No. 15-549

IN THE

Supreme Court of the United States

DIRECT DIGITAL, LLC,

Petitioner,

v.

VINCE MULLINS, ET AL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Beware the petition for certiorari that begins with a hypothetical. Petitioner's opening narrative, no matter how evocative, is unrelated to the facts of this case. So is the Question Presented in the petition. Direct Digital – as its name suggests – is primarily an online marketer of nutritional supplements. Its revenue stream is centrally generated by direct, digital sales to customers who pay by credit card and receive their purchases in the mail. As a result, Petitioner's business records identify the bulk of its consumers by name.

The facts at issue here do not implicate the purported circuit split about ascertainability, and a decision on the issue for which petitioner seeks review will not alter the result in this case. Direct Digital is principally a direct marketer of a purported pain relief product that is supposed to alleviate joint pain. The claim in this case is that the product is nothing more than a sugar pill that is sold primarily through aggressive direct sales to Direct Digital's customers. The alleged fraudulent misrepresentations about the joint health benefits of Instaflex – the Petitioner's brand name for glucosamine – are the same across all purchasers.

Both courts below properly concluded that the certified class met all the requirements of Rule 23. The harm alleged is the product of a uniform scheme of misrepresentation directed in identical fashion to all of the product's purchasers. And the managerial burdens associated with delivering notice,

administering claims, and ensuring finality did not disrupt the finding of 23(b)(3) superiority.

Direct Digital's very business model requires it to "ascertain" the vast majority of its customer base. Petitioner touts its products through television and internet advertisements directly to targeted demographics. In exchange for their contact and credit card information, purchasers receive a 14-day free trial of the product through the mail to their address. They are then subject to automatic renewals shipped to their address each month unless the purchaser initiates the required cancellation procedures. Absent such cancellation, the monthly billing is automatically charged to their credit cards.

According to Direct Digital's own representations to potential investors – in documents filed under seal in the district court and the subject of inquiry in the oral argument below – the bulk of the company's revenue comes from direct sales. A secondary portion of its Instaflex revenue comes from placing its product in retail stores. In the company's words, "[our] unique platform enables us to effectively manage *vast direct response initiatives* for our products . . . ."[1]

Thus, whatever the merits of addressing whether and at what point in a hypothetical litigation a defendant is entitled to know the identity

[1] *About Direct Digital*, DIRECT DIGITAL, http://directdigitalllc.com/company.html (last visited Dec. 21, 2015) (emphasis added).

of each consumer that it has allegedly defrauded, this case presents the wrong vehicle for resolving any such issues consistent with the case or controversy constraints of Article III.

Beyond the facts of this particular case, certiorari review would be premature for the evolving law of the management of common consumer fraud claims. What Petitioner presents as a circuit split on an issue of law in reality boils down to a nascent difference in case management approaches. The holding below was simply that the district court did not err in "deferring until later in the litigation" the "more detailed aspects of ascertainability and the management of any claims process." Pet. 15a. [2] Lower courts should continue to adapt to the managerial challenges of complex litigation in the consumer fraud field, which was only recently brought under federal subject matter jurisdiction, before any final pronouncement from this Court.

The Petition should therefore be denied.

STATEMENT OF THE CASE

A. As Its Name Implies, Direct Digital is a Direct Marketer.

The Petition describes Direct Digital as placing its products at stores around the country. Pet. 6. That is true as far as it goes, and indeed the

[2] All references to the Petition for Certiorari are designated "Pet. __." All references to the opinions below in the Appendix to the Petition are designated "Pet. __a."

lead plaintiff did purchase his supply of Instaflex, the product at issue, at such a store. But the Petition leaves the misimpression that this establishes the anonymity of its typical seller-customer relationship, and this is inaccurate. Quite simply, store placements are a distinctly secondary part of Direct Digital's business in terms of sales and revenues.

The lion's share of Direct Digital's sales are made directly to consumers who see ads for its products on the internet, television, or home shopping channels.[3] At oral argument in the Seventh Circuit, direct-to-customer online sales were described in general terms as providing over 50 percent of Direct Digital's revenue, and because the exact records are under seal below, this brief shall

[3] The facts presented here are taken from the public web accounts of Direct Digital, both on its corporate web page and on its consumer purchase page. The basic facts were confirmed during a colloquy before the Seventh Circuit. The full facts are under seal below in the form of the 30(b)(6) deposition of Brandon Adcock and various accounts of Direct Digital's business prepared for investors in 2011 and 2013. *See* Suppl. Decl. of Patricia N. Syverson in Support of Plaintiff's Renewed Motion for Class Certification Ex. D, Dep. of Brandon Adcock, Doc. 73-1 (July 28, 2014), *Mullins v. Direct Digital*, *LLC* (No. 1:13-cv-01829) (Defendant's 30(b)(6) witness, filed under seal) [hereinafter Adcock Deposition]; Decl. of Patricia N. Syverson in Support of Plaintiff's Renewed Motion for Class Certification Ex. 17, Direct Digital Discussion Materials, Doc. 48. 73-1 (Feb. 18, 2014), *Mullins v. Direct Digital, LLC* (No. 1:13-cv-01829) (business plan presentation for investors) [hereinafter Investor Discussion Materials]. Because Direct Digital is privately held, there are no public SEC filings. Should Petitioner's Reply dispute the basic facts presented here, Respondent will file the relevant documents with this Court.

