IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MARISSA MADERAZO, et al Plaintiffs v. VHS SAN ANTONIO PARTNERS, L.P. d/b/a BAPTIST HEALTH SYSTEMS; HCA, INC., a/k/a METHODIST HEALTHCARE SYSTEM OF SAN ANTONIO, LTD. L.L.P; CHRISTUS SANTA ROSA HEALTH CARE CORP. Defendants	)	CIVIL ACTION NO. SA-06-CA-535-OG

ORDER

Pending before the Court is Plaintiffs' Amended Motion for Class Certification (docket no. 420) and Defendants' Corrected Opposition to Plaintiffs' Amended Motion for Class Certification (docket no. 482). Plaintiffs also filed a reply (docket nos. 484, 458); Defendants filed a sur-reply (docket no. 468-1) and Plaintiffs filed a response to the sur-reply (docket no. 470-1). Also pending is Defendants' Motion to Exclude the Expert Testimony of Henry S. Farber (docket nos. 441, 442); Plaintiffs' response in opposition thereto (docket nos. 484, 454) and Defendants' reply (docket no. 467). After reviewing the record and the applicable law, the Court finds that Defendants' Motion to Exclude the Expert Testimony of Henry S. Farber (docket no. 441) should be granted on his opinions relating to antitrust impact and

Plaintiffs' Amended Motion for Class Certification (docket no. 420) should be denied.

I.

Statement of the case

This case was brought under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15. Plaintiffs, who are registered nurses, allege that Defendants, who own and/or operate hospital systems, conspired to depress the wages of registered nurses in the San Antonio area from 2002 through 2007 through explicit agreements and/or exchanges of wage information. Docket no. 22.[1] Plaintiffs, on their own behalf and on behalf of the proposed class, seek to recover the wages they would have earned if the hospital systems had not conspired to depress their compensation; trebled damages, pursuant to 15 U.S.C. § 15(a); and fees, costs, and interest to the extent allowed by law. Defendants deny most, but not all, of the allegations in the complaint. Docket nos. 23, 24, 25, 27.[2]

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[1]The San Antonio Metropolitan Statistical Area ("San Antonio MSA" or "San Antonio area") includes Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina, and Wilson counties in Texas. Docket nos. 23, 24 at ¶ 29.

[2]HCA and Methodist admit that Methodist has participated in surveys regarding RN compensation and has provided compensation-related information to and obtained compensation-related information from third party organizations and other hospitals. Docket nos. 23, 24 at ¶ 2. HCA and Methodist admit that employees in Methodist's Human Resources Department have communicated with Human Resources employees at other hospitals and health care systems, including by telephone, and have considered information from such communications in setting compensation." *Id.* at ¶ 35. HCA and Methodist admit that Methodist has purchased surveys regarding RN compensation, and that Methodist has considered such information when setting RN compensation. *Id.* at ¶ 36. HCA and Methodist also admit that certain employees of Methodist have attended meetings of the San Antonio Health Care Human Resources Administrators Association.

II.

Class certification standard

Plaintiffs seek to certify the following class under Fed. R. Civ. P. 23(a) and (b)(3):[3]

> All persons employed between June 20, 2002 and January 10, 2007 as a Registered Nurse by any defendant or co-conspirator who held any of the jobs listed in Tables Eight through Ten of the Supplemental Report of Henry S. Farber at one of the Baptist or Methodist hospital facilities in the San Antonio MSA that is listed in Appendix C to the Supplemental Report of Henry S. Farber or at either the Christus Santa Rosa Hospital or the Christus Santa Rosa Children's Hospital. Specifically excluded from the class are nurses who worked as managers, supervisors, advanced practice nurses, in outpatient care, and at clinics and other non-hospital facilities.

Docket no. 22 at ¶ 18 (Second Amended Complaint); Docket no. 420 at p. 3 (Amended Motion for Class Certification).[4] As movants, they must show the

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Id. at ¶ 37. VHS admits that its human resources employees within Baptist Health System have communicated by telephone with human resources employees at other hospitals regarding RN compensation. Docket no. 25 at ¶ 35. VHS admits that human resources employees within Baptist Health system have purchased surveys regarding the salaries paid by San Antonio hospitals. *Id.* at ¶ 36. VHS also admits that hospital recruiters within Baptist Health System have attended meetings of health care industry associations. *Id.* at ¶ 37. CHRISTUS admits that, on some occasions, its human resources employees have engaged in communications with employees of other health care providers related to compensation issues. Docket no. 27 at ¶ 35. CHRISTUS also admits that it has purchased reports prepared by third parties based on surveys of compensation and other information provided by hospitals in the San Antonio area. *Id.* at ¶ 36.

