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VIA EMAIL AND US MAIL

Committee on Rules of Practice and Procedure
Thurgood Marshall Building
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One Columbus Circle, NE
Washington, D.C. 20544

Re: Comments regarding Potential Amendments to Fed.R.Cvi.P. 23

To the Members of the Advisory Committee on Civil Rules and the Rule 23 Subcommittee:

I understand that the Rule 23 Subcommittee is considering possible revisions to Rule 23 of the Federal Rules of Civil Procedure. As a practitioner with over 30 years of experience in this field, I wish to offer these comments and proposed amendments to Rule 23 for your consideration.

It is now current fashion to challenge class actions at the most basic level – the class definition and its more obscure cousin, ascertainability. Although Rule 23(c)(1)(B) requires that every certification order must define the class, the Rule itself is devoid of definitional parameters. Ascertainability is not even mentioned in the Rule. Litigants have had to navigate the interstices, but struggled between the need to objectively define the class, so as to avoid challenges of "fail-safe classes" — ones that require resolving the underlying merits of the claims to determine class membership – and the concomitant requirement to avoid class definitions that are over-broad, and fall within the newly minted "no-injury class" category.[1] Compounding the confusion involving the proper means to define a class, courts are mistakenly imposing Rule 23(b)(3)'s predominance standard onto the implicit requirement that the class be ascertainable.

[1] *See generally* Edward Sherman, *"No Injury" Plaintiffs and Standing*, 82 GEO. WASH. L. REV. 834, 836 (2014).

Ascertainability has thus become the current talismanic defense against class certification of Rule 23(b)(3) damage classes.[2] This non-textual, common-law restriction on class certification has received significant attention especially in the aftermath of the Third Circuit's pronouncement in *Carrera v. Bayer Corp.*[3] Although *Carrera* must be understood to be limited to its facts,[4] to most practitioners the Third Circuit appears to have effectively expanded Rule 23's implicit ascertainability requirement into an obstacle to class certification unless the proposed class is capable of precise identification of each class member. While the Third Circuit's facial approach to ascertainability was not extraordinary, requiring that every class must be in fact "objectively ascertainable,"[5] as applied, however, the Court's interpretation of a rigorously enforced objective ascertainability standard requires virtual certitude of class membership at the class certification stage. Adding to plaintiffs' burden, the Court dismissed the ability of class members to self-identify, even where defendants' poor record-keeping interferes with identifying class members.[6] In other words, class members must be capable of being indentified through objective proofs *before* the class is even certified. Such exactitude regarding class membership is not expressly stated in Rule 23, nor has it ever before been recognized in this way. Recall in the seminal case for class notice, *Mullane v. Central Hanover Bank & Trust Co.*,[7] it was recognized that publication notice to absent class members was proper and indeed may be the only process they are due under our Constitution.

Not surprisingly, since the *Carrera* opinion issued only 19 months ago, a number of courts have taken conflicting and divergent views regarding whether the court went "too far." *See e.g.*, *Carrera v. Bayer Corp.*, 2014 WL 3887938, *2 (3d Cir. May 2, 2014)(Ambro, J.); *Frey*

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[2] In *Shelton v. Bledsoe*, 2015 WL 74192, *5 (3d Cir. Jan. 7, 2015), the court confirmed that ascertainability requirement only applies in the Rule 23(b)(3) context.

[3] *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), *reh'g denied*, 2014 WL 3887938 (3d Cir. May 2, 2014).

[4] In an appeal involving whether the proposed class of consumers, actual purchasers of Bayer's multi-vitamin, could be identified, the representative plaintiff was unable to testify that he actually bought the product. *Id.*, 727 F.3d at 309 n.5.

[5] *See, e.g., In re Nexium Antitrust Litig.*, 2015 WL 265548, *6 (1st Cir. Jan. 21, 2015)("the definition of the class must be "definite," that is, the standards must allow the class members to be ascertainable.").

[6] *Carrera*, 727 F.3d at 309.

[7] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950)("in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.").

v. First National Bank Southwest, 2015 WL 728066, *5-6 (5th Cir. Feb. 20, 2015)("We have stated that "in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable. However, the court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding.")(citations omitted); *In re ConAgra Foods, Inc.*, 2015 WL 1062756, *23 (N.D.Cal. Feb. 23, 2015)("district courts in this circuit are split as to whether the inability to identify the specific members of a putative class of consumers of low priced products makes the class unascertainable.")(citing cases).

To address this splintering interpretation of Rule 23's implicit ascertainability requirement, I propose that Rule 23 be amended. The proposed amendment is intended to restate the existing jurisprudence and simplify the same. Accordingly, this proposal amending Rule 23(c)(2)(B)(ii) makes clear that ascertainment of class members does not require exactititude:

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

To further ensure that the burden imposed on class members is not too onerous, and to avoid the ruling of *Carrera*, I propose that the Rule make clear the appropriate standard of review applicable to the certification ruling. Thus, Rule 23(c)(1)(A) should be amended to conform with the standard of Preliminary Questions set forth in Fed.R.Evid. 104(b) that the standard of proof should be "evidence sufficient to support a finding," or in other words, a *prima facie* standard. *See, e.g., United States v. Kilpatrick*, 2012 WL 3236727, *3 (E.D.Mich. Aug. 7, 2012)(requiring only a prima facie showing of admissibility of evidence on a preliminary question).

Respectfully submitted,

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