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**

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Class actions under Rule 23 are the rare "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). In an attempt to invoke this exception, Plaintiffs have narrowed their case theory substantially. They now focus on a limited set of conduct only for their Sherman Act Section 1 claim. They have also jettisoned their challenge to the rates Defendants charged for all healthcare services, focusing instead on rates for "outpatient professional services." Plaintiffs propose two classes for this Court's consideration: (1) an overbroad "primary" class for which they lack claims data, and (2) an "alternative" class that is also overbroad but at least is tailored to the claims data that they analyzed. In their Motion, Plaintiffs implore this Court to water down the required rigorous analysis under Rule 23 under the notion that courts "routinely" certify "cases like this." Pls.' Mot. for Class Certification at 1 (the "Motion" or "Mot."), Dkt. 186. Such platitudes invite error—no special rule permits a court to tip the scales toward class certification merely because an antitrust claim is involved. In the end, none of these maneuverings can conceal the flaws that preclude certification of either of Plaintiffs' proposed classes. Plaintiffs' Motion should be denied for the following seven reasons.

First, Plaintiffs' primary class should be rejected out of hand as unsustainable. As Plaintiffs acknowledge, they do not have claims data for a large percentage of the proposed primary class members. They also lack a reliable or admissible way of determining whether those would-be class members suffered antitrust impact, or any way to calculate damages attributable to the class members' numerous and distinct transactions. Thus, individual determinations on these questions would naturally predominate, in violation of Rule 23(b)(3). Presumably it is for this reason that Plaintiffs proffered their "alternative" class—which is limited to payors for which they actually

analyzed data—because they recognized that they cannot support an overbroad class for which they never analyzed any data.

Second, both of Plaintiffs' proposed classes include indirect purchasers despite the longstanding "bright-line" rule that only those who transact directly with an antitrust defendant can seek damages under the federal antitrust laws. In the healthcare context, only entities that directly pay a provider can pursue federal antitrust claims. For example, under the direct purchaser rule, a self-funded health plan would not qualify as a direct payor when the plan uses a Third-Party Administrator ("TPA") or middleman to pay claims. Plaintiffs recognized this direct purchaser limitation in their Complaint when they defined the class as including "all persons or entities that purchased . . . *directly* from Aspirus." Compl. ¶ 92, Dkt. 1 (emphasis added).

Plaintiffs now pivot in an attempt to include a great many indirect purchasers in the class. The problems start with their class definition, which is redrawn to include "all Payors" whose "funds were used." This phrasing renders the class impermissibly overbroad and vague because it sweeps indirect payors into the class. Plaintiffs do not address this issue in their Motion, and neither they nor their experts have a methodology for determining how to sort direct from indirect purchasers on a classwide basis. Individual questions as to how each class member structured its health plan throughout the class period would need to be assessed at trial on a class member-by-class member basis to determine whether any given class member is a direct or indirect purchaser. These individualized inquiries would overwhelm common questions at trial, which means Plaintiffs have failed to satisfy the predominance requirement in Rule 23(b)(3). As an example of the varied nature of this inquiry, discovery has revealed that both of the named Plaintiffs are indirect purchasers because only their respective TPAs ever directly paid Defendants. Not only does this create an insurmountable predominance problem, but it also renders the named Plaintiffs'

claims atypical of those of the class they propose to represent and subjects them to a unique defense that will prejudice any absent direct purchaser class members at trial, in violation of Rule 23(a)(3).

Third, additional individual issues on the elements of antitrust impact and damages would predominate over class issues, precluding certification under Rule 23(b)(3). In this case, antitrust impact and damages turn on the question of what would have happened in the absence of the conduct Plaintiffs challenge, *i.e.*, what alternative contractual arrangements among physicians and payors do Plaintiffs' theorize would have existed. To put it simply, to determine whether a given class member overpaid for healthcare services due to the conduct Plaintiffs challenge, one would need to know what the class member would have paid for those services absent the conduct. The Court captured this causation issue in its decision on the motion to dismiss when it explained that "plaintiffs will have to come forward with specific evidence that new networks likely would be formed in the absence of the restraints in ANI's contracts." Mot. to Dismiss Opinion at 20 (the "MTD Opinion"), Dkt. 47.

Plaintiffs and their experts did not do this. Plaintiffs' class certification expert, Dr. Jeffrey Leitzinger, simply assumed all things would remain equal in the absence of the conduct. In his view of the so-called "but-for" world in which the challenged conduct did not exist, all of the physician networks and health care plans would remain the same, only with lower negotiated rates. But Dr. Leitzinger has no factual basis for this assumption. At his deposition, [redacted] Nor does Dr. Leitzinger provide any basis to assume that payors would have selected the same set of providers and offered the same plans. These types of individualized questions will vary by provider and payor, and they would likewise overwhelm common issues on antitrust impact and damages at trial.

The problems do not stop there. Plaintiffs' only basis to claim an ability to show classwide damages hinges on Dr. Leitzinger's flawed yardstick regression model. This, along with his two-step antitrust impact calculation, should be excluded for the reasons set forth in Defendants' *Daubert* motion, the briefing for which is incorporated herein by reference. Defs.' Mot. to Exclude Dr. Jeffrey J. Leitzinger (the "*Daubert* Mot."), Dkt. 196. Without this damages model, Plaintiffs have no way to calculate classwide damages. That alone is fatal to Plaintiffs' Motion. And for antitrust impact, once Dr. Leitzinger's inadmissible empirical analysis is removed Plaintiffs are left with only "qualitative" evidence from their merits expert and snippets of record evidence. But none of this evidence is capable of detecting the presence of impact on a member-by-member basis. As a last resort, Plaintiffs suggest this Court invoke an "inference" of antitrust impact. Such an inference is at odds with the requirements of Rule 23 and the cases cited by Plaintiffs that have used this concept have only ever done so in litigation involving commodity products. Thus, individualized questions on each class member's antitrust impact and damages (if any) would vary by member and predominate at any class trial.

Fourth, Plaintiffs cannot meet Rule 23(b)(3)'s separate requirement that a class action be superior to other available methods for resolving the dispute. Management of the individual issues with respect to direct purchaser status, antitrust impact, and damages render a class action inferior to other available methods for resolving the dispute. Plaintiffs claim the alternative would be thousands of individual actions and some class members may not pursue claims. This is speculative; the number of entities that could pursue a federal antitrust action as a direct purchaser is far smaller than "thousands," and entities with small claims could proceed with entities with relatively larger claims in a joinder action—a procedural device that class counsel in this case has used in other antitrust direct purchaser litigations after class certification has been denied.

Fifth, Plaintiffs have not demonstrated numerosity under Rule 23(a)(1). To attempt to satisfy that requirement, Plaintiffs rely on Dr. Leitzinger's list of class members. But this list—which only purports to identify the members of Plaintiffs' "alternative" class for the obvious reason that Plaintiffs have not analyzed claims data sufficient to identify the payors in their primary class—took no expertise to create and Dr. Leitzinger has no method to know which of the entities on his list are direct or indirect purchasers. Whatever the correct number of direct purchasers is, Plaintiffs made no effort to calculate it. Rule 23(a)(1) also requires that joinder be impracticable—a requirement Plaintiffs ignore and is independently fatal to Plaintiffs' Motion.

Sixth, Heartland Farms cannot "fairly and adequately protect the interests of the class," as Rule 23(a)(4) requires of class representatives. In explaining why Heartland Farms brought this class action, the individual who recommended bringing it testified that [redacted] Yet these are also direct purchasers that would be included in the proposed class. For this reason, Heartland Farms cannot serve as a class representative.

Finally, the Court should not certify Plaintiffs' claim under Section 2 of the Sherman Act. Plaintiffs note in the first sentence of their Motion, Mot. at 1, and elsewhere, *id.* at 3 n.2, that they are focused on Section 1 of the Sherman Act. Nowhere do they request to certify their Section 2 claim. Plaintiffs do not identify any classwide exclusionary conduct that they argue is specific to their Section 2 claims, and their "price fixing" theory is only viable under Section 1 as a matter of law. Accordingly, there is no basis to include the Section 2 claim in the proposed class.

For the reasons detailed below, Plaintiffs have failed to show that the record in this case supports class certification. There is no express lane for antitrust cases that would allow Plaintiffs to avoid the rigorous analysis required by Rule 23. Plaintiffs' Motion should be denied.

FACTUAL BACKGROUND

Defendant Aspirus Network Inc. ("ANI") operates a Clinically Integrated Network ("CIN") of healthcare providers. As described below, ANI's structure allows it to deliver on the "triple aim" of healthcare by providing high quality healthcare in rural areas of Wisconsin, improving population health, and lowering overall costs. As Plaintiffs alleged at the outset of this litigation, "health care markets operate differently than many consumer goods and services markets." Compl ¶ 2. For this reason, adjudicating Plaintiffs' Motion requires an understanding of the particular ways in which healthcare providers can coordinate to deliver care as well as the various ways in which health plans and other entities contract to pay for those services.

I. Clinically Integrated Networks Are an Established Healthcare Model

A CIN is an organizational structure that brings healthcare providers together with the goal of providing better care at a lower overall cost. The core idea behind a CIN is that patients receive better care at lower overall cost when providers are incentivized to work together. *E.g.*, Dkt. 213, Expert Report of Dr. Gregg Meyer MD, dated May 7, 2025 ("Meyer Rpt.") ¶¶ 30-32. The concept of increased provider coordination is encouraged by the federal and state governments and payors, with CINs operating both within Wisconsin and across the country. *Id.* ¶¶ 55, 81; *see, e.g.*, Dkt. 178, Deposition of Andrea Lathers, dated February 4, 2025 at 104:23-105:24 [redacted]

Dr. Gautam Gowrisankaran, a tenured Professor of Economics in Columbia University's Economics Department and an expert in health economics, explains that CINs create efficiency in multi-specialty settings in which primary care physicians coordinate patient care with specialists and the various specialists coordinate care among themselves. CINs also create efficiencies in single-specialty settings in which, through closer collaboration, the group is able to provide care

more efficiently. Dkt. 212, Expert Report of Gautam Gowrisankaran Ph.D., dated May 7, 2025 ("Gowrisankaran Rpt.") ¶ 44. Dr. Gregg Meyer, a Professor of Medicine at the Massachusetts General Hospital and Harvard Medical School and a Professor of Health Policy & Management at the T. H. Chan Harvard School of Public Health, is a practicing physician who has extensive experience working for healthcare providers, payors, and the federal government in evaluating and operating various physician collaborations, including CINs. Meyer Rpt. ¶¶ 1-12. He explains that CINs are a well-known model for providing high-value healthcare because they (1) enable coordination among providers throughout the lifecycle of their patients' diagnoses; and (2) encourage the creation of mechanisms, including quality measurement and reimbursement tools, that incentivize providers to deliver high-value care and support care quality and efficiency on a system-wide basis. *Id*. ¶¶ 32, 53.

CINs are particularly important in rural areas like the regions in which Aspirus, Inc. ("Aspirus") and ANI operate, which face, among other challenges: a chronic shortage of healthcare providers (both within hospitals and as independent physicians); hospital closures; low patient volumes; and populations that are older, have worse health conditions, are uninsured or under-insured, and have limited transportation options. *Id*. ¶¶ 82-87, 89, 91. CINs help to solve many of the challenges associated with delivering high-quality rural healthcare, including fragmented care. For example, without a CIN, healthcare providers do not communicate with one another regarding a patient's care episode, which adversely impacts both quality and costs. *Id*. ¶ 38-39, 46-68 (summarizing the various ways CINs encourage coordination of care that improve quality and reduce costs).