[3]In addition to meeting the threshold requirements under Rule 23(a), Plaintiffs must show the action is maintainable under Rule 23(b)(1), (2), or (3). They have chosen to seek certification under subsection (3).

[4]By definition, Plaintiffs seek to limit the class to registered nurses on staff at Defendants' acute care hospitals in the San Antonio MSA. Docket no. 420, p. 3. n. 3.

following requirements under Rule 23 have been met:

(a) **Prerequisites**. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions**. A class action may be maintained if rule 23(a) is satisfied and if:

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(a), (b)(3).

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). To justify a departure from that rule, a class representative must be part of the class and "possess the same interest and suffer the same injury as the class members." *Id.* (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). Rule 23 does not set forth "a mere pleading standard." *Id.* at 2551. The party seeking class certification must "affirmatively demonstrate h[er] compliance with the Rule." *Id.* The "rigorous analysis" required for class certification will "entail some overlap with the merits of the claim." *Id.* But district courts cannot engage in a "free-ranging merits inquiry" at the certification stage. *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 133 S.Ct. 1184, 1194-1195 (2013). Thus, any analysis of the evidence is not for the purpose of evaluating the probable outcome of the merits, but instead for evaluating whether common proof will produce a common answer to a common question. *Id.*; *Dukes*, 131 S.Ct. at 2552.

III.

Rule 23(a) requirements

Compliance with Rule 23(a) is indispensable and the Court cannot move on to

consider the requirements under 23(b) unless the prerequisites under 23(a) have been met. *See Dukes*, 131 S.Ct. at 2551. Plaintiffs have shown that all of the prerequisites under Rule 23(a) have been met in this case. Although Defendants do not spell out which class certification requirements, in their view, have not been met, their arguments focus primarily (if not exclusively) on the requirements under Rule 23(b)(3). Thus, the Court addresses the indispensable prerequisites under 23(a), but the real dispute relates to the 23(b) requirements.

A. Numerosity:

First, certification is only appropriate where "the class is so numerous that joinder of all members is impracticable." *Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016) (quoting *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981)). A plaintiff seeking certification must provide a reasonable estimate of the number of purported class members. *Id.* Other considerations include the geographical dispersion of the class members and the ease with which they may be identified. *Id.* Plaintiffs' proposed class is limited to registered nurses on staff at Defendants' acute care hospitals in the San Antonio MSA. *See supra*, p. 2 n. 1, p. 3 n. 4. The San Antonio MSA includes Atascosa, Bandera, Bexar, Comal, Guadalupe, Kendall, Medina, and Wilson counties in Texas. *See supra*, p. 2, n. 1. Plaintiffs estimate the class size to be approximately 11,000 registered nurses. Docket no. 420 at p. 3 n. 2, exhibit 34 ¶ 21 and table 1 (class count). In their answers, HCA and Methodist admit that "Methodist has over . . . 2,700 licensed RNs on staff" in the

defined geographical area. Docket nos. 23, 24 at p. 3. In its answer, Baptist Health System (VHS) admits that it employs "over 1,700 employees in positions that require an RN license." Docket no. 25 at p. 5. In its answer, Defendant CHRISTUS does not provide the number of RNs employed at its hospitals in the defined area, but Plaintiffs' expert has provided an estimate of 1,775 individuals. Docket no. 420, exhibit 34, table 1. Thus, at a minimum, Defendants employ over 6,000 staff RNs in their acute care hospitals within the geographical area. Plaintiffs' expert identified up to 11,227 class members over the time period in question. Docket no. 420 at p. 3 n. 2, exhibit 34 ¶ 21 and table 1 (class count). Although the precise number of class members would have fluctuated during that time period, Defendants do not dispute that payroll data and human resources databases can provide a reasonable estimate with relative ease. Thus, the class is identifiable and meets the threshold requirement of numerosity.

