No. 19-4097

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION

ALBANY COUNTY, NY, NEGOTIATION CLASS'S CLASS REPRESENTATIVES; CO-LEAD NEGOTIATION CLASS COUNSEL; CO-NEGOTIATION CLASS COUNSEL
PLAINTIFFS - APPELLEES

v.

MCKESSON CORPORATION, CARDINAL HEALTH, INC., AMERISOURCEBERGEN DRUG CORPORATION, PRESCRIPTION SUPPLY, INC., DISCOUNT DRUG MART, INC., WALMART, INC., WALGREEN COMPANY; WALGREEN EASTERN CO., INC.; CVS PHARMACY, INC.; CVS INDIANA, LLC; CVS RX SERVICES, INC.; RITE AID OF MARYLAND, INC., dba RITE AID OF MID-ATLANTIC CUSTOMER SUPPORT CENTER
DEFENDANTS - APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION (CIV. NO. 17–MD-2804)
(THE HONORABLE DAN A. POLSTER)

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Sixth Circuit Rule 26.1, **McKesson Corporation** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.
   No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
   No.

Pursuant to Sixth Circuit Rule 26.1, **Cardinal Health, Inc.** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.
   No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
   No.

Pursuant to Sixth Circuit Rule 26.1, **AmerisourceBergen Drug Corporation** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.
   Yes, AmerisourceBergen Drug Corporation is a subsidiary of AmerisourceBergen Corporation and AmerisourceBergen Services Corporation.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
   Same as above.

Pursuant to Sixth Circuit Rule 26.1, **Prescription Supply, Inc.** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.
   No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
   No.

Pursuant to Sixth Circuit Rule 26.1, **Discount Drug Mart, Inc.** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.
   No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
   No.

Pursuant to Sixth Circuit Rule 26.1, **Walmart, Inc.** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.
   No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
   No.

Pursuant to Sixth Circuit Rule 26.1, **Walgreen Co. and Walgreen Eastern Co., Inc.** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

Yes, Walgreen Co. and Walgreen Eastern Co., Inc. are wholly-owned subsidiaries of Walgreens Boots Alliance, Inc., which is a publicly held corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
No, other than as listed above.

Pursuant to Sixth Circuit Rule 26.1, **CVS Indiana LLC, CVS Rx Services Inc., and CVS Pharmacy Inc.** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.
Yes. CVS Pharmacy, Inc. directly owns 100% of the membership interests of CVS Indiana, L.L.C. and 100% of the stock of CVS Rx Services, Inc. and CVS Health Corporation, a publicly traded corporation, owns 100% of CVS Pharmacy, Inc.'s stock.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
Yes, CVS Health Corporation, who owns 100% of CVS Pharmacy, Inc. has a financial interest in the outcome.

Pursuant to Sixth Circuit Rule 26.1, **Rite Aid of Maryland, Inc. d/b/a Mid-Atlantic Customer Support Center ("Rite Aid of Maryland")** makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.
   Yes. Rite Aid of Maryland's parent corporation is Rite Aid Corporation, a publicly traded company (NYSE: RAD).
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:
   No, with the exception of Rite Aid Corporation.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents several significant legal issues, including the district court's invention of an unprecedented "negotiation class" under Rule 23 of the Federal Rules of Civil Procedure. Appellants respectfully request oral argument to aid the Court in its resolution of these issues.

INTRODUCTION

The district court certified a "negotiation class" that is not authorized under Rule 23 of the Federal Rules of Civil Procedure or other applicable law. The class was not certified under Rule 23(b) for the purpose of adjudicating claims, nor under Rule 23(e) to enable entry of judgment on a settlement. Instead, the district court used the certification of this "class" solely as a vehicle for commissioning an organization of local governments to "negotiate" potential settlements. This "negotiation class" violates both Rule 23 and constitutional limits.

The Supreme Court has warned against "judicial inventiveness" in interpreting and applying Rule 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Because the plain text of Rule 23 does not authorize certification of a "negotiation" class, reversal is warranted for that reason alone.

The district court's action also exceeded its Article III powers. A federal district court's jurisdiction is limited to the resolution of concrete cases and controversies, and Rule 23 accordingly permits class certification only for purposes of enabling such judicial action. Employing Rule 23 to create a special-purpose vehicle to enter into "negotiations" that may never

produce a judgment in any specific case exceeds the limits of federal judicial power under Article III.

Even if a "negotiation class" were permissible under Rule 23 and Article III, the district court did not – and, in the absence of a meaningful record, could not – conduct the rigorous analysis of the proposed class that Rule 23 requires. Plaintiffs did not submit evidence in support of their certification motion. The district court's assertion that it could simply rely on its own "extensive knowledge" in lieu of a record was clear error.

Moreover, it is clear, even without a meaningful record, that this class fails to satisfy at least the predominance and adequacy of representation requirements of Rule 23. The "negotiation class" includes tens of thousands of political subdivisions and myriad claims under the laws of many different states, and individualized issues undoubtedly predominate. Indeed, the district court implicitly acknowledged a lack of predominance by attempting to invoke the authorization of Rule 23(c) for "issue" classes – despite the fact that the court was not certifying a class to adjudicate any *issues*, but rather to negotiate potential settlement of *cases*. The district court's RICO-only certification theory was a similarly inappropriate attempt to ignore non-common issues for a court-invented class – a large proportion of which has not even asserted RICO claims.

