No. 16-16401

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARTIN SIEGEL, ET AL.,

Plaintiffs-Appellees,

v.

DELTA AIRLINES, INC. AND AIRTRAN AIRWAYS INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division
Civil Action No. 1:09-MD-2089-TCB

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC. AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES AND SUPPORTING AFFIRMANCE

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February 1, 2017

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1-2, the following parties, not identified in the earlier-filed briefs, have an interest in the outcome of this appeal:

- National Consumer Law Center – Amicus Curiae
- Public Citizen, Inc. – Amicus Curiae
- Public Citizen Litigation Group – law firm for Public Citizen, Inc.
- Scott L. Nelson – counsel for Amicus Curiae
- Allison M. Zieve – counsel for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that amici curiae Public Citizen, Inc. and National Consumer Law Center are nonprofit, non-stock corporations. They have no parent corporations, and no publicly traded corporations have an ownership interest in them.

/s/ Allison M. Zieve
Allison M. Zieve
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INTEREST OF AMICI CURIAE[1]

Founded in 1971, Public Citizen, Inc. is a nonprofit consumer advocacy organization with members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents its members' interests in litigation and as amicus curiae. Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process. The interests of both named and absent class members, defendants, the judiciary, and the public at large are best served by adherence to the principles incorporated in Federal Rule of Civil Procedure 23. Public Citizen has sought to advance this view by participating, either as counsel or amicus curiae, in many significant class actions, including *Amchem Products, Inc. v. Windsor*, 521 U.S.

[1] All parties have consented to the filing of this amicus brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amici made a monetary contribution to the preparation or submission of this brief.

591 (1997), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Public Citizen has also appeared as amicus curiae in appeals addressing "ascertainability," including *Leyse v. Lifetime Entertainment Services*, No. 16-1133 (2d Cir.) (pending), *Jones v. ConAgra Foods, Inc.*, No. 14-16327 (9th Cir.) (pending), and *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers, and is recognized nationally as an expert in consumer issues. For more than 46 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-volume Consumer Credit and Sales Legal Practice Series. In these volumes NCLC specifically addresses issues concerning the strong enforcement of the Telephone Consumer Protection Act, *see, e.g.*, *Federal Deception Law* (2nd ed. 2015), and insuring consumer access to justice, *see*, *e.g.*, *Consumer Class Actions* (9th ed. 2016). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and elderly consumers, and to promote protections against such practices. *See, e.g.*, *Unfair and Deceptive Acts and Practices* (8th ed. 2012 &

Supp. 2013). NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country, including on issues concerning Federal Rule of Civil Procedure 23. NCLC has also participated in the most recent efforts to amend Rule 23 by presenting written testimony to the Rule 23 Subcommittee and testifying before the Standing Committee on Civil Rules. NCLC has an interest in seeking strong and effective enforcement of consumer protection laws, and class actions are an important tool for achieving this objective.

STATEMENT OF THE ISSUES

This brief addresses only one of the issues presented in this appeal:

Whether the Court should engraft an implied "administrative feasibility" requirement as a threshold prerequisite to class certification under Federal Rule of Civil Procedure 23.

SUMMARY OF THE ARGUMENT

Courts have long recognized that class certification is premised on a clearly defined class, based on objective criteria. This implicit requirement serves to prevent vague or subjective classes (*e.g.*, persons "annoyed" by defendants' first bag fees), as well as classes defined by success on the merits, so-called fail-safe classes (*e.g.*, persons with "Sherman Act claims" against defendants for their first bag fees). Defendants do not argue that the class here—made up of those "that directly paid Delta Airlines and/or AirTran Airways one or more first bag fees on

domestic flights" during the class period—fails to satisfy these well-settled standards.

Nonetheless, focusing on the point that the ticketed passenger is not always the bag-fee payor, defendants ask this Court to adopt a new threshold prerequisite, one that if accepted would doom the majority of low-value consumer class actions: that, at the outset, the plaintiff must prove an "administratively feasible method" to identify class members. *Id.* at 14. Although the district court correctly concluded as a factual matter that plaintiffs in this case met even this standard, this Court should join the majority of courts of appeals to have addressed this novel precondition and reject defendants' efforts to graft a new threshold showing, not stated in Federal Rule 23, on top of the Rule's already rigorous requirements.

ARGUMENT

"Administrative feasibility" is not a finding prerequisite to class certification.

