does it matter that Painters Fund must indemnify BCBS for shortfalls: by definition, indemnity means that *BCBS* is liable

to the healthcare provider for the services. So the indemnity provision does not take BCBS out of the picture as the direct purchaser of services. Indeed, there is a ten-day termination clause that authorizes BCBS to nullify the agreement if Painters Fund fails to make a payment to BCBS: "BCBSI can terminate the Network Agreement in as little as 10 days if Painters Fund fails to pay any amount due and does not cure the default. *Id.* at Bates PF000341-42.[8]

All in all, the BCBS-Painters Fund contract simply does not setup BCBS as some mere conduit of payment, as if it were some PayPal-like clearinghouse. The only other relevant consideration in the *Illinois Brick* analysis here is which entity negotiated and maintained the contract with the healthcare provider. That is BCBS. Painters Fund employees conceded that the Fund does not have a contract with the hospitals and that it is BCBS that negotiates the contracts. DX 8 Anderson Dep. at 72, 106, 109-110; DX 6 Charles Anderson Dep. at 46, 67-68; Vogt Expert Rep. ¶ 27; Ehrhardt Dep. at 95, 204; DX 7, BCBS Painters Fund Contract, Ex. 2 at Section II. So the *direct* victim of antitrust harm is BCBS, not Painters Fund. As discussed earlier, the holdings of *Marshfield Clinic* and *In re Brand Name Prescription Drugs*

[8] The BCBS-Painters Fund contract contains another provision that undermines the idea that BCBS is simply a conduit for payments. In Section XCI, "The Network Administrator's Separate Financial Agreements with Providers," DX 7 at 13-14, the contract grants to *BCBS* any financial benefit that it might negotiate or secure from healthcare providers. *Id.* ("The Fund understands that the Network Administrator may receive such payments, discounts and/or other allowances during the term of this Agreement and that the compensation to the Network Administrator specified in this Agreement reflects the amount of additional consideration expected to be received by the Network Administrator in the form of such payments, discounts or allowances. *Neither the Fund nor Covered Participants hereunder are entitled to receive any portion of any such payments, discounts and/or other allowances* as part of any Claim settlement or otherwise except as such items may be directly or indirectly reflected in the compensation to the Network Administrator pursuant to the terms of this Agreement.") (emphasis added).

Antitrust Litig., and the emphatic Supreme Court focus on maintaining the distinction between direct and indirect purchasers, dictate that BCBS is the direct purchaser, not Painters Fund.

IV. Conclusion

For the reasons discussed, there currently is no adequate class representative. But Plaintiffs' counsel probably can fix this problem, so the Court will stay the effectiveness of this Order and, for now, delay class decertification. To move forward, by May 7, 2018, Plaintiffs' counsel shall file a motion to substitute a class representative. That will serve as the deadline (at least the initial deadline) to find a substitute class representative. If the Court approves the proposed substitute, then the Court will be in a position to reinstate and to decide the remaining motions. The status hearing of April 17, 2018 remains in place to get an update from Plaintiffs' counsel.

ENTERED:

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

DATE: March 31, 2018