No. 16-1133

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARK LEYSE, individually and on behalf of
all others similarly situated,

Plaintiff-Appellant,

v.

LIFETIME ENTERTAINMENT SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York

BRIEF AMICUS CURIAE OF PUBLIC CITIZEN, INC.
AND NATIONAL CONSUMER LAW CENTER
IN SUPPORT OF APPELLANT AND SUPPORTING REVERSAL

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Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

The National Consumer Law Center is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICI CURIAE[1]

Founded in 1971, Public Citizen, Inc. is a non-profit consumer advocacy organization with more than 300,000 members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents its members' interests in litigation and as amicus curiae. Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process. The interests of both named and absent class members, defendants, the judiciary, and the public at large are best served by adherence to the principles incorporated in Federal Rule of Civil Procedure 23. Public Citizen has sought to advance this view by participating, either as counsel or amicus curiae, in many significant class actions, including *Amchem Products,*

[1] Both parties consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or part. Apart from amici curiae, no person or organization, including parties or parties' counsel, contributed money intended to fund the preparation and submission of this brief.

Inc. v. Windsor, 521 U.S. 591 (1997), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Public Citizen and its attorneys have also participated in class action appeals addressing the effect on a class action of the entry of judgment or an offer of judgment on the named plaintiff's individual claim and in appeals addressing "ascertainability," by serving as co-counsel or amicus curiae in cases including, for example, *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016), and *Carrera v. Bayer*, 727 F.3d 300 (3d Cir. 2013).

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers, and is recognized nationally as an expert in consumer issues. For more than 46 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-volume Consumer Credit and Sales Legal Practice Series. In these volumes NCLC specifically addresses issues concerning the strong enforcement of the Telephone Consumer Protection Act, *see*, *e.g.*, *Federal Deception Law* (2nd ed. 2015), and insuring consumer access to justice, *see*, *e.g.*, *Consumer Class Actions* (8th ed. 2013 & Supp. 2014). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated

against low-income and elderly consumers, and to promote protections against such practices. *See, e.g.*, *Unfair and Deceptive Acts and Practices* (8th ed. 2012 & Supp. 2013). NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country. NCLC has an interest in seeking strong and effective enforcement of consumer protection laws.

SUMMARY OF ARGUMENT

I. The propriety of the district court's denial of class certification is properly before this Court on Leyse's appeal from the district court's final judgment, notwithstanding that that judgment was entered because the defendant consented to relief that would fully satisfy Leyse's *individual* claims. This Court has stated that a district court may permissibly resolve a live case or controversy between a plaintiff and a defendant by entering judgment, over the plaintiff's objection, based on the defendant's consent to a judgment providing complete relief on all claims remaining in the case. Such a judgment, however, does not insulate the district court's prior procedural and substantive rulings from review if reversal of those rulings would affect the determination of what constitutes complete relief.

Thus, an erroneous ruling denying class certification may be appealed from a final judgment awarding complete individual relief to the named plaintiff, because if the class had been certified, the court could not properly have terminated the case with a judgment awarding relief only to the class representative

and not to the class he represents. This Court has recognized that a named plaintiffs' appeal of the denial of certification presents a live controversy in such circumstances, *see Abrams v. Interco Inc.*, 719 F.2d 23 (2d Cir. 1983), as has the Supreme Court, *see Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). Those precedents, binding on this Court, require consideration of the merits of Leyse's appeal here.

II. The district court's holding that the proposed class is not "ascertainable" misunderstands the judicially created doctrine of ascertainability. Rule 23 presumes the existence of "a definite or ascertainable class." 1 William Rubenstein et al., *Newberg on Class Actions* § 3:2 (5th ed. 2013). That is, a class must be "susceptible of precise definition." 5 *Moore's Federal Practice* § 23.21[1] (3d ed. 1997). This requirement has always "focus[ed] on the question of whether the class can be ascertained by objective criteria," as opposed to "subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against)." 1 *Newberg on Class Actions* § 3:3; *Manual for Complex Litigation, Fourth* § 21.222 (Fed'l Judicial Ctr. 2004).