For example, population demographics in areas such as Northern Wisconsin are skewed toward those with chronic health care needs whose costs of care will depend on the behavior of

multiple different providers. Gowrisankaran Rpt. ¶ 61. Physician coordination via a CIN, both in delivering care and in accepting compensation, facilitates providers lowering barriers to care and costs for patients with chronic conditions and responding to the incentives set out by value-based contracting, including incentives to manage total patient care costs. *Id.* Patients in rural areas often must travel long distances for care from specialists or wellness care, which influences how often they actually seek such care, complete wellness visits, or perform other activities necessary for them to stay healthy. Meyer Rpt. ¶ 92. CINs help to solve those rural healthcare challenges by establishing a framework for comprehensive coordination through clinical integration with providers across the healthcare spectrum. *Id.*

In addition, value-based contracts are a growing trend in national healthcare; to participate, physician practices require sophisticated data collection, monitoring, and reporting processes. *Id.* ¶¶ 63, 77. Value-based contracts involve arrangements between payors and providers in which a provider's reimbursement depends on the quality and/or cost of the care delivered. Both the federal government and commercial payors prioritize the shift toward value-based care, which in turn drives provider behavior. *Id.* ¶ 81. For example, some of the largest commercial payors, including Anthem Blue Cross Blue Shield ("Anthem"), UnitedHealthcare, Humana, Cigna, and Aetna, have publicly announced their commitment to the advancement of value-based care. *Id.* ¶ 80.

While small practices lack the financial resources to cover unexpected costly medical events, CINs allow these providers to more easily enter into value-based contracts (where their reimbursement may depend on managing total care costs) that pool outcomes of a larger set of patients across multiple providers, reducing the influence of factors outside the providers' control (*i.e.*, patient's genetic predispositions, lifestyle choices, and environmental exposures). *Id.* ¶¶ 60, 92. CINs further help small rural providers by reducing the infrastructure costs associated with

the implementation and maintenance of value-based and coordinated care. *Id.* ¶¶ 65, 92. And while large providers and technology vendors may be less likely to adapt their information-sharing practices to local practices, CINs reduce the administrative costs and duplication associated with implementation and maintenance of value-based and coordinated care and create a greater incentive to share data. *Id.* ¶ 92.

II. ANI Operates a High Performing Clinically Integrated Network

Aspirus is a nonprofit, community-directed health system based in Wausau, Wisconsin, serving northeastern Minnesota, northern and central Wisconsin, and the Upper Peninsula of Michigan. *E.g.*, Meyer Rpt. ¶ 15. ANI, a subsidiary of Aspirus, operates a CIN of leading primary and specialty care physicians, hospitals, and aligned health care professionals. ANI is a [redacted] Ex. A, TEAM-SCHIERL-ASPIRUS-0005532 at -532.[1] [redacted] *Id.* [redacted] *Id.* [redacted]

[1] All exhibits are in reference to the contemporaneously filed Declaration of Zachary M. Johns In Support of Defendants' Opposition to Plaintiffs' Motion for Class Certification, Dkt. 215.

[redacted] *Id.*; *see also id.* § 3.14.

[redacted]

E.g., Gowrisankaran Rpt. ¶ 417 (summarizing history). [redacted]

[redacted] *Id.* [redacted]

[redacted] *Id.* [redacted]

[redacted] Ex. A, TEAM-SCHIERL-ASPIRUS-0005532 at -532. [redacted]

[redacted]

Gowrisankaran Rpt. ¶ 417. [redacted]

[redacted]

[redacted] Meyer Rpt. ¶ 102. [redacted]

[redacted] *Id.* ¶ 103. [redacted]

[redacted] *Id.* [redacted]

[redacted] *Id.* ¶ 135. [redacted]

[redacted] *Id.* ¶ 136. [redacted]

[redacted] *Id.* ¶ 138. [redacted]

[redacted] *Id.*

ANI has also implemented and maintained initiatives to support the quality of the network and to reward and modify practice patterns to improve coordination of care. *Id.* ¶ 115. [redacted] *Id.* [redacted] *Id.* ¶¶ 117-18. [redacted] *Id.* ¶ 119. [redacted] Gowrisankaran Rpt. ¶ 93. [redacted] *Id.* [redacted] Aspirus hospitals, within which Aspirus-employed and ANI member physicians work, have earned

various awards and accolades for high-quality healthcare in recent years. From 2018 through 2020, Aspirus was recognized by IBM Watson Health in its "15 Top Health Systems" annual study identifying the top-performing health systems in the country based on overall organizational performance. Meyer Rpt. ¶ 175 (listing additional recent awards to Aspirus' hospitals in Wisconsin from 2021-2025).

The practices that make up ANI's CIN complement one another and allow the network to provide integrated care across a range of medical services in the areas it operates. "Complements," in economic terms, are products or services that deliver more value when offered or consumed together than the sum of the values that each delivers alone. Gowrisankaran Rpt. ¶ 197. ANI's CIN includes a full complement of care providers—such as primary care providers, specialists, hospitals, and related services. Meyer Rpt. ¶ 62. These services are not interchangeable, even if there are regional areas of overlap of certain providers. For example, a primary care physician does not compete with an anesthesiologist. Nor do emergency medicine physicians compete with psychiatrists. Gowrisankaran Rpt. ¶¶ 357, 362. [redacted][2] *Id.* ¶ 362, Ex. 22.

Plaintiffs challenge two aspects of how ANI operates its CIN—its joint contracting function on behalf of CIN members and a limited exclusivity provision in CIN member agreements (the "Challenged Conduct"). Mot. at 2. Both are vital aspects of the CIN that support ANI's broader purpose of providing high quality care at reduced cost in some of the most rural and

[2] [redacted]

historically underserved parts of Wisconsin. [redacted] Meyer Rpt. ¶¶ 187-189. [redacted] *Id.* [redacted] *Id.* [redacted] *Id.* [redacted] *Id.*; Gowrisankaran Rpt. ¶ 72.

III. The Negotiation of Payor Agreements Between ANI and "Network Vendors"

ANI negotiates with various payors, but the majority of its commercial contracts are negotiated with: [redacted] *See* Dkt. 192, Rebuttal Report of Jeffrey J. Leitzinger, Ph.D., dated June 11, 2025 ("Leitzinger Reb. Rpt.") ¶ 88. These entities offer fully insured plans as well as networks of providers that self-funded health plans could use. Plaintiffs define the term "Network Vendors" to refer to entities that negotiate

and contract with providers to "assemble provider networks, which consist of healthcare providers that have agreed to provide services at negotiated prices." Mot. at 7. Network Vendors, like the five entities above, can either offer healthcare plans themselves, *i.e.*, operate as fully insured plans, or they can sell access to their networks and various administrative services to self-funded health plans. Dkt. 191, Expert Report of Jeffrey J. Leitzinger, Ph.D., dated March 26, 2025 ("Leitzinger Rpt.") ¶ 4, n.1.

Under a fully insured plan, an employer pays a fixed premium to the commercial health insurance carrier, which in turn bears the costs for healthcare services on behalf of the plan sponsor. *E.g.*, Gowrisankaran Rpt. at 6-7; Dkt. 198, Expert Report of David Dranove, Ph.D., dated March 26, 2025 ("Dranove Rpt.") ¶ 50. [redacted] Dranove Rpt. at 19, n.36, 39; Dkt. 208, Deposition of Candace Meronk, dated December 16, 2024 ("Meronk Tr.") at 97:4-20; Dkt. 206, Deposition of Marc Bouwer, dated February 26, 2025 ("Bouwer Tr.") at 226:17-20.

Under a self-funded plan, employers and employees are responsible for the costs for healthcare services of the enrolled population. Gowrisankaran Rpt. at 8. [redacted] Dkt. 194, Expert Report of Dr. Laurence Baker, Ph.D., dated May 7, 2025 ("Baker Rpt.") ¶ 201; Bouwer Tr. at 142:8-25; Meronk Tr. at 97:4-20. TPAs may also design plan benefits or construct a provider network. Baker Rpt. ¶ 200. A Network Vendor may also offer TPA services. For example, [redacted] offers fully insured plans, will sell access to its networks of providers to self-funded health plans, and offers TPA services. *Id.* [redacted]

IV. The Named Plaintiffs

Plaintiff Team Schierl Companies ("Team Schierl") owns and operates multiple businesses in Wisconsin, including tire and automative centers and quick-service restaurants (*e.g.*, Subway). Ex. B, TSC_001594_R; Compl. ¶ 20. Plaintiff Heartland Farms, Inc. ("Heartland Farms") is a 27,000-acre potato and vegetable farm located in Hancock, Wisconsin. Compl. ¶ 21. Both Plaintiffs operate self-funded health plans, although they only engaged with ANI as an "in-network" provider for a portion of the class period. *E.g.*, Compl. ¶¶ 20-21, 86.

[redacted] *E.g.*, Ex. C, HF_001496; Ex. D, HF_001478, Ex. E, TSC_013014; Ex. F, TSC_012034. [redacted] *Id.* [redacted] *E.g.*, Ex. G, HF_003843 at -846 [redacted] Ex. H, TSC_001395 at 395 [redacted] Ex. I, TSC_005947_R [redacted]

[redacted] *E.g.*, Bouwer Tr. at 120:23-121:13; Meronk Tr. at 96:19-24; Dkt. 207, Deposition of Drew Leatherberry, dated May

16, 2025 ("Leatherberry Tr.") at 35:9-13. The below chart summarizes the named Plaintiffs' various healthcare plans and the TPAs they used during the class period:

TABLE 1: Named Plaintiffs' Network Vendors and TPAs

	Team Schierl	*Heartland Farms*
Year	[redacted]	
2019		
2020		
2021		
2022		
2023		

A. Team Schierl's Use of TPAs to Pay Claims

During the class period, Team Schierl used three TPAs: [redacted] Ex. J, TSC_016448, §§ 1.1, 3.1 [redacted] Meronk Tr. at 36:15-37:4. [redacted] Ex. K, TSC_001171_R; *see also* Ex. L, TSC_001364_R at 364. [redacted]

[redacted] *E.g.*, Ex. H, TSC_001395 at 395; Ex. I, TSC_005947_R. [redacted] *E.g.*, Ex. M, TSC_012840 at 841.

[redacted] *E.g.*, Ex. N, TSC-[redacted]; *id*. at § 4 and Ex. B. [redacted] Ex. E, TSC_013014; Ex. F, TSC_012034. E[redacted] Ex. O, TSC_012008; Meronk Tr. at 148:22-149:10.

[redacted] Ex. P, AITHER00001 at 001. [redacted] *Id*., Ex. B § 3.1 [redacted]

[redacted][3] Ex. Q, TSC_016713; Ex. R, TSC_013676. [redacted] [redacted] Ex. S, TSC_016923.

