No. 15-

IN THE
Supreme Court of the United States

DIRECT DIGITAL, LLC,

Petitioner,

v.

VINCE MULLINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To certify a class under Federal Rule of Civil Procedure 23, the class must be "ascertainable." This requirement has been adopted by every Circuit to consider it. A plurality of the circuits holds that to satisfy ascertainability, the plaintiff must show that class membership can be ascertained through reliable and administratively feasible methods. Two circuits, including the Seventh Circuit in this case, reject that requirement and hold that it is enough to simply define the class by objective criteria, even if those criteria cannot actually be used to ascertain membership. The question presented is:

May a court certify a class under Federal Rule of Civil Procedure 23(b)(3) where the plaintiff fails to make any showing of a reliable and administratively feasible means for ascertaining class membership?

CORPORATE DISCLOSURE STATEMENT

Petitioner Direct Digital, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

We've all been there: standing in the pharmacy, feeling a cold coming on, scanning a couple dozen options—different brands, different active ingredients, different dosages within brands, combinations of Echinacea, Vitamin C, and Zinc. Eventually, you settle on one and take it periodically during cold season. Now fast forward two years. Your colleague tells you that she has just joined a class action she learned about on the internet alleging that a company sold an Echinacea product with only a trace amount of the active ingredient in it. She sends you a link to a simple online opt-in form. But do you remember what you chose that day? You didn't hang onto the receipt and you haven't the foggiest idea what happened to that bottle from two winters ago. Do you remember what brand it was? Which product? Whether or when you got sick that winter, and how bad your symptoms were?

In many consumer class actions filed in the federal courts, plaintiffs seek to certify classes whose claimed membership would be determined based on nothing more than a consumer's vague recollections. In the absence of proof of purchase or other records showing who purchased what product and when, plaintiffs suggest that class membership can be established through self-identifying affidavits—simple boilerplate recitations, untested by cross-examination, that claim a place in the class. And inevitably, of course, this method carries not only the risk of foggy memory, but can also tempt outright fraud. If such claims were brought individually, a defendant would have a due process right to test whether the plaintiff actually purchased the defend-

ant's product. That fundamental right cannot be compromised for the convenience of class plaintiffs and their counsel.

A plurality of the federal courts of appeals agrees. Led by the Third Circuit, they recognize that a class cannot be certified under Rule 23 unless its membership is truly "ascertainable." This plurality requires a plaintiff to make a basic showing that class membership can be ascertained in a manner that is reliable and administratively feasible, and to do so at "an early practicable time" after a person sues, as Rule 23 contemplates. As the Third Circuit has explained, the methods proposed by the class plaintiff must be reliable because "[f]orcing [a defendant] 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 v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012); *see Carrera v. Bayer Corp.*, 727 F.3d 300, 303-05 (3d Cir. 2013). And they must be administratively feasible because that is the whole point of class adjudication—"[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Marcus*, 687 F.3d at 593. This simple showing thus ensures class members are ascertainable in a way that is consistent with due process and the goals of class adjudication. And, it does so *before* a class is certified and before the action is sent hurtling toward a settlement that forces the defendant to abandon meritorious defenses or a trial that could threaten the defendant's very existence.

But two circuits recently rejected that approach. Here, the Seventh Circuit certified a class of all individuals who purchased a health supplement called Instaflex, without requiring class plaintiff Vince Mullins to make *any* showing that these individuals could actually be ascertained in a feasible and reliable manner. The court explicitly acknowledged the other circuits that would require such an ascertainability showing, but chose to reject their approach.

The Seventh Circuit's decision leaves Petitioner Direct Digital facing potentially huge damages from the certified class, with no assurances that it will ever be able to test whether any of the would-be class members actually purchased Instaflex. The only winner, of course, is not the class members—who stand to recover little, if they can be identified at all—but class *counsel*—who has now been handed extraordinary leverage to negotiate a settlement and its fee.

The divide sparked by the Seventh Circuit has only deepened since. Less than a month after the Seventh Circuit decided this case, the Sixth Circuit too declined to require any showing of a reliable and feasible method for ascertaining class members. *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015). And dozens of district courts across the country have waded into the debate, generating mass confusion in the class action bar concerning the proper standard. This intractable conflict on a frequently recurring question calls for this Court's review.

The Seventh Circuit's minority approach not only conflicts with the plurality of its sister circuits, it

also conflicts with this Court's recent precedents, and undermines class action defendants' due process rights. In recent cases—most notably *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013)—this Court has insisted on a "rigorous" Rule 23 analysis prior to certification. The Seventh Circuit ignores that directive. In doing so, it defers any opportunity for the defendant to challenge the appropriateness of a class action until after settlement or trial, which is far too late in the day to matter. Rule 23's conditions are "grounded in due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)—they cannot be so easily cast aside. And certainly they cannot be cast aside, as the Seventh Circuit did, based on a judicial policy preference in favor of exempting small-dollar consumer class actions from Rule 23's standards.

Finally, this case is an ideal vehicle for resolving the question. The Seventh Circuit clearly rejected any requirement of a meaningful showing of ascertainability prior to certification. It relied on no alternate ground—indeed, Mullins did not offer one—and made no attempt to distinguish the rules of other circuits. This case is therefore an ideal opportunity for this Court to resolve whether Rule 23's ascertainability requirement entails a showing at the certification stage that class members can be ascertained in a fair and reliable manner. This Court should grant the petition and hold that it does.

OPINIONS AND ORDERS BELOW

The court of appeals' opinion (Pet. App. 1a-41a) is reported at 795 F.3d 654 (7th Cir. 2015). The dis-

trict court's order granting-in-part and denying-in-part Mullins's motion for class certification (Pet. App. 42a-50a) is not published in the *Federal Reporter* but is available at 2014 WL 5461903 (N.D. Ill. Sept. 30, 2014).

JURISDICTION

The court of appeals entered judgment on July 28, 2015. Pet. App. 1a. On August 18, 2015, the court of appeals granted Direct Digital's motion to stay the mandate pending this Court's review. *Mullins v. Direct Digital LLC*, 15-1776 (7th Cir.), D.E. 29. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

This case involves Federal Rule of Civil Procedure 23(b)(3) and Rule 23(c)(1)(A), which are reproduced at Pet. App. 51a-52a.

STATEMENT OF THE CASE

Mullins Files A Consumer Class Action Against Direct Digital.

Vince Mullins says that in the Fall of 2012, he began to experience occasional "discomfort in [his] knees" brought on by jogging. 4R160-63.[1] Mullins did not seek medical treatment. But, Mullins says, he remembered that his former college roommate had

[1] Citations to the record before the Seventh Circuit, *Mullins v. Direct Digital LLC*, 15-1776 (7th Cir.), D.E. 5, begin with volume number, followed by "R," followed by page number.

"mentioned" a supplement called "glucosamine" while "talking about working out." 4R169-70. The roommate had said that glucosamine helps with "cartilage repair or … stiffness." *Id*. So, sometime around "February 2013"—Mullins does not remember the date—he went to a nutrition store to purchase a glucosamine supplement. 2R49.

Direct Digital, LLC markets and sells a supplement called "Instaflex Joint Support" ("Instaflex"). 4R33. Instaflex is designed to relieve joint discomfort through a formula combining glucosamine with other ingredients. 4R33-34. The "Joint Support" supplement is not the only Instaflex-brand supplement Direct Digital markets—for example, there is also "Instaflex Bone Support," "Instaflex Muscle Support," and "Instaflex Multivitamin." 4R34. These products are sold throughout the country at dozens of third-party brick-and-mortar retailers, like GNC, Walgreens, Vitamin Shoppe, Rite Aid, and Duane Reade. 4R33. And these retailers typically sell their different brands of supplements right next to one another. *E.g.*, 4R167. It would thus be common to see a retailer shelve other glucosamine-based supplements right next to Instaflex. Unsurprisingly, many of these supplements have similar names, like "Tri-Flex," "TripleFlex," or "Osteo Bi-Flex," and are packaged similarly. 4R34.

Mullins says that he remembers purchasing Instaflex from a GNC. 4R167. He recalls that there were about "10 to 15" other options on the shelves. *Id.* Mullins, however, has no proof of purchase. He did not save the receipt. He has no credit card record because he claims that he paid with cash. 4R175-76. He has no other evidence confirming the purchase.

Nor did he tell anyone that he bought Instaflex. There are no medical records even suggesting that he has any condition, let alone a prescription or indication that Mullins would or did use Instaflex to treat it. 4R176. He does not even have the bottle that he claimed to have purchased; he says that two weeks after—in February 2013—he discarded it. 4R177.

Around the beginning of March of 2013, Mullins received a phone call from an old family friend named Joe Siprut. 4R185. Siprut is a lawyer who specializes in bringing class actions. 4R186. Siprut "mentioned" to Mullins that he was "looking at different cases regarding glucosamine and asked if [Mullins] had taken any in the past." *Id.* Mullins said that he had taken Instaflex. *Id.*

Days later, on March 8, 2013, Mullins, represented by Siprut, filed this action seeking to assert a class action against Direct Digital. 1R5-19. The complaint alleged that statements on Instaflex's product packaging—for example, that Instaflex is "scientifically formulated" to "relieve discomfort"—are not true. 1R10. Mullins, on behalf of all others similarly situated, claimed that these statements violate the Illinois Consumer Fraud Act. 1R14-15.

The District Court Certifies A Class And The Seventh Circuit Affirms.

Mullins moved to certify a class of "[a]ll consumers in Illinois and states with similar laws, who purchased Instaflex within the applicable statute of limitations." Pet. App. 43a. Direct Digital opposed, arguing, among other things, that Mullins had failed

to satisfy Rule 23(b)'s ascertainability requirement. Citing authority from the Third and Eleventh Circuits, Direct Digital maintained that Mullins's proposed class could not be certified because he had made no showing that the members of the class could be feasibly and reliably ascertained. Pet. App. 45a-47a.

In response, Mullins did not attempt to show that his proposed class could be identified at all, let alone feasibly and reliably. Instead, he argued that the court should certify his class as long as the class was defined by "objective criteria"—even if there was no way of actually applying those criteria to ascertain class membership in a manner that is both reliable and feasible. The district court accepted Mullins's argument and certified a multi-state damages class. Pet. App. 50a. Its two-sentence ascertainability analysis contained no finding as to whether the membership of the class could be feasibly identified or reliably confirmed. Pet. App. 46a.

The Seventh Circuit granted Direct Digital's request to appeal the district court's class certification decision under Rule 23(f). After full briefing and argument, the court of appeals affirmed. The court recognized that Rule 23(b)(3) carries an ascertainability condition "requir[ing] that classes be defined clearly and based on objective criteria." Pet. App. 7a. The court also acknowledged the authorities from the Third and Eleventh Circuits, requiring not just "objective criteria" defining the class, but also "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." Pet. App. 13a (quoting *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir.

2015)). The court, however, expressly rejected that rule.

