No. 19-2325

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROBERT OREN, et al.,
Plaintiffs-Appellees,
v.
DOLLAR GENERAL CORPORATION, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Missouri, Master Case No. 16-md-02709-GAF

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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/s/ Adam G. Unikowsky

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Defendants-Appellants consent to the filing of this amicus brief. Plaintiffs-Appellants do not consent to the filing of this amicus brief.[1]

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. The Chamber frequently files amicus briefs in class-action cases, including in this Court. *See, e.g.*, *Harris v. Union Pacific Railroad Co.*, No. 19-1514 (brief filed April 29, 2019); *Klein v. TD Ameritrade Holding Corp.*, No. 18-3689 (brief filed March 11, 2019); *Vogt v. State Farm Life Insurance Co.*, No. 18-3419 (brief filed Feb. 5, 2019).

Businesses, including the Chamber's members, are almost always the defendants in class action litigation. Businesses—and indirectly the customers, employees,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

and communities that depend on them—have a strong interest in the proper application of the rules governing class certification. Among those rules are "Rule 23's implicit requirement that a class must be adequately defined and clearly ascertainable." *McKeage v. TMBC, LLC*, 847 F.3d 992, 998 (8th Cir. 2017) (internal quotation marks omitted), *cert. denied*, 138 S. Ct. 2026 (2018). Although the District Court nominally applied the ascertainability requirement, its lenient approach reflects a fundamental misunderstanding of that doctrine and would sap it of practical significance. This Court should clarify the legal basis for the ascertainability requirement, so as to ensure that district courts apply it correctly.

SUMMARY OF ARGUMENT

The Chamber agrees with Dollar General that the Court should reverse the District Court's class-certification decision. In addition, the Court should tale take the opportunity to clarify both the basis for, and the scope of, the "ascertainability" doctrine. The Chamber submits this brief to underscore three critical points about the governing legal standard and the district court's fundamental misunderstanding of it here.

I. Rightly understood, the requirement of ascertainability is a corollary of Rule 23(b)(3)'s familiar superiority and predominance requirements. If there is no ready means of ascertaining who is even in the proposed class, it will be impossible for the plaintiff to show either that a class action will be "superior ... for fairly and efficiently

adjudicating the controversy," or that common questions will "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The class-action device will be inferior—and common questions will not predominate—because the litigation will be bogged down in case-by-case disputes about whether each individual belongs in the class at all.

II. Ascertainability's legal roots also explain its proper contours. In order for a class to be ascertainable in the relevant sense—that is, the sense *relevant to superiority and predominance*—it must be possible for the court to determine class membership without recourse to debatable, individualized determinations that require a weighing of conflicting evidence. This Court has put this point in terms of the need for "objective criteria" to determine class membership. *E.g.*, *McKeage*, 847 F.3d at 998. But "objectivity" here has a specific meaning. What matters to ascertainability is not whether there is an objective "fact of the matter" about whether a person actually meets the class definition, but rather whether that determination *can be made* based on objective factual records that are not reasonably subject to dispute.

III. The district court gravely erred here because it conflated these two different senses of "objectivity." There may well be a true fact of the matter about whether any given person bought motor oil with the intent to use it for one purpose or another. But what matters for ascertainability is simply that a person's intent in buying a

product is not *discernible* through a streamlined, mechanical process based on records that effectively speak for themselves. Rather, determining each person's intent—and hence his or her class membership—will call for credibility judgments and a weighing of often-conflicting evidence, such as evidence about the vehicles the person owned at the time, his or her purchasing habits, and other similar matters. A class is not ascertainable—and thus a class action is not appropriate under Rule 23(b)(3)—when individualized mini-trials would be needed to identify class members with confidence in the first place.

IV. Affirming the District Court's decision would render ascertainability a dead letter. According to the District Court, proving ascertainability is a simple matter of showing that all class members can fill out an affidavit attesting to their membership in the class according to a common class definition. But that requirement will be satisfied in every case—class counsel must always propound a class definition as a prerequisite to class certification, and can always assert that class members can file affidavits attesting to their class membership. The Court should reverse the District Court and ensure that the ascertainability requirement retains independent force.

ARGUMENT

I. RULE 23(B)(3) REQUIRES AN ASCERTAINABLE CLASS.

As this Court has recognized, Rule 23 imposes an "implicit requirement that a class 'must be adequately defined and clearly ascertainable.'" *McKeage*, 847 F.3d at 998 (quoting *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016)). However, "[t]his [C]ourt, unlike most other courts of appeals, has not outlined" exactly what this "requirement of ascertainability" demands or how it fits into the overall scheme of Rule 23. *Sandusky*, 821 F.3d at 996. Instead, the Court has simply relied upon the "elementary" proposition "that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *Id.* (quotation marks omitted). In this appeal, the Court should reaffirm that Rule 23 requires ascertainability and clarify the legal basis for that requirement.