B. Commonality:

The next prerequisite is commonality, which means there must be a question of law or fact common to the class. *Ibe*, 836 F.3d at 528. "Even a single common question of law or fact can suffice to establish commonality, so long as resolution of that question will resolve an issue that is central to the validity of each one of the [class member's] claims in one stroke." *Id.* (quoting *Dukes*, 131 S.Ct. at 2541); *see also In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014)(the claims must depend on a common contention that is capable of classwide resolution). In this case, Plaintiffs have raised at least one common contention: that Defendants

conspired to suppress the wages of registered nurses. Docket no. 22. This contention is central to the validity of their claim and may be established with common proof. Docket no. 22 at p. 3, ¶ B. Plaintiffs have identified some of the common proof that the class will rely on, including but not limited to: regular joint meetings among the Defendants' HR personnel to discuss, among other things, RN wage rates and structure in the market;[5] annual surveys on wage rates in the market;[6] phone communications with other hospitals to confer about nurse wages prior to implementing increases;[7] surveys tracking wages and benefits of other hospital systems in the area for the purpose of setting their own wages and benefits;[8] and email communications reflecting discussions among Defendant hospital systems regarding their RN pay rates and whether pay adjustments should be made.[9] With this type of common proof, the fact finder will be able to reach a classwide resolution to this question. Because even a single common question of law or fact will suffice, the commonality prerequisite has been met.

C. Typicality:

Typicality is also a prerequisite which is easily met in this case. Typicality

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[5]Docket no. 420, exh. 1

[6]Docket no. 420, exh. 2 (noting that "ongoing surveys are done through discreet inquiry [because they must] maintain awareness of legal issues regarding price fixing")

[7]Docket no. 420, exh. 3

[8]Docket no. 420, exh. 5-7 (wages), 8-20 (benefit packages)

[9]Docket no. 420, exh. 21-22, 24-26

requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This inquiry looks at the similarity of legal and remedial theories behind the named plaintiffs claims and those of the unnamed class members. *Ibe*, 836 F.3d at 528-29. Typicality is intended to "limit the class claims to those fairly encompassed by the named plaintiffs' claims." *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980). If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality. 5 JAMES WM. MOORE et al., MOORE'S FEDERAL PRACTICE ¶ 23.24[4] (3d ed. 2000). Plaintiffs have demonstrated, through the record developed thus far, that the claims of the named Plaintiffs and those of the putative class members all arise from the same course of conduct (conspiring to suppress RN wages) and are based on the same theory of liability under § 1 of the Sherman Act. Docket nos. 22, 420.

D. Adequacy of representation:

The fourth prerequisite under Rule 23(a) is adequacy of representation. To satisfy this prerequisite, the named Plaintiffs must show that they will fairly and adequately protect the interests of the class. They must have no conflicts of interest with the class and be willing to play an active role in the litigation. *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 129-30 (5th Cir. 2005). To carry out their role, they must have "a sufficient level of knowledge and understanding to be capable of controlling or prosecuting the litigation." *Ibe*, 836 F.3d at 529 (quoting *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 482-83 (5th Cir. 2001) (internal quotations

omitted). Marissa Maderazo has worked as an RN at Methodist Children's Hospital since April 2000. Docket no. 407, Exh. B, E. Roselia Pollard has worked as an RN at hospitals within both the CHRISTUS hospital system and the Baptist VHS Health system since June 2002. Docket no. 407, Exh. C, F. Barbara Miles has also worked as an RN at hospitals within the Methodist and Baptist VHS health systems since June 2002. Docket no. 407, Exh. D, G. All three registered nurses recognize and accept the responsibilities of being class representatives; understand that as class representatives they must consider the interests of the class just as they would consider their own interests; have actively participated in the lawsuit by staying abreast of the status, progress, and claims in the lawsuit and testifying at deposition and answering written discovery as necessary; and affirm that they are unaware of any matter that could possibly put their interests in conflict with those of any other member of the proposed class. Docket no. 407, Exh. B, C, D (declarations); Exh. H, deposition of M. Maderazo at 38:11-16 and 277:15-19 (confirming her understanding of what the case is about); 62:9-24 and 244:8-11 (confirming her understanding of the class that she is representing); 63:5-8, 243:10-23, and 277:5-8 (confirming her active role in the litigation); 276:15-24 (explaining, in her own words, her duty to "adequately and fairly represent their issues"); Exh. I, deposition of R. Pollard at 8:18-23 (her explanation of the role of a class representative); 10:6-16 and 12:6-14 (confirming her active role in the litigation); 23:11-24:9 (her understanding of the claims in the lawsuit); Exh. J, deposition of B. Miles at 245:4-13 (confirming her understanding of the claims in the lawsuit);