In rejecting the ascertainability requirement imposed by the other circuits, the Seventh Circuit held that a class plaintiff has no obligation at the class certification stage to show that class members could be feasibly and reliably ascertained. Pet. App. 14a. Instead, the court held, a district judge should certify the class, and then "normally should … wait and see how serious the problem may turn out to be *after* settlement or judgment," attempting to solve any issues of class member identification then. Pet. App. 18a-19a (emphasis added). The court believed that requiring a plaintiff to show before trial that class members could be feasibly and reliably ascertained was too burdensome to do before trial, and should not be imposed prior to certification. Pet. App. 14a-15a.

Direct Digital now petitions for review.

REASONS FOR GRANTING THE WRIT

I. This Case Presents A Recurring Question That Has Intractably Divided Lower Courts Across The Country.

This case presents the Court with an opportunity to resolve the established circuit conflict over whether a court can certify a class under Rule 23, even where a plaintiff makes no attempt to show that the class members can be ascertained through feasible and reliable means. A plurality of the courts of appeals—led by the Third Circuit—requires the plaintiff to demonstrate that the putative class is not only

objectively definable in theory, but also feasibly and reliably ascertained.

The Seventh Circuit in this case, joined recently by the Sixth Circuit, expressly rejected the plurality's requirement of such a showing. They hold that a class can be certified without any showing that the membership of the class can be ascertained in a manner that is both as reliable as a defendant would be entitled to in an individual action and as efficient as would justify class adjudication. District courts are also intractably divided on this question. The conflict can be resolved only by this Court's review.

A. "The 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*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To justify a departure from the ordinary rule, the class plaintiff bears the burden of showing that class-wide adjudication of claims is appropriate. *Id.* The conditions for making this showing are contained in Rule 23. This Court has recognized Rule 23's "procedural protections" as "grounded in due process." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008).

As a threshold matter, all courts agree in some sense that a class should not be certified unless its membership is ascertainable.[2] This stands to reason.

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[2] *See Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012); *Little v. T–Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012); *John v. Nat'l Sec. Fire & Cas. Co.*, 501

Rule 23(c)(1)(B) requires that a certification order "define the class." In order to evaluate whether that class satisfies Rule 23's other requirements—commonality, for example, or predominance—a court must be able to determine whom and what the class purports to represent. *See Simer v. Rios*, 661 F.2d 655, 687 (7th Cir. 1981); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam); William B. Rubenstein, *Newberg on Class Actions* § 3.2 (5th ed. 2015). That is, the "class must be currently and readily ascertainable." *Newberg on Class Actions* § 3:2 (5th ed. 2015).

According to the leading treatises on class actions, the ascertainability requirement has two related components. One is that plaintiffs must define their proposed class using "objective criteria." *Newberg on Class Actions* § 3.3; Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (11th ed. 2014); 5 James Wm. Moore et al., *Moore's Federal Practice* ¶ 23.21[1]; 7 Wright & Miller, *Federal Practice and Procedure* § 1760 at p. 582). A class defined by refer-

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F.3d 443, 445 (5th Cir. 2007); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006); *Crosby v. Social Sec. Admin. of the U.S.*, 796 F.2d 576, 580 (1st Cir. 1986); *Simer v. Rios*, 661 F.2d 655, 687 (7th Cir. 1981); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x. 782, 787 (11th Cir. 2014) (unpublished); *Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 41-42 (1st Cir. 2009); William B. Rubenstein, *Newberg on Class Actions* § 3:3 (5th ed. 2015) (a "class must be currently and readily ascertainable"); Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (11th ed. 2014).

ence to, for example, class members' state of mind would fail this requirement because state of mind is not an objective fact that could be applied to ascertain whether a purported class member belongs. *See, e.g.*, *Simer*, 661 F.2d at 669-70 (7th Cir. 1981).

The second component—and the one at issue in this case—requires that the plaintiff show an "administratively feasible" method for reliably identifying class members without requiring "much, if any, individual factual inquiry." *Newberg on Class Actions* § 3:3. If, for example, individualized mini-trials are necessary to determine class membership, the purposes of class adjudication would be frustrated, and class certification would be inappropriate.

Thus, the proper ascertainability standard requires that before a class is certified, the plaintiff must (a) define the class with objective facts, and (b) show that these objective facts can actually be applied, consistent with the administrative efficiencies expected from a class action, to reliably ascertain class membership.

B. The clearest articulation of this standard can be found in a trilogy of Third Circuit cases: *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); and *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

The latest of the three, *Carrera*, illustrates the standard as it has developed in the Third Circuit. In *Carrera*, plaintiff Carrera alleged that Bayer falsely claimed its dietary supplement enhanced metabolism. 727 F.3d at 304. Despite the unavailability of

any documentary proof of purchases, the district court certified the class. *Id.* On appeal, Bayer contested certification on the basis that class members were not ascertainable. *Id.* at 303. Carrera countered by arguing two ways the court could ascertain the class: (1) class members could submit affidavits attesting to their purchase of the supplement, and (2) those affidavits could be screened to identify potentially fraudulent claims. *Id.* at 304. The court of appeals held that the putative class was not ascertainable and vacated its certification. *Id.* at 312.

The Third Circuit began its analysis by recognizing the longstanding certification requirement that a class "be currently and readily ascertainable based on objective criteria." *Id.* at 305 (quoting *Marcus*, 687 F.3d at 593). It recognized that this requirement, like all other Rule 23 requirements, "mandates a rigorous approach at the outset" of any class action suit. *Id.* at 306-07 (citing *Wal-Mart*, 131 S. Ct. at 2551 and *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

The court of appeals then further explained the basis for the rule: "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." *Id.* at 307. That right, moreover, includes the ability "to challenge the proof used to demonstrate class membership." *Id.* At the same time, the method chosen to guarantee that opportunity must also preserve "the efficiencies expected in a class action." *Id.* at 305 (citation omitted). If it would necessitate "individualized fact-

finding or mini-trials," class adjudication of claims would simply not be appropriate. *Id.*

Carrera's showing could not pass muster. Because there were no purchase or other records to ascertain class members, he proposed ascertaining class claimants purely by the claimants' own affidavits. *Id.* at 309. But the reliability of such affidavits was seriously in question because of the high likelihood that many class members "w[ould] have difficulty accurately recalling their purchases of WeightSmart," or worse, might be deliberately untruthful. *Id.* In that context, the court of appeals concluded that Carrera's proposed method was not sufficiently reliable and would not safeguard Bayer's right to challenge class membership. *Id.*

Other Circuits have followed the Third Circuit's rule. The Eleventh Circuit recently applied the Third Circuit's ascertainability analysis in *Karhu v. Vital Pharmaceuticals, Inc.*, No. 14-11648, 2015 WL 3560722, at *2-4 (11th Cir. June 9, 2015) (unpublished). In *Karhu*, the plaintiff alleged that he had purchased a dietary supplement in reliance on defendant's false advertising. *Id.* at *1. The court affirmed the district court's decision that the proposed class was not ascertainable: "A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Id.* at *3; *see also Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782, 788 (11th Cir. 2014) (holding that the class should not be certi-

fied because the plaintiffs had not shown how class members could be feasibly ascertained).

The Fourth and First Circuits have imposed similar requirements as well. The Fourth Circuit explained in *EQT Production Co. v. Adair* that "[it] ha[s] repeatedly recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" 764 F.3d 347, 358 (4th Cir. 2014) (citation omitted). The *EQT* court also cited the Third Circuit trilogy, signaling its accord. *Id.* Meanwhile, in *In re Nexium Antitrust Litigation*, despite certifying the class, the First Circuit explained the need to ensure at the certification stage that the mechanisms for substantiating a would-be claimant's bona fides be "'administratively feasible,' and protective of defendants' Seventh Amendment and due process rights." 777 F.3d 9, 19 (1st Cir. 2015) (quoting *Carrera*, 727 F.3d at 307); *see also Crosby v. Soc. Sec. Admin. of U.S.*, 796 F.2d 576, 580 (1st Cir. 1986) (noting that a "description of [a] class must be sufficiently definite so that it is administratively feasible to determine whether a particular individual is a member"). And numerous district courts have expressly followed the Third Circuit's standard, too.[3]

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[3] *E.g.*, *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3-4 (N.D. Ill. Feb. 25, 2015); *Bobryk v. Durand Glass Mfg. Co.*, 50 F. Supp. 3d 637, 644 (D.N.J. 2014); *Stewart v. Beam Global Spirits & Wine, Inc.*, No. CIV. 11-5149 NLH/KMW, 2014 WL 2920806, at *2-4 (D.N.J. June 27, 2014); *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *8-11 (N.D. Cal. June 13, 2014), *appeal docketed*, No. 14-16327 (9th Cir. July 15, 2014); *In re POM Wonderful*

C. Within the last few months, two circuits have rejected the plurality's approach to ascertainability. The first is the Seventh Circuit in this case. As detailed above, Mullins, the class plaintiff, claims to remember that he purchased Instaflex, a glucosamine-based supplement, from a shelf with 10 to 15 other glucosamine-based supplements. *Supra* 5-7. But he claims to have paid in cash and to have thrown away his receipt, so he has no record or other proof of the purchase. He cannot even produce the bottle he asserts he bought. His own membership in the class is thus based entirely on his word and recollection.

When Direct Digital questioned whether there was a feasible and reliable method for ascertaining class members, Mullins responded that none was necessary—that it was perfectly fine to have an entire class with members identified by their own say-so. The district court agreed and granted certification. Direct Digital appealed, insisting that before a class was certified, the district court should have examined whether there was a feasible and reliable

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LLC, No. ML 10-02199 DDP RZX, 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014); *Clark v. Bally's Park Place, Inc.*, 298 F.R.D. 188, 194 (D.N.J. 2014); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at *5-6 (N.D. Cal. Feb. 13, 2014); *Adami v. Cardo Windows, Inc.*, 299 F.R.D. 68, 85 (D.N.J. 2014); *see also Stalley v. ADS Alliance Data Sys., Inc.*, 296 F.R.D. 670, 677-80 (M.D. Fla. 2013), *appeal docketed*, No. 14-10872 (11th Cir. Feb. 28, 2014) ("The Court is not convinced by [plaintiffs'] assertion that the proposed class here is sufficiently defined. The Court has not been presented with reasonable methods for ascertaining the identity of [class] individuals.").

method for ascertaining class members such that Direct Digital would have a fair opportunity to challenge class membership. *Supra* 7-9.

The Seventh Circuit affirmed the certification of the class. It acknowledged that the ascertainability requirement is "well-settled" generally, but held it merely requires that the class "be defined by objective criteria." Pet. App. 2a. The Seventh Circuit expressly rejected the requirement that plaintiffs must show a "reliable and administratively feasible way" to ascertain those who fall within the sweep of the class definition—a requirement that the court labeled a "heightened" version of ascertainability. *Id.* at 11a. The Seventh Circuit further acknowledged the various courts applying *Carrera* and the policy considerations underlying those decisions, but it held that the requirement of showing a "reliable and administratively feasible way" to ascertain class members was too onerous. *Id.*

A few weeks later, the Sixth Circuit joined the Seventh Circuit in *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015). There, the plaintiff purchased defendant's probiotic nutritional supplement, and upon finding that it "did not work as advertised," sued defendant for violations of various state unfair or deceptive practices statutes. *Id.* at 502. The district court certified the proposed classes. *Id.* Defendant appealed on several grounds, including an argument that the proposed class was not ascertainable because plaintiffs "failed to demonstrate that there is a 'reliable' and 'administratively feasible' method for identifying the class members." *Id.* at 524 (citation omitted). The Sixth Circuit affirmed, seeing "no reason to follow *Carrera*," particularly in

the wake of the Seventh Circuit's rejection of it in this case. *Id.* at 525 (citing *Mullins*, 795 F.3d 654, 672 (7th Cir. 2015)).

