UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TEAM SCHIERL COMPANIES and HEARTLAND FARMS, INC., on behalf of themselves and all others similarly situated, *Plaintiffs*, v. ASPIRUS, INC. and ASPIRUS NETWORK, INC., *Defendants*.	Civil Action No. 3:22-cv-00580-jdp Hon. James D. Peterson, U.S.D.J. Hon. Anita M. Boor, U.S.M.J. **ORAL ARGUMENT REQUESTED** **Public Redacted Version**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO EXCLUDE OPINIONS AND TESTIMONY OF PLAINTIFFS' CLASS CERTIFICATION AND DAMAGES EXPERT DR. JEFFREY J. LEITZINGER

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INTRODUCTION

Plaintiffs Team Schierl Companies and Heartland Farms, Inc. launched this litigation by alleging that Defendants Aspirus, Inc. ("Aspirus") and its subsidiary, Defendant Aspirus Network, Inc. ("ANI") engaged in a "multifaceted scheme" that increased the cost of healthcare in northern Wisconsin. ANI is a clinically integrated network consisting of Aspirus and independent medical practices organized around the "triple aim" of healthcare: to provide better quality care, improve population health, and lower overall cost. Discovery has revealed that ANI delivers on these goals, providing world-class healthcare in rural Wisconsin at lower overall costs. In fact, ANI is generally less costly than its closest competitor, Marshfield Clinic. Plaintiffs have responded to the reality that their operative complaint lacks evidentiary support by shifting their theory of their case. Ignoring critical factors such as quality and total cost of care—areas in which ANI excels—Plaintiffs have directed their two expert witnesses to focus on a narrow set of contracting practices that they contend affected reimbursement rates paid by certain payors for a subset of health care services. Plaintiffs now contend that ANI's joint contract negotiations with insurance companies and self-funded employer health plans, as well as a contractual provision that allegedly prevented ANI's independent members from directly contracting with some payors (collectively, the "Challenged Conduct"), inflated the reimbursement rates for outpatient professional services provided by ANI in its service area in north and central Wisconsin.

This motion addresses the opinions offered by Plaintiffs' class and damages expert, Dr. Jeffrey J. Leitzinger, who proposes a method for calculating the claimed aggregate overcharges and a separate method to determine whether the supposed impact of those alleged overcharges was felt classwide. Dr. Leitzinger's models and the opinions he draws from them are fundamentally unreliable. For instance, his impact model is so deeply flawed and unreliable that it results in a

near 100% error rate. Dr. Leitzinger's opinions and testimony should be excluded for each of the following reasons.

First, Dr. Leitzinger's opinions about alleged "overcharges" are unreliable. Dr. Leitzinger purports to identify an average overcharge percentage attributable to the conduct Plaintiffs challenge, which he then multiplies by the total amount paid by the putative class to arrive at an aggregate overcharge damages figure. But the regression model that he created for this litigation is incapable of isolating the one thing he purports to examine: the impact (if any) of the Challenged Conduct on the reimbursement rates charged by ANI. Because Dr. Leitzinger—[redacted]—did not have price data for the period before the Challenged Conduct began, he was unable to perform a "before-and-after" comparison of prices to attempt to isolate the price effect (if any) of that conduct. Rather, he developed a yardstick regression model that compares ANI's pricing to that of other health care providers in other parts of Wisconsin.

For his yardstick model to work, Dr. Leitzinger needed (1) a proper yardstick, and (2) a proper set of explanatory variables that would allow him to isolate any price effects of the Challenged Conduct. His model fails on both counts. It turns out Dr. Leitzinger's yardstick comparator group includes healthcare providers that allegedly engaged in the same conduct that he sought to isolate. And when comparing ANI's prices to those in his faulty yardstick, he failed to control for the two factors that the Seventh Circuit has said are among the "most important" in the healthcare context—quality and market share—both of which [redacted]. *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998) (Posner, J.); Dkt. No. 190, Deposition of Jeffrey J. Leitzinger taken June 24, 2025 ("Leitzinger Dep.") at 164:20-22, 210:1-6.

Second, Dr. Leitzinger's opinions about the class-wide impact of any overcharges is unreliable as well. Dr. Leitzinger offers a two-step method to assess whether proposed class members were impacted. This involves going line-by-line through claims data, using the yardstick regression model to calculate a predicted price (step one), and then comparing the predicted price against the actual price (step two). But this method is unreliable because it relies on the flawed yardstick regression model. Beyond that, the comparison between predicted and actual prices is contrary to basic economic principles. Such a precise comparison is meaningless because a regression model cannot isolate the cause of any differences between the actual and predicted price for any individual claim-line. Indeed, when this method is tested with data that does not involve ANI, it returns a near [redacted] error rate. This is the hallmark of unreliability.

Third, both of Dr. Leitzinger's damages calculations are unreliable. Dr. Leitzinger calculates aggregate damages using a subset of the claims data produced in this case—multiplying the "average overcharge" percentage derived by his faulty yardstick model by the total amount of reimbursement he finds in that data. That calculation is unreliable because it is based on his unreliable overcharge model. He then goes on to extrapolate tens of millions in additional aggregate damages for which he either has no data (as well as some data that had been produced but he inexplicably overlooked or omitted), making assumptions based on what he had "been hearing" from his staff without doing anything to confirm the accuracy of what he was hearing or test the validity of his assumptions. That calculation is unreliable both because it also relies on his faulty overcharge model and because it is the product of speculation, not any reliable methodology.