continue to use these general terms.[4] Nonetheless, a fairly clear picture of the business model is available publicly. For example, Direct Digital's website boasts that "[w]ithin months" of its launch, "Instaflex had achieved widespread brand recognition" and "acquired thousands of direct-to-consumer customers."[5] The key to this business model was the enrollment of customers through aggressive direct-to-consumer advertising on "TV, Radio, Print, and online."[6] The company "target[s] exact demographics" and reaches possible customers "[t]hrough a powerful combination of in-house media buying, landing page optimization, analytics-based ad-targeting, and a talented in-house graphic design team."[7]

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[4] The actual figures are under seal below as confidential business records. At oral argument in the Seventh Circuit, the exact figure was described euphemistically as the "substantial bulk" of sales or "over 50 percent." Oral Argument at 18:44, 19:32, *Mullins v. Direct Digital, LLC* (No. 15-1776), *available at* http://media.ca7.uscourts.gov/sound/2015/rt.15-1776.15-1776_06_03_2015.mp3. The fact that a large percentage of sales are made directly to consumers was not disputed by Direct Digital's counsel. *Id.* at 38:40. The business records of Direct Digital show the number is higher than the figure used at oral argument. *See* Investor Discussion Materials, *supra* note 3, at 9.

[5] *Direct Digital Case Studies*, DIRECT DIGITAL, http:// direct digitalllc.com/innovation.html (last visited Dec. 21, 2015).

[6] DIRECT DIGITAL, http://directdigitalllc.com (last visited Dec. 21, 2015).

[7] *Direct Digital Case Studies*, *supra* note 5. For further specifics, see Adcock Deposition, *supra* note 3, at 258-92 (discussing direct advertising to consumers).

Direct Digital's online solicitations bombard potential consumers with claims about the health benefits of Instaflex, the company's glucosamine supplement.[8] The company offers a 14-day free trial for consumers who provide their credit card information and personal details. Customers then receive their free 14-day sample bottle of Instaflex in the mail. Following the trial period, each customer is automatically enrolled in a program of ongoing continuous shipments of Instaflex. Unless consumers promptly and carefully follow the cancellation procedures required by Direct Digital, their credit card is charged and the product is shipped directly to them on a recurring monthly basis.[9]

This recurring purchase arrangement is the key to Direct Digital's overall business strategy. The websites are geared to repeat customers who find themselves in a continuous relationship with the company as a result of their having accepted the 14-day sample. Thus, the company's website states that the product's purported benefits do not accrue until 4

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[8] *See, e.g.*, *Direct Digital Brands*, DIRECT DIGITAL, http://directdigitalllc.com/brands.html (last visited Dec. 21, 2015); INSTAFLEX, https://www.instaflex.com (last visited Dec. 21, 2015). A fuller version of the core sales pitch is found in both the Adcock deposition and the business models prepared for investors. *See* Adcock Deposition and Investor Discussion Materials, *supra* note 3.

[9] *See Frequently Asked Questions*, INSTAFLEX, https://www.instaflex.com/faq (last visited Dec. 21, 2015). *See also* Adcock Deposition, *supra* note 3, at 283 (discussing automatic shipments).

weeks of use and recommends "that users take Instaflex for a minimum of three months to observe full effects."[10]

Direct Digital also markets its products in a select number of retail stores and their online outlets, including GNC, Vitamin Shoppe, and Duane Reade. Pet. 6. These retail sales amount to a secondary percentage of revenue, and even these retail sales are designed to allow the company to combine its "traditional retail presence with powerful direct response techniques." Direct Digital's "unique brand management platform" the website reports, allows the company "to effectively manage vast direct response initiatives" for all users of Instaflex.[11]

At oral argument in the Seventh Circuit, Respondent's counsel asserted that "the substantial bulk of their sales are made directly by the company so most class members' email addresses and mailing addresses in this case will likely be available to the defendant when [plaintiffs] send out notice."[12] Direct Digital's counsel did not dispute this and admitted that the company kept records on and could describe the quantity of Instaflex sold directly to customers vs.

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[10] *Frequently Asked Questions*, *supra* note 9. Given this business model, the website states that direct customers are not able to pay for Instaflex in cash; they must pay by credit card. *Id.*

[11] Express information about direct contact efforts with even retail store customers is contained in the sealed business docutments. The quotes in this paragraph are from the firm website. *See About Direct Digital*, *supra* note 1.

