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

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR ENTRY OF ORDER CERTIFYING CLASS IN ACCORDANCE WITH THE SEVENTH CIRCUIT OPINION

On January 13, 2012, the Seventh Circuit vacated the District Court's denial of class certification. *Messner v. NorthShore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012), *reh'g denied*, 2012 U.S. App. LEXIS 4778 (Feb. 28, 2012). The Seventh Circuit found Rule 23(b)(3)'s predominance requirement satisfied, and reversed the District Court's finding that predominance had not been shown, stating:

> [T]he evidence shows that Dranove [*i.e.*, Plaintiff's expert] can use common evidence and his difference-in-differences methodology to estimate the antitrust impact, if any, of Northshore's merger on the members of that class. Together with the common questions and evidence on other liability issues, this was sufficient to show predominance under Rule 23(b)(3).

Id. at 826. The Seventh Circuit also noted that the District Court had previously found that the Plaintiffs satisfied the four elements of Rule 23(a) and remanded this action back to this Court to conduct "further proceedings consistent with this opinion." *Id*. While the District Court did not make a finding concerning Rule 23(b)(3)'s superiority requirement, the Seventh Circuit stated that this final prong "likely poses no serious obstacle to class certification here." *Id.* at 814 n.5.

For the reasons set forth below, this Court should find that the superiority requirement has been met and enter an order certifying Plaintiffs' proposed class.

BACKGROUND

I. NorthShore's Unlawful Restraint on Trade.

This action concerns a merger between Evanston Northwestern Healthcare Corporation (now known as NorthShore University HealthSystem) and Highland Park Hospital (collectively "NorthShore"), which occurred on January 1, 2000. On February 10, 2004, the Federal Trade Commission (the "FTC") filed an administrative complaint against NorthShore, alleging that the merger substantially lessened competition and enabled NorthShore to raise its prices for services to private payors above the prices that hospitals would have charged absent the merger, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. On October 20, 2005, an FTC Administrative Law Judge ("ALJ") found NorthShore to be in violation of Section 7 of the Clayton Act. On appeal, the full Commission affirmed the ALJ's finding of liability. *See Messner*, 669 F.3d at 809.

II. Plaintiffs Seek Redress for the Higher Prices Paid Caused by the Unlawful Merger.

Plaintiffs are persons or entities who directly paid NorthShore anticompetitive prices for inpatient hospital services or hospital-based outpatient services. The proposed class includes individual patients, employers who were self-insured, and third-party payors (*e.g.*, managed care organizations ("MCOs")) who paid higher prices for hospital care as a result of the merger. Plaintiffs seek treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, and, by way of this motion, certification of the following class:

> All persons or entities in the United States of America and Puerto Rico, except those who solely paid fixed amount co-pays, uninsureds who did not pay their bill, Medicaid and Traditional Medicare patients, governmental entities, defendant, other providers of healthcare services, and the present and former

> parents, predecessors, subsidiaries and affiliates of defendant and other providers of healthcare services who purchased or paid for inpatient hospital services or hospital-based outpatient services directly from NorthShore University HealthSystem (formerly known as Evanston Northwestern Healthcare), its wholly-owned hospitals, predecessors, subsidiaries, or affiliates other than those acquired as a result of the merger with Rush North Shore Medical Center (the "Class") from at least as early as January 1, 2000 to the present.[1]

III. The District Court's Class Certification Determination.

On February 13, 2009, Plaintiffs moved for class certification under Rule 23(b)(3). The parties conducted extensive briefing on Plaintiffs' motion,[2] and the District Court held an evidentiary hearing.

On April 12, 2010, after the evidentiary hearing on class certification, the District Court issued its opinion and order with respect to Plaintiffs' class certification motion. *In re Evanston Northwestern Healthcare Corp. Antitrust Litig.*, 268 F.R.D. 56 (N.D. Ill. 2010) ("*ENH*"). The District Court found that Plaintiffs had met the requirements of Rule 23(a), and specifically found, among other things, Plaintiffs' counsel to be adequate. *See id.* at 61-66. The District Court, however, erroneously concluded that Plaintiffs failed to meet the predominance requirement of Rule 23(b)(3) and that the proposed Class therefore could not be certified. *Id.*

IV. Plaintiffs' Appeal of the District Court's Denial of Class Certification.

Pursuant to Federal Rule of Civil Procedure 23(f), Plaintiffs timely sought interlocutory appeal of the District Court's denial of class certification. "Because of the importance of the issue for this case and for private antitrust enforcement, particularly with respect to hospitals and

[1] Plaintiffs' Motion for Class Certification (Dkt. No. 240) at 1, *quoted in Messner*, 669 F.3d at 810.