Adequacy of representation is also lacking. Conflicts of interest abound among class members, including between counties and their constituent cities and towns, many of which have very different priorities for any settlement negotiation effort.

Finally, the class notice approved by the district court does not comport with due process. The core element of the notice authorized by the court is a website, the content of which is neither in the record nor mandated by court order. And neither the court-authorized notice nor the website provides critical information that plaintiffs concede is vital.

Each of these errors is a separate ground requiring reversal of the district court's certification of a "negotiation class."

STATEMENT OF JURISDICTION

The district court has subject-matter jurisdiction over the individual actions in MDL No. 2804 under 28 U.S.C. § 1331.[1] This Court has jurisdiction pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, as enabled by 28 U.S.C. § 1292(e), which allows for discretionary appeals of

[1] As discussed below, the district court does not have jurisdiction over the lawsuit filed by one of the appointed representatives of the certified class, which is pending in state court. However, the remaining appointed class representatives are plaintiffs in various separate federal suits that are currently pending in MDL No. 2804.

interlocutory orders granting or denying class-action certification. On September 11, 2019, the district court entered an order granting plaintiffs' motion for class certification. Order Certifying Neg. Class, R. 2591 at PageID # 413618. Pursuant to Rule 23(f) as well as Rule 5 of the Federal Rules of Appellate Procedure, Appellants, each of whom is a defendant in one or more of the individual suits in MDL No. 2804 brought by class representatives, timely filed a petition to appeal on September 25, 2019, which was docketed in this Court at No. 19-305. This Court granted Appellants' petition on November 8, 2019.

STATEMENT OF ISSUES

(1) Did the district court err in certifying a "negotiation class" that is not authorized by Rule 23 of the Federal Rules of Civil Procedure and exceeds the limits on federal judicial power established under Article III of the Constitution?

(2) Did the district court err in certifying a class without conducting the rigorous analysis mandated by Rule 23 and without the required record support?

(3) Did the class notice violate due process by relying on a judicially unsupervised website that provides inconsistent and incomplete information about the "negotiation class"?

STATEMENT OF THE CASE

I. The Prescription Opioid Multidistrict Litigation

In December 2017, the Judicial Panel on Multidistrict Litigation established the national prescription opioid MDL, No. 2804, where more than 2,600 cases are pending for pretrial proceedings before the Honorable Dan Aaron Polster of the U.S. District Court for the Northern District of Ohio. The cases include a variety of suits by political subdivisions, hospitals, third-party payors, and various other plaintiffs against pharmaceutical manufacturers, distributors, pharmacies, doctors, and other defendants.

In addition to cases in the MDL, several hundred cases brought by states and political subdivisions are pending in state courts across the country. Counties and municipalities litigating in state courts are part of the "negotiation class" certified by the district court.

II. Plaintiffs' "Negotiation Class" Proposal

On June 17, 2019, the Plaintiffs' Executive Committee ("PEC") for the MDL moved for certification of a "cities/counties negotiation class." Pls. Corr. Mem. Supp. Cert., R. 1690-1 at PageID # 47101. Relying on a draft law review article co-authored by one of the special masters appointed to

assist the district court in this MDL,[2] the PEC proposed certification of a "negotiation class" defined to include all cities, counties, towns, and similar political subdivisions in the United States.

The motion was not filed in any specific civil action but rather was styled as a document relating to "all cases" in the MDL. *Id.* As plaintiffs took care to explain, the proposal was for neither a litigation class to adjudicate claims nor a settlement class to allow the court to enter judgment on a duly negotiated agreement in any pending case. *Id.* at PageID # 47113-14*; see also id.* at PageID # 47109 ("The Negotiation Class … is not aimed at being the vehicle for litigation or settlement."). Instead, plaintiffs asked the district court to invoke Rule 23 to "creat[e] a unified body" of all cities and counties in the United States, so that this entity – which plaintiffs compared to the National League of Cities, *id.* at PageID # 47109, 47116 & n.6 – could "enter into further negotiations," in hopes of achieving a broad settlement of class members' pending and/or potential claims. *Id.* at PageID # 47109. Plaintiffs admitted that this was "not a customary usage of the class mechanism." *Id.*

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[2] Francis McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Large Claim Class Actions* (June 13, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834.

The district court convened a hearing on plaintiffs' motion on June 25, 2019 – barely a week after the motion was filed. *See* Order Granting Leave to Amend, R. 1745 at PageID # 51786. On June 24, certain defendants, including Appellants, filed briefs opposing certification and identifying numerous legal flaws in the proposal. *See* Mem. Certain Defs. Opp., R. 1720; Certain Pharmacy Defs. Opp., R. 1723. More than thirty state Attorneys General joined *amicus curiae* letters that also raised a series of legal concerns about the proposal. Letter, R. 1726; Letter, R. 1727.

Faced with this broad opposition, plaintiffs announced at the June 25, 2019, hearing that they were withdrawing their original motion and, on July 9, 2019, they filed a "renewed" motion to incorporate "input" from Appellants and the Attorneys General. Pls. Mem. Supp. Renewed Am. Mot. Cert. ("Pls. Certification Motion"), R. 1820-1 at PageID # 56656. The renewed motion largely mirrored the original proposal, still seeking certification of a "negotiation class" of all U.S. political subdivisions so that a "unified body [could] enter into further negotiations with defendants." *Id.* at PageID # 56661.

