No. 19-4097

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION

ALBANY COUNTY, NY, NEGOTIATION CLASS'S CLASS REPRESENTATIVE; CO-LEAD NEGOTIATION CLASS COUNSEL; CO-NEGOTIATION CLASS COUNSEL,

Plaintiffs-Appellees,

v.

MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN DRUG CORPORATION; PRESCRIPTION SUPPLY, INC.; DISCOUNT DRUG MART, INC.; WALMART, INC.; WALGREEN CO.; CVS PHARMACY INC.; AND RITE AID OF MARYLAND, INC.,

Defendants-Appellants.

On appeal from the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 1:17-MD-2082
The Honorable Dan Aaron Polster

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

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT...2

I. Introduction...2

II. Rule 23 does not authorize creation of a "negotiation class." 4

A. Rule 23 permits creation of a class action to "adjudicate" a controversy or enter a final settlement to resolve a lawsuit; the negotiation class does neither. 5

B. The district court's order improperly rewrites Rule 23. 8

C. The district court lacked authority to expand the scope and purpose of Rule 23...10

III. The district court's ruling will distort class action litigation. 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) .... *passim*

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 11

Donovan v. Univ. of Tex.-El Paso,
643 F.2d 1201 (5th Cir. 1981) 5

In re Am. Med. Sys., Inc.,
75 F.3d 1069 (6th Cir. 1996) 3

In re Constar Int'l Inc. Sec. Litig.,
585 F.3d 774 (3d Cir. 2009) 2

In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.,
722 F.3d 838 (6th Cir. 2013) 4

Kern v. Siemens Corp.,
393 F.3d 120 (2d Cir. 2004) 11

Schneider v. Elec. Auto-Lite Co.,
456 F.2d 366 (6th Cir. 1972) 10

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 4

RULES

Fed. R. App. P. 29 2

Fed. R. Civ. P. 23 .... *passim*

Fed. R. Civ. P. 23(a) 5

Fed. R. Civ. P. 23(b)(1) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Fed. R. Civ. P. 23(b)(2) 6

Fed. R. Civ. P. 23(b)(3) 6

Fed. R. Civ. P. 23(e) 6, 8

OTHER AUTHORITIES

Black's Law Dictionary (11th ed. 2019) 6

Alison Frankel, *Opioid MDL judge[] OKs novel negotiating class as 'likely to promote global settlement'*, Reuters (Sept. 12, 2019) 13

Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders* (June 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834 .... 9, 12, 13, 14

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing the interests of approximately 300,000 direct members and indirectly representing the interests of more than three million businesses and organizations of every size, in every industry sector, and from every geographical region of the country. A central function of the Chamber is to represent the interests of its members in important matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases addressing issues of concern to the Nation's business community, and has repeatedly participated in cases in this Court and many others involving the meaning of Federal Rule of Civil Procedure 23.

There is no denying the magnitude of the opioid crisis in America. It is a devastating social and economic problem—one that deserves serious solutions. Although the dispute underlying this appeal concerns litigation relating to the opioid epidemic, the Chamber is not participating because of that subject matter. The Chamber has a substantial interest in the issue presented in this case because businesses in all sectors of the economy are affected by class actions, which may be uniquely expensive and time-consuming forms of litigation. The Chamber believes that the experience of its

members with these problems makes it well qualified to address the issues presented by the novel "negotiation class" certified by the district court in this case.[1]

ARGUMENT

I. Introduction

The "negotiation class" devised by the district court has no basis in Rule 23. As its plain language shows, Rule 23 provides a mechanism for conducting and terminating litigation by means of a verdict or settlement that results in a binding final judgment with preclusive effect. And given the magnitude of parties' interests on both sides of a class action, as well as the potential for abuse of the class action device, courts have repeatedly emphasized that the Rule's enumerated certification criteria must be applied rigorously: Certifying a class action "is an especially serious decision," *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009), that does not lend itself to "judicial inventiveness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). This rule has particular force in this case, as this Court has explained that "strict adherence to Rule 23 in products liability cases

[1] Pursuant to Fed. R. App. P. 29, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its counsel, or its members made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

involving drug or medical products which require FDA approval is *especially* important." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996) (emphasis in original).

