STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21CVS003276-100
WILLIAM ALAN DAVIS; JONATHAN POWELL; FAITH C. COOK, Psy.D.; KATHERINE BUTTON; and BRUNK AUCTIONS, INC., on their own behalf and on behalf of all others similar situated, Plaintiffs, v. HCA HEALTHCARE, INC.; HCA MANAGEMENT SERVICES, LP; HCA, INC.; MH MASTER HOLDINGS, LLLP; MH HOSPITAL MANAGER, LLC; MH MISSION HOSPITAL, LLLP; ANC HEALTHCARE, INC. F/K/A MISSION HEALTH SYSTEM, INC.; and MISSION HOSPITAL, INC., Defendants.	**ORDER ON MOTION FOR CLASS CERTIFICATION AND MOTION TO EXCLUDE THE EXPERT REPORT OF PROFESSOR ROBERT J. TOWN**

THIS MATTER is before the Court on Plaintiffs William Alan Davis, Jonathan Powell, Faith C. Cook, Katherine Button, and Brunk Auctions, Inc.'s (collectively, "Plaintiffs") Motion for Class Certification ("Motion for Class Certification," ECF No. 248 [sealed]) and Defendants HCA Healthcare, Inc.; HCA Management Services, LP, HCA, Inc., MH Master Holdings, LLLP, MH Hospital Manager, LLC, MH Mission Hospital, LLLP, ANC Healthcare, Inc., and Mission Hospital Inc.'s (collectively, "Defendants")[1] Motion to Exclude the Expert Report of Professor Robert J. Town ("Motion to Exclude Dr. Town," ECF No. 273 [sealed]).

[1] Throughout this Opinion the Court will refer to HCA Healthcare, Inc.; HCA Management Services, LP, HCA, Inc., MH Master Holdings, LLLP, MH Hospital Manager, LLC, and MH Mission Hospital, LLLP, collectively, as the "HCA Defendants," and ANC Healthcare, Inc. and Mission Hospital, Inc. will collectively be referred to as the "ANC Defendants."

INTRODUCTION

1. The primary issue before the Court is whether this antitrust case should be certified as a class action under Rule 23 of the North Carolina Rules of Civil Procedure. Because Plaintiffs have failed to satisfy the requirements for class certification under Rule 23, the Court concludes that their motion for class certification must be denied without prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

2. In analyzing whether the criteria for class certification under Rule 23 have been satisfied, the Court makes findings of fact based on the competent evidence of record. *See, e.g., Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 338 (2014).

I. The Parties

3. Plaintiff William Alan Davis is a citizen of the State of North Carolina and a resident of Haywood County, North Carolina. (Second Amended Class Action Complaint ("SAC"), ECF No. 93, ¶ 15; *see also* William Davis Dep. Tr., ECF No. 271.31 [sealed], at 11.) Prior to January 2025, Davis obtained health insurance through employer-sponsored plans administered by Cigna and Aetna. (Davis Dep. Tr., at 12, 14.) However, beginning in January 2025, he acquired health insurance from Blue Cross Blue Shield ("BCBS") through the online marketplace at HealthCare.gov (known as the "ACA Exchange"). (Davis Dep. Tr., at 12.)

4. Plaintiff Jonathan Powell is a citizen of the State of North Carolina and a resident of Burke County, North Carolina. (SAC ¶ 17.) Prior to October 2023, Powell purchased health insurance through an employer-sponsored plan

administered by BCBS. (Jonathan Powell Dep. Tr., ECF No. 271.32 [sealed], at 44–46.) However, since October 2023, Powell has obtained his health insurance from Aetna, using the ACA Exchange. (Powell Dep. Tr., at 44–45.)

5. Plaintiff Faith C. Cook is a citizen of the State of North Carolina and a resident of Buncombe County, North Carolina. (SAC ¶ 18.) Since approximately 2017, Cook has obtained health insurance from BCBS through the ACA Exchange. (Faith Cook Dep. Tr., ECF No. 271.30 [sealed], at 19–20.)

6. Plaintiff Katherine Button is a citizen of the State of North Carolina and a resident of Buncombe County, North Carolina. (SAC ¶ 19.) At all relevant times, Button has purchased health insurance through employer-sponsored plans administered by MedCost and Aetna. (Katherine Button Dep. Tr., ECF No. 169.12 [sealed], at 31–32.)

7. Plaintiff Brunk Auctions, Inc. ("Brunk Auctions") is a North Carolina corporation that maintains its principal place of business in Asheville, North Carolina. (SAC ¶ 20; *see also* Brunk Auctions R. 30(b)(6) Dep. Tr., ECF No. 271.33 [sealed], at 18.) Brunk Auctions has approximately twenty-five employees and offers them a fully insured employer-sponsored health insurance program through United Healthcare ("United"). (Brunk Auctions R. 30(b)(6) Dep. Tr., at 18, 26–27.)

8. Defendant ANC Healthcare, Inc. is a North Carolina nonprofit corporation that maintains its principal place of business in Winter Park, Florida. (SAC ¶ 42; ANC Defs.' Answer to SAC, ECF No. 95, ¶ 42.)

9. Defendant Mission Hospital, Inc. is a North Carolina nonprofit corporation that maintains its principal place of business in Winter Park, Florida. (SAC ¶ 46; ANC Defs.' Answer to SAC ¶ 46.)

10. As part of their business, through 31 January 2019, the ANC Defendants owned and operated Mission Health—an integrated hospital system that provides inpatient and outpatient services throughout Western North Carolina as a not-for-profit healthcare system. (SAC ¶ 6; ANC Defs.' Answer to SAC ¶ 6.)

11. Defendants HCA Healthcare, Inc. and HCA, Inc. are Delaware corporations that maintain their principal places of business in Nashville, Tennessee. (SAC ¶¶ 21, 27; HCA Defs.' Answer to SAC, ECF No. 94, ¶¶ 21, 27.)

12. Defendant HCA Management Services, LP is a Delaware limited partnership that maintains its principal place of business in Nashville, Tennessee. (SAC ¶ 24; HCA Defs.' Answer to SAC ¶ 24.)

13. Defendants MH Master Holdings, LLLP and MH Mission Hospital, LLLP are Delaware limited liability partnerships that maintain their principal places of business in Asheville, North Carolina. (SAC ¶¶ 29, 40; HCA Defs.' Answer to SAC ¶¶ 29, 40.)

14. Defendant MH Hospital Manager, LLC is a Delaware limited liability company that maintains its principal place of business in Asheville, North Carolina. (SAC ¶ 37; HCA Defs.' Answer to SAC ¶ 37.)

15. On January 31, 2019, the HCA Defendants purchased nearly all of the Mission Health assets and facilities from the ANC Defendants and have continued to

own and operate Mission Health since that time. (SAC ¶ 6; ANC Defs.' Answer to SAC ¶ 6; HCA Defs.' Answer to SAC ¶ 6.)

II. Healthcare Pricing and Insurance

16. In addressing the legal issues currently before the Court, it is necessary to understand certain basic principles regarding healthcare pricing and the role of commercial health insurance.

17. As an initial matter, healthcare providers (*i.e.* hospitals and hospital networks) negotiate and enter into contracts—known as managed care contracts—with commercial health insurance companies. (ECF No. 251 [sealed], at 7–8.)

18. In these managed care contracts, healthcare providers and commercial insurance companies determine, among other things, whether the healthcare providers' facilities will be "in-network" for the customers of an insurance company and what rates the commercial health insurance company will pay to the healthcare providers for their services. (ECF No. 251 [sealed], at 7–8.)

19. Thereafter, commercial health insurance companies sell their plans to customers. Relevant to the present action, there are essentially three ways in which commercial health insurance can be obtained.

20. First, an individual—regardless of their employment status—can select from multiple plan options (offered by multiple providers) through the ACA Exchange. Once enrolled in a plan purchased from the ACA Exchange, individuals pay premiums to their health insurance provider, who is then responsible for paying

the cost of covered healthcare services. (ECF No. 251 [sealed], at 11; ECF No. 271.27 [sealed], at 20.)

21. Second, an individual's employer may negotiate with a commercial health insurance company through which employees can enter into "fully-insured" plans. Under "fully-insured" employer-sponsored plans, the insurance provider is responsible for directly paying healthcare providers for the cost of services provided to plan enrollees—meaning that the insurer bears the risk of high healthcare costs. (ECF No. 251 [sealed], at 10; ECF No. 271.27 [sealed], at 20.) In exchange, the employer and the covered participants are responsible for paying monthly premiums to the insurance provider. (ECF No. 251 [sealed], at 10; ECF No. 271.27 [sealed], at 20.)

22. Third, an individual's employer may offer a "self-funded" healthcare plan to its employees, whereby the employer directly pays for the costs of healthcare services offered to its employees—meaning that the employer bears the risk of high healthcare costs. To minimize their risks, employers offering "self-funded" plans can contract with commercial health insurance companies—by paying a monthly "network vendor" fee—in order to have access to lower "in-network" pricing for healthcare services. (ECF No. 251 [sealed], at 10; ECF No. 271.27 [sealed], at 20.)