Like their original motion, plaintiffs' renewed motion was not filed in any particular civil action but instead purported to apply to "all actions" in the MDL. *See id.* at PageID # 56649. It identified 51 proposed class

representatives, most (but not all) of whom were plaintiffs in separate civil actions that had been transferred to MDL No. 2804 from federal courts all across the country, raising issues under a variety of state laws. *See id.* at PageID # 56656.[3] Plaintiffs proposed as class counsel several lawyers, most (but not all) of whom represented plaintiffs in various cases in MDL No. 2804. *See id.* at PageID # 56707; Carter Dec., R. 1820-1 Ex. A at Page ID # 56780.

The centerpiece of plaintiffs' proposal was a two-part requirement to govern the organization they were asking the court to charter through class certification. First, all class members would learn before the opt-out deadline, and would be subsequently bound by, a set formula for allocating the proceeds of any settlement that the organization might negotiate. Thus, although class members would not know – indeed, could not know at that time – the *amount* of any settlement proceeds they would receive, the proposal represented that they would know their *shares* of any settlements "up front." *See* Pls. Certification Motion, R. 1820-1, at PageID # 56662.

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[3] One proposed class representative, the City of Norwalk, Connecticut, is not a plaintiff in any federal action but instead has filed suit only in state court. *See* Mem. Certain Defs. Opp. Pls. Renewed Am. Mot. Cert., R. 1949 at PageID # 119742 n.4. The district court's order accepted uncritically all of the proposed class representatives, including Norwalk.

In fact, although plaintiffs' motion described this as a critical element of the "negotiation class" concept, *id*. at PageID # 56663-64, plaintiffs' proposal did not fully implement it. The proposal fixed allocations only at the *county* level: settlement monies, minus attorneys' and other fees, would be apportioned *among counties* according to an undisclosed formula that would employ various metrics to account for each county's volume of opioid medication, overdose deaths, and opioid use disorder cases. *See id.* at PageID # 56660-61, 56703-04.[4] But the proposal identified only a possible *non-binding* formula for the next step of dividing proceeds between counties and their constituent political subdivisions (who would also be members of the class), and ultimately left that final allocation to further negotiation and possible court resolution. *See id*. at PageID # 56715-17.

Second, the proposed organization would be bound by a rule of governance consisting of a supermajority voting mechanism. If a settlement were successfully negotiated with a defendant, class members

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[4] The specific formula was not provided in plaintiffs' motion (or, subsequently, in the district court's order). Instead, plaintiffs' motion identified various statistics that would be used as inputs, and their website (discussed below) purports to use an algorithm that applies the formula to identify specific shares.

would be invited to vote on it. *Id.* at PageID # 56662-64, 56707. A settlement would be submitted to the district court for approval only if it first received seventy-five percent approval from voting class members, counted six different ways to ensure supermajority approval by each of several segments of the class.[5] If judicially approved, the settlement would bind all class members – including those that voted against it. *See id.* at PageID # 56663-64.[6] But if no settlement were reached, or if the supermajority approval hurdles were not met, the district court would have no further contact with the class. *See id.* at PageID # 56667-68 ("only if … there is a classwide settlement offer that gets supermajority approval … [will] the normal Rule 23(e) mechanism for settlement approval and final orders by the Court be activated").

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[5] Specifically, seventy-five percent would need to be achieved separately in counting the votes of "litigating and non-litigating counties and municipal bodies," with each group sorted "by number, by population, and by allocation [share]." Pls. Certification Motion, R. 1820-1 at PageID # 56672, 56708-10.

[6] In theory, the district court could give class members a second opportunity to opt out of any specific settlement pursuant to Rule 23(e)(4), but the district court has made clear that it would not do so. *See, e.g.*, Order Directing Special Master Yanni Assess Fairness, R. 2529 at PageID # 408985 ("If the court certifies the class, class members will be given a one-time opportunity to opt out of the class prior to any settlement being proposed….").

Plaintiffs' motion deviated from the norm for class certification motions in other respects as well. Plaintiffs submitted no declarations, exhibits, or other evidence in support of their motion, aside from short declarations from proposed class counsel that addressed their personal qualifications to serve in that capacity. *See, e.g.*, Carter Dec., R. 1820-1 Ex. A; Flessner Dec., R. 1821. The "record" offered in support of the motion otherwise consisted solely of the arguments and unverified assertions in plaintiffs' brief.

Plaintiffs made only a perfunctory effort to address the individual criteria for class certification set forth in Rule 23(a) and (b). For example, plaintiffs did not discuss the evidence that would be needed to prove the broad array of claims asserted by class members that the proposed "class" would be empowered to negotiate. Instead, all they offered was a partial analysis of which causes of action had been *asserted*, presenting a series of charts that detailed the prevalence of certain select claims in the class representatives' own complaints and in the complaints of fifty other putative class members with cases in the MDL. *See* Pls. Certification

Motion, R. 1820-1 at PageID # 56736.[7] Even those selections – which failed to account for the large number of class members that had chosen to litigate in *state* court – showed significant variation. Although many putative class members had asserted RICO claims, many had not. (Virtually no class members with cases in state court have asserted RICO claims.) A wide variety of state-law claims were asserted – including (among others) claims for public nuisance, negligence, unjust enrichment, and violation of consumer protection statutes – invoking the laws of dozens of different states. *See* Mem. Certain Defs. Opp. Pls. Renewed Am. Mot. Cert. ("Appellants' Opp."), R. 1949 at PageID # 119768-70.[8] Despite this wide variation across the proposed class, plaintiffs sought certification of a single unified class with no subclasses. *See* Pls. Certification Motion, R. 1820-1 at PageID # 56725-26.