[12] Oral Argument, *supra* note 4, at 18:44.

in retail stores.[13] Direct Digital's counsel also confirmed that Instaflex was advertised directly to customers on television and on the Internet.[14]

Regardless where advertised, the message from Direct Digital was the same. The ads and the product's label stated that it would "relieve discomfort," "improve flexibility," "increase mobility," and "support cartilage repair," and that it was "scientifically formulated" and "clinically tested for maximum effectiveness . . . ." Pet. 5a. As alleged below, this was simply not so. On the merits, the class claim is that this was blatant consumer fraud, selling a sugar pill through high-tech razzle-dazzle. *Id.*

Mullins eventually brought suit against Direct Digital in the United States District Court for the Northern District of Illinois. The class suit alleges that Instaflex is a fraud, and that the purported joint health claims about its efficacy are entirely false. Specifically, the complaint alleges violations of the Illinois state consumer fraud law and the similar laws of nine other states. Pet. 5a, 42a-43a. Moreover, the complaint alleges that Direct Digital defrauded all purchasers and that Mr. Mullins suffered exactly the same harm as everyone else who purchased the product for personal use. Pet. 46a-47a.

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[13] *Id.* at 15:15, 38:40.
[14] *Id.* at 9:30.

B. The Fraudulent Scheme

Direct Digital is a marketing company. Direct Digital does not innovate. This litigation turns on the claim that Direct Digital simply repackages a common dietary supplement, distinguished only by the extravagances of its claims and the aggressiveness of its marketing.[15] Its promotional materials are noteworthy for the extensive attention to marketing and the absence of any mention of product innovation or proven medical benefits.[16] The founders of Direct Digital are all marketing executives and only on May 23, 2013, well after the marketing of Instaflex began and near the end of the class period, did Direct Digital for the first time announce any affiliation with any individual with medical or scientific credentials.[17]

The heart of the complaint is that Direct Digital's fraud is common to all consumers. The claimed joint health benefits have been conclusively proven to be false by numerous high quality clinical studies, including a large scale study sponsored and conducted by the National Institutes of Health (NIH), which have all concluded that glucosamine is no better than a placebo or sugar pill. Pet. 5a. The

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[15] Compl. at 1-2, Doc. 1 (Mar. 8, 2013), *Mullins v. Direct Digital, LLC* (No. 1:13-cv-01829).

[16] *See Direct Digital Case Studies*, *supra* note 5.

[17] *See Direct Digital News*, DIRECT DIGITAL, http://directdigitalllc.com/news.html (last visited Dec. 21, 2015). These basic facts are further developed in the sealed documents below. *See, e.g.*, Adcock Deposition, *supra* note 3, at 11.

Complaint alone cites nine major studies proving glucosamine's ineffectiveness. It also cites studies showing the additional ingredients incorporated into Instaflex, such as cayenne pepper, ginger root and turmeric, perhaps to justify its seventy-dollar per bottle price tag, are equally ineffective in providing joint health benefits.[18]

Since at least as early as 2006, studies have conclusively established that "glucosamine, alone or in combination, is not effective in providing the represented joint health benefits."[19] The Complaint sets out a uniform pattern of consumer fraud, plain and simple.

C. The Rulings Below

The district court found that the proposed class satisfied the requirements of Rule 23(a) and (b)(3), including commonality, typicality, and adequacy. Pet. 47a. The court deemed the class "ascertainable because it is objectively contained to all individuals who purchased Instaflex for personal use during the class period and the class period is finite." Pet. 46a. Direct Digital made the same fraudulent claims to everyone and, as the district court found, all direct and retail purchasers allegedly paid good money for a bad product, claiming to have been deceived by "the same course of conduct and [asserting the] same legal theory." Pet. 47a.

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[18] *See* Compl., *supra* note 15, at 7-10.
[19] *Id.* at 7.

Direct Digital sought Rule 23(f) review on two grounds: that the court failed to properly determine whether the class was "ascertainable" prior to certification, and that the court erred in finding the efficacy of Instaflex to be a "common question" under Rule 23(a)(2). Pet. 5a-6a. Petitioner was granted 23(f) appeal on the issues of the ascertainability of the class, and whether Mr. Mullins needed to allege that he had joint pain in order to be an adequate class representative (which, in any event, the record clearly established that he did prior to his purchase). Pet. 5a-6a. Nonetheless, discretionary review under Rule 23(f) was granted "primarily to address the developing law of ascertainability." Pet. 6a.

The issue of how Mr. Mullins bought his glucosamine and whether that made him not typical was not an issue for which the Seventh Circuit granted the petition and is not properly an issue before this Court. Further, that Mullins purchased the product at a GNC store and the majority of other purchasers obtained the product directly from Direct Digital does not alter the unifying allegation that the purported joint health benefits of glucosamine are nonexistent, the product is worthless, and that the representations made to all consumers were fraudulent. How Mr. Mullins in particular bought his glucosamine is irrelevant to the claim of fraudulent misrepresentation of the joint health benefits of Instaflex, and the district court found that Mr. Mullins's claim was typical of the claims of absent class members. Pet. 47a.

On the question of ascertainability, the court below rejected the defendant's theory of a heightened ascertainability requirement, holding that "imposing [the] stringent version of ascertainability does not further any interest of Rule 23 that is not already adequately protected by the Rule's explicit requirements." Pet. 14a. The requirement "that a class must be defined clearly and that membership be defined by objective criteria," the court found, prevents the problems of vagueness, subjectively defined classes, and fail-safe classes, and therefore sufficiently protects defendant's finality interest by "bar[ring] class members from relitigating their claims." Pet. 10a.

