No. 19-13242

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRANDY VARNER, *et al.*,
Plaintiffs-Appellants,

v.

DOMETIC CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida, No. 16-cv-22482-RNS

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE DOMETIC CORPORATION

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER OF
LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Ashley C. Parrish
Counsel of Record
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
aparrish@kslaw.com

Jonathan R. Chally
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, GA 30309
(404) 572-4600
jchally@kslaw.com

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

May 6, 2020

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and 11th Cir. R. 26.1, *amicus curiae* the Chamber of Commerce of the United States of America states that, in addition to the persons listed in the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellee Domestic Corporation on April 29, 2020, the following persons and entities have an interest in the outcome of this case:

1. Jonathan R. Chally, Counsel for *Amicus Curiae*
2. Chamber of Commerce of the United States of America, *Amicus Curiae*
3. King & Spalding, LLP, Counsel for *Amicus Curiae*
4. Steven P. Lehotsky, Counsel for *Amicus Curiae*
5. Ashley C. Parrish, Counsel for *Amicus Curiae*
6. Jonathan D. Urick, Counsel for *Amicus Curiae*

Amicus curiae further states that it is a non-profit membership organization with no parent company and no publicly traded stock.

Date: May 6, 2020

/s/ *Ashley C. Parrish*
Ashley C. Parrish

Counsel for Amicus Curiae
the Chamber of Commerce of the
United States of America

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including class actions.

Almost always the defendants in class actions, businesses have a keen interest in this case because it concerns Rule 23's threshold requirement that "a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and *clearly ascertainable*." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012), *as corrected* (Aug. 24, 2012) (emphasis added, internal quotation marks omitted). The district court correctly followed this Court's instructions when it denied certification because it found that

plaintiffs had failed to provide an "administratively feasible" method for identifying class members that did "'not require much, if any, individual inquiry.'" *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946–48 (11th Cir. 2015) (quoting *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014)). Ensuring that courts continue to enforce Rule 23's requirements is exceptionally important to *amicus*'s members. As courts have long recognized, "when the central issue in a case is given class treatment" to be resolved "once and for all" by a single trier of fact, "trial becomes a roll of the dice" and "a single throw may determine the outcome of an immense number of separate claims," exposing defendants to staggering liability. *Thorogood v. Sears Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

STATEMENT OF COMPLIANCE WITH RULE 29(a)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks omitted). As a result, a class action is permitted only when a plaintiff demonstrates affirmative compliance with Rule 23's requirements. Those requirements ensure that major legal and factual questions in a case can be fairly adjudicated on a class-wide basis.

Determining *when* aggregate treatment is appropriate lies at the core of this Court's "ascertainability" jurisprudence. *Amicus* submits this brief to emphasize three points: (1) the district court acted well within its discretion in determining that plaintiffs failed to show an administratively feasible method for identifying absent class members;

(2) this Court's recognition that there must be an administratively feasible method for identifying absent class members is grounded in and mandated by the plain text of several of Rule 23's provisions; and (3) rigorously enforcing Rule 23's requirements is particularly important in cases, such as this one, where there are significant risks that the class-action device is being abused to the detriment of both defendants and absent class members.

STATEMENT OF ISSUES

Whether the district court abused its discretion when it denied certification because plaintiffs failed to carry their burden to identify an administratively feasible way of identifying absent class members without undertaking individualized inquiries.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Denying Certification.

Plaintiffs gloss over the standard of review—abuse of discretion—that governs the district court's denial of class certification. *See Gilchrist v. Bolger*, 733 F.2d 1551, 1555 (11th Cir. 1984). A district court abuses its discretion *only* if it "fails to apply the proper legal standard or to follow proper procedures in making the determination, or makes findings of fact th[at] are clearly erroneous." *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1337 (11th Cir. 2006). The district court made none of those mistakes here.

The District Court Applied the Correct Standard. The law in this Circuit is clear that when a plaintiff seeks certification, the plaintiff "bears the burden of establishing the requirements of Rule 23, including ascertainability." *Karhu*, 621 F. App'x at 947; *Little*, 691 F.3d at 1304. The Court has held on many occasions that Rule 23 requires that a proposed class be "adequately defined and clearly ascertainable." *Little*, 691 F.3d at 1304; *Karhu*, 621 F. App'x at 947; *Bussey*, 562 F. App'x at 787. A district court must therefore ensure—before certifying a class—that there is an "administratively feasible way" for identifying absent

class members that "'does not require much, if any, individual inquiry.'" *Karhu*, 621 F. App'x at 946–48 (quoting *Bussey*, 562 F. App'x at 787). A "plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records"; the plaintiff must "establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Karhu*, 621 F. App'x at 947–48.

