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THE ASCERTAINABILITY LANDSCAPE AND THE MODERN AFFIDAVIT

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I. INTRODUCTION**

Over the past several years, corporations turned increasingly to a pair of arguments outside the text of Federal Rule of Civil

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** Editors' Note: For ease of accessibility in electronic format, the legal citations in this Article depart in minor respects from the norms of *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

Procedure 23 in defending class actions for alleged marketplace violations. The first argument is that the presence of uninjured persons within a proposed class creates a standing problem. The second argument—the focus of this Article—is that a proposed class cannot be "ascertained" because it is too hard to tell who is in and who is out of it. Suppose, for example, that the manufacturer of a new men's personal care product has been touting it as guaranteed to prevent hair loss, despite internal findings that the product has no effect on hair loss. A rapidly balding man who purchased and used the product, but who continued to lose more hair, files a class action lawsuit against the manufacturer for fraud. The manufacturer does not sell directly to consumers and only maintains records of its sales to distributors and retailers. When subpoenaed for their own relevant sales records, the largest retail sellers of personal care products respond that their databases cannot identify those who bought the product. May the class of defrauded consumers still be certified? If so, how should those who will be entitled to any damages be determined?

Fifty years after modern Rule 23 went into effect, the answers are less than clear. With defendants seizing on 2012 and 2013 holdings from the Third Circuit Court of Appeals, the federal courts grappled with the ascertainability doctrine, and the case law applying this doctrine proliferated. The Supreme Court denied two petitions for certiorari in 2016, in *Direct Digital, LLC v. Mullins*[1] and *Procter & Gamble Co. v. Rikos*,[2] leaving an unsettled legal landscape. In November 2015, the Rule 23 Subcommittee of the Federal Rules Advisory Committee observed that this area of class action law "is still in a state of considerable flux. It might even receive Supreme Court attention in the near future."[3] I bring a unique vantage point to the topic of ascertainability, having both prosecuted and defended large class actions. In this Article I explore existing law with the goal of clarifying this doctrine as it applies in the above type of situation and others.[4]

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1. 136 S. Ct. 1161 (2016).

2. 136 S. Ct. 1493 (2016).

3. ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, RULE 23 SUBCOMMITTEE REPORT 35 (2015), *available at* http://www.classactioncountermeasures.com /files/2015/10/2015-1105-Rule-23-Subcommittee-Report.pdf. The Rule 23 Subcommittee declined to consider a codification of the ascertainability doctrine in 2015, out of "caution about proceeding before the actual state of the law has become clear enough to make the consequences of rulemaking relatively predictable." *Id.*

4. *Cf.* Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354, 2362–63 (2015) (calling for more scholarship on ascertainability).

A primary conclusion is that many classes can be "self-ascertained" by means of a modern affidavit: clicking through a web-based form that asks whether the person meets the class definition, for instance because the person bought or used the product or service in question. This method, while generally inferior to relying on records, should be unobjectionable when it appears reasonably possible for persons to discern their membership in the class. Self-identification then grants no more weight to their sworn statements than is due and customary.

There should be no surprise that developments in the federal law of class actions intensified after enactment of the Class Action Fairness Act of 2005 ("CAFA")[5]—which shifted state law claims arising from major controversies into federal court[6]—or that corporate defendants now press ascertainability arguments to raise doubts in judges' minds about class actions. Yet an expanded role for ascertainability is at odds with the law and policies of Rule 23. I argue, first, that the doctrine always requires an objective class definition tied to the facts of cases under Rule 23(b)(3). Second, it should be reasonably possible for class members to be identified at later stages when the court may supervise the distribution of damages or decide preclusion issues. A recent divergence in the law concerns whether this question of class member identification should be analyzed by reference to the class definition and the nature of the case, or also by reference to proof of a method by which class members can be feasibly and reliably identified. Courts traditionally took the former approach. Since 2012, some have taken the latter, which in practice can disallow class member affidavits as a means of ascertaining a class and defeat certification itself.

My final sections consider whether and when such affidavits may be relied upon to determine the status of persons as class members. The points and authorities in Part IV.A show that affidavits have

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5. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

6. *See* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1350 (2013) (recognizing CAFA's "primary objective" of "ensuring 'Federal court consideration of interstate cases of national importance.'") (citation omitted); THE CLASS ACTION FAIRNESS ACT: LAW AND STRATEGY 142, 223 (Gregory C. Cook ed., 2013) (noting that CAFA effected "a landmark shift in diversity law" and has resulted in "more opportunity to remove class actions to federal court."); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1441 (2008) ("The scope of putative class actions that, at the end of the day, the statute brings within the subject matter jurisdiction of the federal courts is very broad.").

long provided a convenient and commonplace method for the submission of evidence warranting a range of judicial acts. Based on the Article's analysis and the body of case law, I offer a synthesis of the ascertainability doctrine in the Conclusion.

II. THE ROLE OF THE CLASS DEFINITION IN ENSURING DEFINITENESS

A. Overview of the Ascertainability Doctrine

"Definiteness," rather than "ascertainability," may best capture the judge-made doctrine that a class must exist and be well-defined for it to be properly certified.[7] As this alternate name suggests, the doctrine revolves around the class definition required by Rule 23(c)(1)(B).[8] To be definite, a class should be defined without

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7. A leading treatise on class action law uses the two terms interchangeably, with a preference for "definiteness." *See* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 3:1–3:7 (5th ed. 2011). The Ninth Circuit, in its 2017 decision addressing the doctrine, "refrain[ed] from referring to 'ascertainability' . . . because courts ascribe widely varied meanings to that term." Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.3 (9th Cir. 2017). A definition of "ascertain," in a leading dictionary at the time the doctrine emerged, is "to define by removing obscurity or ambiguity." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1940); *cf.* Miller Brewing Co. v. G. Heileman Brewing Co., 561 F.2d 75, 80 (7th Cir. 1977) (terming the Second Unabridged Edition the "classic" Webster's dictionary).

8. *See, e.g.*, Good v. American Water Works Co., Inc., 310 F.R.D. 274, 284 (S.D.W. Va. 2015) (stating that "the definition of the class is an essential prerequisite to maintaining a class action" and that this "settled principle of case law, in a nutshell, defines the concept of ascertainability.") (citing Roman v. ESB, Inc., 550 F.2d 1343, 1348 (4th Cir. 1976)); Floyd v. City of New York, 283 F.R.D. 153, 171 (S.D.N.Y. 2012) (describing ascertainability as "a judicial creation meant to ensure that class definitions are workable when members of the class will be entitled to damages or require notice for another reason."); *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) (holding that "the definition of the class must be 'definite,' that is, the standards must allow the class members to be ascertainable."); Mullins v. Direct Digital, LLC, 795 F.3d 654, 657 (7th Cir. 2015) (construing ascertainability as "an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria"), *cert. denied*, 136 S. Ct. 1161 (2016); Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 952 (11th Cir. 2015) (Martin, J., concurring) ("Historically, courts analyzing ascertainability have required something quite narrow. Ascertainability has traditionally been defined as the existence of a class whose members can be identified by reference to objective criteria in the class definition.") (citing Daniel Luks, Note, *Ascertainability in the Third Circuit: Name That Class Member*, 82 FORDHAM L. REV. 2359, 2369 (2014)); Guido v. L'Oreal, USA, Inc., No. CV 11-1067 CAS JCX, 2013 WL 3353857, at *18 (C.D. Cal. July 1, 2013) ("The requirement of an ascertainable class is met as long as the class can be defined through objective criteria."); *see also infra* notes 65, 73.

reference to the merits or the alleged violation itself (to avoid the "fail-safe" class[9]), or to class members' mental states.[10]

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9. The rule against circular definitions framed in terms of the defendant's liability prevents certification of a class which, were it to lose on the merits, could nevertheless pursue a follow-on suit because the defeat would eliminate the class as defined. Thus, "[a] fail-safe class is improper because it shields the class members from the risk of an adverse judgment: either the class members win or they are not in the class and therefore not bound by the judgment." 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 522 (2016 ed.). As a practical matter, one of the reasons a certified class may include some uninjured persons is that excluding them would often necessitate a fail-safe definition. *See Nexium*, 777 F.3d at 22; Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012); Rodman v. Safeway, Inc., No. 11-cv-03003-JST, 2014 WL 988992, at *15 (N.D. Cal. Mar. 10, 2014); *see also In re* NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d 1050, 1094 (C.D. Cal. 2015) ("The inclusion of uninjured class members does not necessarily render a class unascertainable."); Senne v. Kansas City Royals Baseball Corp., No. 14-cv-00608-JCS, 2016 WL 3940761, at *33 (N.D. Cal. July 21, 2016) ("[W]hile a class may be ascertainable even if it includes persons who have suffered no injury, where it appears there are 'a great many' such individuals, the class may not be ascertainable."); *cf.* Nicodemus v. Saint Francis Mem'l Hosp., 208 Cal. Rptr. 3d 411, 421–22 (Cal. Ct. App. 2016) (holding that ascertainability is not defeated under California law simply because the proposed class may include uninjured persons).

The fail-safe prohibition is firmly established. *See, e.g.*, Randleman v. Fidelity Nat'l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011) (holding that a class defined as those "entitled to relief" was "an improper fail-safe class that shields the putative class members from receiving an adverse judgment."); McCaster v. Darden Restaurants, Inc., 845 F.3d 794, 2017 WL 56298, at *4 (7th Cir. 2017) (holding that a class definition fell into the fail-safe trap by referring to employees "who did not receive all earned vacation pay benefits"); Colindres v. QuietFlex Mfg., 235 F.R.D. 347, 368 (S.D. Tex. 2006) (reiterating that "[a] class definition should not use terms that depend on resolving the claims on the merits," and finding that a proposed definition did "precisely that by defining the class as those subjected to discriminatory practices."); Alhassid v. Bank of Am., N.A., 307 F.R.D. 684, 694 (S.D. Fla. 2015) (denying certification on ascertainability grounds when class membership would have turned on whether the defendant mortgage lender violated federal guidelines or its own internal policies); Brazil v. Dell Inc., 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008) (striking a fail-safe definition that referenced "falsely advertised" products). *But see, e.g.*, Matamoros v. Starbucks Corp., 699 F.3d 129, 139 (1st Cir. 2012) (rejecting the defendant's fail-safe argument because the class was objectively defined by reference to job titles); O.B. v. Norwood, No. 15 C 10463, 2016 WL 2866132, at *2–3 (N.D. Ill. May 17, 2016) (rejecting a fail-safe challenge because the alleged nursing-service inadequacies were not necessarily traceable to the defendant).

10. Where class membership "would come down to the state of mind of" various individuals, "it would be easy to fade in or out of the class depending on the outcome." Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal.

These prohibitions are applied pragmatically, with a view toward effectuating two main functions of the class action: relief for deserving class members; and finality for the defendant. Thus, a class action could proceed on behalf of same-sex couples in Alabama who "desired" to marry, because marriage license application records could confirm that mental state.[11] Similarly, a recent Eighth Circuit decision overturning a denial of class certification shows that the law of ascertainability does not demand total precision.[12] The persons allegedly injured under a federal statute were those who received unsolicited faxes, not necessarily those who paid for the targeted fax numbers.[13] Even though "the subscriber to the fax number may not be the recipient of the fax," logs of the fax numbers sufficed to ascertain the class.[14]

2011); *see generally* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:5 (5th ed. 2011) (explaining that "[w]ithout sufficient objective criteria," whether someone "is or is not a member of the class is left solely to their own desires and interests," which makes it "difficult for a court to determine with any certainty who should receive notice, who will be bound by the judgment, and who should receive any relief"). Courts, therefore, declined to certify subjectively defined classes even before the 1966 overhaul of Rule 23. For example, the proposed class in *Chaffee v. Johnson* consisted of civil rights "workers for the end of discrimination and segregation in Mississippi, for the encouragement of the exercise by Negroes in Mississippi of their right to vote[,] . . . and for the exercise and preservation of civil rights generally in Mississippi." 229 F. Supp. 445, 448 (S.D. Miss. 1964), *aff'd*, 352 F.2d 514 (5th Cir. 1965) (per curiam). The court concluded that "[t]he vague and indefinite description . . . depends upon the state of mind of a particular individual, rendering it difficult, if not impossible, to determine whether any given individual is within or without the alleged class." *Id.* at 448. This principle continues to apply. *See, e.g.*, Growers 1–7 v. Ocean Spray Cranberries, Inc., No. 1:12-cv-12016-RWZ, ECF No. 222, slip op. at 8–10 (D. Mass. May 10, 2016) (finding a class definition inadequate because it referenced the subjective "purpose" for delivery of goods).

11. Strawser v. Strange, 307 F.R.D. 604, 610–11 (S.D. Ala. 2015). Another district court recently applied common sense to reject a vagueness challenge to a class encompassing certain corn producers who "priced" their corn after a certain date. *In re* Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 WL 5371856, at *2–4 (D. Kan. Sept. 26, 2016). The court found that "the term 'priced' is reasonably and properly understood to refer to the date on which the price for particular corn is agreed upon by the parties to the sale," and that a USDA form supplied a "reasonably reliable and objective method of identifying corn producers .... [Defendant] has not explained how the failure to capture every injured party within a definition dooms class certification." *Id.* at *3.

12. Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 994 (8th Cir. 2016).

13. *Id.* at 997–98.

14. *Id.*; *see also* Sartin v. EKF Diagnostics, Inc., No. CV 16-1816, 2016 WL 7450471, at *6–7 (E.D. La. Dec. 28, 2016) ("Although certain faxes shown in the logs

Pragmatism also drove the analysis in *Union Asset Management Holding A.G. v. Dell, Inc.*, where the class consisted of persons who invested in Dell stock "between May 16, 2002 and September 8, 2006, inclusive, and who were damaged thereby."[15] Settlement objectors claimed that the "damaged thereby" phrase would necessitate "mini-trials" to ascertain whether Dell's alleged securities fraud harmed each individual claimant.[16] But the Fifth Circuit applied common sense to find the challenged phrase "superfluous"—Dell shareholders were allegedly harmed "just by holding stock, and a quick look at the trading records is all that is required to determine whether someone did so."[17] Likewise, as discussed below, class actions have proceeded on behalf of those injured "as a result of" alleged misconduct.[18] Such definitions do not necessarily abridge the defendant's rights because class membership depends on future findings regarding the element of causation, not violation.

Defining a class is more art than science[19] and is sometimes impossible.[20] The definition must be concrete, objective, and closely

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may have been sent to multiple recipients, class membership can feasibly be determined by reviewing the actual faxes to determine the individuals and entities to whom they were addressed. This straightforward, mechanical procedure can be done without resort to individualized hearings or inquiry into the merits of each potential class member's claims."); Golan v. Veritas Entm't, LLC, No. 4:14CV00069 ERW, 2017 WL 193560, at *2 (E.D. Mo. Jan. 18, 2017) ("Even if only phone numbers are provided, Plaintiffs will be able to derive addresses from the phone numbers because they are residential land lines."); Nepomuceno v. Midland Credit Mgmt., Inc., No. CV 14-05719-SDW-SCM, 2016 WL 3392299, at *4 (D.N.J. June 13, 2016) (approving a class defined to include individuals to whom the defendant sent debt collection letters: "Whether the proposed definition includes individuals who did not receive Defendant's letter does not prevent the individuals in the definition from being identified and, therefore, does not affect whether Plaintiff has satisfied the ascertainability requirement.").

15. 669 F.3d 632, 637–40 (5th Cir. 2012).

16. *Id.* at 640.

17. *Id.* (internal quotation marks and alteration omitted) (quoting *In re* Initial Pub. Offering Sec. Litig., 671 F. Supp. 2d 467, 492 (S.D.N.Y. 2009)); *cf.* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 81 (2011) (Scalia, J., dissenting) (observing that "one does not always have to cast about for some additional meaning to the word or phrase that could have been dispensed with. This has always been understood.").

18. *See infra* Section II.C.

19. *See* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012).

20. *See, e.g.*, Plotnick v. Computer Scis. Corp. Deferred Comp. Plan for Key Execs., No. 1:15-cv-01002, 2016 WL 1704158, at *7–8 (E.D. Va. Apr. 26, 2016) (holding that market volatility and individual investment-plan elections made it

tailored to the facts giving rise to the claims.[21] This furthers the due process protections for class members, in a Rule 23(b)(3) case, of notice and the right to opt out of the class. The definition, moreover, controls who is entitled to benefit from a verdict or settlement if the class prevails, and, regardless of outcome, who is precluded from bringing a follow-on suit complaining of the same alleged violations.[22]

Ascertainability analysis, therefore, hinges on the class definition and serves pragmatic purposes embedded in the provisions of Rule 23. Ultimately the doctrine arises from the need

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impossible to define a class asserting ERISA claims). It can be especially hard to define a non-fail-safe class when claims arise under statutes that, in contrast to the common law, forbid conduct in precise terms. *See* Alpha Tech Pet, Inc. v. Lagasse, LLC, No. 16 C 513, 2016 WL 4678316, at *6 (N.D. Ill. Sept. 7, 2016).

21. "What is critical is that Plaintiffs' theory of . . . injury . . . actually maps onto the membership of the class. In other words, class membership must fit the theory of legal liability." Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1138 (9th Cir. 2016); *compare, e.g.*, Rodriguez v. Berrybrook Farms, Inc., 672 F. Supp. 1009, 1012 (W.D. Mich. 1987) (the definition properly "specifie[d] a group of agricultural laborers during a specific time frame and at a specific location who were harmed in a specific way"), *with* Vigus v. Southern Ill. Riverboat/Casino Cruises, Inc., 274 F.R.D. 229, 235 (S.D. Ill. 2011) (an overly broad class would have included people with "no grievance" who consented to receiving "robocalls"), *and* Peterson v. Aaron's, Inc., No. 1:14-cv-1919-TWT, 2017 WL 364094, at *3–4 (N.D. Ga. Jan. 25, 2017) (an overly broad class would have included "the employees of an individual who leased a computer but never gave computer access to his or her employees."), *and* McKinnon v. Dollar Thrifty Auto. Grp., Inc., No. 12-cv-04457-YGR, 2016 WL 6582045, at *8 (N.D. Cal. Nov. 7, 2016) (the definition was "not sufficiently limited . . . to times and locations" at which the defendant car rental company failed to provide legally required notice that the insurance coverage it was offering might be duplicative of consumers' existing coverage); *see also* Wynn v. New York City Hous. Auth., 314 F.R.D. 122, 127–28 (S.D.N.Y. 2016) ("The very fact that counsel defines the class in at least four different ways makes the class unascertainable."); Daniel F. v. Blue Shield of Cal., 305 F.R.D. 115, 123 (N.D. Cal. 2014) ("In short, the definition is a moving target."); Mann v. Boeing Co., No. 2:15-cv-01507-RSL, ECF No. 49, slip op. at 5 (W.D. Wash. Aug. 23, 2016) (denying class certification without prejudice to the plaintiff's ability to fashion and propose a modified "class definition that includes the intended group of employees without being overly broad").

