United States Court of Appeals

for the

Third Circuit

Case No. 15-3931

CITY SELECT AUTO SALES INC., a New Jersey corporation, individually and as the representative of a class similarly situated persons,

Plaintiff-Appellant,

– v. –

BMW BANK OF NORTH AMERICA INC; BMW FINANCIAL SERVICES LLC; CREDITSMARTS CORP.

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY NO. 13-4595
THE HONORABLE NOEL L. HILLMAN

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GROCERY MANUFACTURERS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-3931

CITY SELECT AUTO SALES, INC., a New Jersey Corporation, individually and as the representative of a class of similarly situated persons,

v.

BMW BANK OF NORTH AMERICA, INC., BMW FINANCIAL SERVICES, NA, LLC, and CREDITSMARTS CORP.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, The Chamber of Commerce of the United States of America makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Jonathan D. Hacker
(Signature of Counsel or Party)

Dated: May 27, 2016

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

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If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, The Grocery Manufacturers Association makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Jonathan D. Hacker
(Signature of Counsel or Party)

Dated: May 27, 2016

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber 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. The Chamber represents 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, including cases addressing the requirements for class certification.

Many of the Chamber's members and affiliates are defendants in class actions. Accordingly, they have a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification before a class is certified. For the reasons explained below, reaffirming this Court's "ascertainability" principle—i.e., that class certification is inappropriate unless the plaintiff can demonstrate a reliable and administratively feasible method for identifying who falls within the class of individuals with a claim against the defendant—is critically important to Chamber members.

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

The same is true of amicus curiae the Grocery Manufacturers Association (GMA), a trade association representing more than 250 leading food, beverage, and consumer product companies. GMA and its member companies are committed to meeting the needs of consumers through product innovation, responsible business practices, and effective public policy solutions developed through a genuine partnership with policymakers and other stakeholders. Many of GMA's members are also defendants in class actions. Indeed, questions of ascertainability frequently arise in class actions involving consumer products and thus GMA and its members have a strong interest in this Court reaffirming that a class must be ascertainable before it may be certified.

INTRODUCTION AND SUMMARY OF ARGUMENT

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quotations omitted). When properly employed, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quotations omitted). Yet aggregate treatment is only appropriate if the major legal and factual questions in the case can be adjudicated

on a classwide basis. If individual issues predominate over common ones, the benefits of class adjudication are lost. Nor can courts simply ignore individualized issues in favor of efficiency. Class action defendants possess a fundamental due process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotation omitted). Where such defenses must be adjudicated individually for each class member, class treatment is inappropriate.

Federal Rule of Civil Procedure 23 was designed to accommodate and reflect both administrative efficiencies and due process. Most relevant here, Rule 23(b)(3) allows a class to be certified when (among other things) "questions of law or fact common to class members predominate over any questions affecting only individual members, and … a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Those preconditions are not satisfied, however, when a defendant's defenses—including as to unnamed plaintiffs that are purportedly members of the class—will result in individualized issues overwhelming common ones. In that circumstance, individualized adjudication of those defenses would destroy the efficiencies that class actions are meant to foster, whereas classwide adjudication would deprive defendants of their due process right to litigate their defenses.

Rule 23's fundamental principles lie at the core of this Court's

"ascertainability" jurisprudence. In some cases—including this one—it is simply not practicable to determine on a classwide basis which potential plaintiffs were injured by the defendant's allegedly unlawful conduct. This problem is particularly pronounced in cases involving low-cost consumer goods because consumers typically do not keep receipts or packaging years after their purchases, and manufacturers rarely maintain customer lists. Yet no one disputes that defendants must be afforded the right to test that each would-be plaintiff was actually injured by the defendant's conduct and thus has a claim.

In a series of cases, this Court has given effect to those due process and class-action principles through the ascertainability rule, under which the named plaintiff must (among other things) come forward with a reliable and administratively feasible method for identifying absent class members before a class can be certified. *See, e.g.*, *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015); *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175 (3d Cir. 2014); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

Although some have criticized this rule as a "heightened" and "freestanding" add-on to the textual requirements of Rule 23, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 664 (7th Cir. 2015), the rule in fact flows directly from Rule 23(b)(3)'s predominance and superiority requirements. Common issues of law and fact

cannot predominate over individualized issues when individualized assessments of the very existence of a claim overwhelm common questions. And a class action is not the superior method of adjudication when deciding whether each plaintiff has a claim *at all* unavoidably requires individualized mini-trials.