In addition to these two circuit decisions, several district courts have also rejected the Third Circuit's ascertainability standard, choosing instead to require only a class definition based on objective criteria.[4]

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[4] *See, e.g.*, *Daniels v. Hollister Co.*, 440 N.J. Super. 359, 368, 113 A.3d 796, 801 (App. Div. 2015); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 337 n.11 (D. Mass. 2015), *appeal pending*; *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 237-40 (N.D. Cal. 2014); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 564-67 (C.D. Cal. 2014); *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014) ("It appears that pursuant to *Carerra* in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, *Carerra* prohibits certification of the class. While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit."); *see also Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2014 WL 6815779, at *4 (N.D. Cal. Dec. 3, 2014); (articulating *Carrera*'s standard—"A class is ascertainable if the class is defined with 'objective criteria' and if it is 'administratively feasible to determine whether a particular individual is a member of the class.'"—but applying only the "objective criteria" portion of the test, with no regard for the "administrative feasibility" of identifying class members—"[I]t is enough that the class definition describes a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description.") (citations omitted); *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK MRWX, 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014) ("The requirement of an ascertainable class is met as long as the class can be defined through objective criteria." (quoting *Guido v. L'Oreal,*

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In sum, the Third Circuit—joined in substantial part by the First, Fourth, and Eleventh Circuits and a host of district courts—properly read Rule 23 to require a class action plaintiff to show at the certification stage not only that a class can be defined through objective criteria, but also that the class members can be feasibly and reliably ascertained. Meanwhile, the Seventh and Sixth Circuits and an equal share of district courts have declined to recognize such a meaningful ascertainability requirement. The high number of cases addressing this important issue, especially in recent years, underscores the need for the Court's guidance.

II. The Approach Taken By The Seventh And Sixth Circuits Conflicts With This Court's Recent Precedents On Class Certification And Undermines Fundamental Due Process Interests.

That the question presented here arises so frequently is no surprise. For a consumer retailer facing a proposed class action suit, it is vital to be able to test the bona fides of the class prior to certification. In its recent cases applying Rule 23, this Court has demanded that district courts apply a "rigorous

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USA, Inc., Nos. 11-1067, 11-5465, 2013 WL 3353857, at *18 (C.D. Cal. July 1, 2013)) (internal quotation marks omitted)); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) ("[T]he ascertainability difficulties, while formidable, should not be made into a device for defeating the action."), *reconsideration denied*, No. 13 CIV. 2311(JSR), 2014 WL 1301857 (S.D.N.Y. Mar. 19, 2014).

analysis" at the certification stage to any question that goes to whether "all [a proposed class's] claims can productively be litigated at once." *See Wal-Mart*, 131 S. Ct. at 2551; *Comcast*, 133 S. Ct. at 1432. In refusing to consider *before* certification whether a feasible and reliable means to test class membership exists, the Seventh and Sixth Circuits ignore this Court's directives. Worse still, their rule threatens to eviscerate class action defendants' due process rights. These shortcomings further merit this Court's review.

A. This Court is well aware of the dynamics driving class action litigation. As it has explained, whether to certify a class under Rule 23 "is often the most significant decision rendered in … class-action proceedings." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). That is because, "[w]ith vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 98-99 (2009); *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (stating that certification "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of 'in terrorem' settlements that class actions entail ….''). So once the class plaintiff has moved to certify a class, it is often

now-or-never for a defendant wishing to challenge defects in the class action.

This is more than just a matter of litigation strategy. It is a fundamental due process issue. Due process guarantees a defendant "an opportunity to present every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972), including, say, a challenge to whether an individual claiming that she purchased the defendant's product actually did. No one questions that, in an individual proceeding, the defendant would have a full opportunity to do so. That opportunity cannot be compromised in the name of the efficiencies of class adjudication. *See Wal-Mart*, 131 S. Ct. at 2561 ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims."). In fact, the Rules Enabling Act bars any application of Rule 23 that would "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). And, of course, Rule 23 itself is "grounded in due process." *Taylor*, 553 U.S. at 901.

This Court's recent cases underscore the crucial role Rule 23 plays in safeguarding a defendant's due process rights. In *Wal-Mart*, the Court emphasized that "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must *affirmatively demonstrate* his compliance with the Rule." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added). District courts, for their part, must perform a "rigorous analysis" to guarantee such compliance. *Id.* And, consistent with the notion that the class certification stage may be a defendant's most meaningful chance to test the viability of the class action, this Court has recognized that "frequently that 'rigorous

analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Id.*

Comcast Corp. v. Behrend illustrates these principles in action. There, the issue was whether certification of a class of Comcast cable subscribers was appropriate under Rule 23(b)(3), which requires that questions common to the class "predominate over any questions affecting only individual members." 133 S. Ct. at 1430. At the certification stage, Comcast maintained that a class could not be certified because the class plaintiffs' theory of antitrust injury was flawed, and because application of a sound model would require individual damages calculations that would predominate over common issues. *Id.* at 1431, 1436. The Third Circuit, in affirming the district court's certification of a class, declined to consider Comcast's argument. *Id.* In its view, Comcast's "attac[k] on the merits of the [damages] methodology [had] no place in the class certification inquiry." *Id.* (quoting *Behrend v. Comcast Corp.*, 655 F.3d 182, 207 (3d Cir. 2011)).

This Court reversed. It faulted the court of appeals for "refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification." *Id.* at 1432. And, undertaking a review of that methodology, it found that "respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis." *Id.* at 1433. *Comcast* thus stands for the broad proposition that a defendant's due process interest in testing individual claims cannot be sacrificed at the altar of class action convenience. This does not, of course, require the class plaintiff to prove each individual claim on the merits at the cer-

tification stage. But it absolutely requires the plaintiff to show that these individual claims are amenable to class adjudication—that they can be resolved together in a way that is more efficient than individual resolution, but that also honors the defendant's due process interests.

This Court's concerns in *Wal-Mart* and *Comcast* are precisely what animate the requirement at issue here. In scores of consumer class actions filed each year in the federal courts, just as in this case, the potential members of the class will almost uniformly lack any proof that they purchased the product at issue. *See supra* 5-7. And the defendant will not have a comprehensive record of particular purchasers either, likely because its products are sold by third-party retailers. If any of these class members sued the defendant individually, no one would question the defendant's right to challenge whether the individual in fact purchased the product that purportedly caused the harm alleged—whether this requires discovery, depositions, direct testimony, cross-examination, and so forth. *Carrera*, 727 F.3d at 307 ("If this were an individual claim, a plaintiff would have to prove at trial he purchased [the product]."). So in a class action, the plaintiff must make a showing at the certification stage that the defendant will be able to do the same, with the same level or reliability, but also with the administrative feasibility that makes a class action appropriate. *Id.*

To be clear, just as *Comcast* doesn't require the court to resolve the merits of claims at the certification stage, no one is suggesting that a plaintiff must *actually identify* class members by name at the class certification stage. *See id.* at 308 n.2. The modest as-

certainability requirement at issue here is hardly draconian, and, contrary to the Seventh Circuit's suggestion, will in no way "bar[] low-value consumer class actions," Pet. App. 15a. Rather, a plaintiff need only show that class members *can* be identified in a manner consistent with class adjudication goals and a defendant's due process rights. As the Third Circuit has put it, however, "[a] plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership." *Carrera*, 727 F.3d at 307 (citation omitted). The bottom line is this: Defendants have a right to test individual claims, and if that right cannot be honored while still achieving the efficiency promised by the class action mechanism, a class action is simply not appropriate.

B. The decision below conflicts with this Court's recent class action precedents and undermines class action defendant's due process rights.

1. First, the Seventh Circuit ignored the requirement of a "rigorous" inquiry at the certification stage into the appropriateness of class adjudication. *Wal-Mart*, 131 S. Ct. at 2550-51; *Comcast*, 133 S. Ct. at 1432. It acknowledged that there will be cases in which "it may be challenging to identify particular class members," Pet. App. 18a, and it allowed that there is a "risk of mistaken or fraudulent claims," *id.* at 26a. Yet it thought that "a district court … normally should … wait and see how serious the problem may turn out to be after settlement or judgment." *Id.* at 18a-19a. Thus, it deferred any opportunity to challenge even the feasibility and reliability of a method of ascertaining class members

until the claims administration stage and, indeed, after trial. *Id.* at 26a-27a, 36a.

This certify-first-ask-questions-later model is inconsistent with Rule 23 and this Court's precedent. Rule 23(c)(1)(A) demands that a court consider "whether to certify the action"—including, by implication, all the necessary requisites—"[a]t an early practicable time." And *Wal-Mart* and *Comcast* both make absolutely clear that all issues going to the appropriateness of class adjudication must be considered at the certification stage. *Supra* 21-23. By declining to require *any* showing before certification that class members can be ascertained in a reliable and feasible manner, the court's ruling here effectively eliminates the ascertainability requirement, turning it into "a mere pleading standard," *Wal-Mart*, 131 S. Ct. at 2551. This Court has flatly rejected this approach.

2. Second, the court of appeals improperly gave short shrift to a class action defendant's due process interest in being able to ascertain the class membership in a manner that is reliable, feasible, and efficient. It paid lip service to "[a] defendant['s] due process right to challenge the plaintiffs' evidence at any stage of the case." Pet. App. 31a. But it nevertheless thought that "so long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant during the claims administration process, its due process rights have been protected." *Id.* at 35a.

Hardly. As we have explained, once a court certifies a class, a defendant faces the risk of massive lia-

bility. *Supra* 20-21. Given the pressures to settle post-certification and abandon even meritorious defenses, the opportunity to raise challenges to class adjudication early on is key. The notion, advanced by the *Mullins* court, that "if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation" is unrealistic. Pet. App. 19a. By that point, a defendant will often have been forced to settle as a result of the enormous leverage the district court handed the plaintiffs instead of conducting the rigorous analysis this Court has demanded, or will have suffered a verdict that will put the defendant out of business.

It is no answer that a defendant has no "due process right to a *cost-effective* procedure for challenging every individual claim to class membership." Pet. App. at 31a (emphasis in original). This attempts to address the due process problem—superficially at best, as just explained—but creates another. A class action is appropriate only to the extent it "saves the resources of both the courts and the parties" by allowing an aggregation of similar claims "to be litigated in an economical fashion." *Falcon*, 457 U.S. at 155 (citation omitted). As the Third Circuit explained, "[i]f class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate." *Carrera*, 727 F.3d at 305 (citation and internal quotation marks omitted). So even if it were true that a defendant's *due process interests* were satisfied by thousands of mini-trials during claims administration, it does not follow that *Rule 23* is satisfied. And indeed it should not be, lest consumer class actions turn into little more than a vehicle for attorney-fee driven settlements.