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[7] The comparison of causes of action from class members' complaints was presented solely through assertions in plaintiffs' brief, without citation to the specific complaints being compared. Appellants were able to track down the complaints for purposes of pointing out the flaws in plaintiffs' analysis (*see* Mem. Certain Defs. Opp. Pls. Renewed Am. Mot. Cert., R. 1949 at PageID # 119768-77), but plaintiffs neither submitted those pleadings as part of the record nor cited them in a manner that would permit them to be readily located.

[8] *See also* Appellants' Opp. Exs. 2-3; R. 1949-2, R. 1949-3, R. 1949-4.

Plaintiffs' renewed motion again sparked wide-ranging opposition, including from several putative class members. *See* Cert. Pls. Mem. Opp., R. 1958; City of Elyria's Joinder, R. 2064. Nearly forty state Attorneys General signed *amicus curiae* letters filed with the court asserting that the proposed class was unlawful and in direct conflict with paramount state interests. *See* Letter, R. 1951; Letter, R. 1955; Letter, R. 1973. Appellants also opposed the motion. *See* Appellants' Opp., R. 1949.

III. The Certification Order

On September 11, 2019, the district court issued an opinion and order certifying a "negotiation class." Mem. Op. Certifying Neg. Class ("Certification Op."), R. 2590; Order Certifying Neg. Class ("Certification Order"), R. 2591. The district court largely adopted plaintiffs' proposal, with a few modifications.

The district court's first modification was to select a civil action – a case filed by Summit County, Ohio – and to declare that this action's case number would be "attributed to this class action going forward." Certification Order, R. 2591 at PageID # 413621. This change was apparently made in response to Appellants' argument that Rule 23 permits class certification only in the context of a specific civil action. But none of the class representatives is a plaintiff in the *Summit County* case, and the

plaintiffs in *Summit County* were not eligible to serve as class representatives because they had entered into individual settlements with several defendants.[9]

The district court's second modification was to "certify" as to federal RICO claims, *see* Certification Op., R. 2590 at PageID # 413591, rather than the full array of claims presented in class members' lawsuits. The court did not explain the reason for this modification, although it noted the prevalence of "state-based legal claims that vary across the class." *Id.* at PageID # 413606. The court also invoked Rule 23(c)(4) to certify two "issues" related to the federal Controlled Substances Act. *Id.* at PageID # 413591. However, these two issues and the RICO claim were not singled out for "certification" for any particular purpose. To the contrary, the district court made clear that it expected the class to negotiate (and attempt to settle) "*any* … claims," state or federal, "arising out of a common factual predicate." *Id.* at PageID # 413617.

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[9] Summit County was proposed as a class representative in plaintiffs' original motion, but it was withdrawn from consideration following its individual settlements. *See* Class Counsel's Am. Supp. Renewed Am. Mot. Cert., R. 2583 at PageID # 413493.

The district court was untroubled by the absence of an evidentiary record to support its findings under Rule 23, referring to its own "extensive knowledge of the heavily-developed legal and factual record" in the MDL. *Id.* at PageID # 413589.

IV. The Notice Process

The district court adopted plaintiffs' notice plan without change. *See* Class Counsel's Am. Supp. Renewed Am. Mot. Cert. ("Class Counsel's Notice Plan"), R. 2583; Certification Op., R. 2590 at PageID # 413614; Certification Order, R. 2591 at PageID # 413618. The notice plan consisted of mailing and/or emailing a notice to all potential class members and posting that notice and other information on a website designed and maintained by plaintiffs, www.opioidsnegotiationclass.info. The mailed and emailed notice provided only limited content, referring each recipient to the website as the primary source of key information. *See, e.g.*, Class Counsel's Notice Plan Ex. A, R. 2583-1 at PageID # 413497 ("Important information … will be available on the Class website"); *id.* at PageID # 413507 ("Further information … [is] available at the class website"); *id.* at PageID # 413510 (similar).

Among other things, class members were directed to the website for information about their shares of any class settlement that might be

negotiated. *See id.* at PageID #s 413506-07. The website purports to offer specific share numbers for every class member. *Id.* at PageID # 413497. However, there is in fact no fixed and binding allocation formula beyond the county level, and the individual allocations provided on the website for each plaintiff within a county (the county itself and its constituent cities and towns) are only *estimated*, based on a *possible* formula that might be used for such allocations. *See id.* at PageID # 413507 ("Any of the affected jurisdictions may ask … [for] a different formula."). The content on the website has changed over time. *Compare* Appellants' Opp. Ex. 1, R. 1949-1 at PageID # 119794-816 (describing the website and providing screenshots of some of the pages that have since been changed), *with* https://opioidsnegotiationclass.info/. The district court neither mandated the specific content of the website nor required that content to be submitted for the record or maintained unchanged.

