United States Court of Appeals

for the

Third Circuit

Case No. 21-

IN RE: NIASPAN ANTITRUST LITIGATION.

ON PETITION FOR LEAVE TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, CASE NO. 2:13-MD-02460, HONORABLE JAN E. DUBOIS, JUDGE

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(F) AND FED. R. APP. P. 5

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I. PRELIMINARY STATEMENT

Ascertainability, as defined in the Third Circuit, is supposed to capture a simple concept: class certification requires an objective class definition and "administratively feasible" methodology that can more-likely-than-not identify putative class members before litigation can proceed. A long line of Circuit precedent establishes that an ascertainability methodology does not fail the "administratively feasible" test just because some individual inquiry is necessary. Despite this Court's continued efforts to clarify, district courts continue to struggle.

In this indirect-purchaser "pay for delay" pharmaceutical antitrust case, the district court denied class certification solely because it found that the End-Payor Plaintiffs ("Plaintiffs") had not shown an administratively feasible mechanism for applying *one of six* exclusions, even though Plaintiffs provided samples of the comprehensive and detailed electronic claims data they proposed to use reflecting the identity of every potential class member for the entire class period. The court did so because it believed that *two* examples of many offered by Plaintiffs' expert were ambiguous as to which one of the two entities appearing in the data was the correct class member.

The court entirely ignored and contradicted this Court's post-*Carrera*

precedent[1] by failing to address Plaintiffs' proposal that affidavits could be used to clarify any ambiguity as to the correct class member, and that two examples out of millions of transactions requiring further clarification does not preclude certification. The district court's insistence on conclusive identification of all excluded members at the certification stage conflicts with this Court's precedents and other indirect-purchaser pharmaceutical antitrust cases inside and outside this Circuit where district courts have found the *same* methodology, offered by the *same* pharmaceutical data expert, to be administratively feasible.

This Court should grant interlocutory review to further clarify what is required to meet this Circuit's administrative feasibility threshold, sort out the intra-Circuit split on this issue as to indirect-purchaser pharmaceutical antitrust cases, and provide guidance for the many other such cases pending in the Circuit. Without review now, the district court's opinion is likely to escape review altogether, as the class mechanism is the most economical way to bring these claims forward. If other courts follow this district court's overly rigid approach, indirect purchasers harmed by wrongful conduct will have no redress.[2]

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[1] *E.g.*, *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 439 (3d Cir. 2017); *Hargrove v. Sleepy's LLC*, 974 F.3d 467 (3d Cir. 2020).

[2] *See FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *In re Lipitor Antitrust Litig.*, 868 F.3d 231 (3d Cir. 2017).

II. RELIEF REQUESTED

The putative end-payor class requests that this Court review and reverse the district court's August 17, 2021 Order denying Plaintiffs' renewed motion to certify the class. A-1.

III. QUESTION PRESENTED

Did the district court err by denying class certification—even though comprehensive and detailed data identifies all potential class members, and a proven methodology, supplemented by affidavits, if necessary, addresses potential overinclusion—by holding that plaintiffs flunk the ascertainability standard if there is any amount of "individualized fact-finding?" A-16-19.

IV. FACTUAL AND PROCEDURAL BACKGROUND

This is an indirect-purchaser antitrust class action brought by "end-payors" of the brand drug Niaspan and its AB-rated generic equivalents. A-1. Plaintiffs allege that Kos Pharmaceuticals, Inc. ("Kos") and its first-to-file generic competitor, Barr Pharmaceuticals Inc., unlawfully delayed AB-rated generic competition to Niaspan by entering into an anticompetitive, "reverse payment" settlement agreement that extended Kos' monopoly over the Niaspan market and caused the putative end-payor class to pay hundreds of millions of dollars in overcharges. *In re Niaspan Antitrust Litig.*, 42 F. Supp. 3d 735, 739-40 (E.D. Pa. 2014).