The district court faithfully applied this precedent in finding that plaintiffs had not come forward with an administratively feasible method for identifying class members. JA343–45. Plaintiffs do not meaningfully dispute that the district court applied the correct legal standard. In fact, as Dometic explains, rather than raising any objection, plaintiffs "affirmatively invited the district court to require an administratively feasible method for identifying class members and argued that they had satisfied that requirement." Appellee's Br. 19. Plaintiffs have therefore forfeited any argument that the district court failed to apply the proper legal standard. *See id.* 20–24 (citing cases).

The District Court's Findings Are Not Clearly Erroneous. Plaintiffs also have not identified any clearly erroneous factual finding.

They contend only that the district court should have determined that class membership could be ascertained based on a combination of third-party records, domestic records, and self-identifying affidavits. Appellants' Br. 5–8; 12–14, 46–53. But these arguments obfuscate who bears the burden of proof. As the district court found, plaintiffs did not meet *their* burden in demonstrating *how* class membership could be ascertained through those records. *See* JA343–45. Plaintiffs make no showing that *this* finding was clearly erroneous.

Nor did the district court rely on any presumption against establishing ascertainability through self-identifying affidavits, contrary to plaintiffs' *amici*'s suggestions. *Cf.* NCLC Br. 10–12. In fact, the opposite is true. Relying on *Karhu*, the district court recognized that "ascertainment via self-identification" *was possible* so long as the plaintiff "propos[es] a case-specific and demonstrably reliable method for screening each self-identification." JA345 (quoting *Karhu*, 261 F. App'x at 949 & n.5). But plaintiffs did not meet their burden in "provid[ing] the [district court] with any proposals demonstrating how self-identification would work, much less a plan that would be administratively feasible and

not otherwise problematic." *Id.* Again, plaintiffs have not shown that this finding was clearly erroneous.

Plaintiffs' Certify Now, Worry Later Approach Is Wrong. Plaintiffs complain that the district court and this Court's approach to ascertainability is too "heightened," *see, e.g.*, Appellants' Br. 27–31, but relaxing their burden would violate the Supreme Court's repeated admonition that "[t]he class action is 'an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Dukes*, 564 U.S. at 348 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)) (emphasis added). To justify that exception, the party seeking class certification must "affirmatively demonstrate" that the proposed class complies with Rule 23. *Id.* at 350. As the Supreme Court has emphasized, key questions concerning class certification must be resolved *before* a class is certified. A "party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with Rule 23" at the certification stage, and courts must "conduct a 'rigorous analysis' to determine whether" the moving party has met that burden. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 35 (2013) (quoting *Dukes*, 564 U.S. at

350–51); *Gen. Tel. Co of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("actual, not presumed, conformance" with Rule 23 "remains . . . indispensable").

Nor is it enough for plaintiffs merely to *allege* that absent class members can be identified in an administratively feasible manner at some later juncture. When plaintiffs wish to certify a class action, they "must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. 258, 275 (2014). Plaintiffs "'must affirmatively demonstrate [their] compliance with Rule 23' by proving that the requirements are '*in fact*' satisfied." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1234 (11th Cir. 2016) (quoting *Comcast*, 569 U.S. at 33). As a result, "a party cannot merely provide assurances to the district court that it will later meet Rule 23's requirements." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 164 (3d Cir. 2015), *as amended* (Apr. 28, 2015). That certify now, worry later approach is improper. "A district court that has doubts about whether 'the requirements of Rule 23 have been met should refuse certification until they have been met.'" *Brown*, 817 F.3d at 1233–34 (quoting Fed. R. Civ. P. 23(f), note (Advisory Comm. 2003)).

This timing consideration has both legal and practical significance. Unless certification issues are addressed at the certification stage, they likely will never be addressed at all. As the Supreme Court has explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Concepcion*, 563 U.S. at 350 ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). In short, "the presumption is *against* class certification because class actions are an exception to our constitutional tradition of individual litigation." *Brown*, 817 F.3d at 1233 (emphasis added).