The district court ignored that fundamental insight, however, expressly engaging in "creative thinking" and offering "an innovative solution: a new form of class action entitled 'negotiation class certification'" that rests on "a novel procedure." Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413579-413580. That was wrong. The duty of a district judge is not to devise "new form[s] of class action[s]"; it is to apply the terms of Rule 23, as they are written, to determine whether there is a certifiable class.[2] It may be admirable that the district court seeks to help "solve" the opioid crisis in America. But it is emphatically *not* the province of the judiciary to create new laws to solve societal problems—however dire and urgent.

The Chamber agrees with defendants that the district court's order exceeds the bounds of Rule 23 in several respects. Rather than restate those points, the Chamber writes to emphasize that certification of a negotiation

[2] The court made clear from the outset that its focus is on solving the opioid crisis, not adjudicating the case in "a traditional manner." Transcript, R. 58, Page ID # 410-413.

class would be irreconcilable with Rule 23's text, in a manner that would encourage abuse by litigants and that would distort class action practice.

II. Rule 23 does not authorize creation of a "negotiation class."

In providing a mechanism for conducting and terminating litigation by means of a verdict or settlement, the Rule sets forth criteria that must be rigorously applied to specific ends. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851 (6th Cir. 2013) ("Class certification is appropriate if the court finds, after conducting a 'rigorous analysis,' that the requirements of Rule 23 have been met.") (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)).

The district court's order creating a negotiation class, however, is fundamentally different in character from the usual class action procedure. It is a "new form of class action" that is specifically designed "to *promote* global settlement." Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413579-413580 (emphasis added). This is more than a "novel" or "innovative" application of an existing procedure; it *transforms* Rule 23 into a mechanism for "assisting parties in creating a settlement." *Id.* at Page ID # 413588. This use of the class action device has no foundation in the text, history, or policy of the Rule.

A. Rule 23 permits creation of a class action to "adjudicate" a controversy or enter a final settlement to resolve a lawsuit; the negotiation class does neither.

"It is undisputed that the purpose of Rule 23 is to prevent piecemeal litigation to avoid (i) a multiplicity of suits on common claims resulting in inconsistent adjudications and (ii) the difficulties in determining the res judicata effects of a judgment." *Donovan v. Univ. of Tex.-El Paso*, 643 F.2d 1201, 1206-07 (5th Cir. 1981). The history of the class action procedure confirms that it developed, in part, as a means to determine "the proper extent of the judgment …, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action." Fed. R. Civ. P. 23 advisory committee's notes to 1966 amendment.

The language of Rule 23 reflects this understanding. The Rule's text focuses on providing a mechanism for the court to resolve a case efficiently while entering judgment on the claims. It permits representative parties to "sue or be sued." Fed. R. Civ. P. 23(a). It defines the "[t]ypes of [c]lass [a]ctions" that may be certified, with particular focus on "adjudications" and entry of final judgments. Rule 23(b)(1) permits class actions if "prosecuting separate actions" would risk either (1) "inconsistent or varying adjudications" that "would establish incompatible standards of conduct for the party opposing the class" or (2) "adjudications" that would be dispositive of non-

parties' interests. *Id*. at 23(b)(1). Rule 23(b)(2) permits class actions where "final injunctive relief or corresponding declaratory relief is appropriate" for a class as a whole. *Id*. at 23(b)(2). And Rule 23(b)(3) allows creation of a class action in certain circumstances where it is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Id*. at 23(b)(3). Thus, each type of class is focused on adjudicating controversies and entering final relief.

Because an "adjudication" is "[t]he legal process of resolving a dispute; the process of judicially deciding a case," Black's Law Dictionary (11th ed. 2019), Rule 23 unmistakably is aimed at resolving litigation. Thus, even "the most 'adventuresome'" class actions—those under Rule 23(b)(3)—are certified "to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem Prods.*, 521 U.S. at 614-15 (citation omitted).