This Court, like many others, has held that class certification is appropriate only when a class is "adequately defined and clearly ascertainable." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016) (quoting *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012)); *see* William Rubenstein, et al., *Newberg on Class Actions* § 3.3 (5th ed. 2013) ("All courts essentially focus on the question of whether the class can be ascertained by objective criteria"). The so-called ascertainability requirement is based on Rule 23(c)(1)(B), which requires

that a court order certifying a class "must define the class." A clear and objective definition enables courts to identify who is bound by a judgment and thus to enforce the res judicata effect of final judgment against the class members.

Contrary to defendants' assertion, ascertainability does not mean that each class member must be individually identifiable at the time of class certification. *Briseno v. ConAgra Foods, Inc.*, __ F.3d __, 2017 WL 24618, at *10 (9th Cir. 2017); *Brecher v. Republic of Arg.*, 806 F.3d 22, 25 n.2 (2d Cir. 2015) (quoting 1 *McLaughlin on Class Actions* § 4:2 (11th ed. 2014) ("The class need not be so finely described, however, that every potential member can be specifically identified at the commencement of the action; it is sufficient that the general parameters of membership are determinable at the outset.")); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015). Nonetheless, in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), the Third Circuit stated a new ascertainability standard, pursuant to which each class member must be individually identifiable at the time of class certification, *id.* at 307–08. Although an unpublished, non-precedential decision of this Court suggests agreement with the Third Circuit's new approach, *see Karhu v. Vital Pharm, Inc.*, 621 F. App'x 945, 947–50 (11th Cir. 2015), the Court chose not to make that decision precedential. Meanwhile, the Sixth, Seventh, Eighth, and Ninth Circuits have considered and rejected the Third Circuit's new standard. *See Briseno*, 2017 WL 24618 at *10; *Sandusky Wellness*

Ctr., LLC, v. Medtox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins*, 795 F.3d at 658. This Court should do the same.

I. Rule 23 does not include an administrative feasibility threshold.

Defendants argue that "administrative feasibility" is a key aspect of ascertainability and that a showing of an "administratively feasible" method to identify class members is a prerequisite to class certification. Neither the plain text of nor the policy behind Rule 23, however, supports an administrative feasibility requirement.

A. The Supreme Court has instructed that Rule 23 "sets the requirements [the courts] are bound to enforce" when considering class certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The text of the rule "limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered." *Id*. Without doubt "administrative feasibility" is not specified or implied in Rule 23.

Rule 23(a), titled "Prerequisites," does not include "administrative feasibility." The Rule lists "four threshold requirements applicable to all class actions." *Amchem*, 521 U.S. at 613. The four threshold requirements—numerosity, commonality, typicality, and adequacy of representation—are exclusive. Under the doctrine "expressio unius est exclusio alterius," the enumeration of four

"prerequisites" "implies the exclusion of [others]." *United States v. Castro*, 837 F.2d 441, 442 (11th Cir. 1988) (applying doctrine); *see also United States v. Spoor ex rel. Louise Paxton Gallagher Revocable Tr.*, 838 F.3d 1197, 1203 (11th Cir. 2016). ("The canon of statutory construction that the inclusion of one implies the exclusion of others is well-established." (citation omitted)). Thus, as the Ninth Circuit recently explained, *Briseno*, 2017 WL 24618, at *4, because administrative feasibility is not listed among Rule 23(a)'s list of exclusive prerequisites, it is not a prerequisite to class certification under the Rule.

Likewise, a heightened ascertainability requirement cannot be located in the Rule 23(b)(3) factors. Rule 23(b)(3)(D) instructs courts to consider "the likely difficulties in managing a class action." "Imposing a separate administrative feasibility requirement would render that manageability criterion largely superfluous, a result that contravenes the familiar precept that a rule should be interpreted 'to give effect to every clause.'" *Briseno*, 2017 WL 24618, at *4 (internal brackets omitted) (quoting *Republic of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2014)). Put simply, "[n]othing in Rule 23 mentions or implies this heightened [ascertainability] requirement under Rule 23(b)(3), which [would have] the effect of skewing the balance that district courts must strike when deciding whether to certify classes." *Mullins*, 795 F.3d at 658.

Moreover, Rule 23's notice provision specifically envisions that class members will not all be specifically identifiable at the certification stage. *See* Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 Yale L.J. 2354, 2367 (2015). The notice provision, Rule 23(c)(2)(B) provides that, for any class certified under Rule 23(b)(3), the court must direct to class members the "best notice that is practicable under the circumstances, including individual notice to all *members who can be identified through reasonable effort*" (emphasis added). Thus, the Rule specifically recognizes that some class members might *not* be identifiable at the time of class certification. *See Briseno*, 2017 WL 24618, at *7 (explaining that Rule 23 "recognizes it might be *impossible* to identify some class members for purposes of actual notice" (quoting *Mullins*, 795 F.3d at 665)); Shaw, 124 Yale L.J. at 2367.