II. The Court's Ascertainability Requirement Flows Directly from Several of Rule 23's Essential Provisions.

Ascertainability is a threshold requirement and "an 'essential' element of class certification" that is necessarily "implied" and "encompassed" by many of Rule 23's provisions. 1 Newberg on Class Actions § 3:2 (5th ed.). "Implied" does *not* mean atextual. To the contrary, the ascertainability requirement logically flows from the rule's

text. The rule's repeated use of the word "class" leaves no doubt that the existence of an actual, identifiable "class" is "an essential prerequisite" for class certification. 7A Wright & Miller, Fed. Prac. & Proc. Civ. § 1760 (3d ed. 2020). More fundamentally, unless absent class members are identifiable, a court cannot perform the required rigorous analysis of Rule 23's specific criteria and a defendant is prevented from effectively litigating its individualized defenses. Ascertainability is thus not an atextual *addition to* the requirements of Rule 23(b)(3); it is a textually grounded *application of* those express requirements.

A Class Must Be Ascertainable for The Court to Ensure Compliance with Rule 23(a). Consider Rule 23(a), which sets out the prerequisites for certifying a class action: "the class" must be "so numerous that joinder of all members is impracticable"; there must be "questions of law or fact common to the class"; "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class"; and "the representative parties [must] fairly and adequately protect the interests of *the class*." Fed. R. Civ. P. 23(a) (emphases added).

A district court cannot determine whether a proposed class satisfies these requirements without an administratively feasible way to identify

absent class members. Courts "must be able to know who belongs to a class before they can determine the numerosity of the class, the commonality of the claims of the class members, or any of the other class certification prerequisites." 1 Newberg § 3:2. A court cannot determine whether a class is "so numerous that joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), unless it can first accurately estimate how many members are in the class. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267–68 (11th Cir. 2009) (concluding that the numerosity requirement was not satisfied because there was no actual evidence of the number of persons that would comprise the class). Nor can a court determine whether there are "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), unless it first determines that the "class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 350 (quoting *Falcon*, 457 U.S. at 157). Evaluating the injuries of absent class members is infeasible unless the court is able to identify who is properly part of the class. Only then can a court determine—as it must—whether common questions will generate "common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350, 356–57 (quoting

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Likewise, without an administratively feasible method for identifying class members, a court cannot perform other tasks that Rule 23 mandates. For example, identifying *who* makes up the class is an essential prerequisite to determining whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class" or that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(3)–(4). These "typicality" and "adequacy" prerequisites ensure that "a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1278–79 (11th Cir. 2000). Without any feasible way to identify absent class members and their claims, however, a district court cannot determine whether the required nexus exists, including ensuring that "the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Id.* at 1279 (internal quotation marks omitted); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (these inquiries "serve[]

to uncover conflicts of interest between named parties and the class they seek to represent").

An Administratively Feasible Mechanism for Identifying Absent Class Members Is Especially Important When the Class Seeks Damages. For class actions that seek a damages recovery (such as this one), the requirement that the class be "clearly ascertainable," *Little*, 691 F.3d at 1304, is also properly understood as part and parcel of two other express requirements: superiority and predominance. *See* Fed. R. Civ. P. 23(b)(3).

To prove superiority, the plaintiff must establish "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"—even after taking account of "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Similarly, to prove predominance, the plaintiff must establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Ascertainability "*overlaps with*" these inquiries—in other words, it logically flows from them—because "[i]t must be administratively feasible for the court to determine whether a given person fits within the

class definition without effectively conducting a mini-trial." 1 McLaughlin on Class Actions § 4:2 (16th ed. 2019); *see also Marcus v. BMW of N. America, LLC*, 687 F.3d 583, 591 (3d Cir. 2012) (ascertainability is part of Rule 23(b)(3)'s requirement that common issues of law or fact "predominate" over individual issues of law or fact).