B. Heartland Farms' Use of TPAs to Pay Claims

During the putative class period, Heartland Farms similarly used [redacted] Bouwer Tr. at 142:23-25. [redacted] Ex. T, UHG-Team_Schierl-00027170. [redacted] *Id*. at -179-82. [redacted] *See id*. at -180. [redacted] Ex. U, TSC_014578; Bouwer Tr. at 96:2-13. [redacted] Ex. V, [redacted] Bouwer Tr. at 96:17-19. As was the case with Team Schierl, [redacted] Bouwer Tr. at 103:10-15, [redacted] Ex. U, HF_001478 at 488-91. [redacted]

[3] [redacted] *See id.*

[redacted] Bouwer Tr. at 138:13-25; *see also* Ex. W, TSC_014308.

[redacted] Bouwer Tr. at 138:13-16. [redacted]; *see also* Bouwer Tr. at 141:7-14 [redacted] Bouwer Tr. at 139:24-140:17. [redacted] *Id*. at 143:1-144:5. [redacted] *Id*. at 143:6-18. [redacted] *Id*. at 150:3-11. [redacted] Ex. X, HF_009993 at § 3.5 [redacted] Bouwer Tr. at 151:9-11 [redacted] Ex. Y, PS000142. [redacted] Ex. Z, HF_008929 at 929.

V. Procedural History and Plaintiffs' Proposed Classes

Plaintiffs filed their Complaint on October 12, 2022, and brought claims under Sections 1 and 2 of the Sherman Act alleging that Defendants engaged in a multifaceted "scheme" that inflated reimbursement rates across all inpatient and outpatient care offerings by ANI. Compl. ¶ 1.

In their Complaint, Plaintiffs defined their class as "[a]ll persons or entities that purchased [general acute care] and/or Outpatient services *directly* from Aspirus in North-Central Wisconsin at any time during the period from October 11, 2018 up to the present." *Id*. ¶ 92 (emphasis added).

On October 17, 2023, the Court granted in part and denied in part Defendants' motion to dismiss. The Court described Plaintiffs' theories as "novel" and noted that Plaintiffs "may have an uphill battle to prove their claims." MTD Opinion at 2. In evaluating the plausibility of Plaintiffs' theory that Defendants' "scheme" prevented payors from forming lower cost networks of providers, the Court observed that to show causation "plaintiffs will have to come forward with specific evidence that new networks likely would be formed in the absence of the restraints in ANI's contracts." *Id*. at 20.

On July 2, 2025, after more than two years of fact discovery, the production of hundreds of thousands of documents, and multiple party and non-party depositions, Plaintiffs moved for class certification. They did so on a substantially narrowed case. Departing from their Complaint, Plaintiffs narrowed the scope of conduct they challenge to joint contracting and limited exclusivity. The range of services that are the focus of Plaintiffs' theory has also been reduced to "outpatient professional services"—a subset of the services within ANI's offerings.

Plaintiffs now seek to certify the following primary class:

> All Payors whose funds were used to pay Defendants and/or their Co-Conspirators for in-network outpatient professional services provided in North-Central Wisconsin, during the period October 11, 2018, up to and including June 30, 2023 (the "Class Period").

Mot. at 3. Recognizing that they do not have from all Network Vendors, Plaintiffs offer the following "narrower" alternative class that is more limited in its "membership and damages:"

> All Payors whose funds were used to pay Defendants and/or their Co-Conspirators for in-network outpatient professional services provided in North-Central Wisconsin, during the period October 11, 2018, up to and including June 30, 2023

> (the "Class Period") and who used The Alliance, Anthem, Security Health Plan, UnitedHealthcare, and/or UnitedHealthcare Management Resources as a Network Vendor and/or TPA.

Id. at 3 n.3.[4]

Significantly, Plaintiffs removed from their class definition reference to entities that paid Defendants "*directly*." Compl. ¶ 92 (emphasis added). In its place is the phrase all "*Payors whose funds were used*." While the phrase "Payors" is defined to exclude naturalized persons, *i.e.*, patients or plan members who paid premiums, co-payments, and/or other deductibles, the phrase "whose funds were used" is not given any precision. Leitzinger Rpt. ¶ 4 n.1 (defining "Payors" as including "both commercial health insurance carriers offering fully insured plans and self-funded entities who pay claims on behalf of their own members . . .").

Finally, Plaintiffs only "focus" on certification of their Section 1 claim. *E.g.*, Mot. at 1 ("This antitrust case is about an illegal agreement in restraint of trade—price fixing—in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1"). They do not ask to certify their Section 2 claim in Count II of their Complaint, instead suggesting they no longer intend to "focus" on that claim. *Id*. at 3, n.2 ("With fact discovery largely complete, Plaintiffs now focus on how this scheme violates Section 1 and inflated prices for outpatient professional services").

ARGUMENT

To invoke the class action "exception," a plaintiff "'must affirmatively demonstrate his compliance' with Rule 23." *Comcast*, 569 U.S. at 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). The Rules Enabling Act, which is the Congressional authorization that provides for the creation of the Federal Rules of Civil Procedure, states that the

[4] Further, Plaintiffs' expert, Dr. Leitzinger chose [redacted]

rules may not "enlarge or modify any substantive right." 28 U.S.C. § 2072(b). In the context of Rule 23, the Supreme Court has explained that this prohibits giving "plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016) (citing *Dukes*, 564 U.S. at 367). For example, in an individual action, defendants at trial would have the ability to contest whether a plaintiff may bring a claim or sustained a cognizable injury. If not properly constrained, class actions could obscure and even eliminate this ability, thereby curtailing a defendant's Constitutional rights to due process and a jury trial under the Fifth and Seventh Amendments. U.S. CONST. Amends. V & VII. To guard against this risk, courts "*must* rigorously analyze" whether plaintiffs' evidence at class certification satisfies each of the Rule 23 elements. *Eddlemon v. Bradley Univ.*, 65 F.4th 335, 338 (7th Cir. 2023) (citations omitted, emphasis in original). The requirements of Rule 23 cannot be reduced to a mere pleading standard. *Id*. at 339. And while Plaintiffs claim that courts "routinely recognize price-fixing cases" as suitable for class treatment, *e.g.*, Mot. at 1, 27, there is no judicial presumption in favor of class certification in antitrust cases.[5]

To certify a class, Plaintiffs must "prove" by a preponderance of the evidence "that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Eddlemon*, 65 F.4th at 339; *Van v. Ford Motor Co.*, 332 F.R.D. 249, 264 (N.D. Ill. 2019) (citing *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006)). Frequently, the required "rigorous analysis" will

[5] Plaintiffs quote dicta from *Amchem Prods., Inc. v. Windsor*, an asbestos mass-torts case, in which Rule 23's commonality requirement was not met. *See* Mot. at 1 (citing 521 U.S. 591, 625 (1997)). *Amchem*, did not involve any federal antitrust claim and stated in passing that in "certain" antitrust cases predominance is readily met. 521 U.S. at 625. However, subsequent courts evaluating antitrust cases have denied proposed classes for a failure to meet the predominance requirement and any number of Rule 23's other requirements. *E.g.*, *Comcast*, 569 U.S. at 38; *Black v. Occidental Petroleum Corp.*, 69 F.4th 1161, 1182 (10th Cir. 2023) (rejecting "broad presumption" of "class-wide antitrust impact in all cases alleging anticompetitive conduct"); *Blades v. Monsanto Co.*, 400 F.3d 562, 572 (8th Cir. 2005) (affirming denial of class certification in *per se* pricing fixing case).

entail some overlap with the merits of the underlying claims. *Dukes*, 564 U.S. at 351. The "[f]ailure to meet any of the Rule's requirements precludes class certification." *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008) (citing *Harriston v. Chi. Tribune Co.*, 992 F.2d 697, 702 (7th Cir. 1993)).

Here, Plaintiffs have not met their burden under Rule 23. First, only Plaintiffs' "alternative class" should even be considered because the "primary" class is unsupported by data necessary to make any determinations as to antitrust impact and damages, or even to identify who is in that expanded class. Second, Plaintiffs' proposed classes are replete with indirect purchasers that have no ability to pursue federal antitrust claims, including both named Plaintiffs (which renders them inadequate class representatives). Third, Plaintiffs have not and cannot show that common issues would predominate. Establishing class members' direct purchaser status, impact, and damages would require proof at trial that is highly individualized. Fourth, because individual issues predominate, a class is not a superior method of resolving this action. Fifth, after all the class members that lack standing are removed from the proposed class, Plaintiffs have not met the numerosity requirement. Sixth, Heartland Farms is an inadequate class representative for an additional reason: [redacted] Finally, Plaintiffs have effectively abandoned their Section 2 claim and advance no argument or evidence as to why that claim should be resolved on a class basis.

I. Plaintiffs' Primary Class Cannot Be Certified Because Plaintiffs Lack Evidentiary Support

As a threshold matter, the only remotely viable class identified by Plaintiffs is the one they propose in the alternative. Mot. at 3 n.3. There are multiple reasons why the primary class does not satisfy Rule 23 as detailed below, but it can be quickly disposed of because Plaintiffs failed to

obtain claims data for a large percentage of the proposed primary class. Without these data, Plaintiffs have no reliable or admissible way of determining, on a classwide basis, whether class members suffered antitrust impact, nor any way to calculate damages attributable to their transactions. [redacted] Leitzinger Rpt. ¶ 20; Dkt. 190, Deposition of Jeffrey J. Leitzinger, Ph.D., dated June 24, 2025 ("Leitzinger Tr.") at 115:7-17. [redacted] is the subject of Defendants' pending *Daubert* motion. *Daubert* Mot. at 25-27. Those opinions are inadmissible and should be disregarded for the reasons set forth in that briefing. Without these opinions, individual questions as to antitrust impact and damages for the extrapolated portion of the primary class would easily overwhelm common issues at trial. Fed. R. Civ. P. 23(b)(3).

Presumably, because they recognize that they cannot support an overbroad class composed of a great many class members that they cannot identify and for which they have no data, Plaintiffs propose an "alternative" class that is limited to members and claims for which Plaintiffs have actually analyzed data. It is only that alternative class that merits any real consideration, but that class also fails to satisfy Rule 23 for multiple reasons, as discussed below.

II. The Inclusion of Indirect Purchasers in the Proposed Classes Is Improper for Multiple Reasons

Under the federal antitrust laws, only entities that directly transact with the defendants may pursue claims for damages under the Sherman Act. Indirect purchasers, meaning those that transact *indirectly* or downstream from the defendant, are barred under long-standing Supreme Court precedent. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 740, 746 (1977). Here, Plaintiffs run afoul of *Illinois Brick*'s bright-line rule in multiple ways. They begin by defining their classes with a vague phrase that sweeps in indirect purchasers, and Plaintiffs have no proposed method to

identify and remove them. The inclusion of indirect purchasers would have significant ramifications at trial—determining whether each class member is a direct purchaser would require numerous mini-trials to assess on an individualized basis how health plans operated and how (and by whom) providers were compensated for their services for each class member on a year by year basis.[6] This problem is best illustrated by the named Plaintiffs themselves—both of whom are indirect purchasers that cannot bring federal antitrust claims, rendering them inadequate class representatives under Rule 23 as explained below. The individualized evidence the Court would need to adjudicate challenges to payors' status as direct purchasers would be extensive.