Nor is the Seventh Circuit's ruling justified by its policy concern that requiring a feasible and reliable means of ascertaining class members "effectively bars low-value consumer class actions." Pet. App. 15a. To begin with, notwithstanding the familiar doomsday rhetoric, the Seventh Circuit itself allows that consumer class actions are alive and well "where plaintiffs … have documentary proof of purchases." *Id.* And, more fundamentally, a judicial policy preference in favor of class action litigation is neither a basis for excusing smaller-dollar claims from the requirements of Rule 23, nor a valid ground for trampling defendants' due process rights. *Cf. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (rejecting notion that Rule 23 should be relaxed on account of "prohibitively high cost of compliance") (citation and internal quotation marks omitted).

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Because the Seventh Circuit's decision conflicts with this Court's precedent and ignores important due process interests, this Court should intercede.

III. This Case Is An Ideal Vehicle For Resolving The Question Presented.

Finally, this Court should grant the petition because this case is a perfect vehicle for resolving the question. The Seventh Circuit concluded simply and squarely that Rule 23's ascertainability standard does not require a defendant to make *any* showing of a reliable and administratively feasible mechanism for identifying class members "at an early practicable time," Fed. R. Civ. P. 23(c)(1)(A). Pet. App. 26a.

Neither the Seventh Circuit nor the district court rested its decision on alternative grounds or on fact-bound issues peculiar to the record in this case. And the Seventh Circuit flatly acknowledged that its ruling split from the Third and Eleventh Circuits and the many district courts that have followed that approach, without attempting to distinguish those cases. *Id.* at 3a-4a, 11a-15a & n.2. The result in this case therefore turns on this split. The clean ruling and posture make this case an ideal one for review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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October 26, 2015

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VINCE MULLINS, on behalf of himself and all others similarly situated,	No. 15-1776 D.C. No. 3:12-cv -05109-SI
Plaintiff-Appellee.	OPINION
v.	
DIRECT DIGITAL, LLC, a Delaware Limited Liability Company,	
Defendant-Appellant.	

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13 CV 1829 — **Charles R. Norgle**, *Judge*.

ARGUED JUNE 3, 2015
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DECIDED JULY 28, 2015

Before: BAUER, KANNE, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. We agreed to hear this appeal under Federal Rule of Civil Procedure 23(f), which permits interlocutory review of orders granting or denying class action

certification, to address whether Rule 23(b)(3) imposes a heightened "ascertainability" requirement as the Third Circuit and some district courts have held recently. See, e.g., *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). In this case, the plaintiff alleges consumer fraud by the seller of a dietary supplement, and the district court certified a plaintiff class. The court found that the proposed class satisfies the explicit requirements of Rule 23(a) and (b)(3), and the court rejected defendant's argument that Rule 23(b)(3) implies a heightened ascertainability requirement.

We affirm. We and other courts have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind. In addressing this requirement, courts have sometimes used the term "ascertainability." They have applied this requirement to all class actions, regardless of whether certification was sought under Rule 23(b)(1), (2), or (3). Class definitions have failed this requirement when they were too vague or subjective, or when class membership was defined in terms of success on the merits (so-called "fail-safe" classes). This version of ascertainability is well-settled in our circuit, and this class satisfies it.

More recently, however, some courts have raised the bar for class actions under Rule 23(b)(3). Using the term "ascertainability," at times without recognizing the extension, these courts have imposed a new requirement that plaintiffs prove at the certification stage that there is a "reliable and

administratively feasible" way to identify all who fall within the class definition. These courts have moved beyond examining the adequacy of the class definition itself to examine the potential difficulty of identifying particular members of the class and evaluating the validity of claims they might eventually submit. See *Byrd v. Aaron's Inc.*, 784 F.3d 154, 168 (3d Cir. 2015) (distinguishing between our circuit's standard and the Third Circuit's ascertainability requirement).

This heightened requirement has defeated certification, especially in consumer class actions. See, e.g., *Karhu v. Vital Pharmaceuticals, Inc.*, — F. App'x —, 2015 WL 3560722, at *2–4 (11th Cir. June 9, 2015) (purchasers of dietary supplements); *Carrera*, 727 F.3d at 307–12 (purchasers of dietary supplements); *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1089–90 (N.D. Cal. 2011) (Marlboro smokers); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *12–13 (S.D.N.Y. Aug. 5, 2010) (purchasers of Snapple beverages). All of these classes would seem to have satisfied the established meaning of "ascertainability." See generally Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305 (2010) (describing recent cases).

We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes. The policy

concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3). These existing requirements already address the balance of interests that Rule 23 is designed to protect. A court must consider "the likely difficulties in managing a class action," but in doing so it must balance countervailing interests to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." See Fed. R. Civ. P. 23(b)(3).

The heightened ascertainability requirement upsets this balance. In effect, it gives one factor in the balance absolute priority, with the effect of barring class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase. These are cases where the class device is often essential "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997), quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997); see also *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014) (reversing denial of class certification: "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all"), quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)

(affirming certification of class with millions of members).

I. *Factual and Procedural Background*

Plaintiff Vince Mullins sued defendant Direct Digital, LLC for fraudulently representing that its product, Instaflex Joint Support, relieves joint discomfort. He alleges that statements on the Instaflex labels and marketing materials—"relieve discomfort," "improve flexibility," "increase mobility," "support cartilage repair," "scientifically formulated," and "clinically tested for maximum effectiveness"—are fraudulent because the primary ingredient in the supplement (glucosamine sulfate) is nothing more than a sugar pill and there is no scientific support for these claims. Mullins asserts that Direct Digital is liable for consumer fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, and similar consumer protection laws in nine other states.

Mullins moved to certify a class of consumers "who purchased Instaflex within the applicable statute of limitations of the respective Class States for personal use until the date notice is disseminated." The district court certified the class under Rule 23(b)(3).

Direct Digital filed a petition for leave to appeal under Rule 23(f) arguing that the district court abused its discretion in certifying the class without first finding that the class was "ascertainable." Direct Digital also argued that the district court erred by concluding that the efficacy of

a health product can qualify as a "common" question under Rule 23(a)(2). We granted the Rule 23(f) petition primarily to address the developing law of ascertainability, including among district courts within this circuit. See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (granting an appeal is appropriate to "facilitate the development of the law" governing class actions).[1]

We review the grant or denial of a motion for class certification for an abuse of discretion, e.g., *Harper v. Sheriff of Cook County*, 581 F.3d 511, 514 (7th Cir. 2009), but a decision based on an erroneous view of the law, such as imposing a new requirement under Rule 23(b)(3), is likely to be an abuse of discretion. E.g., *Ervin v. OS Restaurant Services, Inc.*, 632 F.3d 971, 976 (7th Cir. 2011) ("If, however, the district court applies an incorrect legal rule as part of its decision, then the framework within which it has applied its discretion is flawed, and the decision must be set aside as an abuse.").

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[1] Compare *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3–4 (N.D. Ill. Feb. 25, 2015) (favorably citing *Carrera* and denying certification), with *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417–18 (N.D. Ill. 2012) (rejecting stringent version of ascertainability and certifying class); see also *Balschmiter v. TD Auto Finance LLC,* 303 F.R.D. 508, 514 (E.D. Wis. 2014) (noting "a dearth of case law from this circuit on the requirement" of ascertainability and discussing Third Circuit precedent); *Harris v. comScore, Inc.*, 292 F.R.D. 579, 587–88 (N.D. Ill. 2013) (favorably citing Third Circuit precedent adopting heightened ascertainability but also the district court opinion in *Carrera*, which was later vacated by the Third Circuit).

II. *Analysis*

A. The Established Meaning of "Ascertainability"

We begin with the current state of the law in this circuit. Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria. See William B. Rubenstein, *Newberg on Class Actions* § 3:3 (5th ed. 2015); Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (11th ed. 2014); see, e.g., *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 139 (1st Cir. 2012); *Bakalar v. Vavra*, 237 F.R.D. 59, 64 (S.D.N.Y. 2006); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam). When courts wrote of this implicit requirement of "ascertainability," they trained their attention on the adequacy of the class definition itself. They were not focused on whether, given an adequate class definition, it would be difficult to identify particular members of the class.

This "weak" version of ascertainability has long been the law in this circuit. See *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 495 (7th Cir. 2012) ("It's not hard to see how this class lacks the definiteness required for class certification; there is no way to know or readily ascertain who is a member of the class."); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006) (class definition "must be definite enough that the class can be ascertained"); accord, *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) ("In summary, the proposed class of plaintiffs is so highly diverse and so difficult

to identify that it is not adequately defined or nearly ascertainable.").

The language of this well-settled requirement is susceptible to misinterpretation, though, which may explain some of the doctrinal drift described below. To understand its established meaning, it's better to focus on the three common problems that have caused plaintiffs to flunk this requirement.

First, classes that are defined too vaguely fail to satisfy the "clear definition" component. See, e.g., *Young v. Nationwide Mutual Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) ("There can be no class action if the proposed class is amorphous or imprecise." (citation and internal quotation marks omitted)); *APB Associates, Inc. v. Bronco's Saloon, Inc.*, 297 F.R.D. 302, 316 (E.D. Mich. 2013) (denying certification because proposed class definition was too "imprecise and amorphous"); *DeBremaecker*, 433 F.2d at 734 (affirming denial of certification for proposed class defined as residents "active in the 'peace movement'"); 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed. 2005) (collecting cases). Vagueness is a problem because a court needs to be able to identify who will receive notice, who will share in any recovery, and who will be bound by a judgment. See *Kent v. SunAmerica Life Ins. Co.*, 190 F.R.D. 271, 278 (D. Mass. 2000). To avoid vagueness, class definitions generally need to identify a particular group, harmed during a particular time frame, in a particular location, in a particular way. See *McLaughlin on Class Actions* § 4:2; see, e.g., *Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1012 (W.D. Mich. 1987) (granting

certification and noting the class definition specified "a group of agricultural laborers during a specific time frame and at a specific location who were harmed in a specific way").

Second, classes that are defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement. E.g., *Simer v. Rios*, 661 F.2d 655, 669–70 (7th Cir. 1981) (affirming denial of certification of class of people who felt discouraged from applying for government energy assistance); *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977–78 (7th Cir. 1977) (affirming certification of class defined by actions of defendants rather than class members' states of mind); *Harris v. General Development Corp.*, 127 F.R.D. 655, 659 (N.D. Ill. 1989) (denying class certification of proposed subclass defined by mental state: "The proposed class of persons who allegedly were discouraged from applying at GDC is too imprecise and speculative to be certified."); 7A Wright et al., *Federal Practice & Procedure* § 1760 (collecting cases). Plaintiffs can generally avoid the subjectivity problem by defining the class in terms of conduct (an objective fact) rather than a state of mind. See, e.g., *National Org. for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 358–59 (N.D. Ill. 1997) (accepting modified class definition so that "membership in the classes sought to be certified is based exclusively on the defendants' conduct with no particular state of mind required"); *Newberg on Class Actions* § 3:5.