22. *See In re* Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75, 93 (D. Mass. 2005) (stating that the point is to determine "who will receive notice, who will share in any recovery, and who will be bound by the judgment.") (citation omitted). *But see* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 330 (2010) (arguing that "the ascertainability requirement readily sacrifices both deterrence and compensation in favor of an alternative value, namely, ensuring that compensation does not flow to uninjured parties.").

for a class to "actually function as a class."[23]

B. Origins and Functions of the Ascertainability Doctrine

Even as ascertainability supports essential functions of class actions, the doctrine's source remains "murky."[24] Rule 23, like the Constitution, contains vague phrases designed for unforeseen settings and flexible application over time. The quartet of numerosity, commonality, typicality, and adequacy of representation may lack the lofty ring of "equal protection of the laws," but what these four terms mean is equally up for interpretation.[25] Also in the eye of the beholder is whether a class action in a given case "is superior to other available methods for fairly and efficiently adjudicating the controversy."[26] Just as an extratextual right to privacy emerges from the common law and a string of constitutional amendments,[27] so does the need for a definite class grow out of the history of representative litigation[28] and the textual mandates, for Rule 23(b)(3) classes, of superiority, manageability, res judicata, and notice and opt-out rights.[29]

If a class cannot be precisely defined using objective criteria that track the claims, a class action will not be a superior method of adjudication but instead is likely to be unfair to the defendant. The goal of a class action defendant is, almost invariably, to make the lawsuit go away with minimal cost and with a broad "binding effect"[30] that will let the company place the controversy behind it for good. But if membership in a class cannot be readily discerned from overlaying the definition onto a person's circumstances, it will not only be hard to give notice to the class and manage distribution of a recovery; it will also be unclear whom the judgment binds,

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23. Byrd v. Aaron's Inc., 784 F.3d 154, 162 (3d Cir. 2015); *see also* N.B. v. Hamos, 26 F. Supp. 3d 756, 763 (N.D. Ill. 2014) (opining that "ascertainability is really a threshold issue—if the class cannot be identified, then courts cannot reliably assess whether an action on behalf of that class satisfies the express requirements of Rule 23.").

24. Shelton v. Bledsoe, 775 F.3d 554, 560 (3d Cir. 2015).

25. U.S. CONST. amend. XIV, § 1; FED. R. CIV. P. 23(a).

26. FED. R. CIV. P. 23(b)(3), (c)(2)(B).

27. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); RESTATEMENT (SECOND) OF TORTS § 652A–I (AM. LAW INST. 1977).

28. *See* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1853–54 (1998).

29. FED. R. CIV. P. 23(b)(3), (c)(2).

30. FED. R. CIV. P. 23(c)(2)(B)(vii), (c)(3).

interfering with the defendant's repose in the final judgment. And if a person cannot tell from the class definition whether the person belongs to a class, the person has no basis to decide whether to opt out and bring an individual case.[31]

C. Limits of the Ascertainability Doctrine

Because the superiority, manageability, and notice and opt-out requirements pertain to only one type of class action—cases for money damages under Rule 23(b)(3)—courts have held that the ascertainability requirement, too, pertains only to this type of case and not to cases seeking injunctive and/or declaratory relief.[32] The classic use of Rule 23(b)(2)'s equitable relief mechanism comes in a civil rights case on behalf of a class "whose members are incapable of specific enumeration."[33] Enforcement of an injunction benefiting such a class ordinarily "does not require identification of individual

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31. *See* FED. R. CIV. P. 23(c)(2)(B)(v) (in cases certified under Rule 23(b)(3), requiring notice to class members to the effect "that the court will exclude from the class any member who requests exclusion"); *see also In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1104–05 (5th Cir. 1977) (holding that "the notice required by subdivision (c)(2) must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment.").

32. *See* Cole v. City of Memphis, 839 F.3d 530, 541–42 (6th Cir. 2016) ("Since notice is not required for a (b)(2) class, the practical efficiencies that come with knowing the precise membership of the class are nonexistent. Likewise, without notice and an opportunity to opt-out, absent (b)(2) class members would not be estopped by a final judgment for the defense."); Shelton v. Bledsoe, 775 F.3d 554, 561–63 (3d Cir. 2015) ("[T]he focus in a (b)(2) class is more heavily placed on the nature of the remedy sought, and . . . a remedy obtained by one member will necessarily affect the others"); Shook v. El Paso Cty., 386 F.3d 963, 972 (10th Cir. 2004) ("[N]otice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited.") (citing Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972)); Santomenno v. Transamerica Life Ins. Co., No. CV 12-02782 DDP (MANx), 2016 WL 1158449, at *17 (C.D. Cal. Mar. 14, 2016) ("[T]he concerns that motivate the ascertainability inquiry are less pressing in an action under Rule 23(b)(1) or (b)(2) as compared to a Rule 23(b)(3) action."); Braggs v. Dunn, No. 2:14CV601-MHT, 2016 WL 6917203, at *31 (M.D. Ala. Nov. 25, 2016) ("[T]here is serious reason to doubt that the judicially created ascertainability requirement applies to Rule 23(b)(2) classes."); *see also, e.g.*, Baby Neal v. Casey, 43 F.3d 48, 54 (3d Cir. 1994) (reversing with instructions to certify an effectively unascertainable Rule 23(b)(2) class of "all children in Philadelphia who have been abused or neglected and are known or should be known to the Philadelphia Department of Human Services.").

33. FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment.

members . . . because if relief is granted the defendants are legally obligated to comply" without the need to identify, or pay damages to, individual class members.[34] Largely for this reason, notice to the class is optional rather than mandatory in actions for injunctive and/or declaratory relief.[35] Notice costs, "moreover, could easily cripple actions that do not seek damages."[36]

"[T]he best notice that is practicable under the circumstances"[37] is required in Rule 23(b)(3) cases, which seek damages and carry the opt-out right; but not all or even most of the class members must be known at the certification stage. Instead, that class members are not identifiable at this stage may "support[] rather than bar[] the bringing of a class action, because joinder is impracticable"[38]—which can make a class action efficient. Provided that notice can issue and a claims process is reasonably possible, even if laborious, nothing prevents the contours of class membership from forming later in the case. This principle applied, for example, in *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, where a subclass was defined to include owners of real property "in the vicinity" of a Maryland gas station whose underground tanks allegedly leaked a dangerous chemical.[39] Judge Scheindlin of the Southern District of New York was untroubled by this definition's lack of geographical precision, explaining that the group of homeowners harmed by the leakage could not be determined until the jury "decide[d] how the [chemical] spread after the underground

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34. Dunakin v. Quigley, 99 F. Supp. 3d 1297, 1326 (W.D. Wash. 2015); *In re* Yahoo Mail Litig., 308 F.R.D. 577, 597 (N.D. Cal. 2015); Rice v. City of Philadelphia, 66 F.R.D. 17, 19 (E.D. Pa. 1974).

35. FED. R. CIV. P. 23(c)(2)(A); *see* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–63 (2011) (unanimous Part III.A of the decision). For an informative discussion of the class action for declaratory relief, see Andrew Bradt, *"Much to Gain and Nothing to Lose": Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 773 (2006).

36. FED. R. CIV. P. 23(c)(2) advisory committee's note to 2003 amendment.

37. FED. R. CIV. P. 23(c)(2)(B).

38. Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638, 645 (4th Cir. 1975); *see also* Disability Law Ctr. v. Utah, No. 2:15-cv-00645-RJS, 2016 WL 5396681, at *4 (D. Utah Sept. 27, 2016) (analyzing the numerosity requirement of Rule 23(a)(1) and stating that "joinder is impracticable where individual class members are difficult to identify.") (citing Colorado Cross-Disability Coal. v. Taco Bell Corp., 184 F.R.D. 354, 357–59 (D. Colo. 1999)); Phillips v. Joint Legislative Comm. on Performance & Expenditure Review, 637 F.2d 1014, 1022 (5th Cir. 1981) (concluding joinder was impracticable and numerosity "clearly met" because class members were "necessarily unidentifiable."), *cert. denied*, 456 U.S. 960 (1982).

39. 241 F.R.D. 185, 189 (S.D.N.Y. 2007).

storage tank leaked it into the ground."[40] Hence the vague term "vicinity" was capable of objective determination "once a jury ma[d]e its findings of fact."[41]

Too vague, by contrast, were classes defined to include purchasers who received warranties "nearly identical" to that of the named plaintiff;[42] purchasers of "commercial quantities" of silver;[43] debtors who were asked "probing" questions by collection agents;[44] people who cannot afford utility service because they are poor;[45] student-athletes who were "recruited" to play college football;[46] bidders who "would have won" eBay auctions absent a practice alleged to have artificially raised prices;[47] investors who owned beneficial interests in Argentinian-issued bonds regardless of when;[48] clients who retained an attorney who was "independent" of a defendant offering estate-planning services;[49] individuals who experienced "severe" withdrawal after discontinuing use of a psychiatric drug;[50] and "disabled" persons in a discrimination case.[51] These proposed classes were simply too indefinite to cohere, given manageability and res judicata considerations. To fix such problems

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40. *Id.* at 196.

41. *Id.* at 185, 196.

42. Cunningham Charter Corp. v. Learjet, Inc., 258 F.R.D. 320, 326 (S.D. Ill. 2009); *cf., e.g.*, Bernal v. NRA Grp., LLC, No. 16 C 1904, 2016 WL 4530321, at *4 (N.D. Ill. Aug. 30, 2016) (finding a class definition "as objective as it comes: all Illinois residents from whom [the defendant] attempted to collect a delinquent consumer debt allegedly owed for a Six Flags contract via a collection letter identical to the letter attached to the complaint").

43. Zeltser v. Hunt, 90 F.R.D. 65, 66 (S.D.N.Y. 1981).

44. Huebner v. Midland Credit Mgmt., Inc., No. 14 CIV. 6046 (BMC), 2016 WL 3172789, at *7–8 (E.D.N.Y. June 6, 2016).

45. Ihrke v. Northern States Power Co., 459 F.2d 566, 573 (8th Cir. 1972), *vacated as moot*, 409 U.S. 815 (1972).

46. Rock v. National Coll. Athletic Ass'n, No. 112CV01019TWPDKL, 2016 WL 1270087, at *7–8 (S.D. Ind. Mar. 31, 2016).

47. Mazur v. eBay Inc., 257 F.R.D. 563, 567–68 (N.D. Cal. 2009).

48. Brecher v. Republic of Argentina, 806 F.3d 22, 24, 26 (2d Cir. 2015) (holding that "[t]he lack of a defined class period, taken in light of the unique features of the bonds," rendered the class "insufficiently definite as a matter of law.").

49. Anderson v. United Fin. Sys. Corp., 281 F.R.D. 292, 296 (N.D. Ohio 2012).

50. *In re* Paxil Litig., 212 F.R.D. 539, 545–46 (C.D. Cal. 2003).

51. Access Now Inc. v. Walt Disney World Co., 211 F.R.D. 452, 454 (M.D. Fla. 2001). *But see* Cole v. Livingston, No. 4:14-cv-1698, 2016 WL 3258345, at *6 (S.D. Tex. June 14, 2016) ("Courts regularly certify classes of inmates who are disabled, even if they do not have the same disability," in cases seeking injunctive and declaratory relief).

the court can craft its own definition,[52] and, as in *MTBE*, a sufficiently precise definition may pass muster even if class membership cannot be determined until after merits fact-finding.

Similarly, the rule against fail-safe classes does not prohibit defining a class by reference to the causation element to include those injured by alleged misconduct.[53] For example, one court certified a class of millions of Wells Fargo customers who allegedly incurred overdraft fees "as a result of" the bank's out-of-order posting of debit transactions.[54] Another court, certifying a class of workers allegedly harmed "as a result of" exposure to the defendant's radiation, held "it is not fatal to Plaintiffs' proposed definition that it includes an element of causation without providing an objective method for determining causation."[55]

The class definition remains subject to change over the course of a case,[56] and it is the class itself—not its constituent members—that must be identified when it is certified.[57] Certainly "'the possibility that some claimants may fail to prevail on their individual claims will not defeat class membership' on the basis of the ascertainability

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52. *See, e.g.*, Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 757 (7th Cir. 2014); *In re* Monumental Life Ins. Co., 365 F.3d 408, 414 & n.7 (5th Cir. 2004); Alpha Tech Pet, Inc. v. Lagasse, LLC, No. 16 C 513, 2016 WL 4678316, at *7–8 (N.D. Ill. Sept. 7, 2016); Henderson v. Trans Union LLC, No. 3:14-cv-00679-JAG, 2016 WL 2344786, at *6 (E.D. Va. May 3, 2016); *In re* NJOY, Inc. Consumer Class Action Litig., 120 F. Supp. 3d 1050, 1093–94 (C.D. Cal. Aug. 14, 2015); Roundtree v. Bush Ross, P.A., 304 F.R.D. 644, 651–52 (M.D. Fla. 2015).

53. *See, e.g.*, *In re* Suntrust Banks, Inc. ERISA Litig., No. 1:08-cv-03384-RWS, 2016 WL 4377131, at *8 (N.D. Ga. Aug. 17, 2016) (in response to the defendants' argument that some retirement-plan participants were not injured by alleged breaches of fiduciary duty, the court redefined the class to include only participants who were injured thereby because their accounts sustained a loss "as a result of" the pertinent investment); *see also In re* Rodriguez, 695 F.3d 360, 370 (5th Cir. 2012) (stating that the members of such a class may be "linked by [their] common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership.") (quoting Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. 1999)).

54. *In re* Checking Account Overdraft Litig., 307 F.R.D. 630, 637–39 (S.D. Fla. 2015).

55. Norwood v. Raytheon Co., 237 F.R.D. 581, 586 (W.D. Tex. 2006).

56. FED. R. CIV. P. 23(c)(1)(C).

57. *See In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 241 F.R.D. 185, 195 & n.66 (S.D.N.Y. 2007); *see also* Daar v. Yellow Cab Co., 433 P.2d 732, 740 (Cal. 1967) ("If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment.").

requirement."[58] This traditional "liberal"[59] approach has been hotly contested of late.[60] Even so, recent federal cases show the traditional approach mostly continuing to prevail, with disagreement centering on whether and when a plaintiff may rely on the future submission of class member affidavits to meet the ascertainability test.

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58. *In re* Deepwater Horizon, 739 F.3d 790, 821 (5th Cir. 2014) (citation and alteration omitted), *cert. denied*, 135 S. Ct. 754 (2014). Class certification is "a procedural device that asks: 'who may sue together?' It is not a substantive rule designed to evaluate who is likely to prevail in that suit." JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:12 (12th ed. 2015). Accordingly, the court may consider the merits of claims and defenses only to the extent necessary to determine whether the Rule 23 prerequisites are satisfied. Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1195 (2013); *see* Krakauer v. Dish Network L.L.C., 311 F.R.D. 384, 394 (M.D.N.C. 2015) (holding that the plaintiff was "not required to prove that, without a doubt, every single person on the class list would be able to recover to satisfy the ascertainability requirement."); Rodman v. Safeway, Inc., No. 11-cv-03003-JST, 2014 WL 988992, at *16 (N.D. Cal. Mar. 10, 2014) ("If Defendant is arguing that, even after a plaintiff establishes all of the Rule 23 factors, a defendant can still defeat certification by pointing to the possibility that certain members of the class will not be able to recover on their claims, the Court does not adopt that view of the 'ascertainability' inquiry.").

59. Rodriguez v. Flowers Foods, Inc., No. 4:16-cv-245, 2016 WL 7210943, at *4–5 (S.D. Tex. Dec. 13, 2016); Forcellati v. Hyland's, Inc., No. CV 12-1983-GHK MRWX, 2014 WL 1410264, at *8 (C.D. Cal. Apr. 9, 2014); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 293 F.R.D. 287, 298 (E.D.N.Y. 2013); *see also In re* Delta/AirTran Baggage Fee Antitrust Litig., No. CV 1:09-md-2089-TCB, —F.R.D.—, 2016 WL 3770957, at *3 (N.D. Ga. July 12, 2016) ("Although ascertainability is an essential element of class certification, it has also been described as a 'slippery' requirement that 'does not require an overly strict degree of certainty and is to be liberally applied.'") (quoting Buford v. H&R Block, Inc. 168 F.R.D. 340, 347 (S.D. Ga. 1996)), *FED. R. CIV. P. 23(f) pet. for interlocutory review granted*, Nos. 16-90013 & 16-16401 (11th Cir.); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1760A (3d ed. 2005) (noting the "liberal judicial attitude toward defining the class and the fact that it normally is not essential to delimit its membership with a high degree of precision at the class-certification stage.").

60. *See* Petition for a Writ of Certiorari at 10, Direct Digital, LLC v. Mullins, 2015 WL 6549672, at *10 (U.S. Oct. 26, 2015) (No. 15-549) (advocating the need for a "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," and contending that affidavits alone fail to make this showing); Petition for a Writ of Certiorari at 33, Procter & Gamble Co. v. Rikos, 2015 WL 9591989, at *33 (U.S. Dec. 28, 2015) (No. 15-835) (contesting an "approach [that] leaves room for individuals to claim membership in a class based on foggy memories, confusion, conjecture, or even outright fraud.").

III. IS THERE A CIRCUIT SPLIT?

Rumors of a deep split on these issues among the federal circuits have been exaggerated. In all circuits, the ascertainability inquiry turns on the class definition and whether it allows for identification of members of the class. In no circuit can a plaintiff define a Rule 23(b)(3) class vaguely, subjectively, or based upon the defendant's liability. In no circuit can a defendant defeat certification with the argument that particular class members have not yet been identified.

*A. Ascertainability Pre-*Carrera

Until recently, the ascertainability doctrine was effectively uniform: A Rule 23(b)(3) class must be precisely defined, using objective criteria conforming to the facts underlying the claims, such that class membership can be determined without extensive effort at the remedies stage.[61] Although a judge cannot "embark on an odyssey that would require innumerable fact intensive inquiries" to confirm membership in a class,[62] the need for "laborious" efforts to

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61. Treatises on class action law recognize this consensus. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004) ("For example, the class may consist of those persons and companies that purchased specified products or securities from the defendants during a specified period, or it may consist of all persons who sought employment or who were employed by the defendant during a fixed period. . . . An identifiable class exists if its members can be ascertained by reference to objective criteria."); WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3.3 (5th ed. 2011) ("All courts essentially focus on the question of whether the class can be ascertained by objective criteria."); JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:2 (12th ed. 2015) ("[I]t is sufficient that the general parameters of membership are determinable at the outset.").

62. Bakalar v. Vavra, 237 F.R.D. 59, 65 (S.D.N.Y. 2006); *see In re* Barrick Gold Sec. Litig., 314 F.R.D. 91, 99 (S.D.N.Y. 2016) ("[A] class is ascertainable when defined by objective criteria . . . and when identifying its members would not require a mini-hearing on the merits of each case.") (ellipsis in original) (quoting Brecher v. Republic of Argentina, 806 F.3d 22, 24–25 (2d Cir. 2015)); Duchardt v. Midland Nat'l Life Ins. Co., 265 F.R.D. 436, 443 (S.D. Iowa 2009) ("The Court should not have to engage in lengthy, individualized inquiries in order to identify members of the class."); Cuming v. South Carolina Lottery Comm'n, No. 3:05-cv-03608-MBS, 2008 WL 906705, at *1 (D.S.C. Mar. 31, 2008) ("The proposed class definition must not . . . require an extensive factual inquiry to determine who is a class member."); *see also, e.g.*, Ramirez v. Palisades Collection LLC, 250 F.R.D. 366, 370 (N.D. Ill. 2008) (certifying a class where inquiries to determine its membership would be neither "arduous" nor "cumbersome"); Compressor Eng'g Corp. v. Thomas, No. 10-10059, — F.R.D.—, 2016 WL 7473448, at *7–9 (E.D. Mich. Dec. 29, 2016) (certifying a class

identify class members, short of mini-trials, does not preclude certification.[63] In practice, "even substantial" work to determine class membership—typically performed by claims administration firms, under class counsel's supervision—is not unusual.[64] Hornbook law consequently holds that it is "the *class definition* [that] must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of

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where the defendant "ha[d] begun to sort through the fax numbers and determine whether the businesses continue to exist"); Lafollette v. Liberty Mut. Fire Ins. Co., No. 2:14-cv-04147-NKL, 2016 WL 4083478, at *16 (W.D. Mo. Aug. 1, 2016) (certifying a class where an expert's work indicated it would take about three minutes, on average, to analyze each insurance file to determine class membership); Jones v. Advanced Bureau of Collections LLP, No. 5:15-cv-16 (MTT), 2016 WL 4499456, at *4 n.3 (M.D. Ga. Aug. 26, 2016) ("To the extent an individual inquiry is required, it will solely be to ascertain whether a letter has been returned. This is not the type of individualized inquiry that amounts to a 'series of mini-trials."); *see also infra* notes 63–64, 138.