[2] *See* Dkt. Nos. 240, 246, 247, 248, 250, 251, 252, 256, 280, 281, 284, 285, 310, 317, 321, 329, 330, 331, 341, 342, 355, 357, 358, 359, 360, 361, 362, 364, 366, 367, 368, 373, 375, 377, 379, 380, 381, 382, 383, 384, 386, and 392.

healthcare providers with complex pricing systems," *Messner*, 669 F.3d at 808, the Seventh Circuit granted the petition for appeal.

V. The Seventh Circuit Vacates the District Court's Erroneous Denial of Class Certification.

In *Messner*, the Seventh Circuit vacated the District Court's denial of Plaintiffs' motion for class certification and remanded this matter for "further proceedings consistent with the opinion." 669 F.3d at 826. The Seventh Circuit held that the District Court had abused its discretion in concluding that Plaintiffs had not met the predominance requirement of Rule 23(b)(3). *Id*. at 819.

In remanding this matter for further proceedings, the Seventh Circuit noted that no finding concerning the superiority requirement of Rule 23(b)(3) had been made by the District Court. The Seventh Circuit stated, however, that "[t]here are so many common issues of law and fact relating to the issue of NorthShore's liability . . . that the superiority requirement likely poses no serious obstacle to class certification." *Id.* at 814 n.5. Plaintiffs agree.

ARGUMENT

I. The Only Remaining Class Certification Issue to Be Resolved Concerns Rule 23(b)(3)'s Superiority Requirement.

A party seeking to certify a class action must meet two conditions. First, the movant must show that the putative class satisfies the four prerequisites of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a); *Oshana v. Coca-Cola Co*., 472 F.3d 506, 513 (7th Cir. 2006). Second, the action must qualify under at least one of the three subsections of Rule 23(b). Fed. R. Civ. P. 23(b). Here, Plaintiffs seek certification under Rule 23(b)(3), which requires a finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient

adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

The District Court's opinion found that the Plaintiffs had satisfied the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy.[3] The Seventh Circuit's opinion additionally found that the Plaintiffs had satisfied the predominance prong of Rule 23(b)(3).[4] As a result, the only issue left for this Court to decide is whether the superiority requirement of Rule 23(b)(3) has been met.

II. This Court Should Find That the Superiority Requirement Has Been Satisfied.

The issue of superiority was fully briefed on Plaintiffs' motion for class certification.[5] However, the District Court did not address this requirement because it erroneously concluded that predominance was lacking.[6] For this Court's convenience, Plaintiffs repeat those arguments here and agree with the Seventh Circuit that the superiority requirement does not pose any obstacle to class certification in this case.

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[3] *Numerosity*: "The parties agree that plaintiffs have satisfied the requirements of numerosity." *ENH*, 268 F.R.D. at 60. *Commonality*: "The parties agree that plaintiffs have satisfied the requirements of . . . commonality . . . . As the defendant does not offer any argument disputing commonality, the court finds plaintiffs have satisfied their burden with respect to this requirement." *Id.* at 61 n.3. *Typicality*: "[T]he court finds that the claims of the named plaintiffs are typical of the claims of the proposed class." *Id.* at 62-63. *Adequacy*: Plaintiffs "satisfied the adequacy of representation requirement." *Id.* at 63-65.

[4] *See Messner*, 669 F.3d at 826 (holding that plaintiffs' proffered evidence "was sufficient to show predominance under Rule 23(b)(3)").

[5] *See* Plaintiffs' Memorandum of Law in Support of Class Certification (Dkt. No. 246); Brief and Appendix by NorthShore University HealthSystem in Opposition to Plaintiffs' Motion for Class Certification (Dkt. No. 280); and Plaintiffs' Reply Memorandum in Support of Motion for Class Certification (Dkt. No. 330).

[6] *See ENH*, 268 F.R.D. at 87 ("[T]he court need not undertake an analysis of whether [Plaintiffs] have satisfied superiority, the second requirement of Rule 23(b)(3).").

Rule 23(b)(3)'s superiority requirement requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3); *Szabo v. Bridgeport Machs. Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). Matters pertinent to a finding of superiority include: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3). The superiority requirement is met where damages make it impractical for class members to bring individual suits and where potential plaintiffs may not be aware of their rights to be able to hire competent counsel. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *see also In re Neopharm, Inc. Sec. Litig.*, 225 F.R.D. 563, 568 (N.D. Ill 2004) (holding that the "superiority" requirement is readily satisfied where members of the class have "relatively small claims making it expensive to seek recovery through individual litigation" and where a "class action would be the most efficient use of judicial resources in resolving common issues").