A. Rule 23 Class Certification Proceedings

The district court denied Plaintiffs' first motion for class certification, without

prejudice, on grounds primarily related to the inclusion of consumers in the putative class. *In re Niaspan Antitrust Litig.*, 464 F. Supp. 3d 678 (E.D. Pa. 2020). Thereafter, Plaintiffs filed a renewed motion to certify a narrowed group of end-payors, limited to self-insured entities and insurance companies that pay the bulk of the purchase price for Niaspan and generic Niaspan ("Third Party Payors" or "TPPs"). Renewed Mot. for Class Cert., ECF No. 722 ("Renewed Mot."). After supplemental motion practice, but without oral argument or expert examination, the district court denied Plaintiffs' renewed motion for certification of a TPP class. A-1.

The narrowed class was defined to include TPPs in certain states, with six exclusions. Defendants did not challenge the feasibility of four exclusions and the district court rejected their challenge regarding the exclusion for federal and state government payors. A-13. The district court rested its denial of class certification solely upon a finding that some individualized inquiry would be required to conclusively apply the exclusion for fully insured health plans. A-19.[3]

Plaintiffs' evidence in support of an ascertainability methodology included the reports of pharmaceutical data expert, Laura Craft. Ms. Craft explained that since 2003, federal law has required Pharmacy Benefit Managers ("PBMs") and pharmacies to use data fields created by the National Council for Prescription Drug

[3] A fully insured health plan is one that purchases insurance covering 100% of the plan's reimbursement obligations to its member. In that instance, the insurer, rather than the plan, is the class member.

Programs ("NCPDP") to electronically process prescription drug transactions. Mem. in Supp. of Renewed Mot. at 10-12, ECF No. 722-1 ("Renewed Mem."). PBMs adjudicate and maintain detailed electronic data regarding such transactions. *Id.* at 8. Ms. Craft explained—and the PBM declarations confirmed—this data identifies, among other things, the TPP name and amount paid for each purchase by a TPP of prescription drugs (including Niaspan and generic Niaspan) for the entire class period. *Id.* at 8-12. Each of the nine named class representatives produced this data, reflecting their relevant purchases. *See* Decl. of Kenneth A. Wexler in Supp. of Reply in Supp. Class Cert., Exs. 28-33, 36-38, ECF Nos. 628-1, 628-8-13, 628-16-18. Plaintiffs also separately obtained a sample set of data from one of the largest PBMs, OptumRX, which likewise spanned the entire class period. *See* Am. Reply Mem. in Supp. of Renewed Mot. for Class Cert. at 5, ECF No. 751.

Ms. Craft's methodology detailed how review of certain fields in the PBM data (including Carrier, Account, and Group names and descriptions) would identify class members.[4] For fully insured plans, which constitute 88% of employer-based plans, the insurer that pays for a fully insured plan members' prescription drugs appears in the Carrier/client field, allowing ready identification of both the class

[4] Expert Reply Report of Laura R. Craft ¶¶ 3-5, ECF No. 751-2 ("Reply Report").

member (the insurer) and the excluded fully insured plan.[5] And because, as Defendants' own expert conceded, PBMs collect and electronically maintain information that shows whether a plan is fully or self-insured during the account set-up process, the data could also be produced by PBMs to exclude fully insured plans.[6]

For the remaining 12% of plans that self-fund, Defendants argued that Third Party Administrators ("TPAs")[7] or Administrative Service Only ("ASO")[8] entities—non-class member intermediaries that administer claims on behalf of class-member self-funded plans—presented an additional ascertainability concern. A-11. In particular, Defendants argued that it would be difficult to differentiate an entity that is acting as an ASO or TPA from the self-funded class member. A-11-16. In reply, Ms. Craft demonstrated, using OptumRX data, that the ASO or TPA is often clearly identified with the terms "ASO" or "Admin" alongside the entity name.[9] For those transactions, the Account or Group description field would be used to identify the self-funded class member.[10] And, if necessary, PBMs could also flag any accounts

[5] Suppl. Expert Decl. of Laura R. Craft ¶¶ 31-34, ECF No. 722-8 ("Suppl. Decl."); Reply Report ¶ 9, ECF No. 751-2.