Others have contended that class membership can be established by simply allowing each potential plaintiff to provide an affidavit swearing that she was injured by the defendant's allegedly unlawful conduct. But unless the accuracy of such an affidavit is capable of verification on a classwide basis, this trial-by-affidavit approach either (i) deprives the defendant of a meaningful opportunity to test the accuracy of the claims against it or (ii) fails predominance and superiority because individualized mini-trials would be necessary to test each affidavit. Neither option is acceptable, which is why this Court requires, at a minimum, that the plaintiff develop a reliable "screening model" to corroborate the veracity of any affidavits. *Carrera v. Bayer Corp.*, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Smith, J., opinion sur denial of panel rehearing); *accord Carrera*, 727 F.3d at 311-12.

The Seventh Circuit in *Mullins* attempted a different solution to the ascertainability problem—district courts in that Circuit may now certify a class without any basis for determining the identity of absent class members, and delay

that identification process until after the class has been certified. But as with the affidavit approach, the Seventh Circuit's "kick the can down the road" solution is no solution at all. At best, it conflicts with the Supreme Court's admonition that class-certification questions must be resolved at the class-certification stage. At worst, it allows certification of class actions that cannot possibly be adjudicated to final judgment consistent with Rule 23 and, given the inexorable settlement pressure created by class certification, all but assures that defendants will *never* be allowed their due process right to test the existence of each plaintiff's claim.

This Court's ascertainability principle, in short, is compelled not only by fundamental due process principles, but by Rule 23 itself. The Court should reaffirm it in this case.

ARGUMENT

I. RULE 23(b)(3) AUTHORIZES CLASS CERTIFICATION ONLY WHERE THERE IS A PRACTICAL METHOD FOR CLASSWIDE ADJUDICATION THAT IS CONSISTENT WITH DUE PROCESS.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," and to justify a departure from this ordinary rule, the class plaintiff bears the burden of showing that classwide adjudication of claims is appropriate. *Dukes*, 564 U.S. at 348-49 (quotations omitted). Class treatment is only appropriate where the key questions

can be resolved "in the same manner [as] to each member of the class," *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979), "[f]or in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" *General Tel. Co.*, 457 U.S. at 155 (quoting *Yamasaki*, 442 U.S. at 701).

It is self-evident, however, that not every group of individual claims calls for class treatment. Where deciding the claims of a class will eventually "devolve into numerous mini-trials," a putative class action cannot satisfy the predominance or superiority requirements of Federal Rule of Civil Procedure 23, and the class may not be certified. *Marcus v. BMW of N. America, LLC*, 687 F.3d 583, 606 (3rd Cir. 2012). Nor can the need for such mini-trials be avoided by "sacrificing procedural fairness." Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment. In particular, a defendant has a due process right "to present every available defense." *Lindsey*, 405 U.S. at 66 (quotation omitted).

One such defense is that the plaintiff has no claim at all because he or she was never a class member to begin with. *See Lewis v. Casey*, 518 U.S. 343, 360 n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established."). For example, there is no doubt that, had this case been

brought as an individual action, the plaintiff would have to offer evidence, among other things, that it was injured by the defendant's conduct because it received one of the challenged faxes, and that the defendant would be allowed to challenge the plaintiff's proof. The same is true in a class-action, which is merely a procedural device "ancillary to the litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), that "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion); *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (same).

Indeed, Rule 23's "procedural protections" are grounded in "due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008), and were carefully crafted not only to allow plaintiffs to aggregate claims, but to protect defendants' due-process rights. Courts—including this one—have thus avoided reading the Rule in a manner that would deprive a defendant of its right "to litigate its . . . defenses to individual claims." *Dukes*, 564 U.S. at 367. "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera*, 727 F.3d at 307.

II. THIS COURT'S ASCERTAINABILITY REQUIREMENT FLOWS DIRECTLY FROM, AND IS COMPELLED BY, RULE 23(b)(3).

There is no plausible dispute about the above principles. The question is how to give them effect. The answer, as this Court has recognized in the past and as the district court recognized below, is to assure that there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *see also Byrd*, 784 F.3d at 163; *Carrera*, 727 F.3d at 307; *Marcus*, 687 F.3d at 593-94. That established rule follows directly from Rule 23(b)(3)'s express requirements.

A. This Court's "Ascertainability" Requirement Protects A Defendant's Right to Challenge Class Membership While Preserving The Benefits Of Class Adjudication.