In this case, members of the Class do not have an interest in individually controlling the prosecution of separate actions given the complexity of this case and the likely resources that would be engendered by such separate litigation versus the potential recovery. The record demonstrates that there are thousands of members of the Class and that their identities are readily known from NorthShore's records. *See* Pls.' Mem. of Law in Support of Class Certification (Dkt. No. 246), at 15. Moreover, class action treatment will permit those thousands of payors for hospital-based healthcare services provided by NorthShore who are similarly situated to

Plaintiffs to have their common claims prosecuted in a single forum—simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. Furthermore, because the identities of the members of the Class are known, there will not be any difficulty with providing individual notice to them of these proceedings.

As the Seventh Circuit has concluded, there are no material issues affecting only individual Class members. *Messner*, 669 F.3d at 814, n.5 ("This case, at least on its face, implicates none of the specific concerns that we have previously said will prevent a finding of superiority."). Here, every member of the Class has an interest in proving NorthShore's common course of conduct as detailed in the complaint. It would be enormously inefficient—*for both the Court and the parties*—to engage in multiple trials in individual actions on the same liability issues. *See, e.g.*, *In re Carbon Black Antitrust Litig.*, No. 03-10191, 2005 WL 102966, at *22 (D. Mass. Jan. 18, 2005); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 31 (D.D.C. 2001); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 527 (S.D.N.Y. 1996). It simply defies logic and common sense to have these same issues developed repeatedly in each separate case by individual claimants, even if certain claimants could afford to do so.[7]

[7] Rule 23(b)(3) does not require class members to be destitute or to possess *de minimis* claims in order to participate in a class action or to establish predominance and superiority. *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 351 (E.D. Mich. 2001) (*quoting Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196 (6th Cir. 1988) ("The procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather to achieve the economies of time, effort, and expense.")); *In re Synthroid Mktg. Litig.*, 188 F.R.D. 287, 294-95 (N.D. Ill. 1999) (rejecting argument that "a class action is not a superior method of litigation because the potential class members are sophisticated . . . companies with substantial financial incentive to sue individually"). Therefore, the presence of some class members with large claims does not preclude a finding of superiority, particularly in antitrust actions, which are notably complex and costly to litigate. *See, e.g.*, *Paper Sys., Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 605 (E.D. Wis. 2000) ("the presence of large claimants in a proposed antitrust class and the possibility that some of them might proceed

III. There Are No Other Issues That Need To Be Decided Before Certifying The Class.

Plaintiffs anticipate that NorthShore may raise several objections to class certification; however, as discussed below, these objections have already been rejected by the District Court and the Seventh Circuit.

A. The District Court Previously Held That NorthShore's Motion to Compel Arbitration Should Not Forestall Class Certification.

NorthShore will likely contend that the Class should not be certified on the grounds that certain of the class members, the MCOs, had purportedly agreed to arbitrate the type of claims that are the subject of this lawsuit. This eleventh-hour tactic to forestall class certification has already been rejected by the District Court.

Prior to the class certification evidentiary hearing in the district court, and ***after nearly two years of litigation***, NorthShore filed a motion to compel arbitration, arguing that the MCOs could not be part of the Class on the grounds that each had agreed to arbitrate the types of claims brought by Plaintiffs in this action. *See* Dkt. No. 270. Plaintiffs responded by filing a cross motion concerning this same arbitration issue, which sought an order finding waiver of arbitration by NorthShore. *See* Plaintiffs' Memorandum of Law In Support of Their Motion For Entry of Order Finding Waiver of Arbitration By Defendant And Limiting Improper Defendant Conduct With Punitive Class, Dkt. No. 273 (explaining how NorthShore's untimely request to arbitrate was waived by their persistent litigation of these claims for 19 months).[8] On June 11,

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on their own does not militate against class certification"); *Scholes v. Moore*, 150 F.R.D. 133, 138 (N.D. Ill. 1993) ("although some class members . . . may have 'large' claims . . . this will not defeat class certification"); 4 Newberg on Class Actions, § 18.40 at 18-138 (3d ed. 1992) (class certification "should not be denied merely because [certain] individual claims [may be] large").

[8] *See* Dkt. No. 273, *citing Cabinetree of Wis., Inc. v. Kraftsmaid Cabinetry, Inc.*, 50 F.3d 388, 389-90 (7th Cir. 1995) ("an election to proceed before a nonarbitral tribunal . . . is a presumptive waiver of the right to arbitrate"); *Gas Tech. Inst. v. Rehmat*, 524 F. Supp. 2d 1058, 1068 (N.D.