A Class Must Be Ascertainable for The Court to Ensure Compliance with Rule 23(c). The ascertainability requirement also flows from Rule 23(c). Rules 23(c)(1) and (2) require a court certifying a class to issue an "order" that "define[s] the class and the class claims, issues, or defenses" and issue a judgment that "include[s] and describe[s] those whom the court finds to be class members." Fed. R. Civ. P. 23(c)(1)(B), (c)(3)(A)–(B). Again, a court must first determine which persons are members of the class before it can define the class or describe the class members. For this reason, several courts have read Rule 23(c) to "contain the substantive obligation that the class being certified be ascertainable." 1 Newberg § 3:2; *see, e.g., Riedel v. XTO Energy Inc.*, 257 F.R.D. 494, 506 (E.D. Ark. 2009) ("Rule 23 requires that any order certifying the class 'must define the class'"); *Benito v. Indymac Mortg. Servs.*, No. 2:09-001218-PMP-PAL, 2010 WL 2089297, at *2 (D. Nev. May

21, 2010) (Rule 23(c)(1)(B) provides persuasive authority for maintaining the ascertainability requirement).

The ascertainability requirement is particularly important in connection with Rule 23(c)'s provisions pertaining to opt-out rights for putative members of class actions seeking damages. Due process considerations aside, *cf.* Appellants' Br. 40–41, the *text* of Rule 23(c) requires courts to provide the "best notice that is practicable under the circumstances," directing that notice to "all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Marcus*, 687 F.3d at 593 (the ascertainability requirement "protects absent class members by facilitating the 'best notice practicable' under Rule 23(c)(2) in a Rule 23(b)(3) action"); *see also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 173–177 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in Rule 23(b)(3) actions and this requirement may not be relaxed based on high cost). But a court cannot determine the "best notice" without a meaningful upfront effort to ascertain the class's actual members.

The requirement that a class be ascertainable also effectuates Rule 23(c)'s command that class judgments bind absent members "whether or

not favorable to the class." Fed. R. Civ. P. 23(c)(3)(B); Fed. R. Civ. P. 23(c)(2)(B)(vii) (Rule 23(b) classes have a "binding effect" on class members). When a class is not readily ascertainable, it opens the door to the risk of a "fail-safe" class—a class "defined such that membership in the class is contingent on the validity of the class members' claims"—that would never be bound by an adverse judgment. Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769, 2783 (2013). In such cases, the absent class members are not ascertainable until liability is established because the class's very existence depends on the class's winning. *Id.* at 2808–09. Putative members of a fail-safe class are never "bound by an adverse judgment because they either win or, if they lose, are no longer part of the class" and therefore can bring the lawsuit again in their own individual capacities. *Id.* at 2783; *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 n.19 (1st Cir. 2015) ("[A] fail-safe class is one in which 'it is virtually impossible for the Defendants to ever "win" the case, with the intended class preclusive effects.'").

The surest way to ensure that class judgments bind absent class members—"[w]hether or not" the judgment is "favorable to the class,"

Fed. R. Civ. P. 23(c)(3)(B)—is to apply a meaningful ascertainability test at the certification stage. While plaintiffs purport to be concerned with fail-safe classes, *see* Appellant's Br. 22–23, they fail to appreciate that administratively feasible methods for determining who meets objective criteria for class membership allow the court to police this specific abuse of the class action procedure and to ensure that class certification decisions accord with the text of Rule 23.

Determining Who Is Part of the Class Is Not Merely A Question of Manageability and Superiority. Plaintiffs suggest that administrative feasibility is completely and exclusively subsumed by the questions of manageability and superiority. *See* Appellants' Br. 36–39; Public Citizen Br. 5. That is wrong. Although ascertainability is certainly relevant to both inquiries, it is also relevant to many of Rule 23's other criteria. To be sure, ascertainability is not coextensive with those criteria. A class can be ascertainable, for example, without meeting the predominance and superiority requirements. But the converse is not true: a class-action plaintiff cannot satisfy those requirements *unless* the class is ascertainable.

Because ascertaining the members of the class is a *threshold* requirement—a showing that must be made in order for a court to undertake the rigorous analysis that Rule 23 requires—it is insufficient for courts to relegate the question of class membership to an afterthought that balances it against "the likelihood that, absent a class action," the unidentifiable "class members will not be able to pursue any relief." Appellants' Brief 18–19. That focus is directly contrary to the underlying premise for class adjudication. A class action cannot be certified unless the plaintiff first makes an affirmative showing sufficient to satisfy all of Rule 23's demanding requirements.