Once a class has been objectively defined, however, the tools for determining class membership and distributing recoveries traditionally have been calibrated to the circumstances of each case, and the adequacy of those tools has not been viewed as a threshold issue of class certification. Denying certification

where class-member identification would be imperfect, as the court below did, would make the class-action device effectively unavailable in many cases, often based only on the defendant's record-keeping practices. Thus, under the district court's view of ascertainability, the alternative to rough justice would be no justice at all, particularly in cases involving small-value claims where an economically rational individual would not bring an individual suit.

ARGUMENT

I. The Appeal of The Denial of Class Certification Is Not Moot.

The district court's entry of judgment in favor of Leyse on his individual claims following its denial of class certification does not moot Leyse's appeal from the denial of certification. The district court based its judgment on the defendant's consent to the entry of the judgment in the full amount claimed by Leyse on his own behalf. Far from precluding Leyse from obtaining review of the court's interlocutory certification order, such a final judgment is, as the district court recognized, *see* Appendix A-194 at n.1, the appealable order that *enables* Leyse to obtain review of the denial of class certification order. And if the district court's denial of certification was erroneous, the final judgment must be reversed because it could not properly have been entered if the class had been certified.

As the district court recognized, neither Lifetime Entertainment's offer to pay the full amount of Leyse's claim nor its consent to the entry of a judgment in

that amount mooted the case. The Supreme Court's recent opinion in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), makes that point clear, as does this Court's earlier opinion in *Tanasi v. New Alliance Bank*, 786 F.3d 195 (2d Cir. 2015), which anticipated the holding in *Campbell-Ewald*.

The district court's entry of judgment rested not on mootness, but on the view expressed in several of this Court's opinions prior to *Campbell-Ewald* that, in an individual case, a defendant's consent to entry of judgment in the full amount of the plaintiff's claims is a proper basis for resolving a *live* case or controversy in the plaintiff's favor. *See, e.g.*, *Tanasi*, 786 F.3d at 200; *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013); *ABN Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 485 F.3d 85, 94 (2d Cir. 2007); *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 341 (2d Cir. 2005); *Abrams v. Interco Inc.*, 719 F.2d at 32; *Kline v. Wolf*, 702 F.2d 400, 405 (2d Cir. 1983). Indeed, the court's power to enter such a judgment presupposes that the case is not moot, because a court lacks power to enter a judgment absent a case or controversy. *ABN Amro*, 485 F.3d at 94.

This Court has sometimes suggested, in dicta, that such a case becomes moot once a judgment has been entered, *see Tanasi*, 786 F.3d at 200, but a more accurate characterization is that, after a final judgment, "the controversy [is] resolved such that the [district] court lacks further jurisdiction," *Cabala*, 736 F.3d

at 228.[2] To the extent that grounds remain for contesting the propriety of the judgment, however, its entry does not truly render the case moot. As this Court has put it, "[w]e fail to understand how a controversy can be sufficiently alive to warrant a district court to enter a judgment granting relief and then become moot the instant the judgment is entered." *Alan Guttmacher Inst. v. McPherson*, 805 F.2d 1088, 1094 (2d Cir. 1986).

Thus, this Court has recognized that, although a court may have authority to enter a judgment granting a plaintiff all the relief available on his claims, the plaintiff may still appeal interlocutory rulings in which the district court held that the plaintiff was not entitled to particular forms of relief, as the propriety of the district court's later judgment awarding "complete relief" necessarily depends on the correctness of its earlier rulings narrowing the plaintiff's entitlement to relief. *See ABN Amro*, 485 F.3d at 94–96. In *ABN Amro*, for example, the plaintiff sought damages of $500,000, but the district ruled, as a matter of law, that he was entitled to no more than $50 from each of the two defendants. *See id*. at 89–92. Those defendants then consented to the entry of judgment in the amount of $50 each; the

[2] Even *Cabala*'s formulation is incomplete, because after resolution of a case through judgment, the district court retains jurisdiction to entertain challenges to the propriety of the judgment as authorized under Federal Rules of Civil Procedure 59 and 60, to address collateral matters such as costs and fees, *see* Fed. R. Civ. P. 54(d), and to give effect to its judgment, *see Epperson v. Entm't Express, Inc*., 242 F.3d 100, 103–07 (2d Cir. 2001).

district court entered the requested judgment and then dismissed the case as moot. *See id*. at 92. This Court held, not surprisingly, that the entry of judgment by no means mooted the case because a raging controversy remained over the correctness of the ruling limiting liability to $50, which was subject to appeal. *See id*. at 94–96. Only after concluding that the district court's ruling on that point was correct did this Court hold that the district court's entry of judgment was proper (notwithstanding its erroneous characterization of the case as "moot," which this Court ordered stricken from the judgment). *See id*. at 96–103.

