No. 15-549

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent Vince Mullins's brief in opposition lectures the reader to "[b]eware the petition for certiorari that begins with a hypothetical." Opp. 1. Very well, then, let's deal in realities. Mullins, the putative class representative himself, claims he went to a store that sells dietary supplements. He claims he picked Instaflex from among competing products with similar looking labels. He has no record of his purchase. And he seeks to represent the interests of hundreds of thousands of alleged Instaflex purchasers who not only are unidentified, but are likely unidentifiable. The Seventh Circuit acknowledged all this. Then it squarely recognized, but declined to apply, a Third Circuit requirement—substantially followed by the First, Fourth, and Eleventh Circuits—that a class plaintiff show when it moves for class certification that class members can be feasibly and reliably identified. The petition is about resolving that conflict.

To avoid this reality, Mullins tries to invent a vehicle problem. He speculates that "[o]nly a minority of class members purchased Instaflex in retail stores," Opp. 31-32, and insinuates that Direct Digital must therefore "know[] the identity of the overwhelming majority of its customers," Opp. 22. Given this speculation, Mullins argues that "this case would have come out exactly the same had Third Circuit law been applied." Opp. 32. The argument fails every which way. The speculated facts are unsupported, were never presented as part of the record to the Seventh Circuit or relied upon by that court, and have no bearing on the correctness of its ruling. They are

also incorrect. Had the courts below required Mullins to make some showing that the class would be ascertainable—as would be required in the plurality of circuits—we would not be debating facts here. Since they did not, there are no factual findings about the proportion of class members that purchased via retail or any other potentially relevant issues. This want of a fact record simply highlights the reality of the circuit conflict.

When Mullins finally does turn to the circuit split, he does so only to note fact-driven variation in the application of the Third Circuit's clear rule. But the question presented here concerns the Seventh Circuit's wholesale rejection of *any* rule. As for other circuits that have adopted it, Mullins simply ignores them. And he relegates to an inconspicuous coda at the back of his opposition another reality, one that has animated this Court's class action case law for the last decade: Once a class is certified, the pressure to settle is often so enormous that the defendant never has a chance to contest class members' claims on the merits. Mullins never meaningfully confronts the serious due process implications of this dynamic.

Beware the brief in opposition that buries the lede. For the reasons explained in our petition, the Court should grant certiorari.

ARGUMENT

I. Mullins's Attempt To Conjure A Vehicle Problem Fails.

There is no vehicle problem.

First, the Seventh Circuit's decision rests in no way on Mullins's new factual speculations. As Mullins concedes, the Seventh Circuit decided this case on the assumption that Direct Digital *would not* have purchase records "for a large number of retail customers," Pet. 11a, not that it would know "the identity of the overwhelming majority," Opp. 22. Mullins's supposition about the nature of Direct Digital's sales was not litigated, because Mullins maintained that he should not be required to make any ascertainability showing prior to certification. It thus has nothing to do with the Seventh Circuit's decision or the question presented here.

Second, Mullins is flatly wrong to suggest that his speculation about Direct Digital's business model would satisfy the plurality ascertainability standard the Seventh Circuit rejected. In the Third Circuit, "[a] plaintiff may not merely propose a method for ascertaining a class without any evidentiary support that the method will be successful." *Carrera v. Bayer Corp.*, 727 F.3d 300, 306 (3d Cir. 2013). In the Eleventh Circuit, "[a] plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 948 (11th Cir. 2015). So even if the Seventh

Circuit had relied on Mullins's new contentions, the case would have come out differently in other circuits.

Third, Mullins's speculation that some large proportion of "class members" is readily identifiable begs the question. There are no "class members" until they are identified. So even if a large proportion of *actual purchasers* was readily identifiable—which it likely is not, *see infra* 5 & n.1—that would leave unaddressed the potentially enormous number of self-identifying would-be class members who claim to have purchased Instaflex in a retail store and yet have nothing to prove it. Mullins proposes no mechanism for verifying the claims of purchasers at what he concedes are "stores around the country," Opp. 3.

Fourth, Mullins's take-away that Direct Digital "knows the identity of the overwhelming majority of its customers," Opp. 22, is absolutely a disputed issue. Contrary to Mullins's suggestion (at 31), Direct Digital conceded nothing at oral argument. Rather, counsel explained that "this idea that more than 50 percent of people are ascertainable or identifiable … might be true, might not be true but I can tell you that that was not something that was argued or, certainly wasn't in the district court's order." Oral Argument at 38:40-53, *Mullins v. Direct Digital, LLC*, No. 15-1776 (June 3, 2014), http://tinyurl.com/MullinsArgument; *see id.* 39:16-18 ("[I]t wasn't an issue that was argued below."). Nothing Mullins cites here was given to the district court in support of certification, nor is it in the record on appeal.