The Seventh Circuit affirmed the lower court's decision to "defer[] until later in the litigation decisions about more detailed aspects of ascertainability and the management of any claims process" in light of the facts presented. Pet. 15a. The court highlighted that it was inappropriate to extend the analysis to speculations about "the potential difficulty of identifying particular members of the class." Pet. 3a. The court refused to accept Direct Digital's assertion that the only means of class member identification would be affidavits, remarking that such a reality "remains to be seen." Pet. 11a. According to the Seventh Circuit, the court does "not know yet what sales and customer records Direct Digital has." *Id.* For purposes of the opinion, the Seventh Circuit assumed only that Direct Digital would not have records "for a large number of *retail* customers." *Id.* (emphasis added).

The Seventh Circuit concluded that any class certification concerns about the administrative efficiency of a particular class action should be addressed through the textually-based Rule 23 requirement of superiority. Superiority explicitly incorporates manageability concerns into its analysis, but, unlike the heightened ascertainability requirement advocated by Direct Digital, it takes an appropriately comparative approach, considering these administrative inconveniences in light of the other options or lack of options available. Pet. 17a.

Further, the Seventh Circuit held the certification of a plaintiff class did not infringe the defendant's due process rights. The court below sufficiently protected Direct Digital's right to assert any defenses it might have when it recognized Direct Digital's "due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability." Pet. 31a. Petitioner sought below to turn this into a requirement that due process can only be satisfied if every issue concerning any class member were addressed at the threshold stages of litigation. The Seventh Circuit clarified that "[t]he due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward." Pet. 31a. The court found that class certification would not affect whatever defenses might be available to Petitioner.

Whereas Petitioner claims a right to contest every claim at the beginning of the litigation, the court below stressed that the rights of the defendant would depend on the nature of the proof in class actions. "It is certainly true that a defendant has a due process right not to pay in excess of its liability and to present individualized defenses *if those defenses affect its liability*." Pet. 31a (citing *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2560-61 (2011)) (emphasis added). Thus, in a case "where the total amount of damages can be determined in the aggregate," Pet. 32a, the distribution among the class would not affect the defendant's interests at all, only those of the absent class members. Pet. 33a. If, by contrast, damages cannot be determined in the aggregate, then the defendant might have individual defenses on damage calculations. Pet. 34a. Finally, where liability can be established on an aggregate basis, but damages cannot – a situation not at issue in this case – then courts have been able to bifurcate damages from liability. Pet. 36a. The court below concluded that selecting the proper type of proof was a matter of case management and "we should not underestimate the ability of district courts to develop effective auditing and screening methods tailored to the individual case." Pet. 31a.

The Seventh Circuit also rejected Direct Digital's commonality challenge to the common questions unifying the plaintiff class. Petitioner's contention that each class member must prove as a threshold matter that he or she had received no benefit from Instaflex was based on a

misunderstanding of plaintiffs' theory of liability. Pet. 39a. The question was not as Direct Digital claimed about the effects of the supplement on any particular purchaser – post-purchase. Rather, the question was whether the Defendant's supplement was a sugar pill at the time of purchase; if so all purchasers would be harmed at the time of purchase by Direct Digital's fraudulent claims. The post-purchase experiences are not relevant. Pet. 39a. That inquiry into whether Direct Digital's statements were false or misleading, the court held, was indeed a common question because "determination of its truth or falsity [would] resolve an issue that is central to the validity of each one of the claims in one stroke." Pet. 40a (quoting *Dukes*, 131 S. Ct. at 2551).

REASONS TO DENY THE WRIT

I. THERE IS NO MATURED CIRCUIT SPLIT ON THE QUESTION OF ASCERTAINABILITY.

In the aftermath of the Class Action Fairness Act of 2005, federal courts confronted increased numbers of state-law consumer class actions.[20] All

[20] *See* EMORY G. LEE III & THOMAS E. WILLGING, IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS 3 (Federal Judicial Center 2008), *available at* http://www.uscourts.gov/file/17913/download (65% of sampled federal court class actions involved contract and consumer credit).

fifty states and the District of Columbia have statutes to combat the serious problem of consumer fraud, and all but one provide for private rights of action to enforce those statutes.[21] Almost invariably these suits are brought as class actions in order "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). In fact, in *Amchem,* this Court noted that consumer fraud class actions were a prototypic class action in which "[p]redominance is a test readily met . . . ." *Id.* at 625.

Consumer class actions are highly fact dependent, as reflected in the efforts of Petitioner to elide the nature of how it conducts its direct marketing business. Courts routinely address questions concerning class membership and the distribution of any class recoveries as managerial issues, to be confronted when and if the class allegations are proven. Lower court approaches on how best to handle these cases are very much a fact-dependent, managerial work in progress, far from a hardened circuit split over matured doctrine.