Accordingly, the Court should exclude Dr. Leitzinger's (1) opinions and testimony based on his yardstick overcharge model, including his opinions on aggregate damages; (2) opinions and testimony with respect to classwide impact; and (3) calculations of damages based on his improper

extrapolation. Fed. R. Evid. 702 & 403; *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579 (1993).[1]

BACKGROUND

Plaintiffs filed their Complaint on October 12, 2022 alleging a "multifaceted anticompetitive scheme." *See, e.g*., Class Action Complaint ("CAC") ¶¶ 13(a)-(f), Dkt. No. 1. After months of fact discovery, Plaintiffs' experts' reports reflect Plaintiffs' recognition that their original theory is unsupported. First, Plaintiffs' experts focus on evaluating just two aspects of Plaintiffs' "multifaceted scheme," which they define as the Challenged Conduct: (1) contracting by ANI on behalf of the members in its clinically integrated network ("CIN"), and (2) a limited exclusivity clause in ANI's participating provider agreements with its CIN members. Second, the class definition is now limited to entities whose "funds were used" to pay for "outpatient professional services."[2]

Plaintiffs disclosed reports from two experts. Professor David Dranove offers opinions on, among other things, relevant markets and the claimed existence of anticompetitive effects within those markets. Dr. Leitzinger opines on the identity of members of Plaintiffs' alternative class (but not their primary class), the amount of purported aggregate overcharge damages for their

[1] Dr. Leitzinger's opinions are referenced herein based on three reports: Dkt. No. 191, Expert Report of Jeffrey J. Leitzinger, Ph.D., dated March 26, 2025 ("Leitzinger Rpt." or "Opening Report"), Dkt. No. 192, Rebuttal Report of Jeffrey J. Leitzinger, Ph.D., dated June 11, 2025 ("Reb. Rpt." or "Rebuttal Report"), and Dkt. No. 193, Supplemental Report of Jeffrey J. Leitzinger, Ph.D., dated June 11, 2025 ("Supp. Rpt." or "Supplemental Report").

[2] Plaintiffs instructed Dr. Leitzinger to analyze two proposed classes that are both different from the class in their Complaint: "[a]ll persons or entities that purchased GAC and/or Outpatient services directly from Aspirus in North-Central Wisconsin." CAC ¶ 92. [redacted] Leitzinger Rpt. ¶ 5. [redacted] Leitzinger Rpt. ¶ 5 n.4; Leitzinger Dep. at 113:20-114:19.

alternative class (which he purports to "extrapolate" to the broader, primary class), and whether common evidence can be used to establish classwide antitrust impact.

[redacted] Leitzinger Dep. at 47:1-48:1, 61:5-15. For purposes of his assignments in this case, Dr. Leitzinger (1) created a regression model using a "yardstick" methodology that he uses to estimate aggregate—*i.e.*, the total amount of overpayment purportedly paid by the class as opposed to individual overpayments—and (2) then devised a two-step process using inputs from his overcharge regression model to attempt to determine class member impact, *i.e.*, alleged harm to each class member in the alternative class. These are the only analyses that purportedly allow him to quantify the amount of overcharge caused by the Challenged Conduct and the extent to which it supposedly affected putative class members.

I. Yardstick Overcharge Model

To calculate classwide damages, Dr. Leitzinger created a "yardstick" model. Unlike a before-and-after comparison in which economists compare the prices charged by the defendant before the challenged conduct begins with the prices that follow, a yardstick study compares the prices charged by the defendant with prices charged by others in a different market that is unaffected by the challenged conduct. Leitzinger Rpt. ¶ 31 [redacted] Here, Dr. Leitzinger's yardstick compares prices for [redacted] to prices for [redacted] Leitzinger Rpt.

¶¶ 31, 34.[3] [redacted] *Id*. ¶¶ 32-33. [redacted] *Id*.; Leitzinger Dep. at 162:4-163:4.

Dr. Leitzinger's regression does not directly measure the impact of the Challenged Conduct. Instead, [redacted] Leitzinger Rpt. ¶ 34. [redacted] Leitzinger Dep. at 92:25-93:21. Based on that methodology, Dr. Leitzinger finds an "average overcharge" of approximately [redacted] percent. Leitzinger Rpt. ¶ 35; Leitzinger Supp. Rpt., Ex. 5 [redacted]; Leitzinger Dep. at 244:12-21.

[3] [redacted] *E.g.*, Leitzinger Rpt. ¶ 34 n.50; Leitzinger Dep. at 168:24-169:22. [redacted] Leitzinger Dep. at 171:20-176:14.