256:3-14 (confirming her understanding of the class she seeks to represent). Plaintiffs have shown that the class representatives will fairly and adequately represent the interests of the class.

IV.

Rule 23(b) requirements

Plaintiffs have met all of the prerequisites for class certification under Rule 23(a). However, they must also satisfy the requirements under Rule 23(b)(3). To certify a class under 23(b)(3), movants must show that issues common to the class predominate over individual issues and a class action is a superior method for resolving the controversy. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). Factors pertinent to superiority include, but are not limited to: the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3).

A. Predominance:

The predominance inquiry is more rigorous than the commonality requirement. *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006)(citing *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005)). It "requires courts to carefully scrutinize the relationship between common and individual questions in a case." *Crutchfield v. Sewerage and Water Bd. of New Orleans*, 829

F.3d 370, 376 (5th Cir. 2016)(citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016)). Predominance is not satisfied if individual questions overwhelm the questions common to the class. *Amgen*, 133 S.Ct. at 1196. "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one . . . susceptible to generalized, class-wide proof." *Tyson Foods*, 136 S.Ct. at 1045 (quoting 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:50, pp. 196-97 (5th ed. 2012) (internal quotations omitted). In considering certification, the Court remains mindful of the policy considerations for Rule 23(b)(3). As the advisory committee noted on the 1966 amendments to the Rule, "[s]ubdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23, advisory committee's note to 1966 amendments. "It is only where . . . predominance exists that economies can be achieved by means of the class action device." *Id.* The Supreme Court has observed that "predominance is a test readily met" in certain cases alleging violations of the antitrust laws. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2250 (1997); *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S.Ct. 1426, 1437 (2013). However, "there are no hard and fast rules . . . regarding suitability of a particular type of antitrust case for class action treatment." *State of Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 316

(5th Cir. 1978). Although it is generally true that antitrust cases are "particularly suitable for class action treatment," the proposed class still has to meet the requirements. *Robinson v. Texas Automobile Dealers Ass'n*, 387 F.3d 416, 422 (5th Cir. 2004) (quoting, in part, *Blue Bird*, 573 F.2d at 322).

The predominance analysis requires the Court to delve further into the law and the record to consider the elements of the asserted claims; the common or individual issues that may arise in prosecuting the claims; and the expert testimony being offered to demonstrate that common issues predominate over individual issues.

1. Essential elements of the antitrust claims

The parties agree that Plaintiffs are asserting both a *per se* claim and a "rule of reason" claim. Docket no. 420, p. 19 n. 18; Docket no. 482, pp. 4-5. The wage-fixing conspiracy claim is a *per se* claim,[10] and the information-sharing claim is a "rule of reason" claim.[11] To establish liability under either theory, Plaintiffs must show an antitrust violation; that the violation caused an antitrust injury (also referred to as "fact of damage" or "antitrust impact"); and measurable damages. *Bell*

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[10]Section 1 of the Sherman Act "outlaw[s] only unreasonable restraints." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885, 127 S.Ct. 2705 (2007) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)). The *per se* rule, which treats certain categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint. *Id.* at 886. Thus, it is a departure from the rule of reason, which is the accepted standard for determining whether a practice constitutes an unreasonable restraint of trade in violation of § 1. *Id.* at 885-87.

[11]Under the presumptively applied "rule of reason" analysis, plaintiffs must demonstrate that a particular practice is in fact unreasonable and anticompetitive. *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5, 125 S.Ct. 1276 (2006).