The Court has "recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal

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[21] *See* Carolyn L. Carter, *Consumer Protection in the States: A Fifty State Survey on Unfair and Deceptive Acts and Practices Statutes*, NAT'L CONSUMER LAW CENTER 3, 5 (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); s*ee also Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting) (cautioning against premature Court intervention on "the sort of issue that could benefit from further attention" by lower courts). Far from compelling intervention by this Court, as urged by Petitioner and its captive amici, [22] the evolving nature of case management approaches throughout the lower court system counsels against premature review by this Court.

A. Consistent with the Text of Rule 23, the Seventh Circuit Properly Addressed the Identification of Class Members as a Question of Manageability.

The Seventh Circuit followed a text-based approach to the identification of the plaintiff class. Pet. 16a-18a. The superiority and manageability provisions of Rule 23(b)(3) give courts the case-specific administrative tools needed to achieve efficient resolution of claims in which common questions predominate. According to Rule 23(b)(3)'s

[22] In disregard of Supreme Court Rule 37.1, the roving band of amici who travel together from class action to class action do not attempt to do anything more than reiterate arguments made by Petitioner. This improper use of amicus briefing is just an expansion of the word limit on Petitioner's filing.

text, class certification is only appropriate after a district court considers the "likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). As part of that manageability inquiry, a district court must therefore consider whether the proposed class definition will enable the delivery of notice to absent class members, whether the class members will be sufficiently identifiable at the remedies stage to administer claims, and whether the definition of the class clearly establishes who is bound by a judgment.

Mullins thus properly rooted its scrutiny of the managerial difficulties of administering a class action in the Rule's textual inquiry whether class treatment is "superior to other available methods for fairly and efficiently adjudicating the controversy." Pet. 16a (quoting Fed. R. Civ. P. 23(b)(3)). As the court below concluded, imposing a per se requirement of some heightened standard of ascertainability as a freestanding penumbral rule supplement at the class certification stage "renders the manageability criterion of the superiority requirement superfluous." Pet. 16a.

B. The Petition Mischaracterizes Third Circuit Law.

The heart of the Petition is a claimed difference in approaches between the Third and Seventh Circuits. Once probed, however, the grounds invoked for certiorari slip away, both on the facts presented and because Third Circuit law continues to mature.

Petitioner and amici focus on *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) to establish an intercircuit conflict. An examination of *Carrera*, however, reveals that the Third Circuit was addressing a factual setting completely unlike that of a direct marketer in electronic contact with its customer base. At issue was a putative weight-loss supplement sold in convenience stores. The problem was that there was apparently no record of who any purchaser had been:

> [T]here is no evidence that a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales. There is no evidence that retailers even have records for the relevant period.

Id. at 309. *Carrera* did not require a threshold showing of the identity of each class member. Instead it held that the burden at the time of class certification was only to provide a method to ascertain class membership: "[d]epending on the facts of a case, retailer records may be a perfectly acceptable method of proving class membership." *Id.* at 308. Thus, "ascertainability only requires the plaintiff to show that class members can be identified" at some stage in the litigation. *Id.* at 308 n.2. *Carrera* remanded to determine whether any purchasers could be identified through sales records, *id.* at 308, 312, something not at issue in the present case because of the centrality of direct sales by Direct

Digital to online purchasers.

Petitioner seeks to convert the qualified holding in *Carrera* into a categorical, non-textual requirement of ascertainability. Pet. 14a. The opinion below properly rejected this penumbral addition to the prerequisites of Rule 23 and cautioned that *Carrera* "is at this point the high-water mark of [the Third Circuit's] developing ascertainability doctrine …." *Id.* As if to confirm the correctness of *Mullins,* the Third Circuit the very next day handed down *In re Community Bank of Northern Virginia,* 795 F.3d 380 (3d Cir. 2015) – a case unmentioned by Petitioner or its amici.[23] There, Judge Jordan narrowed the Third Circuit's reading of *Carrera* to focus on the "evidentiary problems" presented where the plaintiff "failed to adduce sufficient evidence showing that the first method could identify even a single purchaser.…" *Id.* at 397. By contrast, in a case where the bulk of the class has established relations with the bank defendant accused of fraudulent home equity lending, the *Carrera* evidentiary inquiry can readily be satisfied by a process that would "consult [the bank's] business records and then follow a few steps to determine whether the borrower is the real party in interest." *Id.*

In re Community Bank continues a series of Third Circuit cases that have tried to integrate (still

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[23] Petition for Certiorari filed on November 23, 2015, *sub nom. PNC Bank, et al. v. Brian W., et al.* (No 15-693). The issues presented in the Petition for Certiorari in *PNC Bank* have no bearing on the present case.

not fully) the question of ascertainability into the evidentiary and manageability structures of a class action. In *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015) – another case unmentioned by Petitioner or amici – Chief Judge McKee acknowledged that, under Third Circuit law, "a precise definition of the judicially-created requirement of ascertainability is elusive" because "the question is intensely fact-specific and the origins of the requirement murky." 775 F.3d at 560.

Only last April, the Third Circuit went further, reversing the denial of class certification on ascertainability grounds in *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015) – a case mentioned only in passing by Petitioner and not at all by amici. In a case alleging damage from the installation of spyware on leased computers, Judge Smith distanced the court from the way (as evident in this Petition), "defendants in class actions have seized upon this lack of precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification." *Id.* at 162. Instead, the Third Circuit reaffirmed that "[t]he ascertainability inquiry is narrow" and requires only an administratively feasible mechanism to identify class members. *Id.* at 165.