[4] A regression analysis is a "statistical tool used to understand the relationship between or among two or more variables." Fed. Judicial Ctr., Reference Manual on Scientific Evidence at 305 (3d ed. 2011) (incorporating Rubinfeld, Reference Guide on Multiple Regression), *available at* https://www.fjc.gov/sites/default/files/2015/SciMan3D08.pdf (the "Reference Manual"). Multiple regression analysis "involves a variable to be explained—called the dependent variable—and additional explanatory variables that are thought to produce or be associated with changes in the dependent variable." *Id*.; *see also ATA Airlines, Inc. v. Fed. Exp. Corp*., 665 F.3d 882, 889-91 (7th Cir. 2011) (Posner, J.) (providing additional guidance on how courts should evaluate regression analyses). A regression estimates how changes in each explanatory variable are associated with changes in the dependent variable, i.e., their correlation. Reference Manual at 309. Regressions do not mathematically prove causation, they can only be used to *infer* causation in appropriate circumstances. *Id*. at 309-310 (explaining that "[c]ausality cannot be inferred by data analysis alone" and cautioning about the possibility of spurious correlation that could lead to improper causal inferences).

II. Two-Step Method for Determining Class Member Impact

Dr. Leitzinger uses his yardstick overcharge model as part of a two-step approach to assess whether there is "empirical evidence" of classwide antitrust impact, *i.e.*, evidence that each class member sustained harm proximately caused by the alleged conduct. Leitzinger Rpt. ¶¶ 56-58. [redacted] *Id.* ¶ 57; Leitzinger Dep. at 245:24-246:16, 247:21-248:13. [redacted] Leitzinger Rpt. ¶ 57; Leitzinger Dep. at 248:8-13. [redacted] Leitzinger Rpt. ¶ 58; Leitzinger Dep. at 249:25-251:13.

III. Aggregate Damages Calculations

Dr. Leitzinger uses his yardstick overcharge model to calculate two sets of aggregate damages. First, he calculates [redacted] in aggregate damages based on claims data produced in the litigation from a subset of payors: [redacted] Leitzinger Rpt. ¶¶ 29, 36; Leitzinger Supp. Rpt. ¶ 10(b). Second, using a number of assumptions not specified in his report and unsupported at his deposition, he estimates [redacted] Leitzinger Supp. Rpt. ¶ 10(b); Dkt. No. 194, Expert Report of Laurence C. Baker, dated May 7, 2025 ("Baker Rpt.") ¶ 193 [redacted],

¶ 195 [redacted]

[redacted].

* * *

Dr. Leitzinger submitted his Rebuttal Report on June 11, 2025, responding to the opinions of Professor Baker, in which Dr. Leitzinger reaffirmed the opinions in his Opening Report. On the same day, he also submitted a Supplemental Report in which he supplemented some of the figures in his Opening Report based on additional claims data produced in this case by Anthem. Dr. Leitzinger was deposed on June 24, 2025.

ARGUMENT

Under Federal Rule of Evidence 702, an expert may only offer opinions if "the proponent demonstrates to the court that it is more likely than not that" the opinions (a) will "help the trier of fact to understand the evidence or to determine a fact in issue," (b) "is based on sufficient facts or data," (c) "is the product of reliable principles and methods," and (d) "reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702; *see also Daubert*, 509 U.S. at 592. The Court, in exercising its gatekeeping function, is required to undertake a rigorous screening of statistical analysis to ensure that methodologies are reliably applied and conclusions drawn are reliable. *ATA Airlines, Inc. v. Fed. Exp. Corp.*, 665 F.3d 882, 896 (7th Cir. 2011). As part of its evaluation, the Court should consider, among other things, "whether the expert has adequately accounted for obvious alternative explanations." Fed. R. Evid. 702, Comm. Note to 2000 Amendment; *Liebhart v. SPX Corp.*, No. 16-cv-700, 2018 WL 1583296, at *4 (W.D. Wis. Mar. 30, 2018) (Peterson, J.), *vacated and remanded on different grounds*, 917 F.3d 952 (7th Cir. 2019) (finding expert "fundamentally unreliable" because, among other reasons, they "overlook[ed] . . . obvious explanation[s]").

The Court should also be "mindful of other applicable rules" that may preclude admissibility, such as Federal Rules of Evidence 401 and 403. *Daubert*, 509 U.S. at 595; *Koehler v. Infosys Techs. Ltd. Inc.*, 628 F. Supp. 3d 835, 883 (E.D. Wis. 2022) ("Even if the expert's methodology was scientifically valid and could properly be applied to the facts at issue, a judge may exclude it for the reasons listed in Rule 403."); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-cv-0660, 2016 WL 6947065, at *2 (S.D. Ill. June 2, 2016) (applying Rules 401 and 403 to expert testimony offered in support of motion for class certification).

In 2023 Congress and the Supreme Court amended Rule 702 to emphasize that district courts must fulfill their gatekeeper role by strictly enforcing the Rule. According to the Committee, "critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology," *are questions of admissibility and not just of weight*. Fed. R. Evid. Comm. Note to 2023 Amendment. Accordingly, before a court can admit expert testimony, it must be satisfied that "the proponent," here Plaintiffs, "demonstrates . . . that it is more likely than not" that the four Rule 702 factors weigh in favor of admissibility. *Id.*; *see also Huss v. Sharkninja Operating LLC*, No. 23-cv-01435, 2025 WL 257226, at *3 (S.D. Ind. Jan. 21, 2025) ("Given the amendment to Rule 702, the Court must also determine whether the proponent has made the requisite showing under the 'more likely than not' standard."). Where the "expert's report or testimony is critical to class certification," as it is here, a district court must perform this analysis and "conclusively rule on any challenge to the expert's . . . submissions prior to ruling on a class certification motion." *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010).