This foundational restriction on the reach of federal antitrust law is grounded in the doctrine of antitrust standing. Antitrust standing is a body of law that interprets the limits of Section 4 of the Clayton Act—the statutory provision that provides the basis for private rights of action under the Sherman Act.[7] 15 U.S.C. § 15(a). The doctrine was created because, in enacting the Clayton Act, "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters* ("*AGC*"), 459 U.S. 519, 534 (1983) (citation omitted).

[6] Plaintiffs may suggest that such issues can be deferred to a claims adjudication phase after a jury trial. Such an approach would subvert Defendants' Due Process and Seventh Amendment rights. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 52-53 (1st Cir. 2018) (rejecting proposal to adjudicate Article III standing of absent class members by affidavits that were rebuttable and relied on inadmissible hearsay). It also assumes Plaintiffs prevail. If a defense verdict is rendered, this process will never take place and the question of who is in the class and bound by the judgment would remain unresolved, unfairly prejudicing Defendants.

[7] The threshold requirements under Section 4 of the Clayton Act are often referred to "antitrust standing" in the caselaw. These requirements are not synonymous with Article III standing, as this Court has observed, MTD Opinion at 18, and Defendants use "antitrust standing" to refer to the requirements in Clayton Act Section 4.

In *Illinois Brick*, the Supreme Court held that only direct purchasers may bring federal antitrust claims. 431 U.S. 720, 740, 746. *Illinois Brick* set forth a "bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers." *Apple Inc. v. Pepper*, 587 U.S. 273, 279 (2019) (citing *Illinois Brick*, 431 U.S. at 746). As the Supreme Court recently explained, this means that "*indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue." *Id.*; *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990) (defining an indirect purchaser as an entity that is "not the immediate buyers from the alleged antitrust violators"); *see also California v. ARC Am. Corp.*, 490 U.S. 93, 97 (1989). The Supreme Court remains "emphatic" about the strictness of this requirement. *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1414 (7th Cir. 1995) (citations omitted).

The relevant question in the healthcare setting—like this case—is which entity "directly paid the healthcare provider." *In re NorthShore Univ. HealthSystem Antitrust Litig.*, No. 07-cv-4446, 2018 WL 2383098, at *6 (N.D. Ill. Mar. 31, 2018); *see also Marshfield Clinic*, 65 F.3d at 1414 (finding that insurance company Blue Cross had antitrust standing where "money went directly from Blue Cross to the Clinic"). The answer to this question remains the same even if the entity paying the claims passed on "the *entire* overcharge of a purchase to someone else down the line," —the original purchasing entity remains the 'direct purchaser' for antitrust-suit purposes." *In re NorthShore*, 2018 WL 2383098, at *6. (emphasis in original); *see also UtiliCorp*, 497 U.S. at 209, 217 (indirect purchasers cannot sue even if "any economic assumptions underlying" the rule "might be disproved in a specific case"). Here, this means that only those proposed class members who *directly* paid Defendants have antitrust standing. If a self-funded entity uses, for example, a middleman like a TPA insurer to pay claims on their behalf, the TPA is the direct purchaser with antitrust standing and the self-funded entity is an indirect purchaser. *In re*

NorthShore, 2018 WL 2383098, at *7 (explaining that "the entity actually sending money to [the provider] for payment" is the direct purchaser). *Illinois Brick* contemplated this result when it expressly "reject[ed] . . . attempts to carve out exceptions," such as when "middlemen . . . resell goods without altering them." 431 U.S. at 744-45.

Courts have also held that Clayton Act Section 4 includes a proximate causation requirement. Under this requirement, entities that are two steps or more removed from the payment of claims lack antitrust standing. *AGC*, 459 U.S. at 535-36. "[T]he same concerns" in *Illinois Brick* about "indirectness of [an] alleged injury" guided the *AGC* court's application of the proximation causation requirement. *Id*. at 543-45. This means that, in addition to *Illinois Brick*'s direct purchaser rule, an antitrust plaintiff must also show that they were "injured at the first step of the causal chain of the defendants' actions, *i.e.*, the "first step rule." *In re Am. Express Anti-Steering Rules Antitrust Litig.* ("*Amex*"), 19 F.4th 127, 135, 140 (2d Cir. 2021) (citing *AGC*, 459 U.S. at 534); *see also Pepper*, 587 U.S. at 279. The first step rule requires that there is "some direct relation between the injury asserted and the injurious conduct alleged." *Amex*, 19 F.4th at 140; *see also Austin v. Blue Cross & Blue Shield of Alabama*, 903 F.2d 1385, 1393 (11th Cir. 1990) (allegations too remote when they relied on actions taken by third parties that were not parties to the suit).

Plaintiffs' proposed classes run headfirst into the *Illinois Brick* direct purchaser limitation and cannot clear *AGC*'s first step rule. This failure infects multiple of Rule 23's requirements and should result in the denial of Plaintiffs' Motion.

A. Plaintiffs' Proposed Class Definitions Are Impermissibly Overbroad and Violate Rule 23's "Clear Definition" Requirement

Both of Plaintiffs' proposed class definitions identify the types of entities included in the class with the phrase "[a]ll *Payors whose funds were used to pay* Defendants and/or their Co-

Conspirators for in-network outpatient professional services. . . " from October 11, 2018 through June 30, 2023. Mot. at 3 n.3. (emphasis added); *id*. at 3. The term "Payors" and the phrase "whose funds were used" are impermissibly overbroad and vague because they include *indirect* payors.

A class cannot be certified if it is defined so broadly "that it sweeps within it persons who could not have been injured by the defendant's conduct." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). That is because defining a class "so broadly as to include many members who could not bring a valid claim even under the best of circumstances" only adds to the "'*in terrorem* character of a class action.'" *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (quoting *Kohen*, 571 F.3d at 678). There is "no precise measure" for when a class includes too many unharmed members; "[s]uch determinations are a matter of degree and will turn on the facts as they appear from case to case." *Id*.[8]

In addition, Rule 23 requires that "a class be defined […] clearly and based on objective criteria." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015). Vagueness in a class definition "is a problem" because it means courts are unable to easily "identify who will receive notice, who will share in any recovery, and who will be bound by a judgment." *Id*. at 660. To

[8] The Plaintiffs' proposed class includes class members that were uninjured under the federal antitrust laws and for that reason alone should not be certified. Leitzinger Reb. Rpt. at 19 [redacted]. While the Seventh Circuit permits certification so long as there are not a "great many" uninjured class members, there is a circuit split on the issue. *Compare Messner*, 669 F.3d at 825-26 (certifying a class despite the presence of a limited number of uninjured class members), *with In re Rail Freight Fuel Surcharge Antitrust Litig. - MDL No. 1869*, 934 F.3d 619, 625 (D.C. Cir. 2019) (noting that a class with more than 5% to 6% uninjured members represents "the outer limits of a *de minimis* number"); *In re Asacol Antitrust Litig*., 907 F.3d at 53-54 (refusing to certify class with a non-*de minimis* number of uninjured class members). Moreover, the Supreme Court recently granted certiorari in a case that would have addressed that issue, but that appeal was denied as improvidently granted. *Lab'y Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1608, 1612 (2025); *see also id.* at 1609 (Kavanaugh, J. dissenting) (stating that he would hold that a federal court may not certify a damages class that includes both injured and uninjured members). Defendants contend that class certification should be denied where any unharmed class members are included, consistent with the trend of class certification jurisprudence. Defendants understand this Court is bound to follow Seventh Circuit precedent that, as of now, does not have this requirement.

satisfy the "clear definition" requirement, a proposed class definition must "identify a particular group, harmed during a particular time frame, in a particular location, in a particular way," and those characteristics must be based on objective criteria, rather than subjective criteria. *Mullins*, 795 F.3d at 660; *see also Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 495 (7th Cir. 2012) (concluding that a proposed class that included all disabled students, even those who were not identified and remained unidentified, was too vague, noting that identifying class members would be a "complex, highly individualized task, and cannot be reduced to the application of a set of simple, objective criteria"); *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 12-cv-01019, 2016 WL 1270087, at *7 (S.D. Ind. Mar. 31, 2016) (holding that the term "recruited" in the class definition was vague, when the plaintiff had "presented no class-wide evidence to demonstrate how a student-athlete can be identified as having been 'recruited'").

Plaintiffs' proposed class definitions include a "great many" indirect purchasers and lack sufficient criteria to clearly identify a "particular group" of members who were "harmed." *Kohen*, 571 F.3d at 677; *Mullins*, 795 F.3d at 660. This ambiguity appears in two ways. First, while undefined in the Motion, the term "Payors" is defined by Plaintiffs' expert, Dr. Leitzinger, to include entities that [redacted] Leitzinger Rpt. ¶ 4 n.1. Dr. Leitzinger understood that to mean, and thus included in his list of class members, [redacted] *Id.* ¶ 19. It is thus unclear what types of entities are included in the category of "fully insured," and it appears that Dr. Leitzinger [redacted] Dr. Leitzinger at his deposition testified that [redacted] Leitzinger Tr. at 127:19-128:4; *see also* Baker Rpt. ¶

16. But such *indirect* purchasers lack antitrust standing. *See Marshfield Clinic*, 65 F.3d at 1414 (finding that insurance company Blue Cross had antitrust standing where "money went directly from Blue Cross to the Clinic"); *In re NorthShore*, 2018 WL 2383098, at *6 (concluding that the submitting entity, not the self-funded health plan, was the direct purchaser under *Illinois Brick*); *see also UtiliCorp.*, 497 U.S. at 209 (holding that indirect purchaser was barred, even when 100 percent of the overcharge was passed on).

Second, the phrase "whose funds were used" is equally problematic. It certainly can be read to include both direct purchasers—such as fully insured plans and self-funded health plans that paid healthcare providers directly—and indirect "Payors" like entities that subscribed to fully insured plans and self-funded health plans which used a TPA that in turn paid healthcare providers. Missing, however, is any clear criteria to limit the class to only *direct* payors. Providing this clarity is not an impossible task and it is commonly done in other direct purchaser antitrust actions. In fact, Plaintiffs' Complaint alleged a class limited to "[a]ll persons or entities that purchased . . . services *directly* from Aspirus . . . ." Compl. ¶ 92 (emphasis added); *see also id.* ¶ 91 (alleging that class members "purchased health care services *directly* from Aspirus" (emphasis added)).

Plaintiffs chose to abandon that definition in favor of one that is impermissibly overbroad and effectively reaches multiple levels down the payment chain to sweep in as class members entities that (1) used middlemen like TPAs to make the payments, and/or (2) purchased fully insured plans.[9] The named Plaintiffs, for instance, would be included in the class yet they are barred from bringing federal antitrust claims under *Illinois Brick*. [redacted]

[9] [redacted] Leitzinger Tr. at 110:25-111:10, 112:20-113:1, 127:19-128:4. [redacted] *See id.* at 108:11-113:1, 126:14-127:11, 128:12-129:7.

[redacted] Bouwer Tr. at 120:23-121:13; Meronk Tr. at 96:19-24; Leatherberry Tr. at 35:9-13. Just like the self-funded health plan plaintiff in *In re Northshore*, [redacted] 2018 WL 2383098, at *7. [redacted] Bouwer Tr. at 142:23-25. [redacted] *See* Factual Background Section IV.A, *supra*.

