No. 21-2895

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: NIASPAN ANTITRUST LITIGATION

A.F. of L. - A.G.C. BUILDING TRADES WELFARE PLAN; CITY OF PROVIDENCE, RHODE ISLAND; ELECTRICAL WORKERS 242 AND 294 HEALTH & WELFARE FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 49 HEALTH AND WELFARE FUND; INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 HEALTH AND WELFARE FUND; NEW ENGLAND ELECTRICAL WORKERS BENEFITS FUND; PAINTERS DISTRICT COUNCIL NO. 30 HEALTH & WELFARE FUND; UNITED FOOD & COMMERCIAL WORKERS LOCAL 1776 & PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUND; MILES WALLIS; CAROL PRASSE,

Appellants.

On Permission to Appeal from the United States District Court for the Eastern District of Pennsylvania (Dubois, D.J.; D. Ct. Case No. 13-md-2460)

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' REQUEST FOR RECONSIDERATION OR, IN THE ALTERNATIVE, REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Appellate Rule 26.1.1, *amicus* states as follows:

The American Antitrust Institute is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of competition policy. AAI enjoys the input of an Advisory Board consisting of over 130 prominent antitrust lawyers, professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[2]

SUMMARY OF ARGUMENT

The administrative feasibility prong of this Court's ascertainability doctrine has become clear over the last decade. This Court's early opinions emphasized when plaintiffs had *not* provided an administratively feasible way to determine class membership. More recent opinions have emphasized when plaintiffs *have* established administrative feasibility. Taken together, the opinions provide a

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[1] All parties consent to the filing of this *amicus* brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than *amicus curiae* or its counsel—has contributed money that was intended to fund preparing or submitting this brief. Joshua Davis is a Research Professor at U.C. Law San Francisco and a shareholder at Berger Montague PC, which represents a class of *direct* purchasers in litigation involving the same conduct at issue in this case. *See In re Niaspan Antitrust Litig.*, 397 F. Supp. 3d 668 (E.D. Pa. 2019) (class certification granted). The ascertainability issues addressed in this brief were not at issue in the direct purchaser action, *id*. at 691, and Prof. Davis has done no work in the direct or indirect purchaser actions.

[2] The views of individual members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

standard for administrative feasibility that is practical, serves the purposes of Rule 23, and should be readily satisfied in antitrust cases involving prescription drugs.

Third Circuit law imposes two ascertainability requirements under Rule 23(b)(3). The first is a class definition that uses objective criteria ("objectivity"). The second is that an individual or entity's membership in the class can be determined in a reliable and administratively feasible way ("administrative feasibility").

The second requirement is at issue here. It is practical. This Court has focused the analysis on a limited number of tasks required by Rule 23(b)(3): providing notice to class members and resolving any disputes about class membership. In furtherance of these practical concerns, this Court has adopted concrete rules for administrative feasibility:

(1) Unreliable affidavits from potential class members lacking records to corroborate them are insufficient;
(2) Plaintiffs do not have to create a list of class members; and
(3) Data that are generally capable of determining class membership suffice, even if the data come from multiple sources, are incomplete, need supporting affidavits, or require review of individual records.

Kelly v. RealPage, *Inc.*, 47 F.4th 202, 222-25 (3d Cir. 2022); *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 470, 480 (3d Cir. 2020); *City Select Auto Sales, Inc. v. BMW Bank of North America, Inc*., 867 F.3d 434, 439 (3d Cir. 2017); *Byrd v. Aaron's Inc*., 784 F.3d 154, 163, 170-71 (3d Cir. 2015).

These concrete rules should be easy to satisfy in antirust cases involving prescription drugs. Businesses maintain detailed records about purchases of prescription drugs because the relevant data are extraordinarily valuable. As a result, antitrust cases involving prescription drugs, particularly when they are brought on behalf of third-party payors, should generally meet the standard for administrative feasibility. Data, sometimes combined with reliable affidavits, can identify who paid for a prescription drug subject to allegedly supracompetitive prices.

By requiring a "systematic" way to identify class members at the outset of a case when antitrust violations affect many transactions, Op. 45 n.13, the panel opinion could be read as deviating from the proper practical approach. As a result, reconsideration by the panel, or rehearing by the Third Circuit *en banc*, would be appropriate to confirm this Court's practical approach to ascertainability.

I. THE PANEL OPINION DID NOT TREAT THE ASCERTAINABILITY STANDARD AS APPROPRIATELY PRACTICAL.

The term ascertainability appears nowhere in Rule 23. Rather, this Court derived ascertainability from the practical tasks required by Rule 23.

Those relevant tasks are few. Trial courts need to ensure class notice meets the requirements of Rule 23 and Due Process. Absent class members need to be able to opt out, to object, or to participate in any financial recoveries from settlement or trial. Plaintiffs' counsel need to be able to allocate funds from a

settlement or trial. Defendants need to be able to enforce any final judgments, protecting themselves from precluded claims. This Court has reasoned that, if these tasks are not manageable, then individual issues may come to predominate over common issues, rendering class certification inappropriate.