Dr. Leitzinger's opinions fail these standards and should be excluded under Federal Rules of Evidence 702 and 403 for each of the following reasons.

I. Dr. Leitzinger's Opinions and Testimony Based on His Yardstick Overcharge Regression Model Should Be Excluded

Dr. Leitzinger's opinions and testimony based on his yardstick overcharge regression model are not "the product of reliable principles and methods," do not "reflect[] a reliable application of the principles and methods to the facts of the case," and will not "help the trier of fact" decide any issue of consequence. Fed. R. Evid. 702(a), (c), (d). Dr. Leitzinger's regression does not reliably measure how much the putative class allegedly overpaid for "outpatient professional services" due to the Challenged Conduct because his yardstick model is (1) unreliable as a matter of fundamental economic principles, and (2) incapable of isolating price effects from the Challenged Conduct.

A. The Yardstick Is Improperly Constructed

First, Dr. Leitzinger's overcharge model is unreliable because the yardstick itself is incapable of isolating any price effect of the Challenged Conduct by ANI—because his yardstick includes healthcare providers that also supposedly engaged in the Challenged Conduct. [redacted] Leitzinger Rpt. ¶ 31 (emphasis added); *see also City of Rockford v. Mallinckrodt ARD, Inc.*, No. 17-cv-50107, 2024 WL 1363544, at *6 (N.D. Ill. Mar. 29, 2024) (describing the "'yardstick' method of estimating but-for prices," as one "in which the prices in a similar market, *unaffected by the anticompetitive conduct present in the market at issue*, are assumed to be a reasonable stand-in for the but-for prices that would have prevailed in the market at issue absent the anticompetitive conduct" (emphasis added)).

[redacted] Leitzinger Rpt. ¶ 31 n.42 [redacted]

[redacted] The reason for this is simple: if the yardstick is also affected by the conduct at issue, then it defeats the purpose of using it as a proxy for pricing that would prevail *but-for* that conduct. *E.g.*, *id.*; *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 392 (Fourth and Fifth Editions, 2025 Cum. Supp. 2018-2023) ("Under the yardstick approach the plaintiff attempts to identify a market or firm similar to the plaintiff in all respects but for the impact of the antitrust violation.").

In attempting to respond to another critical problem identified by Professor Baker, Dr. Leitzinger [redacted] As Professor Baker pointed out in his report, [redacted] Baker Rpt. ¶¶ 24(a), 135, 147. Yet, when Professor Baker did just that—[redacted]—the yardstick finds an overcharge of [redacted] which is not statistically distinguishable from the [redacted] average overcharge Dr. Leitzinger finds for ANI. *Id.* ¶ 130, Ex. 11.

[redacted] Leitzinger Reb. Rpt. ¶¶ 61-62; *see also* Leitzinger Dep. at 186:8-22, 195:22-196:12 [redacted][5]

[5] [redacted] Leitzinger Dep. at 194:18-195:1, 197:4-198:3.

[redacted] Leitzinger Dep. at 151:11-152:23. [redacted] *See id*. at 151:11-155:15.

Dr. Leitzinger's carelessness in selecting his yardstick was on full display during his deposition. [redacted] Leitzinger Dep. at 186:24-188:18. [redacted] This failure to meaningfully evaluate any "critical factors" on the "question of comparability" renders Dr. Leitzinger's yardstick unreliable and inadmissible. *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 810-17 (N.D. Ill. 2005) (excluding expert's yardstick as unreliable where comparator group was "[u]ndiscriminatingly label[ed]" and expert knew "nothing about the respective geographic or product markets or customer bases of the eight companies or of the quality of service or any other relevant factor that would bear upon the question of comparability"); *see also El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 F. App'x 450, 453 (5th Cir. 2005) (affirming exclusion of opinion where expert did not engage in meaningful analysis of the comparator group).

This is not a situation where Defendants quibble with Dr. Leitzinger's choice of the yardstick approach. Rather, it is his construction of the yardstick that is inherently unreliable. [redacted]

[redacted] In the absence of "a clean control group, [Dr. Leitzinger's] regression analysis is not" reliable. *See CMFG Life Ins. Co. v. Credit Suisse Sec. (USA) LLC*, No. 14-cv-249, 2017 WL 4792253, at *6 (W.D. Wis. Oct. 23, 2017) (excluding regression where expert failed to have "clean control group" devoid of the challenged conduct); *Nat'l Credit Union Admin. Bd. v. UBS Sec., LLC*, Nos. 12-cv-2591, 12-cv-2648, 2016 WL 7373857, at *8 (D. Kan. Dec. 20, 2016) (excluding regression that included challenged conduct in the control group; "[t]he failure to control for the very issue being tested would render a regression analysis incomplete; thus, such failure in this case makes any opinion based on the faulty analysis inadmissible.").