Plaintiffs also have a proximate causation problem under *AGC*. Specifically, Plaintiffs allege that Defendants negotiated and entered into contracts with Network Vendors. *E.g.*, Mot. at 2, 10. Plaintiffs say that these negotiations "are at the center of this case," *id*. at 8, and are completed by "just a handful of Network Vendors," *id*. at 44. The reimbursement rates for medical services were determined during those negotiations. *Id*. at 7. While self-funded health plans like named Plaintiffs rely on may pay to access the contracts negotiated by Network Vendors, those plans do not themselves negotiate with Defendants. Therein lies Plaintiffs' problem. Relying on the negotiations and actions of third parties (the Network Vendors) means that self-funded health plans could not have been injured at the first step of the casual chain—*i.e.*, the contract negotiations. *Pepper*, 587 U.S. at 279; *Amex*, 19 F.4th at 140.

The overbreadth and ambiguity in Plaintiffs' class definitions has significant implications that *Kohen* and Rule 23's "clear definition" requirement seek to guard against. An overbroad class adds hydraulic pressure to a defendant with the threat of defending against large numbers of aggregated yet "meritless claims." *Messner*, 669 F.3d at 825 (citing *Kohen*, 571 F.3d at 678); *Lab'y Corp.*, 145 S. Ct. at 1612 (Kavanaugh, J.) (dissenting from dismissal of appeal as

improvidently granted and observing that "overinflated classes" lead to "coerced settlements" and have "serious real-world consequences" that "ultimately harm consumers, retirees, and workers, among others" in the form of higher prices). As an example of the vagueness problem, if a judgment were entered against the class, a direct purchaser TPA may argue that it is not bound because it used funds from others, even though the TPA made the necessary payment at the first step of the *Illinois Brick* and *AGC* inquiries. *See Pepper*, 587 U.S. at 279. Rule 23's "clear definition" requirement is designed to head off problems regarding, among other things, "who will be bound by a judgment." *Mullins*, 795 F.3d at 660. [redacted] Dkt. 190, Leitzinger Tr. at 108:11-113:1. To put it bluntly, Plaintiffs' expert "said the quiet part out loud." The reason they changed their class definition was precisely because they knew named Plaintiffs and most of their proposed class are not direct purchasers.

The overbroad and unclear class definition alone should result in the denial of class certification.

B. Determining Whether Class Members Are Direct Purchasers Would Overwhelm a Class Trial and Plaintiffs Have No Classwide Methodology to Address This Threshold Issue

As addressed above, the classes facially include two types of indirect payors, self-funded health plans that used TPAs and entities that subscribed to fully insured health plans. Neither of these sets of entities has cognizable claims as a matter of law. Despite this, Plaintiffs offer no classwide method to identify and remove them. Instead, the parties would be left to sort this out at trial by sifting through mountains of evidence before the jury about each class member's health

plan in each year of the class period to determine if they are direct payors. The pervasiveness of this issue across the classes would predominate the presentation to the jury.

Rule 23(b)(3) requires Plaintiffs to show that "common questions 'predominate' over individual ones." *Dukes*, 564 U.S. at 359 (quoting Fed. R. Civ. P. 23(b)(3)). While "similar to Rule 23(a)'s requirements for typicality and commonality, 'the predominance criterion is far more demanding.'" *McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 800 (7th Cir. 2017); *see also Amchem*, 521 U.S. at 623-24 (requiring courts to take a "close look" at whether the far more demanding predominance prong is met). Specifically, "[if] the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question" and the predominance requirement is not satisfied. *Conrad v. Jimmy John's Franchise, LLC*, No. 18-cv-00133, 2021 WL 3268339, at *8 (S.D. Ill. July 30, 2021) (quoting *Blades*, 400 F.3d at 566).

Determining whether the proposed class members were direct purchasers during the class period will require each entity to submit individualized evidence at trial regarding their arrangements with healthcare providers, Network Vendors, TPAs, and/or insurance companies, and Defendants have a Due Process and Seventh Amendment right to challenge that evidence. As detailed above, the history of the named Plaintiffs is emblematic of the type of individualized assessment that is required. This is a significant common question that there is unaddressed in Plaintiffs' Motion. *See* Mot. at 33.

Class members are likely to have a variety of custom and individualized health plan arrangements. Other self-funded entities in the putative class may have used TPAs that directly sent money to Defendants for payment. [redacted]

[redacted] *Id.* ¶ 9. [redacted] *Id.* Yet Plaintiffs nowhere address which class members used [redacted] as their TPA.

Plaintiffs are aware of this problem but offer no solution. Dr. Leitzinger was tasked with [redacted] Leitzinger Rpt. ¶ 8(a). [redacted] Leitzinger Tr. at 123:5-20. [redacted] *id.* at 108:15-109:6, [redacted] *id.* at 127:19-128:4. [redacted] *Id.* at 126:14-127:11. [redacted]

[redacted]

Id. at 112:20-113:1. [redacted]

Id. at 128:12-129:11.

In short, Plaintiffs have not met their burden under Rule 23(b)(3) because they have failed to address the obvious problems raised by including indirect purchasers in their proposed classes.

C. The Named Class Representatives Are Atypical Because They Are Indirect Purchasers

The *Illinois Brick* and *AGC* limitations also disqualify the named Plaintiffs from serving as class representatives. Rule 23 requires that the putative class representatives' claims are "typical of the claims" of the class. Fed. R. Civ. P. 23(a)(3). "[T]he presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011); *see also Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011) (affirming denial of class certification when named plaintiff's claims were "significantly weaker than those of some (perhaps many) other class members"). "The fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer." *CE Design*, 637 F.3d at 726 (quoting *J. H. Cohn & Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980)).

Those concerns are present here. [redacted] *See* Factual Background Section IV, *supra*. This subjects them to defenses that do not apply to the direct purchasers in their proposed class. [redacted] Litigating this defense at trial would also prejudice those absent class members who are direct purchasers. Thus, neither of the proposed named Plaintiffs are appropriate class representatives.

III. Individual Damages and Impact Questions Would Predominate

There are additional reasons why plaintiffs fail the Rule 23(b)(3) predominance requirement. To satisfy that requirement, Plaintiffs must show that common questions over the elements of damages and antitrust impact can be shown using classwide evidence. *See Dawson v. Great Lakes Educ. Loan Servs., Inc.*, 327 F.R.D. 637, 649 (W.D. Wis. 2018) (Peterson, J.) (citing *Comcast*, 569 U.S. at 43) (stating that Rule 23(b)(3) "also requires plaintiffs to put forth a common methodology that has the ability to measure damages on a class-wide basis . . . ."); *Reed v. Advocate Health Care*, 268 F.R.D. 573, 581-82 (N.D. Ill. 2009) (explaining that a class plaintiff must "demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."). A class cannot be certified where, for example, "[q]uestions of individual damage calculations" exist because such issues "will inevitably overwhelm questions common to the class." *Comcast*, 569 U.S. at 34. While Plaintiffs are not required to prove each element of their claim at class certification, they must show that they have a reliable *methodology* for doing so on a classwide basis. *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 773 (7th Cir. 2013) (holding the decertification was appropriate where plaintiffs trial plan did not present a feasible way of determining the plaintiffs' damages, and would have required "2341 separate evidentiary hearings"). Further, "to decide predominance, the court must understand what the plaintiffs will need to prove and must evaluate the extent to which they can prove their case with common evidence." *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 603 (7th Cir. 2020).

Plaintiffs fail to make this showing. First, when it comes to attempting to quantify damages and classwide impact, Plaintiffs rely entirely on the opinions of Dr. Leitzinger. But his opinions are inadmissible and, even if considered, should be given no weight for multiple reasons. For starters, his opinions are founded upon speculative and unsupported assumptions about what would

have occurred in the absence of the Challenged Conduct. Absent from Dr. Leitzinger's analyses is the type of "specific evidence" that the Court said is necessary to establish the alternative set of plans and networks that might have existed but for the Challenged Conduct. MTD Opinion at 20. These alternatives would provide the baseline for a jury to conclude whether the Challenged Conduct caused any particular class member to overpay and by how much. Second, the damages and impact models Dr. Leitzinger uses are wholly unreliable for the reasons explained in Defendants' *Daubert* motion. Finally, for purposes of antitrust impact, Plaintiffs rely on a mix of qualitative evidence and implore the Court to draw an "inference" of classwide impact. *E.g.*, Mot. at 41. No such "inference" is appropriate and the "qualitative" approach is incapable of determining which class members (if any) sustained an antitrust impact in this case.

A. Dr. Leitzinger's Damages and Impact Opinions Rest on an Unsupported Assumption About What Networks Would Exist Absent the Challenged Conduct

Plaintiffs' theory of antitrust liability rests on the notion that, absent the Challenged Conduct, reimbursement rates for ANI members would have been lower. *E.g.*, Mot. at 11, 15. But Plaintiffs and their experts leave unaddressed a key question: what provider networks or alternative contracts would have been negotiated in the absence of the Challenged Conduct. This is exactly the question the Court teed up at the motion-to-dismiss stage when stating "[a]t summary judgment or trial, plaintiffs will have to come forward with specific evidence that new networks likely would be formed in the absence of the restraints in ANI's contracts." MTD Opinion at 20.

Plaintiffs have ignored this instruction, likely because they are unable to satisfy it or recognize that attempting to do so would require exactly the type of individualized inquires that render class treatment inappropriate in this case. Instead, Dr. Leitzinger conjures "classwide" damage and impact models that require him to assume that, but-for Defendants' Challenged Conduct, all things would have remained the same, just at lower costs in the hypothetical but-for

world. As he testified, he kept [redacted] Leitzinger Tr. at 103:19-22.

This unsupported and unrealistic assumption fails to engage with the great many complexities of how healthcare services are priced, structured, negotiated, and offered and how those complexities would affect different class members, and any potential damages they might experience, differently. *See* Gowrisankaran Rpt. ¶ 131; *see also* Baker Rpt. ¶¶ 121-125; *see also In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 165 (S.D. Ind. 2009) ("An expert's opinions must be based on the evidence in the case, and, if he bases his opinions on empirical assumptions, those assumptions must be supported by evidence."). The Court is required to determine at class certification "whether the evidence and the methodology are sound and convincing," and "'investigate[ ] the realism of the plaintiffs' injury and damage model in light of the defendants' counterarguments.'" *Dawson*, 327 F.R.D. at 649 (quoting *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014)) (denying class certification); *Zarinebaf v. Champion Petfoods USA Inc.*, No. 18-cv-6951, 2023 WL 2561613, at *5 (N.D. Ill. Mar. 17, 2023) (applying instruction from *In re Allstate Corp. Sec. Litig.* to "engage with the merits" in denying class certification of a Rule 23(b)(3) class where "proposed class certification involves too many different products, too many different product labels, too many different purchasers, and too many different package contents to effectively resolve the legal claim together"). Dr. Leitzinger's assumption does not withstand this scrutiny.