III. Strong Policy Reasons Counsel Against Relaxing the Standards for Class Certification.

Plaintiffs' objections appear to be driven principally by the concern that, unless courts loosen the requirements for class certification, individual consumers may not be able to obtain redress in cases involving low-value consumer goods. *See* Appellants' Br. 32–33. But "policy arguments" about "the desirability of the small-claim class action" are best addressed to Congress and the Rules Committee, not to the courts. *Coopers*, 437 U.S. at 470. Such concerns cannot overcome Rule 23's text or the need for a rigorous analysis that can be performed only if there is

an administratively feasible mechanism for ascertaining who is (and who is not) part of the class.

It would be a mistake, however, to assume that relaxing the standards for class certification would benefit consumers. As Dometic notes, there is no evidence that low-value consumer class actions are not viable under a properly applied requirement that plaintiffs come forward with an administratively feasible mechanism for identifying absent class members. *See* Appellee's Br. 38–39. In fact, the evidence points in the opposite direction. As Congress found a decade ago, "[c]lass members often receive little or no benefit from class actions and are sometimes harmed." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4, 4. That is especially true when absent class members are not easily identified and, as a result, direct notice is not feasible.

For example, in connection with the settlement of a class action involving purchasers of Duracell batteries, the class settlement administrator explained that based on "hundreds of class settlements, it is [the administrator's] experience that consumer class action settlements with little or no direct mail notice will almost always have a claims rate of less than one percent." Decl. of Deborah McComb

¶ 5, *Poertner v. Gillette Co.*, No. 6:12-cv-00803 (M.D. Fla. Apr. 22, 2014) (Doc. 156). The settlements reviewed involved products "such as toothpaste, children's clothing, heating pads, gift cards, an over-the-counter medication, a snack food, a weight loss supplement and sunglasses." *Id.* The median claims rate for those cases was ".023%," which is roughly 1 claim per 4,350 class members. *Id.* If those cases are any guide, in the mine-run class action involving products for which class members are not readily identifiable and direct notice is legally impossible, approximately *99.98%* of class members receive *no benefit* at all.

These concerns are heightened in this case because plaintiffs seek to recover economic losses based on a purported "benefit of the bargain" theory that the refrigerators sold by Dometic did not perform as intended. In other words, they do not seek to recover damages for purchasers whose refrigerators allegedly malfunctioned and who suffered injury as a result; instead, they argue that absent class members are entitled to a recovery because they paid more than they should have for their refrigerators. But even assuming that theory is viable, it underscores why plaintiffs must come forward with an administratively feasible mechanism for

identifying who is properly part of the class. That information is essential to ensuring that Dometic is able to litigate its individualized defenses (showing, for example, for any particular purchaser that the refrigerator is not defective) and to ensuring that Dometic is not held liable multiple times over in situations when a refrigerator has been sold (and re-sold) to subsequent purchasers.

Plaintiffs do not have that evidence because they do not want to have to defend their claims on the merits. Instead, their objective is to certify a sweeping, unidentifiable class that puts Dometic in a position that makes it very difficult to litigate the case on its merits. As plaintiffs are well aware, because of the costs of discovery and trial, certification in these circumstances unleashes "hydraulic" pressure to settle. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001), *as amended* (Oct. 16, 2001); *see also* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 639 (1989). Aggregating claims "makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merits of

the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002).

CONCLUSION

Plaintiffs' liability theory is a symptom of a larger problem in cases predominated by individual issues where there is no feasible way to identify class members. Recognizing that class actions are an exception to the usual rule that litigation should be conducted by and on behalf of named parties, the district court struck the right balance and properly exercised its discretion in enforcing Rule 23's requirements. That judgment should be respected and affirmed.

Respectfully submitted,

/s/ *Ashley C. Parrish*

Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
aparrish@kslaw.com

Jonathan R. Chally
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, GA 30309
(404) 572-4600
jchally@kslaw.com

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER OF
LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

May 6, 2020

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(g)(1), Fed. R. App. P. 32(a)(7)(B), and Fed. R. App. 29(a)(5) because this brief contains 4,342 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

/s/ *Ashley C. Parrish*
Ashley C. Parrish

Counsel for Amicus Curiae
the Chamber of Commerce of the
United States of America

Date: May 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Ashley C. Parrish*
Ashley C. Parrish

Counsel for Amicus Curiae
the Chamber of Commerce of the
United States of America