[6] Reply Report ¶ 5, ECF No. 751-2.

[7] A TPA provides administrative services for self-funded health plans.

[8] An ASO is typically an insurer that also provides administrative services for self-funded health plans.

[9] Reply Report ¶¶ 13-14, ECF No. 751-2.

[10] *Id.*

where the entity appearing in the data is acting as a TPA or ASO for a self-funded class member.[11] Ms. Craft noted, for example, that named Plaintiff A.F. of L. AGC Building Trades Welfare Plan ("A.F. of L."), requested and obtained (from its PBM) records of its reimbursed Niaspan claims that identified A.F. of L. as the only entity and payor in the data, despite the fact that it used an ASO for the entire class period and the ASO, rather than A.F. of L., contracted directly with the PBM.[12] Finally, Ms. Craft explained that because the claims data is maintained electronically and highly standardized as a result of the NCPDP requirements, merging, sorting, culling and analyzing the data can be accomplished in a programmatic and efficient manner.[13]

B. The District Court's Class Certification Decision

The district court denied Plaintiffs' renewed motion to certify a narrowed class based upon a single element of the judicially-created ascertainability requirement. The district court concluded that Plaintiffs' proposed methodology for applying the exclusion for fully insured plans was not "administratively feasible" because Plaintiffs "have not shown they can identify, without individualized inquiry" every excluded fully insured plan. A-19.

The district court credited Defendants' conflicting view of two examples

[11] *Id.* ¶ 15.

[12] *Id.*

[13] Suppl. Decl. ¶¶ 21-29, ECF No. 722-8.

provided by Plaintiffs' expert. In her Reply Report, Ms. Craft analyzed twenty-three examples involving hundreds of transactions from the data, and identified which entity was the class member (i.e., the insurer or self-funded plan) and which entity was excluded (i.e., the fully insured plan, ASO or TPA).[14] Defendants argued that two of the examples wrongly identified self-funded plans as fully insured, citing documents gleaned from web searches that ranged from five to nine years after the contested transactions took place. A-16. The district court concluded that the dispute over these isolated examples meant that the methodology could not identify excluded fully insured plans without individual inquiry, and for that reason, the class was not ascertainable. A-17.

Plaintiffs timely filed this petition within 14 days of the court's opinion.

V. REASONS WHY THE PETITION SHOULD BE GRANTED

This Court has wide latitude to allow a Rule 23(f) appeal, "on the basis of any consideration that the court of appeals finds persuasive." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (quoting Fed. R. Civ. P. 23(f) advisory committee note to 1998 amendment). Exercise of that discretion is appropriate here to "facilitate the development of the law on class certification" and to correct "an erroneous ruling." *Id.*

[14] Reply Report ¶¶ 14-15 & nn.38-40, ECF No. 751-2.

A. The District Court's Erroneous Class Certification Denial Is Likely to Escape Review If This Petition Is Not Granted

The vast majority of the tens of thousands of would-be TPP class members, including the named Plaintiffs in this case, have small individual claims that are dwarfed by the costs of litigating this complex antitrust case—now in its eighth year. This is precisely the type of case that class actions were designed to address. In contrast to the relatively small amount at stake for most individual plaintiffs, the total estimated aggregate damages to the putative class from Defendants' unlawful conduct is calculated at over $1 billion. Decl. of Kenneth A. Wexler Decl. in Supp. of Renewed Mot., Ex. 1 to Ex. A, Expert Report of Meredith Rosenthal at Att. C.10.d, ECF No. 722-7. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is 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)).

Already-incurred case expenses considerably exceed the named Plaintiffs' total collective documented purchases of Niaspan and generic Niaspan. If litigated to judgment, expert expenses alone can be expected to total millions more. Absent interlocutory review, there is a high likelihood that there will be no appellate review at all.