This Court's "ascertainability" requirement appropriately preserves class-action efficiencies while protecting defendants' rights to challenge the basis for plaintiffs' assertion that they are members of the class. To satisfy ascertainability, the plaintiff must show that there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes*, 725 F.3d at 355. The plaintiff is *not* required to "identify all class members at class certification—instead, a plaintiff need only show that 'class members *can* be identified.'" *Byrd*, 784 F.3d at 163 (quotation omitted).

This requirement ensures that a defendant can exercise its due-process right to "test the reliability of the evidence submitted to prove class membership" on a classwide basis rather than through a series of mini-trials inconsistent with the class mechanism. *Carrera*, 727 F.3d at 307. By requiring the plaintiff to come forward with a workable and testable method for identifying absent class members, ascertainability "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action." *Marcus*, 687 F.3d at 593 (quotations omitted); *accord In re Nexium Antitrust Litig.*, 777 F.3d 9, 19-20 (1st Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).

Moreover, it is critical that the plaintiff be required to make this showing "at the class certification stage." *Carrera*, 727 F.3d at 307. The Supreme Court has made clear that key questions concerning class certification must be resolved *before* a class is certified. Accordingly, the Court has mandated that "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23" at the certification stage, and that courts "conduct a 'rigorous analysis' to determine whether" he has met that burden. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013) (quoting *Dukes*, 564 U.S. at 350-51)). And it is not enough for a plaintiff to *allege* that absent class members can be identified in an administratively feasible manner, because "plaintiffs wishing to

proceed through a class action must actually *prove*—not simply plead—that their proposed class" can be certified. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). Thus, "a party cannot merely provide assurances to the district court that it will later meet Rule 23's requirements." *Byrd*, 784 F.3d at 164.

This timing element has not only legal but practical significance—unless certification issues are addressed at the certification stage, they will likely never be addressed at all. As the Supreme Court has explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

This is why "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). Because "the certification decision is typically a game-changer, often the whole ballgame," for plaintiffs and defendants alike, *Marcus*, 687 F.3d at 591 n.2, a defendant's only meaningful opportunity to test the plaintiff's assertion that an

identifiable class exists—i.e., that each plaintiff that seeks a recovery against the defendant actually has a claim—is at the certification stage.[2]

B. This Court's Ascertainability Rule Is Simply A Specific Application Of The Predominance And Superiority Requirements Of Rule 23(b)(3).

While the Court has noted that this ascertainability rule protects important due process principles, there can be no doubt that the rule is compelled by the express provisions of Rule 23(b)(3)—which, as explained, is itself intended to safeguard those same principles.

Rule 23(b)(3) requires the plaintiff to show, at the class-certification stage, "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A plaintiff cannot possibly satisfy this burden without offering an administrable method of identifying would-be class members.

The predominance inquiry "tests whether proposed classes are sufficiently

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[2] This is particularly true for small businesses, who are responsible for "most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half of the nation's nonfarm, private real gross domestic product (GDP), as well as a significant share of innovations." U.S. Small Bus. Admin., *The Small Business Economy: A Report to the President* 1 (2009). Businesses subject to large class actions are forced to spend massive amounts of money on litigation and defense costs, *see infra* __, which small businesses can ill afford.

cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997), and ensures that class adjudication "achieve[s] economies of time, effort, and expense," Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment. And it is axiomatic that predominance is not satisfied, and a class cannot be certified, where each plaintiff's claims require "individual treatment." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (quotations omitted). A plaintiff at class certification must accordingly demonstrate that its claim "is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* at 311-12.

A plaintiff cannot satisfy predominance where there is no administratively feasible method for identifying class members, because the only way to test each plaintiff's claim to membership would be to conduct a series of individualized mini-trials as to whether each plaintiff has a claim in the first place. A plaintiff-by-plaintiff sideshow dedicated to determining who bought the precise product in question, or (in this case) received the challenged fax, would so overwhelm any common questions that the benefits of class adjudication would be lost entirely. *See, e.g.*, *Carrera*, 727 F.3d at 307 (noting the benefits of class adjudication would be "lost" if "extensive and individualized fact-finding or 'mini-trials'" were

required (quotations omitted)).

Indeed, this Court has already recognized that "the line dividing ascertainability from predominance is blurry." *Hayes*, 725 F.3d at 359. The Court has in the past drawn a distinction between the two inquiries on the view that "the ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort to mini-trials, whereas the predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence." *Id.* (internal citation omitted).