Third, classes that are defined in terms of success on the merits—so-called "fail-safe classes" — also are not properly defined. See *In re Nexium*

Antitrust Litig., 777 F.3d 9, 22 (1st Cir. 2015); *Young*, 693 F.3d at 538; *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012); *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); but see *In re Rodriguez*, 695 F.3d 360, 369–70 (5th Cir. 2012) (affirming fail-safe class certification). Defining the class in terms of success on the merits is a problem because "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. This raises an obvious fairness problem for the defendant: the defendant is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation. See Erin L. Geller, Note, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769 (2013). The key to avoiding this problem is to define the class so that membership does not depend on the liability of the defendant.

The class definition in this case complies with this settled law and avoids all of these problems. It is not vague. It identifies a particular group of individuals (purchasers of Instaflex) harmed in a particular way (defrauded by labels and marketing materials) during a specific period in particular areas. The class definition also is not based on subjective criteria. It focuses on the act of purchase and Direct Digital's conduct in labeling and advertising the product. It also does not create a fail-safe class. If Direct Digital prevails, *res judicata* will bar class members from re-litigating their claims.

Direct Digital argues, however, that we should demand more. It urges us to adopt a new component to the ascertainability requirement that goes beyond the adequacy of the class definition itself. Drawing on recent decisions by the Third Circuit, Direct Digital argues that class certification should be denied if the plaintiff fails to show a reliable and administratively feasible way to determine whether a particular person is a member of the class. And, Direct Digital continues, affidavits from putative class members are insufficient as a matter of law to satisfy this requirement.

In support of this argument, Direct Digital asserts that the only method of identifying class members here is by affidavit from the putative class members themselves. That remains to be seen. We do not know yet what sales and customer records Direct Digital has. We assume for purposes of this decision that Direct Digital will have no records for a large number of retail customers. We also assume that many consumers of Instaflex are unlikely to have kept their receipts since it's a relatively inexpensive consumer good.

B. *The Recent Expansion of "Ascertainability"*

To understand the genesis of Direct Digital's argument, we briefly summarize the law of the Third Circuit, which has adopted this more stringent version of ascertainability. The Third Circuit's innovation began with *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012), where the court vacated certification of a poorly defined

class. The decisive portion of the opinion, *id.* at 592–94, certainly seems sound, but the opinion went on to caution that on remand, if defendants' records would not identify class members, the district court should not approve a method relying on "potential class members' say so," and the opinion said that reliance on class members' affidavits might not be "proper or just," *id.* at 594 (internal quotation marks omitted). The opinion did not explain this new requirement other than to cite an easily distinguishable district court decision.

Since *Marcus*, the court has applied this heightened ascertainability requirement in several more cases: *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354–56 (3d Cir. 2013); *Carrera v. Bayer Corp.*, 727 F.3d 300, 305–12 (3d Cir. 2013); *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 184–85 (3d Cir. 2014); *Shelton v. Bledsoe*, 775 F.3d 554, 559–63 (3d Cir. 2015); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 161–71 (3d Cir. 2015). As the requirement has evolved, several members of the court have expressed doubts about the expanding ascertainability doctrine. See *Byrd*, 784 F.3d at 172–77 (Rendell, J., concurring); *Carrera v. Bayer Corp.*, No. 12–2621, 2014 WL 3887938, at *1–3 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing en banc).[2]

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[2] The Eleventh Circuit recently applied a fairly strong version of an ascertainability requirement in a non-precedential decision, *Karhu v. Vital Pharmaceuticals, Inc.*, — F. App'x —, 2015 WL 3560722, at *2–4 (11th Cir. June 9, 2015) (unpublished). Some courts have followed the Third Circuit's innovation. See, e.g., *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3–4 (N.D. Ill. Feb. 25, 2015);

As it stands now, the Third Circuit's test for ascertainability has two prongs: (1) the class must be "defined with reference to objective criteria" (consistent with long-established law discussed above), and (2) there must be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd*, 784 F.3d at 163, quoting *Carrera*, 727 F.3d at 355; see also *Shelton*, 775 F.3d at 560 (making clear that "the question of ascertainability" is separate from "the question of whether the class was properly defined").

This second requirement sounds sensible at first glance. Who could reasonably argue that a plaintiff should be allowed to certify a class whose members are impossible to identify? In practice, however, some courts have used this requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims.

The demands of this heightened requirement are most apparent from the Third Circuit's

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Jones v. ConAgra Foods, Inc., No. C 12–01633 CRB, 2014 WL 2702726, at *8–11 (N.D. Cal. June 13, 2014), appeal docketed, No. 14–16327; *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12–2907–SC, 2014 WL 580696, at *5–6 (N.D. Cal. Feb. 13, 2014). Others have rejected it. See, e.g., *Daniels v. Hollister Co.*, 113 A.3d 796, 798–803 (N.J. App. 2015); *Rahman v. Mott's LLP*, No. 13–cv–03482–SI, 2014 WL 6815779, at *4 (N.D. Cal. Dec. 3, 2014); *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *4–6 (N.D. Cal. Sept. 18, 2014); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 565–67 (C.D. Cal. 2014).

discussion of self-identification by affidavit. It has said that affidavits from putative class members cannot satisfy the stringent ascertainability requirement. See *Carrera*, 727 F.3d at 308–12 (remanding to give plaintiff "another opportunity to satisfy the ascertainability requirement" but rejecting plaintiff's attempt to use affidavits from class members to show their purchases of weight loss supplement); *Hayes*, 725 F.3d at 356 ("But the nature or thoroughness of a defendant's recordkeeping does not alter the plaintiff's burden to fulfill Rule 23's requirements."); *Marcus*, 687 F.3d at 594 ("We caution, however, against approving a method that would amount to no more than ascertaining by potential class members' say so."). Direct Digital urges us to adopt this rule and to reverse the certification order here because the only method for identifying class members proposed by Mullins in the district court was self-identification by affidavit.

We decline to do so. The Third Circuit's approach in *Carrera*, which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23. *Carrera* and cases like it have given four policy reasons for requiring more than affidavits from putative class members. We address each one below and find them unpersuasive.

In general, we think imposing this stringent version of ascertainability does not further any interest of Rule 23 that is not already adequately protected by the Rule's explicit requirements. On

the other side of the balance, the costs of imposing the requirement are substantial. The stringent version of ascertainability effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do. Accordingly, we conclude that the district court here did not abuse its discretion by deferring until later in the litigation decisions about more detailed aspects of ascertainability and the management of any claims process. At bottom, the district court was correct not to let a quest for perfect treatment of one issue become a reason to deny class certification and with it the hope of any effective relief at all.

We now turn to the policy concerns identified by the courts that have embraced this heightened ascertainability requirement. The policy concerns are substantial and legitimate, but we do not believe they justify the new requirement. As will become clear, we agree in essence with Judge Rendell's concurring opinion in *Byrd*, 784 F.3d at 172–77, which urged "retreat from [the] heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23," *id.* at 177.

1. *Administrative Convenience*

Some courts have argued that imposing a stringent version of ascertainability "eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members." *Marcus*, 687 F.3d at 593 (citation and

internal quotation marks omitted). It does this by ensuring that the court will be able to identify class members without "extensive and individualized fact-finding or mini-trials." *Carrera*, 727 F.3d at 307 (citation and internal quotation marks omitted).

This concern about administrative inconvenience is better addressed by the explicit requirements of Rule 23(b)(3), which requires that the class device be "superior to other available methods for fairly and efficiently adjudicating the controversy." One relevant factor is "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D).

The superiority requirement of Rule 23(b)(3) is clarified by substantial case law. See 7AA Wright et al., *Federal Practice & Procedure* §§ 1779, 1780. Imposing a stringent version of ascertainability because of concerns about administrative inconvenience renders the manageability criterion of the superiority requirement superfluous. See Daniel Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member*, 82 Fordham L. Rev. 2359, 2395 (2014). It also conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (noting that failure to certify a class action under Rule 23(b)(3) solely on manageability grounds is generally disfavored), *overruled on other grounds by In re IPO*, 471 F.3d 24 (2d Cir. 2006); accord, *Byrd*, 784 F.3d at 175 (Rendell, J., concurring) ("Imposing a proof-of-purchase

requirement does nothing to ensure the manageability of a class or the 'efficiencies' of the class action mechanism; rather, it obstructs certification by assuming that hypothetical roadblocks will exist at the claims administration stage of the proceedings.").

A reader might fairly ask whether there is any practical difference between addressing administrative inconvenience as a matter of ascertainability versus as a matter of superiority. In fact, there is. When administrative inconvenience is addressed as a matter of ascertainability, courts tend to look at the problem in a vacuum, considering only the administrative costs and headaches of proceeding as a class action. See, e.g., *Sethavanish*, 2014 WL 580696, at *6 (purchasers of "all natural" nutrition bars sold through retailers; denying class certification solely on the ground of ascertainability without addressing other available methods for adjudicating the controversy). But when courts approach the issue as part of a careful application of Rule 23(b)(3)'s superiority standard, they must recognize both the costs *and benefits* of the class device. See 7AA Wright et al., *Federal Practice & Procedure* § 1780 ("Viewing the potential administrative difficulties from a comparative perspective seems sound and a decision against class-action treatment should be rendered only when the ministerial efforts simply will not produce corresponding efficiencies. In no event should the court use the possibility of becoming involved with the administration of a complex lawsuit as a justification for evading the responsibilities imposed by Rule 23.").

Rule 23(b)(3)'s superiority requirement, unlike the freestanding ascertainability requirement, is comparative: the court must assess efficiency with an eye toward "other available methods." In many cases where the heightened ascertainability requirement will be hardest to satisfy, there realistically is no other alternative to class treatment. See *id.* ("If judicial management of a class action ... will reap the rewards of efficiency and economy for the entire system that the drafters of the federal rule envisioned, then the individual judge should undertake the task. Ironically, those Rule 23(b)(3) actions requiring the most management may yield the greatest pay-off in terms of effective dispute resolution."); cf. *Schleicher v. Wendt*, 618 F.3d 679, 686–87 (7th Cir. 2010) (rejecting defendant's invitation to "tighten" Rule 23 requirements for class certification and noting that doing so would make certification impossible in many securities fraud cases).

This does not mean, of course, that district courts should automatically certify classes in these difficult cases. But it does mean that before refusing to certify a class that meets the requirements of Rule 23(a), the district court should consider the alternatives as Rule 23(b)(3) instructs rather than denying certification because it may be challenging to identify particular class members. District courts have considerable experience with and flexibility in engineering solutions to difficult problems of case management.