At deposition, Dr. Leitzinger attempted to salvage his yardstick by testifying that [redacted] Leitzinger Dep. at 141:10-142:12, 146:25-147:11, 153:14-17. But that assertion—which nowhere appears in either his Opening or Rebuttal Reports—is belied by the text of his reports, the economic literature cited therein, and the case law explaining that a proper yardstick [redacted] *E.g.*, Leitzinger Rpt. ¶ 31 & n.42; *Mallinckrodt*, 2024 WL 1363544, at *5; *CMFG Life Ins. Co.*, 2017 WL 4792253, at *6. Dr. Leitzinger's new opinion reveals that he is not "employ[ing] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

Instead, this new opinion on yardstick construction and his view that [redacted] are classic *ipse dixit*. *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."); *see also Zamecnik v. Indian Prairie School Dist. No. 204*, 636 F.3d 874, 881 (7th Cir. 2011) ("Mere conclusions, without a hint of an inferential process, are useless to the court." (internal quotation marks and citation omitted)). [redacted] Leitzinger Dep. at 153:18-154:25. [redacted] *Id*. at 155:2-10. As the Supreme Court explained years ago, "[n]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137 (1997).

Dr. Leitzinger's yardstick overcharge regression should thus be excluded because he failed to select a proper yardstick comparator group. Fed. R. Evid. 702.

B. The Yardstick Overcharge Regression Does Not Isolate Price Effects Purportedly Caused by the Challenged Conduct or Account for the "Most Important" Factors Identified by the Seventh Circuit

Dr. Leitzinger's yardstick overcharge regression should also be excluded because it fails to reliably measure the effects of the Challenged Conduct. That is because his regression merely compares pricing by ANI CIN members with pricing by health systems and providers in other parts of Wisconsin.

Under Plaintiffs' theory, the Challenged Conduct allegedly causes anticompetitive effects by [redacted] *E.g.*, Baker Rpt. ¶ 59. The fundamental problem with Dr. Leitzinger's yardstick regression calculation is that it does not [redacted] *See id.* ¶¶ 122-23. [redacted] Leitzinger Reb. Rpt. ¶¶ 30, 35. But that is wrong for a simple reason: [redacted] Leitzinger Dep. at 157:8-158:8. This assumption means that Dr. Leitzinger's yardstick regression [redacted] rendering his regression calculations in this case unreliable and unhelpful. Fed. R. Evid. 702 (a), (c), (d); *see also United States v. Gallardo*, 497 F.3d 727, 733 (7th Cir. 2007) ("*Daubert* instructs that expert testimony must be relevant and factually linked to the case in order to meet Rule 702's 'helpfulness' requirement." (citation omitted)); *Leliaert v. City of S. Bend*, No. 22-cv-359, 2024 WL 3873744, at *2 (N.D. Ind. Aug. 20, 2024) (expert testimony must be "tied to case facts and issues" such that it will help the trier of fact decide "an issue of consequence").

To be clear, Defendants do not argue that regressions, in general, are unreliable. Rather, the particular regression that Dr. Leitzinger constructed in this case is unreliable—even apart from the problems with his yardstick discussed above. [redacted] Leitzinger Reb. Rpt. ¶¶ 31-33. Here, there are "serious questions about the reliability of the expert's application of the regression

analysis to the facts." *AOT Holding AG v. Archer Daniels Midland Co.*, No. 19-cv-2240, 2022 WL 22393244, at *7 (C.D. Ill. Sept. 30, 2022); *Conrad v. Jimmy John's Franchise, LLC*, No. 18-cv-00133, 2021 WL 718320, at *16 (S.D. Ill. Feb. 24, 2021) (noting that an expert "may employ this reliable methodology [*i.e.*, a regression analysis] in an unreliable way").[6] The inability to directly measure the price effect of the Challenged Conduct is a "serious question" that shows the yardstick regression is both unreliable and unfit.

The problems with Dr. Leitzinger's faulty yardstick are highlighted by his failure to account for at least two critical factors that could explain differences in prices even in the absence of the Challenged Conduct—*quality* and *market share*. Leitzinger Reb. Rpt. ¶ 64; *see also* Leitzinger Rpt. ¶¶ 32-33. Indeed, those two factors have been identified by the Seventh Circuit as the "most important" when using a yardstick regression model in the healthcare context. *Marshfield Clinic*, 152 F.3d at 591, 593. It makes no sense—and is thus unreliable—to compare the reimbursement rates for services provided by different healthcare providers without taking into account the relative quality of those services. This is like studying the differences in prices between an award-winning steakhouse (the "variable of interest") and a burger stand in a neighboring county (the "yardstick"), and controlling for factors such as the relative "urbanicity" of their locations and the "wage index" of restaurant workers, without considering the fact that the quality of the food served at the steakhouse might be better and thus its customers are willing to pay more to eat there.[7] Dr. Leitzinger's failure to consider these factors renders the regression

[6] *See also Mallinckrodt*, 2024 WL 1363544, at *5-9 (excluding unreliable yardstick model under *Daubert*); *Doctor's Data, Inc. v. Barrett*, No. 10-cv-03795, 2017 WL 11885711, at *7-8 (N.D. Ill. Mar. 31, 2017) (same); *CDW LLC v. NETech Corp.*, 906 F. Supp. 2d 815, 823-26 (S.D. Ind. 2012) (same).