Specifically, on the supply-side for the at-issue healthcare services, Dr. Leitzinger [redacted] Leitzinger Tr. at 96:3-103:22 [redacted]

[redacted] Instead, it is equally possible that any physician could have, for example, declined to remain in-network; providers could have failed financially because they could not sustain their practices at lower reimbursement rates; or providers could have moved practices to other regions of the state or become hospital employees. *See also* Gowrisankaran Rpt. §§ 5.4.1 and 5.4.2. Dr. Leitzinger did not study any of these possibilities. Leitzinger Tr. at 102:2-12 [redacted]; *see also* Baker Rpt. ¶ 93 [redacted] Prof. Dranove's opinions fare no better and speculates [redacted] Dkt. 199, Reply Report of Dr. David Dranove, Ph.D, dated June 11, 2025 ("Dranove Reply Rpt.") ¶ 140.

On the buy-side, Dr. Leitzinger assumes, without reason or basis, [redacted] *See* Baker Rpt. ¶¶ 53-54. But any change in plan offerings could differentially affect which providers each payor wishes to contract with based on (among other things) where their members seek care—additional complexities Plaintiffs fail to grapple with.[10] *Id.* This assumption is also inconsistent with

[10] For instance, Plaintiffs are required under the rule of reason standard applicable to the antitrust claims in this case to prove that the alleged conduct caused harm in a relevant geographic market. *DeSlandes v. McDonald's USA, LLC*, No. 17-cv-4857, 2021 WL 3187668, at *11 (N.D. Ill. July 28, 2021) (collecting authority). As Plaintiffs aver and the evidence shows, determining whether a given class member suffered harm in a relevant geographic market relies on individualized questions about where class members look for providers that they would want in network. Compl ¶ 55; *see also* Meronk Tr. at 81:9-82:11 [redacted] Bouwer Tr. at 171:9-172:25 [redacted] That need may vary significantly from a local employer to a regional employer to a state-wide employer. Plaintiffs offer no classwide methodology to address this issue, which means this is "not a question that can be answered with common evidence." *DeSlandes*, 2021 WL 3187668, at *11-14 (predominance requirement not satisfied in alleged "no poach" case where proposed class members sold their labor in local geographic markets based (continued)

Plaintiffs' theory that, but-for the Challenged Conduct, "health plans would seek to assemble 'networks' of providers" that do not include all ANI providers.[11] *See, e.g.*, Compl. ¶¶ 8, 12.

These unsupported assumptions about what would have happened in the absence of the Challenged Conduct reveal that Dr. Leitzinger's overcharge and impact opinions are hinge a baseless assumption of the underlying contracting process that he did not study and defies both common sense and this Court's unambiguous direction about what evidence Plaintiffs would need to prove their claims.

B. Dr. Leitzinger's Classwide Overcharge Opinions Are Unreliable and Do Not Support a Finding of Predominance

To show classwide damages, Plaintiffs rely only on the flawed opinions of Dr. Leitzinger. Mot. at 26, 44. As explained in Defendants' *Daubert* motion, Dr. Leitzinger's use of a yardstick model to assess any potential overcharge suffers fatal flaws that render it unreliable for calculating classwide damages. *See Daubert* Mot. at 10-20. Without a reliable methodology that enables Plaintiffs to calculate classwide damages, individualized damage questions would predominate, rendering class treatment inappropriate. *City of Rockford v. Mallinckrodt ARD, Inc.*, No. 17-cv-50107, 2024 WL 1363544, at *9-10 (N.D. Ill. Mar. 29, 2024) (denying class certification where plaintiffs' expert's damages model was excluded, and individual damages would therefore "inevitably overwhelm questions common to the class"); *Series 17-03-615 v. Express Scripts, Inc.*, No. 20-cv-50056, 2024 WL 1834311, at *4 (N.D. Ill. Apr. 26, 2024) (same).

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on, *inter alia*, commuting distance and thus determining "anticompetitive effects of the restraint [would] have to be judged separately for each of the hundreds (or thousands) of relevant markets, and that [would] be the predominant issue, especially if, as plaintiffs assert[ed], antitrust impact [was] a common question"). Defendants agree that the Court need not determine now what mode of analysis applies, Mot. at 35, because class certification is inappropriate under any standard.

[11] While Prof. Dranove studies [redacted]

Even if admissible, Dr. Leitzinger's damages model must still be evaluated at the class certification stage to assess whether it supports a finding that Rule 23's elements have been established by a preponderance of the evidence. *In re Allstate Corp. Sec. Litig.*, 966 F.3d at 600-01, 611, 614 (vacating class certification where the district court improperly declined to assess the evidence on the critical class certification questions); *Reed*, 268 F.R.D. at 594 (finding that when an expert's "method fails to provide a reliable basis for plaintiffs to show common impact or damages, we hold against plaintiffs on the substance of [the expert's] analysis and not merely on the question of whether it passes muster under *Daubert*"). Given the fundamental unreliability of his yardstick model, Dr. Leitzinger's opinions on classwide overcharge cannot support a finding of predominance for several reasons.

First, the problems begin with the yardstick's construction. As Dr. Leitzinger explained in his opening report, a properly constructed yardstick compares the prices charged by the defendant with prices charged by others in a different area *that is unaffected by the Challenged Conduct*. *See Daubert* Mot. at 10-14. Plaintiffs expressly acknowledge the requirement that the comparator group be "unaffected" in their Motion. Mot. at 21. Yet, Dr. Leitzinger's yardstick [redacted] and found an overcharge of [redacted]. *Daubert* Mot. at 11. To try to explain this obvious false positive, Dr. Leitzinger asserted that [redacted] *Id.* at 11-12.[12] That explanation is by itself a fatal admission. It is an express concession that that Dr. Leitzinger failed

[12] [redacted] Leitzinger Tr. at 186:13-22.

to use a yardstick that is unaffected by the Challenged Conduct, rendering his conclusions based on the use of that flawed yardstick unreliable and inadmissible.

Second, Dr. Leitzinger's yardstick regression (the mathematical model that generates the aggregate damages figures) is inadmissible and should be given no weight for multiple reasons. To start, it relies on his flawed yardstick. In addition, his regression is not capable of isolating the supposed effect of the Challenged Conduct on prices. Among other problems, he fails 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. *See Daubert* Mot. at 16-17 (discussing the Seventh Circuit's emphasis on these two factors in constructing a yardstick model in the healthcare industry in *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 592-93 (7th Cir. 1998)). Dr. Leitzinger admitted [redacted] *Daubert* Mot. at 18-19. Dr. Leitzinger's failure to account for these "most important" factors that may impact price in healthcare means that his yardstick regression model is unreliable and should not be afforded any weight. *Marshfield*, 152 F.3d at 592-94 (holding that "no reasonable jury could estimate the plaintiff's damages" where expert's yardstick analysis failed to control for healthcare defendant's quality or market share).

Finally, even if the Court were to consider the "primary" class definition, Dr. Leitzinger inappropriately extrapolates damages numbers for payors for which he has no data. *Daubert* Mot. at 26. In calculating an aggregate overcharge, Dr. Leitzinger relied on claims data produced by [redacted] *Id.* at 25. [redacted]

[redacted] *Id.* [redacted]

[redacted] *Id.* [redacted]

[redacted] *See id.* [redacted]

[redacted] *Id.* at 26 (citing Leitzinger Tr. at 280:21-281:14, 288:13-291:2). These extrapolated damages for the primary class definition are speculative and unsupported.

In sum, Dr. Leitzinger's classwide damages model is unreliable and, to the extent admissible, it does not support a finding that damages can be shown on a classwide basis.

C. Dr. Leitzinger's Classwide Impact Opinions Are Likewise Inadmissible and Cannot Show How Impact Can Be Proven Through Common Evidence

Plaintiffs at class certification must also be able to demonstrate that antitrust impact is capable of proof at trial through evidence that is common to the class. *Reed*, 268 F.R.D. at 581-82; *see Gilbert v. Lands' End, Inc.*, Nos. 19-cv-823, 19-cv-1066, 2021 WL 3662448, at *7 (W.D. Wisc. Aug. 18, 2021) (Peterson, J.) (finding plaintiffs failed to satisfy the predominance requirement of Rule 23(b)(3) where plaintiffs did not show that "class members suffered a common injury as a result of a common defect"). But Dr. Leitzinger's proposed methodology of proving classwide impact relies on his faulty yardstick analysis described above, and is further flawed by relying on comparisons that are not economically supported. *Daubert* Mot. at 20-25. These flaws render Dr. Leitzinger's two-step empirical method for assessing impact inadmissible, and without Dr. Leitzinger's proposed methodology for measuring classwide impact, plaintiffs lack a methodology for demonstrating classwide impact without the need to engage in individualized

inquiry as to the unique circumstances of each class member.[13] *Blair v. Supportkids, Inc.*, No. 02-cv-0632, 2003 WL 1908031, at *4 (N.D. Ill. Apr. 18, 2003) ("If liability questions are not subject to class wide proof but, rather, would require 'both individual and fact intensive' determinations, common issues cannot be found to predominate." (citations omitted)). Even if admissible, Rule 23 "commands" a "hard look at the soundness of statistical models that purport to show predominance," which the Court must do here. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013).

As discussed in Defendants' *Daubert* motion, Dr. Leitzinger's impact model relies on his flawed overcharge analysis described in the preceding section, thus rendering his impact opinions equally unreliable. *See Daubert* Mot. at 20 (citing *ATA Airlines, Inc. v. Fed. Exp. Corp.*, 665 F.3d 882, 893 (7th Cir. 2011)). Indeed, Dr. Leitzinger admitted [redacted] *Id.* (citing Leitzinger Tr. at 249:21-24).

In addition, the two-step method employed by Dr. Leitzinger makes pricing comparisons to draw inferences of impact that are not economically supported. He assumes that if his predicted price (based on the unreliable yardstick regression) is lower than actual prices in the claims data, the transaction was impacted by the Challenged Conduct. *Daubert* Mot. at 20-21. Extensive economic literature shows that a regression cannot be used to identify individual causal effects; in this case, antitrust impact for specific transactions. *Id.* at 21. Put differently, comparing the results

[13] The nomenclature "two step" refers to two separate analyses in the briefing. As used here, Defendants refer to Dr. Leitzinger's two-step regression analysis described in Defendants' *Daubert* motion. *Daubert* Mot. at 7, 20-25. In their Motion, Plaintiffs also refer to a "two-step" approach to showing antitrust impact that meshes together qualitative and quantitative evidence. Mot. at 37-38. That approach—borrowed from inapposite commodity price fixing cases—is incapable of showing antitrust impact on a classwide basis in this case.

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.*

Unsurprisingly given the defects in his methodology, Dr. Leitzinger's approach has a [redacted] error rate. *Id.* at 24. When Prof. Baker tested placebo transactions with no (or negative) overcharges, Dr. Leitzinger's impact methodology finds [redacted] class members were impacted [redacted] because [redacted] *Id.* In other words, his methodology generated false results [redacted] *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."); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 252-56 (vacating district court's class certification where it failed to "address the defendants' concern that the damages model yielded false positives").

Plaintiffs claim that Dr. Leitzinger's two-step methodology is "widely accepted." Mot. at 17 (citing *In re Broiler Chicken Grower Antitrust Litig. (No. II)*, No. 6:20-md-02977, 2024 WL 2117359, at *29 (E.D. Okla. May 8, 2024)). Even if the method itself has been accepted in other contexts, Dr Leitzinger's attempt to employ it here fails. *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.").