But even that distinction—between the elements of the class's claims and whether a particular plaintiff has a claim at all—is largely artificial, and certainly does not derive from Rule 23 itself. Whether a plaintiff has been injured by the defendant's conduct is a "question of law or fact" that must satisfy the predominance inquiry. Fed. R. Civ. P. 23(b)(3). Ascertainability is thus nothing more than a specific application of predominance that focuses on the injury element of the plaintiff's claim, i.e., whether each plaintiff was in fact subject to the allegedly unlawful practice. It thereby ensures that the most basic question in class litigation—have the class members suffered an injury?—is capable of generating a "common *answer[]*." *Dukes*, 564 U.S. at 350 (quotations omitted).

Ascertainability also gives effect to Rule 23's superiority requirement, i.e., that a class action "represent[s] the best available method for the fair and efficient adjudication of the controversy," with a view toward "the difficulties likely to be encountered in the management of a class action." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191 (3d Cir. 2001) (quotations and alteration omitted). A class without identifiable class members is hardly superior to individual litigation, because where "injury determinations must be made on an individual basis … , adjudicating the claims as a class will not reduce litigation or save scarce judicial resources." *Id.* at 192.

Many courts have reached the same conclusion. As one court explained, "[w]hether addressed under the heading of 'ascertainability' or 'manageability,' the fact remains that in order for a class to be certified, the proposed class must be both ascertainable in theory and readily identifiable (thus, administratively manageable) in fact." *Dumas v. Albers Med., Inc.*, 2005 WL 2172030, at *7 (W.D. Mo. Sept. 7, 2005); *see also, e.g.*, *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *16 (N.D. Cal. June 13, 2014) (Breyer, J.) ("Whether this is a predominance question, an ascertainability question, or a manageability question, it is also the case here that ConAgra has no way to determine … who the purchasers of its canned tomato products are, i.e., the identity of class members." (quotations

omitted)); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *13 (N.D. Cal. Jan. 7, 2014) (a class action is "plainly not a superior method of adjudication of the controversy" where the "plaintiff has not identified an ascertainable class").

This Court's precedents already suggest that a plaintiff cannot satisfy its burden to demonstrate predominance and superiority if absent class members cannot be identified without individualized fact-finding. *See Shelton v. Bledsoe*, 775 F.3d 554, 562 (3d Cir. 2015) (observing that ascertainability "ensures that the procedural safeguards necessary for litigation as a (b)(3) class are met" and holding that ascertainability is only required for class actions under Rule 23(b)(3)). Thus, to the extent the objection to the Court's ascertainability rule is that it is not required by Rule 23, that objection is simply wrong—this Court's existing precedent not only derives from, but is compelled by, the express requirements of Rule 23(b)(3).

III. TRIAL BY AFFIDAVIT AND CLAIMS-ADMINISTRATOR MINI-TRIALS ARE NOT LEGITIMATE SUBSTITUTES FOR PROPER ASCERTAINABILITY.

Some have suggested jettisoning this doctrine, and instead either relaxing the requirements of proof or delaying consideration until after certification. Neither proposal adequately safeguards a defendant's due process rights, or gives effect to

the requirements of Rule 23(b)(3).

A. Trial By Affidavit, Without More, Cannot Adequately Safeguard A Defendant's Right To Challenge Class Membership.

Plaintiffs—like the plaintiff here—often contend that these concerns can be addressed by allowing absent class members to self-identify through affidavits in which the potential class member simply asserts that she is a class member (for example, by asserting that she purchased the offending product). But allowing plaintiffs to assert a claim by affidavit does not solve the problems that animate the ascertainability rule. To the contrary, such an affidavit requirement *demonstrates* the problem, because the defendant would either (i) have to be given the opportunity to challenge the veracity of each affidavit, thus undermining the predominance and superiority requirements identified above, or (ii) be deprived of its fundamental due process right to challenge each claim against it.

Thus, as this Court has explained, "[f]orcing [defendants] to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications." *Marcus*, 687 F.3d at 594. Indeed, "[c]ourts have rejected proposals to employ class member affidavits and sworn questionnaires as substitutes for traditional individualized proofs" because such submissions are "not subject to cross-examination." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8.6 (12th ed. 2015).