[7] This example is not intended to disparage the quality of healthcare providers in Dr. Leitzinger's yardstick, but simply to emphasize the commonsense point that Dr. Leitzinger failed to consider [redacted] that quality and reputation for quality can have a direct impact on what payors will pay. Leitzinger Dep. at 225:12-22. The example also understates the importance of quality in the healthcare setting, since high quality care can also provide long-term benefits for patients and cost savings for payors. Quality may not be as important a factor in many of the commodity

model unreliable, unhelpful, and disconnected from the facts. *Liebhart v. SPX Corp.*, 917 F.3d 952, 963 (7th Cir. 2019) (affirming this Court's exclusion of expert who did "not adequately account for obvious alternative explanations" (citations and alterations omitted)).

The Seventh Circuit has held that a very similar yardstick model could not support a "reasonable estimate" of damages stemming from the alleged antitrust violation where it too failed to adequately control for quality and defendant's market shares. In *Marshfield*, plaintiffs alleged that Marshfield Clinic entered into agreements with other healthcare providers "to stay out of each other's territories" in "north-central Wisconsin" so that Marshfield Clinic and its alleged co-conspirators could "charge higher prices." *Marshfield Clinic*, 152 F.3d at 591-92. Like here, plaintiff did not attempt to "measure damages" in the "usual way"—by comparing prices before and during the alleged conspiracy (or after the conspiracy ended). *Id*. at 592. Instead, it used a yardstick model that "compared the Marshfield Clinic's prices for medical services . . . with the prices charged by other providers of medical care for the same services during the same period elsewhere in Wisconsin." *Id*. Although Judge Posner noted that use of a yardstick model is not categorically "improper," the particular model used in that case—just as here—was unreliable because it was not "properly adjusted" to detect overcharges resulting from the alleged conduct in the healthcare setting. *Id*. at 593.

Specifically, the Seventh Circuit held that plaintiff's yardstick model could not support a "reasonable estimate" of damages because it did not control for "the amount and quality of the Marshfield Clinic's service and its market share." *Id*. The reason is simple: a statistical study cannot provide a "rational basis for a judgment" when it "fail[s] to correct for salient factors, not

markets that Dr. Leitzinger typically studies, but—even more importantly than a good meal—the quality of healthcare can have a direct impact on reimbursement rates.

attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining." *Id*. The quality of services and market share were "[t]he most important factors" for the yardstick to control for in the healthcare context because they were likely to explain why Marshfield Clinic's prices were higher than other providers' prices in the yardstick. *See id*.

Neither of these "important factors" were included as explanatory variables by Dr. Leitzinger in his model, [redacted] Leitzinger Dep. at 164:20-165:6, 197:22-198:3.[8]

[redacted]

[8] [redacted]

[9] [redacted]

[redacted] But as this Seventh Circuit explained, healthcare is exactly the "setting[]" where market share should be considered in a yardstick regression. *Marshfield Clinic*, 152 F.3d at 593.

* * *

In sum, Dr. Leitzinger's opinions and testimony based on his yardstick overcharge regression model should be excluded because his regression is an unreliable and unhelpful method to measure harm (if any) caused by the Challenged Conduct. Fed. R. Evid. 702 (a), (c), (d); *Marshfield Clinic*, 152 F.3d at 591-94; *Mallinckrodt*, 2024 WL 1363544, at *8 (applying *Marshfield* and excluding under *Daubert* a yardstick model because, among other things, it did not control for defendant's market power). The issues with Dr. Leitzinger's yardstick regression are "not nitpicking"; they instead reveal that the "regression had as many bloody wounds as Julius Caesar when he was stabbed 23 times by the Roman Senators led by Brutus." *ATA Airlines*, 665

F.3d at 896 (reversing admission of regression that contained multiple errors in its construction and use). The yardstick model would also be confusing to the jury and prejudicial insofar as Dr. Leitzinger's analysis implies that he has identified through empirical evidence a causal connection that does not exist. Fed. R. Evid. 403. There is a considerable risk that a jury would be swayed by Dr. Leitzinger's unreliable regression solely because it is complicated and gives the false appearance of scientific precision. *Daubert*, 509 U.S. at 595.

II. Dr. Leitzinger's Two-Step Method for Identifying Antitrust Impact Is So Unreliable that it Produces a Near [redacted] Error Rate When Tested

Dr. Leitzinger's purported "empirical evidence" of widespread class member impact should be excluded because it is predicated on his unreliable yardstick overcharge regression model. Leitzinger Rpt. ¶¶ 56-58; Leitzinger Reb. Rpt. ¶ 43, Leitzinger Dep. at 245:19-246:16, 247:21-248:13. Dr. Leitzinger uses his overcharge regression model to generate a "predicted price" for each transaction. Leitzinger Rpt. ¶¶ 56-57. That means the impact model is infected with the same reliability problems at the heart of his overcharge model. *See id*. A model built on an unreliable input cannot itself be reliable. *ATA Airlines*, 665 F.3d at 893 (excluding expert testimony not "built on a rational foundation"). Indeed, Dr. Leitzinger admitted that he [redacted] Leitzinger Dep. at 249:21-24.