SUMMARY OF ARGUMENT

In furtherance of the district court's goal of establishing something "creative" and "powerful" to generate a global resolution of the opioid litigation, Certification Op., R. 2590 at PageID # 413581, the court's special master invented, the PEC repurposed, and the district court adopted and certified an unprecedented "negotiation class."

This class was not certified in support of any judicial function. It was not certified to litigate claims. Nor was it certified in aid of the court's entry of judgment on settled claims. Rather, certification was made for the sole purpose of creating a judicially sponsored contractual arrangement among all counties, cities, and other local governments under which those entities would be bound by any settlement negotiated on their behalf by the class representatives and their counsel, so long as the terms received supermajority approval.

Nothing endowed the district court with the power to create this arrangement. While the district court purported to act under Rule 23 of the Federal Rules of Civil Procedure, the plain text of Rule 23 does not authorize class certification to organize plaintiffs for "negotiation" in a manner that is untethered to either the collective litigation of class members' claims or a request to enter judgment on a settlement that has already been agreed upon. *See Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1091 (6th Cir. 2016) (observing that Rule 23 envisions class certification for purposes of "settlement" or "trial").

The district court sought to justify its action on the ground that Rule 23 does not expressly *prohibit* certification of a "negotiation class." This contravenes the Supreme Court's clear instructions that Rule 23 must be

applied strictly according to its terms and without the invocation of "judicial inventiveness." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) ("a mere negative inference does not … suffice to establish a disposition that has no basis in [Rule 23's] text"); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1090 (6th Cir. 1996) ("both Supreme Court and Sixth Circuit precedent require close adherence to the strictures of Rule 23").

The absence of any textual basis in Rule 23 for the certification of a "negotiation class" that is untethered to the exercise of ordinary judicial functions is consistent with the limitations of Article III, which limit the power of federal district courts to the adjudication of concrete cases and controversies. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Chartering an organization of plaintiff-side entities for the sole purpose of empowering the group's representatives to negotiate settlements is not a judicial function.

Rule 23 and Article III similarly do not permit certification of a free-floating "MDL class" untethered to a specific civil action. Plaintiffs' failure to file their motion in any such action highlighted their determination to keep any "negotiation class" carefully separated from the actual litigation in which each class representative is otherwise engaged. The district court

could not cure this defect by assigning the negotiation class to the *Summit County* case number. None of the class representatives are parties in the *Summit County* case, and no *Summit County* plaintiff was qualified to act as a class representative. As a result, this certification violated the fundamental requirement that class representatives be both plaintiffs in the case and class members. *See East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977) (proposed class could not be certified because plaintiffs were not class members).

Separately, even if certification of a negotiation class were permissible in concept, the district court's certification decision failed to comply with Rule 23 in multiple ways. Class certification must be preceded by a "rigorous analysis" to ensure that the requirements of Rule 23 are fully satisfied. *Wal-Mart*, 564 U.S. at 350-51; *In re Cmty. Health Sys., Inc.*, 2019 WL 5549319, at *1 (6th Cir. Oct. 23, 2019). Plaintiffs submitted no evidence in support of their certification motion, relying instead on a superficial comparison of the causes of action allegedly asserted in some class members' complaints. But "Rule 23 does not set forth a mere pleading standard," *Wal-Mart*, 564 U.S. at 350, and "the district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." *In re Initial Pub.*

Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006). Plaintiffs' wholesale failure to provide a record to enable the required "rigorous analysis" rendered a sustainable certification decision impossible. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006).

Second, based on the record that *does* exist, it is plain that this class fails to satisfy at least two of the mandatory requirements for class certification, *i.e.*, predominance of common issues and adequacy of representation. Given the breadth of this class, the distinct facts that by necessity underlie the varying claims of each class member, and the wide variation in the applicable state laws, predominance could not possibly be satisfied. The district court could not circumvent those requirements by purporting to ground its certification on the RICO claims asserted by some class members and a couple of narrow "issues."

Third, there are significant conflicts of interest within this class, a fact that precludes any finding of adequacy of representation. *See Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013) (reversing adequacy determination due to conflict among class members). Indeed, unlike when a class action is properly certified under Rule 23, the class representatives here are not required to give priority to pursuing the interests of the class but are instead permitted – indeed, expected – to

continue to litigate their individual claims independently in their separate lawsuits. Thus, each class representative remains incentivized to maximize its own individual recovery, even if at the expense of other members of the class they supposedly represent.

Finally, the notice process proposed by plaintiffs and accepted by the district court without examination does not satisfy the requirements of due process or Rule 23. The notice does not adequately inform class members about their share of any potential settlement; it refers them, instead, to a judicially unsupervised, plaintiff-run website that provides incomplete information. Rule 23 demands more.

Any of these errors would alone be sufficient to require reversal. In combination, they establish that the certification of this class was fundamentally in error.