Finally, Mullins's factual contentions are deeply misleading. For example, he repeatedly conflates alleged proportions of Direct Digital "sales and revenues" with proportions of Instaflex purchasers, Opp. 4—i.e., with potential class members. The problem is that some purchasers buy more than others, so simply citing sales and revenue figures does not prove the proportions of purchasers.[1] Mullins also says nothing about other issues, for example, the fact that 95% of online customers have agreed to waive class action rights, effectively removing them from the class, and skewing class membership dramatically towards retail purchasers.

These issues have not been litigated, and the certiorari stage at the Supreme Court is not the time or place to do so. The time is during class certification and the place is the district court, as the plurality of Circuits have held. This petition is about ensuring that this occurs consistently across all circuits.

II. This Case Implicates An Acknowledged And Entrenched Circuit Conflict.

The Seventh Circuit "agreed to hear this appeal … to address whether Rule 23(b)(3) imposes a heightened 'ascertainability' requirement as the Third Circuit and some district courts have held recently." Pet. App. 1a-2a. It then "decline[d] to follow

[1] In any event, Mullins's rough estimates are wrong. If and when Mullins is required to make the appropriate showing, Direct Digital's evidence would show that around half of the over 2 million bottles sold were at retail, with an even greater proportion of retail sales in recent years.

this path." Pet. App. 3a. As explained in our petition, the First, Fourth, and Eleventh Circuits have largely joined the Third, Pet. 12-15, while the Sixth has joined the Seventh. Pet. 16-18. District courts are divided as well. Pet. 15 n.3, 18 n.4. There is a split, plain and simple, and the issue is ripe for resolution.

A. Mullins's attempt to obscure the split begins by framing the identification of class members as a matter of "the evolving nature of case management approaches throughout the lower courts." Opp. 17. The notion is to dismiss divergence in the case law as the product of "fact-dependent, managerial work in progress." Opp. 16.

Mullins's focus on the Seventh Circuit's "case management" approach only highlights the divergence between the courts of appeals. As explained in our petition (at 13), the Third Circuit's rule is rooted in the idea that "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera*, 727 F.3d at 307. This due-process-based rule is a component of Rule 23's ascertainability requirement, and it "mandates a rigorous approach at the outset" to determine whether class membership can be feasibly and readily ascertained. *Id.* at 306-07. The Seventh Circuit's "case management" approach, by contrast, treats any inquiry into the feasibility or reliability of class identification as part of Rule 23's "superiority" requirement, and thus as merely one component of a discretionary, administrative balancing of "the costs and benefits of the class device." Pet. App. 17a

(emphasis omitted). Not only that, the Seventh Circuit also instructs that district courts must "normally … wait and see how serious the problem may turn out to be *after* settlement or judgment." Pet. App. 18a-19a (emphasis added).

These approaches are night and day. If this case were brought in the Third Circuit—or the First, Fourth, or Eleventh—Mullins would have had to show the feasibility and reliability of identification before certification handed his counsel overwhelming settlement leverage. But here, the Seventh Circuit has sent this case hurtling toward settlement or a bet-the-company trial with no inquiry at all, and nothing but a suggestion that the district court consider the costs and benefits of class adjudication after settlement or judgment—that is, after most of class adjudication has already happened. So the question presented in this case is hardly a "fact dependent" matter of case administration. The question, for all practical purposes, is whether the relevant facts will ever be considered at all.

Comcast v. Behrend, 133 S. Ct. 1426 (2013), presented a similar question. The court of appeals in that case had held that issues pertaining to the class damages methodology "[had] no place in the class certification inquiry." *Id.* at 1431 (quoting *Behrend v. Comcast Corp.*, 655 F.3d 182, 207 (3d Cir. 2011)). This Court did not treat the deferral of Rule 23's requirements to a later stage as a flexible matter of case management. It demanded that issues implicating the appropriateness of classwide adjudication be considered at the certification stage

as part of the "rigorous analysis" Rule 23 demands. *Id.* at 1432. The same approach is warranted here.

B. Mullins next argues that our petition "[m]ischaracterizes" Third Circuit rulings, and that "Third Circuit law continues to mature." Opp. 18. This argument confuses *application* of a legal rule with the establishment of the rule itself. The latter is what is at issue in the question presented, and Third Circuit case law, along with the Seventh Circuit's opinion, make clear that conflicting legal standards are entrenched on both sides.

Mullins's argument that we misread Third Circuit law misreads our petition. Mullins repeatedly depicts our petition as presenting the Third Circuit ascertainability rule as "requir[ing] a threshold showing of *the identity of each class member*." Opp. 19 (emphasis added); *see* Opp. 14, 21. But, as Mullins elsewhere acknowledges (e.g., at 22), our petition expressly states that "no one is suggesting that a plaintiff must *actually identify* class members by name at the certification stage." Pet. 23 (emphasis in original). This position is not a "retreat[]," nor does it somehow render the question presented "vacuous." Opp. 22. Mullins himself has resisted tooth-and-nail the application of the Third Circuit's requirement of "a reliable and administratively feasible *mechanism*" for identifying class members. *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (emphasis added). And again, *Comcast* refutes Mullins. There, this Court held that although the class plaintiff need not actually prove its claims at the certification stage, it must show their amenability to class adjudication.