63. Mitchell-Tracey v. United Gen. Title Ins. Co., 237 F.R.D. 551, 560 (D. Md. 2006); *see, e.g.*, *In re* Monumental Life Ins. Co., 365 F.3d 408, 419 (5th Cir. 2004) (reversing a denial of certification even though "'thousands' of grids must be constructed" for "myriad . . . policy variations" to calculate class member damages awards); Rodriguez v. Flowers Foods, Inc., No. 4:16-cv-245, 2016 WL 7210943, at *5 (S.D. Tex. Dec. 13, 2016) (holding that ascertainability was satisfied, in an overtime-pay case on behalf of food distributors, despite the need for "individualized testimony" to identify class members who did not hire helpers or assistants); Cummings v. Starbucks Corp., No. 12-06345, 2014 WL 1379119, at *16 (C.D. Cal. Mar. 24, 2014) (finding a proposed class ascertainable despite the defendant's argument that it would be "laborious" to review individual personnel files). *But see* Spencer v. Beavex, Inc., No. 05-cv-1501WQH (WMC), 2006 WL 6500597, at *9 (S.D. Cal. Dec. 15, 2006) (finding a proposed class not ascertainable because it would be "excessively complex" to determine which individuals drove particular routes on given days) (citing Joyce v. City & Cty. of San Francisco, No. C-93-4149 DLJ, 1994 WL 443464, at *6 (N.D. Cal. Aug. 4, 1994)).

64. Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539–40 (6th Cir. 2012); *see, e.g.*, Perez v. First Am. Title Ins. Co., No. CV-08-1184-PHX-DGC, 2009 WL 2486003, at *7 (D. Ariz. Aug. 12, 2009) ("Even if it takes a substantial amount of time to review files and determine who is eligible for the discount, that work can be done during discovery. Plaintiffs can then identify the individuals who are eligible for the discounts and did not receive them. If the jury agrees that such individuals are entitled to a recovery . . . then proof of class membership would be relatively easy. In short, while this issue may involve a file-by-file review, it will not require a file-by-file trial."), *modified on other grounds*, 2010 WL 1507012 (D. Ariz. Apr. 14, 2010); Labrier v. State Farm Fire & Cas. Co., 315 F.R.D. 503, 517–20 (W.D. Mo. 2016) (granting certification over the defendant's objection that "it is not feasible to identify the members of the class without a file-by-file analysis of its records and such analysis will require a great deal of its time and resources."); *see also supra* notes 62–63; *infra* note 138.

the proposed class."[65]

When membership depends upon a complex question, such as whether an individual contracted tuberculosis or was addicted to cigarettes, the composition of the class—and the amount of individual damages awards—can sometimes be determined in proceedings after common liability issues have been tried.[66] But a class is not ascertainable if "[m]any of the streamlining benefits that are the hallmark of a proper class action would be lost in the morass of individualized determinations of class membership," as when membership would depend upon employees having a reasonable expectation of privacy in different types of conversations,[67] or upon consumers having seen an alleged misrepresentation within a set of product ads, only some of which were deceptive.[68] The rule against burdensome person-by-person inquiries into class membership "follows Rule 23's animating rationale: certify only those classes that

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65. *Young*, 693 F.3d at 537–38 (emphasis added) (adopting district court findings and quoting J.W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.21[1] (3d ed.)); *accord* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1760A (3d ed. 2005); *see also* EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) ("However phrased, the requirement is the same. A class cannot be certified unless a court can readily identify the class members in reference to objective criteria.") (citation omitted); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1126 n.6 (9th Cir. 2017) ("[A] class definition must be objective and definite."); Hale v. State Farm Mut. Auto. Ins. Co., No. 12-0660-DRH, 2016 WL 4992504, at *10–11 (S.D. Ill. Sept. 16, 2016) (the precise, objective definition permitted certification even where, according to the defendant insurer, there was "no administratively feasible or objectively determinable way to identify class members who had their cars repaired over a 10½ year period and either had non-OEM parts used in the repair or had non-OEM parts specified on their repair estimates," and those cars "were likely disposed of long ago which makes it impossible to determine whether putative class members had non-OEM parts installed or whether the installation diminished the car's value as required for class membership."); *In re* Wholesale Grocery Prods. Antitrust Litig., No. 09-md-2090 ADM/TNL, 2016 WL 4697338, at *5 (D. Minn. Sept. 7, 2016) ("Because objective criteria will define the precise contours of the classes at some stage in the proceeding, the proposed classes are not infirm due to ascertainability."); Krueger v. Wyeth, Inc., 310 F.R.D. 468, 475 (S.D. Cal. 2015) ("[I]t is enough that the class definition describes 'a set of common characteristics sufficient to allow' an individual to determine whether she is a class member with a potential right to recover."); *supra* note 8; *infra* note 73.

66. DeGidio v. Perpich, 612 F. Supp. 1383, 1386 (D. Minn. 1985); Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 431–32 (Fla. 2013), *cert. denied*, 134 S. Ct. 332 (2013).

67. Kline v. Security Guards, Inc., 196 F.R.D. 261, 268 (E.D. Pa. 2000).

68. Perrine v. Sega of Am., Inc., No. 13-cv-01962-JD, 2015 WL 2227846, at *3–4 (N.D. Cal. May 12, 2015).

economize aggregate litigation."[69] Thus, where such inquiries would be required, common issues may give way to individual issues, defeating certification under the express language of Rule 23(b)(3).

Recently, however, ascertainability has moved from background to foreground, taking on a life of its own as a doctrine that can knock out even otherwise certifiable class actions. The Third Circuit issued three opinions in 2012 and 2013 that developed a new gloss on the doctrine. The court held that the plaintiff must propose a viable method at the certification stage for determining whether persons fit within the class and must affirmatively show that this method will be both reliable and administratively feasible.[70] These decisions have sowed confusion and led to denials of class certification based on plaintiffs' failures to prove there are records identifying class members.[71] One court even faulted plaintiffs for failing to show how they could accurately identify every single class member.[72] Yet the traditional requirement is more modest. It calls for a class definition that will allow the court to ascertain whether a given person is a

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69. Growers 1–7 v. Ocean Spray Cranberries, Inc., No. 1:12-cv-12016-RWZ, ECF No. 222, slip op. at 8 (D. Mass. May 10, 2016); *see also In re* PEPCO Emp. Litig., No. CIV. A. 86-0603(RCL), 1992 WL 442759, at *11 (D.D.C. Dec. 4, 1992) ("Rule 23 exists to ensure that courts certify only those classes that will promote efficiency.").

70. Carrera v. Bayer Corp., 727 F.3d 300, 308 (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, 594 (3d Cir. 2012).

71. An order in a defective products case deemed the proposed class unascertainable because the plaintiff had "not proved by a preponderance of the evidence that putative class members will know their replaced part's serial number." Kotsur v. Goodman Global, Inc., No. CV 14-1147, 2016 WL 4430609, at *6 (E.D. Pa. Aug. 22, 2016). Although the plaintiff's invoice from his service technician listed the serial number, the court stated that "other invoices (if potential class members retained them) may not." *Id.* In a similar vein, other orders denied certification of proposed classes that, at least before *Carrera*, stood a good chance of being found ascertainable. *See, e.g.*, *In re* Clorox Consumer Litig., 301 F.R.D. 436, 440–41 (N.D. Cal. 2014); *In re* Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 567–73 (E.D. Tenn. 2014); Stein v. Monterey Fin. Servs., Inc., No. 2:13-cv-01336-AKK, 2017 WL 412874, at *3–4 (N.D. Ala. Jan. 31, 2017); Brey Corp. v. LQ Mgmt. LLC, No. 11-cv-718, 2014 WL 943445, at *1 (D. Md. Jan. 30, 2014); *see also* Mladenov v. Wegmans Food Mkts., Inc., 124 F. Supp. 3d 360, 371–72 (D.N.J. 2015) (striking class allegations).

72. Jones v. ConAgra Foods, Inc., No. C 12-01633 CRB, 2014 WL 2702726, at *10 n.20 (N.D. Cal. June 13, 2014) (holding "that Plaintiffs have not established how they will accurately identify all class members ever.").

member.[73] In determining whether the final judgment in a class action precludes claims in a subsequent lawsuit, courts assess whether the follow-on plaintiff fits within the class definition and compare the follow-on complaint with the release of liability in the prior suit.[74] As a result, "there is no need to identify [a class's] individual members in order to bind all members by the judgment,"[75] and class membership need only "be determined with reasonable—but not perfect—accuracy."[76]

B. The Third Circuit's Carrera *Trilogy*

The proposed class in *Marcus v. BMW of North America, LLC* comprised New Jersey residents who owned certain BMW vehicles with allegedly defective "run-flat" tires that had gone flat and been

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73. O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998); Joseph v. General Motors Corp., 109 F.R.D. 635, 639 (D. Colo. 1986); *see supra* notes 8, 65.

74. Cooper v. Federal Reserve Bank, 467 U.S. 867, 874 (1984) ("[A] judgment in a properly entertained class action is binding on class members in any subsequent litigation."); *In re* Gen. Am. Life Ins. Co. Sales Practices Litig., 357 F.3d 800, 803 (8th Cir. 2004) ("The answer to the res judicata question, of course, must be determined by inspecting the language of the judgment that concluded the class action, including the settlement agreement that was included in that judgment."); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1130 n.9 (9th Cir. 2017) ("[D]etermining whether a plaintiff in that future action was a member of this class precluded from relitigating would be possible so long as the class definition in this action was clear"); *see, e.g.*, Cedillo v. TransCor Am., LLC, 131 F. Supp. 3d 734, 738–43 (M.D. Tenn. 2015); Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc., 679 F. Supp. 2d 1287, 1301–07 (D. Kan. 2010); Horton v. Metropolitan Life Ins. Co., 459 F. Supp. 2d 1246, 1249–55 (M.D. Fla. 2006); Gates v. Towery, 456 F. Supp. 2d 953, 963–66 (N.D. Ill. 2006); *In re* National Life Ins. Co., 247 F. Supp. 2d 486, 493–95 (D. Vt. 2002); Cook v. Harris, 85 F.R.D. 279, 285–86 (N.D. Ga. 1979); Hendler v. Wohlstetter, 411 F. Supp. 919, 921–22 (S.D.N.Y. 1975).

75. Daar v. Yellow Cab Co., 433 P.2d 732, 740 (Cal. 1967); *see also* Black v. General Info. Servs., Inc., No. 1:15 CV 1731, 2016 WL 899295, at *3 (N.D. Ohio Mar. 2, 2016) ("Courts in this Circuit routinely certify classes of purchasers of over-the-counter products where it will be impossible to identify and notice every member of the class.") (citations omitted); Legrand v. Intellicorp Records, Inc., No. 1:15 CV 2091, 2016 WL 1161817, at *3 (N.D. Ohio Mar. 24, 2016) ("The Sixth Circuit does not require that the Defendant, or the Court, be able to specifically identify each class member, but only that a prospective class member be able to identify him or herself as having a right to recover or opt out based on the description of the class.").

76. Rikos v. Procter & Gamble Co., 799 F.3d 497, 526 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1493 (2016); *see also* Bias v. Wells Fargo & Co., 312 F.R.D. 528, 539 (N.D. Cal. 2015) (holding that "ascertainability does not demand . . . mathematical precision.").

replaced.[77] The Third Circuit reversed certification in 2012 because BMW dealership records could not pin down this group, and "caution[ed] . . . against approving a method that would amount to no more than ascertaining by potential class members' say so."[78]

The proposed class in *Hayes v. Wal-Mart Stores, Inc.* comprised consumers who bought an "as-is" product from a Sam's Club store in New Jersey, along with an extended warranty plan not covering the product.[79] Noting the district court's acknowledgment of gaps in the pertinent store database records, the Third Circuit reversed certification in 2013 and held—for the first time—that the "plaintiff must show by a preponderance of the evidence that there is a reliable and administratively feasible method for ascertaining the class."[80]

The opinion three weeks later in *Carrera v. Bayer Corporation* took this holding a step further.[81] The proposed class comprised Florida consumers who bought a weight-loss supplement that Bayer allegedly marketed in a fraudulent manner.[82] Class members were unlikely to have proof of purchase, so the plaintiff proposed determining class membership through a combination of online retailer records and affidavits from purchasers.[83] The Third Circuit rejected these methods, holding that the plaintiff had not shown they were reliable or capable of identifying class members; further, relying on them could abridge Bayer's due process rights by impeding its ability to challenge whether consumers belonged to the class.[84] The court deemed inadequate a declaration from a claims administrator outlining auditing protocols for weeding out fraudulent claims.[85] The protocols were not specific to the case, the court remarked, and even if they were, they would not justify certification because "[a]t this stage in the litigation, the district

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77. 687 F.3d 583, 590 (3d Cir. 2012).

78. *Id.* at 593–94.

79. 725 F.3d 349, 353 (3d Cir. 2013).

80. *Id.* at 356.

81. 727 F.3d 300 (3d Cir. 2013). *Carrera* had a widespread impact in part because it, like *Hayes*, was authored by Judge Scirica, a former Chief Judge of the Third Circuit and no stranger to complex class action topics. *See, e.g.*, Sullivan v. DB Invs., Inc., 667 F.3d 273, 333–40 (3d Cir. 2011) (Scirica, J., concurring) (elaborating on unique aspects of class certification analysis in the settlement context).

82. *Id.* at 304.

83. *Id.* at 308.

84. *Id.* at 307–12.

85. *Id.* at 311.

court will not actually see the model in action."[86]

The full Third Circuit denied a subsequent en banc petition, with Judge Ambro, who authored *Marcus*, dissenting, joined by three other judges.[87] *Carrera* settled on remand for a common fund of $500,000.[88] Class members who lacked proof of purchase could still submit claims and receive a $15 payment: evidently, Bayer's interest in settling for a relatively low sum eclipsed the concern it voiced in the Third Circuit about fraudulent claims.[89]

*C. Post-*Carrera *Developments in the Courts of Appeals*

The "high-water mark"[90] of *Carrera* soon receded. A Third Circuit panel in 2015 had no problem with identifying class members by consulting a mortgage lender's business records and then "follow[ing] a few steps to determine whether the borrower is the real party in interest."[91] That process was not "onerous enough to defeat the ascertainability requirement" and contrasted with the failure in *Carrera* to show that retailer records "could identify even a

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86. *Id.*

87. In Judge Ambro's view, the *Carrera* opinion "begs the question of what does work to identify class members. . . . Because [the ascertainability doctrine] is a creature of common law, I believe that we should be flexible with its application, especially in instances where the defendant's actions cause the difficulty. Where, as here, 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, the consumers who make up that class should not be made to suffer." 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).

88. Jeannie O'Sullivan, *Bayer Settles False Ad Suit Over WeightSmart Vitamins*, LAW360 (Apr. 27, 2015, 10:22 PM), *available at* http://www.law360.com/articles/648263/bayer-settles-false-ad-suit-over-weightsmart-vitamins.

89. *Compare* Notice of Motion, Carrera v. Bayer Corp., No. 2:08-cv-04716-JLL-JAD, ECF No. 142 (D.N.J. Nov. 21, 2014), *and* Order Preliminarily Certifying Settlement Class, Granting Preliminary Approval of Settlement, and Approving Class Notice, Carrera v. Bayer Corp., No. 2:08-cv-04716-JLL-JAD, ECF No. 143 (D.N.J. Dec. 22, 2014), *and* Carrera v. Bayer Corp., No. 2:08-cv-04716-JLL-JAD, ECF No. 147 (D.N.J. Apr. 27, 2015), *with* Reply Brief for Appellants Bayer Corp. & Bayer Healthcare, LLC at 7, No. 12-2621, 2012 WL 4468337, at *7 (3d Cir. Sept. 24, 2012) (asserting that various "failures demonstrate the inherent unreliability of affidavits to determine WeightSmart class membership.").

90. Mullins v. Direct Digital, LLC, 795 F.3d 654, 662 (7th Cir. 2015).

91. *In re* Community Bank of N. Va. Mortg. Lending Practices Litig., 795 F.3d 380, 397 (3d Cir. 2015), *cert. denied sub nom.* PNC Bank v. Brian W., 136 S. Ct. 1167 (2016).

single purchaser[.]"[92] Another 2015 Third Circuit decision overturned a denial of certification and, in apparent tension with *Carrera*'s statement that "[a]scertainability mandates a rigorous approach,"[93] characterized the ascertainability inquiry as "narrow."[94] "There will always be some level of inquiry required to verify that a person is a member of a class," the court explained, but "there is no records requirement."[95] A concurrence from Judge Rendell criticized the *Carrera* approach as unrealistic and likely to subvert Rule 23's purposes of deterring wrongdoing and compensating its victims, even where identifying all of them is not possible.[96] Notwithstanding this pushback, the *Carrera* holdings continue to influence the ongoing debate over whether, absent records identifying class members, such persons can self-identify with a sworn affirmation.

The First Circuit's 2015 split decision in the Nexium antitrust litigation illustrates the basic disagreement.[97] The majority opinion upheld certification of a class of end-payors for a heartburn medication who alleged a scheme to delay generic competition to the patented prescription drug.[98] In so ruling, the majority rejected the defendants' argument that the presence of some uninjured class members destroyed standing so as to render certification inappropriate, holding instead that a *de minimis* number of uninjured class members creates no bar to certification if the provisions of Rule 23 are satisfied.[99] Central to this analysis were the class definition and the ability to distinguish injured from

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92. *Id.*

93. Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2013).

94. Byrd v. Aaron's Inc., 784 F.3d 154, 165 (3d Cir. 2015).

95. *Id.* at 164, 170.

96. *Id.* at 172–77 (Rendell, J., concurring) ("Records are not the only way to prove that someone is in a class. . . . Could not the judge decide that, in addition to an individual's 'say so' that he is a member of the class, the claimant needs to submit an affidavit from another household member or from his doctor corroborating his assertion that he did, in fact, take Bayer aspirin? Is that not permissible and appropriate? Yet, we foreclose this process at the outset . . . . In small-claims class actions like *Carrera*, the real choice for courts is between compensating a few of the injured, on the one hand, versus compensating none while allowing corporate malfeasance to go unchecked."); *see also infra* note 126.