In addition, a district judge has discretion to (and we think normally should) wait and see how

serious the problem may turn out to be after settlement or judgment, when much more may be known about available records, response rates, and other relevant factors. And if a problem is truly insoluble, the court may decertify the class at a later stage of the litigation. See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

If faced with what appear to be unusually difficult manageability problems at the certification stage, district courts have discretion to insist on details of the plaintiff's plan for notifying the class and managing the action. In conducting this inquiry, district courts should consider also whether the administrative burdens can be eased by the procedures set out in Rule 23(c) and (d). See, e.g., *Bobbitt v. Academy of Court Reporting, Inc.*, 252 F.R.D. 327, 344–45 (E.D. Mich. 2008) (granting class certification despite potential manageability problems and noting options "a special master, representative trials, or other means" to manage the problems).

Under this comparative framework, refusing to certify on manageability grounds alone should be the last resort. See *Carnegie*, 376 F.3d at 661 ("a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all"), quoted in *Suchanek*, 764 F.3d at 760. In all events, deciding whether and when to insist on details, and how many details, are matters for the sound discretion of district judges who have

so much first-hand experience managing class actions.

On the other hand, if courts look only at the cost-side of the equation and fail to consider administrative solutions like those available under Rule 23(c) and (d), courts will err systematically against certification. See Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 Yale L.J. 2354, 2396–99 (2015) (explaining why addressing issue of manageability under umbrella of superiority is preferable to addressing it as a matter of ascertainability). The stringent version of ascertainability invites precisely this type of systemic error.

2. *Unfairness to Absent Class Members*

Courts also have asserted that the heightened ascertainability requirement is needed to protect absent class members. If the identities of absent class members cannot be ascertained, the argument goes, it is unfair to bind them by the judicial proceeding. See *Carrera*, 727 F.3d at 307; *Marcus*, 687 F.3d at 593. A central premise of this argument is that class members must receive actual notice of the class action so that they do not lose their opt-out rights.

We believe that premise is mistaken. For Rule 23(b)(3) classes, Rule 23(c)(2)(B) requires the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable

effort." The rule does not insist on actual notice to all class members in all cases. It recognizes it might be *impossible* to identify some class members for purposes of actual notice. See Shaw, 124 Yale L.J. at 2367–69. While actual individual notice may be the ideal, due process does not always require it. See *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (rejecting requirement of individual notice); *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012) (noting that "even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice" and collecting cases); accord, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950).

When class members' names and addresses are known or knowable with reasonable effort, notice can be accomplished by first-class mail. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174–75 (1974). When that is not possible, courts may use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process. See *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 676–77 (7th Cir. 2013). As long as the alternative means satisfy the standard of Rule 23(b)(3), there is no due process violation. See, e.g., *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *5 (N.D. Cal. Sept. 18, 2014) (rejecting notice argument for same reason); *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 418 (N.D. Ill. 2012) (same). Due process simply does not require the ability to

identify all members of the class at the certification stage.

More broadly, the stringent version of ascertainability loses sight of a critical feature of class actions for low-value claims like this one. In these cases, "only a lunatic or a fanatic" would litigate the claim individually, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004), so opt-out rights are not likely to be exercised by anyone planning a separate individual lawsuit. When this is true, it is particularly important that the types of notice that courts require correspond to the value of the absent class members' interests. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). That is why in *Hughes*, for example, where each plaintiff's claim was valued at approximately $1,000 or less, we approved a notice plan consisting of sticker notices on the defendant's two ATMs, publication of a notice in the primary local newspaper, and notice on a website. *Hughes*, 731 F.3d at 676– 77. We did not insist on first-class mail even though the notice plan likely would not reach everyone in the class. We approved the plan because the notice plan was "commensurate with the stakes." *Id.* at 676.

The heightened ascertainability approach upsets this balance. It comes close to insisting on actual notice to protect the interests of absent class members, yet overlooks the reality that without certification, putative class members with valid claims would not recover anything at all. See *Amchem*, 521 U.S. at 617; *Eisen*, 417 U.S. at 161; *Hughes*, 731 F.3d at 677; *Butler v. Sears, Roebuck &*

Co., 727 F.3d 796, 798 (7th Cir. 2013); see also, e.g., *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) ("Against this background, the ascertainability difficulties, while formidable, should not be made into a device for defeating the action."); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 500 (S.D. Cal. 2013) ("If class actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a consumer class action." (citation and internal quotation marks omitted)). When it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good.

3. *Unfairness to Bona Fide Class Members*

The third concern offered to justify the heightened ascertainability requirement is the interests of class members with valid claims. Courts have expressed concern that if class members are identified only by their own affidavits, individuals without a valid claim will submit erroneous or fraudulent claims and dilute the share of recovery for true class members. See *Carrera*, 727 F.3d at 310 ("It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.").[3]

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[3] *Bello v. Beam Global Spirits & Wine, Inc.*, No. 11–5149 (NLH/KMW), 2015 WL 3613723 (D.N.J. June 9, 2015), is a striking example of how demanding this approach has become, requiring something close to perfection in identifying class members. When the plaintiff first moved to certify a class of

Again, this concern about the danger of fraudulent or mistaken claims is legitimate and understandable, especially when contemplating the prospect that money might seem available just for the asking. In the words of then-future President John Adams, "it is prudent not to put virtue to too serious a test." 2 John Adams, *The Works of John Adams, Second President of the United States: Diary, with A Life of the Author, Notes & Illustrations* 457 (Charles Francis Adams ed. 1850) (during 1775 debate on whether to open ports for trade and the need for customs officials to regulate the ports).

We see two problems with using these concerns to impose the heightened ascertainability standard. First, in practice, the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible. We are aware of no empirical evidence that the risk of

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consumers who had purchased a beverage product, she attempted to satisfy the ascertainability requirement with affidavits from putative class members. The court, relying on the recent Third Circuit cases, denied the motion without prejudice and gave her another opportunity to propose "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at *11, quoting *Hayes*, 725 F.3d at 355. The plaintiff renewed her motion, this time proposing a detailed screening method to weed out mistaken or fraudulent claims. See *id.* at *6–7 (describing three levels of review). The court denied her renewed motion, holding that even this screening method failed to satisfy *Carrera*'s heightened ascertainability requirement. See *id.* at *11–14. At one point, the court wrote that even an affidavit *plus a receipt* would not be enough to clear the ascertainability hurdle. See *id.* at *12.

dilution caused by inaccurate or fraudulent claims in the typical low-value consumer class action is significant. In most cases, the expected recovery is so small that we question whether many people would be willing to sign affidavits under penalty of perjury saying that they purchased the good or service. See *Byrd*, 784 F.3d at 175 (Rendell, J., concurring). In this case, for example, the value of each claim is approximately $70 (the retail price). Direct Digital has provided no evidence, and we have found none, that claims of this magnitude have provoked the widespread submission of inaccurate or fraudulent claims.

We could be wrong, of course, about this empirical prediction. Suppose people are more willing to file inaccurate or fraudulent claims for low-value recoveries than we suspect. Even then, the risk of dilution appears small because only a tiny fraction of eligible claimants ever submit claims for compensation in consumer class actions. See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 119–20 (2007) (noting that it is not unusual to have participation rates of 10 to 15 percent and examining more recent examples of rates lower than 5 percent). Any participation rate less than 100 percent leaves unclaimed funds in the pot, whether it is a judgment award or a settlement fund. When there are unclaimed funds, the addition of a fraudulent or inaccurate claim typically does not detract from a bona fide class member's recovery because the non-deserving claimant merely takes from unclaimed funds, not the deserving class member. It is of

course theoretically possible that the total sum claimed by non-deserving claimants exceeds the total amount of unclaimed funds, in which case there would be dilution, but given the low participation rates actually observed in the real world, this danger is not so great that it justifies denying class certification altogether, at least without empirical evidence supporting the fear. See Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305, 315 (2010) (given actual claims rates in practice, "it is simply not true that compensation of uninjured parties affects the compensation interests of injured class members"). *Carrera* and cases like it have given no reason to think otherwise.

We recognize that the risk of mistaken or fraudulent claims is not zero. But courts are not without tools to combat this problem during the claims administration process. They 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. See Manual for Complex Litigation §§ 21.66–.661 (4th ed. 2004); *Newberg on Class Actions* § 12:20; see also, e.g., *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417 (N.D. Ill. 2012) (affirming class certification where class included individuals who threw away promotional gift cards because they were told that the balances had been voided: "anybody claiming class membership on that basis

will be required to submit an appropriate affidavit, which can be evaluated during the claims administration process"). Relying on concerns about what are essentially claim administration issues to deny certification and to prevent any recovery on valid claims upsets the balance a district judge must consider. In the face of such empirical uncertainty, a district judge has discretion to say let's wait until we know more and see how big a problem this turns out to be.

The second problem with this dilution argument is that class certification provides the only meaningful possibility for bona fide class members to recover anything at all. Keep in mind what's at stake. If the class is certified and fraudulent or inaccurate claims actually cause dilution, then deserving class members still receive something. But if class certification is denied, they will receive nothing, for they would not have brought suit individually in the first place. See *Amchem*, 521 U.S. at 617; *Eisen*, 417 U.S. at 161; *Hughes*, 731 F.3d at 677; *Butler*, 727 F.3d at 798. To deny class certification based on fear of dilution would in effect deprive bona fide class members of any recovery as a means to ensure they do not recover too little.

This stringent approach has far-reaching consequences, too. By "focusing on making absolutely certain that compensation is distributed only to those individuals who were actually harmed," the heightened ascertainability requirement "has ignored an equally important policy objective of class actions: deterring and punishing corporate wrongdoing." *Byrd*, 784 F.3d at 175–76 (Rendell, J.,

concurring), discussing *Hughes*, 731 F.3d at 677 ("A class action, like litigation in general, has a deterrent as well as a compensatory objective."). Even if the risk of dilution is not trivial, refusing to certify on this basis effectively immunizes defendants from liability because they chose not to maintain records of the relevant transactions. See *Daniels v. Hollister Co.,* 113 A.3d 796, 801 (N.J. App. 2015) ("Ascertainability ... is particularly misguided when applied to a case where any difficulties encountered in identifying class members are a consequence of a defendant's own acts or omissions. ... 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."); *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 250 (N.D. Ill. 2014) ("Doing this—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."); *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *4 (N.D. Cal. Sept. 18, 2014) ("Adopting the *Carrera* approach would have significant negative ramifications for the ability to obtain redress for consumer injuries."); *Carrera v. Bayer Corp.*, No. 12–2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J., dissenting from denial of rehearing en banc) (explaining that *Carrera* may have gone too far where "a defendant's lack of records and business practices make it more difficult

to ascertain the members of an otherwise objectively verifiable low-value class").

When faced with this counterargument, courts applying the heightened ascertainability approach have tended to emphasize that the plaintiff has the burden to satisfy Rule 23 and that the deterrence concern is therefore irrelevant. See, e.g., *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 356 (3d Cir. 2013) ("Rule 23's requirements that the class be administratively feasible to ascertain and sufficiently numerous to warrant class action treatment cannot be relaxed or adjusted on the basis of Hayes' assertion that Wal–Mart's records are of no help to him."). With respect, that response begs an important question. Why are affidavits from putative class members deemed *insufficient as a matter of law* to satisfy this burden? In other words, no one disputes that the plaintiff carries the burden; the decisive question is whether certain evidence is sufficient to meet it. Cf. *Carrera*, 2014 WL 3887938, at *1 (Ambro, J., dissenting from denial of rehearing en banc) ("Even if ... the ability to identify class members is a set piece for Rule 23 to work, how far we go in requiring plaintiffs to prove that ability at the outset is exceptionally important and requires a delicate balancing of interests.").