STANDARD OF REVIEW

"A district court's class certification decision calls for an exercise of judgment; its use of the proper legal framework does not." *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011). The issues presented in this appeal relate to the legal framework underlying the district court's order and thus present questions of law that are reviewed *de novo*. The discretion that a district court otherwise enjoys on class

certification is necessarily abused if it "relies on clearly erroneous findings of fact, *applies the wrong legal standard*, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012) (emphasis added). This is consistent with the general principle that a court of appeals "reviews … [a] district court's legal conclusions *de novo*." *In re Thompson Boat Co.*, 252 F.3d 852, 854 (6th Cir. 2001). Similarly, *de novo* review applies to any question concerning the scope of the lower court's authority to issue the ruling in question. *United States v. B & D Vending, Inc.*, 398 F.3d 728, 731 (6th Cir. 2004); *see also United States v. Truman*, 304 F.3d 586, 589 (6th Cir. 2002) ("the question of whether discretion exists at all is purely a question of law" that is reviewed *de novo*).

ARGUMENT

I. The District Court's Certification of a "Negotiation Class" Should Be Reversed Because It Contravenes Rule 23 and Article III.

"[F]ederal district courts are courts of limited jurisdiction and have only such jurisdiction as Congress may confer upon them." *Goldsmith v. Sutherland*, 426 F.2d 1395, 1398 (6th Cir. 1970). The unprecedented "negotiation class" certified here contravenes both Rule 23 and Article III.

A. Rule 23 Does Not Permit Certification of a "Negotiation Class."

The plain text of Rule 23 does not permit certification of a class merely for negotiation. Rule 23 authorizes classes to be certified for two purposes, both related to the judicial functions of an Article III tribunal. The first is to adjudicate and try claims. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue … as representative parties on behalf of all members"); *see also* Fed. R. Civ. P. 23(b)(3)(C) (envisioning "concentrating the litigation of the claims in the particular forum"). The second is to enter judgment on an existing settlement. *See* Fed. R. Civ. P. 23(e) ("[A] class [may be] certified for purposes of settlement" after the district court evaluates a proposed agreement and enters a judgment of approval); *see also Whitlock*, 843 F.3d at 1091 (observing that Rule 23 envisions class certification for purposes of "settlement" or "trial"). Rule 23 includes no provision authorizing certification merely to help plaintiffs organize themselves to "negotiate."

The district court acknowledged that it was certifying neither a litigation class under Rule 23(a) nor a settlement class under Rule 23(e). *See* Certification Op., R. 2590 at PageID # 413584-85.

Plaintiffs did not seriously argue – and the district court certainly did not find – that the stringent requirements imposed under Rule 23(a) and

(b) for a litigation class had been satisfied here. To the contrary, plaintiffs emphatically disavowed any effort to certify a litigation class. *See* Pls. Cert. Mot., R. 1820-1 at PageID # 56661-62. For its part, the district court understood that what it was doing was outside the norm and went so far as to caution parties that its certification order could not even be *cited* in future cases seeking certification of any other class. Certification Order, R. 2591 at PageID # 413623 (declaring that "no class member or any party … may cite this Order or the accompanying Memorandum Opinion as precedent or in support of, or in opposition to, the certification of any class for any other purpose").

Plaintiffs also stressed in their motion that this was *not* a "settlement" class submitted for certification under Rule 23(e). *See* Pls. Cert. Mot., R. 1820-1, at PageID # 56661. It is undisputed that many of the prerequisites for certification under Rule 23(e) – such as the presentation of specific settlement terms that the district court could review for fairness for purposes of entering judgment – could not have been met here. *See* Fed. R. Civ. P. 23(e)(2), (3). This class was certified solely to attempt to *negotiate* a settlement, not to seek a judgment approving one.

Notwithstanding the absence of authority in Rule 23 for certification of a "negotiation class," the district court concluded that it could create

such a class because Rule 23's "text does not prohibit" this novel expansion of the class action device. Certification Op., R. 2590 at PageID # 413586. But that is not how the Supreme Court interprets and applies Rule 23. To the contrary, the Supreme Court has repeatedly cautioned that Rule 23 may not be stretched beyond its plain terms. The Court has also made clear that "a mere negative inference does not … suffice to establish a disposition that has no basis in [Rule 23's] text." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011); *see also, e.g.*, *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1090 (6th Cir. 1996) ("both Supreme Court and Sixth Circuit precedent require close adherence to the strictures of Rule 23"); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017) ("Supreme Court precedent … counsels in favor of hewing closely to the text of Rule 23.").

As the Supreme Court has explained, "Federal Rules take effect after an extensive deliberative process involving many reviewers" – including "a Rules Advisory Committee, public commenters, the Judicial Conference, [the Supreme] Court, [and] Congress." *Amchem*, 521 U.S. at 620. As a result of this process, "[t]he text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered." *Id.*

Amchem involved a similar effort to use Rule 23 creatively to resolve mass tort litigation of nationwide scope – in that instance, "an asbestos-litigation crisis." *Id.* at 597. Unlike here, *Amchem* at least involved an actual proposed settlement in an actual case. However, it was plain that application of Rule 23 would not permit certification of a nationwide class of asbestos claimants. Among other things, variation in the claims and interests of class members precluded any finding, as required by Rule 23, of adequacy of representation and predominance of common issues. *Id.* at 607-11. The question before the Supreme Court was whether those requirements could be bypassed to approve a global class settlement, based on the argument that class members had an overriding common interest in the approval and implementation of such a settlement. *Id.* at 619-23, 629. The Supreme Court's answer was "no."