97. *In re* Nexium Antitrust Litig., 777 F.3d 9 (1st Cir. 2015).

98. During the pendency of the class certification appeal, two of the defendants prevailed against this class in a full trial on the merits, as recounted in the district court's idiosyncratic post-trial opinion. *See In re* Nexium (Esomeprazole) Antitrust Litig., 309 F.R.D. 107 (D. Mass. 2015).

99. *Nexium*, 777 F.3d at 14.

uninjured end-payors in an eventual claims process.[100] The majority concluded that "brand-loyal" consumers, who were not injured because they would not have chosen to purchase a more affordable generic version of the drug, could be identified and excluded from the class.[101] This choice, however, existed only as a hypothetical in a "but-for" world free of collusion, leaving no records to consult.[102] Class members accordingly could

> establish injury through testimony . . . that, given the choice, he or she would have purchased the generic. Such testimony, if unrebutted, would be sufficient to establish injury in an individual action. And if such consumer testimony would be sufficient to establish injury in an individual suit, it follows that similar testimony *in the form of an affidavit or declaration* would be sufficient in a class action.[103]

Instead of pointing to the arguably subjective class membership criteria, the dissenting judge in *Nexium* posed a series of rhetorical questions whose concerns parallel those of *Carrera*. Affidavits from individual class members to establish harm, Judge Kayatta wrote, might go "[u]ntested by the adversary system, unexamined by any trial judge," and could raise more questions than they would answer:

> What happens to those consumers who do not return an affidavit (of whom there may be many, given the low dollar amount of any potential recovery)? Will they be deemed to have opted out of the class? Or will they be deemed to have remained in, but lost their claims due to lack of injury? Even more daunting, what happens if tens or hundreds of thousands of Nexium purchasers file affidavits? How exactly will defendants exercise their acknowledged right to "challenge individual damage claims at trial"? Will the defendants seek to depose everyone who has returned an affidavit, effectively challenging plaintiffs' counsel to a discovery game of chicken?[104]

A line of settlement cases answers Judge Kayatta's first three

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100. *Id.* at 19.
101. *Id.* at 20.
102. *Id.* at 26.
103. *Id.* at 20 (emphasis added).
104. *Id.* at 34–35 (Kayatta, J., dissenting).

questions—class members who miss the claims deadline and who, as a result, are not entitled to recover, remain class members bound by the judgment, unless a settlement agreement (or the court) provides otherwise.[105] The balance of Judge Kayatta's questioning is addressed in Part IV, *infra*.

The same disagreement over the use of affidavits characterizes a 2015 unpublished Eleventh Circuit decision.[106] Citing Third Circuit cases, the lead opinion upheld an order denying certification of a group of purchasers of a weight-loss supplement that the defendant was alleged to have falsely advertised.[107] The defendant's "sales data identified mostly third-party retailers, not class members," and the court concluded that "[w]ithout a specific proposal as to how identification via affidavit would successfully operate, the district court had no basis to accept the method."[108] Judge Martin concurred but maintained that "self-identification can and should be a sufficient means of ascertaining a class, particularly for a class of consumers of a cheap and unique product[.]"[109]

Other federal courts, most notably the Seventh Circuit, wasted little time in repudiating *Carrera* and making clear that individual claim forms can ascertain a class.[110] *Pearson v. NBTY, Inc.*, a 2014 opinion that delves into class settlement pitfalls, expresses a preference for simplicity in claim submissions: "One would have thought, given the low ceiling on the amount of money that a

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105. *See, e.g.*, *In re* Optical Disk Drive Antitrust Litig., No. 3:10-md-02143 RS, 2014 WL 1654028, at *2 (N.D. Cal. Apr. 25, 2014); *In re* Volkswagen & Audi Warranty Extension Litig., 273 F.R.D. 349, 355 (D. Mass. 2011); *In re* Managed Care Litig., No. 00-1334-md-MOR, 2003 WL 22218324, at *4 (S.D. Fla. May 30, 2003); Diamond Chem. Co. v. Akzo Nobel Chems. B.V., 205 F.R.D. 33, 35 (D.D.C. 2001).

106. Karhu v. Vital Pharm., Inc., 621 F. App'x 945 (11th Cir. 2015).

107. *Id.* at 950.

108. *Id.* at 949.

109. *Id.* at 951–54 (Martin, J., concurring). In another post-*Carrera* unpublished opinion, the Eleventh Circuit reversed certification of a class of electronic bingo players claiming an illegal gambling operation, where the casino database did not show who lost money in individual bingo games. Bussey v. Macon Cty. Greyhound Park, Inc., 562 F. App'x 782, 788 (11th Cir. 2014). The court instructed the district court to reevaluate predominance with a class defined to match the database, comprising people who lost money in entire gambling sessions. *Id.* at 791. The Eleventh Circuit may further address ascertainability in a pending antitrust class certification appeal, in which the parties briefed the issue. Siegel v. Delta Air Lines, Inc., Nos. 16-90013 & 16-16401 (11th Cir.).

110. The Sixth Circuit likewise saw "no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts." Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015).

member of the class could claim, that a sworn statement would be sufficient documentation, without requiring receipts or other business records likely to have been discarded."[111] Unlike the elaborate process in the *Pearson* case, which seemed designed to discourage claims,[112] a 2015 settlement with a lender accused of unlawfully increasing insurance prices won praise from a district court for its "simple 'check the box' claims process requiring minimal information readily known by the Class Members, but not Defendants."[113]

Yet a simple claim form may not always be possible, particularly in cases involving competing interests or several different products, services, contracts, or alleged misrepresentations. The Fourth Circuit's 2014 decision in *EQT Production Co. v. Adair*[114] demonstrates the need to sort through and untangle these issues before a class may be certified. The lawsuit claimed two companies violated Virginia law by withholding royalties to owners of land parcels from which the companies extracted coalbed methane gas.[115] The court reversed class certification because of "numerous heirship, intestacy, and title-defect issues" that "pose[d] a significant administrative barrier to ascertaining the ownership classes," which were defined to include successors-in-interest (landowners who did not acquire their parcels until after a state board received notice of a defendant's intent to extract gas from them).[116] The Fourth Circuit remanded for further consideration as to the class definition, the estimated number of successors-in-interest, and how to manage the administrative challenges associated with using land records to establish ownership.[117] The *EQT* decision suggests that ascertainability problems in cases with higher-value claims can sometimes be avoided, or minimized, by sorting class members into subclasses based on how membership will be verified.[118] In *EQT*, for

111. 772 F.3d 778, 783 (7th Cir. 2014).

112. *Id.*

113. Braynen v. Nationstar Mortg., LLC, No. 14-cv-20726, 2015 WL 6872519, at *17 (S.D. Fla. Nov. 9, 2015); *see also infra* note 133.

114. 764 F.3d 347 (4th Cir. 2014).

115. *Id.* at 353–55.

116. *Id.* at 359. In contrast, a federal court in Dallas certified a class of gas-royalty interest owners on a motion for reconsideration, finding it "possible to identify" class members "either through public or [defendant] records, or by affidavit[.]" Seeligson v. Devon Energy Prod. Co., L.P., No. 3:16-cv-00082-K, 2017 WL 68013, at *4–5 (N.D. Tex. Jan. 6, 2017).

117. *EQT*, 764 F.3d at 360.

118. Rule 23(c)(5) vests the court with authority to designate subclasses.

example, the class certification order likely would have fared better on appeal had it designated subclasses corresponding to deed language and landowner categories.

In its 2015 decision in *Mullins v. Direct Digital, LLC*, the Seventh Circuit preserved the traditional understanding of ascertainability as a low bar to class certification that trains on the class definition.[119] Courts must "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."[120]

The Seventh Circuit rejected the Third Circuit's demand for proof, at the certification stage, of a reliable and administratively feasible means of identifying class members.[121] In deciding certification, judges need not "examine the potential difficulty of identifying particular members of the class and evaluating the validity of claims they might eventually submit," for such a requirement has the detrimental "effect of barring class actions where class treatment is often most needed."[122] As an example, the court cited *Boundas v. Abercrombie & Fitch Stores, Inc.*, where a clothing company had allegedly failed to abide by its representation that promotional gift cards would never expire.[123] Class certification was proper even though the class included people who had thrown away their gift cards, because "anybody claiming class membership on that basis will be required to submit an appropriate affidavit, which can be evaluated during the claims administration process[.]"[124]

The Seventh Circuit held that the issues analyzed by the Third Circuit under the freestanding ascertainability doctrine are better analyzed under the flexible, text-based mandates of superiority and manageability, which courts apply not absolutely but comparatively, taking into account viable alternatives to class treatment.[125]

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119. 795 F.3d 654, 657–58 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

120. *Id.* at 672.

121. *Id.* at 657.

122. *Mullins*, 795 F.3d at 657–58.

123. 280 F.R.D. 408, 411 (N.D. Ill. 2012).

124. *Id.* at 417 (citations omitted).

125. *Mullins*, 795 F.3d at 658, 663–64; *see also* Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016) (holding that ascertainability is not "a separate, preliminary requirement," but rather an embedded requirement of Rule 23); Abarca v. Werner Enters., Inc., No. 8:14CV319, 2016 WL 6407836, at *3–6 (D. Neb. Oct. 28, 2016) (applying *Sandusky* to deny class certification for lack of

Further, a superiority analysis may favor class treatment in cases presenting the most sprawling administrative challenges—not only because there is "the greatest pay-off" in compensation to the injured when such cases are litigated efficiently and preclusively, but also because, without a class, "there realistically is no other alternative" and violations can go undeterred.[126]

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ascertainability under all four prongs of Rule 23(a), but granting leave to amend the complaint with an adequate class definition); *In re* Global Tel*Link Corp. ICS Litig., No. 5:14-cv-5275, 2017 WL 471571, at *3 (W.D. Ark. Feb. 3, 2017) (stating that "inquiry into administrative burdens should be shaped and guided by the Rule 23(b)(3) factors that properly implicate them, rather than being elevated to a separate, preliminary requirement for a heightened showing that has no basis in the text of Rule 23."); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1128 (9th Cir. 2017) (declining to adopt "a standalone administrative feasibility requirement" based in part on the conclusion that it "would invite courts to consider the administrative burdens of class litigation 'in a vacuum'" instead of "assessing manageability as one component of the superiority inquiry") (quoting *Mullins*, 795 F.3d at 663); *In re* Petrobras Sec. Litig., 312 F.R.D. 354, 363–64 (S.D.N.Y. 2016) (treating ascertainability as a component of the superiority analysis); Perez v. First Am. Title Ins. Co., No. CV-08-1184-PHX-DGC, 2009 WL 2486003, at *7 (D. Ariz. Aug. 12, 2009) (same); *In re* First Am. Home Buyers Prot. Corp. Class Action Litig., 313 F.R.D. 578, 610 (S.D. Cal. 2016) (finding that an ascertainability argument was "more appropriately addressed in terms of manageability."); Labrier v. State Farm Fire & Cas. Co., 315 F.R.D. 503, 517–20 (W.D. Mo. 2016) (analyzing ascertainability issues under the rubric of manageability); Kumar v. Salov N. Am. Corp., No. 14-cv-2411-YGR, 2016 WL 3844334, at *5 (N.D. Cal. July 15, 2016) (noting that the ascertainability doctrine may be "viewed through the lens of manageability, superiority, or predominance").

126. *Mullins*, 795 F.3d at 658, 664 (citing CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1780 (3d ed. 2005)); *see* Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (concluding that antitrust class actions have a "significant" deterrent effect); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (articulating "[t]he policy at the very core of the class action mechanism"—"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.") (citation omitted); Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 338–39 (1980); Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 677 (7th Cir. 2013) (emphasizing that "[a] class action, like litigation in general, has a deterrent as well as a compensatory objective."); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) (prioritizing "the deterrent effect of class actions" in addressing *cy pres* distributions of residual settlement funds); Linder v. Thrifty Oil Co., 2 P.3d 27, 38 (Cal. 2000) (declaring that "[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation.") (citations omitted); *see also* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 195–96 (opining that "class actions serve a very important regulatory function in the United States and, without them, a great deal of wrongdoing would go undeterred."); Myriam Gilles &

Finally, the Ninth Circuit weighed in with an ascertainability decision in a products mislabeling case, *Briseno v. ConAgra Foods, Inc.*[127] Siding with the Seventh Circuit, the Ninth Circuit rejected an administrative feasibility hurdle to certification as ill-conceived, atextual, and duplicative of "Rule 23's enumerated criteria[.]"[128] The court reasoned that "[i]mposing a separate administrative feasibility requirement would render th[e] manageability criterion largely superfluous" and would "conflict[] with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns."[129] At the same time, the court cautioned against "definitional deficiencies," restating the core "principle that a class definition must be objective and definite."[130]

IV. THE MODERN WEB AFFIDAVIT AND THE LIMITS OF DUE PROCESS

Technological changes have transformed the world of complex litigation. Lawyers prepare for trial by creating electronic demonstratives; discovery documents are uploaded for review onto Internet platforms instead of being housed in overflowing bankers' boxes; pleadings are forwarded and edited in ways that would have been inconceivable a generation ago; judges supervising multidistrict litigation post orders and other case documents on public

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Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 139 (2006) (arguing that "the primary goal in small-claims class actions is deterrence, and that the only question we should ask with respect to any rule or reform proposal in this area is whether it promotes or optimizes deterrence.").

127. 844 F.3d 1121 (9th Cir. 2017).

128. *Id.* at 1123, 1127.

129. *Id.* at 1125–28 (quoting *Mullins*, 795 F.3d at 663) (citing In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001), *overruled on other grounds by* In re IPO Sec. Litig., 471 F.3d 24 (2d Cir. 2006), *and superseded by statute on other grounds as stated in* Attenborough v. Construction & Gen. Bldg. Laborers' Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006)); *see also* Klay v. Humana, Inc., 382 F.3d 1241, 1272–73 (11th Cir. 2004) (holding that a manageability "concern will rarely, if ever, be in itself sufficient to prevent certification of a class."), *cert. denied*, 543 U.S. 1081 (2005), *abrogated in part on other grounds by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008); Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 760 (7th Cir. 2014) (stating that "[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.") (citation omitted).

130. *ConAgra*, 844 F.3d at 1124 n.4, 1126 n.6.

websites;[131] court records can be instantly obtained online from far-flung jurisdictions; and notices of class actions are sent via e-mail and published on the Internet.[132] By and large, the process for submitting a claim to a class judgment has also become web-based.

Claims administrators manage websites with links to claim forms that class members complete and upload with clicks of the computer mouse. For example, the claim form in a recent privacy

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131. For an example of such an MDL website, see *Syngenta AG MIR 162 Corn Litigation*, U.S. DIST. COURT FOR THE DIST. OF KAN., http://www.ksd.uscourts.gov/syngenta-ag-mir162-corn-litigation.

132. In the early 2000s, use of the Internet became "a mainstay in class action notice programs. As a result, more class members may become aware of the class actions to which they are parties and, ultimately, can participate more directly in those actions." Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 734 (2008). Direct notice via U.S. mail still outperforms all other forms of notice by a considerable margin. *See* Letter from Todd B. Hilsee, Pollard v. Remington Arms Co., No. 4:13-cv-00086-ODS, ECF No. 134 at 10 & Ex. 2 (W.D. Mo. July 29, 2016) (citing data presented to the Federal Trade Commission by Analytics LLC in March 2016). Even so, direct notice via e-mail is increasingly used. *See, e.g.*, *In re* Online DVD-Rental Antitrust Litig., 779 F.3d 934, 941, 946 (9th Cir. 2015) (settlement notice was first e-mailed to thirty-five million class members and then sent via U.S. mail to over nine million class members whose e-mail addresses generated bounce-back messages); McCrary v. Elations Co., No. EDCV 13-0242 JGB (SPx), 2016 WL 769703, at *7 (C.D. Cal. Feb. 25, 2016) (notice was sent via U.S. mail and e-mail to potential class members); *In re* Magsafe Apple Power Adapter Litig., No. 5:091-cv-01911-EJD, 2015 WL 428105, at *10 (N.D. Cal. Jan. 30, 2015) (e-mails, the primary notice vehicle, were sent to 5,523,878 class members). When it is infeasible to notify class members directly, web-based publication notice may suffice, as "[s]omething is better than nothing." Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 786 (7th Cir. 2004); *see, e.g.*, Juris v. Inamed Corp., 685 F.3d 1294, 1304–05, 1316–21 (11th Cir. 2012) (notice program with an Internet-posting component satisfied due process; "[w]here certain class members' names and addresses cannot be determined with reasonable efforts, notice by publication is generally considered adequate."); *In re* Polyurethane Foam Antitrust Litig., 168 F. Supp. 3d 985, 993–94 (N.D. Ohio 2016) (notice plan relied on online banner and text ads on multiple networks, including social media and targeted websites); Mark v. Gawker Media LLC, No. 13-cv-4347 (AJN), 2015 WL 2330274, at *1–2 (S.D.N.Y. Apr. 10, 2015) (notice was effectuated through social media); *In re* Motor Fuel Temperature Sales Practices Litig., No. 07-md-1840-KHV, 2015 WL 5010048, at *8 (D. Kan. Aug. 21, 2015) (notice plan relied on online banner ads and keyword search ads); *In re* Colgate-Palmolive Softsoap Antibacterial Hand Soap Mktg. & Sales Practices Litig., No. 12-md-2320-PB, 2015 WL 7282543, at *3 (D.N.H. Nov. 16, 2015) (over the course of one month, "the banner ad campaign resulted in more than seventy-one million impressions published to Internet users," and over two months "the Class Settlement website received 44,133 visits and 58,984 page views.").

case asked consumers to verify their class membership by listing their cell phone numbers, smartphone models, and wireless providers.[133] However, because claims rates are typically low,[134] the optimal recovery process is one in which class members automatically receive a check or, better yet, an electronic funds transfer.[135] Automatic and electronic claims payment should become increasingly possible—and prevalent—with the rise of big data, sophisticated marketing to consumers, and tracking of consumer purchases in the mass economy.[136] Correspondingly, the preferred

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133. Claim Form, *In re Carrier IQ, Inc. Consumer Privacy Litig.*, No. C-12-md-2330 EMC (N.D. Cal.), *available at* http://www.carrieriqsettlement.com/media/488922/v12_ciq_claim_031616_final-web.pdf; *see also* Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. at 742 ("Claims administration websites provide notice of class action settlements and foster class members' participation," including by allowing them to "submit directly a claim form."); *supra* note 113.

134. *See* Gascho v. Global Fitness Holdings, LLC, No. 2:11-cv-436, 2014 WL 1350509, at *30 (S.D. Ohio Apr. 4, 2014) (accepting expert testimony "that response rates in class actions generally range from one to 12 percent"); Date v. Sony Elecs., Inc., No. 07-15474, 2013 WL 3945981, at *9–10 (E.D. Mich. July 31, 2013) (finding that "many factors affect response rates and this ratio should not be given great significance.") (citing *In re* Serzone Prods. Liab. Litig., 231 F.R.D. 221, 235–36 (S.D.W. Va. 2005)); *In re* Packaged Ice Antitrust Litig., No. 08-MDL-01952, 2011 WL 6209188, at *14 (E.D. Mich. Dec. 13, 2011) (recognizing that the claims rate in class settlements is frequently less than five percent); Jackson v. Wells Fargo Bank, N.A., 136 F. Supp. 3d 687, 706 (W.D. Pa. 2015) (concluding that a thirteen percent claims rate "appears to be fairly high in the area of consumer lending and supports settlement."); Touhey v. United States, No. EDCV 08-01418-VAP (RCx), 2011 WL 3179036, at *7–8 (C.D. Cal. July 25, 2011) (approving a class settlement where two percent responded); Poertner v. Gillette Co., No. 6:12-cv-803-Orl-31DAB, 2014 WL 4162771, at *5 (M.D. Fla. Aug. 21, 2014) (approving a class settlement where 0.0762 percent responded), *aff'd*, 618 F. App'x 624 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1453 (2016).