Petitioner cannot corral Third Circuit law into a per se rule that each class member's identity must be ascertained prior to class certification. As *Byrd* held, "[w]hether a class is ascertainable is dependent on the nature of the claims at issue." *Id.* at 170.

Wisely, the Petition backs off from its apparent contention that there is a circuit split over early identification of the plaintiff class that justifies certiorari. Petitioner retreats to conceding that "no one is suggesting that a plaintiff must *actually identify* class members by name at the certification stage." Pet. 23 (emphasis in original). Instead, Petitioner offers the "modest ascertainability requirement" of identifying class members "in a manner consistent with class adjudication goals and a defendant's due process rights." *Id.* at 23-24. This formulation of the issue for certiorari is entirely vacuous. As a legal standard, it does nothing to differentiate the law of the Third and Seventh Circuits.

C. The Seventh and Third Circuit Standards Are More Convergent Than Divergent.

In the context of a direct marketer who knows the identity of the overwhelming majority of its customers, it is unlikely that there would be any divergence between the Third and Seventh Circuits, as shown by the result in *Community Bank*. Even beyond the facts of this case, however, it is unclear that there is much doctrinal space left between the Third Circuit's narrow recasting of ascertainability in *Byrd* and the Seventh Circuit's holding that "the district court did not abuse its discretion by deferring until later in the litigation decisions about more detailed aspects of ascertainability and the management of any claims process." Pet. 15a.

Petitioner erroneously claims that *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), confirms the claimed circuit conflict. To the contrary, *Rikos* affirms the convergent holdings of all the circuits that have addressed the issue of ascertainability in the context of direct electronic relations between the seller and consumers. In facts strikingly similar to the present case, *Rikos* was a class action alleging that a digestive supplement was "nothing but sugar-filled capsules injected with a small amount of unremarkable bacteria." *Rikos v. Procter & Gamble Co.*, 782 F. Supp. 2d 522, 527 (S.D. Ohio 2011). The defendant, just like Direct Digital here, claimed that the class was insufficiently ascertainable and pointed to the Third Circuit's decision in *Carrera.* The Sixth Circuit, like the Third Circuit in *Byrd* and *Community Bank,* distinguished *Carrera* as turning on the fact that there was "no evidence that *a single purchaser*… could be identified using records of customer membership cards or online sales." *Rikos*, 799 F.3d at 526-27 (*quoting Carrera*, 727 F.3d. at 309). By contrast, in *Rikos* – almost exactly like the present case – the defendant's "own documents indicate that more than half of its sales are online. At a minimum, online sales would provide the names and shipping addresses of those who purchased" the product alleged to be a fraud. *Id.* (citation omitted).

Evolving managerial differences should be expected in an area of law only recently brought under federal subject matter jurisdiction. Certiorari should not cut short the necessary processes of

experimentation and self-correction by which lower courts adapt to the realities of complex litigation.[24]

II. CLASS CERTIFICATION DID NOT INFRINGE ANY COGNIZABLE DUE PROCESS RIGHT OF THE PETITIONER.

Neither the Petitioner nor amici give much content to their constitutional claims beyond the characterization of Rule 23 as protecting due process interests. *See* Pet. 21. A class action defendant has a protected interest in obtaining finality through any litigated or settled class action and in being able to assert whatever defenses might be available under the substantive law. These interests are fully addressed and preserved by the Seventh Circuit. The Seventh Circuit refused to allow "what are essentially claim administration issues to deny certification" by imposing them all at the front end of the litigation. Pet. 27a. These limited due process interests do not create any independent entitlement of the defendant to assert and have determined whatever substantive defenses it might have prior to class certification.

Nor would certiorari follow from Petitioner's extravagant claim that this case is emblematic of the

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[24] Other courts have also experimented with the referral of broad consumer class actions to administrative agencies. *See, e.g., Belfiore v. Procter & Gamble Co.*, No. 14-CV-1142, 2015 WL 5781541, at *52 (E.D.N.Y. Oct. 5, 2015) (referring the remedy phase of a putative class action to the Federal Trade Commission).

"scores of consumer class actions filed each year in the federal courts" in which neither members of the class nor the defendant has records or proof of purchase, "likely because [the defendant's] products are sold by third-party retailers." Pet. 23. What remedies might be available for companies that commit large scale frauds through small cash transactions is not at issue here. As set forth previously, whatever the issues presented in other cases, Direct Digital sells the bulk of its products to identifiable customers through electronic transactions.