III. Mission Health System

23. During the relevant time period, Mission Health has included six general acute care hospitals throughout Western North Carolina. (*See generally* SAC ¶ 6; *see also* ECF No. 251 [sealed], at 3; ECF No. 271.27 [sealed], at 6 n.8.)

24. In the 1990's, while Mission Health was under the ownership of the ANC Defendants, the State of North Carolina issued a Certificate of Public Advantage ("COPA") to Mission Health. (*See* SAC ¶¶ 57–61; ECF No. 251 [sealed], at 37; ECF No. 271.27 [sealed], at 14.)

25. Pursuant to the COPA, the ANC Defendants—as the owners of Mission Health—were protected from federal and state antitrust action in exchange for Mission Health subjecting itself to regulatory oversight. (*See* SAC ¶¶ 57–67, 70–71; ECF No. 251 [sealed], at 37–38; ECF No. 271.27 [sealed], at 14–15.)

26. The COPA—and, subsequently, the statute that authorized the issuance of the COPA—was repealed in 2016. (SAC ¶ 81; ECF No. 251 [sealed], at 39; ECF No. 271.27 [sealed], at 16.)

27. Thereafter, Plaintiffs allege, the ANC Defendants—left with an unregulated monopoly for the provision of in-patient general acute care services in Western North Carolina—began improperly using their market power in negotiations with BCBS and United to demand the inclusion of anticompetitive provisions in their managed care contracts. (*See generally* SAC ¶¶ 140–68; ECF No. 251 [sealed], at 57–81.)

28. Subsequently, as noted above, on 31 January 2019, the ANC Defendants sold Mission Health (and its related assets) to the HCA Defendants. (SAC ¶¶ 2, 6; ECF No. 251 [sealed], at 2, 18; ECF No. 271.27 [sealed], at 17.)

29. Plaintiffs allege that since assuming ownership of Mission Health, the HCA Defendants have continued to leverage the monopoly power of Mission Health

in the western North Carolina region by essentially coercing BCBS and United to include certain anticompetitive provisions in their managed care contracts. (*See generally* SAC ¶¶ 140–68; ECF No. 251 [sealed], at 57–81.)

30. As a result of the inclusion of these allegedly anticompetitive terms in Mission Health's contracts with BCBS and United, Plaintiffs assert, Defendants have been able to charge supra-competitive prices for in-patient acute general care services. (*See generally* SAC ¶¶ 140–68; ECF No. 251 [sealed], at 57–81.)

31. According to Plaintiffs, those higher prices have ultimately been passed on to individuals enrolled in commercial health insurance plans offered by BCBS and United (including ACA Exchange plans, employer-sponsored "fully-insured" plans, and employer-sponsored "self-funded" plans) in the form of higher premiums that BCBS and United have charged to individuals and their employers. (SAC ¶¶ 5, 9, 108–10, 213, 228, 264–65, 271, 277; ECF No. 251 [sealed], at 104–06.)

IV. Procedural History

32. Plaintiffs[2] initiated the present action on 10 August 2021 by filing a Complaint (labelled as a "Class Action Complaint") against Defendants in Buncombe County Superior Court. (ECF No. 3.)

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[2] At the time this lawsuit was first initiated, the named plaintiffs included: Davis, Powell, Cook, Button, Richard Nash, and Will Overfelt. (*See* ECF No. 3.) As the case progressed, however, Richard Nash passed away and Lorraine Nash (as the administrator of his estate) was substituted as a plaintiff. (*See* ECF No. 40.) Both Lorraine Nash (as the administrator of Richard Nash's estate) and Overfelt subsequently voluntarily dismissed their claims against Defendants without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, and Brunk Auctions, Inc. was added as a new plaintiff. (*See* ECF Nos. 67, 93, 166.)

33. This matter was subsequently designated as a mandatory complex business case on 11 August 2021 and was thereafter assigned to the undersigned on 3 January 2022. (ECF Nos. 1–2; ECF Nos. 31–32.)

34. On 19 September 2022, the Court entered an Order and Opinion on Defendants' Motion to Dismiss wherein the Court dismissed some—but not all—of the claims asserted in the original Complaint. *See generally Davis v. HCA Healthcare, Inc.*, 2022 NCBC LEXIS 108 (N.C. Super. Ct. Sept. 19, 2022).

35. Plaintiffs subsequently filed a First Amended Class Action Complaint on 31 October 2022. (ECF No. 61.)

36. Thereafter, on 27 April 2023, the Court entered an Order and Opinion on Defendants' Motion to Dismiss First Amended Class Action Complaint (ECF No. 87) in which the Court dismissed certain claims for relief asserted by Plaintiffs. *See generally Davis v. HCA Healthcare, Inc.*, 2023 NCBC LEXIS 63 (N.C. Super. Ct. Apr. 27, 2023).

37. By agreement of the parties, Plaintiffs then filed a Second Amended Class Action Complaint—which is currently their operative pleading—on 14 June 2023. (ECF No. 93; *see also* ECF No. 92.)

38. In the Second Amended Class Action Complaint, Plaintiffs have asserted claims against Defendants for (1) monopolization in violation of the North

Carolina Constitution and N.C.G.S. § 75-1; (2) attempted monopolization; and (3) restraint of trade in violation of N.C.G.S. § 75-1.[3]

39. After a lengthy discovery period, Plaintiffs filed the present Motion for Class Certification on 17 December 2025 and requested that—pursuant to Rule 23 of the North Carolina Rules of Civil Procedure—the Court certify a class consisting of the following:

> Any individual or entity in the MHS Region who is a North Carolina resident and who, during all or part of the period beginning August 10, 2017 to the present, paid some portion of premiums for a self-insured or fully-insured product in which payments were made pursuant to contracts between any Defendant and Blue Cross Blue Shield or United Healthcare.

(ECF No. 248 [sealed], at 1.)[4]

40. In addition to filing a brief in response to the Motion for Class Certification, on 16 February 2026, Defendants filed the present Motion to Exclude Dr. Town wherein they have requested that the Court exclude the written report of Plaintiffs' putative expert witness—Dr. Robert J. Town.

41. This matter came on for a hearing before the Court on 9 July 2026 at which all parties were represented by counsel. (*See* ECF No. 325.)

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[3] Each of the claims asserted by Plaintiffs in the Second Amended Class Action Complaint have been brought exclusively pursuant to North Carolina law.

[4] Plaintiffs have defined the "MHS Region" as including all of Buncombe, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Swain, Transylvania and Yancey Counties. (ECF No. 248 [sealed], at 1 n.1.)

42. Following the hearing, on 10 July 2026, the Court directed the parties to submit supplemental briefing on several issues relevant to the Motions. (ECF No. 334.)

43. Having been fully briefed, the Motion for Class Certification and Motion to Exclude Dr. Town are now ripe for resolution.

LEGAL STANDARD

44. Motions for class certification are governed by Rule 23 of the North Carolina Rules of Civil Procedure, which provides, in relevant part, that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C. R. Civ. P. 23(a).

45. "As a threshold matter, the party seeking class certification bears the burden to show that a proper class exists, meaning the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Armistead v. Cnty. of Carteret*, 389 N.C. 21, 24 (2026) (cleaned up).

46. Our Supreme Court has further recognized that

> [b]eyond this threshold requirement, the party seeking class certification also must satisfy a number of other certification criteria, including: (1) that the class representatives have the ability to fairly and adequately represent the interest of all class members; (2) that there are no conflicts of interest between the class representatives and the unnamed class members; (3) that the class representatives have a genuine personal interest in the outcome of the suit; and (4) that the class representatives have the ability to adequately represent class members outside of the jurisdiction; (5) that the proposed class members are so numerous that it is impractical to bring them all before the court;

> and (6) that it is possible to provide sufficient notice to all putative class members.

Jackson v. Home Depot U.S.A., Inc., 388 N.C. 109, 113 (2025) (quoting *Surgeon v. TKO Shelby, LLC*, 385 N.C. 772, 777 (2024)).

47. "When these prerequisites are satisfied, the determination of whether a class action is superior to other available methods of adjudication is committed to the sound discretion of the trial court." *Wardson Constr., Inc. v. City of Raleigh*, 389 N.C. 140, 145 (2026) (citing *Beroth Oil Co.*, 367 N.C. at 337).

48. "The Court evaluates a motion to exclude an expert's testimony under Rule 702 of [the] North Carolina Rules of Evidence, which is now virtually identical to its federal counterpart[.]" *Loyd v. Griffin*, 2023 NCBC LEXIS 34, at *6 (N.C. Super. Ct. Mar. 6, 2023) (cleaned up). Subpart (a) of Rule 702 states as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
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> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

49. North Carolina courts apply the Rule 702(a) factors in accordance with the United States Supreme Court's analysis in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and its progeny. *See State v. McGrady*, 368 N.C. 880, 890 (2016)

("In its discretion, the trial court should use those factors that it believes will best help it determine whether the testimony is reliable in the three ways described in the text of Rule 702(a)(1) to (a)(3).").