B. The District Court's Ruling Is Erroneous

This case presents an "appeal-worthy certification issue[]" that cries out for

interlocutory review. *See* Fed. R. Civ. P. 23 advisory committee's notes to 1998 amendment. The only question before the Court is ascertainability, and it is presented on a well-developed record, painstakingly built by Plaintiffs following the roadmap laid out by this Court's precedent. But the district court never bothered to engage that binding law; it held—contrary to *Byrd*, *City Select*, and *Hargrove*—that any amount of individual review, however minimal or easily accomplished by affidavit, meant that Plaintiffs' proposed methodology was not "administratively feasible." A-19.

1. The district court's categorical no-individual-inquiry rule conflicts with Circuit precedent.

With respect to the *single* exclusion category where the district court found an ascertainability issue—fully insured plans—the district court erroneously held that EPPs "must prove that identifying class members will not require 'individualized fact finding.'" A-17. This Court's precedents say the opposite. In *Byrd*, this Court explained "[t]here will always be some level of inquiry required to verify that a person is a member of a class," and "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*, 784 F.3d at 170-71 (citation omitted); *see id.* at 171 ("Certainly, *Carrera* does not suggest that *no* level of inquiry as to the identity of class members can ever be undertaken. If that were the case, no Rule 23(b)(3) class could ever be certified."); *accord City Select*, 867 F.3d at 441.

The district court also erred by ignoring Plaintiffs' proposal that affidavits could be used to supplement the methodology for distinguishing self-insured TPP class members from fully insured plans if the database fields alone could not provide the answer. But this Court has repeatedly confirmed that "[a]ffidavits, in combination with records or other reliable and administratively feasible means, can meet the ascertainability standard." *City Select*, 867 F.3d at 441 (citing *Byrd*, 784 F.3d at 170-71); *see also Hargrove*, 974 F.3d at 480. Here, in addition to comprehensive records and affidavits, Plaintiffs have offered a proven methodology for identifying class members and exclusions. Yet the district court, as in *Hargrove*, "failed to explain why, in light of . . . precedents, the records as a whole, together with the affidavits, did not provide a reliable and feasible method to ascertain class members at the certification stage." *Hargrove*, 974 F.3d at 480. The word "affidavit" does not even appear in the district court's opinion.

Whether a plan is fully insured (or not) is an objective fact that is well suited to being confirmed by an affidavit in combination with the (indisputably) available data. Here, the "problem" is, if anything, there is *so much* detailed data that Defendants can readily manufacture "inconsistencies" by relying on incomparable documents to suggest it is a herculean task to determine who is actually paying for any given Niaspan prescription. Defendants' own expert conceded that PBMs collect and electronically maintain information that shows whether a plan is fully or self-

insured as part of the account set-up process.[15] This concession is no surprise; two decades of precedent show that indirect-purchaser pharmaceutical class actions can be certified, resolved, and class members efficiently identified (and paid) using objective purchase data.[16]

Compared to cases where this Court has approved the use of affidavits, the data here is far more robust and the class member inquiry significantly more limited. *See Byrd*, 784 F.3d at 170 ("a form . . . could be used to identify household members"); *City Select*, 867 F.3d at 441-42 (affidavits could be used to determine "whether a particular dealership in the database received the BMW fax on one of the dates in question"); *Hargrove*, 974 F.3d at 480 (affidavits could be used to confirm that "each proposed class member was indeed a full-time driver"); *see also In re Cmty. Bank of N. Va. Mort. Lending Pracs. Litig.*, 795 F.3d 380, 397 (3d Cir. 2015) (consulting "business records and then follow[ing] a few steps to determine whether the borrower is the real party in interest" is not "onerous enough to defeat the ascertainability requirement").

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[15] Reply Report ¶ 5, ECF No. 751-2.