135. *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 790 (2015) (arguing convincingly that PayPal accounts "are *made* for receiving money and there is nothing to prevent them from receiving money from class action settlements.") (emphasis in original). Electronic payment of claims also avoids the cost of processing and mailing class members checks, a portion of which are never cashed or deposited.

136. *See* Labrier v. State Farm Fire & Cas. Co., 315 F.R.D. 503, 518 (W.D. Mo. 2016) (rejecting an ascertainability challenge: "Logically, a primary reason any large and sophisticated business entity . . . would choose to maintain records electronically is to simplify the tracking and manipulation of such large amounts of data."); Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court"*, 48 AKRON L. REV. 757, 792 (2015) (observing that "the law of big numbers works in [corporations'] favor on the sales and marketing side," and suggesting that courts,

way to ascertain a class is through business records, as in a case for securities fraud where the defendant company and transfer agents maintain records of who owns how much stock.[137] The need to scrutinize such records or consult experts does not affect class ascertainability "so long as the inquiry is not so daunting as to make the class definition insufficient."[138] But class lists or other

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congruently, should enlist mass techniques in aid of those harmed by corporate violations instead of "impos[ing] upon the class a different (and now non-exempt) social and economic reality than the operative one in which defendant has actually conducted its business."); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 313 (2014) ("Significant products are mass produced and sold on a national or global marketplace basis, and a multitude of transactions take place, often anonymously, on the internet; manufacturers, financial institutions, and service providers benefit from these geographically unbounded marketplaces, distribution systems, and information networks. Because these entities reap the rewards of national or global commerce, plaintiffs similarly should be enabled to seek rectification on a corresponding geographically unlimited and aggregate basis when there is a commonality of claims.").

137. *See, e.g.*, *In re* Facebook, Inc., IPO Sec. & Deriv. Litig., 312 F.R.D. 332, 353 (S.D.N.Y. 2015); Fogarazzo v. Lehman Bros., 263 F.R.D. 90, 101 (S.D.N.Y. 2009); *see also* Thomas v. FTS USA, LLC, 312 F.R.D. 407, 416 (E.D. Va. 2016) (holding that ascertainability was satisfied, in fair-credit-reporting case, based on defendants' files and records on class of job applicants); Qureshi v. OPS 9, LLC, No. CV 14-1806, 2016 WL 6434345, at *1–2 & n.1 (D.N.J. Oct. 28, 2016) (holding that ascertainability was satisfied, in fair-debt-collection case, based on information in individual applications for default judgment); Verma v. 3001 Castor, Inc., No. CV 13-3034, 2016 WL 6962522, at *12 (E.D. Pa. Nov. 29, 2016) (holding that ascertainability was satisfied, in overtime-pay case, based on index of exotic dancer performance contracts); Ward v. United Airlines, Inc., No. C 15-02309 WHA, 2016 WL 1161504, at *7–8 (N.D. Cal. Mar. 23, 2016) (holding that ascertainability was satisfied, in dispute over adequacy of wage statements, based on defendant's records of pilots as to whom it applied California income tax laws), *followed in* Vidrio v. United Airlines, Inc., No. CV15-7985 PSG (MRWx), ECF No. 32, slip op. at 10 (C.D. Cal. Aug. 23, 2016).

138. Rollins v. Traylor Bros., No. C14-1414 JCC, 2016 WL 258523, at *3 (W.D. Wash. Jan. 21, 2016) (internal quotation marks omitted) (quoting, *inter alia*, Lau v. Arrow Fin. Servs., LLC, 245 F.R.D. 620, 624 (N.D. Ill. 2007)); *see also* NorCal Tea Party Patriots v. IRS, No. 1:13-cv-341, 2016 WL 223680, at *5 (S.D. Ohio Jan. 19, 2016) (holding that "[t]he need to manually review individual files to determine class membership is not a reason to reject class certification.") (citing Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539–40 (6th Cir. 2012)); Krakauer v. Dish Network LLC, 311 F.R.D. 384, 390–94 (M.D.N.C. Sept. 9, 2015) (performing a detailed analysis of records to find a class ascertainable); Cole v. Livingston, No. 4:14-cv-1698, 2016 WL 3258345, at *6 (S.D. Tex. June 14, 2016) ("The fact that 'only a medical provider' could determine which conditions place people at increased risk for heat-related illness, injury, or death does not make the subclass unascertainable."); Rhodes v. National Collection Sys., Inc., 317 F.R.D. 579, 583 (D. Colo. 2016) ("That these

identifying records are not always available, as in certain cases involving complex chains of distribution. In such circumstances, courts have allowed class members to obtain recovery by completing a web-based claim form.[139]

A. Affidavits Alone Can and Do Bring About Consequential Judicial Acts

Testimony in affidavits has long sufficed to justify a variety of judicial acts. Consequential steps that courts have taken with the support of an affidavit alone include allowing victims of large-scale accidents to recover damages, lifting default judgments due to excusable neglect, issuing search and arrest warrants, and entering temporary restraining orders.[140]

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notations [identifying class members] may be idiosyncratic, may not always be accurate, or in individual cases may be omitted all together, does not defeat ascertainability wholesale."); Nitsch v. Dreamworks Animation SKG Inc., 315 F.R.D. 270, 285–88 (N.D. Cal. May 25, 2016) (relying on an expert's report to find a class ascertainable); *supra* notes 62–64. *But see* Espejo v. Santander Consumer USA, Inc., No. 11 C 8987, 2016 WL 6037625, at *7–8 (N.D. Ill. Oct. 14, 2016) (deeming a proposed class unascertainable when the plaintiff seeking certification "challenge[d] the content, clarity, accuracy, and completeness of the very records on which [she] would base class certification, on the very points needed to determine class membership.").

139. For instance, at least 233,944 persons who purchased televisions or computers that incorporated price-fixed LCD panels filled out a web-based form between 2012 and 2014 to submit valid claims in connection with the administration and distribution of a $1.1 billion class settlement. *LCD Indirect Purchaser Litigation and Settlements*, https://lcdclass.com; *see* Indirect-Purchaser Plaintiffs' & Settling States' Joint Motion to Distribute Settlement Fund at 6, *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 3:07-md-01827-SI, ECF No. 9217 at 6 (N.D. Cal. Sept. 12, 2014), *available at* https://lcdclass.com/Portals/0/Documents/9-12-14%20LCD%20Mot%20to%20Distrib.pdf.

140. These are not the only circumstances in which submission of an affidavit can have a legal effect or alter litigants' rights. *See also, e.g.*, Department of Recreation & Sports v. World Boxing Ass'n, 942 F.2d 84, 88 (1st Cir. 1991) (holding that when the defendant in a diversity suit disputes federal jurisdiction, the plaintiff can meet its burden under the amount-in-controversy requirement "by submitting affidavits.") (citing Diefenthal v. Civil Aeronautics Bd., 681 F.2d 1039, 1052 (5th Cir. 1982)); Pudlowski v. St. Louis Rams, LLC, 829 F.3d 963, 964 (8th Cir. 2016) (reversing an order that would have remanded the case to state court for lack of federal jurisdiction and finding an abuse of discretion in the district court's refusal to consider two post-removal affidavits demonstrating diversity of citizenship); FED. R. CIV. P. 56(d)(1) (the court may deny or defer ruling on summary judgment upon the nonmovant's showing "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition"); Lanz v. Goldstone, 197 Cal. Rptr. 3d

First, mass tort cases filed and consolidated on the heels of disasters like toxic waste spills, or upon revelations of unreasonably dangerous products, represent the closest analogues to class action litigation. Courts presiding over aggregate mass tort proceedings have entered "*Lone Pine*" orders,[141] under which plaintiffs submit affidavits that are used to exclude meritless claims and that can also establish eligibility to recover out of a global settlement. A typical *Lone Pine* order requires each plaintiff to "state the chemical or toxic substance to which that plaintiff was exposed; the date or dates and place of exposure; the method of exposure; the nature of [the] plaintiff's injury; and the identity of each medical expert who will support" the claim.[142] Such orders aim to streamline complex litigation for disposition[143] and may issue "shortly before or after a comprehensive settlement is reached[.]"[144]

Second, at common law, an attorney's affidavit stating good

227, 238–39 (Cal. Ct. App. 2015) (motions invoking California's anti-SLAPP statute to avoid liability rise or fall on "the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.") (citing CAL. CIV. PROC. CODE § 425.16(b)(2)); Stoeckert v. Nooth, 344 P.3d 136, 139 (Or. Ct. App. 2015) (a prisoner's affidavit sufficed to preserve his post-conviction appeal); *infra* note 203.

141. Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986).

142. Cottle v. Superior Court, 5 Cal. Rptr. 2d 882, 884 (Cal. Ct. App. 1992); *see also* Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604 n.2 (5th Cir. 2006) (in a mass tort arising from an oil refinery fire, plaintiffs "produce[d], depending on the type of injury alleged [i.e., harm to person or property], either an affidavit from a qualified treating or other physician, or an affidavit from a qualified real estate appraiser or other real estate expert."); *In re* Zimmer Nexgen Knee Implant Prods. Liab. Litig., No. 1:11-cv-05468, 2016 WL 3281032, at *2 (N.D. Ill. June 10, 2016) (a *Lone Pine* order appended a form affidavit for doctors to attest "to a reasonable degree of medical certainty" that high-flexion activity caused the defendant's knee implant device to loosen within a given plaintiff); *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 576 (S.D. Tex. 2005) (in a mass tort involving the claims of workers exposed to silica dust, plaintiffs submitted "fact sheets" stating pertinent medical information and when, where, and how they were exposed to the particles).

143. *See In re* Fosamax Prods. Liab. Litig., No. 06 MD 1789 (JFK), 2013 WL 4494427, at *1 (S.D.N.Y. Aug. 22, 2013).

144. S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEM. L. REV. 559, 616 (2012) (footnote omitted); *see, e.g.*, *In re* Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig., No. 3:12-cv-60081-DRH-SCW, 2015 WL 5307473, at *1 (S.D. Ill. Sept. 10, 2015) (entering a *Lone Pine* order following a global settlement "for the purpose of resolving the claims of . . . two categories of claimants."); *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., No. 2007-md-1871, 2010 WL 4720335, at *1 (E.D. Pa. Nov. 15, 2010) (entering a *Lone Pine* order partly "in furtherance of settlement agreements").

grounds for a defense, notwithstanding a failure to have previously appeared in court, permitted a default judgment against the attorney's client to be set aside.[145] The practice "running back to the time of William and Mary" was that a default judgment could be "taken off if it shall appear to the court that the defendant has a meritorious, just, and legal ground of defence."[146] Some states codified this doctrine,[147] and it continues to apply where affidavits attest to facts evidencing good cause for the failure to appear. In one civil case (for assault with a large boulder!), affidavits blaming a newly hired secretary for the defense attorney's failure to appear helped persuade a reviewing court to affirm the lifting of a default judgment.[148]

Third, affidavits routinely support the issuance of warrants compromising the privacy and liberty interests of criminal suspects. During the Warren Court era, a two-pronged test governed whether probable cause for a police search arose from the affidavit of an anonymous informant. The affidavit had to show both the credibility of the informant and the reliability of the information—or, in the parlance of the criminal defense bar, who is he and how'd he know

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145. *See, e.g.*, Brown v. Philadelphia, Wilmington & Baltimore R.R. Co., 9 F. 183, 186 (C.C.D. Del. 1881) (setting aside a default judgment based solely on affidavits attesting to defense counsel's mistaken belief that the case was in a different court); A. M. Swarthout, Annotation, *Scope and Character of Meritorious Defense as Condition of Relief from Judgment*, 174 A.L.R. 10, § 1 (1948) ("Under the practice obtaining in some jurisdictions all that is required with respect to the establishment of a meritorious defense in connection with a motion or petition for the opening or vacation of a judgment is the tender of pleadings or affidavits").

146. *Brown*, 9 F. at 185.

147. *See, e.g.*, CAL. CIV. PROC. CODE § 473(c) (2016); OR. R. CIV. P. 69(A).

148. Kohlbeck v. Handley, 415 P.2d 483, 485–86 (Ariz. Ct. App. 1966); *see also* McGee v. C & S Lounge, 671 N.E.2d 589, 591–94 (Ohio Ct. App. 1996) (affirming lifting of default judgment in slip-and-fall case because affidavits demonstrated excusable neglect); Bronstein v. Lueck, 1992 Mass. App. Div. 5, 5 (Mass. Dist. Ct. 1992) (ordering default judgment lifted: "[T]he defendants filed uncontroverted affidavits indicating that upon inquiry to the clerk's office the information was given that no judgment had been entered against them."); State Farm Fire & Cas. Co. v. Shapiro, 118 A.D.2d 556, 55–58 (N.Y. App. Div. 1986) (ordering default judgment lifted based on affidavits and exhibits); Vosnos v. Wenzel, 194 N.E.2d 484, 486 (Ill. App. Ct. 1963) (ordering default judgment lifted: "[T]he defendants showed in their pleadings and affidavits a good defense upon the merits and have exercised proper diligence."); Worstell v. Devine, 335 P.2d 305, 307 (Mont. 1959) (ordering default judgment lifted because "[i]t appears from the affidavit that [the attorney made] an honest mistake—and not one dreamed up to excuse the neglect.").

about it?[149] The Rehnquist Court replaced this test with a fluid totality-of-the-circumstances test that looks to the affidavit's overall indicia of reliability.[150] That standard continues to apply, and police continue to execute search[151] and arrest[152] warrants on the basis of imperfect affidavits that relay anonymous tips and other inculpatory facts.

Fourth, a person can obtain the extraordinary, ex parte remedy of a temporary restraining order ("TRO") with affidavit testimony.[153] Federal Rule of Civil Procedure 65(b) empowers the court to enjoin a defendant for up to fourteen days if "specific facts in an affidavit . . . clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."[154] Even where the court dissolves the order or denies a later motion for a preliminary or permanent injunction, a TRO can harm a business, sometimes drastically.[155] A TRO's potential for

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149. Spinelli v. United States, 393 U.S. 410, 415 (1969), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983); Aguilar v. Texas, 378 U.S. 108, 114 (1964), *abrogated by Gates*, 462 U.S. 213.

150. *Gates*, 462 U.S. at 233–35.

151. *See* Sanseverino v. Chrostowski, 536 F. App'x 62, 63–65 (2d Cir. 2013); United States v. Craig, 497 F. App'x 328, 330 (4th Cir. 2012).

152. *See* Hart v. Mannina, 798 F.3d 578, 585 (7th Cir. 2015); Bircher v. Pierce, 610 F. App'x 194, 197–98 (3d Cir. 2015); Johnson v. Norcross, 565 F. App'x 287, 290–91 (5th Cir. 2014); Pines v. Bailey, 563 F. App'x 814, 816–17 (2d Cir. 2014); Smith v. Sheriff, Clay Cty., Fla., 506 F. App'x 894, 898–900 (11th Cir. 2013).

153. *See, e.g.*, Farnese v. Bagnasco, 687 F.2d 761, 762 (3d Cir. 1982) (noting that the trial court entered a temporary restraining order to prevent depletion or concealment of assets "[o]n the basis of the verified complaint and plaintiff's accompanying affidavit"); Reserve Int'l Liquidity Fund, Ltd. v. Caxton Int'l Ltd., 721 F. Supp. 2d 253, 256 (S.D.N.Y. 2010) (noting that a state court prohibited transfer of $10 million based solely on an affidavit); Stokely-Van Camp, Inc. v. Thacker, 394 F. Supp. 715, 720 (W.D. Wash. 1975) (enjoining a labor strike as an illegal work stoppage based solely on an affidavit).

154. FED. R. CIV. P. 65(b)(1). Similarly, a California provision allows a victim of stalking or domestic abuse to submit an affidavit to obtain immediate relief for up to twenty-one days, subject to further proceedings. CAL. CIV. PROC. CODE § 527.6 (2016); *see* Schraer v. Berkeley Prop. Owners' Assn., 255 Cal. Rptr. 453, 461 (Cal. Ct. App. 1989) ("Although an initial temporary restraining order may be obtained ex parte on affidavit, the statute requires a more formal procedure for obtaining what approximates a permanent injunction.").

155. The temporary restraining order has been described as "even more dangerous an instrument than the preliminary injunction." DAN D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.10 (1973). A TRO generally cannot be appealed. Chicago United Indus., Ltd. v. City of Chicago, 445 F.3d 940, 943 (7th Cir. 2006); Northeast Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v.

swift displacement was highlighted in March 2016, when a federal judge enjoined the sale of two Southern California newspapers as anticompetitive—and a rival bidder won ownership of those papers on the next business day.[156] The Federal Rules, in short, enable a person "to procure an ex parte temporary restraining order that may well inhibit defendant's use of [its] property on the basis of an affidavit instead of a hearing."[157]

So the position that affidavits cannot ascertain a class ignores their status as a commonplace method of proof in any number of legal contexts. And it is somewhat ironic when class action defendants advance that position, in tension with settled evidentiary principles, alongside arguments that a class action would change the law by abridging their substantive rights.[158]

B. Reliance on Affidavits Has Come into Question, Including as a Means of Ascertaining Consumer Classes

Many in our legal community have come to regard affidavits, for all their convenience and utility, as an unreliable stepchild—with the parental favorite being testimony on cross-examination. Affidavits seem inferior not just because they contain hearsay but

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Blackwell, 467 F.3d 999, 1005–06 (6th Cir. 2006). In one dispute over intellectual property in the cryogenics industry, the court refused to enter a TRO enjoining a company from selling or producing anything derived from the plaintiff's technical drawings, as such an order would create "a real possibility of doing substantial harm to" the company and "would, essentially, force [it] out of business[.]" Kendall Holdings, Ltd. v. Eden Cryogenics LLC, 630 F. Supp. 2d 853, 869 (S.D. Ohio 2008); *see also* Konecranes, Inc. v. Sinclair, 340 F. Supp. 2d 1126, 1134 (D. Or. 2004) (refusing to enter a TRO based in part on the finding that it would have driven a defendant out of business).

156. Unites States v. Tribune Publ'g Co., No. 16-cv-01822-AB (C.D. Cal. filed Mar. 17, 2016); *see* Jonathan Lansner, *Temporary Restraining Order Blocks* Tribune *Purchase of* OC Register, Press-Enterprise, ORANGE COUNTY REG. (Mar. 19, 2016, 4:15 PM), *available at* http://www.ocregister.com/articles/tribune-708746-court-temporary.html; Jonathan Lansner, *Digital First Gets Court OK to Buy* The Orange County Register, Press-Enterprise, ORANGE COUNTY REG. (Mar. 22, 2016, 7:19 AM), *available at* http://www.ocregister.com/articles/-709037--.html.

157. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2951 (3d ed. 2005).