50. "[Q]uestions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility." *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374 (2015) (cleaned up). In practice, this means that the Court "does not examine whether the facts obtained by the [expert] witness are themselves reliable—whether the facts used are qualitatively reliable is a question of the *weight* to be given the opinion by the factfinder, not the *admissibility* of the opinion." *Id.* (cleaned up).

51. Our Supreme Court has also observed that "[t]he precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony[,]" and that the trial court exercises considerable discretion when applying the three factors. *McGrady*, 368 N.C. at 890. In addition, "when applying the principles set forth in *Daubert*, the Court may seek guidance from federal case law." *Brakebush Bros., Inc. v. Certain Underwriters at Lloyd's of London – Novae 2007 Syndicate Subscribing to Pol'y with No. 93PRX17F157*, 2024 NCBC LEXIS 137, at *5 (N.C. Super. Ct. Oct. 16, 2024) (cleaned up).

ANALYSIS

52. The Motion for Class Certification and the Motion to Exclude Dr. Town are intertwined. This is so because Plaintiffs rely heavily on Dr. Town's opinions to satisfy their burden of attempting to show that the requirements for certification

under Rule 23 are satisfied. Accordingly, the Court will analyze both Motions together.

53. With regard to the Motion for Class Certification, the Court's inquiry is confined to the requirements of Rule 23 and does not extend to an assessment of the merits of Plaintiffs' underlying claims. *See Wardson Constr., Inc.*, 389 N.C. at 145 (2026) ("[C]ertification does not resolve the merits of the underlying dispute. A court may examine issues touching on the merits only to the extent necessary to determine whether the requirements of Rule 23 are satisfied." (cleaned up)); *see also Beroth Oil Co.*, 367 N.C. at 333 ("We hold that analyzing the substantive merits of plaintiffs' inverse condemnation claim is improper at the class certification stage[.]").

54. The primary focus of Defendants' opposition to certification concerns the issue of whether Plaintiffs have satisfied the "predominance" element as it relates to the issue of class-wide antitrust impact. *See Williams v. Ests. LLC*, 2021 U.S. Dist. LEXIS 78101, at *7–8 (M.D.N.C. Apr. 22, 2021) ("In antitrust cases, impact often is critically important for the purpose of evaluating [the] predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." (cleaned up)).

55. For the reasons set out below, the Court agrees that the denial of Plaintiffs' Motion for Class Certification on this basis alone is proper and therefore focuses its analysis on this issue. *See Dewalt v. Hooks*, 382 N.C. 340, 345 (2022) (recognizing that although "the trial court identified three distinct bases for denying plaintiffs' motion for class certification . . [,] [a]ny of the three independent bases

would have been adequate to support the denial of class certification[ ]"); *see also Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 549 n.3 (2005) ("While we address several of the trial court's conclusions, to all of which Plaintiffs excepted, Plaintiffs' failure to meet any one of the prerequisites for class certification necessitates denial of their motion for class certification." (cleaned up)).

56. The requirement to show common proof of class-wide antitrust impact under Rule 23 has been described as follows:

> The plaintiffs have failed to show that the antitrust element of impact can be proven by common class-wide proof, which means that they cannot show that common issues predominate. Without predominance the motion must be denied.
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> . . .
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> At the class certification stage, the plaintiffs must show that antitrust impact is "capable of proof at trial through evidence that is common to the class rather than individual to its members" in order to meet the predominance requirement.
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> . . .
>
> The plaintiffs seem to assume that the existence of the bid-rigging scheme is enough to show injury. But proof that the conspiracy exists is not the same as proof that each class member was injured-in-fact by the conspiracy.

Williams, 2021 U.S. Dist. LEXIS 78101, at *7, *9, *11 (cleaned up).

57. Plaintiffs contend that they have presented sufficient common proof of class-wide impact under two different theories.

58. First, and primarily, Plaintiffs assert an "indirect purchaser" theory (explained more fully below) in which they allege the following sequence of events: (1) Defendants coercively used their market power when negotiating managed care

contracts with BCBS and United (the "direct purchasers"); (2) as a result, the managed care contracts entered into by BCBS and United with Defendants contained anticompetitive provisions that allowed Defendants to charge above-market prices for the healthcare services provided by Mission Health facilities; and (3) these overcharges were then "passed through" to the putative class of indirect purchasers in the present action by BCBS and United in the form of higher health insurance premiums than these indirect purchasers would otherwise would have had to pay.[5]

59. Second, Plaintiffs contend that as a result of the monopoly power that Defendants exercised, they permitted an overall decrease to occur in the quality of care offered by the Mission Health system that adversely affected the putative class members.

60. Of these two theories of antitrust impact (increased premiums and decreased quality), the parties have focused most of their arguments on the issue relating to the alleged pass-through of overcharges via higher premiums. Accordingly, the Court will address that issue first.

I. Higher Health Insurance Premiums

61. Certain types of antitrust lawsuits can be divided into two categories: (1) those brought on behalf of direct purchasers; and (2) those brought on behalf of indirect purchasers. *See, e.g., Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019)

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[5] For clarity, Plaintiffs are not contending in this case that BCBS or United acted unlawfully in charging the higher premiums. Rather, they are asserting that the higher premiums were the result of the overcharges that BCBS and United were forced to pay as a result of Defendants' anticompetitive conduct.

(recognizing the difference between antitrust actions asserted by "direct purchasers" and actions brought by "indirect purchasers"). As noted above, the present case falls into the latter category.

62. Here, Plaintiffs have sought to certify a class consisting of *indirect* purchasers who are alleged to have paid higher premiums to certain health insurance companies (BCBS and United) who, in turn, paid supra-competitive prices to Defendants in connection with healthcare services that Defendants provided to the putative class members.

63. Notably, the present action is the second class action lawsuit that has been filed against Defendants regarding the inclusion of allegedly anticompetitive terms in their managed care contracts with commercial health insurance providers. A separate lawsuit was brought against Defendants several years ago in the Western District of North Carolina by a class of *direct* purchasers—that is, a group of plaintiffs who alleged that they were forced to pay supra-competitive prices to Defendants for healthcare services provided by Mission Health based on Defendants' exercise of monopoly power. *See City of Brevard v. HCA Healthcare, Inc.*, No. 1:22-CV-00114 (W.D.N.C. June 3, 2022). That lawsuit ultimately resulted in a settlement.

64. By way of contrast, the present lawsuit is premised on the theory that those same alleged supra-competitive prices were passed on by BCBS and United to the putative class members as indirect purchasers in the form of higher health insurance premiums.

65. In order to determine whether Plaintiffs have met their burden with respect to showing class-wide impact under Rule 23 in connection with a putative indirect purchaser class, it is necessary to first understand what that burden is.

66. North Carolina's appellate courts do not appear to have previously addressed class certification issues in the context of an antitrust action involving a putative class of indirect purchasers. A number of such cases, however, have been litigated in federal court. Those federal cases provide helpful guidance here—albeit with an important caveat.

67. That caveat, in a nutshell, is based on the fact that (as explained in more detail below) federal courts do not require putative class action plaintiffs to show that common issues of fact or law predominate under Rule 23 of the *Federal* Rules of Civil Procedure where the relief sought is purely injunctive in nature (as opposed to relief in the form of monetary damages).

68. Conversely, North Carolina courts—based on Rule 23 of the *North Carolina* Rules of Civil Procedure—require a showing of predominance *regardless* of whether the putative class action seeks injunctive relief *or* monetary damages.

69. In the present case, Plaintiffs initially filed this action seeking the recovery of actual damages sustained by the putative class (presumably in the amount of the alleged increased premiums charged by BCBS and United). (*See* SAC, at 97 (requesting that the Court "order[ ] that Plaintiffs and members of the class recover threefold the damages determined to have been sustained by them as a result of Defendants' misconduct complained of . . .").)

70. However, the relief they are requesting has now changed. (*Compare* SAC, at 97 *with* ECF No. 248 [sealed], at 1.) In the Motion for Class Certification, Plaintiffs represent that they are no longer seeking actual damages and are now pursuing only equitable relief—injunctive relief and equitable disgorgement.

71. As a result, Plaintiffs argue that the more rigorous predominance standard applied by federal courts at the class certification stage in indirect purchaser cases seeking monetary damages does not apply here and that this Court should instead essentially undertake a more relaxed certification analysis akin to that employed by federal courts in actions seeking the certification of a purely injunctive class.

72. The Court rejects this argument. Our Supreme Court has made clear that Rule 23 of the North Carolina Rules of Civil Procedure and Rule 23 of the Federal Rules of Civil Procedure are not identical and differ in certain key respects. *See Dewalt*, 382 N.C. at 344 n.2 ("There are notable differences between Rule 23 of the North Carolina Rules of Civil Procedure and Rule 23 of the Federal Rules of Civil Procedure governing class action lawsuits."); *see also* N.C. R. Civ. P. 23 Cmmt. (b) (noting that there are intentional differences between North Carolina's Rule 23 and its federal counterpart).