Atlantic Corp. v. AT&T Corp., 339 F.3d 294, 302-03 (5th Cir. 2003); *Blue Bird*, 573 F.2d at 317; *Wheeler v. Pilgrim's Pride Corp.*, 246 F.R.D. 532, 539 (E.D. Tex. 2007). At the class certification stage, Plaintiffs are not required to prove the elements of their claims. "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the metho[d] best suited to adjudication of the controversy fairly and efficiently." *Amgen*, 133 .Ct. at 1191. "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.*

2. Common proof of conspiracy/information sharing

The Court agrees with Plaintiffs that the conspiracy issue is susceptible to generalized proof because it deals primarily with "what the Defendants themselves did and said." Docket no. 420, p. 10 (citing *Transamerican Refining Corp. v. Dravo Corp.*, 130 F.R.D. 70, 75 (S.D. Tex. 1990)). Some of the generalized proof is discussed *supra*, including: evidence regarding regular joint meetings among Defendants' HR personnel to discuss RN wage rates and structure in the relevant market; reliance on annual surveys on wage rates in the market; phone communications between hospitals to confer about nurse wages prior to implementing increases; and email communications among Defendant hospital systems regarding their RN pay rates and whether adjustments should be made. *See supra*, pp. 7-8. Defendants' argument to the contrary reads more like a summary judgment argument. *See* docket no. 482, p. 22 (disputing that agreements

existed and arguing that RN wages actually increased during the class period). The Court's concern, at this juncture, is whether the existence, nature, and scope of the alleged wage-fixing conspiracy or information-sharing arrangement is a question common to the class that may be answered with common proof – not whether the question will be answered, on the merits, in favor of the class. The Court finds that this question is common to the class and susceptible to classwide proof.

3. Common proof of injury/antitrust impact and damages

Whether injury/antitrust impact and damages are subject to generalized or individualized proof is more difficult question. Plaintiffs rely on their expert, Professor Henry S. Farber, to show that the question of antitrust injury/impact is subject to common proof. Defendants claim that Professor Farber's analysis is unreliable and they filed a *Daubert* motion to exclude his expert testimony (docket no. 435). Plaintiffs filed a response in opposition (docket no. 483, 454) and Defendants filed a reply (docket no. 467). Just as Plaintiffs have the burden to prove that class certification is appropriate, they also have the burden of establishing the reliability of their expert's opinions. Because they are relying on their expert's opinions to show that class certification is appropriate, the underlying opinions must be reliable.

Professor Farber's assignment was to opine on whether classwide methods exist (1) for showing that members of the class were harmed by the alleged conspiracy; (2) for calculating damages on a classwide basis; and (3) for showing that Defendants had the market power to be able to suppress class members' wages.

Docket no. 483, p. 1. Defendants seek to exclude his opinions on several grounds: First, Professor Farber's impact and damages opinions are not causally linked to Plaintiff's liability theories. Second, his wage-cascading opinion is just a theoretical discussion. Third, his impact and damages model is not a reliable method for analyzing or quantifying the impact of any alleged conspiracy. Fourth, his analysis of market power is not reliable. Docket no. 435, pp. 1-2.

The Court first looks at the argument that became the primary focus of the parties' class certification briefs – whether Plaintiffs have demonstrated that common evidence can be used to show causation on a classwide basis. *See* docket nos. 482 at pp. 19-22, 24-26; 484 at pp. 1, 4-8; 468 at pp. 2-4; 470-1 at pp. 1-4. To establish private liability under § 4 of the Clayton Act, Plaintiffs must show not only a Sherman Act violation, but that they "suffered an injury from the violation." *In re: Pool Products Distribution Market Antitrust Litigation*, 166 F. Supp. 3d 654, 668 (E.D. La. 2016). "The injury must be 'antitrust injury,' which is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690 1977)). The Fifth Circuit has cautioned that "awareness of the distinction between conduct which violates § 1 of the Sherman Act and the elements which establish liability in private party litigation under § 4 of the Clayton Act is vital." *Blue Bird*, 573 F.2d at 317. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or

property by reason of anything forbidden in the antitrust laws may sue . . .". 15 U.S.C. § 15; *Blue Bird*, 573 F.2d at 317; *Bell Atlantic*, 339 F.3d at 302. This means that the antitrust violation must cause injury to the antitrust plaintiffs. *Blue Bird*, 573 F.2d at 317; *Bell Atlantic*, 339 F.3d at 302. The causal link between the violation and the injury may not be based on speculation, but rather must be proved "as a matter of fact and with a fair degree of certainty." *Blue Bird*, 573 F.2d at 317. There is simply no road to recovery, in either a class or individual action, unless there is evidence of a causal connection between the specific antitrust violation and the alleged injury to the plaintiffs. *Id.*; *Bell Atlantic*, 339 F.3d. at 302.