[16] *See, e.g.*, *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md-02409 (D. Mass.); *In re Flonase Antitrust Litig.*, No. 08-cv-03301 (E.D. Pa.); *In re Relafen Antitrust Litig.*, No. 01-cv-12239 (D. Mass.); *In re Warfarin Sodium Antitrust Litig.*, No. 98-md-01232 (D. Del.); *In re Cardizem CD Antitrust Litig.*, No. 98-cv-74043 (E.D. Mich.); *In re Remeron End-Payor Antitrust Litig.*, No. 02-cv-02007 (D.N.J.); *In re Augmentin Antitrust Litig.*, No. 02-cv-00442 (E.D. Va.); *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-md-01317 (S.D. Fla.); *Nicholas v. SmithKline Beecham Corp.*, No. 00-cv-06222 (E.D. Pa.).

Choosing between two already-identified entities in the data, in those rare instances where questions arise, raises no problem of reliability analogous to the consumer affidavits in *Carrera*. *Carrera v. Bayer Corp.*, 727 F.3d 300, 309-312 (3d Cir. 2013). The prescription drug industry is one of the most data rich and regulated industries on the planet. Plaintiffs need not "identify the class members at the class certification stage." *Hargrove*, 974 F,3d at 470 (finding class ascertainable despite acknowledging that the records produced at class certification could not be relied on "to determine which drivers drove full-time"). At this stage of the litigation, Plaintiffs need only show that it is more likely than not that PBMs can produce the data in a form that allows for the identification of who is paying for the prescription drugs and who is acting as an administrative intermediary, and if the data does not make that clear on its face, the information is easy to verify through affidavits.

Byrd's teaching that "some level of inquiry [will be] required" to identify class members flatly rejects the district court's holding that "individualized fact-finding" renders an ascertainability methodology a *per se* administrative failure. 784 F.3d at 170. *Hargrove*'s further confirmation that data does not need to conclusively identify all class members and can be supplemented with affidavits, 974 F.3d at 480, should have conclusively buried the argument that any level of "individualized fact-finding" defeats class certification. The district court failed to apply this precedent.

2. The district court disregarded Circuit precedent that overinclusive records may satisfy the ascertainability requirement.

City Select establishes that if a method of identifying class members involves the use of potentially overinclusive records—i.e., records that do not facially distinguish class members from others—it may still satisfy the ascertainability requirement. As *City Select* explained: "[A]ny degree of over-inclusiveness [in the proposed records] will not" prevent certification, and only "a high degree of over-inclusiveness *could*" do so. 867 F.3d at 442 n.4 (emphasis added); *see McDonald v. Wells Fargo Bank, N.A.*, 374 F. Supp. 3d 462, 503 (W.D. Pa. 2019) (finding that identification of class members was administratively feasible even in absence of affidavits because "database does not contain high degree of over-inclusiveness").

Ignoring this precedent, the district court concluded that *two* examples of (purportedly) misidentified class members rendered the class unascertainable. Two instances among millions of class transactions cannot reasonably be considered a "high degree of over-inclusiveness." *City Select*, 867 F.3d at 442 & n.4. The district court suggested that "distinguishing between class members and mere intermediaries, such as fully insured plans and TPAs, is not *de minimis*." A-13.[17] The district court clearly erred in concluding, based upon two examples of millions, that

[17] The district court may have been led astray by its misunderstanding that fully insured plans should be excluded from the class as "intermediaries." A-13, A-19. Fully insured plans are not "intermediaries."

the "problem" was more than "*de minimis*." More importantly, the district court did not even grasp that the relevant inquiry was whether the indisputably-available records are highly likely to misidentify the relevant class member in a narrow category of cases as between the only two entities that could be the TPP member. The evidence in the record shows, at most, that the *potential* degree of overinclusiveness is slight.[18] More importantly for the purposes of this petition, even if the degree of overinclusiveness in the data goes beyond the two instances the court thought were problematic, the district court made *no* findings on this "critical consideration." *See City Select*, 867 F.3d at 442.

3. The district court abused its discretion in resting its decision on clearly erroneous findings of fact.

The flawed ascertainability decision here not only misapplied the law, but also rested on factual findings drawn from irrelevant documents dated *years* after the contested transactions. Defendants' manufactured inconsistencies did not undermine Ms. Craft's methodology.