73. Critically, Rule 23 of the Federal Rules of Civil Procedure contains a separate and distinct provision—Rule 23(b)(2)—that applies to the certification of class actions seeking purely injunctive relief and omits the requirement that "questions of law or fact common to class members predominate over any questions

affecting only individual members[.]" *Compare* Fed. R. Civ. P. 23(b)(2) *with* Fed. R. Civ. P. 23(b)(3).

74. This, however, is not true under North Carolina law because Rule 23 of the North Carolina Rules of Civil Procedure does not contain a counterpart to Rule 23(b)(2) of the Federal Rules. Caselaw from our Supreme Court makes clear that *all* class actions certified under Rule 23 of the North Carolina Rules of Civil Procedure—including those seeking purely injunctive relief—must satisfy the predominance requirement. Indeed, our Supreme Court has recently addressed this issue.

> . . . To support their contention, plaintiffs claim that when "a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate," quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 362–63. As the trial court correctly concluded, however, the Supreme Court of the United States was analyzing a subsection of Rule 23 of the Federal Rules of Civil Procedure, Rule 23(b)(2), which is not included in North Carolina's Rule 23. Further, it is well established that this Court has interpreted North Carolina's Rule 23 to require plaintiffs seeking class certification to establish the existence of a class, which requires plaintiffs to demonstrate that each member has "an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Crow*, 319 N.C. at 277.

Dewalt, 382 N.C. at 350–51.

75. Accordingly, all parties seeking class certification under North Carolina's enactment of Rule 23 have the same burden and must satisfy the same requirements regardless of whether they are seeking to certify a damages class or a purely injunctive class.

76. Therefore, the Court must determine whether Plaintiffs have actually met their burden of satisfying the predominance requirement as to class-wide impact with respect to all (or all but a *de minimis* number) of the putative class members.[6]

77. Because of the absence of caselaw from North Carolina's appellate courts analyzing the class-wide impact requirement in the context of an indirect purchaser class, the Court finds it helpful to review federal cases analyzing this issue. In doing so, however, the Court must remain mindful of the caveat discussed above. *See id.* at 344 n.2 (recognizing that despite "notable differences" between the applicable rules, "federal cases which address the provision of the federal rule that is similar to the state provision are instructive").

78. Plaintiffs' briefs convey the impression that their need to present evidence of class-wide impact is largely diminished by a "commonsense" recognition (as a basic economic principle) that if BCBS and United were forced to pay higher costs to Defendants, then the putative class members would necessarily, in turn, have been required to pay higher premiums to BCBS and United. By this logic, the existence of such pass-through impact is so self-evident that little, if anything, in the way of actual proof would actually be required.

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[6] In analogous indirect purchaser antitrust cases, federal courts have held that "a class may be certified so long as a '*de minimis*' number of class members were uninjured or, conversely, 'virtually all' class members were injured." *In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig.*, 335 F.R.D. 1, 17 (E.D.N.Y. 2020) (cleaned up); *see also In re Rail Freigh Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 135 (D.D.C. 2017) ("The Court views the 'all or virtually all' and the '*de minimis*' standards as two sides of the same coin. If the putative class includes only a *de minimis* number of uninjured members, then plaintiffs have satisfied the all or virtually all standard for predominance and have demonstrated that they can prove class-wide injury through common evidence at trial." (cleaned up)).

79. But, as demonstrated below, this position is not supported by well-reasoned case law. Even if it can be said (in a theoretical sense) that some general relationship exists between higher healthcare costs paid by a health insurance provider and higher premiums paid by the end-payor, such a generality is insufficient to meet Plaintiffs' burden of showing class-wide impact.

80. Plaintiffs' present burden is not merely to demonstrate that higher health care costs can *potentially* play a role in an insurance company's decision to increase premiums on a pass-through basis. Instead, their obligation is to present admissible class-wide evidence—whether through competent expert testimony or otherwise—that all (or all but a *de minimis* number) of the putative class members *in this case* paid higher insurance premiums to BCBS and/or United as a direct result of Defendants' conduct.

81. With respect to this issue, both sides appear to agree that the most on-point decisions from around the country are the so-called "*Sutter* Cases." *See Sidibe v. Sutter Health*, 333 F.R.D. 463 (N.D. Cal. Aug. 30, 2019) ("*Sutter I*"); *Sidibe v. Sutter Health*, 2020 U.S. Dist. LEXIS 136657 (N.D. Cal. July 30, 2020) ("*Sutter II*").

82. In the *Sutter* Cases, a putative class of indirect purchasers consisting of individuals and businesses who had paid premiums to health insurance providers sought class certification in connection with their antitrust claims against a hospital network. Like Plaintiffs in this case, the putative class in the *Sutter* Cases alleged that a hospital network—Sutter Health—had leveraged its market power to require health insurance providers to include anticompetitive terms in its managed care

contracts and that as a result of those contracting practices, Sutter Health was able to charge above-market prices for healthcare services, the costs of which were subsequently "passed through" to the putative class through higher health insurance premiums.

83. In *Sutter I*, the federal court denied the plaintiffs' initial motion for class certification, and stated the following:[7]

> The plaintiffs' liability theory is that Sutter charged the five health plans at issue in this case—Blue Shield, Anthem, Aetna, Health Net, and UnitedHealthcare—supra-competitive rates. The plaintiffs do not allege that Sutter directly charged class members supra-competitive rates. Instead, the alleged antitrust injury is indirect: the class members' harm comes only to the extent the health plans passed on Sutter's alleged overcharges through to class members in the form of higher premiums than the health plans would have charged in the but-for world. As a result, the plaintiffs have a two-fold burden: they must demonstrate that (1) the five health plans paid Sutter inflated prices for inpatient hospital services, and then (2) those overcharges were passed on to class members in the form of inflated premiums. *Cf., e.g., In re Qualcomm*, 328 F.R.D. at 299.
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> . . .
>
> The court has taken a "hard look" at the plaintiffs' proposed methodology for assessing antitrust injury and calculating antitrust damages. The court finds the plaintiffs' proposed methodology has at least two significant deficiencies that prevent the plaintiffs from relying on it to demonstrate that they can prove antitrust injury or calculate antitrust damages on a class-wide basis: (1) it does not include a reliable method for proving or calculating Sutter's overcharges to the five health plans, and (2) it does not include a reliable method for proving or calculating how the overcharges were passed through to health-insurance premiums paid by class members.

[7] The Court has quoted at length from the *Sutter I* decision because the quoted portion contains a well-reasoned analysis of the burden faced by indirect purchaser plaintiffs in presenting common evidence of class-wide impact at the class certification stage.

. . .

"Where, as here, the class is composed of indirect purchasers, 'proof of class-wide antitrust impact is made more complex because plaintiffs must offer a model of impact and damages that demonstrates the alleged overcharge was passed through to each successive link in the distribution chain, and ultimately to the plaintiffs.' " *In re Qualcomm*, 328 F.R.D. at 301 (quoting *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2018 U.S. Dist. LEXIS 35744, 2018 WL 1156797, at *3 (N.D. Cal. Mar. 5, 2018) (*In re Lithium Ion Batteries II*)).

Courts in indirect-purchaser antitrust cases have recognized the use of averaging in calculating passthrough rates where experts have shown the sound methodological steps through which they calculated their averages. *See, e.g., id.* at 315 (collecting cases). For example, *In re Qualcomm*—an antitrust case against a manufacturer of "modem chips" used in cellphones brought by a class of indirect purchasers who bought phones containing the chips—the plaintiffs' expert calculated an average passthrough rate from the chip manufacturer through cellphone manufacturers and retailers to cellphone buyers through regression analyses based on sales data from (1) six major cellphone manufacturers, including the five largest manufacturers in the U.S. market (Apple, Samsung, Motorola, LG, and HTC), representing approximately 90 percent of total cellphone sales, (2) six of the largest U.S. retailers (including Best Buy, Amazon, Wal-Mart, and Target), representing approximately 84 percent of the retailer market, and (3) five wireless carriers, including the four major U.S. carriers (AT&T, Sprint, T-Mobile, and Verizon) and one regional carrier, representing approximately 97 percent of the wireless-carrier market. *Id.* at 302–03. The expert used ten control variables in his regressions (the same ten control variables that the defendant used in a submission to the FTC) and calculated separate passthrough rates for each of the 18 sales channels, which he then weighted to calculate an overall sales-channel-weighted averaged passthrough rate of 87.4 percent. *Id.* at 303–04. In finding that the expert's average weighted passthrough rate was sufficient to support class certification, the court found that:

> [The plaintiffs' expert] does not simply assume a uniform pass-through rate for OEMs. Instead, he examines transactional data for six different OEMs—including the five largest OEMs in the U.S. market (Apple, Samsung, Motorola, LG, and HTC)—who "accounted for approximately 90% of total cell phone sales" during the relevant period. [He] calculates individual pass-through

> rates for these six OEMs in order to model a composite pass-through rate.