Similarly, where the only reason that the judgment to which a defendant has consented fully satisfies the claims remaining in a case is that the district court has previously denied a motion for certification of a class, the judgment does not prevent appellate review of the denial of certification. Rather, the plaintiff may obtain review of the interlocutory order denying class certification by appealing the final judgment. And the appellate court must reverse the judgment if it finds that the denial of certification was erroneous, because judgment may be entered over the named plaintiff's objection in such circumstances "only where class certification has been *properly* denied." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996) (emphasis added).

This Court long ago recognized this point in *Abrams v. Interco*, 719 F.2d at 32. There, the Court, in an opinion by Judge Friendly, addressed a putative class

action in which the trial court had first denied class certification and then entered judgment in favor of the named plaintiffs in the full amount of their individual claims. The plaintiffs appealed, and this Court, after holding that the plaintiffs could appeal the denial of class certification as a matter of right because of the entry of an appealable final judgment, *id*. at 26–27, affirmed the denial of certification on the merits, *id*. at 27–31. Only after holding that the denial of class certification was proper did the Court address the correctness of the entry of judgment on the plaintiffs' individual claims. *Id*. at 32–34. The Court upheld the entry of judgment only because "class certification [had] been properly denied on a ground not shown to have any likelihood of susceptibility to cure," *id*. at 34, and thus all that remained in the case were the individual claims that the judgment fully satisfied, *id*. at 32. The Court emphasized that plaintiffs had a "right to appeal the denial of class certification," and that "if we were to reverse the denial of class certification, plaintiffs' individual claims would be reinstated." *Id*. Indeed, the Court recognized that even after its judgment the certification issue remained live, subject to "possible Supreme Court review." *Id*.

This Court has never questioned *Abrams*' conclusion that an assertedly erroneous denial of class certification presents a live issue for appeal notwithstanding the entry of judgment on the plaintiff's individual claims. That holding is fully consistent with the Court's later statements in *Tanasi*, *Cabala*,

ABN Amro, and *McCauley* that it is permissible to enter judgment to which the defendant has consented and over the plaintiff's objection, if and only if the judgment fully satisfies the claims that are properly part of the case. Because, under those cases, the district court could not properly enter a final judgment satisfying only the individual plaintiff's claims if it had certified the class, the correctness of the certification ruling is critical to the court's authority to enter a judgment based on the defendant's consent.

Abrams also is consistent with the Supreme Court's rulings in *Roper*, 445 U.S. 326, and *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), which would dictate the result here even if *Abrams* and this Court's other precedents on the subject did not exist. In *Roper*, the Court addressed circumstances on all fours with those of this case: A district court had denied class certification; the defendants had then offered to pay the full amounts of the named plaintiffs' individual claims, and the district court had, over the plaintiffs' objection, entered judgment in their favor. The Supreme Court held that the entry of judgment did not moot the plaintiffs' appeal of the denial of class certification; indeed, entry of final judgment, by supplying an appealable order, was what *enabled* them to appeal that issue. *See* 445 U.S. at 332–40. In *Geraghty*, the Court went one step further and held that even a plaintiff who claim has become moot as a result of circumstances *not* attributable to a defendant's attempt to pick off the

class representative may appeal a denial of class certification that was issued when the plaintiff's claim was still live. *See* 445 U.S. at 396–407 & n.11.