Moreover, Plaintiffs' authorities do not support reliance on Dr. Leitzinger's opinions. The court in *Chicken Grower* was persuaded by factors not present here—the broiler chicken industry's "standardized pricing structure, the defendant's price-fixing conspiracy, and the artificially inflated baseline for pricing negotiations." *Chicken Grower*, 2024 WL 2117359, at *30 (citing *Occidental Petroleum Corp.*, 69 F.4th at 1182). Plaintiffs do not allege a "standardized pricing structure"

here—nor could they, when healthcare agreements are highly negotiated, complex, arrangements that vary by Network Vendor. *E.g.*, Gowrisankaran Rpt. ¶¶ 274, 431. The market conditions and pricing of a commodity product like broiler chicken that a court may find make it susceptible to proving impact through common evidence, including through a two-step regression methodology, are not present in healthcare.

Plaintiffs also cite *In re Turkey Antitrust Litig.* for the proposition that there is a "prevailing view" that "price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." Mot. at 5 (citing No. 19-cv-8318, 2025 WL 264021, at *14 (N.D. Ill. Jan. 22, 2025)). First, joint contracting between CINs and Network Vendors is not *per se* "price fixing." As is evident from ANI's structure and operations, *see* Factual Background Sections I-II, *supra*, joint contracting is reasonably necessary to achieve its procompetitive purposes, similar to joint ventures that are subject to the rule of reason.[14] Second, *Turkey* also dealt with a commodity product in the protein industry. 2025 WL 264021, at *14.[15] This is a complex healthcare case, not a commodity protein case. As the Seventh Circuit has explained when differentiating healthcare from commodity markets, the market for hospital services is "particularly complex," as "[i]nsurers and other third-party payors negotiate

[14] Defendants agree with Plaintiffs that the Court need not determine now whether the rule of reason or *per se* rule applies in order to resolve this Motion. Mot. at 35.

[15] While the plaintiffs' expert in *In re Turkey Antitrust Litig.* used a two-step methodology, he additionally performed price correlation analyses showing that turkey product prices are "parallel and highly correlated across products, Processor Defendants, geographic locations, and customers," as well as a "production regression which found that 'turkey production in the actual world [was] statistically significantly lower than production but-for the alleged conspiracy. . . .'" 2025 WL 264021, at *8-9. There is no parallel to the facts of this case, especially when Plaintiffs are not claiming that the output of medical services has been artificially depressed. Moreover, while defendants' expert in *Turkey* claimed that the model "would show injury on half the transactions in the benchmark period even when there was no conspiracy," the court found that defendants' expert did not claim that this criticism indicated "50 percent false positives"—whereas here, Prof. Baker found a [redacted] error rate in Dr. Leitiznger's methodology for measuring impacted class members—precisely a measure of false positives. Baker Rpt., Ex 4.

sophisticated contracts with health care providers." *Messner*, 669 F.3d at 816.[16] "If the market for health care services functioned like a market for a generic, undifferentiated commodity (*i.e.*, corn, wheat, or pork bellies) traded on an exchange with standard contract terms and little opportunity for individual bargaining, showing antitrust impact through such overcharges would have been relatively simple." *Id.* That is not the case here.

The remaining cases cited by Plaintiffs in support of their assertion that Dr. Litzinger's two-step methodology "is the type of market-wide economic analysis [that] has been accepted by many courts to show predominance as to antitrust impact" are similarly distinguishable. Mot. at 43 n.18 (collecting cases). First, none of these cases involve complex healthcare pricing negotiated across different payors for a multitude of outpatient professional medical services. Instead, the vast majority of these cases involved horizontal price fixing theories among direct competitors for the same product in other commodity markets like capacitors,[17] airfreight services,[18] packaged

[16] Prof. Dranove was the expert in *Messner* and his analysis of antitrust impact was accepted. His opinion consisted of a difference-in-difference analysis of a hospital merger, which is a specific statistical test that Prof. Dranove performs here. *Messner*, 669 F.3d at 817-19. [redacted]
Leitzinger Tr. at 227:2-231:7.

[17] The *Capacitors* court specifically found that had the plaintiffs relied solely on their expert's regression analysis as proof of common impact, defendants' arguments criticizing that analysis "might pack some punch." *In re Capacitors Antitrust Litigation (No. III)*, No. 17-md-002801, 2018 WL 5980139, at *8 (N.D. Cal. 2018). But plaintiffs additionally offered evidence on "how the structure of the market for capacitors was conducive to price fixing, including evidence about the concentration of manufacturers, the barriers to entry created by the manufacturing process, low elasticity of demand, and the commodity-like nature of capacitors." *Id.*

[18] In *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1175, 2014 WL 7882100 (E.D.N.Y. Oct. 15, 2014), the court agreed with plaintiffs' expert's market structure analysis that "airfreight services are 'fungible,' 'interchangeable,' or 'commodity-like,' meaning that each defendant's service is essentially similar and they compete primarily on price."

seafood,[19] and drywall,[20] with some litigations involving guilty pleas to parallel criminal price-fixing litigations that factored into the analysis. Leitzinger Reb. Rpt. ¶ 33 n.47. For example, the court in *In re Capacitors Antitrust Litigation (No. III)* specifically noted that 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." 2018 WL 5980139, at *8 (emphasis added). In *In re Domestic Drywall Antitrust Litig.*, 322 F.R.D. at 217, the court observed that competition for the commodity of drywall was "based largely on price," which is unlike healthcare where, as the Seventh Circuit recognized in *Marshfield Clinic*, 152 F.3d at 593, quality of service is a significant factor of competition. 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.

Further, 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 651 (9th Cir. 2022) (emphasis added); *see also ATA Airlines*, 665

[19] In *In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308 (S.D. Cal. 2019), the plaintiffs' expert sought to determine whether "there exist[] well-accepted economic methodologies and other common evidence from which a fact-finder could determine the existence of an agreement among Defendants to fix prices for large-sized packaged tuna products," and in "making this determination, Dr. Williams points to several industry characteristics that are indicative of an antitrust violation," including "high seller concentration," "a commodity-like product," "substantial antitrust barriers to entry," and "stable or declining demand."

[20] In *In re Domestic Drywall Antitrust Litig.*, 322 F.R.D. 188, 217 (E.D. Pa. 2017), the court explained that "[i]t is undisputed that the domestic drywall industry is an oligopoly, drywall is a commodity product, and there are high barriers to entry in the industry. Because drywall is a commodity product, the competition is based largely on price."

F.3d at 893; *Le v. Zuffa, LLC*, No. 15-cv-01045, 2023 WL 5085064, at *9 (D. Nev. Aug. 9, 2023) ("the reliability of these methodologies can be ascertained from various testing as to the internal accuracy or confidence of the respective model and consideration of the relative explanatory power or depth of the model"). Dr. Leitzinger's antitrust impact methodology is built on a faulty yardstick and step two of his impact model turns on improper comparisons that produce a [redacted] error rate when tested—something that did not occur in Plaintiffs' preferred authorities.[21]

In short, the two-step methodology employed by Dr. Leitzinger and his application of the methodology are flawed and unreliable—particularly in the context of this complex and specialized industry. Absent Dr. Leitzinger's classwide impact model, Plaintiffs cannot prove that antitrust impact is capable of proof at trial through evidence that is common to the class.

D. Plaintiffs' "Qualitative" Evidence Cannot Be Used to Show that All or Nearly All Class Members Were Impacted

Without Dr. Leitzinger's opinions, Plaintiffs have no way to calculate classwide damages or impact using common evidence. Plaintiffs attempt to fill this void by offering Prof. Dranove's "structural" opinions and citing a handful of cherrypicked record documents to make the nebulous claim that the "nature" of the Challenged Conduct and market dynamics make them conducive to inferring classwide harm and impact. *See* Mot. at 20-21, 39, 41-42. These generalized conclusions are not enough to satisfy Plaintiffs' burden under Rule 23.

First, for damages, Prof. Dranove concedes that his assignment [redacted] Dranove Reply Rpt. ¶ 92. As a result, his opinions cannot be used to

[21] It is also inaccurate to claim, as Plaintiffs do, that "it is implausible that *any* Class members, let alone many, would have been able to avoid paying overcharges on purchases of outpatient professional healthcare services during the Class Period." Mot. at 25. Dr. Letzinger's impact calculation shows that [redacted] class members had zero overcharge transactions. Leitzinger Reb. Rpt. at 19, Fig. 1; Leitzinger Tr. at 287:10-19. [redacted] Leitzinger Tr. at 286:10-287:9.

show that there is some method capable calculating of classwide damages.[22] None of Plaintiffs' other "qualitative" evidence can quantify the extent of any purported overcharge damages on a classwide basis.

Second, the lack of an empirical model to identify antitrust impact on a member-by-member basis is likewise fatal. Plaintiffs instead want the Court to take their word for it. They claim "there is economic evidence that the nature of the Challenged Conduct, as well as the way the market functions, would transmit harm broadly across the Class." Mot. at 41. Specifically, they rely on Dr. Dranove's claim that [redacted] *Id.* at 42 (citing Dranove Reply Rpt. ¶ 20). As support for their contention that Dr. Dranove's structural opinions about the market can support a finding of classwide impact, Plaintiffs cite two cases, *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016), and *In re Turkey Antitrust Litig.*, 2025 WL 264021, at *1. Mot. at 42. Neither case involved elaborate dynamics of the healthcare industry, nor were many of the marketplace characteristics described in those cases present here.

In *Kleen Products*, plaintiffs' expert demonstrated that the at-issue containerboard market was "conducive to successful collusion" based on: "the concentration of manufacturers; the vertical integration of the market; the capital-intensive manufacturing process (which affected the pace and likelihood of new entry); weak competition from imported containerboard; no good substitutes for the product; a low elasticity of demand; and a standardized, commodity product," all of which the court found to be "well accepted characteristics of a market that is subject to

[22] While Plaintiffs point to Prof. Dranove's empirical analysis in the context of his work related to market power, e.g., Mot. at 17, Prof. Dranove [redacted]

cartelization." 831 F.3d at 927 (collecting cases). Similarly, plaintiffs' expert in *Turkey* relied on economic principles and record testimony showing "the well-established relationship between the supply and price of turkey meat." 2024 WL 264021, at *13. Marketplace and pricing dynamics for containerboard and turkey—commoditized products with relatively straightforward supply and demand relationships and impact from new entry—are entirely different from the complicated marketplace for healthcare services. Healthcare services are differentiated, multifaceted, and complex; they are not commodity building materials or proteins, and the Seventh Circuit has cautioned that this is not a situation where one can rely on mere industry structure to assume elevated prices. *Messner*, 669 F.3d at 816; *see also* Gowrisankaran Rpt. ¶¶ 137-143 (explaining how in healthcare markets, prices (and other contractual terms) are determined by the bargaining leverage of providers and payors when they negotiate, where "leverage" can take a variety of forms); *see also* Dkt. 209, Deposition of Paul Van Den Heuvel, dated January 10, 2025 at 249:15-250:24 [redacted] For instance, whether a class member was impacted will turn on the mix of healthcare services they consumed and from which providers, all of which are at different price points depending on service and plan. Plaintiffs fail to identify any cases applying a structural, non-empirical assumption of antitrust impact in healthcare services markets—because it does not apply.