Id. at 308. By contrast, courts have rejected the use of averaging in calculating passthrough rates where experts have not shown the sound methodological steps through which they calculated their averages. For example, in *In re Lithium Ion Batteries*—an antitrust case against manufacturers of batteries used in consumer electronics—the plaintiffs' expert assumed that the passthrough rate at each level in the distribution chain from the battery manufacturers to device manufacturers to retailers to the end consumers approached 100 percent without sufficiently supporting his analysis. *In re Lithium Ion Batteries I*, 2017 U.S. Dist. LEXIS 57340, 2017 WL 1391491, at *12. Among other things, "[the expert] acknowledged that bundling, rebates, and discounts would affect the accuracy of cost data, but apparently has offered no methodology to account for it in his analysis." *Id.* The court there "f[ound] the [expert's] declarations insufficient to show that pass-through and damages can be established by expert analysis on a class-wide basis" and denied certification. *Id.* On a renewed motion a year later, the court found that the expert's supplemental analysis still failed to account for a central issue affecting passthrough rates (focal-point pricing; meaning, the practice of retailers setting prices at certain "focal points," such as prices ending with 9, and not adjusting such prices based on small differences in costs) and thus "left too much uncertainty as to whether pass-through can be estimated reliably at 100% as to retailers or distributors farther down the supply chain, and ultimately to the consumers who make up the proposed class," and once again denied certification. *In re Lithium Ion Batteries II*, 2018 U.S. Dist. LEXIS 35744, 2018 WL 1156797, at *4.

The *In re Optical Disk Drive* antitrust litigation is instructive because the court there first denied class certification due in part to deficiencies in the plaintiffs' passthrough assumptions and then, two years later, granted a renewed motion for class certification. The plaintiffs there alleged that optical-disc-drive ("ODD") manufacturers engaged in bid-rigging to prop up the price of ODDs. *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 314 (N.D. Cal. 2014) (*In re Optical Disk Drive I*). The plaintiffs sought to certify a class of direct-purchaser plaintiffs ("DPPs") that bought ODDs directly from the defendants, *id.* at 316, and a class of indirect-purchaser plaintiffs ("IPPs") that bought products that contained ODDs manufactured by the defendants (but which the IPPs did not buy directly from the defendants), *id.* at 323. On the plaintiffs' initial class-certification motion, the plaintiffs' expert aggregated prices for all purchasers who bought ODDs of particular

types in given years before running a regression analysis to calculate a passthrough rate. *Id.* at 324. The court found that this resulted in "classwide impact . . . being *assumed* by the models, rather than demonstrated by the results." *Id.* (emphasis in original). The expert "purport[ed] to test the validity of his models by looking to specific examples in the data," but the court rejected this approach, holding that "[i]dentifying some instances where the empirical data appears to match the model does not transform the analysis from one that assumes class-wide impact into one that proves it." *Id.* The court ultimately concluded that "the IPPs have not presented a persuasive explanation as to why it would be reasonable to assume a uniform pass through rate" and denied certification. *Id.*

Two years later, the plaintiffs moved for certification again, this time for a narrower IPP class. *In re Optical Disk Drive II*, 2016 U.S. Dist. LEXIS 15899, 2016 WL 467444, at *3. The plaintiffs' expert offered a modified overcharge model that, among other things, "integrate[d] all 'useable' sales and costs data produced—from 86 percent of the market" and "provide[d] further detail on the multivariable regression analysis, which [the plaintiffs] contend shows that all factors other than [the antitrust] conspiracy are being adequately controlled for in the overcharge model." *Id.* at *6. The court found that this new analysis, which measured passthrough rates for over 273 million ODD products, *id.* at *9, was sufficient to support certification.

Dr. Chipty's passthrough analyses here have more in common with the deficient models in *In re Lithium Ion Batteries* and the first *In re Optical Disk Drive* decision than the models in *In re Qualcomm*, the second *In re Optical Disk Drive* decision, or other decisions where courts have accepted passthrough models. Dr. Chipty began by assuming what she needs to prove, namely, that each of the five health plans pass on 100 percent of any Sutter overcharges through to the premiums they charge their customers. Dr. Chipty based her 100-percent-passthrough assumption in large part on the Bob Reed PowerPoint presentation where Sutter supposedly assumed a 100-percent-passthrough rate for the purpose of running hypotheticals . . . . Contrary to Dr. Chipty's inference, the hypothetical in that presentation does not establish that Sutter actually concluded that health plans pass on 100 percent of Sutter's price reductions (or increases) through to their customers' premiums. Even if it did, the fact that Sutter (which is not a health plan) might have drawn this conclusion does not establish that health plans actually pass on 100 percent of price reductions (or increases) through to their customers' premiums. *Dr. Chipty further based her 100-percent-passthrough assumption on documents and analyses that she*

> *said indicates that health plans try to set premiums at a level that covers all their expenses and that when their costs increase, their premiums do as well. The fact that health plans try to set premiums at a level that covers all their expenses as a whole, or that their premiums generally increase when their costs increase, does not establish that health plans pass on 100 percent of any given cost increase or overcharge through to their customers. To the contrary, Dr. Chipty herself acknowledged that "a health plan may decide to absorb some portion of a medical cost increase, by cutting into [its] margins," rather than passing on 100 percent of those increases to its customers.*
>
> . . .
>
> *The court finds that Dr. Chipty's analyses are insufficient to show that antitrust injury and damages can be established on a class-wide basis. And absent a sound methodology for proving on a class-wide basis what Sutter's overcharges were and how those overcharges were passed through to the class, the plaintiffs have not met their burden of showing that common issues predominate. Cf. In re Optical Disk Drive I*, 303 F.R.D. at 324 (absent a class-wide methodology for calculating overcharges and passthroughs, the case would result in " 'thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment' "). The court therefore denies the plaintiffs' motion to certify their proposed class under Rule 23(b)(3).

Sutter I, 333 F.R.D. at 492–98 (emphasis added and footnotes omitted).

84. Plaintiffs seek to distinguish *Sutter I*, in part, on the fact that the federal court nevertheless granted certification of an *injunctive* relief class pursuant to federal Rule 23(b)(2) and opined that "[a]lthough common issues must predominate for class certification *under Rule 23(b)(3)*, no such requirement exists under *[Rule] 23(b)(2)*[.]" *Sutter I*, 333 F.R.D. at 399 (emphasis added and cleaned up)). However, as discussed at length above, our Supreme Court has made clear that because the North Carolina Rules of Civil Procedure do not contain a counterpart to Rule 23(b)(2) of the Federal Rules of Civil Procedure, the predominance requirement exists under

the laws of our State as to any case in which class certification is sought. *See Dewalt*, 382 N.C. at 350–51.

85. The federal court's reasoning in *Sutter I* is consistent with that employed by a number of courts in addressing the antitrust impact and predominance requirements at the class certification stage in other cases involving indirect purchaser antitrust claims. Among those additional cases are the following representative samples:

- In *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 2010 U.S. Dist. LEXIS 105646 (E.D. Pa. Sept. 30, 2010), the court denied certification of an indirect purchaser class of insured individuals who were prescribed an anti-depressant, Wellbutrin SR, and held as follows:

> However, the plaintiffs must demonstrate that common evidence is available to show that at least some of the direct purchaser injury *passed through* to each indirect purchaser. *See Hydrogen Peroxide*, 552 F.3d at 316 n.14 ("The burden of proof rests on the movant.") (citing *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005) ("The party seeking certification bears the burden of establishing *all* requirements of Rule 23 have been satisfied.").
>
> . . .
>
> *Even assuming that plaintiffs can show on a basic level that prices for both generic and branded buproprion SR increased as a result of GSK's allegedly anti-competitive conduct, they must also demonstrate that all the end-payor purchasers made a purchase at a supra-competitive price. If some direct purchasers absorbed any GSK price increase, there would be no pass through injury to certain indirect purchasers. If only some end-payors paid increased prices, this would suggest the plaintiffs will have to prove economic impact customer-by-customer. See In re OSB*, 2007 U.S. Dist. LEXIS 56617, at *21.
>
> . . .

> A "rigorous analysis" of Dr. Rosenthal's reports and testimony reveals it does not show that *all* class members paid supra-competitive prices for generic or branded sustained release bupropion, or that this determination can be made with common proof.

Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 2010 U.S. Dist. LEXIS 105646, at *65, *86–87, *93 (E.D. Pa. Sept. 30, 2010) (emphasis added and footnotes omitted).

- In *In re Processed Egg Products Antitrust Litigation*, 312 F.R.D. 124 (E.D. Pa. 2015), the court denied certification of a putative class of indirect purchasers on the basis that the plaintiffs had failed to show predominance with regard to antitrust impact. Specifically, in addressing the sufficiency of an economic model presented by the plaintiffs' putative expert witness, the court concluded:

> Finally, and most critically, the model does not show that common evidence can prove antitrust impact at the level of the indirect purchasers—*i.e.*, that retail customers were the ones paying the premium resulting from the conspiracy. Plaintiffs attempt to show that the premium resulting from the conspiracy was passed on to consumers, but their model falls short. Their model fails to analyze what appear to be significant individualized differences in pricing across different retailers and regions. Dr. Murphy's testimony, which the Court credits and finds persuasive, shows that pricing at the retail level is far more individualized and complex than Dr. Stiegert's single-pass-through model acknowledges and can accommodate. Thus, after consideration of the evidence from both Plaintiffs and Defendants, and after accounting for the shortcomings of Dr. Stiegert's model, the Court concludes that common issues do not predominate as to antitrust impact.