Dr. Leitzinger's impact model should also be excluded for the independent reasons that it is contrary to well-understood economic principles and results in a near 100% error rate. Fed. R. Evid. 702(a), (c), (d); *see also* Fed. R. Evid. 403. [redacted] Leitzinger Rpt. ¶¶ 57-58. [redacted]

[redacted] Leitzinger Rpt. ¶ 57; Baker Rpt. ¶ 72. Dr. Leitzinger calls this a "residual analysis." *E.g.*, Leitzinger Reb. Rpt. ¶ 31.

Dr. Leitzinger's model is unreliable because of the fundamental principle that a regression *cannot* be used to identify individual causal effects; in this case, antitrust impact for specific transactions. Baker Rpt. ¶¶ 61-73 (summarizing extensive economic literature discussing this methodological flaw). As The Nobel Prize Committee and scores of other academic texts have explained, data points derived from a regression cannot be used to identify individual causal effects in comparison to a specific data point because of the individualized factors that impact each transaction. *E.g.*, *id*. ¶¶ 66-69. In other words, simply comparing the results from a regression to a specific data point does not explain why that specific data point is higher or lower than the regression's output. *Id*. ¶ 72.

[redacted] Leitzinger Reb. Rpt. ¶ 31. [redacted] This article is far from the type of general acceptance courts have found necessary and, in any event, it

does not answer the question of whether the two-step method is reliable as used in this case.[10] *See, e.g.*, *A & M Recs., Inc. v. Napster, Inc.*, No. 00-cv-0074, 2000 WL 1170106, at *8 (N.D. Cal. Aug. 10, 2000) (refusing to rely on expert opinion "based on information reported in newspapers and magazines" that the expert "did not write or research"). At no point does Dr. Leitzinger delineate the assumptions under which his approach is valid or test whether those assumptions are appropriate, let alone appropriate or reliable here.

[redacted] Leitzinger Reb. Rpt. ¶ 33 n.47. But none of the cases Dr. Leitzinger cites involve complex healthcare pricing negotiated across different payors for a multitude of outpatient professional medical services. Instead, each involved traditional horizontal price fixing theories among direct competitors in commodity markets like broiler chickens, tuna, pork, capacitors, and drywall, with some litigations involving guilty pleas to criminal price-fixing that factored into the analysis.[11] Leitzinger Reb. Rpt. ¶ 33 n.47. Outpatient professional medical services, such as primary care, pediatrics, radiology, and orthopedic surgery, are obviously not commoditized, nor are these services direct competitors with one another. More to the point, the cases recognize that a regression model may be capable of showing classwide antitrust impact "provided that the district court considers factors that may undercut the model's reliability (such as unsupported assumptions, erroneous inputs, or nonsensical outputs such as false positives) and resolves disputes raised by the parties." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th

[10] [redacted]

[11] *E.g.*, *In re Capacitors Antitrust Litigation (No. III)*, No. 17-md-002801, 2018 WL 5980139, at *8 (N.D. Cal. 2018) (noting plaintiffs had "a substantial body of factual evidence in the form of defendants' own documents and criminal guilty pleas," and that one could argue "these sources are enough in themselves to establish common proof").

651 (9th Cir. 2022); *see also ATA Airlines*, 665 F.3d at 893. Here, step two of Dr. Leitzinger's antitrust impact methodology turns on improper comparisons that he cannot justify using in this case.

Not only does this approach run afoul of economic teachings, it also defies commonsense. Even under a well-specified regression, *individual* transactions are not expected to exactly match the predicted outcome of a regression model. For transactions within Dr. Leitzinger's yardstick, it is roughly a coin flip as to whether any individual claim line has an actual price above or below the predicted price. Yet Dr. Leitzinger proposes to ascertain impact within the tested group based on observing a single transaction with a higher than predicted price. For example, the median putative class member in Dr. Leitzinger's data has [redacted] transactions. Baker Rpt. ¶ 79. Under Dr. Leitzinger's method, the class member sustains antitrust impact if the price associated with just one of those [redacted] transactions strays above his average predicted price. *See id*. Because there is no way for Dr. Leitzinger to [redacted] Leitzinger Dep. at 256:12-268:13; *see ATA Airlines*, 665 F.3d at 893 ("Even if we assumed that [the expert's regression] model were built on a rational foundation, we would have to reject its results because the model was improperly implemented."); *see also In re Fluidmaster, Inc. Water Connector Components Prods. Liab. Litig.*, No. 14-cv-5696, 2017 WL 1196990, at *31 n.28 (N.D. Ill. Nov. 28, 2022) (excluding expert's conjoint analysis opinions where expert "arbitrarily and unreliably chose which attributes she would measure").