Neither *Roper* nor *Geraghty* has been overruled by the Supreme Court, and their holdings are fully consistent with *Campbell-Ewald*.[3] Thus, not surprisingly, courts before and after *Campbell-Ewald* have agreed with this Court in *Abrams* that entry of judgment on an putative class representative's individual claims does not moot the representative's appeal of a district court's order denying class certification if the class representative had a live claim when the order was issued. *See, e.g.*, *Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995, 998 (8th Cir. 2016) (reversing erroneous denial of class certification and vacating judgment providing complete individual relief to named plaintiff); *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) ("[H]ere … the offer of judgment was not made until the district judge refused to certify the suit as a class action, leaving Greisz as the sole party plaintiff, and so the offer was one of complete relief. She could, notwithstanding the offer, still appeal the denial of class certification …."); *Alpern*, 84 F.3d at 1538–41 (reversing order denying class certification where district court had subsequently entered judgment for plaintiffs' on individual claims); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)

[3] Even if not bound by its own precedent in *Abrams*, this Court would lack power to disregard the holdings of *Roper* and *Geraghty*. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

(deciding merits of appeal of order denying class certification when district court had, after denying certification, entered judgment based on an offer of complete individual relief);[4] *Zimmerman v. Bell*, 800 F.2d 386, 388–90 (4th Cir. 1986) (same).

In short, this Court's precedents, authoritative Supreme Court rulings, and a broad consensus among the courts of appeals demonstrate that a consent judgment providing a named plaintiff with complete individual relief does not bar the plaintiff, on mootness grounds or any other, from challenging an earlier order denying class certification by appealing the entry of judgment. This Court therefore must address the merits of the district court's certification order.

II. The District Court Erred in Denying Class Certification.

Although "ascertainability" is not a requirement of Federal Rule of Civil Procedure 23, the courts have widely held that class certification is appropriate only where the class definition describes an ascertainable class. *E.g.*, *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015). "Ascertainability" has traditionally meant that the class is defined using objective criteria. *E.g.*, *Stinson v.*

[4] *Rand* was overruled in part by the Seventh Circuit in *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015), in which that court, like this Court, correctly anticipated the ruling in *Campbell-Ewald* that an offer of complete relief does not moot a plaintiff's claim. But that fact only illustrates that even courts that erroneously regarded the individual plaintiff's claim as "moot" when a defendant offered complete relief still agreed that the plaintiff must be allowed to appeal an earlier denial of class certification.

City of New York, 282 F.R.D. 360, 367 (S.D.N.Y. 2012). Ascertainability in this sense is important for purposes of giving notice to class members and for determining who is bound by the judgment. Ascertainability does not mean, however, that each class member must be individually identifiable at the time of class certification. *Brecher*, 806 F.3d at 25 n.2 (quoting 1 *McLaughlin on Class Actions* § 4:2 (11th ed. 2014) ("The class need not be so finely described, however, that every potential member can be specifically identified at the commencement of the action; it is sufficient that the general parameters of membership are determinable at the outset.")). "The standard for ascertainability is not demanding. It is designed only to prevent the certification of a class whose membership is truly indeterminable." *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 312 F.R.D. 332, 353 (S.D.N.Y. 2015) (quoting *Stinson*, 282 F.R.D. at 373).

Here, because the parties have no list of called numbers, the district court found that it "would be unable to determine if any particular individual is a member of Leyse's proposed class." Appendix A-168. Stating that the class was therefore unascertainable, the court denied class certification. *Id.* Because the court misunderstood the ascertainability consideration, its order denying class certification should be reversed.

A. The class is ascertainable under the standard stated in *Brecher*.

In *Brecher*, this Court stated that "the touchstone of ascertainability is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'" *Id.* at 24 (quoting 7A Charles Alan Wright & Arthur R. Miller et al., *Federal Practice & Procedure* § 1760 (3d ed. 1998)). *Brecher* addressed a class that lacked objectively bounded membership. This Court first discussed a hypothetical class defined as "those wearing blue shirts." Such a class could not be certified, the Court explained, because, while defined by objective criteria, its membership would lack an objective temporal boundary: "the ever-changing composition of the membership would make determining the identity of those wearing blue shirts impossible." *Id.* at 25. The Court analogized that class to the class before it, defined to include all holders of transferable bonds. Because the bonds were not individually identifiable and could not be traced through sale, there was no objective way to draw a boundary around the class: in certain instances there was no distinction between a class member and a non–class member. *Id.* at 26 & n.4; *see also id.* at 26 ("The lack of a defined class period, taken in light of the unique

features of the bonds in this case, thus makes the modified class insufficiently definite as a matter of law.").[5]