[18] The ASO/TPA issue that Defendants have raised is extremely narrow. Only self-funded plans use an ASO or TPA and (because 88% of plans are fully insured) only 12% of plans are self-funded. A-14. Of that 12%, the district court acknowledged that between "38 and 55 percent" contract with an ASO/TPA. A-14. Thus, this issue could only impact 5% to 7% of all employer plans (12% x 38% to 55%). And the issue is narrower still because, as was the case with named Plaintiff A.F. of L., even where a class member contracts with an ASO/TPA, the data produced by the PBM will sometimes *only* identify the self-funded plan and not the ASO/TPA. *See supra* pp. 6-7.

To illustrate her exclusion methodology, Ms. Craft analyzed twenty-three examples involving hundreds of transactions from the data to demonstrate how fields in the PBM data allowed for identification of TPP class members while excluding fully insured plans, ASOs and TPAs. *See* A-15-16 & n.8. The district court credited Defendants' challenge to two of those examples, largely basing its decision to deny certification on Ms. Craft's purported error. A-17. Importantly, Defendants only challenged two of the twenty-three examples. Even under the district court's analysis, together with Plaintiffs' proposed use of affidavits, the methodology presented was more than sufficient to satisfy the "preponderance of the evidence" standard for establishing ascertainability. *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 304 (3d Cir. 2016).

The district court's finding that Ms. Craft erred in two of her examples was wrong in any event. Ms. Craft's Reply Report analyzed *2012* claims data produced by OptumRX, identifying Kaiser Colorado and Kaiser-California North as TPP class members, with Mitre and Target as the fully insured entities to be excluded. Reply Report ¶ 15 n.39, ECF No. 751-2. Defendants disputed this analysis, citing documents they claimed "suggested" that Mitre and Target were self-insured, and therefore the class members (making the Kaiser entities the excluded intermediaries). Pls.' Reply to Defs.' Resp. to Craft Reply at 2, ECF No. 759-1 ("Craft Resp."). However, those documents post-dated the 2012 transactions by

years.[19] For the *2012* Mitre transactions, Defendants presented a *2017* benefit booklet.[20] For the *2012* Target transactions, Defendants offered a Target webpage dated February *2021*.[21] Despite the incomparable time frames, the court found these documents "relevant to whether Mitre Corporation was a TPP during the class period, which concluded in 2018." A-16 n.9. But whether Mitre or Target were class members in 2018 or 2021—the only time periods addressed by the "evidence" the court cited—was *not* the question; the issue was whether Ms. Craft's methodology did in fact misidentify Mitre and Target as non-class members in 2012 based on their 2012 purchases. Defendants' "evidence" did not show that it did, and the court's erroneous reliance on two isolated apples-to-oranges comparisons cannot sustain the denial of class certification.

C. The District Court's Opinion Conflicts With Decisions From This and Other Circuits

In denying class certification, the district court relied on a single outdated district court case, *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 3623005 (E.D. Pa. June 10, 2015). There, Judge Goldberg found that an end-payor class that

[19] The district court also relied upon a Target 10-K stating that Target "retain[s] a substantial portion of the risk related to . . . team member medical and dental claims." A-16 (internal citation omitted). This document is likewise irrelevant—it neither indicates that Target is self-insured *or* addresses prescription benefits.

[20] *See* Craft Resp. at 1 & n.4, ECF No. 759-1 (depicting data with a date range of 4.1.12 – 5.31.12).

[21] *See id.* at 2.

included TPPs *and* consumers was not ascertainable where "[p]laintiffs have failed to present any evidence that they have developed a methodology for ascertaining the identities of class members, aside from simply assuring the court that records of Provigil prescriptions exist." *Id.* at *13. The record for this TPP-only class is far more developed.

When revisiting ascertainability on a more fulsome record in *In re Suboxone (Buprenorphine Hydrochloride & Nalazone) Antitrust Litigation*, 421 F. Supp. 3d 12, 71-74 (E.D. Pa. 2019), another pharmaceutical antitrust case, Judge Goldberg held that end-payor plaintiffs *had* satisfied the ascertainability requirement.[22] Plaintiffs here proposed an even more robust methodology and relied upon the same expert and econometrics firm, Laura Craft and OnPoint Analytics, yet received a diametrically opposite result.