Id. at 160–61.

- In *In re Methionine Antitrust Litigation*, 204 F.R.D. 161 (N.D. Cal. 2001), the court denied certification of a putative class of indirect purchasers and concluded the plaintiffs' putative expert witness had failed to present common evidence of antitrust injury:

> Plaintiff does not identify any evidence in the record that suggests that this formula is appropriate for the methionine industry. For example, Connor's method

> assumes that there is a single pass-through rate for all direct and indirect resellers, yet Connor and plaintiff point to nothing in the record that suggests that such an assumption is valid. To the contrary, the evidence demonstrates that resellers do not act uniformly and that they operate in different markets with different competitive pressures; that is, that there is not a single pass-through rate for all methionine resellers regardless of where they are in the distribution chain or what methionine product they sell.
>
> . . .
>
> *Accordingly, plaintiff has not demonstrated that injury in fact—an element essential to prove liability—can reasonably be proven on a class-wide basis. Thus, while the issue of the conspiracy is a common question, the question of injury in fact is an individual question that would have to be resolved by mini-trials examining the particular circumstance of each class member.*

Id. at 165 (emphasis added).

- In *Mr. Dee's Inc. v. Inmar, Inc.*, 2023 U.S. Dist. LEXIS 147784 (M.D.N.C. Aug. 23, 2023), *aff'd*, 2025 U.S. App. LEXIS 3255 (4th Cir. Feb. 12, 2025), while granting certification of a *direct* purchaser class, the court denied certification of an *indirect* purchaser class on the basis that the plaintiffs could not "satisfy the predominance requirement because [p]laintiffs' expert's regressions did not find impact to almost one-third of the class and [p]laintiffs fail[ed] to proffer additional evidence that all manufacturers in the class suffered antitrust impact and damages." *Id.* at *38.

- In *In re Fresh Del Monte Pineapples Antitrust Litigation*, 2008 U.S. Dist. LEXIS 18388 (S.D.N.Y. Feb. 20, 2008), the Court denied certification of an indirect purchaser class and stated as follows with respect to the plaintiffs' proffered expert analysis:

  > As noted, *the Indirect Purchasers have not "present[ed] a reliable methodology for determining damages to the class . . . such that plaintiffs can show that class-wide issues predominate over individual issues*" (*see* page 11, supra). *See also In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 165 (N.D. Cal. 2001) (Plaintiff's expert's "method assumes that there is a single pass-through rate for all direct and

> indirect resellers, yet [the expert] and plaintiff point to nothing in the record that suggests that such an assumption is valid."); *A & M Supply Co. v. Microsoft Corp.*, 252 Mich. App. 580, 638–39, 654 N.W.2d 572, 602 (Mich. App. 2002) (plaintiffs' expert "did not describe a formula or method demonstrating that indirect purchasers were damaged, other than the assertion that the pass-on might be one hundred percent"). Among other things, "[t]he empirical analysis necessary to estimate a pass-through rate requires estimation of the relationship between wholesale price changes and retail price changes across time and location." (Reiff Supp. Decl. P 6.) *See McCarter v. Abbott Laboratories, Inc.*, No. Civ. A. 91-050, 1993 WL 13011463, at *3–6 (Ala. Cir. Ct. April 9, 1993) (" 'the only way to get to the bottom of whether or not there was pass-on or not pass-on is to analyze store by store, price increase by price increase, year by year, exactly what was happening at the retail level' "). "The Court finds that, because of these individualized questions, certification of a class in this case would not result in prompt, efficient judicial administration," but, "[r]ather,. . . would result in thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment." *McCarter*, 1993 WL 13011463, at *5. In other words, because individual damages issues will predominate, a class action is not a "superior" method of adjudication under Fed. R. Civ. P. 23(b)(3) and the case is unmanageable. *See O'Connor v. Boeing North American, Inc.*, 180 F.R.D. 359, 383 (C.D. Cal. 1997) ("The inquiries surrounding predominance of common facts and superiority of the class action are intertwined. The greater the number of individual issues, the less likely that a class action is the superior method of adjudication."); Moore's § 23.46[2][e][i].

In re Fresh Del Monte Pineapples Antitrust Litigation, 2008 U.S. Dist. LEXIS 18388, at *33–34 (S.D.N.Y. Feb. 20, 2008) (emphasis added and footnotes omitted).

86. Here, Plaintiffs assert that they have satisfied their burden of showing class-wide impact in two ways: (1) through the opinions contained in the expert report

of Dr. Town; and (2) through the more generalized deposition testimony elicited from the corporate representatives of BCBS and United.

87. The Court will address each in turn.

A. Dr. Town's Expert Report

88. With respect to the opinions offered by Dr. Town in his written report, Defendants have filed a motion requesting that the Court exclude those opinions on a number of grounds, including on the basis that his stated opinions on the pass-through issue do not satisfy the applicable standard under *Daubert* and its progeny.

89. By way of background and as noted above, while the present case has been brought solely on behalf of a putative class of indirect purchasers, a related lawsuit against Defendants was previously litigated in federal court that was brought by a group of direct purchasers.

90. In the federal lawsuit, the plaintiffs retained Dr. Town to provide expert testimony regarding the antitrust impact and damages caused to the direct purchasers as a result of Defendants' alleged anticompetitive conduct. (Dr. Town Dep. Tr., at 16–17.)

91. When the present action was filed, Dr. Town was retained by Plaintiffs here on behalf of the putative indirect purchaser class. (Dr. Town Dep. Tr., at 16.)

92. Dr. Town's expert report containing his opinions consists of 237 numbered paragraphs. Of those 237 paragraphs, there are only six (numbered 232 through 237) that expressly address the pass-through issue with regard to the indirect purchasers. The remainder of his report largely relates to the subject at issue

in the federal action—that is, whether Defendants engaged in anticompetitive conduct that resulted in BCBS and United paying above-market costs for healthcare services.

93. These six paragraphs (exclusive of footnotes) state—in their entirety—as follows:

> 232. Mission's conduct significantly harmed Plaintiffs and members of the putative class through higher prices and lower quality of care.
>
> 233. Extensive academic research and evidence from this case indicate that all those who paid premiums to United Healthcare and BCBSNC in the Relevant Market were impacted by the Challenged Conduct.
>
> 234. First, as a simple matter of the nature of health insurance premiums, price increases or overcharges are passed onto individuals and businesses paying premiums to those insurers. This is not a disputed proposition in health economics. For example, as part of a broader study, Brot-Goldberg, et al. (2024) observe "that health spending is passed through on a dollar-for-dollar basis into employer [employer-sponsored insurance] premiums." and "find that a 1% increase in health care prices leads to a 0.95% increase in [employer-sponsored insurance] premiums. These estimates suggest that rising health care prices are virtually fully reflected in higher insurance premiums." Kanimian and Ho (2024) came to the same conclusion specifically for hospital prices: "high hospital prices drive insurance premiums." Similarly, the Congressional Budget Office summarized the broad consensus when writing that, "The prices that commercial health insurers in the United States pay for hospitals' and physicians' services are much higher, on average, and have been rising more quickly than the prices paid by public health insurance programs. Those rising prices—rather than growth in the per-person use of health care services—are an important driver of recent increases in premiums for commercial health plans."
>
> 235. Evidence in this case reflects that well-accepted fact. The corporate representative for United Healthcare testified that members of UHC health plans "are going to feel the impact" of

> higher provider reimbursement rates through increased premiums and/or reduced benefits. Similarly the corporate representative for BCBSNC testified that "price, of course, flows into the premiums that we charge" and noted generally that provider price increases are passed through by BCBSNC in the form of higher premiums. And the corporate representative for Aetna testified that reductions in the cost of care result in lower premiums. The basic structure of health insurance risk pooling means that all members of a health plan pay higher premiums as a result of higher provider prices whether or not they received care that the specific provider—or at any provider at all. In practice, provider price increases typically impact future year premiums so, for example, the extent of premium increases due to provider price increases in 2024 and 2025 would not be precisely calculable at this time, as evidence in this case reflects.
>
> 236. And documents produced in this case similarly support this well-understood conclusion, including documents where insurers note that the prices at Mission and other hospitals directly impact the affordability of ACA plans in Western North Carolina, where BCBSNC notes that "The connection between health care pricing and premiums should be crystal clear to Mission" while noting that overutilization may cause even higher premiums as well.
>
> 237. Based on claims data produced in this case, the evidence above, and a simple evaluation of the population in the Relevant Market, I estimate there are tens of thousands of class members who paid higher premiums due to Mission's conduct.

(ECF No. 251 [sealed], at 104–06 (footnotes omitted).)

94. Absent from these paragraphs is any indication that Dr. Town based his conclusions on any type of economic or statistical model with regard to Plaintiffs' pass-through theory. Instead, his opinions on this issue were based solely on general economic principles contained in various articles and selected portions from the

deposition testimony of BCBS, United, and Aetna's[8] respective corporate representatives in this case.