This does not mean that there is a "records requirement" for certification. *Byrd*, 784 F.3d at 164. A plaintiff may still rely on affidavits to identify absent class members so long as he or she also "submit[s] a screening model specific to th[e] case that can reliably distinguish between accurate affidavits and fraudulent or inaccurate ones." *Carrera*, 2014 WL 3887938, at *3 (Smith, J., opinion sur denial of panel rehearing); *Carrera*, 727 F.3d at 311-12 (same). In this way, a defendant's due process rights are meaningfully protected, notwithstanding the use of conclusory affidavits, because the defendant retains the ability to "challenge the reliability of the screening model" to ensure that that only truthful affidavits are credited. *Carrera*, 2014 WL 3887938, at *3 (Smith, J., opinion sur denial of panel rehearing). Due process merely forbids the plaintiff from relying on affidavits alone. *Compare Byrd*, 784 F.3d at 169-70 (no ascertainability problem where public records could readily corroborate proposed affidavits identifying members of subclass)

The right to challenge such affidavits is acutely important in cases involving low-cost consumer goods, which, as noted, is where these issues most frequently arise. Oftentimes, the goods at issue are sold in packaging nearly identical to the packaging of lookalike competitors, or there may be brand extensions by the same manufacturer, with important but subtle differences between the two products.

Uncorroborated affidavits are especially unreliable in this context because putative class members often "will have difficulty accurately recalling their purchases" years after the fact. *Carrera*, 727 F.3d at 309.

Carrera illustrates the problem perfectly. That case involved a challenge to Bayer's marketing of the diet supplement WeightSmart. There was no dispute that class members were unlikely to have retained documentary proof of purchase and, because Bayer did not sell directly to consumers during the class period, it had no list of purchasers. The plaintiff suggested that class members could be identified through affidavits, but when the named plaintiff's contention that he had purchased WeightSmart was challenged at deposition, he could not remember if he purchased WeightSmart or a brand extension, WeightSmart Advanced, and he confused WeightSmart with other generic or similar product, none of which was part of the litigation. *Id.* at 304.

Or consider the following examples:

- In *Ault v. J.M. Smucker Co.*, consumers were asked to recall their purchases of cooking oils—but only those from specific brand extensions, and of those, only those with an "All Natural" label, which appeared on different brand extensions at different times. 310 F.R.D. 59 (S.D.N.Y. 2015)
- In *Bruton v. Gerber Products Co.*, consumers were asked to recall baby food purchases—but only those from specific brand extensions, and of those, only specific flavors, and of those, only the products sold in two particular packaging formats. 2014 WL 2860995 (N.D. Cal. June 23,

2014).

- In *True v. Conagra Foods, Inc.*, consumers were asked to recount purchases of frozen food—but only those sold in the 7-ounce single serving frozen size, and of those, only those with "P-9" or "Est. 1059" printed on the side of the package. 2011 WL 176037 (W.D. Mo. Jan. 4, 2011).

- In *In re Phenylpropanolamine (PPA) Products Liability Litigation*, consumers were asked to recall purchases of over-the-counter products containing the ingredient phenylpropanolamine–but not those containing pseudoephedrine. 214 F.R.D. 614 (W.D. Wash. 2003).

As these cases demonstrate, defendants often will have a strong defense to any particular class member's uncorroborated claim of membership. But litigating that defense through discovery and cross examination of hundreds or thousands of class members would eliminate the efficiencies of classwide adjudication.

To be sure, in small-dollar class actions like the ones above, plaintiffs may be less likely to go through the trouble of fabricating a claim. But a far more significant problem overshadows the specter of fraud. In cases concerning low-value purchases, it is the "vagaries of memory" that present the more pressing concern, including the pronounced risk of mistake inevitable with a claims process that invites class members to speculate about precisely *which* bottle of cooking oil or jar of baby food they bought years earlier. *In re Phenylpropanolamine*, 214 F.R.D. at 617; *see also Jones*, 2014 WL 2702726, at *10 ("Even assuming that all proposed class members would be honest, it is hard to imagine that they would be

able to remember which particular Hunt's products they purchased from 2008 to the present, and whether those products bore the challenged label statements."); *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010) ("[S]oliciting declarations from putative class members regarding their history of Snapple purchases would invite them to speculate, or worse.").

At its core, that is what the ascertainability requirement is all about. It ensures that a plaintiff's claim to recovery is based on something more than speculation or guesswork, and that courts do not paper over glaring defects in the plaintiff's assertion that classwide treatment is possible by allowing untested affidavits to prove membership in the class. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (noting that a "factfinder is not entitled to base a judgment on speculation or guesswork"). Both Rule 23 and due process demand as much.