Brecher thus indicates that class certification can be denied on ascertainability grounds where a class is "truly indeterminable," in that the class is objectively unbounded, *id.* (quoting *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014)), or "administratively infeasible," in that its determination requires "individualized mini-hearings," *id.* at 24. Here, by contrast, class membership is objectively bounded: members of the class, and only members of the class, received the Tim Gunn telephone call. Moreover, plaintiffs' proposal for determining class membership—submission of sworn affidavits subject to the claims administration process—does not involve individualized mini-hearings. Affidavits are a well-established and reliable form of proof in civil litigation and would be used in this case to determine class membership, not to establish liability, as they have been in other cases within the Second Circuit. *See, e.g.*, *Ebin*, 297 F.R.D. at 567 (certifying a class of product purchasers where affidavits would likely be used to establish membership).

[5] Some courts have stated that administrative feasibility is not part of the ascertainability analysis. *See Mullins v. Direct Dig., LLC*, 795 F.3d 654, 662 (7th Cir. 2015) (holding that the administrative feasibility of identifying individual class members should be considered as part of Rule 23(b)(3)'s superiority criterion rather than as a threshold issue of ascertainability); *see also Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015) (same). Although we agree with those courts, the point does not affect the outcome of this case.

The district court's apparent evidentiary concern is distinct from ascertainability, and it is appropriately deferred until after "settlement or judgment, when much more may be known about available records, response rates, and other relevant factors." *Mullins,* 795 F.3d at 664. Submission of "claim forms by oath or affirmation" may be required in some circumstances, while in other situations additional "substantiation of claims," such as invoices or other records, is appropriate. *Manual for Complex Litigation* § 21.66, at 331. In all cases, "documentation ... should be no more burdensome than necessary." *Id.* Accordingly, the appropriate "[a]udit and review procedures ... depend on the nature of the case." *Id.* at 332. Large-claim cases "might warrant a field audit to check for inaccuracies or fraud," *id.* (case citation omitted), medium-sized claims may be subjected to "random sampling" audit inquiries, and small claims may be accepted on the basis of the sworn claim forms alone, *id.* Moreover, the *Manual*'s endorsement comes in a discussion of implementation of class-action settlements, not in conjunction with "ascertaining" class members at the certification stage, which often comes first. *See also Byrd v. Aaron's Inc.*, 784 F.3d 154, 165 (3d Cir. 2015) (in a suit alleging damages from the installation of spyware on leased computers, reaffirming that "[t]he ascertainability inquiry is narrow").

This point underscores that where, as here, the class definition is clear, concerns about claims processing should not be used to scuttle class actions in their

infancy. Rather, those concerns should be considered in case-management orders or during the settlement process, when the court and the parties are best equipped to address potential fraud or inaccuracy.

B. The district court's approach to ascertainability would substantially limit the availability of class actions.

When a company exposes many people to the same unlawful practice, a class action is often the only effective way to redress the wrongdoing. As the Supreme Court has observed, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). "The policy at the very core of the class action mechanism is to overcome [this] problem … . A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* (quoting *Mace v. Van Ru Credit Corp.*, 109 F. 3d 338, 344 (7th Cir. 1997)). "The smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013). In such cases, class actions offer the only means for achieving individual redress and deterrence of wrongful conduct. *See* Judith Resnik, *From "Cases" to "Litigation,"* 54 Law & Contemp. Probs. 5, 14 (1991) (explaining that the primary drafter of Rule 23 believed the rule "provide[d]

means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all" (citation omitted)).

Because class actions are in many cases the only feasible means of vindicating substantive rights, the decision below offers companies a way to avoid accountability for unlawful practices: minimize recordkeeping. *See Mullins*, 795 F.3d at 668 (warning that "refusing to certify [based on risk of fraudulent affidavits] effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions"). As one court explained in a TCPA case, allowing the contours of a class to be defined by defendants' own recordkeeping—"or declining to certify a class altogether, as defendants propose—would create an incentive for a person to violate the TCPA on a mass scale and keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct." *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 250 (N.D. Ill. 2014); *see also Daniels v. Hollister Co.*, 113 A.3d 796, 801 (N.J. App. 2015) ("Allowing a defendant to escape responsibility for its alleged wrongdoing by dint of its particular recordkeeping policies … is not in harmony with the principles governing class actions.").