At least in putative class actions based on Rule 23(b)(3), ascertainability is properly understood as a corollary of two express textual requirements: superiority and predominance. *Cf. Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–93 (3d Cir. 2012) ("Many courts and commentators have recognized that an essential pre-requisite of a class action, *at least with respect to actions under Rule 23(b)(3)*, is that the class must be currently and readily ascertainable based on objective criteria."

(emphasis added)); 1 *McLaughlin on Class Actions* § 4:2, Westlaw (15th ed. database updated Oct. 2018) ("a Rule 23(b)(3) class must be presently ascertainable based on objective criteria"). In order to prove superiority, the plaintiff must establish "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"—even after taking account of "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). And in order to prove predominance, the plaintiff must establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Id.*

This Court's demand that a class be "clearly ascertainable," *McKeage*, 847 F.3d at 998 (quotation marks omitted), is naturally construed as a corollary of those two requirements. A class action will not be manageable—and hence will not be "superior" to other methods of adjudication—if it is difficult to discern who is *in* the class in the first place. And likewise, it will not be possible for a plaintiff to prove that common questions "predominate over any questions affecting only individual members" if each additional class member's participation will automatically generate a non-obvious question affecting only the individual member. Thus, the requirement of ascertainability is grounded in the text of Rule 23: when class members are not ascertainable, Rule 23(b)(3)'s requirements of superiority and predominance are necessarily unmet.

II. A CLASS IS ASCERTAINABLE ONLY WHEN MEMBERSHIP DEPENDS ON RECORDS NOT REASONABLY SUBJECT TO DISPUTE.

Once ascertainability is properly understood as a rule about superiority and predominance, its practical contours naturally follow. As this Court has explained, ascertainability concerns "the *method* for identifying class members"—and specifically, whether "[class] members may be identified by reference to objective criteria." *McKeage*, 847 F.3d at 998 (emphasis added). Whether there are "objective criteria" for determining class membership, in turn, depends on whether membership can confidently be assessed on the basis of records not reasonably subject to dispute. That standard reflects the function of the ascertainability doctrine: The presence or absence of the requisite records determines whether the class-action mechanism is genuinely "superior" and whether common questions will in fact "predominate" over individualized inquiries into class membership. Fed. R. Civ. P. 23(b)(3).

This Court's decisions are consistent with that formulation of the ascertainability doctrine. Thus, for example, in a suit based on unsolicited faxes, "*fax logs* showing the numbers that received each fax" served as "objective criteria that make the recipient clearly ascertainable." *Sandusky*, 821 F.3d at 997 (emphasis added); *accord McKeage*, 847 F.3d at 998-99. Similarly, a class was clearly ascertainable when its members could be "identified by reviewing ... *customer files*" to determine whether they contain contracts with particular language. *See McKeage*, 847 F.3d at

999 (emphasis added). Generalizing from examples such as these, some courts have expressly "held that where nothing in company databases shows or could show whether individuals should be included in the proposed class, the class definition fails." *Marcus*, 687 F.3d at 593; *accord, e.g.*, *Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x 803, 804 (9th Cir. 2014) (affirming finding that "the proposed class was not ascertainable because there was no reasonably efficient way to determine which of the hundreds of thousands of individuals who used the parking lots 'used a personal credit or debit card, rather than a business or corporate card,' to purchase parking" (citation omitted)).

What matters for determining the presence of "objective criteria" in this context is thus not objectivity in some abstract philosophical sense, but rather whether class membership can readily be determined from existing records. *See* 1 *McLaughlin on Class Actions* § 4:2 ("Courts properly look below the surface of a class definition to determine whether the *actual process of ascertaining* class membership will necessitate delving into individualized or subjective determinations." (emphasis added)). This focus makes sense because it speaks to whether identifying class members will require the "extensive and individualized fact-finding or 'mini-trials'" that preclude satisfaction of Rule 23(b)(3)'s express requirements. *Marcus*, 687 F.3d at 593; *see* 1 *McLaughlin on Class Actions* § 4:2 (explaining that "[i]t must be administratively feasible for the court to determine whether a given person fits within

the class definition without effectively conducting a mini-trial of each person's claim," and that ascertainability thus "overlaps with" the superiority inquiry).