Ultimately, Petitioner's constitutional argument amounts to a demand for individual proof of harm at the threshold stages of class action litigation.[25] The Court has repeatedly refused to front-load class action proceedings in the name of a defendant's supposed due process interests, regardless whether dressed up as a Rule 23 argument or a constitutional claim. *See, e.g.*, *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1191 (2013) (characterizing the requirement of proof that all class members will

[25] For example, Petitioner describes *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), as "stand[ing] for the broad proposition" that a defendant's due process rights cannot be reduced in the name of efficiency. Pet. 22. Similarly Petitioner reduces *Taylor v. Sturgell*, 553 U.S. 880 (2008), to the sound bite that Rule 23 itself is "grounded in due process." Pet. 21. Contrary to Petitioner's characterization, C*omcast* addressed only the predominance requirement of Rule 23 and *Taylor* addresses the process due to non-parties, not the protections owed to class action defendants.

recover damages as a condition of class certification as putting "the cart before the horse"); *Erica P. John Fund, Inc. v. Halliburton Co.,* 131 S. Ct. 2179, 2186 (2011) (rejecting the requirement of proof of loss causation at class certification stage).

Even a cursory review of the Seventh Circuit opinion shows that any cognizable due process interest of Petitioner is and will be fully met.

1. *Res judicata.*

It is well established that the defendant has a due process interest in finality. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921). Concretely, this means that Direct Digital must have the ability to obtain closure against any subsequent effort to relitigate claims for fraudulent sales of glucosamine brought by any class member, regardless of whether plaintiffs ultimately prevail or lose at trial. In turn, this means that class members must be identified with sufficient specificity such that Petitioner may assert the affirmative defense of *res judicata* in subsequent cases under Fed. R. Civ. P. 8(c) or its state law equivalents.

As the court of appeals made clear, for *res judicata* what matters is the clarity of the class definition and its use of objective criteria. Pet. 38a. Accordingly, the court of appeals required that the class be defined clearly based on objective criteria. Pet. 7a. The definition of the class is indeed clear:

consumers who purchased Instaflex within a specified time frame in the ten certified states. Pet. 5a, 10a. What would allow a potential claimant to succeed in proving he had a claim – that he bought Instaflex in one of the certified states within the specified time period – would also prove his membership in the class and would thus preclude any subsequent lawsuit.

Thus, once notice is sent in this matter, both directly where practicable and through publication notice, finality will exist with respect to all class members who do not opt-out. If at a future date, after the litigation is concluded, a person who purchased this product during the class period and did not opt-out from the class attempted to bring suit again, he or she would be properly precluded for claims arising from that purchase.

The due process concern with finality requires an objective mechanism to determine who is in and who is out for *res judicata* purposes. On that score, the claimed circuit dispute melts away. The holding in *Carrera* was to remand to give the plaintiffs another opportunity to propose "a reliable and administratively feasible" mechanism for determining whether putative class members fall within the class definition. *Carrera*, 727 F.3d at 308; *cf. Hayes v. Wal-Mart Stores, Inc.,* 725 F.3d 349, 359 (3d Cir. 2013) (the "ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort to mini-

trials"). *Mullins* recognizes and protects the same concern.

Ultimately, because *res judicata* is an affirmative defense that can only arise in a subsequent action, the Seventh Circuit held that "[t]he due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward." Pet. 31a. Relitigation is foreclosed by a fixed and objective class definition in the first lawsuit, which in turn is what allows finality to be asserted in any subsequent litigation. That has been done here.

2. *Limiting Liability.*

Direct Digital claims that it has a constitutionally protected interest in not paying in excess of its liability due to legally unfounded or fraudulent claims. Nothing in the Seventh Circuit's opinion is to the contrary. How the amount of damages it may ultimately have to pay is determined and the amount that it may have to pay if proven liable for fraud is clearly a merits issue that need not be addressed at the class certification stage.

Petitioner relies on *Dukes* for the proposition that Rule 23 requires a rigorous inquiry into class composition. Pet. 21. Standing alone, that uncontroversial statement is irrelevant to the present case. In *Dukes,* in the context of individually-

based decisions on employment, the Court found that commonality was lacking because "individualized determinations of each employee's eligibility for backpay" would be an inescapable part of the case. 131 S. Ct. at 2560. Such individual determinations are not at issue in a uniform consumer case involving identical claimed harms across all class members. Unlike the difficulties in establishing commonality in a class asserting discrimination in promotion, for example, there are no such individual inquiries where the allegation is that the product is uniformly useless for all class members. Further, whatever issues may be present in other cases concerning class composition are certainly not an issue in a case, such as the present one, where a defendant has already identified a sizeable portion of the class through direct sales.

What Petitioner is really demanding here is not the ability to raise defenses, but proof of each claimant's entitlement at the threshold stages of the case. The court below properly concluded that class certification was not the proper moment for proof of claims, and that the need for subsequent determinations at a "later stage of the litigation does not itself justify the denial of certification." Pet 35a. Petitioner's due process argument would fare no better in the Third Circuit. *Byrd* reversed the district court's denial of class certification, rejecting the notion that class treatment was foreclosed just because subsequent investigation might be needed to determine some members of the class and their potential recoveries. In so doing, the Third Circuit

also preserved defendants' due process rights. "Defendants are not foreclosed from challenging the evidence the Byrds propose to use." *Byrd*, 784 F.3d at 170-171.