The Court emphasized that "of overriding importance, courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce." *Id.* at 620. *Any* class certified under Rule 23 for *any* purpose must satisfy all requirements, and be subject to all limitations, set forth in the Rule. This is so even though "[t]he argument is sensibly made that a nationwide administrative claims processing regime [as established by the district court in approving the class] would provide the most secure,

fair, and efficient means of compensating victims of asbestos exposure." *Id.* at 628-29. "Congress … has not adopted such a solution," the Court observed, and Rule 23 could not "carry the large load" the parties and the lower court had sought to heap upon it. *Id.* at 629.

Here, the district court's "negotiation class" constitutes a similar attempt at impermissible "judicial inventiveness." *See* Certification Op., R. 2590 at PageID # 413579 (praising Special Master McGovern and plaintiffs for "creative thinking" and "develop[ing] an innovative solution" in the face of the perceived flaws of "a standard settlement class action"). But such a mechanism is not authorized by the Federal Rules as they are currently written. And *Amchem*'s instruction is plain: "Federal courts … lack authority to substitute for Rule 23's certification criteria a standard never adopted." 521 U.S. at 622.

The district court's assertion that "Rule 23 is equitable in nature," Certification Op., R. 2590 at PageID # 413586, does not support a different conclusion. As the Supreme Court has explained, although class actions emerged historically from equity, that does not mean that the limits of the rules may be ignored, but rather only that "historical models" are appropriately used in "determining [the] meaning" of Rule 23. *Wal-Mart*, 564 U.S. at 361 (rejecting interpretation of Rule 23 that was without

precedent in equity). There is no traditional analogue in equity to a "negotiation class." And now that permissible uses of class actions have been "codifi[ed]" in Rule 23, courts are precluded from straying beyond its text. *Id.* at 361, 363; *see also Kern v. Siemens Corp.*, 393 F.3d 120, 128 (2d Cir. 2004) (district courts cannot invoke "equitable powers" to certify a class beyond Rule 23's explicit bounds, as "Rule 23 offers the *exclusive* route to forming a class action").[10]

The district court's disregard for that directive alone warrants reversal.

B. Class Certification for "Negotiation" Exceeds the Limits on Judicial Power Rooted in Article III.

In certifying a class that was not authorized by Rule 23 and was untethered to judicial resolution of a concrete controversy, the district court also exceeded the limits on its powers imposed under Article III. Rule 23 authorizes certification for purposes of pursuing *judicial* functions: the

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[10] *Schneider v. Elec. Auto-Lite Co.*, 456 F.2d 366 (6th Cir. 1972), cited by the district court, does not support its reliance on equity as a source of authority. *Schneider* states in general terms that Rule 23 should be applied "liberally" but does not attempt to invent a new kind of class action and does not mention "equity." Moreover, *Schneider* pre-dates *Amchem* – a "decision [that] was expressly intended to curb 'judicial inventiveness' ..., and to restrict district judges' discretion to do equity under the guise of Rule 23." *In re Ephedra Prods. Liab. Litig.*, 231 F.R.D. 167, 169-70 (S.D.N.Y. 2005) (citation omitted).

adjudication of claims or entering judgment on their settlement. *See* Fed. R. Civ. P. 23(b), (e). Such judicial functions are rooted in Article III, which limits federal courts to adjudication of concrete cases and controversies culminating in the entry of judgment. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821). By contrast, commissioning a "unified body" of cities and counties to pursue activities in the interest of its members – such as the negotiation of contracts – is *not* a judicial function.

The district court's decision exceeded the "properly limited … role of the courts," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted), in at least two important respects.

First, the certification has nothing to do with resolving a concrete controversy between plaintiffs and defendants. *See* Pls. Corr. Mem. Supp. Cert., R. 1690-1 at PageID # 47109 ("The Negotiation Class … is not aimed at being the vehicle for litigation or settlement."). The district court's order purports to dictate the relationship only among various *plaintiff-side* entities. The order disclaims requiring defendants to do anything and establishes no process that would necessarily involve the court in any activity to resolve disputes between the class and any defendant. Pls. Answer to Pet. Permission Appeal at 6, *In re: McKesson Corp.*, No. 19-305

(6th Cir. filed Oct. 7, 2019), ECF 18; *see also* Certification Op., R. 2590 at PageID # 413609 ("no defendant is required to utilize this process").[11] But, functioning as an Article III tribunal means "adjudicat[ing] … between the parties," *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838), not organizing a superstructure among plaintiffs. *See also DaimlerChrysler*, 547 U.S. at 340-41 (the "Federal Judiciary's authority" is grounded in "the judicial function of deciding cases … 'between parties'") (quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984)).

While the district court would assuredly need to approve any class settlement, that process, which is governed by Rule 23(e), does not anticipate antecedent certification of a class solely to attempt to *negotiate* possible settlements. To the contrary, Rule 23 clearly anticipates that a class will be formed either (1) through certification to *litigate* the case under Rule 23(b) or (2) if such certification has not yet occurred when the parties have agreed on a settlement, through certification for settlement purposes under Rule 23(e). Either way, class certification occurs for

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[11] As discussed in Section IV below, Appellants have a stake in this appeal because of other impacts stemming from the district court's order. But the court's order did not purport to relate to the adjudication of any plaintiff's claim against any defendant – it expressly disclaimed doing so.

purposes of furthering the court's immediate and direct engagement in resolving a case or controversy. *See Stern v. Marshall*, 564 U.S. 462, 494 (2011) (the exercise of the "judicial power" conferred by Article III requires "the entry of a final, binding judgment"); *cf. Gordon v. United States*, 117 U.S. 697, 705 (1864) ("express[ing] an opinion, which … binds no one" and "may or may not be carried into effect" "is no judgment in the legal sense of the term").