B. Resolving Problems Of Ascertainability Cannot Be Deferred Until After The Class Has Been Certified Or Farmed Out To Claims Administrators.

The Seventh Circuit has recently adopted a different approach, under which a court may defer any assessment of a plaintiff's method for identifying class members until *after* the class is certified. *See Mullins*, 795 F.3d at 664. That approach conflicts with Rule 23 and due process principles, not to mention

Supreme Court precedent.

As a threshold matter, the Seventh Circuit's approach puts the cart before the horse by allowing courts to certify a class without knowing whether it will be possible to determine who will be in it or how the class's claims will be adjudicated. *Mullins* thus cannot be squared with the Supreme Court's repeated admonition that key questions concerning the propriety of class treatment must be resolved at the class-certification stage. *See, e.g.*, *Halliburton*, 134 S. Ct. at 2412; *Comcast*, 133 S. Ct. at 1432-33; *Dukes*, 564 U.S. at 350; *see supra* at __.

Moreover, the Seventh Circuit's approach invites a significant practical problem—delaying a defendant's due process right to challenge class membership until after a class has been certified all but assures that defendants will be deprived of that right altogether because of the tremendous settlement pressure imposed by the class certification order itself. *See supra* at __. *Mullins* suggests that "if a[n ascertainability] problem is truly insoluble, the court may decertify the class at a later stage of the litigation." 795 F.3d at 664. However, because few defendants can withstand the settlement pressure that results from certification of a class, there likely will not *be* a later stage of the litigation. Rather, a defendant will be pressured to settle meritless claims based on a class that does not satisfy the

requirements of Rule 23.[3]

The Seventh Circuit's response appears to be that the possibility of fraudulent or mistaken affidavits is "essentially [a] claim administration issue[]," more appropriately handled by claims administrators than Article III judges. *Mullins*, 795 F.3d at 667-68. That solution does not solve any of the due process or Rule 23 problems just described, because it does not require this showing to be made as a prerequisite to class certification. And in any event, the Seventh Circuit's claims-administration suggestion relies on sources concerning class *settlement* administration, *see id.* (citing *Manual for Complex Litigation* § 21.66-.661 (4th ed. 2004), and William B. Rubenstein, *Newberg on Class Actions* § 12:20

[3] The Seventh Circuit's approach—kicking the can down the road until after judgment—thus raises many of the same concerns as are present with a "fail-safe" class, i.e., one defined in terms of liability. *E.g.*, *Zarichny v. Complete Payment Recovery Servs., Inc.*, 80 F. Supp. 3d 610, 625-26 (E.D. Pa. 2015). In both a fail-safe class and a class where ascertainability problems are postponed, courts are asked to assume away plaintiff-specific differences at the class-certification stage—such as whether each plaintiff was subject to the challenged practice. Both mask individualized issues that would otherwise be contested if the action were brought as individual cases. This sleight of hand frustrates the provision of notice, implicates defendants' due process rights, and ultimately requires "mini-hearings on the merits . . . to determine class membership." *Kondratick v. Beneficial Consumer Discount Co.*, 2006 WL 305399, at *10 (E.D. Pa. Feb. 8, 2006). The Seventh Circuit's brusque dismissal that a class may be certified so long as it is defined in reference to "objective criteria" ignores the fact that, if those objective criteria must be subject to individualized fact-finding, the Rule 23 and due process problems discussed above are merely presented, not solved. *See, e.g.*, *Marcus*, 687 F.3d at 593.

(5th ed.))—a context in which the defendant *waives* the right to an Article III adjudication in exchange for a discount on the potential liability claimed by the plaintiff.

The question here, however, only arises in the context of a litigated class action. It should be obvious that depriving a defendant of an Article III adjudication of whether a plaintiff was injured by the defendant's conduct only exacerbates the due process problem, and certainly does not solve it. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (a district court's reliance on a non-Article III entity to adjudicate fundamental issues amounts to "an abdication of the judicial function depriving the parties of a trial before the court on basic issues involved in the litigation"); *Baezer East Inc. v. Mead Corp.*, 412 F.3d 429, 442 (3d Cir. 2005) (district court cannot refer "the basic issues to be tried" to a magistrate judge absent consent (quotation omitted)).