158. *See, e.g.*, Petition for a Writ of Certiorari at 1, 21, Direct Digital, LLC v. Mullins, 2015 WL 6549672, at *1, *21 (U.S. Oct. 26, 2015) (No. 15-549) (arguing that the right to present substantive defenses "cannot be compromised in the name of the efficiencies of class adjudication," while also maligning class member affidavits as "simple boilerplate recitations").

also because they are so often written by, or with heavy input from, lawyers, and in a self-serving manner.[159] The truism that "[t]he deposition of a witness will usually be more reliable than his affidavit" leads judges finding facts or ruling at summary judgment to look primarily to the oral testimony of lay or expert witnesses while discounting their written statements in litigation.[160] This distinction underlies the holdings that self-serving, conclusory affidavits cannot defeat summary judgment by themselves[161] and that post-deposition affidavits cannot be used to clean up the testimony.[162] It is chiefly for this reason, too, that preliminary

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159. *See, e.g.*, Reynolds v. Jamison, 488 F.3d 756, 769 (7th Cir. 2007) (Rovner, J., concurring in part and dissenting in part) ("Affidavits, responses to interrogatories, and other written statements are typically drafted by lawyers and by their nature are self-serving."); Sullivan v. Conway, 157 F.3d 1092, 1096–97 (7th Cir. 1998) ("Affidavits are normally as here written by lawyers"); Steel Strip Wheels, Ltd. v. General Rigging, LLC, No. 08-cv-13737, 2009 WL 3190415, at *2 n.1 (E.D. Mich. Sept. 30, 2009) ("[T]he Court is certainly aware that lawyers routinely draft affidavits for their lay clients"); United States v. Estate of Oxarango, No. CIV. 97-0085-S-BLW, 2008 WL 5411719, at *5 (D. Idaho Dec. 24, 2008) ("[I]t is widely recognized that affidavits and declarations are often written by attorneys and not the declarant or affiant.") (citing Safeflight, Inc. v. Chelton Flight Sys., Inc., 543 F. Supp. 2d 779, 788 (N.D. Ohio 2008)); Ciccarelli v. Gichner Sys. Grp., Inc., 862 F. Supp. 1293, 1299 n.5 (M.D. Pa. 1994)); Hudson v. General Dynamics Corp., 186 F.R.D. 271, 275 (D. Conn. 1999) ("The simple reality is that complaints and affidavits are drafted by lawyers").

160. Jiminez v. All Am. Rathskeller, Inc., 503 F.3d 247, 253 (3d Cir. 2007) (quoting Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969) (quoting J.W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.22[1], at 2814 (2d ed.))).

161. *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990); Wells v. Shalala, 228 F.3d 1137, 1144 (10th Cir. 2000); Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 662 (7th Cir. 1982); Wojcik v. Brandiss, 973 F. Supp. 2d 195, 213 (E.D.N.Y. 2013) (citing United Magazine Co. v. Murdoch Magazines Distrib., Inc., 393 F. Supp. 2d 199, 211 (S.D.N.Y. 2005), *aff'd*, 279 F. App'x 14 (2d Cir. 2008)); Solis v. A-1 Mortg. Corp., 934 F. Supp. 2d 778, 808 (W.D. Pa. 2013); Acevedo v. City of Philadelphia, 680 F. Supp. 2d 716, 737 n.8 (E.D. Pa. 2010); Daniel v. Chase Bank USA, N.A., 650 F. Supp. 2d 1275, 1289–90 (N.D. Ga. 2009); Cruz-Claudio v. Garcia Trucking Serv., Inc., 639 F. Supp. 2d 198, 208 (D.P.R. 2009); Fuller v. Cty. of Charleston, 444 F. Supp. 2d 494, 499 (D.S.C. 2006).

162. *See* Beckel v. Wal-Mart Assocs., Inc., 301 F.3d 621, 623–24 (7th Cir. 2002) (stating that "[a]ffidavits, though signed under oath by the affiant, are typically . . . written by the affiant's lawyer, and when offered to contradict the affiant's deposition are so lacking in credibility as to be entitled to zero weight in summary judgment proceedings unless the affiant gives a plausible explanation for the discrepancy."); Jiminez v. All Am. Rathskeller, Inc., 503 F.3d 247, 252–53 (3d Cir. 2007) (surveying case law and concluding that "every federal court of appeals has

injunctions seldom issue without live testimony.[163] And yet, if "[a]lmost all affidavits submitted in litigation are drafted by the lawyers rather than by the affiants,"[164] the Internet class action claim form is an exception. It is the individual class member—not an attorney of record—who clicks the relevant boxes or fills in text under penalty of perjury.

The fact that ordinary people, not lawyers trying to prove a point, create web affidavits in a claims process should significantly blunt criticism of affidavits in this setting. Such criticism nonetheless figured in the debate that played out, most voluminously, in the "food courts" of California before the Ninth Circuit issued its *ConAgra* decision.

A flood of cases over "all natural," "GMO-free," "100% organic," and similar alleged misstatements on the packaging of low-cost food and other items has required courts—in particular, the California federal bench—to grapple with whether and how consumer purchasers can be identified, given that few people keep store receipts for very long and that the defendant manufacturer may lack

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adopted some form of the sham affidavit doctrine."); Gullick v. Ott, 517 F. Supp. 2d 1063, 1075 (W.D. Wis. 2007) (noting that "[t]he rationale for the rule appears to be that affidavits are less reliable than depositions because they are not subject to cross examination and because they are often drafted by the lawyer rather than the affiant.").

163. *See* Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1575 (Fed. Cir. 1990) ("As a general rule, a preliminary injunction should not issue on the basis of affidavits alone.") (citing People *ex rel.* Hartigan v. Peters, 871 F.2d 1336 (7th Cir. 1989); Medeco Sec. Locks, Inc. v. Swiderek, 680 F.2d 37 (7th Cir. 1981); Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp., 443 F.2d 867 (2d Cir. 1971)); G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 748 (E.D. Va. 2015) ("Declarations are frequently drafted by lawyers, and the evidence presented within them is not subject to the rigors of cross examination. A plaintiff relying solely on such weak evidence is unlikely to make the clear showing required for the issuance of a preliminary injunction."); Carrera Int'l Corp. v. Carrera Jeans Ltd., 481 F. Supp. 820, 827 (S.D.N.Y. 1979) ("[D]istrict courts should tread warily in granting preliminary injunctions on the basis of affidavits alone"). *But see* International Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986) (affirming issuance of preliminary injunction based solely on affidavits where the defendant did not request a hearing and the magnitude of the inquiry would have made a hearing impractical); Spartacus Youth League v. Board of Trs. of Ill. Indus. Univ., 502 F. Supp. 789, 805 (N.D. Ill. 1980) ("In the absence of a factual controversy, this court has the discretion to grant a preliminary injunction upon the affidavits alone, without an evidentiary hearing."); SEC v. General Refractories Co., 400 F. Supp. 1248, 1256 (D.D.C. 1975) (same).

164. Russell v. Acme-Evans Co., 51 F.3d 64, 67 (7th Cir. 1995).

retail sales records.[165] Some California federal judges, perceiving no reliable identification method, declined to certify consumer classes.[166] "No receipt, no relief" is the upshot of this branch of case law. Other judges found such classes ascertainable by means of affidavit, lest application of *Carrera* override Rule 23's policies of combining common claims, especially smaller ones, to promote

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165. *See infra* notes 166–67.

166. *See In re* POM Wonderful LLC, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014) (finding a proposed class unascertainable because "[f]ew, if any, consumers are likely to have retained receipts during the class period" and "there is no way to reliably determine who purchased Defendant's [juice] products or when they did so."); Algarin v. Maybelline, LLC, 300 F.R.D. 444, 455–56 (S.D. Cal. 2014) (deeming self-identification by class members unreliable); *In re* Clorox Consumer Litig., 301 F.R.D. 436, 440 (N.D. Cal. 2014) (embracing *Carrera* and holding that "[a]ffidavits from consumers alone are insufficient to identify members of the class."); Sethavanish v. ZonePerfect Nutrition Co., No. 12-2907-SC, 2014 WL 580696, at *5–6 (N.D. Cal. Feb. 13, 2014) (stating that "even though there is no requirement that a named plaintiff identify all class members at the time of certification, that does not mean that a named plaintiff need not present some method of identifying absent class members to prevail on a motion for class certification," and finding it "unclear how Plaintiff intends to weed out inaccurate or fraudulent claims. Without more, the Court cannot find that the proposed class is ascertainable."); Astiana v. Ben & Jerry's Homemade, Inc., No. C 10-4387 PJH, 2014 WL 60097, at *3 (N.D. Cal. Jan. 7, 2014) (finding that the inability to trace the synthetic ingredient at issue to individual ice cream purchases defeated ascertainability); Kosta v. Del Monte Foods, Inc., 308 F.R.D. 217, 229 (N.D. Cal. 2015) (holding that the ascertainability requirement was not met where the proposed class definition "cover[ed] purchasers of *any* product within . . . [food] product lines, eliding issues of whether every product in those lines, throughout the entire class period, contained the alleged false labeling and packaging.") (emphasis in original); Red v. Kraft Foods, Inc., No. CV 10-1028-GW (AGRx), 2012 WL 8019257, at *5–6 (C.D. Cal. Apr. 12, 2012) (deeming unascertainable a proposed class of purchasers of crackers and cookies marketed as healthy in spite of unhealthy ingredients, but stating that "[a] lack of ascertainability alone will generally not scuttle class certification."); Hodes v. Van's Int'l Foods, No. CV 09-1530 RGK (FFMx), 2009 WL 2424214, at *4 (C.D. Cal. July 23, 2009) (voicing "concerns about how Plaintiffs will identify each class member and prove which brand of Van's frozen waffles each member purchased, in what quantity, and for what purpose."); *see also* Hughes v. Ester C Co., 317 F.R.D. 333, 349–50 (E.D.N.Y. 2016) (finding "accurate self-identification infeasible" because the vitamin C supplements bearing the alleged misrepresentation were licensed to more than 150 sellers, not merely to defendants) (quoting Ault v. J.M. Smucker Co., 310 F.R.D. 59, 66 (S.D.N.Y. 2015)); Ruffo v. Adidas Am. Inc., No. 15 Civ. 5989 (AKH), 2016 WL 4581344, at *2 (S.D.N.Y. Sept. 2, 2016) ("Adidas has no records of the consumers who purchased the shoes, and assuming a class could be certified, the identification of class members will be near impossible.") (citing Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010)).

deterrence and just compensation.[167]

The debate persists in courts across the country. One New York federal judge denied certification with prejudice in a vitamin mislabeling case, commenting that "[i]f Rule 23's implied

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167. *See* Ries v. Arizona Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2012) (holding that the unavailability of receipts for iced tea purchases cannot be dispositive, or "there would be no such thing as a consumer class action."); McCrary v. Elations Co., No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014) ("In this Circuit, it 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.'") (citation omitted); Krueger v. Wyeth, Inc., 310 F.R.D. 468, 475–76 (S.D. Cal. 2015) (same); Astiana v. Kashi Co., 291 F.R.D. 493, 500 (S.D. Cal. 2013) (certifying a class comprising purchasers of Kashi products labeled "All Natural" and "Nothing Artificial"—"[a]s long as the class definition is sufficiently definite to identify putative class members, '[t]he challenges entailed in the administration of this class are not so burdensome as to defeat certification.'") (citation omitted); Morales v. Kraft Foods Grp., Inc., No. LA CV14-04387 JAK, 2015 WL 10786035, at *12–13 (C.D. Cal. June 23, 2015) ("[S]elf-identification through sworn statements makes sense" in part because, "absent this approach, a class proceeding would not be available . . . . That thousands of potential actions could be brought, or almost none, would be inconsistent with the bases for Rule 23."); *In re* ConAgra Foods, Inc., 90 F. Supp. 3d 919, 970–71 (C.D. Cal. 2015) ("[Defendant's] argument would effectively prohibit class actions involving low priced consumer goods—the very type of claims that would not be filed individually—thereby upending '[t]he policy at the very core of the class action mechanism.'") (citation omitted); Kumar v. Salov N. Am. Corp., No. 14-cv-2411-YGR, 2016 WL 3844334, at *7 & n.8 (N.D. Cal. July 15, 2016) ("Though it is unlikely that this class of consumers will be able to produce evidence of purchase [of an olive oil bottle] such as receipts or store/club card data to verify a purchase, this is no impediment to their offering evidence of purchase by affidavit on a claim form. Indeed, requiring consumer class members to produce receipts to demonstrate their purchases in order to recover would essentially preclude relief for most consumer injuries."); Lilly v. Jamba Juice Co., 308 F.R.D. 231, 238 (N.D. Cal. 2014) ("Few people retain receipts for low-priced goods, since there is little possibility they will need to later verify that they made the purchase. Yet it is precisely in circumstances like these, where the injury to any individual consumer is small, but the cumulative injury to consumers as a group is substantial, that the class action mechanism provides one of its most important social benefits. In the absence of a class action, the injury would go unredressed.") (footnote omitted); *see also* Brazil v. Dole Packaged Foods, LLC, No. 12-cv-01831-LHK, 2014 WL 5794873, at *14–15 (N.D. Cal. Nov. 6, 2014) (finding a class of fruit juice and canned fruit purchasers ascertainable); Lanovaz v. Twinings N. Am., Inc., No. C-12-02646-RMW, 2014 WL 1652338, at *2–3 (N.D. Cal. Apr. 24, 2014) (same for tea purchasers); Forcellati v. Hyland's, Inc., No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *5–8 (C.D. Cal. Apr. 9, 2014) (same for purchasers of children's cold and flu medicine); *see also supra* note 126 (authorities recognizing the deterrent effect of class actions); *infra* note 202 (further cases in which courts endorsed self-identification of class members).

ascertainability requirement is to have any meaning, then surely it applies . . . where there are no records of consumer purchases and it is impossible for consumers to accurately self-report."[168] Another New York federal judge certified a class of purchasers of olive oil allegedly mislabeled as "100% Pure," holding that "[t]he standard for ascertainability is 'not demanding' and is 'designed only to prevent the certification of a class whose membership is truly indeterminable,'" whereas the defendant's position "would render class actions against producers almost impossible to bring. Yet the class action device, at its very core, is designed for cases . . . where a large number of consumers have been defrauded but no one consumer has suffered an injury sufficiently large" to justify an individual suit.[169] The Ninth Circuit provided similar guidance in early 2017, rejecting a rule of administrative feasibility that it concluded would come "at the expense of any possible recovery for all class members—in precisely those cases that depend most on the class mechanism."[170]

C. Due Process Challenges to Class Member Self-Identification Overlook the Express Rule 23 Safeguards and the Lack of Prejudice to the Defendant from Allocation of an Aggregate Judgment

While the matter remains unresolved nationally, the tide of case law seems to be turning against *Carrera*.[171] The conclusion that the

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168. Hughes v. Ester C Co., 317 F.R.D. 333, 349 n.23 (E.D.N.Y. 2016).

169. Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (quoting Gortat v. Capala Bros., No. 07-cv-3629 (ILG), 2010 WL 1423018, at *2 (E.D.N.Y. Apr. 9, 2010)); *accord* Goldemberg v. Johnson & Johnson Consumer Cos., Inc., 317 F.R.D. 374, 398–99 (S.D.N.Y. 2016) (following *Ebin*: "denial of class certification in consumer protection cases like these on the basis of ascertainability would severely contract the class action mechanism as a means for injured consumers to seek redress under statutes specifically designed to protect their interests."), *appeal filed*, No. 16-3528 (2d Cir.); *In re* Scotts EZ Seed Litig., 304 F.R.D. 397, 407 (S.D.N.Y. 2015).

170. *ConAgra*, 844 F.3d at 1129.

171. For example, in the Syngenta multidistrict litigation involving the market effects of tainted corn seed, the court was "persuaded by the thorough and well-reasoned analysis of the Seventh Circuit in *Mullins*. Thus, [the court] decline[d] Syngenta's invitation to apply a standard—one not adopted by the Tenth Circuit—that would preclude certification without a showing that class members may be determined in an administratively feasible manner." *In re* Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 WL 5371856, at *2–3 (D. Kan. Sept. 26, 2016). By contrast, in January 2017, a district court denied class certification in part

Third Circuit's strict ascertainability holdings would disable consumer class actions has taken on the air of conventional wisdom.[172] This rationale for rejecting *Carrera*, however, may carry less weight with judges sympathetic to corporate defendants' position, often framed in terms of due process, that class certification creates unfair settlement pressure by threatening ruinous liability (and drives up prices and reduces jobs by increasing business expenses).[173] In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court

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for failure to show administrative feasibility. Stein v. Monterey Fin. Servs., Inc., No. 2:13-cv-01336-AKK, 2017 WL 412874, at *3–4 (N.D. Ala. Jan. 31, 2017).

Carrera's dilution point is unrealistic. 727 F.3d at 310–11. Claims rates are low enough in claims-made recovery processes that even substantial levels of fraud would not diminish individual recoveries in most cases, and evidence to the contrary is lacking. *See supra* note 134; *ConAgra*, 844 F.3d at 1130. Even if dilution were to occur, it would be spread among a large group that would have recovered nothing had the class been rejected as unascertainable. *See id.*; Mullins v. Direct Digital, LLC, 795 F.3d 654, 667–68 (7th Cir. 2015); Lilly v. Jamba Juice Co., 308 F.R.D. 231, 240 (N.D. Cal. 2014); Forcellati v. Hyland's, Inc., No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *8 (C.D. Cal. Apr. 9, 2014).

172. *See, e.g.*, Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303, 331 (2016) ("Strict ascertainability, if widely adopted, threatens to end most consumer class actions involving a low-priced consumer good."); Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1605–08 (2016) (predicting "the [d]emise" of *Carrera*); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1556 (2016) (arguing that "the development in recent years of an 'implicit requirement' of ascertainability, under which courts in consumer cases have refused to certify classes in the absence of 'reliable proof of purchase or a knowable list of injured plaintiffs,' has sounded a death knell for many (if not most) class actions arising from small retail purchases.") (citations omitted); Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354, 2392 (2015) (discussing purposes of modern Rule 23, as articulated by its framers, and stressing that the ascertainability doctrine "pushes *out* of court the very classes that Rule 23 was designed to bring *in* to court and as a result makes the Rule less 'effective.'") (emphasis in original); Sarah Valenzuela, *Tracing the Evolution of Food Fraud Litigation: Adopting an Ascertainability Standard That Is "Natural,"* 34 REV. LITIG. 609, 638 (2015) (recommending that courts "not impose an ascertainability requirement that precludes the very types of claims Rule 23 was designed to facilitate."); Daniel Luks, Note, *Ascertainability in the Third Circuit: Name that Class Member*, 82 FORDHAM L. REV. 2359, 2393–97 (2014) (urging rejection of *Carrera* "so as not to destroy consumer class actions").

173. *See, e.g.*, Brief of the Chamber of Commerce of the U.S., Bus. Roundtable, Retail Litig. Ctr., Inc., & the Nat'l Fed'n of Indep. Small Bus. Legal Ctr. as Amici Curiae in Support of Petitioner at 20, Tyson Foods, Inc. v. Bouaphakeo, 135 S. Ct. 2806 (2015) (No. 14-1146), 2015 WL 4967193, at *20 (arguing "[i]t is no secret that

recognized the defendant's right "to litigate its statutory defenses to individual claims" whose resolution would not be driven by a common issue.[174] Class action defendants and their supporters have sought to graft *Wal-Mart* onto the implied ascertainability doctrine, asserting a due process right to challenge the individual claims of each class member and arguing that self-identification abridges this right.[175] These arguments go too far. They disregard the representative nature of the class action mechanism and the procedural protections already afforded.