The administrative feasibility prong of the ascertainability requirement addresses that risk. To exercise their procedural rights, class members need to figure out whether they are members of the class in a feasible and reliable way. Parties, lawyers, and courts need to be able to do the same in resolving disputes about who gets to recover in a class action and who is bound by a final judgment.

None of those tasks requires a systematic method for producing a list of class members. When disputes arise about who falls within a class definition, the issue can be addressed by considering relevant records and affidavits, as long as there is reason to believe those sources will be reliable.

Rule 23 and Due Process doctrine similarly reject a rigid approach to class notice. Rule 23 instructs a court to "direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23 does *not* require that all members of a class be identifiable through reasonable effort. To the contrary, it assumes that at times *they will not be*. And it requires individual notice only to those class members who can be reasonably identified. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317–19 (1950).

The above framework is consistent with this Court's early decisions on ascertainability. In them, plaintiffs had not identified reliable and administratively feasible ways to determine class membership, but rather tended to rely on class member affidavits that might not be reliable and for which there might not be any possible corroboration. *Carrera*, for example, involved proposed class claims against manufacturers of an over-the-counter dietary supplement over several years in Florida. *Carrera v. Bayer Corp*., 727 F.3d 300, 304 (3d Cir. 2013). It was not clear that either class members or retail sellers had any memory or records of which supplements, if any, consumers bought. *Id*. at 308–09. This Court remanded for discovery on whether there was a reliable and administratively feasible way to determine class membership. *Id*. at 312.[3]

In contrast, this Court's more recent cases emphasize that administrative feasibility does *not* require a list of class members or prohibit inquiry into individual circumstances. *Byrd*, for example, involved lessees of computers in which spyware was installed and activated without their consent. This Court held that records of the lessees sufficed for ascertainability of a class that comprised not

[3] *See also Hayes v. Wal-Mart Stores, Inc*., 725 F.3d 349, 356 (3d Cir. 2013) (remanding for plaintiffs to propose reliable and administratively feasible way to assess whether purchasers (1) bought a service plan on an "as-is" item that (2) came with a manufacturer's full warranty and (3) received service on the as-is item or a refund on the cost of the service plan); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593–94 (3d Cir. 2012) (membership in a proposed class of New Jersey purchasers of BMW cars equipped with "run-flat tires" that had "gone flat and been replaced" depended on various factors which plaintiffs offered no reliable or administratively feasible way to assess, just "potential class members' say so").

only them, but also other members of their households. That was so even though no evidence was put forward establishing how the non-lessee household members could be identified. 784 F.3d at 170–71. This Court characterized the facts before it as "a far cry from an unverifiable affidavit, or the absence of any methodology that can be used later to ascertain class members." *Id*. at 170 (citing *Carrera*, 727 F.3d at 310–11).

Similarly, *City Select* involved an automobile dealership that brought a proposed class action against a consumer financing division of a car manufacturer, BMW, and its contractor, Creditsmarts. The dealership alleged defendants violated the Telephone Consumer Protection Act by sending it junk faxes. The district court found a proposed class of car dealers was not ascertainable because a database did not indicate which dealers actually received unsolicited faxes. 867 F.3d at 441. This Court vacated and remanded, based in part on the possibility that affidavits from potential class members combined with data could satisfy the ascertainability standard. *Id*. at 440–41.

In so doing, this Court denied that plaintiffs must come up with a list of class members at class certification. *Id*. at 439. It explained that "plaintiff need not 'be able to identify all class members at class certification—instead, a plaintiff need only show that "class members *can* be identified."'" *Id*. (quoting *Byrd*, 784 F.3d at 163 (quoting *Hayes*, 725 F.3d at 355)). It thus drew a crucial distinction. Administrative feasibility requires a method by which class members generally *can*

be identified, that is, a method that *can* "establish[] class membership," *id*. at 441 (citing *Byrd*, 784 F.3d at 163), or that *can* "determine class membership." *Id*. at 442. It does *not* require a list of class members.

City Select identified "three principal rationales" for its holding:

(1) to protect opt out rights, *id*. at 439 (citing *Carrera*, 727 F.3d at 306);

(2) to enforce a final judgment, *id*. (citing *Marcus*, 687 F.3d at 593); and

(3) to otherwise protect the "efficiencies of a class action," *id*. (quoting *Carrera*, 727 F.3d at 307), such as providing class notice and resolving any disputes about which entities may participate in any class recovery.

Hargrove confirmed *City Select*. As long as plaintiffs identify records, along with reliable affidavits, that could, when combined, perform the tasks required by Rule 23, plaintiffs "establish a 'reliable and administratively feasible mechanism' for determining class membership." *Id*. at 480 (quoting *Byrd*, 784 F.3d at 163 (quoting *Carrera*, 727 F.3d at 306)).

Most recently, *RealPage* confirmed that this Court's earlier cases meant what they said: "a straightforward 'yes-or-no' review of existing records to identify class members is administratively feasible even if it requires review of individual records with cross-referencing of voluminous data from multiple sources." 47 F.4th at 224.

In sum, this Court's recent cases establish that data suffice for administrative feasibility, even if they are incomplete, need support from affidavits, or require review of individual records.