That Rule 23 also permits a court to certify a class for purposes of settlement in no way detracts from this point. *See* Fed. R. Civ. P. 23(e). A settlement ends a lawsuit—it is a means of resolving a claim. Black's Law Dictionary (11th ed. 2019) (defining "settlement" as "[a]n agreement ending a dispute or lawsuit"). Certification of a class for the purposes of entering a

settlement thus is a means of adjudicating, and resolving, a claim that results in a final judgment.

A negotiation class, however, is not adjudicatory in nature at all. The district court was clear on this point, explaining repeatedly that the "negotiation class" is a "voluntary mechanism developed to address the unique circumstances of this litigation" that the district court "hopes will directly or indirectly facilitate the voluntary, fair, adequate and reasonable resolution" of the claims before it. Order Certifying Negotiation Class and Approving Notice, R. 2591, Page ID # 413624-413625; *see* Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413581. Eschewing any direct relationship to the text of Rule 23, the court regarded this process as "an even more important judicial function" than resolution of a class action through certification of a settlement class. *Id.* at Page ID # 413587. And perhaps most strikingly, the court explained that, if the negotiation does not result in a settlement, the class is *not* certified for purposes of adjudicating the claims: "[T]he proposal is not for litigation or trial, but simply for settlement negotiations." *Id.* at Page ID # 413608; *see id.* at Page ID # 413606 n.8 ("since the Court is certifying the class solely for purposes of negotiation, [Seventh Amendment] concerns are not present.").

But creation of a complex, formal mechanism with judicial imprimatur under which the parties opposing the class are permitted, but not required, to negotiate is untethered from the Rule's language and purpose. Courts undoubtedly have a degree of discretion in determining how they encourage settlement negotiations (in class and individual actions). Congress, however, contemplated that Rule 23 will be used at the *end* of a successful settlement negotiation, not as a means to provide judicial oversight of negotiations or to *coerce* parties to the bargaining table. Thus, Rule 23(e) permits a "class proposed to be certified for purposes of settlement"—not *negotiation* of settlement. Fed. R. Civ. P. 23(e). In this regard, the Rule identifies the limited role in that process that is assigned to the court: it is to ensure that proper class notice is given and to decide whether to approve the settlement. *Id.*

Because the negotiation class does not—and is not intended to—facilitate the adjudication of claims or the entry of final judgment, it cannot be squared with the text and purpose of Rule 23.

B. The district court's order improperly rewrites Rule 23.

In thus departing from the purpose of Rule 23, the district court's order is a stark example of "judicial inventiveness" that avowedly seeks to transcend the Rule's plain terms in pursuit of novel policy goals. In fact,

that order—like the law review article upon which it is based—reads more like an innovative statute than a judicial decision that is resolving a concrete claim under existing law. The order sets out a lengthy list of "five stages" through which "[t]he negotiation class certification process unfolds." Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413582; *see id.* at Page ID # 413582-413584; Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders* (June 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834, at 28-29. To this end, it includes numerous procedural steps and substeps and addresses policy considerations that, the district court believed, showed that "negotiation class[es]" are a good idea. *See* Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413584-413588.

This disconnect of the negotiation class from ordinary practice is further suggested by the genesis of the idea in an article written by the very same people who serve as a special master and an expert witness in this case. *See id.* at Page ID # 413579 n.1. This is, to say the least, an unusual provenance for a rule of judicial decision.

The negotiation class devised in this case has goals that are largely similar to, and suffer from some of the same legal defects as, those of the

settlement class that the Supreme Court disapproved in *Amchem*. Like that attempted settlement class, the negotiation class in this case "evolved in response to a[] [mass tort]-litigation crisis" and "sought to achieve global settlement" of claims arising in that context. *Amchem*, 521 U.S. at 597. And as in that case, the novel Rule 23 procedure embraced by the district court here "is a matter fit for legislative consideration." *Id.* at 622.

But just as the Supreme Court explained of the analogous proposal in *Amchem*, however "sensibl[e]" a negotiation class mechanism might be, "Congress … has not adopted such a solution." *Id.* at 628-29. And needless to say, whatever the wisdom of the congressional choice, it is not a court's role to step in when Congress has declined to act.