The Court apparently saw nothing "vacuous" in such a rule.

Without his straw man to go after, Mullins's attack on the petition's reading of Third Circuit case law swings at air. Indeed, the cases he cites as purportedly undermining our reading of *Carrera* confirm that we are right. In *Byrd v. Aaron's Inc.*, the Third Circuit said that Rule 23's "rigorous analysis" requires a plaintiff to prove that "there is a reliable and administratively feasible mechanism for determining whether class members fall within the class definition." 784 F.3d at 163 (internal quotation marks and citation omitted).

The same is true of *In re Community Bank of Northern Virginia*, which Mullins criticizes us for not citing,[2] but which again just repeats the very rule Direct Digital advanced and the Seventh Circuit rejected: "It is the Plaintiffs' burden to show by a preponderance of the evidence that the class is currently and readily ascertainable," including that class members can be identified "without extensive and individualized fact-finding or mini-trials." 795 F.3d 380, 396 (3d Cir. 2015), *petition for cert. filed*, No. 15-693 (U.S. Nov. 23, 2015) (internal quotation marks and citations omitted). The plaintiffs in that case

[2] Mullins also faults us (at 21) for not mentioning *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015). That case is not relevant. It holds that in the context of a class seeking only injunctive or declaratory relief, there is no ascertainability requirement at all. *Id.* at 560-63. Everyone agrees in this case that Mullins must show ascertainability to get his damages class certified—the question is what that entails and when the showing must be made. *Shelton* says nothing about that.

undertook that showing and succeeded by "identif[ying] a reliable, repeatable process whereby members of the putative class may be identified." *Id.* at 397. Mullins, on the other hand, has consistently maintained that no such showing is required, and the Seventh Circuit agreed.

Third Circuit case law could not be clearer in adopting a threshold requirement of a reliable and feasible mechanism for class identification, and the Seventh Circuit could not have more clearly rejected it. That some plaintiffs succeed under the Third Circuit rule and some do not hardly means that there is "nothing to differentiate the law of the Third and Seventh Circuits," Opp. 22.

C. Finally, Mullins maintains that "[i]n the context of a direct marketer who knows the identity of the overwhelming majority of its customers, it is unlikely that there would be any divergence between the Third and Seventh Circuits." Opp. 22. As we have explained at length (at 3-5), Mullins's premise is dead wrong. Whether class membership as a whole can be feasibly and reliably ascertained is precisely the issue Direct Digital has been begging to litigate. But it never was litigated, which is why the Seventh Circuit's opinion does not rest on any of Mullins's contentions. And even if the Seventh Circuit had relied on Mullins's generalized speculation, that still would not have sufficed in the plurality of circuits.

III. Mullins Does Not Meaningfully Address The Dynamics Of Class Action Litigation And Their Impact On Due Process Interests.

As discussed in our petition (at 19-27), the rule that a plaintiff must show a feasible and reliable mechanism for identifying class members has roots in the fundamental due process interest in presenting every available defense, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). That interest takes on extraordinary salience at the certification stage of a class action, 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). So before the settlement calculus is skewed in favor of the class—and, in reality, in favor of class counsel—Rule 23 demands a "rigorous analysis" of the appropriateness of the class action device.

Mullins does not meaningfully address any of this. He minimizes the well-known impact of certification on settlement dynamics by citing a single case that did not settle after certification. Opp. 33-34. That is hardly an answer to a dynamic that this Court and others have repeatedly recognized. *See* Pet. 20. Meanwhile, he is dismissive of the very idea that Rule 23 protects due process interests, belittling this Court's statement that the rule is "grounded in due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008), as a mere "sound bite," Opp. 25 n.25. He opts instead for a circumscribed discussion of two due process interests—finality and "not paying in excess

of … liability," Opp. 28—that largely miss the point. And then he simply reasserts that the issue of whether there is a feasible and reliable mechanism for identifying class members is "really [a] demand[]" for "proof of each claimant's entitlement at the threshold stages of the case." Opp. 29. This, he says, is a "merits issue that need not be addressed at the class certification stage." Opp. 28.

We have already addressed Mullins's strange (and erroneous) insistence that a showing of a feasible and reliable *mechanism* for identifying class members amounts to actual identification. *Supra* 8-9. In any event, this Court has flatly rejected a rigid divide between Rule 23 issues and merits issues. It made clear in *Wal-Mart Stores, Inc. v. Dukes* that "[f]requently [Rule 23's] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." 131 S. Ct. 2541, 2551 (2011). And its holding in *Comcast*, rejecting the very argument Mullins makes here, puts an even finer point on it. *Supra* 7-8. Mullins's avoidance of all of this speaks volumes.

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Whether the class can be reliably and feasibly identified in a way that both respects due process interests and maintains the benefits of class adjudication is yet to be litigated. This case is a perfect vehicle for deciding whether Rule 23 requires Mullins to make such a showing.

CONCLUSION

For the reasons stated in the petition for certiorari and above, this Court should grant certiorari.

Respectfully submitted,

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