After reviewing the record, the Court finds that Professor Farber's opinions do not address a causal link and thus do not assist the Court in determining whether antitrust injury/impact can be shown with evidence common to the class. In his original report, he makes broad conclusions such as: "[i]t is feasible to show using common evidence whether all, or virtually all, members of the proposed class have been harmed as a result of the conspiracy" (docket 435-4, report p. 4 ¶ 7); "class-wide evidence and analysis are available to determine whether all, or virtually all, members of the proposed class would have been harmed by the alleged conspiracy" (*id.*, report pp .7-8 ¶ 18); "one would expect that a conspiracy of the type alleged by the plaintiffs would have harmed members of the proposed class in a systematic way" (*id.*, report p. 13 ¶ 31); and "if the defendant did engage in a successful conspiracy to depress the compensation of RNs employed by hospitals in

the San Antonio area, all or almost all of the proposed class would have suffered from depressed compensation." (*id.*, report p. 17 ¶ 44). Professor Farber then engages in a statistical analysis of RN wages, but provides no explanation of the type of common evidence that would link the alleged conduct to the alleged harm. This omission is not addressed in Professor Farber's rebuttal report. Instead, he simply reiterates the same broad assumptions about injury without an evidentiary link to the alleged conduct. *See* docket no. 435-5, report p. 3 ¶ 6 ("I assume that, if the alleged conspiracy did take place, it was broadly based and not narrowly focused on a small subset of RNs"); *id.* at p. 4 ¶ 7 ("I assume that the alleged conspiracy was aimed a[t] suppressing a broad range of forms of compensation and not just base wages"); *id.* at p. 7 ¶ 15 ("the effects of wage suppression can be propagated throughout the class, even if the conspiracy is directed at a subset of the class"); *id.* at p. 15 ¶ 33 ("all or virtually all RNs who chose to remain with the defendant hospitals were harmed by the alleged conspiracy"). In his supplemental report, Professor Farber states that "[w]hile my previous method allowed me to compute aggregate damages for the class, it did not provide a means for showing whether or not there was a classwide impact of the alleged conspiracy. My alternate method allows me to both determine aggregate damages and determine whether there has been such a class-wide impact." Docket no. 435-6, p. 6 ¶ 12 (supplemental report). He then measures "lost earnings" by analyzing the difference between external agency fees for RN services (labeled as actual earnings) and internal staff RN wages (labeled as "but for" earnings), *id.* at pp. 6-7 ¶ 13, and concludes that "[o]nce I

compute these measures of the "but for" earnings of the class members and their actual pay, I determine which RNs had been harmed by the alleged conspiracy," *id.* at p. 50 ¶ 119. However, there is still no factual explanation of how plaintiffs would show a causal link between the conspiracy and the wages of staff registered nurses. *See id.*, supp. report p. 8 ¶ 16 ("I have been instructed by counsel for the plaintiffs to assume that if plaintiffs prove the alleged agreement to exchange information . . ."); p. 14 ¶ 31 (the presence of suppressed wages "indicates that the alleged conspiracy had an effect on all or almost [all] members of the proposed class"). As Professor Farber admitted in his deposition, he made no effort to trace the impact of the alleged agreement through any of the actions of any of the defendants. Docket no. 435-3 at 58:3-6; Docket no. 468, exh. W at 258:24-259:2 ("I don't know anything about the precise effect of the – of any conspiracy or information exchange on the wages of different nurses").