The panel, or the Third Circuit *en banc*, should clarify that a practical standard applies to ascertainability. The panel opinion in this case could be read otherwise. It required the Plaintiffs to show that a single set of data—PBM data—could "feasibly identify and filter out" entities that might appear in the data but were not class members, *i.e.*, intermediaries who were not the ultimate payors of prescription drugs. Op. at 34-35. Concluding that Plaintiffs had failed to make this showing, the panel ended its inquiry. Instead, it should have further considered whether there was—aside from parsing the PBM data itself—an administratively feasible way to determine whether entities were class members, including by reviewing individual transaction records.

Nor did the panel consider whether PBM data, particularly when combined with other records, could serve the practical aims of the ascertainability standard. It did not evaluate whether overinclusive PBM data, along with other standard techniques employed in class actions, could be used to provide notice to class members. It did not address whether, considering the objective class definition—self-funded plans that paid for Niaspan—it would be feasible to determine whether an entity is a class member and bound by a judgment. Nor did it discuss whether, in light of the PBM data and class members' own records, there would be any difficulty in determining if the judgment could be enforced against a subsequent litigant. Critically, while the panel focused on the number of transactions at issue, none of these tasks would require a review—at trial or otherwise—of each Niaspan

transaction. By not considering the practical bases for the ascertainability requirement, the panel opinion could be interpreted as drawing a bright line that does not exist in Third Circuit precedent: that plaintiffs must be able to use data or other centralized records, without any further inquiry, to create an exhaustive list of class members.

II. THE PANEL OPINION DID NOT ADEQUATELY CONSIDER THE EXTENSIVENESS OF PRESCRIPTION DRUG DATA.

The panel's opinion did not give sufficient weight to the extraordinary data available in the pharmaceutical industry that can determine whether an entity or person meets the class definition in a case like this one. Reliable data are available because, among other reasons, they have extraordinary commercial value, providing financial incentive for their preservation.

Data, and AI for analyzing data, have been described as the new electricity and the new oil.[4] Consider PBMs. They not only process claims, but also use the resulting data to advise their clients on drug utilization and cost, "maximizing generic switch opportunities and cost savings," and "optimization of generic dispensing opportunities."[5] One of the country's largest PBMs, Express Scripts,

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[4] *See, e.g.*, Martin Ford, AI as the New Electricity, *in* Rule of the Robots: How Artificial Intelligence Will Transform Everything 11–30 (2021); Terry Moon Cronk, *Defense Official Calls Artificial Intelligence the New Oil*, DOD News (Oct. 19, 2020).

[5] Pharmacy Benefits Manager Services Contract between the State of Tennessee and OptumRx, Inc. § A.50.f.6., at 107 (Feb. 22, 2019).

declares, "Clients gain exclusive benefits from our original research and actionable analysis of their data, including learnings from our peer-reviewed publications that they won't get anywhere else."[6]

Another of the largest PBMs, OptumRx, offers the "Optum Research Database (ORD)" that "represents patients enrolled in one of the largest providers of commercial and Medicare Part D health plans. It comprises medical and pharmacy claims data from 1993 to current, covering 64.3 million lives."[7] An Optum white paper explains, "There is an overwhelming demand for high-quality, reliable, real-world information."[8]

Nor are PBMs alone in exploiting claims data for financial gain. Commercial data publishers collect such data from pharmacies, health plans, and the shared switches that route transactions between pharmacies and PBMs. They aggregate the data and sell it to manufacturers, researchers, and industry analysts.[9] IQVIA—a company that specializes in "Human Data Science"[10]—has a market

[6] Express Scripts, *Research*, Express-Scripts.com (last visited Jan. 14, 2022).

[7] Optum, *Meeting real-world evidence challenges*, Optum.com (last visited Jan. 14, 2022).

[8] Optum, *Addressing the need for real-world observational research solutions* 1–2 (Optum white paper, 2018).

[9] IQVIA, *Available IQVIA Data*, IQVIA.com (last visited Jan. 14, 2022); Symphony Health, *IDV Fact Sheet*, SymphonyHealth.com (last visited Jan. 14, 2022).

[10] *See* IQVIA, *Human Data Science*, IQVIA.com (last visited Jan. 14, 2022).

capitalization of over $50 billion[11] and annual revenues of over $10 billion.[12] The prescription drug market is big business, as is the market for the data it produces.

CONCLUSION

For the foregoing reasons, the panel should reconsider its decision, or in the alternative, the Third Circuit should grant rehearing *en banc*.

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Respectfully submitted,

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[11] Companies Market Cap, *IQVIA*, CompaniesMarketCap.com (last visited Jan. 14, 2022).

[12] *Id*.

CERTIFICATE OF COUNSEL

I, Joshua P. Davis, hereby certify that:

1. Pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,593 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type styles requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

4. Pursuant to Third Circuit Local Appellate Rule 31.1(c), the PDF file and the text of the paper version of the brief are identical. The electronic version of the brief has been scanned for viruses using Microsoft Defender Antivirus, Version 1.389.1375.0 and no viruses were found.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on May 15, 2023. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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