C. Policy Considerations Do Not Support Certifying A Class Where Its Members Cannot Feasibly Be Identified.

Objections to this Court's ascertainability jurisprudence appear to be driven principally by the worry that ascertainability may foreclose "individual redress" in cases involving low-value consumer goods and permits wrongdoing defendants to get off scot-free. *See* Appellant's Brief at 32, 35; *Byrd*, 784 F.3d at 176 (Rendell, J., concurring). But maintaining a robust ascertainability requirement will not (and

has not) spelled the end of the consumer class action—all ascertainability requires is an administrable mechanism for identifying absent class members. *See Byrd*, 784 F.3d at 169-70. These concerns are also not well founded, and certainly cannot justify jettisoning the due-process and Rule 23 protections addressed above.

The premise that certification of class actions involving low-cost consumer goods will benefit absent class members is dubious at best. As Congress found a decade ago, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(a)(3), 119 Stat. 4.

The available data regarding the distribution of class settlements confirm that absent class members benefit very little where they are not easily identified and thus direct notice is not feasible. For example, in connection with the settlement of a class action involving purchasers of Duracell batteries, the class settlement administrator explained that based on "hundreds of class settlements, it is [the administrator's] experience that consumer class action settlements with little or no direct mail notice will almost always have a claims rate of less than one percent." *See* Decl. of Deborah McComb ¶ 5, *Poertner v. Gillette Co.*, No. 6:12-

cv-00803 (M.D. Fla. Apr. 22, 2014).[4] The settlements reviewed involved products "such as toothpaste, children's clothing, heating pads, gift cards, an over-the-counter medication, a snack food, a weight loss supplement and sunglasses." *Id.* The median claims rate for those cases was a paltry ".023%"—which is roughly 1 claim per 4,350 class members. *Id*. If these cases are any guide, in the mine-run class action involving products for which class members are not readily identifiable and direct notice is legally impossible, approximately *99.98%* of class members receive *no benefit* at all.

These data were consistent with a recent study conducted at the request of the Chamber's Institute of Legal Reform, in which a team of lawyers undertook an empirical analysis of 148 consumer and employee class actions filed in or removed to federal court in 2009.[5] Of the six cases in the data set for which settlement distribution data was public, "five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%." *Id*. at 2.[6] At best, 88% of

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[4] *Available at* http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf.

[5] See Mayer Brown LLP, Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions (Dec. 11, 2013), *available at* http://www.instituteforlegalreform.com/resource/do-class-actions-benefit-class-members/.

[6] The sixth case was an outlier stemming from the Bernie Madoff Ponzi Scheme, where "each class member's individual claim was worth, on average, over $2.5

class members received no benefit, and absent class members are even less likely to make a claim where direct notice is not possible.

But while data suggest that absent class members are not seeing the benefits of class certification, particularly in cases where they are not easily identified, there is no doubt who is. Plaintiffs' lawyers are handsomely rewarded for class action settlements, notwithstanding these abysmal claims rates, "[s]ince attorneys' fees in class actions are often calculated as a percentage of the recovery." Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 122 (2014). And defense lawyers generate massive fees, as businesses subject to large class actions are forced to spend immense amounts of money on defense costs, which can soar into the tens of millions of dollars. *See, e.g.*, *The 2015 Carlton Fields Jordan Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015) (noting that in 75% of bet-the-company class actions, "the cost of outside counsel exceeds $5 million per year per case").[7]

The ripple effects of these lawsuits are felt throughout the economy, harming businesses *and consumers* alike. Litigation costs and settlement payouts

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million," *id.* at 10-11 & n.20, thus distinguishing that case from the small-dollar consumer class action discussed here.

[7] *Available at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf.

are ultimately passed along, at least in part, to consumers in the form of higher prices, to employees in the form of lower wages, and to investors in the form of lower returns. The irony of all this is that these attempts to save low-value claims only make it more difficult to deliver low-priced goods. *See, e.g.*, *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974) ("Whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute.").