"In making the determination as to predominance, of utmost importance is whether 'impact' should be considered an issue common to the class and subject to generalized proof." *Blue Bird*, 573 F.2d at 320. "[T]his Circuit places great importance on the 'impact' element of any antitrust cause of action . . . [w]hatever the nature of the alleged conspiracy . . . injury is the *sine qua non* for stating a cause of action . . . [and there can] be no recovery of any amount of damage where the jury could only speculate either as to its occurrence or as to its causal relationship to the anticompetitive activity." *Id.* at 327 (quoting, in part, *Shumate & Co., Inc. v. Nat'l Ass'n of Sec. Deal., Inc.*, 509 F.2d 147, 152-53 (5th Cir. 1975)

(internal quotations omitted). Without some explanation of how Plaintiffs would show a causal connection, the Court cannot conclude that Plaintiffs will be able to show impact/injury through evidence common to the class. There is simply no explanation as to how Plaintiffs plan to link the alleged conspiracy to the alleged impact/injury, with either common or individual evidence. Without an evidentiary link, Professor Farber's analysis would do nothing more than show a difference between agency fees and staff wages. Plaintiffs could have offered some alternative explanation for how they plan to show antitrust injury/impact – perhaps through another expert or other evidence common to the class. But at this juncture, they have failed to offer any alternative explanations and this omission is too glaring to overlook. Thus, they have failed to demonstrate that antitrust injury/impact can be addressed through evidence common to the class.

Plaintiffs rely heavily on *Cason-Merenda* for support. But like Professor Farber, the experts in *Cason-Merenda* did not try to hide the fact that their opinions suffered from this obvious omission. The first expert, Dr. Ashenfelter, "testified that he made no effort to draw any conclusions as to 'whether a particular information exchange led to a suppression of wages or not,' that he had not 'actually used the [information] exchanges to study whether – what the effect of the exchange was on wages,' and that he had not 'made that connection.'" *Cason-Merenda v. VHS of Michigan, Inc.*, 862 F.Supp.2d 603, 642 (E.D. Mich. 2012)(denying in part and

granting in part summary judgment).[12] The second expert, Gregory Vistnes, "similarly testified that he had not 'attempted to make a direct causal link between the information exchange and the resulting conduct of the hospitals,' that he 'was not looking at whether or not there were actual effects from any of the communications,' and that the 'magnitude of the effect [of the information exchanges] and whether the effect left wages above or below what the competitive price or wage should have been, was not an issue that [he] was looking at.'" *Id.* This omission plagued the *Cason-Merenda* court's decision on class certification – on both initial consideration in 2013 and reconsideration in 2014. When the court initially considered class certification, the defendant argued that the plaintiffs had "failed to produce any evidence, common or otherwise, that could establish the requisite causal link between an alleged antitrust violation and so-called 'antritrust injury' – that is, 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Cason-Merenda v. VHS of Michigan, Inc.*, 296 F.R.D. 528, 547 (E.D. Mich. 2013) (quoting, in part, *Brunswick*, 429 U.S. at 489 (1977)). Although the district court in *Cason-Merenda* permitted class certification, the court was very skeptical about the "highly anecdotal" evidence on causation and concerned that "this body of evidence suffers from

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[12]The Court in *Cason-Merenda* considered class certification *after* ruling on motions for summary judgment and after approval of settlements with all hospital systems except VHS of Michigan. Thus, the district court had a "voluminous record." 862 F.Supp.2d at 645. Even with a voluminous record at the summary judgment stage, the court found that the question of whether the plaintiffs had failed to show a causal link was "a close one." *Id.* at 642.

weaknesses that undercut the inferences Plaintiffs which to draw from it." *Id.* The court further cautioned that when the case reached trial on the merits, the plaintiffs would have to show that "the sub-competitive wage levels identified by [their expert] were caused by a competition-reducing aspect or effect of the [d]efendant hospitals' exchange" and there did not appear to be a clear path for meeting that burden. *Id.* Six months later, when the district court reconsidered its class certification decision, it again noted the substantial weakness of evidence on causal link. The court reiterated:

> As the Defendant hospitals pointed out in their summary judgment motion, and as the Court recognized in its ruling on this [class certification] motion, neither Dr. Ashenfelter nor Plaintiffs' other expert, Gregory Vistnes, made any effort to investigate a possible causal connection between either of Plaintiffs' two theories of liability and antitrust injury suffered by the Plaintiff class. . . . At no time, [ ] did Dr. Ashenfelter attempt to marshal any evidence to demonstrate that either of the two antitrust violations alleged by Plaintiffs actually caused or contributed to the harm measured in his benchmark analysis, whether alone or in combination with Plaintiffs' other theory of liability. [ ] Dr. Ashenfelter was asked, in effect, to assume the existence of a "black box" of antitrust violations, and to measure the injury inflicted upon the Plaintiff class as a result of these assumed violations.