III. THE CLASSES CERTIFIED BELOW ARE NOT ASCERTAINABLE.

This district court fundamentally misunderstood the ascertainability doctrine. The district court held that the proposed classes were ascertainable under this Court's cases—even though membership depends on each individual purchaser's undisclosed intent years ago—"because the intended use language disputed by Defendants does not lead to a conclusion that this phrase could mean different things to different people." Add. 34. But once it is understood that ascertainability concerns predominance and superiority (and that ascertainability therefore requires some means of confidently *determining* class membership without significant adversarial process) the district court's reasoning falls apart. Perhaps it is true that the phrase "'for use' in vehicles made after [a given date]," *id.*, has only one *meaning*, but that does not mean a court can *ascertain* class membership without making case-by-case findings about facts, such as the intent of individual purchasers, that are far from self-evident.

The district court suggested that self-identifying affidavits will somehow solve this problem without "resort to intensive individual inquiries," Add. 35, but that is wrong. It is common sense that many people will seek to recover as class members based on self-serving "recollections" of their undisclosed and unverifiable intent years earlier. Indeed, as Dollar General points out, *even many of the named*

plaintiffs have admitted that they owned vehicles for which the Dollar General motor oil *was* suited at the time of their purchases, and even that they used the oil for its advertised purpose. *See* Dollar General Br. 17-19 (noting named plaintiffs' admissions that they used motor oil for lawnmowers, boats, jet skis, yard equipment, and other devices for which the motor oil was suited). A self-identifying affidavit is thus far from sufficient to warrant confidence that a purchaser belongs in the class. In light of that gap, Dollar General will have ample grounds to litigate the factual circumstances of each purchase, including by pointing to the products that the purchaser owned at the time, cross-examining her about her affidavit and her purchasing habits, and the like. *See* Dollar General Br. 16-21. Indeed, Dollar General will have grounds to litigate whether the asserted class members even *bought* motor oil. Dollar General Br. 30-31 (observing that "there is no common (or even fair) way to test who bought $3 bottles of specific varieties of Dollar General motor oil, going back up to nine years"). That massive, serial litigation over the threshold issue of class membership is fundamentally at odds with Rule 23.

It is no answer to speculate that Dollar General might not actually undertake this mammoth effort. *Whenever* a class is erroneously certified despite the predominance of individual questions, a defendant will face a difficult choice between conceding its meritorious defenses on some of the individualized questions and controlling its litigation costs. The defendant's option to throw in the towel does not

make the class certification any less erroneous; rather, it confirms that the error has compromised the rights that Rule 23 seeks to protect.

IV. THIS COURT CLARIFY THE SCOPE OF THE ASCERTAINABILITY DOCTRINE IN THIS CASE.

Although Dollar General identifies numerous case-specific reasons for reversing the class-certification decision, the Chamber urges the Court to clarify the ascertainability doctrine more generally. As the District Court's decision in this case illustrates, there is substantial confusion on the ascertainability doctrine within this circuit. The Court should resolve that confusion to prevent other courts from committing the fundamental errors of law that the District Court made here.

The district court concluded that class membership is ascertainable so long as every class member could submit a declaration attesting to their class membership under a common class definition. To the district court, it did not matter whether those affidavits were reliable or not, or whether there was any corroborating evidence to support class membership beyond the say-so of the class member. Rather, it was enough that every class member could fill out a form declaration attesting that at some point in the past, they had bought motor oil while holding a particular mental state.

Under this standard, it is difficult to imagine *any* case where the ascertainability requirement is not satisfied. In every case, class counsel propounds a proposed

class definition as part of its motion to certify the class. And in every case, class counsel will be able to argue that class members can fill out an affidavit attesting to their class membership under the proposed class definition. If that is all ascertainability requires—as the district court held here—then the ascertainability requirement has no independent force; it is *necessarily* satisfied once class counsel is able to articulate a class definition. That outcome is irreconcilable with this Court's repeated recognition that ascertainability is a prerequisite to class certification. The Court should clarify the ascertainability requirement to ensure that it retains its vitality in this circuit.

CONCLUSION

This Court should reverse the class-certification decision.

Dated: August 13, 2019

Respectfully Submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 2,655 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with Circuit Rule 28A(h) because the files have been scanned for viruses and are virus-free.

/s/ Adam G. Unikowsky
Adam G. Unikowsky

CERTIFICATE OF SERVICE

I, hereby certify that on August 13, 2019, I caused the foregoing **Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America** to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam G. Unikowsky
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