In addition to vigorously defending their conduct, defendants can and do attack the claims of a class through its typical representatives.[176] Rule 23 is "designed to ensure that the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives."[177] Defendants can raise affirmative defenses,

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the path to recovery in many class actions is paved by convincing trial courts to prevent defendants from litigating individualized defenses, combined with the settlement pressures brought to bear by even small possibilities of large, aggregate liability. . . . It is hard to overstate the toll that frivolous class actions take on U.S. businesses and ultimately their customers."); Petition for a Writ of Certiorari at 17, Google Inc. v. Pulaski & Middleman, LLC, 2016 WL 825978, at *17 (U.S. Mar. 1, 2016) (No. 15-1101) (arguing that "by 'increas[ing] the defendant's potential damages liability and litigation costs,' class certification often forces a defendant to 'abandon' even a 'meritorious defense.'") (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978)), *cert. denied*, 136 S. Ct. 2410 (2016).

174. 564 U.S. 338, 367 (2011) (citing 28 U.S.C. § 2072(b) (2006)).

175. *See, e.g.*, Petition for a Writ of Certiorari at 21, Direct Digital, LLC v. Mullins, 2015 WL 6549672, at *21 (U.S. Oct. 26, 2015) (No. 15-549); Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Defendant-Appellee at 5–10, Jones v. ConAgra Foods, Inc., No. 14-16327, 2015 WL 512706, at *5–10 (9th Cir. Jan. 28, 2015).

176. The typicality inquiry considers the degree of similarity among named plaintiffs' asserted injuries and legal claims and those of the group they propose to represent. *See* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011); Baby Neal *ex rel.* Kanter v. Casey, 43 F.3d 48, 57–58 (3d Cir. 1994). "[U]nique defenses which threaten to become the focus of the litigation" also may render a named plaintiff atypical. Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991); Beck v. Maximus, Inc., 457 F.3d 291, 300–01 (3d Cir. 2006).

177. Cooper v. Southern Co., 390 F.3d 695, 713 (11th Cir. 2004) (internal quotation marks and citation omitted), *overruled in part on other grounds by* Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) ("Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate."); WILLIAM B.

contest certification, appeal a certification order under Rule 23(f), and wield the final judgment to preclude a follow-on suit. They "can oppose the class representatives' showings at every stage."[178] Establishing an additional right to separately challenge each class member claim would convert Rule 23 into just another joinder device for aggregating and adjudicating claims, a device no more efficient than procedures under Rules 19, 20, and 42.[179]

Real-world conditions also reveal there to be no due process problems from class self-identification in most situations. Except when the plaintiff proposes a liability-only class, a motion to certify under Rule 23(b)(3) must show by the preponderance of the evidence that common questions predominate as to damages.[180] And when—as is customary—the plaintiff proposes to calculate a total damages amount, due process concerns relating to the identification of class members dissipate. If the case settles or proceeds to a verdict in favor of the plaintiff, a fixed aggregate sum will likely accompany the judgment, such that who does or does not qualify as a class member causes no prejudice because the defendant is obligated to pay that total sum.[181] In this familiar circumstance, any

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RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:5 (5th ed. 2011) ("[A] primary purpose of the class suit is to promote efficiency by enabling representatives to litigate").

178. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1131–32 (9th Cir. 2017) (holding that "protecting a defendant's due process rights does not necessitate an independent administrative feasibility requirement.").

179. *See* Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 AKRON L. REV. 757, 765, 794 (2015); Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354, 2392–93 (2015); *cf.* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 291 (2008) (observing that class actions "are but one of several methods by . . . which multiple similarly situated parties get similar claims resolved at one time and in one federal forum.").

180. The amount of any compensatory damages "presents a question of historical or predictive fact"; such damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432, 437 (2001) (citations omitted). A damages theory cannot sweep beyond the theories of liability in a class action. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013); *see In re* Nexium Antitrust Litig., 777 F.3d 9, 18 n.15 (1st Cir. 2015) (citing cases interpreting *Comcast*). Individualized damages questions do not, by themselves, preclude class certification. Vaquero v. Ashley Furniture Indus., Inc., 824 F.3d 1150, 1155 (9th Cir. 2016); Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 374–75 & n.10 (3d Cir. 2015); Roach v. T.L. Cannon Corp., 778 F.3d 401, 408–09 (2d Cir. 2015); *In re* IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599, 602–03 (7th Cir. 2014).

181. *See* Mullins v. Direct Digital, LLC, 795 F.3d 654, 670 (7th Cir. 2015); Lilly v. Jamba Juice Co., 308 F.R.D. 231, 239 (N.D. Cal. 2014); Forcellati v. Hyland's, Inc., No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *5–8 (C.D. Cal. Apr. 9, 2014);

irregularities in class member claims have no effect on the defendant's interests.

Due process concerns are even more remote with liability-only classes because separate damages proceedings, in which the defendant can challenge class membership, are explicitly contemplated. In Judge Posner's view, "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" and in fact "will often be the sensible way to proceed."[182] The Supreme Court in 2016 voiced support for this bifurcated procedure: a class action "may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried

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see also In re Urethane Antitrust Litig., 768 F.3d 1245, 1269 (10th Cir. 2014) (recognizing that a defendant had "no interest in the method of distributing the aggregate damages award among the class members."); Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1307 (9th Cir. 1990) (holding that "the interests affected are not the defendant's but rather those of the silent class members" when "the only question is how to distribute the damages").

182. Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *see also In re* Nassau Cty. Strip Search Cases, 461 F.3d 219 (2d Cir. 2006); ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 9:47 (4th ed. 2002) ("Not infrequently, actions filed as class actions present predominating common issues of liability, while proof of damages may remain as individual issues for the several class members."); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.24 (2004) (Rule 23 "permits a class to be certified for specific issues or elements of claims raised in the litigation," with "the common issues . . . tried first, followed by individual trials on questions such as proximate causation and damages"); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. 2005) (the court may "allow a partial class action to go forward, leaving questions of reliance, damages, and other issues to be adjudicated on an individual basis"); *see generally* Susan E. Abitanta, Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 SW. L.J. 743 (1982) (discussing bifurcation of liability and damages issues in class actions). *But see* Castano v. American Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4)."); Ebert v. General Mills, Inc., 823 F.3d 472, 479 (8th Cir. 2016) (reversing certification in an environmental contamination case and holding that the district court "essentially manufactured" a class action "by bifurcating the case and narrowing the question for which certification was sought . . . . To resolve liability there must be a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of [the defendant's] actions, and, if so, whether that contamination is wholly, or actually, attributable to [the defendant] in each instance.").

separately, such as damages or some affirmative defenses[.]"[183]

In only two situations is there a realistic risk of prejudice to the defendant from its inability to challenge class membership person by person. The first occurs when the amount a defendant pays under a settlement depends on the number or value of individual claims.[184] But the defendant has *agreed* to such a structure and can influence how the settlement will be administered. Thus, the defendant should not be heard to complain.[185] The second situation arises when the plaintiff proposes a damages model that will be used not to calculate aggregate damages but to provide a common formula for determining individual damage awards.[186] This situation veers toward the liability-only class scenario; the defendant may object to and obtain rulings on litigated claims that, if approved, will increase its total payout.[187] Whether mini-trials are needed for all or most

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183. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (citing CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1778 (3d ed. 2005)).

184. An example of such a settlement would be one providing that any unclaimed funds will revert to the defendant. Such provisions are disfavored. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07, cmt. b (2010) (finding that reversion provisions "undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable."); *accord In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 783–85 (7th Cir. 2004).

185. A class action defendant's agreement to settle also prevents it from backing out of the settlement if the law breaks in its favor. *See* Whitlock v. FSL Mgmt., LLC, 843 F.3d 1084, 1092–95 (6th Cir. 2016); Ehrheart v. Verizon Wireless, 609 F.3d 590, 595–97 (3d Cir. 2010).

186. *See Mullins*, 795 F.3d at 670–71.

187. In the Vivendi securities litigation, a large individual claim collapsed in post-verdict proceedings. *In re* Vivendi Universal, S.A. Sec. Litig., 284 F.R.D. 144, 153–60 (S.D.N.Y. 2012) (establishing a common damages methodology, together with a process by which the defendant could prevail on the individual reliance element of Exchange Act claims, after a verdict in favor of the class on antecedent common elements); *In re* Vivendi Universal, S.A. Sec. Litig., 123 F. Supp. 3d 424 (S.D.N.Y. 2015) (granting summary judgment to the defendant in one of these individual challenges); *see also* Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1258–59 (11th Cir. 2003) (affirming a ruling that permitted the defendant to participate in a claims process in the absence of an aggregate damages fund), *aff'd*, 545 U.S. 546 (2005); *ConAgra*, 844 F.3d at 1131 (noting that "Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability.") (citing FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment); *Lilly*, 308 F.R.D. at 239 (stating that "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

claimants, however, will depend on the case and may not be known until after the class trial. Experience further shows that "litigants quickly tire of these mini-trials once a clear trend is established," with a global settlement soon to follow.[188]

D. Neither the Text nor the Structure of Rule 23 Calls for Proof at Class Certification of a Workable Ascertainment Method

A method for identifying individual class members can emerge through discovery or at trial. Asking to "see the model in action" *before* certifying a class[189] frontloads a matter pertaining, if at all, to the end of the case. Although Rule 23 requires a class certification ruling "[a]t an early practicable time,"[190] it may not be possible to learn, prior to certification, what information (if any) the defendant maintains about the proposed class members, let alone to test an eventual (and contingent) claims process.[191]

Class action defendants may resist discovery into whether they keep customer lists, how extensive such lists are, and how to interpret them. Dogged use of civil discovery tools—including service and enforcement of subpoenas directed at retailers or other third parties—can unearth customer lists of defendants, downstream

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no opportunity to challenge that determination, and then racks up the defendant's bill every time an individual submits a form.").

188. Labrier v. State Farm Fire & Cas. Co., 315 F.R.D. 503, 520 (W.D. Mo. 2016); *see also* Butler v. Sears, Roebuck & Co., 727 F.3d 796, 798 (7th Cir. 2013) (remarking that "indeed the case would probably be quickly settled" in the course of "individual hearings to determine the damages sustained by each class member.").

189. *Carrera*, 727 F.3d at 311; *cf., e.g.*, *Mullins*, 795 F.3d at 664 (holding that the court "normally should . . . wait and see how serious the problem [of identifying class members] may turn out to be after settlement or judgment, when much more may be known about available records, response rates, and other relevant factors."); Meyers v. Nicolet Rest. of de Pere, LLC, No. 15-C-444, 2016 WL 1275046, at *5 (E.D. Wis. Apr. 1, 2016) ("Defendant's concerns about the difficulties of properly identifying members of the class must be left to a later stage of this litigation."); Black v. General Info. Servs., Inc., No. 1:15 CV 1731, 2016 WL 899295, at *4 (N.D. Ohio Mar. 2, 2016) (finding that a challenge to ascertainability related "to the potential for over burdensome discovery or difficulty in the verification of the claims should the Plaintiffs prevail. These are issues to be addressed at a later time, and only if necessary."); Compressor Eng'g Corp. v. Thomas, No. 10-10059, 2016 WL 438963, at *5 (E.D. Mich. Feb. 3, 2016) (stating that "issues implicating the ascertainability of the class . . . can be determined after the class is certified.").

190. FED. R. CIV. P. 23(c)(1)(A).

191. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 767–68 (2013) ("Frequently, plaintiffs need to conduct discovery before arriving at a definition that takes into account the nuances of the case.").

entities, or others.[192] Records from loyalty discount and membership programs can boost the percentage of known class members,[193] and testimony at deposition and trial can clarify whom the alleged violations affected. "In the face of such empirical uncertainty," the Seventh Circuit advised, "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."[194] At the judge's disposal are later options like narrowing the class,[195] appointing a special master,[196] and decertification.[197]

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192. Third-party subpoenas under Rule 45 to obtain purchaser records have become a standard feature of consumer class litigation. *See, e.g.*, *In re* L'Oreal Wrinkle Cream Mktg. Practices Litig., No. 12-3571 (WJM), 2015 WL 5770202, at *1 (D.N.J. Sept. 30, 2015) (third-party subpoenas were served on ten retailers); *see also* Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement at 9, *In re* Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig., No. 1:09-md-02023-BMC, ECF No. 194-1 at 9 (E.D.N.Y. Jan. 22, 2013) (detailing class counsel's efforts to subpoena class member lists from major retailer sellers of the relevant product), *available at* http://www.bayercombinationaspirinsettlement.com/pdf/Memo%20in%20Support%20of%20Motion%20for%20Final%20Approval.pdf.

193. *See, e.g.*, Mullins v. Premier Nutrition Corp., No. 13-cv-01271-RS, 2016 WL 1535057, at *8 (N.D. Cal. Apr. 15, 2016) ("Costco and Sam's Club, for example, are members-only stores, and therefore they can track members' purchases. Walgreens and Kroger, while not member-only stores, have loyalty programs, which enable them to identify which consumers purchased [the relevant product].").

194. Mullins v. Direct Digital, LLC, 795 F.3d 654, 668 (7th Cir. 2015); *see supra* note 189; *see also* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1128 (9th Cir. 2017) (adopting a presumption against denial of certification on manageability grounds "given the variety of procedural tools courts can use to manage the administrative burdens of class litigation.") (citing In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 140–41 (2d Cir. 2001), *overruled on other grounds by* In re IPO Sec. Litig., 471 F.3d 24 (2d Cir. 2006), *and superseded by statute on other grounds as stated in* Attenborough v. Construction & Gen. Bldg. Laborers' Local 79, 238 F.R.D. 82, 100 (S.D.N.Y. 2006)); *supra* note 129.

195. FED. R. CIV. P. 23(c)(1)(C); General Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982) (holding that "[e]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); *see, e.g.*, *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 302 F.R.D. 448, 462–63 (N.D. Ohio 2014); Garcia v. Tyson Foods, Inc., 890 F. Supp. 2d 1273, 1297–98 (D. Kan. 2012), *aff'd*, 770 F.3d 1300 (10th Cir. 2014).

196. FED. R. CIV. P. 53 (authorizing the court to appoint a special master to "regulate all proceedings" relating to "pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge").

197. *See, e.g.*, Krueger v. Wyeth, Inc., 310 F.R.D. 468, 476 (S.D. Cal. 2015) (mentioning "the ability to decertify" in rejecting a challenge to the use of class member affidavits to satisfy ascertainability); Forcellati v. Hyland's, Inc., No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *7 (C.D. Cal. Apr. 9, 2014) (same); *see also*

It is thus incorrect to ask for a showing of a feasible and reliable claims administration process before all the evidence has been gathered. That resembles the sort of "free-ranging," proof-dependent inquiry that the Supreme Court held there is "no license to engage in . . . at the certification stage."[198] Instead of suggesting that Rule 23 *sub silentio* requires evidence of administrative feasibility, the Court's recent class action jurisprudence underscores "the central importance of enforcing Rule 23's explicit requirements."[199]

Gold v. Midland Credit Mgmt., Inc., 306 F.R.D. 623, 629 (N.D. Cal. 2014) ("In the worst case scenario, if the names on each account cannot be used to preliminarily identify potential class members, a notice and claim form may need to be sent to all recipients of the objectionable letter. In this event, the class certification may be altered or amended or, if the claim forms prove unreliable, Defendants may move to decertify the class."). Decertification has been termed "an 'extreme step,' particularly at a late stage in the litigation, 'where a potentially proper class exists and can easily be created.'" Gulino v. Board of Educ., 907 F. Supp. 2d 492, 504 (S.D.N.Y. 2012) (quoting Woe v. Cuomo, 729 F.2d 96, 107 (2d Cir. 1984)), *aff'd*, 555 F. App'x 37 (2d Cir. 2014); *see also* Chisolm v. TranSouth Fin. Corp., 194 F.R.D. 538, 554 (E.D. Va. 2000) (finding decertification of a class "too extreme. Prior to decertification, the Court must consider all options available to render the case manageable."); *In re* Urethane Antitrust Litig., No. 04-1616-JWL, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013) (referring to class modification as "far superior to decertification."), *aff'd*, 768 F.3d 1245 (10th Cir. 2014). *But see* Mazzei v. Money Store, 829 F.3d 260, 267–68 (2d Cir. 2016) (affirming decertification of a class that prevailed at trial).

198. Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1194–95 (2013).

199. Brent W. Johnson & Emmy L. Levens, *Heightened Ascertainability Requirement Disregards Rule 23's Plain Language*, ANTITRUST, Spring 2016, at 68, 70; Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1607–08 (2016). The Supreme Court's latest securities decisions demonstrate its refusal to overlay new requirements onto the language of Rule 23. In *Amgen*, the Court held that investor classes may be certified in the absence of proof that the alleged misrepresentations or omissions were material. 133 S. Ct. at 1191. A year later the Court reaffirmed the fraud-on-the-market presumption, holding that class certification does not require direct evidence of investor reliance on alleged misrepresentations or omissions. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2412–14 (2014). And in 1997, the landmark *Amchem* opinion (cited in over 5,000 cases) instructed that, "of overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. . . . Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted" by its framers. 521 U.S. at 620–22.

E. Affidavits Are Sufficiently Reliable to Support Class Membership When It Is Reasonably Possible for Persons to Determine Whether They Are Class Members

In all of the class action scenarios discussed above, an affidavit constitutes ordinary evidence of record. That status was reinforced by the Supreme Court's teaching, in its 2016 *Tyson Foods v. Bouaphakeo* decision, that a permissible method for submitting evidence in an individual action should be equally available in a corresponding class action.[200] The Ninth Circuit employed this mode of analysis: "Given that a consumer's affidavit could force a liability determination at [an individual] trial without offending the Due Process Clause, we see no reason to refuse class certification simply because that same consumer will present her affidavit in a claims administration process after a liability determination has already been made."[201] To hold otherwise is to hold class members to a higher standard of proof than normally applies to the plaintiffs representing them—and "[i]ndeed, the leading treatise on class action lawsuits has confirmed that a 'simple statement or affidavit may be sufficient where claims are small or are not amenable to ready verification.'"[202]

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200. 136 S. Ct. 1036, 1046–47 (2016).

201. 844 F.3d 1121, 2017 WL 24618, at *9; *see also Nexium*, 777 F.3d at 20; *Mullins*, 795 F.3d at 669.