Cason-Merenda v. VHS of Michigan, 2014 WL 905828, at *6 (E.D. Mich. 2014), *pet. denied*, 601 Fed. Appx. 342 (6th Cir. 2015). The court in *Cason-Merenda* still allowed the certification ruling to stand, concluding that "VHS remains free, however, to persuade the trier of fact [that the case lacked] a sufficient causal connection between Plaintiff's theory of liability and the alleged injury measured by Dr. Ashenfelter, or on other grounds." *Id.* at *8. Ultimately, the case settled.

While the plaintiffs in *Cason-Merenda* were allowed to pursue the case as a

class action, the trial court's concern about the lack of evidence on causation persisted. Based on the record therein, the *Cason-Merenda* plaintiffs convinced the court that they had enough non-expert evidence common to the class for the case to proceed, even if the evidence was "highly anecdotal." But this is an analytical leap that this Court cannot accept based on the record in this case.

In their reply, Plaintiffs admit that a showing of causation is required for a "rule of reason" claim but deny it is required for a *per se* claim. The Supreme Court has firmly rejected this idea. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335, 110 S.Ct. 1884 (1990)("Respondent argues that . . . it can show antitrust injury from a vertical conspiracy to fix maximum prices that is unlawful under § 1 of the Sherman Act ... [and] that any loss flowing from a *per se* violation of § 1 automatically satisfies the antitrust injury requirement. We reject both contentions."). In the alternative, Plaintiffs claim that causation, by "its very nature," is a common issue. However, a blanket assertion that an issue is common to the class is not enough to make a showing for class certification. Again, Rule 23 does not set forth a mere pleading standard. *Dukes*, 131 S.Ct. at 2551. A party seeking class certification must "affirmatively demonstrate" that the case satisfies the particular requirements of Rule 23. *Id.* This means that the movant must satisfy, "through evidentiary proof," at least one of the provisions of Rule 23(b). *Behrend*, 133 S.Ct. at 1432. Plaintiffs further assert that they sought information on causation during discovery but Defendants did not produce it. However, the Court addressed all discovery disputes raised during the discovery period and if

there was still a failure to produce information, it should have been brought to the Court's attention during the discovery period.[13]

Because Plaintiffs have not demonstrated that antitrust impact/injury, which hinges on a causal link to the violation, can be shown with common evidence on a classwide basis, the Court cannot conclude that common issues would predominate over individual issues. There is no need to reach the remaining arguments for excluding Professor Farber's opinions.[14] Likewise, there is no need to reach a determination on superiority because predominance has not been met.

For these reasons, the Court ORDERS that Defendants' Motion to Exclude the Expert Testimony of Henry S. Farber (docket no. 441) is GRANTED in part and Plaintiffs' Amended Motion for Class Certification (docket no. 420) is DENIED.[15]

SIGNED this 22 day of January, 2019.

ORLANDO L. GARCIA
CHIEF U.S. DISTRICT JUDGE

[13]The Court instructed the parties to conduct discovery on class certification issues, but did not define the scope of such issues. *See* docket no. 51. Plaintiffs did file a motion to compel production of certain inter-defendant communications (docket no. 136), which the Court granted (docket no. 148). Plaintiffs now assert that Defendants failed to produce other documents that may have relevant to causation. Docket no. 484, p. 7 n. 15; Docket no. 458, declaration of R. Farrow, Exh. D-F. However, this was not brought to the Court's attention during the discovery period. There is a difference between movants that are prohibited from obtaining class certification discovery and those that are permitted but fail to obtain and/or use it. The Court cannot conclude that Plaintiffs were prohibited from seeking the information they needed for class certification.

[14]These arguments include whether his opinions relating to market power, the cascading theory, and calculations on the *amount* of damages are reliable.

[15]The Court's class certification ruling does not diminish the troubling nature of the alleged information sharing between these hospital systems.