If not disputed, self-serving affidavits can support a defendant's motion for summary judgment, for example, and defendants surely will be entitled to a fair opportunity to challenge self-serving affidavits from plaintiffs. We are aware of only one type of case in American law where the testimony of one witness is legally insufficient to

prove a fact. See U.S. Const., Art. III, § 3 ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."). There is no good reason to extend that rule to consumer class actions.

Given the significant harm caused by immunizing corporate misconduct, we believe a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.

4. *Due Process Interest of the Defendant*

Finally, courts have said the heightened ascertainability requirement is needed to protect a defendant's due process rights. Relying on cases about a defendant's right to "present every available defense," e.g., *Lindsey v. Normet*, 405 U.S. 56, 66 (1972), these courts have argued that the defendant must have a similar right to challenge the reliability of evidence submitted to prove class membership. See *Carrera*, 727 F.3d at 307 ("Ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership."); *Marcus*, 687 F.3d at 594 ("Forcing BMW and Bridgestone 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.").

We agree with the due process premise but not the conclusion. A defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage. That does not mean a court cannot rely on self-identifying affidavits, subject as needed to audits and verification procedures and challenges, to identify class members. To see why, separate the two claims about a defendant's interest. It is certainly true that a defendant has a due process right not to pay in excess of its liability and to present individualized defenses if those defenses affect its liability. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. —, 131 S. Ct. 2541, 2560–61 (2011). It does not follow that a defendant has a due process right to a *cost-effective* procedure for challenging every individual claim to class membership. Cf. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. —, 133 S. Ct. 2304, 2309 (2013) ("the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim"). And we should not underestimate the ability of district courts to develop effective auditing and screening methods tailored to the individual case.

Whether a defendant's due process interest is violated depends on the nature of the class action, the plaintiff's theory of recovery, and the defendant's opportunity to contest liability and the amount of damages it owes. 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. A district

court can tailor fair verification procedures to the particular case, and a defendant may need to decide how much it wants to invest in litigating individual claims.

To see why this due process argument does not justify the heightened ascertainability requirement, consider three types of class actions. The first type is where the total amount of damages can be determined in the aggregate. A leading treatise provides an example:

> Assume a class of employees has a $50 million pension fund with each employee's share determinable only by a complex formula concerning age, years in service, retirement age, etc. Further assume that the fund's trustee simply transfers the full $50 million to her own personal account. In a case for conversion or fraud, the class would have to demonstrate damage to show liability. They could make that showing simply by demonstrating the aggregate damage the class has suffered—the amount the defendant converted. Individual damages could be worked out later or in subsequent proceedings.

Newberg on Class Actions § 12:2 (footnote omitted). In this situation, the identity of particular class members does not implicate the defendant's due process interest at all. The addition or subtraction of individual class members affects neither the

defendant's liability nor the total amount of damages it owes to the class. See, e.g., *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014) (rejecting Seventh Amendment challenge to allocation of damages award among class members because defendant "has no interest in the method of distributing the aggregate damages award among the class members"); *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 582 F.3d 156, 197–98 (1st Cir. 2009) (rejecting due process challenge to entry of class-wide judgment and award of aggregate damages); *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves."), *aff'd*, 545 U.S. 546 (2005); *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (noting that defendant's interest is "only in the total amount of damages for which it will be liable," not "the identities of those receiving damage awards"); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) ("Where the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members.").

The second type of class action is where the total amount of damages cannot be determined in the aggregate, but there is a common method of determining individual damages. (Most consumer fraud class actions fit this model.) The same treatise provides this example:

> Now assume that [the] same class of current employees is statutorily entitled to overtime wages at time and a half after 40 hours work/week but that the defendant employer has never paid such overtime. In a case alleging violation of the statute, it may be sufficient to demonstrate that the defendant failed to pay overtime without assessing a full aggregate liability. There would be a common method for showing individual damages—a simple formula could be applied to each class member's employment records—and that would be sufficient for the predominance and superiority requirements to be met.

Newberg on Class Actions § 12:2 (footnote omitted). In this situation, the defendant's due process interest is implicated because the calculation of each class member's damages affects the total amount of damages it owes to the class. That's why the method of determining damages must match the plaintiff's theory of liability and be sufficiently reliable. See *Comcast Corp. v. Behrend*, 569 U.S. —, 133 S. Ct. 1426, 1433 (2013). It's also why the defendant must be given the opportunity to raise individual defenses and to challenge the calculation of damages awards for particular class members. See *Allapattah Services*, 333 F.3d at 1259.

But neither of these requirements has any necessary connection to the heightened ascertainability requirement. Whether putative

class members self-identify by affidavits simply does not matter. Suppose an employee files an affidavit falsely claiming that she worked 60 hours a week when in fact she worked only 50, or suppose a person files an affidavit falsely claiming to have been an employee. In either case, so long as the defendant is given a fair opportunity to challenge the claim to class membership and to contest the amount owed each claimant during the claims administration process, its due process rights have been protected.

The third type of class action is where the defendant's liability can be determined on a class-wide basis, but aggregate damages cannot be established and there is no common method for determining individual damages. In this situation, courts often bifurcate the case into a liability phase and a damages phase. See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed").

It has long been recognized that the need for individual damages determinations at this later stage of the litigation does not itself justify the denial of certification. See *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) ("The possibility that individual hearings will be required for some plaintiffs to establish damages does not preclude certification."); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (per curiam); *Arreola v.*

Godinez, 546 F.3d 788, 799–801 (7th Cir. 2008); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Here again, using the heightened ascertainability requirement to deny class certification is not the only means, or even the best means, to protect the defendant's due process rights.

As long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected. See *Lilly v. Jamba Juice Co.*, No. 13–cv–02998–JST, 2014 WL 4652283, at *6 (N.D. Cal. Sept. 18, 2014) ("Defendants would certainly be entitled to object to a process through which a non-judicial administrator 'ascertains' each applicant's class membership on the basis of the applicants' own self-identification, gives a defendant no opportunity to challenge that determination, and then racks up the defendant's bill every time an individual submits a form."); *Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 524 (C.D. Cal. 2011) ("If Mr. Johnson establishes liability for the class, Defendants may challenge reliance and causation individually during a determination of damages, after the issues that are common have been litigated and resolved."); *Godec v. Bayer Corp.*, No. 1:10–CV–224, 2011 WL 5513202, at *7 (N.D. Ohio Nov. 11, 2011) ("In any event, to the extent Bayer has individualized defenses, it is free to try those defenses against individual claimants.").[4]

[4] What we have said is consistent with *Comcast Corp. v. Behrend*, 569 U.S. —, 133 S. Ct. 1426 (2013), which held that class treatment is inappropriate where the class-wide measure

In sum, the concern about protecting a defendant's due process rights does not justify the heightened ascertainability requirement. In all cases, the defendant has a right not to pay in excess of its liability and to present individual defenses, but both rights are protected by other features of the class device and ordinary civil procedure. *Carrera* itself appeared to recognize this rejoinder, but it pivoted to the argument discussed above about protecting absent class members. See 727 F.3d at 310 ("Because Bayer's total liability cannot be so affected by unreliable affidavits, Carrera argues Bayer lacks an interest in challenging class membership. … But ascertainability protects absent class members as well as defendants, so Carrera's focus on Bayer alone is misplaced." (citation omitted)). *Carrera* gave no other reason to think the heightened ascertainability requirement is needed to protect a defendant's due process rights. We can't think of one either.

Ultimately, we decline Direct Digital's invitation to adopt a heightened ascertainability requirement. Nothing in Rule 23 mentions or implies it, and we are not persuaded by the policy concerns identified by other courts. Those concerns

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of damages does not match the plaintiff's theory of liability. See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799–800 (7th Cir. 2013); see also *In re Nexium Antitrust Litig.*, 777 F.3d 9, 18–19 (1st Cir. 2015); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014); *In re Whirlpool Corp. Front-Loading Washer Products Liability Litig.*, 722 F.3d 838, 860–61 (6th Cir. 2013); *Leyva v. Medline Industries Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

are better addressed by a careful and balanced application of the Rule 23(a) and (b)(3) requirements, keeping in mind under Rule 23(b)(3) that the court must compare the available alternatives to class action litigation. District courts should continue to insist that the class definition satisfy the established meaning of ascertainability by defining classes clearly and with objective criteria. If a class is ascertainable in this sense, courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits. If the proposed class presents unusually difficult manageability problems, district courts have discretion to press the plaintiff for details about the plaintiff's plan to identify class members. A plaintiff's failure to address the district court's concerns adequately may well cause the plaintiff to flunk the superiority requirement of Rule 23(b)(3). But in conducting this analysis, the district court should always keep in mind that the superiority standard is comparative and that Rule 23(c) and (d) permit creative solutions to the administrative burdens of the class device.

C. *Commonality*

Direct Digital's other primary challenge to the district court's certification order relates to the commonality requirement of Rule 23(a)(2). The district court found this requirement satisfied by a preponderance of the evidence, see *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012), explaining that whether Instaflex has been clinically tested or scientifically formulated to relieve joint pain, improve flexibility, increase

mobility, and support cartilage repair are questions common to the class. [See R. 89 at 2, 3–4]

Direct Digital argues that Mullins cannot satisfy the commonality requirement because his suit alleges that Instaflex is ineffective. The efficacy of a health product can never form the basis of a common question, Direct Digital argues, because efficacy depends on individual factors such as the severity of the consumer's pre-use medical condition, the consumer's pattern of use, and other potentially confounding variables such as the consumer's overall health, age, activity level, use of other drugs, and the like.

Direct Digital's objection fails because it has mischaracterized Mullins's theory of liability. Mullins does not claim that Instaflex was ineffective, ergo defendant is liable. He alleges that Direct Digital's statements representing that Instaflex has been "clinically tested" and "scientifically formulated" to relieve joint discomfort, improve flexibility, increase mobility, and repair cartilage are false or misleading because they imply there was scientific support for these claims but in fact no reasonable scientific expert would conclude that glucosamine sulfate (the primary ingredient in the supplement) has any positive effect on joint health. Mullins alleges that these statements would have misled a reasonable consumer. See *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 925–27 (Ill. 2007) (reasonable consumer standard); accord, *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756–57 (7th Cir. 2014) (discussing consumer fraud statutes in Illinois and other states). As the district court correctly

concluded, this theory presents a common question: Were the statements false or misleading? This is a "common contention" that is "capable of classwide resolution" because the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. —, 131 S. Ct. 2541, 2551 (2011). Nothing more is required to satisfy Rule 23(a)(2).