95. While the articles cited by Dr. Town suggest that—in the abstract—there is a correlation between the prices charged by healthcare providers and the costs of premiums imposed by commercial health insurers, those articles are not a valid substitute for an actual analysis of the real-world effects on the premium amounts paid by the putative class members *in this case* as a result of Defendants' alleged anticompetitive conduct.

96. Among the relevant issues that Dr. Town's report fails to address are the following:

- How many distinct health insurance plans and policies were issued to putative class members during the relevant time period? Of those, what percentage of those plans and policies saw—during the relevant time period—an (1) increase in premiums; (2) decrease in premiums; and (3) no change in premiums?
- What impact—if any—did the decisions of regulators (including the North Carolina Department of Insurance) have on the costs of premiums charged by health insurance providers during the relevant period?
- What impact—if any—did competition within the commercial health insurance market for Western North Carolina impact the decisions of health insurers to increase premium prices?
- What other factors unrelated to Defendants' conduct may have contributed to any increase in the cost of insurance premiums? And would those other factors have caused the cost of health insurance premiums to rise regardless of Defendants' conduct?
- Were any pass-through costs to the putative class members offset by refunds or rebates issued by health insurance providers?

[8] Aetna's health insurance policies are not at issue in this lawsuit.

- Did insurance premium rates changes depend on whether the class member's plan was (1) purchased on the ACA market; (2) an employer-sponsored "fully-insured" plan; or (3) an employer-sponsored "self-funded" plan?

- For employer-sponsored "self-funded" plans, what percentage of employers passed through the purported increased premium costs to their employees? What percentage of those employers instead opted to absorb any or all of those increased costs? What percentage of those employers chose to, instead, reduce the number of their employees in order to maintain the existing premium amounts for retained employees?

- Rather than raising the price of insurance premiums, did any commercial health insurance providers offset the higher cost of healthcare services by reducing the level of coverage offered under their plans?

97. Courts in analogous cases have excluded expert testimony or otherwise found such testimony to be insufficient to satisfy the predominance requirement on similar grounds. *See In re Lithium Ion Batteries Antitrust Litig.*, 2017 U.S. Dist. LEXIS 57340, at *89 (N.D. Cal. Apr. 12, 2017) (excluding an expert's opinions regarding antitrust impact at the class certification stage where the analysis did not "sufficiently capture[ ] the variety of different types of class members and product categories[ ]"); *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. at 161 (rejecting an expert's opinion when ruling on a motion for class certification where "pricing at the retail level [was] far more individualized and complex" than the putative expert's model accounted for); *In re Methionine Antitrust Litig.*, 204 F.R.D. at 165 (finding that antitrust impact had not been shown through common evidence where the expert's opinion failed to account for "the evidence demonstrat[ing] that resellers d[id] not act uniformly and that they operate[d] in different markets with different competitive pressures[ ]").

98. Dr. Town's failure to utilize a reliable econometric or statistical model—or, for that matter, *any* model at all—with regard to his opinions on the pass-through issue is of particular concern given the inherent complexities of a pass-through impact theory. *See, e.g.*, *In re Optical Disk Drive Antitrust Litig.*, 2016 U.S. Dist. LEXIS 15899, at *56–57 (N.D. Cal. Feb. 8, 2016) (recognizing that indirect purchaser plaintiffs have typically been required to present "an econometric formula or other statistical analysis to show antitrust impact" (cleaned up)). Equally troubling are his candid admissions in his deposition about the inquiries he chose not to undertake (or as to which Plaintiffs' counsel did not ask him to undertake) in connection with his process of formulating opinions on the issue of pass through.

99. Dr. Town was questioned about these issues in his deposition and testified as follows:

> Q: Were you asked to quantify the amount of damages suffered by the putative class members?
>
> A: Not the damages, no, I was not asked to do that.
>
> Q: And just to be clear, since you gave a slightly different distinction, did you do that?
>
> A: No.
>
> Q: Were you asked to determine the number of putative class members who suffered some quantum of damages?
>
> A: I was asked to determine whether there was tens of thousands of members in that class.
>
> Q: Were you asked to do anything more specific in terms of identifying numbers than identifying whether there were tens of thousands?
>
> A: No.

Q: Just to follow up in a similar vein, did you determine, as part of your work, the number of putative class members who suffered some quantum of damages?

A: Outside of the rough number of tens of thousands, no.

Q: Were you asked to determine or did you determine the number of putative class members who suffered no damages?

. . .

A: I was not asked to do that.

Q: Did you do that?

A: And I did not do that.

. . .

Q: The concept of a pass-on or a pass-through is that, in an antitrust case, an overcharge alleged paid by a direct purchaser may potentially be passed on or passed through to an indirect purchaser?

A: Correct.

Q: Are you proffering an opinion anywhere in your report that, in this particular case, if there was a pass-on of an overcharge by either Blue Cross or United, that pass-on would be an immediate pass-on?

. . .

A: You mean like it would happen contemporaneous?

Q: Yes, in the form of higher premiums.

A: I'm not offering an opinion about whether it would be contemporaneous or not.

Q: Have you proffered an opinion about how long a lag period there might be between an overcharge paid by either one of the insurers and a higher premium paid by their beneficiaries?

A: I don't offer such an opinion in my report.

. . .

Q: Are you offering or proffering an opinion in this case about what specific percentage of any overcharge that might have been incurred by either of the insurers was passed on to the insureds, the indirect purchasers in the form of higher premiums?

A: No. That's a damages calculation, which I'm not doing here.

Q: Are you familiar, Dr. Town, with the Sutter litigation in federal court?

A: Very vaguely.

. . .

Q: Okay. Are you aware that when they initially moved for class certification of a damage class, that that motion was denied by the judge, Judge Beeler, because the plaintiffs' expert hadn't done any empirical work to demonstrate pass-on?

. . .

A: I'm not familiar with the details of that case.

Q: Okay. So I take it you're not familiar with the subsequent empirical work by the plaintiffs' expert in that case to measure pass-on?

A: No.

Q: And you haven't attempted to engage in similar empirical work to measure pass-on in this case, correct?

A: That's correct.

. . .

Q: And have you done anything here in this case—and I believe you told Mr. Saint Antoine you have not, but have you done anything in this case to evaluate the extent to which the allegedly higher hospital prices you identified were passed on to members of the putative class?

A: No, that was not part of my assignment. However, there's a lot of challenges to do that in this case.

(Dr. Town Dep. Tr., at 43–44, 163–66, 197.)

100. By way of comparison, in *Sutter I*, the plaintiffs' expert witness—unlike Dr. Town—actually created and applied a statistical model to the facts of that case that was intended to show common evidence of class-wide impact, yet her opinions were still held to be insufficient for class certification purposes as to that issue as a result of the fact that they largely consisted of assumptions. *Sutter I*, 333 F.R.D. at 492.

101. Here, Dr. Town has made no attempt at all to use an econometric or statistical model to show that the alleged supra-competitive costs of healthcare services resulting from Defendants' acts were passed through to the indirect purchasers in the form of higher insurance premiums. The absence of such a model is perhaps unsurprising given that the above-quoted portions of his deposition testimony reveal that Dr. Town was never asked to conduct a quantitative analysis on the issue of antitrust impact.

102. Plaintiffs' counsel have stated in connection with the present Motions that they were unable to obtain specific information from BCBS and United during discovery that would have allowed Dr. Town to quantify the alleged pass-through impact. But it is unclear why Plaintiffs were not able to gain this information during the lengthy discovery period the parties were given for fact discovery. To the extent that BCBS or United refused to comply (or fully comply) with subpoenas for this information, Plaintiffs had the ability to seek intervention from the Court but did not do so.

103. For the reasons set forth above, the Court finds that Dr. Town's opinions contained in paragraphs 232 through 237 of his report (including his conclusory estimate that "there are tens of thousands of class members who paid higher premiums due to [Defendants'] conduct" on a pass-through theory) are not based on the reliable application of economic, statistical, or other empirical principles and methods to relevant facts and data and thus do not satisfy the criteria for admissibility under Rule 702. Indeed, his "tens of thousands" estimate does not appear to be based on anything at all.

104. As a result, the Court, in the exercise of its discretion, concludes that the exclusion of paragraphs 232 through 237 of Dr. Town's report is appropriate.

105. Plaintiffs attempt to minimize the significance of the above-described deficiencies in Dr. Town's report by arguing that they are not required, at the certification stage, to quantify the precise amount of damages that each class member has individually suffered. That is true. But in so arguing, Plaintiffs have conflated the separate and distinct concepts of antitrust *damages* and antitrust *impact*.

106. Although class action plaintiffs need not produce at the certification stage evidence of the *amount* of damages that class members have suffered, common proof of antitrust *impact* is, in fact, required at the certification stage. *See In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184 (3d Cir. 2020) ("We have consistently distinguished injury from damages. This is significant, as we apply a more lenient predominance standard for damages than for injury. *While every plaintiff must be able to show antitrust injury through evidence that is common to the*

class, damages need not be susceptible of measurement across the entire class for purposes of Rule 23(b)(3)[.]" (cleaned up and emphasis added)).