Nor is certifying a class whose members cannot be identified the only way—or even the best way—to deter alleged wrongdoing. In most cases involving low-value consumer goods, the federal or state regulatory apparatus will be better suited to that task. Take the cases discussed above. *See supra* ___. Each involved a product regulated by the Federal Food and Drug Administration ("FDA"), which has a broad mandate to ensure that food and drug labels are accurate and do not mislead consumers. Indeed, one of the principal goals of the federal food labeling legislation is "to provide national uniformity" in labeling standards,while allowing "industry to conduct business in an efficient and cost-effective manner." 58 Fed. Reg. 2462, 2465 (Jan. 6, 1993) (citing 136 Cong. Rec. H12954 (1990)). Entrusting the FDA with maintaining that balance would be far more efficient than permitting

myriad class actions raising the issue one product at a time—and with the potential for different litigation outcomes leading to different rules governing product labels in different states—and sometimes, even within the same state. *See, e.g.*, *Sethavanish v. ZonePerfect Nutrition Co.*, 2014 WL 580696, at *5 n.5 (N.D. Cal. Feb. 13, 2014) (noting the "other means of curbing … false and misleading labeling," including FDA regulation, or suits by the State attorney general or a city attorney).

The same is true here. Congress created numerous avenues for enforcement of the TCPA, including suits by states attorneys general in which the Federal Communication Commission ("Commission") may intervene. 47 U.S.C. § 227(g). "The TCPA [also] envisions civil actions instituted by the Commission for violations of the implementing regulations" and allows the Commission to "seek forfeiture penalties for willful or repeated failure to comply with the Act or regulations." *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 746 n.4 (2012) (citing 47 U.S.C. §§ 227(g)(7), 503(b), 504(a)).

But in any event, policy arguments can provide no excuse for relaxing the requirements of Rule 23(b)(3). As this Court has repeatedly explained, a judicial policy preference for class action litigation "'is insufficient to overcome the hurdles of predominance and superiority and efficient and fair management of a

trial, which Rule 23(b) requires.'" *Newton*, 259 F.3d at 191 (quoting *In re LifeUSA Holding Inc.*, 242 F.3d 136, 148 n.13 (3d Cir. 2001)); *see also* 28 U.S.C. § 2072(b); *Dukes*, 564 U.S. at 367. This is true even where "each individual claim is so small that only a class action will provide a remedy." *Newton*, 259 F.3d at 191; *cf. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (Rule 23's "stringent requirements" cannot be "dispensed with" based on the "prohibitively high cost of compliance" (quotations omitted)). "[P]olicy arguments" about "the desirability of the small-claim class action" are best addressed to the legislature, not the courts. *Coopers*, 437 U.S. at 470. And in the meantime, fundamental principles of class-action law and due process recognized by the Supreme Court and this Court require maintaining this Court's ascertainability requirement.

Not only are these policy concerns inadequate justification for discarding the ascertainability principle, but a robust ascertainability rule will help prevent class action abuse, which is rampant in the consumer class action context. While this case happens to involve a claim brought under the TCPA, a frequent class action target is the labeling of consumer packaged goods, including everything from

shampoo to potato chips.[8] While many of these so-called false labeling cases are ultimately frivolous, an entire cottage industry has arisen of plaintiffs' attorneys who bring such cases in the hopes of obtaining class certification and then extracting a settlement.

Between 2008 and 2012, for instance, the number of consumer fraud class actions brought in federal court against food and beverage companies skyrocketed from 19 to more than 102.[9] Hundreds of food and beverage class action complaints have since been filed, often featuring serial plaintiffs bringing cookie-cutter claims or plaintiffs recruited online, each with (unlike this case) potential damages of only a few dollars each. The lure of large settlements and steep attorneys' fees are the principal driver of these cases. As Congress concluded a decade ago, the class-action device is often used to drive "settlements in which the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves." S. Rep. 109-14 (2005) (Class Action Fairness Act).

As explained, consumer class actions are often where ascertainability

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[8] Greg Trotter, *Lawsuits challenging food labels on the rise, but are they good for consumers?*, Chicago Tribune (May 6, 2016), http://www.chicagotribune.com/business/ct-food-labeling-lawsuits-0506-biz-20160506-story.html.

[9] Jessica Dye, *Food companies confront spike in consumer fraud lawsuits*, Reuters (June 13, 2013), http://suistainability.thomsonreuters.com/2013/06/14/food-companies-confront-spike-in-consumer-fraud-lawsuits/.

concerns are most pronounced. And so conscientious application of the ascertainability requirement is an essential tool in preventing abuse of the class action.

CONCLUSION

The district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Jonathan D. Hacker, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

By: /s/ Jonathan D. Hacker
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1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because this brief contains 6,744 words—no more than half the length of the parties' principal briefs—excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 29.1(b).

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/s/ *Jonathan D. Hacker*
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CERTIFICATE OF SERVICE

I certify that on this 27th day of May, 2016, the foregoing was served on all parties or their counsel of record through the CM/ECF system.

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