Of course the efficacy of the product can be *relevant* to that determination. If consumers experience the reduction or elimination of their symptoms, then that is evidence that the supplement does in fact relieve joint discomfort consistent with Direct Digital's representations. But that's not the focus of Mullins's theory of consumer fraud. What really matters under his theory is whether there is any scientific support for the assertions contained in the labels and advertising materials. In other words, Mullins's claims do not rise or fall on whether individual consumers experienced health benefits, due to the placebo effect or otherwise. They rise or fall on whether Direct Digital's representations were deceptive. See *Suchanek*, 764 F.3d at 756–57 (reversing district court's order denying class certification; commonality is satisfied where plaintiff's theory of liability turns on proving unfair or deceptive marketing and packaging of consumer product).

That's why even if Direct Digital were to prove that consumers experienced less joint pain because of a placebo effect (a theory Direct Digital appears to embrace on appeal), it could still be liable for

consumer fraud. Consumers might have paid more than they otherwise would have because of the representations about clinical testing. Or they could have decided not to seek out better therapeutic alternatives because they believed Instaflex was addressing their underlying condition. See *FTC v. QT, Inc.*, 512 F.3d 858, 862–63 (7th Cir. 2008) (placebo effect is not a defense to consumer fraud where defendant has made specific claims about intended benefits; requiring truth in labeling leads to appropriate prices and ensures that consumers do not forgo better alternatives in reliance on the placebo). At any rate, we express no view on the merits of Mullins's allegations. The key point is that whether the representations were false or misleading is a common question suitable for class treatment, even if Instaflex relieved joint discomfort for some consumers.

III. *Conclusion*

Direct Digital raises a number of other, less developed objections to the district court's certification order. None of these issues would have justified granting an appeal under Rule 23(f), but we have considered them and find them without merit. Direct Digital has not demonstrated that the district court abused its discretion in certifying the class. The order of the district court granting class certification is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VINCE MULLINS, on behalf of himself and all others similarly situated,	No. 13 CV 1829
Plaintiff,	
v.	Hon. Charles R. Norgle
DIRECT DIGITAL, LLC.,	
Defendant.	

ORDER

Plaintiff Vince Mullins' Renewed Motion for Class Certification [45] is granted in part and denied in part.

STATEMENT

This is a putative consumer fraud class action arising under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 Ill. Comp. Stat. 502/1, *et seq.*, and similar consumer protection laws in nine other states. Plaintiff Vince Mullins ("Plaintiff"), on behalf of himself and others

similarly situated, sues Direct Digital, LLC ("Defendant") for fraudulently purporting that its product, Instaflex Joint Support ("Instaflex"), has health benefits when it is actually nothing more than a sugar pill placebo. Specifically, Plaintiff alleges that the statements "Relieve Discomfort," "Improve Flexibility, "Increase Mobility," "scientifically formulated," and "clinically tested" on each Instaflex label are deceptive and constitute misrepresentation. Before the Court is Plaintiff's motion for class certification pursuant to Federal Rule of Civil Procedure 23. For the following reasons, the motion is granted in part and denied in part.

Plaintiff moves to certify one of two classes. The first is a multi-state class including:

> All consumers in Illinois and states with similar laws, who purchased Instaflex within the applicable statute of limitations of the respective Class States, for personal use until the date notice is disseminated.

Mem. in Supp. of Pls.' Renewed Mot. for Class Certification 4. In the alternative, Plaintiff moves to moves to certify a class including only Illinois residents. *Id.*

Class certification is more than a "mere pleading standard." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). Plaintiff "must not only 'be prepared to prove that there are

in fact sufficiently numerous parties, common questions of law and fact,' typicality of claims or defenses, and adequacy of representation. [Plaintiff] must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id.*; *see also* Fed. R. Civ. P. 23(a)-(b). "On issues affecting class certification . . . a court may not simply assume the truth of the matters as asserted by the plaintiff." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Although Plaintiff need not show that the proposed class satisfies Rule 23's requirements "to a degree of absolute certainty," he must prove each disputed requirement by a preponderance of the evidence. *Id.* (citing *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008)).

There are several class action lawsuits pending in California against manufacturers of various health supplements containing the active ingredient glucosamine sulfate, supplements very similar to Instaflex. In those three cases, like this one, plaintiffs allege that defendants' products do not deliver the marketed health benefits. In those cases, the district court has granted class certification twice and denied it once. *See McCrary v. Elations Co.*, 2014 WL 1779243 (C.D. Cal. Jan. 13, 2014) (granting class certification); *Cabral v. Supple, LLC*, No5:12-cv-0085 MWF (OPx) (C.D. Cal. Fe. 14, 2013) (granting class certification); *Moheb v. Nutramax Laboratories Inc.*, 2012 WL 6951904 (C.D. Cal. Sept. 4, 2012) (denying class certification). The Court "has discretion to evaluate practical considerations that may make class treatment unwieldy despite the apparently common issues." *In*

re IKO Roofing Shingle Prods. Liability Litig., 757 F.3d 599, 603 (7th Cir. 2014). In a consumer fraud class action, the critical element for class certification is that a plaintiff has "a theory of loss that match[es] the theory of liability." *Id.* at 602.

In *Moheb*, Plaintiff's common contention was that "Defendant misrepresents the efficacy of Cosamin because it has not been 'proven' to reduce joint [*sic*] and cannot be the 'only' brand proven to reduce joint pain." 2012 WL 6951904 at *4. Class certification failed in *Moheb* for multiple reasons. One reason was that given plaintiff's theory of liability, the commonality and typicality prerequisites could not be met; there were individual questions of what, if any, benefits the class members received from using the product and the plaintiff's medical condition was not typical of the other class members. *Id.*

In *McCrary*, on the other hand, plaintiff's theory of liability was that "Elations is not clinically proven to have any impact on joints, and Elations' label was therefore false." 2014 WL 1779243 at *3. Because McCrary's legal theory was not based on the efficacy of the product, but was limited to the veracity of the statements on the product's label, "[b]y definition, class members were exposed to these labeling claims, creating a 'common core of salient facts." *Id.* at *10 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-20 (9th Cir. 1998)). The question of false advertising was common to all class members and plaintiff's claims were typical of all class members because he relied on the false advertising before purchasing the product. *Id.*

Here, Defendant challenges whether the class can be feasibly ascertained and whether Plaintiff can satisfy the following three prerequisites of Rule 23(a)—commonality, typicality, and adequacy. The Court finds that this case is analogous to *McCrary* because Plaintiff's claims are related to the veracity of the statements on Instaflex's label. For the reasons discussed below, Plaintiff's proposed class is ascertainable and the prerequisites of Rule 23(a) are satisfied.

Plaintiff's class is ascertainable because it is objectively contained to all individuals who purchased Instaflex for personal use during the class period and the class period is finite. The class period will close when notice of this action is disseminated to the class members and will include all individuals who purchased Instaflex within the relevant statute of limitations period allowed by the relevant consumer fraud statute of the state in which they reside.[1]

Defendant concedes that it has sold Instaflex to thousands of consumers across the nation, thus "there are in fact sufficiently numerous parties" to certify a class. *Wal-Mart Stores, Inc*, 131 S. Ct. at 2551.

To satisfy commonality, the plaintiff's "claims must depend on a common contention" and "[t]hat

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[1] For example, the relevant statute of limitations in Illinois is three years, 815 ILCS 505/10a(e), and in California the relevant statute of limitations is four years, Cal. Bus. & Prof Code § 17208.

common contention … must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke" Id. Commonality is satisfied here because the questions of law and fact are common to the class: whether the ingredients of Instaflex provide any health benefits to a person's joints and whether Instaflex's labeling deceives the public consumer.

"A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998) (internal quotation marks and citation omitted). Plaintiff claims that he relied on Instaflex's label when he purchased it and he received no benefit after using it. His claim is based on Illinois' and other states' consumer protection statutes. This is the same course of conduct and same legal theory that would be typical for the other class members, therefore, typicality is met.

Adequacy is met because Plaintiff's tenuous relationship with one member of class counsel has no bearing on his ability to fairly and adequately protect the interests of the class. Plaintiff has already retained experienced and qualified class counsel, attended depositions, and has no disabling conflicts with the interests of the class. The prerequisites under Rule 23(a) are satisfied.

Next, Plaintiff seeks certification under Rule 23(b)(2) and (b)(3). To obtain certification for a class seeking injunctive relief under Rule 23(b)(2), Plaintiff must show: "(1) the plaintiffs have suffered irreparable harm; (2) monetary damages are inadequate to remedy the injury; (3) an equitable remedy is warranted based on the balance of hardships between the plaintiffs and defendant; and (4) the public interest would be well served by the injunction." *Karman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011) (citing *eBay Inc. v. MercExchange, L.L.C.* 547 U.S. 388, 391 (2006) (outlining traditional test for permanent injunctive relief)). Plaintiff alleges, *inter alia*, that the Instaflex product is a phony and he seeks a refund (as well as the appropriate fines under the state consumer fraud statutes) for himself and the other members of the class. The harm to Plaintiff, and likewise the class, "is easily remedied by an award of money damages, a fully adequate remedy." *Id*. While accurate and truthful labeling would be in the public interest, the other elements required for a permanent injunction are not met.

Pursuant to Rule 23(b)(3), Plaintiff must show by a preponderance of evidence: "(1) that the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual class members; and (2) that a class action is superior to other available methods of resolving the controversy." *Messner*, 669 F.3d at 811 (citing Fed. R. Civ. P. 23(b)(3)). The Court has a "duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast Corp.*, 133 S. Ct. at 1432. However, "[i]n

conducting this analysis, the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner*, 669 F.3d at 811 (citations omitted). Class treatment is appropriate where, as here, a plaintiff's theory of damages matches their theory of liability. *In re IKO Roofing Shingle Products Liability Litigation*, 757 F.3d at 602.

Plaintiff's theory of damages—a full refund and statutory consumer fraud fines—matches his theory of liability—Instaflex does not perform as advertised. Whether the medical studies of Plaintiff's experts will show that "glucosamine, alone or in combination, is not effective in providing the represented joint health benefits" and Instaflex "was no more effective than [a] placebo" is a question of fact common to the members of the proposed class. Pl. Compl. ¶ 21, 22. If the medical studies are true, Instaflex's label would be fraudulent on its face, and this question concerns every member of the class. "Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win." *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010). Proceeding to trial as a class will produce a common answer to whether the advertisements on Instaflex's label are false.

Given the sheer size of this class, certifying the class will "achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997) (internal quotation and

citation omitted). Thus, class certification is superior to individual lawsuits.

Finally, Plaintiff's request of the Court to appoint Stewart M. Weltman, LLC; Bonnett, Fairbourn, Friedman & Balint PC; and Siprut PC as class counsel is granted pursuant to Rule 23(g).

For the foregoing reasons, Plaintiff's motion to certify a multi-state class pursuant to Rule 23(b)(3) is granted. His request for an injunctive class under Rule 23(b)(2) is denied.

IT IS SO ORDERED

Dated: September 30, 2014

CHARLES RONALD NORGLE, Judge

United States District Court

APPENDIX C

FEDERAL RULES OF CIVIL PROCEDURE RULE 23

RULE 23. CLASS ACTIONS

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(3) the court finds 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. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.