Similarly, Petitioner contests whether individual class membership could be established by the exclusive use of "simple boilerplate recitations, untested by cross-examination" and seeks to raise this to the level of a due process violation. Pet. 1. The characterization itself is inaccurate. The Seventh Circuit did not deny that each class member bears the burden of proof of class membership, but held that the question of precisely *how* that burden would be met was premature. The Seventh Circuit highlights that even the need to rely on affidavits in this case "remains to be seen" because the court does not yet know "what sales and customer records Direct Digital has." Pet. 11a. The Seventh Circuit merely refused to disqualify the use of affidavits *as a matter of law*, but recognized that self-identifying affidavits may need to be subject to "audits and verification procedures and challenges. . . ." Pet. 31a. This determination is highly case-specific and should be left to the district court's managerial determination, subject to subsequent appellate review.

Like other elements of any representative proceeding, proof of class membership is subject to what is reasonable and practicable under the circumstances. It is well established that all elements of due process in aggregated proceedings, starting with the foundational issue of notice, turn on

what is "practicable" and what is "reasonable under the circumstances." *See Shutts*, 472 U.S. at 811-12; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Nothing in the Seventh Circuit's opinion disrupts these core due process principles.

III. THE QUESTION PRESENTED DOES NOT PERTAIN TO THE PRESENT CASE.

It is axiomatic that this Court reviews cases, not abstract ideas. *Flast v. Cohen,* 392 U.S. 83, 96 (1968) (articulating the "rule against advisory opinions"); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (explaining that the Court has "consistently refused" to rule on questions "abstracted . . . from the immediate considerations" of the case at bar); *see also United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J. dissenting) ("We the people . . . gave judges, in Article III, only the 'judicial Power,' a power to decide not abstract questions but real, concrete 'Cases' and 'Controversies.'")

The Question Presented in this case assumes, contrary to the facts of record, that class members cannot be ascertained from a defendant's customary business records. To the contrary, the large majority of class members are Direct Digital's direct customers. Only a minority of class members

purchased Instaflex in retail stores – something that Direct Digital did not contest below.[26]

For all the claim of an irreconcilable intercircuit conflict, this case would have come out exactly the same had Third Circuit law been applied. In parallel with the class certified below, the class in *Byrd* included purchasers or leasers of computers, who had direct, documented contacts with the defendant, along with their "household members," who had no such direct relationship but still suffered the same harms. *Byrd* held that the inclusion of "household members" should not derail certification because "'household members' is a phrase that is

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[26] When confronted at oral argument with the fact Direct Digital sold directly to most Instaflex purchasers, Petitioner countered only that this would make Mr. Mullins not typical as a class representative because he bought his glucosamine at a retail store. *See* Oral Argument, *supra* note 4, at 39:40. Petitioner confuses the question of whether the class can be ascertained with that of the typicality of Mr. Mullins as the lead class representative. The fact that Mr. Mullins bought his glucosamine from the retailer GNC and paid cash may differentiate him from the majority of class members whose information is directly captured by Petitioner's proprietary consumer contact system. But the standard for typicality is whether the plaintiff has asserted a similar injury to the rest of the class. *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982) (holding that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members") (internal citation omitted). Nevertheless, whether Mr. Mullins is typical of the absent class members was not preserved on appeal and is not part of the Question Presented. For the question of the identification of absent class members, how Mr. Mullins in particular bought his glucosamine is irrelevant.

easily defined and not, as Defendants argue, inherently vague." *Byrd*, 784 F.3d at 170-171.

No court of appeals has denied class certification on grounds of ascertainability where the overwhelming majority of consumer transactions are conducted directly by a defendant relying on electronic communications and ongoing credit card charges. Whether there are other cases that "define the class by objective criteria, even if those criteria cannot actually be used to ascertain membership," as stated in the Question Presented, is not a question for this case. Its resolution would have no application to the matter *sub judice*.

* * *

When all other arguments run out, every class action petitioner invokes the claim that the mere fact of certification will exert an extortionate pressure on a defendant to settle. In particular, amici Chamber of Commerce and its confederates bring this issue to the Court in every class action case, as evident in the washing machine cases two years ago in which the Court denied certiorari review. *See Whirlpool Corp. v. Glazer*, *cert. denied*, No. 13-431, 134 S. Ct. 1277 (Mem.) (Feb. 24, 2014). There, the same group of amici invoked the specter that compelled settlement under class certification "dramatically increases the chances that plaintiffs with individual claims of little worth, or their attorneys, will earn an unwarranted payout." Brief of the Chamber of Commerce et al. at 13, *Whirlpool Corp. v. Glazer,* 133 S. Ct. 1722 (Mem.)

(2012) (No. 12-322); *see also* Brief of Products Liability Advisory Council at 8-9, *Whirlpool*, 133 S. Ct. 1722 (Mem.) (No. 12-322) (invoking "grave risk for American businesses" from "judicial blackmail" in class certifications). This Court ultimately denied review in *Whirlpool,* the case then did not settle, despite amici's prognostication, and Whirlpool prevailed in a full trial on the merits. *In re: Whirlpool Corp. Front-Loading Washer Products Liability Litigation,* No. 08-wp-65000, 2014 WL 8061244 (N.D. Ohio Oct. 31, 2014)**.**

CONCLUSION

The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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