C. The district court lacked authority to expand the scope and purpose of Rule 23.

The district court nevertheless opined that an expansive reading of the Rule's terms is appropriate because "Rule 23 is equitable in nature" and therefore should receive a "liberal application." Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413585-413586. The court purported to find support for this proposition in "myriad judicial decisions" that have applied Rule 23 liberally, although it cited just one: *Schneider v. Elec. Auto-Lite Co.*, 456 F.2d 366, 370 (6th Cir. 1972). Twenty-five years after issuance

of that decision, however, the Supreme Court disavowed "adventuresome" class action practice in favor of a rule requiring adherence to Rule 23's terms. *Amchem*, 521 U.S. at 618, 620, 625-29. Despite Rule 23's equitable lineage, the district court thus lacked "equitable powers" to depart from the Rule's stated requirements. *Kern v. Siemens Corp.*, 393 F.3d 120, 128 (2d Cir. 2004). Instead, "Rule 23 offers the *exclusive* route to forming a class action." *Id.* (citing *Amchem*, 521 U.S. at 620) (emphasis in original).

The district court also believed that certification of a negotiation class was authorized because "the text of Rule 23 does not dictate, nor therefore limit, the uses to which the class action mechanism can be applied." D Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413579-413585. But that approach gets matters backwards, flouting Supreme Court precedent. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotation marks and citation omitted).[3]

[3] The district court's departure from the Supreme Court's guidance is confirmed by the article that serves as the template for the district court's approach. That article dismissed the Supreme Court's holding in *Amchem* "that the standards for certification of a settlement class are, but for one

It is thus irrelevant that nothing in Rule 23 expressly *prohibits* negotiation classes, because nothing in the rule *authorizes* them. "[O]f overriding importance," the Supreme Court has instructed, "courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. … The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered[.]" *Amchem*, 521 U.S. at 620.[4]

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prong, the same as the standards for certification of a trial class *and* that these standards ought to be applied with more not less scrutiny at settlement," declaring that, notwithstanding the Supreme Court's holding, it is "accepted in practice that most courts undertake a more relaxed examination of the certification requirements for a settlement class." McGovern & Rubinstein, *supra*, at 35-36. Taking that result-oriented approach, the authors opined that an unopposed motion to certify a "negotiation class is likely to benefit from a similar bias" in favor of certification. *Id.* at 36. But casting aside the Supreme Court's on-point precedent is a very dubious basis for the district court's "innovative" approach.

[4] The district court found the argument that *Amchem* precludes the court's "creative thinking" unpersuasive because *Amchem* held that a settlement class was appropriate even though Rule 23 at the time did not expressly authorize it. Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413586. But this reasoning disregards that certification of a class for the purpose of entering a settlement serves Rule 23's purpose of resolving claims efficiently and with certain *res judicata* effect. As explained in text, a negotiation class does not do this.

III. The district court's ruling will distort class action litigation.

As might be expected in light of the ways in which the district court's order departs from the terms of Rule 23, the negotiation class mechanism would have numerous pernicious practical effects.

First, were the court's decision to take effect, it would serve as a template for future negotiation classes in all kinds of mass litigation. The authors of the study underlying the order sought to address what they characterized as a common problem that arises with frequency. *See* McGovern & Rubinstein, *supra*, at 9-18. And there can be no doubt that plaintiffs in other cases will seek approval of similar negotiation classes. The instant case is a massive, high-profile, multi-district litigation that is being followed closely across the country. If the district court's order stands, it surely will encourage burdensome class actions that would not otherwise be brought. As one knowledgeable observer has noted, this "negotiati[on] class" approach "could change the way major cases are litigated." Alison Frankel, *Opioid MDL judge[] OKs novel negotiating class as 'likely to promote global settlement'*, Reuters at 5 (Sept. 12, 2019).

Second, the negotiation class process would rewrite the rules of engagement between the parties to class actions, significantly disfavoring those who oppose the class. Certification of a negotiation class involves

court-approved organization of one set of parties to the lawsuit for purposes of obtaining a beneficial resolution from other parties; underlying this approach is the notion that, in crafting such classes, courts may well be prejudging the outcome of the litigation, determining that plaintiffs are entitled to a recovery and seeking some way short of an actual adjudication to effectuate that goal.