In the absence of the empirical models offered by Dr. Leitzinger, Plaintiffs are left with speculative theories about the possible ways class members *might* have been impacted. This falls far short of satisfying Plaintiffs' burden at class certification to show, by a preponderance, that

individual issues on impact would not predominate at any class trial. Individual issues abound here, and class certification should be denied.

IV. A Class Action Is Not Superior

Given the wealth of individualized issues on antitrust standing, impact, and damages, Plaintiffs have also failed to prove that class treatment would be superior to individual actions. Rule 23(b)(3) requires Plaintiffs to prove by a preponderance of the evidence that "a class action is [the] superior" mechanism for adjudicating this dispute. Fed. R. Civ. P. 23(b)(3). Courts have found that proposed class cases are unmanageable, and are thus not superior to individual actions, where determining class membership would require inquiry into each potential class member's eligibility to participate in the class. *E.g.*, *Lands' End,* 2021 WL 3662448, at *7 (finding plaintiffs failed to satisfy Rule 23(b)(3)'s superiority requirement where plaintiffs' proposed individualized inquiry for identifying class members "would present a significant" and unjustified "burden"); *Rock*, 2016 WL 1270087, at *15 (class action not superior where proving class membership eligibility would require the submission of individual affidavits).

Plaintiffs argue that a class is superior because this case has a large discovery record and expert evidence that "any member of the Class could use to prove its claims." Mot. at 45. That is wrong given all the individualized issues noted above. Among other issues, there is no method to address antitrust standing; Plaintiffs have no admissible evidence to show that individual questions on damages and impact can be handled on a classwide basis; and Plaintiffs failed to obtain claims data for a large percentage of the proposed primary class, or had claims data that they chose not to analyze. *Jiminez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) ("[A] methodology for calculation of damages that could not produce a class-wide result [i]s not sufficient to support certification."); *see also Reed*, 268 F.R.D. at 595-96 (because plaintiffs had not shown that there is a reliable mathematical formula for calculating damages, "many thousands of individual

inquiries would be required, which could not manageably be accomplished in a class proceeding"). Superiority is not satisfied where Plaintiffs have failed to show that individualized damages determinations "could be carried out in a way that will not destroy the efficiencies gained by aggregating the class's common issues." *Smith v. LifeVantage Corp.*, 341 F.R.D. 82, 115 (D. Utah 2022). Moreover, the size of the discovery record is irrelevant to assessing whether class action is superior to "other available methods." Fed. R. Civ. P. 23(b)(3).

Plaintiffs also claim (without support) that individual members will not be incentivized to proceed absent a class action, and thousands of class members would be left out in the cold were the action not to proceed as a class. Mot. at 45. Not so. Plaintiffs only arrive at "thousands" of class members by improperly including indirect purchasers in their class. *See* Argument Sections II-III, *supra*. If the class were appropriately limited to TPAs that made direct payments and/or Network Vendors, there would be far fewer members. These entities, some of which include multi-billion dollar corporations like [redacted][23] have the resources to proceed with litigation if they wish. Plaintiffs present no evidence to suggest that an absent class member would decline to pursue its claims—they rely only on speculation. That is not evidence sufficient to show that a class action is superior. Further, adjudicating whether a potential class member in fact can participate in the class as a direct purchaser will require individualized, detailed scrutiny, including inquiries into how each potential class member paid its claims on a year-by-year basis and whether they purchased directly from Defendants (including what TPA and payor each class member used for each claim, how its claim payments were structured, and how this payment flow may have

[23] [redacted]

changed over time). *Bledsoe v. Combs*, No. 99-cv-153, 2000 WL 681094, at *4 (S.D. Ind. Mar. 14, 2000) (holding that, when "the court [cannot] determine whether any individual was a member of the class without hearing evidence on what would amount to the merits of each person's claim," "the proposed class action is unmanageable virtually by definition").

Finally, the alternative to a class action is not a series of individual actions, as Plaintiffs suggest by referring to the potential for "two thousand individual" cases. Mot. at 45. Instead, as Rule 23(a)(1) contemplates, interested parties can file a joinder action whereby they share costs and counsel to prosecute the case. Plaintiffs have presented no evidence that this is unlikely to occur. Nor is there reason to believe a joinder action is impractical, especially when one of the lead law firms involved has extensive experience litigating joinder actions with direct purchaser plaintiffs after class certification is denied. *See In re Modafinil*, No. 2:06-cv-01797 (E.D. Pa.) (Berger Montague P.C. representing plaintiffs in joinder complaint after direct purchaser class denied certification); *Value Drug*, No. 2:21-cv-03500 (E.D. Pa) (same); *In re AndroGel*, No. 1:09-md-2084 (N.D. Ga.) & No. 2:19-cv-03565 (E.D. Pa.) (same); *In re Zetia*, No. 18-md-2836 (E.D. Va.) (same).

In short, Plaintiffs' proposed classes would result in significant burden, costs, and inefficiency. Accordingly, Plaintiffs fail to meet Rule 23(b)(3)'s superiority requirement.

V. Plaintiffs' Evidence of Numerosity Is Insufficient

Plaintiffs claim that they have satisfied the numerosity requirement because Dr. Leitzinger has identified more than forty class members. Mot. at 29-30. [redacted] Leitzinger Rpt. ¶ 20; Leitzinger Tr. at 113:17- 115:17. The list of class members for the alternative class is inflated because it includes indirect purchasers. *See* Argument Section II, *supra*. And there is good reason to think that the class of *direct* purchasers is far smaller. For example,

Plaintiffs readily acknowledge that "Defendants negotiate[] with Network Vendors," Mot. at 4, of which there are only four in the alternative class definition, *id*. at 3 n.3. Whatever that smaller number, Plaintiffs made no effort to determine it or support that determination with evidence. In the absence of such evidence, which is the Plaintiffs' burden to provide, there is no basis to conclude that the numerosity requirement is satisfied.

Moreover, numerosity is not merely a counting exercise; the rule also requires a showing that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs do not mention this requirement. But "impracticality of joinder must be positively shown, and cannot be speculative." *Cwiak v. Flint Ink Corp.*, 186 F.R.D. 494, 496 (N.D. Ill. 1999). As noted above with superiority, there is no evidence to suggest a joinder action, as compared to a class action, is impracticable. Nor do any of the factors courts typically consider tilt in favor of a class action. *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016) (identifying non-exhaustive list of factors that include judicial economy, ability and motivation to litigate, financial resources, and geographic dispersion as relevant considerations); *see also In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 234 (4th Cir. 2021) (same); *Anderson v. Weinert Enters., Inc.*, No. 18-cv-901, 2019 WL 3986345, at *2-3 (E.D. Wis. Aug. 23, 2019), *aff'd*, 986 F.3d 773 (7th Cir. 2021) (recognizing same factors and finding joinder impracticable for class of 37 members).

For judicial economy, the focus is on whether a class action is *substantially* more efficient than joinder of the proposed class. *In re Modafinil*, 837 F.3d at 254. Recent experience by the Berger Montague firm in the matters identified above (*In re Modafinil*, *Value Drug*, *In re AndroGel*, and *In re Zetia*) show that joinder actions can be just as efficient (if not more so) than class actions in direct purchaser antitrust cases. Nor is there any reason to conclude this Court is incapable of managing a joinder action. In addition, many of the class members are large, sophisticated entities,

such as [redacted] that have the ability to litigate and financial resources to do so. Indeed, [redacted] In terms of geographic dispersion, ANI negotiates with payors that do business in Wisconsin, so there is no reason to suspect this factor weighs in favor of class certification.

In short, Plaintiffs have neither put forward a plausible number of direct purchaser class members, nor have they addressed the impracticability of joinder. Any analysis—much less the required rigorous analysis—reveals that there is insufficient evidence to conclude that Rule 23(a)(1) is satisfied.

VI. Heartland Farms Is an Inadequate Class Representative for the Additional Reason That It Does [redacted] About Other Class Members

Beyond its lack of antitrust standing, Heartland Farms is an inadequate class representative because it would not represent the interests of all absent class members. Rule 23(a)(4) requires that putative class representatives "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement flows from the Due Process Clause and is meant to ensure that "the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The adequacy requirement "screens for conflicts of interest among class members because the same representative parties cannot adequately represent class members with divergent interests." *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 609-10 (7th Cir. 2021).

A disqualifying conflict exists here. [redacted] Bouwer Tr. at 14:3-12, 15:4-9, 28:16-17, 229:23-

230:3. [redacted] Leitzinger Rpt. ¶ 19; Dkt. 193, Supplemental Report of Jeffrey J. Leitzinger, dated June 11, 2025, Ex. 6A.

[redacted]

Courts find a representative inadequate when they are unable to represent the interests of the putative class. *Randall*, 637 F.3d at 824 (existence of conflict of interest was independent grounds for denial of class certification); *see also May v. Gladstone*, 562 F. Supp. 3d 709, 714 (C.D. Cal. 2021) (holding that there was a conflict of interest when the class representative may have been motivated by a third party's litigation agenda). [redacted]

VII. Plaintiffs Have Not Moved to Certify a Class for Their Sherman Act Section 2 Claim

Plaintiffs do not even try to identify any issue suitable for class treatment with respect to their Sherman Act Section 2 claim. Their class certification motion focuses entirely on their Sherman Act Section 1 claim. *E.g.* Mot. at 1 ("This antitrust case is about an illegal agreement in restraint of trade—price fixing—in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1"); *id.* at 33 (describing what a plaintiff must show to prove an antitrust violation under Section 1). Plaintiffs mention Section 2 just once in a footnote, and even there emphasize that their "focus" is on how the Challenged Conduct supposedly violates Section 1. Mot. at 3 n.2 ("Plaintiffs also alleged that this conduct violates Section 2 of the Sherman Act. With fact discovery largely complete, Plaintiffs now focus on how this scheme violates Section 1 and inflated prices for outpatient professional services"). Plaintiffs do not identify any exclusionary conduct that they

argue is specific to their Section 2 claim that is classwide. Nor do Plaintiffs even attempt to show what common legal or factual issues would exist for purposes of a monopolization claim under Section 2, or how such issues predominate over individualized ones.

As a result, there is no basis to certify a class as to Plaintiffs' Section 2 claim in Count II. Fed. R. Civ. P. 23(c)(1)(B) ("An order that certifies a class action must define the class *and the class claims*, issues, or defenses." (emphasis added)); *see also Great Neck Cap. Appreciation Inv. P'ship v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 408 (E.D. Wisc. 2002) ("The primary consideration in assessing predominance is the proof necessary to establish the class members' claims under the applicable substantive law"); *Breeden v. Benchmark Lending Grp.*, 229 F.R.D. 623 (N.D. Cal. 2005) (denying certification as to substantive issues where "neither the moving papers nor the declarations filed therewith provide any support for Plaintiffs' contention that class certification is appropriate" for certain claims); *Romero v. Securus Techs., Inc.*, 331 F.R.D. 391, 415 (S.D. Cal. 2018) (finding that Plaintiffs failed to meet their burden to establish that the requirements of Rule 23(a) and (b)(3) were met where Plaintiffs raised only a "handful of examples of possible common issues without supporting evidence").

CONCLUSION

Plaintiffs failed to carry their burden to show that the class certification device—an exception to the usual rule that litigation is on behalf of individual named parties—can be invoked in this case for either of their proposed classes. Class certification should be denied.

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Respectfully submitted,

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