Unsurprisingly given the defects in his methodology, Dr. Leitzinger's approach has a near [redacted] error rate. Baker Rpt. ¶¶ 74-79 & Ex. 4. This is revealed by testing placebo datasets consisting of transactions that could not have been harmed by the alleged conduct. While these transactions show no (or negative) overcharges when fed into Dr. Leitzinger's overcharge regression model, Dr. Leitzinger's antitrust impact methodology finds [redacted] class members were impacted [redacted] because they had at least one transaction where the actual price exceeding the model's predicted price.[12] *Id*. In other words, false results [redacted] occurred. *Cf. Kleen Prods. LLC v. Int'l Paper*, No. 10-cv-5711, 2017 WL 2362567, at *6 (N.D. Ill. May 31, 2017) ("The Court thinks that a method that produces false results the majority of the time cannot be reliable."). As the D.C. Circuit recognized in reversing a grant of class certification, the prevalence of false positives in a regression model means that the court has "no way of knowing" whether the model "is any more accurate than the obviously" false positive estimates. *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 254 (D.C. Cir. 2013).

[redacted] *See* Leitzinger Reb. Rpt. ¶ 43. But this says nothing about Dr. Leitzinger's comparison of predicted price to the actual price. Nor does this point solve the problem because his yardstick regression does not reliably measure the effects of the Challenged Conduct.

12 [redacted]

In short, Dr. Leitzinger's approach for assessing "widespread class member impact" depends on an unreliable regression and consistently finds impact even where none could possibly exist. This approach should be excluded because it is not the "product of reliable principles and methods," a reliable application of a methodology, or "helpful to the trier of fact." Fed. R. Evid. 702(a), (c), (d). The admission of such testimony would also be unduly prejudicial because Dr. Leitzinger's model, which purports to establish causation empirically using a complex regression analysis that is difficult for laypeople to understand much less evaluate, is misleading and likely to confuse the jury. Fed. R. Evid. 403; *Daubert*, 509 U.S. at 595.

III. Dr. Leitzinger's Extrapolation of Aggregate Damages to Transactions For Which He Has No Data or Chose Not to Evaluate Available Data Is Speculative, Without a Reliable Methodology, and Should be Excluded

Dr. Leitzinger unsubstantiated and unreliable extrapolation of overcharges based on healthcare transactions as to which he has no data, or has data that he inexplicably failed to analyze, should also be excluded. *See* Fed. R. Evid. 702 (b), (c), and (d).

In calculating an aggregate overcharge, Dr. Leitzinger relied on [redacted] Leitzinger Rpt. ¶ 36. [redacted] Leitzinger Reb. Rpt. ¶ 88; *see also* Baker Rpt. ¶¶ 193, 195. [redacted] Leitzinger Rpt. ¶ 37. [redacted] *See id*.

Dr. Leitzinger defends his extrapolation exercise by pointing to untested assumptions relating to the nature of Plaintiffs' alleged conspiracy, what data produced by [redacted] shows, and

the relative bargaining power of the payors as to which he has no data. *Id*.; Leitzinger Reb. Rpt. ¶¶ 88-89. [redacted] Leitzinger Dep. at 280:21-24. [redacted] *Id*. at 280:25-281:14, 288:13-291:2. [redacted]

These are not mere rounding errors. In his extrapolation calculation, Dr. Leitzinger estimates the total paid to be [redacted]—a full [redacted] in unsupported claims on top of the [redacted] in payments he estimates based on transactions for the data he examined. *Compare* Dkt. 193-6, Leitzinger Supp. Rpt. Ex. 6A, *with* Dkt. 193-7, Leitzinger Supp. Rpt. Ex. 6B. [redacted] Leitzinger Dep. at 278:18-24, 279:7-16, 281:1-5.

Dr. Leitzinger's extrapolation is also unsupported by even a single piece of academic or econometric literature or record fact—let alone any well-accepted and reliable methodology. Opinions "based on guesswork rather than the facts" should be excluded as "too speculative." *Rogers by Rogers v. K2 Sports, LLC*, 348 F. Supp. 3d 892, 900-01 (W.D. Wis. 2018) (Peterson, J.) (excluding speculative opinions). At most, his opinion is mere syllogism disconnected to any existing data, and it should therefore be excluded.[13] *See Milligan by Thomas v. Rock on the River,*

[13] Dr. Leitzinger's opinions and testimony regarding purported overcharges and impact also should be excluded because he made no attempt to limit his findings to any properly-supported, relevant product market. [redacted]

Inc., No. 16-cv-498, 2017 WL 6734190, at *5 (W.D. Wis. Dec. 29, 2017) (Peterson, J.) (excluding where the expert's "opinions [were] simply conclusions that [were] not tied to any data"), *aff'd*, 738 F. App'x 373 (7th Cir. 2018).

CONCLUSION

For the foregoing reasons, the Court should exclude Dr. Leitzinger's (1) opinions and testimony based on his yardstick overcharge model, including his opinions on aggregate damages; (2) opinions and testimony with respect to classwide impact; and (3) calculations of damages based on his improper extrapolation.

[redacted]

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Respectfully submitted,

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