Although the corporate defendant will often be the best source of information for identifying class members, the defendant's failure to maintain records

need not thwart accountability. If the defendant has not maintained records—whether of telephone numbers called, of people who purchased its product, or of consumers targeted for debt collection—individual claim forms or affidavits may appropriately be used to establish class membership. *Cf. Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016) (explaining that in Fair Labor Standards Act cases, "[i]nstead of punishing 'the employee by denying him any recovery'" where the employer has failed to keep records, employee may present evidence sufficient to establish proof through "just and reasonable inference") (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)).

C. The decision below negates the rights of class members without advancing any legitimate countervailing interest.

The focus of the ascertainability inquiry is a clear class definition based on objective criteria. 1 *Newberg on Class Actions* § 3:2; 5 *Moore's Federal Practice* § 23.21[1]. Here, however, the court was not concerned with the class definition—"all persons to whose residential telephone lines Defendant, Lifetime Entertainment Services, LLC, or a third party acting on its behalf initiated, in August 2009, a telephone call using a prerecorded voice to deliver the [Project Runway] message"—but with its ability "to determine if any particular individual is a member of Leyse's proposed class." Appendix A-168. That concern, however, does not support denial of class certification for lack of ascertainability here, where the definition is clear and the plaintiff has proposed an administratively feasible

means of identifying members. The district court's approach would make it impossible for many people injured by deceptive marketing or defective products to obtain relief, would eliminate an important deterrent of illegal conduct, and yet would do nothing to protect the legitimate interests of absent class members or defendants.

1. First, the possibility of some inaccuracy in identifying class members poses no threat to absent class members. Due process is satisfied when notice is "reasonably calculated" to reach the defined class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *see* Fed. R. Civ. P. 23(c)(2)(B)(vi). And once that "reasonably calculated" notice is given, class members may be bound to any judgment. *Shutts*, 472 U.S. at 811–12. Moreover, Rule 23's notice provision incorporates due process concerns, by requiring the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The drafters of Rule 23 "openly debated whether [this language] was sufficient" to protect absent class members' rights, and "[t]hey selected a standard that would further the basic goal the drafters wished to achieve—to include people who could not necessarily 'be identified through reasonable effort' in litigation—without frustrating the Constitution's due process requirements." Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 Yale L.J. 2354, 2367, 2368 (2015) (citing Benjamin

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 394–96 (1967)). The rule thus "recognizes it might be *impossible* to identify some class members for purposes of actual notice," and it accepts this limitation. *Mullins*, 795 F.3d at 665.

Thus, the question is not whether every class member will actually receive notice, but whether class members can be notified of their opt-out rights consistent with due process. *See generally Dusenbery v. United States*, 534 U.S. 161 (2002) (due process requires attempt reasonably calculated to provide notice, not actual receipt of notice). They can. When class members' names and addresses are known, or are knowable with reasonable effort, notice generally is accomplished by first-class mail. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174–75 (1974). When that is not the case, courts use alternative means, such as notification through third parties, paid advertising, or posting in places frequented by class members. *See, e.g.*, *Hughes*, 731 F.3d at 677 (in a case involving the claims of ATM users individually valued at $1,000 or less, the court explained that the notice "effort [should be] commensurate with the stakes" and approved a notice plan consisting of "sticker notices on [the defendant's] two ATMs and publication of a notice in the principal Indianapolis newspaper and on a website" as "adequate in the circumstances"). The constitutional propriety of these alternative notice methods has been settled law for more than 60 years. *See Mullane v. Cent.*

Hanover Bank & Trust Co., 339 U.S. 306, 314-19 (1950); *see also Manual for Complex Litigation* § 21.311, at 292 (discussing forms of non-first-class-mail notice regularly approved by courts "when individual names or addresses cannot be obtained through reasonable efforts" and citing representative cases). Therefore, this case does not present any genuine concern about providing adequate notice to class members of their opt-out rights.