202. *In re* Dial Complete Mktg. & Sales Practices Litig., 312 F.R.D. 36, 52 (D.N.H. 2015) (quoting ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 18:54 (4th ed. 2002)); *see also, e.g.*, Steigerwald v. BHH, LLC, No. 1:15 CV 741, 2016 WL 695424, at *5 (N.D. Ohio Feb. 22, 2016) (holding that a class of allegedly defrauded purchasers of pest-control devices could be ascertained through "the use of an affidavit in the claims process"); Goldemberg v. Johnson & Johnson Consumer Cos., Inc., 317 F.R.D. 374, 398–99 (S.D.N.Y. 2016) ("[T]he implied ascertainability requirement of Rule 23 can, at minimum, be met on the basis of sworn statements indicating class members purchased the products at issue in the necessary state during the necessary limitations period."); *In re* Korean Ramen Antitrust Litig., No. 13-cv-04115-WHO, 2017 WL 235052, at *21 (N.D. Cal. Jan. 19, 2017) ("Neither the fact that class members have to 'self-identify' nor that they might not have readily available proof of purchase, means that they are not ascertainable sufficient for class certification."); *In re* Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 WL 5371856, at *3 (D. Kan. Sept. 26, 2016) ("To the extent necessary, a producer may be able to establish membership in the class properly by affidavit."); Booth v. Appstack, Inc., No. C13-1533JLR, 2016 WL 3030256, at *8 (W.D. Wash. May 25, 2016) (stating that "sworn self-identification" could ascertain a class that brought a Telephone Consumer Protection Act claim, but deeming unascertainable a proposed overlapping class that brought a claim under state law).

A narrow focus on lack of cross-examination can overlook that declarants submit hard facts on a sworn basis.[203] In this regard the standard warnings on claims administration websites—if you submit a false claim, you risk "penalty of perjury" or "criminal prosecution"—are frightening enough to dissuade many more claims than are submitted fraudulently.[204] The truth is that most people would prefer not to risk criminal penalties—especially not when they stand to gain only a few dollars. That reluctance explains why, all else being equal, claims are filed at a lower rate when claim forms include "penalty of perjury" language, according to Tiffaney A. Janowicz, senior vice president at the claims administration firm Rust Consulting. In general, too, the low claims rates in consumer settlements[205] show that fraud beyond negligible levels is simply not occurring. After all, "[p]eople are not expected to lie" under oath.[206]

Claims that are false tend to be outliers of some sort, claims administrators have found.[207] Claims from prisoners, and multiple claims under the same or similar names or addresses, raise red flags. Suspect claims are reviewed, investigated, and excluded

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203. Treating written testimony as substandard contradicts settled law. In addition to the examples in Section IV.A and note 140, *supra*, courts have permitted witnesses to answer deposition questions under oath in writing, as contemplated by Federal Rule of Civil Procedure 31. *See, e.g.*, Roby v. Stewart, No. C 08-1113 CW PR, 2013 WL 1636375, at *2 (N.D. Cal. Apr. 16, 2013) ("[T]he Court will modify the procedure to allow the deponents to provide written answers to the written deposition questions. This procedure will also resolve the issue of taking the testimony under oath, for the witnesses must verify the written responses"); *see also* Buckeye Ret. Co. v. Buffa, No. 3:05 CV 769 JGM, 2012 WL 4892866, at *4 (D. Conn. Oct. 15, 2012); Rhodes v. Motion Indus., Inc., No. 1:07-cv-251, 2008 WL 4646110, at *6 (E.D. Tenn. Oct. 17, 2008); Laurin v. Pokoik, No. 02 CIV.1938 LMM DFE, 2004 WL 2211653, at *1 (S.D.N.Y. Sept. 30, 2004).

204. *See* Pearson v. NBTY, Inc., 772 F.3d 778, 783 (7th Cir. 2014) (suggesting that a claim form's "threats of criminal prosecution" helped explain "why so few . . . bothered to submit a claim."); *ConAgra*, 844 F.3d at 1130 ("Why would a consumer risk perjury charges and spend the time and effort to submit a false claim for a de minimis monetary recovery?"); Morales v. Kraft Foods Grp., Inc., No. LA CV14-04387 JAK (PJWx), 2015 WL 10786035, at *13 (C.D. Cal. June 23, 2015) ("[A] sworn statement, made under penalty of perjury, has some inherent reliability."), *followed in* Wolf v. Hewlett Packard Co., No. 5:15-cv-01221, ECF No. 94, slip op. at 15–16 (C.D. Cal. Sept. 9, 2016).

205. *See supra* note 134.

206. *Morales*, 2015 WL 10786035, at *13.

207. Statements in this paragraph are derived from my litigation experience and my interviews with claims administrators in the course of researching this topic.

through advanced techniques.[208] Programmatic audits use algorithms to locate false information and duplicative claims. Traps for fraud are laid by offering drop-down menu options that are incorrect. Responses to questions about the goods or services at issue and the price, date, and location of the transaction or occurrence can identify confused claimants or those attempting to commit fraud. Claims administrators also consult a shared database listing known filers of false or duplicative claims in securities class actions.[209] "Moreover, the fact that particular persons may make false claims of membership does not invalidate the objective criteria used to

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208. The claims administrator for the LCD price-fixing settlement (*supra* note 139) identified and excluded 16,079 claims as ineligible. *See* Declaration of Robin M. Niemiec in Support of Indirect Purchaser Plaintiffs' Motion to Authorize Distribution of Settlement Fund, ¶ 28, *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 3:07-md-01827-SI, ECF No. 9217-1 at 8 (N.D. Cal. Sept. 12, 2014), *available at* https://lcdclass.com/Portals/0/Documents/Motion%20to%20Dist%20Dec%20w%20exhibits.pdf. In *Forcellati*, the court described a process that:

> would screen out, *inter alia:* (i) any claim form that stated that a product was purchased from a retailer that does not sell the product (by cross-checking them with records showing which retailers sold which products in which locations); (ii) any claim form that cannot properly identify the images featured on the product packaging; (iii) any claim form that misidentifies whether the particular product was in pill, liquid, or strip form; (iv) duplicate claims; and (v) known frequent fraudulent filers. Defendants' records could also be used [and] claimants will be required to affirm their statements under penalty of perjury.

2014 WL 1410264, at *7 n.3 (citation omitted); *see also Mullins*, 795 F.3d at 677 (instructing courts to "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.").

209. Following this precedent, claims administrators should begin pooling their databases of known fraudulent claimants in class actions more broadly. Like the coterie of lawyers in the business of objecting to and appealing the approval of settlements under Rule 23, the limited group of individuals who seek to exploit class action claims processes are likely to be repeat players. *See* In re Polyurethane Foam Antitrust Litig., 178 F. Supp. 3d 635, 639–40 (N.D. Ohio 2016); In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1362 n.30 (S.D. Fla. 2011); *In re* UnitedHealth Grp. Inc. PSLRA Litig., 643 F. Supp. 2d 1107, 1108 (D. Minn. 2009); Barnes v. FleetBoston Fin. Corp., No. CA 01-10395-NG, 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006); Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 975 (E.D. Tex. 2000).

determine inclusion."[210]

When records are available, they can make individual claim forms unnecessary or supplement them. When claims are of high value, class members are more likely to remember the relevant transactions or occurrences; yet settling defendants also are more likely to seek documentation or verification of claims. Apart from the defendant's records, class membership may be corroborated through photographs,[211] serial numbers,[212] doctors' notes,[213] proofs of purchase from archived bank or credit-card statements,[214] or other "[c]reative solutions . . . to overcome the administrative burdens of the class device."[215] But *requiring* records of who was harmed can allow wrongdoers to escape legal accountability by destroying, transferring, or withholding records, or through the sheer fortuity of their nonexistence.[216] These outcomes contravene the policy of

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210. McCrary v. Elations Co., No. EDCV 13-00242 JGB (OPx), 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014).

211. Saltzman v. Pella Corp., 257 F.R.D. 471, 476 (N.D. Ill. 2009), *aff'd*, 606 F.3d 391 (7th Cir. 2010), *cert. denied*, 562 U.S. 1178 (2011).

212. *In re* Lenovo Adware Litig., No. 15-md-02624-RMW, 2016 WL 6277245, at *17 (N.D. Cal. Oct. 27, 2016).

213. Rikos v. Procter & Gamble Co., 799 F.3d 497, 527 (6th Cir. 2015); Otto v. Abbott Labs. Inc., No. 5:12-cv-01411-SVW-DTB, 2015 WL 9698992, at *2–4 (C.D. Cal. Sept. 29, 2015); *see also* Donovan v. Philip Morris USA, Inc., 268 F.R.D. 1, 9 (D. Mass. 2010) ("Class members can sign affidavits under penalty of perjury or submit doctors' letters to detail their smoking histories and medical status.").

214. Fraser v. Wal-Mart Stores, Inc., No. 2:13-cv-00520-TLN-DB, 2016 WL 6208367, at *5 (E.D. Cal. Oct. 24, 2016) (accepting the plaintiffs' proposal that class members "prove their membership with reliable records such as credit card statements and receipts."); Nieberding v. Barrette Outdoor Living, Inc., 302 F.R.D. 600, 607 (D. Kan. 2014) (accepting the plaintiff's proposal of "simply requiring that all class members complete a claim form with proof of purchase (i.e., receipt, photos, etc.)"), *appeal dismissed*, Nos. 14-3224 & 14-3225 (10th Cir. Sept. 25, 2015).

215. Meyers v. Nicolet Rest. of de Pere, LLC, No. 15-C-444, 2016 WL 1275046, at *5 (E.D. Wis. Apr. 1, 2016) (citing *Mullins*, 795 F.3d at 672).

216. *See* Rhodes v. National Collection Sys., Inc., 317 F.R.D. 579, 583 (D. Colo. 2016) (stating that "to countenance defendant's [ascertainability] argument would put the court's imprimatur on potentially confusing and rather inadequate record keeping, undoubtedly inviting other debt collectors to adopt similarly lax procedures as an easy end run around class action lawsuits."); Brent W. Johnson & Emmy L. Levens, *Heightened Ascertainability Requirement Disregards Rule 23's Plain Language*, ANTITRUST, Spring 2016, at 68, 72 (observing that "as the Third Circuit's heightened ascertainability requirement is applied with increasing frequency and force . . . defendants are actually incentivized to keep poor records or more regularly delete records, as doing so may allow a culpable defendant to escape widespread liability.").

preventing civil defendants from evading liability (including in a class action)[217] because of their own shoddy record-keeping or the inability to determine damages with precision.[218]

In *Tyson Foods*, the Supreme Court approved reliance on statistical sampling to prove class claims for overtime pay "to fill an evidentiary gap created by the employer's failure to keep adequate records" of how much time workers spent donning and doffing protective clothing.[219] The Court's reasoning built on its longstanding rule that if violations "preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend[.]"[220] "Any other rule," the Court explained, "would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery."[221] This rule is relevant to the topic at hand because to

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217. *See* Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 540 (6th Cir. 2012) (concurring with the district court that defendants should not be permitted to "escape class-wide review due solely to the size of their businesses or the manner in which their business records were maintained."); Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1306–07 (9th Cir. 1990) (affirming class certification where "the potential for numerous unlocated class members stems largely from [the defendant's] own failure to record and retain the addresses of its workers"); Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 135 (7th Cir. 1974) (holding that defendants "cannot avoid a class suit merely because their own actions have made the class more difficult to identify.").

218. *See, e.g.*, West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (reiterating the policy against the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation," and noting "[i]t has long been the rule that spoliators should not benefit from their wrongdoing").

219. Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1046–47 (2016).

220. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). The *Tyson Foods* decision, 136 S. Ct. at 1047, expressly follows *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946), which, in turn, relies on *Story Parchment* and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377–79 (1927). In *Eastman Kodak*, the Court held that "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Id.* at 379 (citing Hetzel v. Baltimore & Ohio R.R. Co., 169 U.S. 26, 37–39 (1898); Lincoln v. Orthwein, 120 F. 880, 886 (5th Cir. 1903)).

221. Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264–65 (1946).

ascertain the class is to specify the group that will be entitled to any money damages or other valuable relief.

But, just as pure speculation cannot justify a damages award,[222] so class member affidavits, standing alone, cannot satisfy ascertainability if persons cannot discern (by answering questions or otherwise) whether they were subjected to the alleged violations.[223] Bank customers can't be expected to remember if they used an ATM that failed to conspicuously disclose transaction fees.[224] Copper buyers can't be expected to know whether the prices they paid were expressly related to the pricing of copper futures.[225] Taxpayers can't be expected to know their eligibility for a refund of long-distance telephone call excise taxes.[226]

Other cases present closer calls. Can people be expected to remember whether receipts they were given at movie theaters or parking garages displayed full credit card numbers, rather than just the last four digits? Two cases implicating this question came out differently.[227] In a typical consumer fraud case, if discovery uncovers no class lists or other sources or methods for identifying class members, their self-identification becomes increasingly adequate the

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222. Pattern jury instructions make the point: "Damages must be reasonable. . . . You are not permitted to award speculative damages." 3 KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 128:60 (6th ed. 2008 & Supp. 2010); *accord, e.g.*, JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTIONS No. 3900 (2017) (the plaintiff "does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.").

223. *See* Hughes v. Ester C Co., 317 F.R.D. 333, 349 n.23 (E.D.N.Y. 2016); Sarah R. Cansler, *An "Insurmountable Hurdle" to Class Action Certification? The Heightened Ascertainability Requirement's Effect on Small Consumer Claims*, 94 N.C. L. REV. 1382, 1403 (2016) ("When class members are unable to recall whether they purchased the product in question, let alone provide proof of purchase, they probably cannot prove their claims in court at all—whether litigating in a class action or individually.").

224. Brown v. Wells Fargo & Co., 284 F.R.D. 432, 444–45 (D. Minn. 2012); *cf.* Frey v. First Nat'l Bank Sw., 602 F. App'x 164, 168 (5th Cir. 2015) (affirming certification of a similar class of customers whose identities could be verified through bank records).

225. *In re* Copper Antitrust Litig., 196 F.R.D. 348, 358 (W.D. Wis. 2000).

226. Tech v. United States, 271 F.R.D. 451, 457 (M.D. Pa. 2010).

227. *Compare* Grimes v. Rave Motion Pictures Birmingham, LLC, 264 F.R.D. 659, 665 (N.D. Ala. 2010) ("Without a receipt, no plaintiff would have proof of a claim, the *sine qua non* of class membership."), *with* Tchoboian v. Parking Concepts, Inc., No. SACV 09-422 JVS (ANX), 2009 WL 2169883, at *5 (C.D. Cal. July 16, 2009) ("[T]he Court can imagine methods of identifying the class members, including publishing a notice of the action and allowing class members to come forward.").

more unique and unvarying the relevant products or services, the more recent and continuous the period of time for qualifying purchases or usage, and the fewer the details, such as specific alleged misrepresentations, that must be recalled.[228] To return to our example in the Introduction, ascertaining that hypothetical class in whole or in part through purchaser affidavits should be unobjectionable, where the personal care product was uniformly mislabeled over a discrete period of time, because the balding men who bought the product are reasonably likely to recall having done so. In most cases brought on behalf of an objectively defined group, "an individual would be able to determine, simply by reading the definition, whether he or she was a member of the proposed class."[229]

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228. *See* Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 952–53 (11th Cir. 2015) (Martin, J., concurring) (citing, *inter alia*, *In re* Hulu Privacy Litig., No. C 11-03764 LB, 2014 WL 2758598, at *15–16 (N.D. Cal. June 17, 2014)); *compare, e.g.*, Kosta v. Del Monte Foods, Inc., 308 F.R.D. 217, 229 (N.D. Cal. 2015) ("[V]ariations in the products . . . make it much more difficult for a purchaser to recall which particular product, with which packaging and labeling, they purchased."), *and* Bruton v. Gerber Prods. Co., No. 12-cv-02412-LHK, 2014 WL 2860995, at *9 (N.D. Cal. June 23, 2014) ("While it may be reasonable to ask consumers to submit affidavits testifying that they purchased a Gerber 2nd Foods product during the class period, asking consumers to remember whether or not they purchased a qualifying flavor in a package that bore a challenged statement is unlikely to produce reliable results."), *and* Randolph v. J.M. Smucker Co., 303 F.R.D. 679, 689 (S.D. Fla. 2014) ("Not only would the individual need to recall purchasing Crisco oil, but also the specific variety purchased, and the specific date on which it was purchased beyond simply within the period between 'May 2009 [and] the present.'"), *with* Brazil v. Dole Packaged Foods, LLC, No. 12-cv-01831-LHK, 2014 WL 5794873, at *15 (N.D. Cal. Nov. 6, 2014) ("Here, in contrast, class members would only have to recall whether they purchased any challenged products, all of which bore the labeling claim, during the revised class period."), *and* Kumar v. Salov N. Am. Corp., No. 14-cv-2411-YGR, 2016 WL 3844334, at *7 (N.D. Cal. July 15, 2016) ("The claim involves identical statements on all products for the relevant time period, with no 'memory test' for flavor, size, or time period necessary to determine whether the product purchased had the challenged statement on the label.").

229. Bynum v. District of Columbia, 214 F.R.D. 27, 32 (D.D.C. 2003) (the class comprised those incarcerated within a jurisdiction during a certain period of time); *see also* Nicodemus v. Saint Francis Mem'l Hosp., 208 Cal. Rptr. 3d 411, 420 (Cal. Ct. App. 2016) (stating that "[t]he goal in defining an ascertainable class is to use terminology that will convey sufficient meaning to enable persons hearing it to determine whether they are members of the class") (internal quotation marks and citations omitted); Scott Dodson, *An Opt-in Option for Class Actions*, 115 MICH. L. REV. 171, 191 (2016) (noting that "self-identification largely meets the principal goals of ascertainability.").

V. CONCLUSION

CAFA's expansion of diversity jurisdiction in 2005 increased the flow of class actions into the federal courts, putting related doctrines under strain. My efforts to take stock of the ascertainability doctrine, after it experienced a flurry of jurisprudential activity, show that its application continues to hinge on the class definition. The definition should be precise and closely tailored to the case without referencing liability or state of mind. Even a suitably objective definition can fail the ascertainability test if it is clear that determining class membership—whether through records, affidavits, or other sources or methods—will not be reasonably possible. In such cases, the application of express Rule 23 provisions may dictate that class certification be denied.

The liberal construction of ascertainability supports the purposes and provisions of Rule 23 while allowing those provisions to propel class certification analysis. Since 2012, some courts have bulked up the implied ascertainability doctrine by requiring proof, at the relatively early stage of class certification, of a reliable and administratively feasible method for determining whether a given person belongs to the class. This new requirement would bury the doctrine's pragmatic core in a thicket of logistics. As applied, this approach can prevent classes from being ascertained in whole or part by class member affidavits, impeding certification of otherwise certifiable classes. But it is erroneous to relegate testimony in affidavits to a substandard category of evidence. Not only are sworn statements a form of ordinary proof, they can be tested through means short of cross-examination and have long justified a variety of judicial acts. As described above, affidavits can lift default judgments, cause the issuance of criminal warrants and temporary restraining orders, and establish eligibility to recover out of mass tort settlements. So, too, can electronic or traditional affidavits establish membership in a properly defined class—certainly when their submission causes the defendant no prejudice, as when there is a fixed total damages or settlement amount. Prohibiting certification when affidavits are needed to identify at least some class members, on the other hand, substantially undervalues the evidentiary weight of sworn statements and diminishes Rule 23's utility.

For these reasons, when certification of a Rule 23(b)(3) class is proposed, the question regarding ascertainability should be: Is the class defined (1) using objective criteria that conform to the facts giving rise to the claims, (2) such that it appears reasonably possible to determine after judgment whether a given person belongs to the

class, based on one or more of the following: (a) defendant, third-party, and/or class member records, (b) affidavits from class members where it is reasonably possible for them to determine whether they belong to the class, and/or (c) other sources or methods. If the answer is no, and Rule 23 is otherwise satisfied, the court should consider redefining or subdividing the class, or certifying it for liability purposes only.