B. An administrative feasibility prerequisite is also contrary to the policies underlying Rule 23. When a company exposes many people to the same unlawful practice, a class action is often the only effective way to redress the wrongdoing. As the Supreme Court has observed, "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). "The policy at the very core of the class action mechanism is to overcome [this] problem." *Id.* "The smaller the stakes to each victim of unlawful

conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013). In such cases, class actions offer the only means for achieving individual redress and deterrence of wrongful conduct.

Defendants' position suggests a way for companies to avoid accountability for unlawful practices: minimize recordkeeping. As one court explained, allowing the contours of a class to be defined by defendants' own recordkeeping—"or declining to certify a class altogether, as defendants propose—would create an incentive for a person to … keep no records of its activity, knowing that it could avoid legal responsibility for the full scope of its illegal conduct." *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 250 (N.D. Ill. 2014); *see also Daniels v. Hollister Co.*, 113 A.3d 796, 801–02 (N.J. App. 2015) ("Allowing a defendant to escape responsibility for its alleged wrongdoing by dint of its particular recordkeeping policies … is not in harmony with the principles governing class actions.").

Furthermore, as the district court held in this case, "[t]he fact that some review of files and submissions will be required does not defeat certification." D. Ct. Order at 52 (July 12, 2016). If the rule were "otherwise, Defendants in this case and others could escape class-wide review due solely to the size of their businesses

or the manner in which their business records were maintained." *Id*. (internal quotation marks and citations omitted). Indeed, even in the Third Circuit, the "size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification." *Byrd v. Aaron's Inc*., 784 F.3d 154, 171 (3d Cir. 2015) (quoting *Young v. Nationwide Mut. Ins. Co*., 693 F.3d 532, 539–40 (6th Cir. 2012)). *Cf. Tyson Foods, Inc. v. Bouaphakeo,* 136 S. Ct. 1036, 1047 (2016) (explaining that in Fair Labor Standards Act cases, "[i]nstead of punishing 'the employee by denying him any recovery'" where the employer has failed to keep records, a court may allow the employee may present evidence sufficient to establish proof of a claim through "just and reasonable inference") (quoting *Anderson v. Mt. Clemens Pottery Co*., 328 U.S. 680, 687 (1946))); *see also In re Visa Check/MasterMoney Antitrust Litig*., 280 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (holding that refusal to certify a class "on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule" (internal quotation marks omitted)).

II. Imposing the administrative feasibility requirement sought by defendants here would harm class members without advancing any legitimate countervailing interest.

The focus of the ascertainability inquiry is a clear class definition based on objective criteria. 1 *Newberg on Class Actions* § 3:2; 5 *Moore's Federal Practice* § 23.21[1] (3d ed. 1997). In this case, defendants do not suggest that the class

definition is inadequate. Instead, they argue that class member identification would be administratively complicated. That concern, however, does not support denial of class certification where, as here, the definition is clear and the plaintiff has proposed an administratively feasible means of identifying members. If adopted, defendants' approach would make it impossible for many people injured by deceptive marketing or defective products to obtain relief, would eliminate an important deterrent of illegal conduct, and yet would do nothing to protect the legitimate interests of absent class members or defendants.

Defendants' primary argument is that their records are insufficient to definitively determine class membership and that supplementing their records with class member affidavits would be inadequate to ensure proper identification and protect defendants' due process rights. These concerns are misplaced.

A. To begin with, affidavits are a well-established and reliable form of proof in civil litigation. "Given that a consumer's affidavit could force a liability determination at trial without offending the Due Process Clause," there is "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." *Briseno*, 2017 WL 24618, at *9; *see also Tyson Foods*, 136 S. Ct. at 1048 (explaining in the context of representative evidence that "the

underlying question … [is] whether the [evidence] at issue could have been used to establish liability in an individual action").