In *Carrera v. Bayer*, 727 F.3d 300 (3d Cir. 2013), the Third Circuit expressed concern that relying on affidavits to establish class membership would create "a significant likelihood … recovery will be diluted by fraudulent and inaccurate claims." *Id.* at 310.[6] But given claims rates in practice, "it is simply not true that compensation of uninjured parties affects the compensation interests of injured class members." Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305, 315 (2010), *cited in Mullins*, 795 F.3d at 667.

2. A heightened ascertainability requirement is likewise not needed to protect defendant Lifetime Entertainment. As noted above (*supra* p. 12), an ascertainable class enables courts to identify who is bound by a judgment and thus "to enforce the res judicata effect of final judgment" against the class. *See Carrera*,

[6] Although the opinion in *Carrera* seemed to adopt a heightened ascertainability requirement, Third Circuit has been careful to limit *Carrera* to its facts. *See In re Cmty. Bank of N. Va.*, 795 F.3d 380, 397 (3d Cir. 2015); *Byrd*, 784 F.3d at 165.

727 F.3d at 310. Where the class definition is imprecise, the problem is identifying who is bound by a judgment. Here, however, anyone who later tried to sue over this TCPA violation would necessarily fall within the class definition and be bound by res judicata, unless they could somehow collaterally attack the judgment on due process grounds. If the notice comports with due process, such an attack would be meritless.

Moreover, according to our research, there have been since the creation of Rule 23 only two successful collateral attacks on class-action judgments certified under Rule 23(b)(3): *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2nd Cir. 2001), *aff'd by equally divided court*, 539 U.S. 111 (2003), and *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1223–24 (11th Cir. 1998). Neither of these successful collateral attacks involved a problem in "ascertaining" who was in the class or an assertion that some class members' interests had been "diluted by fraudulent or inaccurate claims," a concern of the court in *Carrera*, 727 F.3d at 3101. For these reasons, class-action defendants have no legitimate concern that, absent an extension of the ascertainability requirement, they will face collateral attacks on class-action judgments to which they are parties.

The vanishingly small number of successful collateral attacks that have imposed costs on class-action defendants shows that the risk of future successful collateral attacks is itself vanishingly small. This number appears even smaller in

light of the number of class-action judgments potentially subject to collateral attack. That number is comparatively large, and many of those judgments, as would be the case here if the class action were settled or litigated to judgment, involve small "negative-value" claims arising under consumer protection, securities, and similar statutes that depend on the class-action device for their survival.[7] Given this large number of cases, if the concern about application of res judicata were correct, the courts would have been entertaining collateral attacks on class-action judgments for decades. Instead, there have been almost none.

In addition, although a defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage, this right is not impeded by use of affidavits to establish class membership, "subject as needed to audits and verification procedures and challenges, to identify class members." *Mullins*, 795 F.3d at 669. "The 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." *Id*. at

[7] *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Emp. L. Stud. 811, 813 (2010) (study showing "that district court judges approved 688 class action settlements" in 2006 and 2007); *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, NERA Economic Consulting (Jan. 25, 2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf (in federal securities class actions, federal district courts approved 108 class-action settlements in 2015).

670. In this case, aside from a rejected defense specific to the named plaintiff, the defendant relied on defenses common to the class. *See* Appendix A-171–72. As defendant's motion for summary judgment demonstrates, use of affidavits would present no obstacle to litigation of those defenses.

3. As discussed above, courts have tools to protect against mistaken or fraudulent claims. Courts "can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to take into account the size of the claims, the cost of the techniques, and an empirical assessment of the likelihood of fraud or inaccuracy." *Mullins*, 795 F.3d at 667 (citing *Manual for Complex Litigation* §§ 21.66–.661; *Newberg on Class Actions* § 12:20). If courts need to employ additional tools to police such claims in particular cases, those tools should not include an expanded ascertainability requirement at the class-certification stage, which would derail legitimate cases before the court has any idea whether fraud or inaccuracy is likely to be a problem. Rather, concerns about claims processing in consumer class actions should be addressed in case management orders. *See* Fed. R. Civ. P. 23(d).

CONCLUSION

The decisions below entering judgment for the plaintiff over his objection and denying class certification should be reversed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on July 21, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ .
Allison M. Zieve

CERTIFICATE OF COMPLIANCE

The brief complies with Fed. R. App. P. 32(a)(5)and (6); it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. This brief is 6,162 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

/s/ .
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