2009, the District Court dismissed the parties' respective cross-motions on the arbitration issue without prejudice, determining that the issue would be disposed of after the Court's class certification determination. *See* Dkt. No. 283.

NorthShore also argued that the arbitration agreements with the MCOs required "individualized analysis" thus defeating predominance. However, the District Court, rejected this argument:

> Whether the ADR provisions are enforceable is an issue common to all MCOs that have such provisions in their contracts. Further, it is an issue that can be resolved with the same evidence for every affected MCO.

ENH, 268 F.R.D. at 66. NorthShore did not challenge this ruling on appeal, and any attempt by NorthShore to raise it before this Court would be improper and should be summarily rejected by this Court. Moreover, under the law of the case doctrine, this Court should allow the District Court's earlier ruling to stand. "Generally speaking, a successor judge should not reconsider the decision of a transferor judge at the same hierarchical level of the judiciary when a case is transferred." *Brengettcy v. Horton*, 423 F.3d 674, 680 (7th Cir. 2005); *see also id.* ("The law of the case doctrine in these circumstances reflects the rightful expectation of litigants that a change of judges midway through a case will not mean going back to square one.") (*quoting Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997)).

Ill. 2007) (finding the filing of a motion to dismiss and several discovery motions sufficient to deny an arbitration request filed nearly two years after the original complaint). Between August 7, 2007 (when Plaintiffs filed this action) and February 13, 2009 (when Plaintiffs moved for class certification), NorthShore actively defended against Plaintiffs claims and never raised the arbitration issue. *See, e.g.*, Dkt. No. 32 (Motion By NorthShore to Dismiss); Dkt. No. 78 (Motion by NorthShore to Compel Responses to Interrogatories). NorthShore's change of heart that it might be better off in arbitration cannot serve to rebut the presumption that it waived its right to compel arbitration. *See Cabinetree*, 50 F.3d at 391.

B. The Seventh Circuit Has Rejected NorthShore's Suggestion Of A *Daubert* Hearing.

It is also anticipated that NorthShore may claim that a *Daubert* hearing regarding Plaintiffs' expert testimony must be held prior to this Court's certification of the Class. This argument has already been rejected by the Seventh Circuit, and this Court should likewise reject this second ploy to delay entry of an order certifying the Class.

Before the evidentiary hearing, Plaintiffs had moved to exclude NorthShore's expert on *Daubert* grounds. NorthShore, by contrast, made the strategic decision not to make such a challenge to Plaintiffs' expert. The District Court chose not to conduct a *Daubert* hearing, despite Plaintiffs' *Daubert* challenge. The Seventh Circuit held that this was improper. *Messner,* 669 F.3d at 811-14. Because the Seventh Circuit further determined that Plaintiffs satisfied the predominance requirement and that Plaintiffs' expert had presented a workable methodology from which the Class's claims could be proven at trial, the Seventh Circuit rendered moot Plaintiffs' *Daubert* challenge concerning NorthShore's expert.

In its petition for panel rehearing, NorthShore argued that the Seventh Circuit should have remanded to this Court to allow NorthShore to challenge Plaintiffs' expert on *Daubert* grounds. This argument is inconsistent both with NorthShore's decision not to challenge Plaintiffs' expert and with the Seventh Circuit's endorsement of Plaintiffs' expert's methodology. When it denied NorthShore's petition for rehearing in its entirety, the Seventh Circuit correctly rejected NorthShore's argument. Thus, a *Daubert* hearing does not need to be scheduled before this Court enters an order certifying the proposed class. The entry of a class certification order should not be delayed.

CONCLUSION

As the Seventh Circuit correctly stated, "[t]here are so many common issues of law and fact relating to the issue of NorthShore's liability . . . that the superiority requirement likely poses no serious obstacle to class certification." *Messner*, 669 F.3d at 814, n.5.

For the foregoing reasons, Plaintiffs request that this Court: (i) find that Plaintiffs satisfy the superiority requirement of Rule 23(b)(3); (ii) certify this case for class treatment pursuant to Fed. R. Civ. P. 23(b)(3); (iii) appoint Plaintiffs as the representative Plaintiffs of the Class; (iv) appoint Plaintiffs' counsel as counsel for the Class pursuant to Fed. R. Civ. P. 23(g); (v) direct that notice be disseminated to members of the Class; and (vi) grant such other and further relief deemed just and appropriate.

Dated: April 4, 2012

Respectfully submitted,

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