Defendants' concerns are distinct from ascertainability, and they are appropriately addressed after "settlement or judgment, when much more may be known about available records, response rates, and other relevant factors." *Mullins*, 795 F.3d at 664; *see id*. at 667. Submission of "claims forms by oath or affirmation" may be required in some circumstances, while in other situations additional "substantiation of claims," such as by invoices or other records, is appropriate. Fed. Judicial Ctr., *Manual for Complex Litigation, Fourth* § 21.66, at 331 (2004). In all cases, "documentation ... should be no more burdensome than necessary." *Id.* Accordingly, the appropriate "[a]udit and review procedures ... depend on the nature of the case." *Id.* at 332. Large-claim cases "might warrant a field audit to check for inaccuracies or fraud," medium-sized claims may be subjected to "random sampling" audit inquiries, and small claims may be accepted on the basis of the sworn claim forms alone. *Id.*

Importantly, the *Manual*'s endorsement comes in a discussion of implementation of class-action settlements, not in conjunction with "ascertaining" class members at the certification stage, which often comes first. *See also Byrd*, 784 F.3d at 165 (in a suit alleging damages from the installation of spyware on leased computers, reaffirming that "[t]he ascertainability inquiry is narrow"). This

point underscores that where, as here, the class definition is clear, concerns about claims processing should not be used to scuttle class actions in their infancy. *See Briseno*, 2017 WL 24618, at *9. Rather, those concerns should be considered in case-management orders, *see* Fed. R. Civ. P. 23(d), or during the settlement process, when the court and the parties are best equipped to address potential fraud or inaccuracy.

B. A heightened "administrative feasibility" requirement at the certification stage is not needed to protect defendants' due process rights. Where the class definition is imprecise, the problem is identifying who is bound by a judgment. Here, however, the class definition is clear and objective, and any class member who later tried to sue over defendants' baggage fees would be bound by res judicata unless they could somehow collaterally attack the judgment on due process grounds. If the notice comports with due process, such an attack would be meritless.

Moreover, according to our research, there have been since the creation of Rule 23 only two successful collateral attacks on class-action judgments certified under Rule 23(b)(3): *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259–61 (2nd Cir. 2001), *aff'd by equally divided court*, 539 U.S. 111 (2003), and *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1223–24 (11th Cir. 1998). Neither of these successful collateral attacks involved a problem in "ascertaining" who was in the

class or an assertion that some class members' interests had been "diluted by fraudulent or inaccurate claims," a concern of the court in *Carrera*, 727 F.3d at 310. For these reasons, class-action defendants have no legitimate concern that, absent an extension of the ascertainability requirement, they will face collateral attacks on class-action judgments to which they are parties. The small number of successful collateral attacks shows that the risk of future successful collateral attacks is itself vanishingly small. This number appears even smaller in light of the number of class-action judgments potentially subject to collateral attack. That number is comparatively large, and many of those judgments, as would be the case here if the class action were settled or litigated to judgment, involve relatively small claims arising under consumer protection, securities, and similar statutes that depend on the class-action device for their survival.[2] Given this large number of cases, if the concern about application of res judicata were correct, the courts would have been entertaining collateral attacks on class-action judgments for decades. Instead, there have been almost none.

[2] *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811, 813 (2010) (study showing "that district court judges approved 688 class action settlements" in 2006 and 2007); NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review* at 1 (2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf (in federal securities class actions, federal district courts approved 108 class-action settlements in 2015).

In addition, although a defendant has a due process right to challenge the plaintiffs' evidence at any stage of the case, including the claims or damages stage, this right is not impeded by use of affidavits to establish class membership, "subject as needed to audits and verification procedures and challenges, to identify class members." *Mullins*, 795 F.3d at 669. At the claims administration stage, parties have long relied 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 validate claims. *Id.* at 667, *quoted in Briseno*, 2017 WL at 24618, at *9. "The due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward." *Id.* at 670.

To be sure, "[i]n all cases, the defendant has a right not to pay in excess of its liability and to present individual defenses, but both rights are protected by other features of the class device and ordinary civil procedure." *Id*. at 672. The advisory committee's notes confirm this point, explaining that certification may be proper "despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." Fed. R. Civ. P. 23 advisory committee's notes to 1966 amendment.

"At bottom, the district court was correct not to let a quest for perfect treatment of one issue become a reason to deny class certification and with it the hope of any effective relief at all." *Mullins*, 795 F.3d at 662.

CONCLUSION

For the foregoing reasons and those set forth in plaintiffs-appellees' brief, this Court should affirm the district court's order granting class certification.

Respectfully submitted,

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February 1, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 3,593 words, less than half the number of words permitted by the Court for the parties' briefs. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program.

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on February 1, 2017.

/s/ Allison M. Zieve
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