Other courts in different circuits have likewise found that TPP classes are ascertainable based on Ms. Craft's methodology.[23] The district court refused to

[22] In *Suboxone*, Judge Goldberg distinguished his own prior decision in *Vista* as a case where "the plaintiffs merely provided 'assurances'" that the necessary data could be obtained "without detailing any reliable methodology for identifying class members." 421 F. Supp. 3d at 72 n.28.

[23] *See, e.g.*, *In re Zetia (Ezetimibe) Antitrust Litig.*, 2021 WL 3704727, at *5 (E.D. Va. Aug. 20, 2021) (upon *de novo* review, "adopt[ing] and approv[ing] in full the findings and recommendations set forth in the Magistrate Judge's thorough and well-reasoned R&R" reported at 2020 WL 5778756 (E.D. Va. Aug. 14, 2020) (emphasis omitted)); *In re Namenda Indirect Purchaser Antitrust Litig.*, 2021 WL 509988, at *11-13 (S.D.N.Y. Feb. 11, 2021); *In re Loestrin 24 FE Antitrust Litig.*, 410 F. Supp.

engage any of these cases largely because they were decided by courts that had not adopted this Circuit's "unique requirement that a class be 'administratively feasible.'" A-17 (quoting *Carrera*, 727 F.3d at 307-08). But at least as to the *Zetia* decision in the Fourth Circuit, the district court was incorrect. *See Byrd*, 784 F.3d at 162 n.4 (noting that "Fourth Circuit's implicit 'readily identifiable' requirement for a proposed class is the same as our Circuit's 'ascertainability' requirement" (quoting *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358-60 (4th Cir. 2014))). However one labels the Fourth Circuit standard, *Zetia* is instructive, given its comprehensive administrability record. The magistrate judge heard live testimony from Ms. Craft and Defendants' expert here, Mr. Dietz, and concluded that Ms. Craft's "methodology can identify and exclude fully-insured plans." *Zetia*, 2020 WL 5778756, at *12; *see also Zetia*, 2021 WL 3704727, at *4.

District courts in the First Circuit have also held that Ms. Craft's methodology for identifying class members using PBM data *was* "administratively feasible." *Ranbaxy*, 338 F.R.D. at 308; *Loestrin*, 410 F. Supp. 3d at 399. *Ranbaxy* rejected defendants' argument that insurers acting as intermediaries (TPAs and ASOs) could not be identified in the records. *Ranbaxy*, 338 F.R.D. at 308. And *Loestrin* held, after hearing experts' testimony, that Ms. Craft's methodology could show whether a plan

3d 352, 397 (D.R.I. 2019); *In re Ranbaxy Generic Drug Application Antitrust Litig.*, 338 F.R.D. 294, 307-08 (D. Mass. 2021).

is fully insured. *Loestrin*, 410 F. Supp. 3d at 399.[24] Here, Plaintiffs repeatedly requested an evidentiary hearing on their renewed motion for class certification, but the court decided the motion on the papers. *See, e.g.*, Renewed Mem. at 15, ECF No. 722-1.

D. Clarification of the Law of Ascertainability Is (Still) Needed

This Court granted petitions for interlocutory appeal in *Byrd*, *City Select*, and *Hargrove* given the "apparent confusion in the invocation and application of ascertainability in this Circuit," *Byrd*, 784 F.3d at 161, which had led district courts to apply it in a manner that is "too exacting." *Hargrove*, 974 F.3d at 479; *see id.* at 479 n.7 (noting that "[s]ince [2012], judges on our Court have warned that the overzealous application of the 'administratively feasible' requirement will defeat the purpose of Rule 23"); *cf. Byrd*, 784 F.3d at 172 (Rendell, J., concurring) ("Our heightened ascertainability requirement defies clarification."); *City Select*, 867 F.3d at 443 n.1 (Fuentes J., concurring) (same). The district court's continued confusion and overzealous application of the ascertainability requirement here warrants this Court's further clarification of the law, particularly as it applies to indirect-purchaser lawsuits.