Indeed, the district court's order was constructed specifically to assist plaintiffs by facilitating their ability to negotiate and to favor a particular outcome in substantial mass tort litigations. As the law professors who formulated the negotiation class concept acknowledged, "[o]ne purpose of the negotiation class is to generate a negotiating bloc that can leverage its breadth to extract a meaningful lump sum settlement offer from a defendant." McGovern & Rubinstein, *supra*, at 30. *See* Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413580-413581, 413588.[5] This goal is inappropriate for the judiciary and finds no parallel in Rule 23 itself, which

[5] For this reason, the municipal plaintiffs are wrong when they maintain in their brief to this Court that the negotiation class mechanism is designed to benefit the defendants, giving them the "best" of "both worlds" and "offering them concessions that uniformly disadvantage the class." *In re Nat'l Prescription Opiate Litig.*, No. 19-4099, Br. of Plaintiffs-Appellants at 3. To the contrary, the avowed goal of the procedure is to "extract" a substantial settlement from the defendants.

authorizes the use of settlement classes but nowhere allows the court to reengineer the fundamental mechanics and incentives of settlement negotiation.

Third, as in this case, the use of loose and judicially invented certification criteria makes it possible for a negotiation class to be applied as a vehicle to circumvent Rule 23's requirements. For example, the district court's decision purported to certify a class for RICO claims and certain issues arising the federal Controlled Substances Act. Mem. Op. Certifying Negotiation Class, R. 2590, Page ID # 413605-413606. But the court did not limit the scope of the negotiations to only those issues, instead authorizing negotiations "on any of the claims or issues identified here, *or those arising out of a common factual predicate*." *Id.* at Page ID # 413617 (emphasis added). Thus, the court found that the requirements for class certification were satisfied for a subset of the issues in the multidistrict litigation, but then authorized the certified class to act with regard to a broader group issues, even if they do not meet the Rule's criteria. As the court acknowledged, "the whole process is more likely to promote global settlement[.]" *Id.* at Page ID # 413580.

Finally, even plaintiffs who have no expectation that a "negotiation class" will succeed in resolving the litigation may seek certification of such

classes, with the goal of having certification of a "negotiation class" ease subsequent certification of a trial or settlement class. This prospect—and the related danger that the certification even of a "negotiation class" that is sought in good faith will infect future trial and settlement class certifications if the "negotiation class" is unsuccessful in resolving the case—is a substantial one. The district court itself seemed to anticipate this problem, repeatedly stating that "no class member or any party, or counsel to a party, to this proceeding may cite this Order or the accompanying Memorandum Opinion as precedent or in support of, or in opposition to, the certification of any class for any other purpose in any opioids-related litigation." Order Certifying Negotiation Class and Approving Notice, R. 2591, Page ID # 413623.

But this assurance will be cold comfort to those who subsequently oppose certification of the members of this (or any future) "negotiation class" for trial or settlement purposes. Because, as we have noted, *Amchem* holds that the Rule 23 certification criteria (aside from those addressing trial management) are supposed to apply identically across all the circumstances in which they are applicable (*see* 521 U.S. at 620), determinations made in

the "negotiation class" context on matters such as adequacy and commonality may well be invoked in subsequent stages of the litigation, at best causing confusion and at worst leading courts into error.

And this element of the district court's decision highlights the ruling's odd and nonjudicial character. It is difficult to imagine other circumstances in which a court has declared that its decision may not to be cited by the parties in future related proceedings and is not intended to serve as precedent. For this reason as well, the holding below is a radical and improper departure from the ordinary application of Rule 23.

CONCLUSION

For these reasons, the district court's order certifying a negotiation class should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 5(c)(1) and 29(a)(5) because it contains 3,732 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in size 13.5 Century Schoolbook font.

Dated: February 14, 2019 /s/ *Andrew J. Pincus*

CERTIFICATE OF SERVICE

I certify that on February 14, 2020, I filed the foregoing via the CM/ECF system and the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: February 14, 2020 /s/ *Andrew J. Pincus*