107. Thus, although Plaintiffs are correct that class certification cannot be denied simply because a variance may exist in the extent of the harm suffered by each of the members of the putative class, certification can (and should) be denied when the plaintiffs have failed to meet their burden under Rule 23 of establishing that all (or all but a *de minimis* number) of the class members suffered *some form of harm*.

108. This obligation is demonstrated by caselaw from our Supreme Court. *See Beroth Oil Co.*, 367 N.C. at 343 (affirming the denial of class certification because "plaintiffs ha[d] not shown that all [members of the putative class] [were] affected in the same way . . ." (cleaned up)); *see also Jackson*, 388 N.C. at 120 ("Figuring out how each class member was actually injured by the referral promotion—if at all—and then calculating that class member's actual injuries—if at all—could cause this case to degenerate into a series of individual trials for each class member." (cleaned up)).

B. Testimony from BCBS and United's Representatives

109. Nor have Plaintiffs put forth sufficient evidence of class-wide impact through the deposition testimony of the corporate representatives of BCBS and United.

110. Contrary to Plaintiffs' characterization to the contrary, a fuller reading of this deposition testimony reveals that the corporate representatives acknowledged that a variety of factors influence decisions on premium rates.

Q: To the extent that Blue Cross does agree to a rate increase with a particular provider, does it pass some or all of that rate increase on to its members [in the form of higher premiums]?

A: Premiums are calculated and filed [*sic*] the Department of Insurance based—based on our medical—medical expense projections. And so medical expense increases would go into those premium projections that would impact future premiums, you know, often a year and a half or two years later based on the cycle that's involved in filing—making premium rate filings.

Q: Can you—

A: Oh, and I should say that premium is just one piece of it. That actual utilization has to be projected too. So there's a lot of actuarial complication that goes into getting it right, and you know, there are years sometimes when payors lose money, payors like Blue Cross lose money, because those projections were not made accurately.

. . .

Q: Can you provide any generalization in terms of ultimately what percentage of a rate increase agreed to by Blue Cross will wind up in the form of a higher premium paid by the members?

. . .

A: Well, the goal would be that all of the increase ends up in the premium, but it's not a one-to-one ratio. So a 1 percent increase to a provider is not going to mean a 1 percent increase to premiums because premiums take into account the entire spectrum of health care services that that whole population receives.

So, you know, hospital professional specialty D&E, pharmacy is a big—a big piece. So—so whatever ratio the provider bears to the overall pie of medical expense for that population, the goal would be to capture that in the premium increase in conjunction with a projection of what utilization patterns are doing in terms of are the members are getting more sicker—more sick, are there certain more expensive services that are occurring.

So at the end of the day there's a rational relationship between the premium and the actual medical expenses being paid out.

. . .

Q: Do you have a general sense at this time in 2017 of Blue Cross' profitability for revenue numbers and whether that provided any indication of whether Blue Cross was to blame for this out-of-network dispute?

. . .

A: I don't recall what our operating margin was at the time. I do know that there are fluctuations in that, and they're often dependent on predictions of utilization as opposed to the—the negotiation of unit price.

And I know also that when we have higher than expected operating margin, we typically attempt to adjust for that through either keeping premiums more flat or in some cases we've actually lowered premiums to try and adjust for that in the next year. So as a not-for-profit, we're seeking to not have massive operating margins, but rather redirect that into affordability for our members.

(BCBS R. 30(b)(6) Dep. Tr., ECF No. 271.38 [sealed], at 113–15, 118.)

Q: . . . Do you generally understand the methodology by which United Healthcare calculates premiums paid by subscribers?

A: Generally.

Q: Is it fair to say that as a general matter what United does is look at last year's utilization, look at next year's reimbursement rates, figure out how much it's going to cost, and then break that down into premiums?

A: I think that's a—you know, it varies by product and line of business, but I think you've got some of the core components of the process.

. . .

Q: Okay. But as a general matter, if a facility's rates go up for the next year, that increase, all other things being equal, is going to be passed on dollar for dollar to the subscribers paying the premiums; right?

. . .

A: The members are going to feel the impact either through their premium or their level of benefits they have. . . .

(United R. 30(b)(6) Dep. Tr., ECF No. 271.39 [sealed], at 124–26).

111. This testimony suggests as a whole that how a commercial health insurer calculates its premium rates is a complex process, influenced by a number of different factors.

112. Moreover, as noted earlier, testimony that healthcare costs and insurance premiums may *generally* be correlated is not—by itself—adequate evidence that Defendants' alleged supra-competitive healthcare prices actually caused BCBS and United to increase the premiums of all (or all but a *de minimis* number) of the putative class members *in this case* during the relevant time period.

113. For all of these reasons, the Court, in its discretion, concludes that Plaintiffs have failed to meet their burden under Rule 23 of showing evidence of class-wide impact with respect to their theory of pass-through damages through higher premium prices.

II. Decreased Quality of Care

114. With regard to Plaintiffs' alternative theory of antitrust impact—predicated on the assertion that the putative class members have been harmed by a decrease in the quality of services provided by Mission Health—Plaintiffs admit that they have been unable to locate any case in which such an alleged decrease in quality (without more) has been found to serve as a sufficient basis for the antitrust impact requirement at the class certification stage.

115. This is not surprising given that this type of alleged harm is—by its very nature—highly individualized and subjective.

116. Indeed, in other contexts, courts have acknowledged the individualized nature of "quality" assessments and their incompatibility with the predominance requirement for the purpose of class certification. *See*, *e.g., Hall-Landers v. N.Y. Univ.*, 2024 U.S. Dist. LEXIS 221502, at *55 (S.D.N.Y. Dec. 6, 2024) (holding that whether each student received the quality of education they signed up for "necessarily involves delving into each putative class member's own circumstances—not necessarily the grades they received or the extra-curricular programming and services they utilized, but the net enrichment of the degree-program they signed up for together with their expectations of it[ ]").

117. Notably, Plaintiffs have made no attempt to demonstrate that all (or all but a *de minimis* number) of the members of the putative class even obtained medical treatment at a Mission Health facility during the relevant time period—much less that they all experienced a diminished quality of services from those facilities. Absent such a showing, it is not clear how Plaintiffs could even hope to satisfy their burden of showing class-wide impact based on a theory of decreased quality in the provision of medical services at Mission Health resulting from Defendants' allegedly anti-competitive acts. It would make no sense to suggest that putative class members who never actually received any treatment at a Mission Health facility during the relevant time period could have suffered antitrust impact in the form of lower quality services.

118. In short, the Court cannot simply assume that all (or even a significant number) of the putative class members both (1) received in-patient treatment at a Mission Health facility during the relevant time period; and (2) experienced a diminution in quality as to the treatment they received. Accordingly, Plaintiffs have failed to show that common evidence predominates with respect to their theory of class-wide antitrust impact based on a decrease in the quality of services offered by Mission Health.

119. In sum, based on the Court's careful review of all of the evidence in this case and in the exercise of its discretion, the Court finds that Plaintiffs have not met their burden of showing class-wide impact for purposes of the predominance requirement under Rule 23 of the North Carolina Rules of Civil Procedure, and the Motion for Class Certification is **DENIED** without prejudice. *See Williams*, 2021 U.S. Dist. LEXIS 78101, at *14 ("Without a common method to prove impact at trial, an individual assessment of whether and how the defendants' scheme affected each class member[ ] . . . will be required—in addition to individual issues of damages. Given these individual issues, common questions of law and fact do not predominate, and the motion for class certification will be denied." (cleaned up)).

120. This denial is without prejudice to Plaintiffs' right to file a renewed motion for certification in which they may seek to address the deficiencies the Court has identified herein (and any other deficiencies that may exist in connection with their present Motion).

CONCLUSION

THEREFORE, IT IS ORDERED as follows:

1. Defendants' Motion to Exclude the Expert Report of Professor Robert J. Town is **GRANTED** with respect to his opinions as to the alleged pass-through of class-wide harm in the form of higher premiums to the putative class of indirect purchasers, as reflected in paragraphs 232 through 237 of his report, and those opinions are hereby **EXCLUDED**[9];

2. Plaintiffs' Motion for Class Certification is **DENIED without prejudice**; and

3. The parties are **DIRECTED** to confer and then jointly file **by 29 September 2026** a proposed schedule for the filing of a new class certification motion and accompanying briefing.

SO ORDERED, this the 8th day of September 2026.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases

[9] Although Defendants have also moved to exclude additional portions of Dr. Town's report that relate to other issues in this case, the Court need not address those arguments because they are not relevant to the Court's basis for denying Plaintiffs' Motion for Class Certification. In addition, the Court need not—and does not—rule on Plaintiffs' Motion to Partially Exclude Expert Report of Dr. Laurence Baker (ECF No. 290.1 [sealed]) and Defendants' Motion to Exclude Expert Report of Jill Wilson (ECF No. 274) because their testimony likewise does not relate to the Court's rationale for denying class certification.