District courts in this Circuit and others have reached conflicting decisions

[24] The district court's assertion that "[t]he evidence presented in this case is to the contrary," A-18, of the conclusions reached by the courts in *Zetia* and *Ranbaxy* rests on its fatally flawed factual findings from the two erroneous examples discussed above.

about the ascertainability of classes of third-party payors, and specifically the administrative feasibility of using available data to identify class members. As the district court recognized, A-17-18, numerous pharmaceutical antitrust end-payor classes have been certified outside this Circuit.[25] And several other cases pending in this Circuit raise the same issue.[26]

The district court below pointed to the Circuit's "unique" legal standard to deny certification, which is all the more reason for this Court to clarify that standard. Because the majority of pharmaceutical antitrust cases are multi-district litigation cases, ostensibly transferred to and consolidated in the circuit only for pre-trial proceedings,[27] it raises due process and Rules Enabling Act concerns when procedural barriers—such as the ascertainability requirement—effectively act as substantive bars to recovery. As the late Justice Stevens explained in his controlling *Shady Grove* concurrence: "When a federal rule appears to abridge, enlarge, or

[25] *See supra* note 23; *see also In re Opana ER Antitrust Litig.*, 2021 WL 2291067 (N.D. Ill. June 4, 2021); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 335 F.R.D. 1 (E.D.N.Y. 2020); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 2020 WL 1873989 (D. Kan. Feb. 27, 2020); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, 2017 WL 4621777 (D. Mass. Oct. 16, 2017); *In re Lidoderm Antitrust Litig.*, 2017 WL 679367 (N.D. Cal. Feb. 21, 2017).

[26] *See, e.g.*, *In re Effexor XR Antitrust Litig.*, No. 11-cv-05661 (D.N.J.); *In re Lipitor Antitrust Litig.*, No. 12-cv-02389 (D.N.J.), *In re Generic Pharms. Pricing Antitrust Litig.*, No. 16-md-02724 (E.D. Pa.); *In re Seroquel XR (Extended Release Quetiapine Fumarate) Litig.*, No. 20-cv-01090 (D. Del.).

[27] 28 U.S.C. § 1407.

modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result." *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 422 (2010).

VI. CONCLUSION

Under this Court's precedent, certification here should have been straight-forward. But the continuing lack of clarity surrounding the Circuit's "administratively feasible" ascertainability element is resulting in drastically different results, despite almost identical records.

It cannot be right that a class was certified and found ascertainable in *Suboxone* but denied in *Niaspan*. And it cannot be right that a record replete with comprehensive detailed data that includes all potential class members, with a repeatedly proven methodology for culling exclusions, and affidavits to address ambiguities, is insufficient for certification. For the stated reasons, the putative end-payor class respectfully requests that the Court grant Plaintiffs' Petition for Permission to Appeal.

Dated: August 31, 2021

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to 3d Cir. L.A.R 46.1 that Kenneth A. Wexler, whose name appears on this Petition, is a member of the bar of this Court.

Dated: August 31, 2021

/s/ Kenneth A. Wexler
Kenneth A. Wexler

CERTIFICATE OF COMPLIANCE

This Petition complies with the requirements of 3d Cir. L.A.R 32.1, the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it has been prepared in 14 point font, Times New Roman, a proportionally spaced typeface.

This Petition contains 5,191 words, exclusive of the pages and documents required by Fed. R. App. P. 5(b)(l)(E), in compliance with the length limit set forth in Fed. R. App. P. 5(c).

Dated: August 31, 2021

/s/ Kenneth A. Wexler
Kenneth A. Wexler

CERTIFICATE OF SERVICE

I, Kenneth A. Wexler, hereby certify that, on August 31, 2021, I served a true and correct copy of Plaintiffs' Petition For Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f), upon all counsel identified below via email and/or Federal Express:

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