Second, certification of a free-floating "MDL class" that is untethered to a specific civil action between the class representatives and the defendants is inconsistent with both Article III as well as Rule 23. Plaintiffs did not file their motion in any civil action, but instead presented it with a caption styling it as related to "all cases" in the MDL.[12] An MDL is not itself a civil action; it is a procedural device for the management of civil actions. *See* 28 U.S.C. § 1407(a) ("When *civil actions* involving one or more common questions of fact are pending in different districts, *such actions*

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[12] This would have made no sense even if it were permissible to certify a class in multiple separate cases at once, as the MDL includes numerous cases brought by plaintiffs *other* than class members, such as hospitals, private payors, and individual persons.

may be transferred to any district for coordinated or consolidated pretrial proceedings.") (emphases added).[13] The transferred civil actions, not the MDL itself, constitute the "cases and controversies" on which Article III jurisdiction is based, and which, under Rule 23, may be certified to proceed as "class actions."

The district court attempted to remedy this fatal flaw *sua sponte* by selecting a case filed by Summit County, Ohio, and declaring that the associated "case number is … attributed to this class action going forward." Certification Order, R. 2591 at PageID # 413621. Even looking past such "judicial rewriting of the plaintiff's [filing]," *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1271 (11th Cir. 2009), tagging the negotiation class with the *Summit County* case number did not solve the problem.

No complaint has been filed in *Summit County* that includes as plaintiffs any of the class representatives, much less all of them. *See* Manual for Complex Litigation (Fourth) § 22.36 (2004) (noting common

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[13] *See also, e.g.*, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 489 F. Supp. 2d 932, 936 (D. Minn. 2007) ("The transfer under § 1407, even after the filing of an amended complaint, is only a change in courtrooms. Consolidation of a master complaint is merely a procedural device designed to promote judicial economy, and, as such, it does not affect the rights of the parties in separate suits.").

practice in MDL litigation of filing a "consolidated amended class action complaint"). *None* of the class representatives for the "negotiation class" are parties to the *Summit County* case, and the plaintiffs who *are* parties to that action have not been appointed as class representatives (and are not qualified for that role, having already settled with many of the defendants individually). The class certification thus violates a fundamental requirement for any class: that its representatives be both plaintiffs in the case and class members. *See East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977) (proposed class could not be certified because plaintiffs in case were not class members); *Merrill v. S. Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986) (same).

These issues stem from plaintiffs' failure to select a specific civil action, to file a complaint that includes the proposed class representatives as plaintiffs, and to submit their certification motion in that case. The class representatives did not take these steps because they wished to preserve their ability to litigate their original suits separately and concurrently without the need to represent the interests of plaintiffs in other cases. This highlights once again the fundamental difference between this "class" and a properly certified class action in which the class representatives are not expected – or permitted – to pursue litigation agendas that are wholly

divorced from the purpose for which the class was certified. *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013) (the "linchpin" of Rule 23 is "the alignment of interests and incentives between the representative plaintiffs and the rest of the class") (citation omitted).

II. Even if a "Negotiation Class" Did Not Contravene Rule 23 and Article III, the Certification Decision Should Be Reversed Because It Did Not Satisfy the Requirements of Rule 23.

Even if Rule 23 and Article III permitted a negotiation class mechanism, the certification of this particular class was improper under Rule 23. *Amchem* confirmed in no uncertain terms that *any* class certified under Rule 23 must satisfy all requirements of Rule 23.[14] The district court lacked any meaningful record upon which to determine whether the requirements were met, and it is abundantly clear that the standards of Rule 23 could not have been met here.

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[14] The one limited exception is that when certifying a class solely for purposes of entering judgment on a settlement, a district court "need not inquire whether the case, if tried, would present intractable management problems," as "the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. However, all other requirements of Rule 23 – including the need for class members' claims to present what would be predominantly common issues for trial – must be satisfied. *Id.* at 622-28.

A. The District Court Did Not Conduct the "Rigorous Analysis" Required by Rule 23.

"Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 564 U.S. at 350. The moving party must "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* And a district court may only certify a class if, after a "rigorous analysis," it finds that the plaintiffs have satisfied all applicable requirements of Rule 23. *Id.* at 350-51; *see In re Cmty. Health Sys., Inc.*, 2019 WL 5549319, at *1 (6th Cir. Oct. 23, 2019); *see also Vega*, 564 F.3d at 1267 ("a plaintiff … bears the burden of establishing every element of Rule 23").

"Rigorous analysis" requires examination of specific facts and evidence. As a result, class certification motions are almost always supported by detailed declarations, including expert analysis and other evidence. *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("[T]he district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met.").

Here, plaintiffs presented no evidence on which the district court could base Rule 23 findings on any element other than the qualifications of

class counsel.[15] On all other issues plaintiffs relied on (and the district court accepted) unverified assertions in their brief.

Plaintiffs' failure to present evidence enabling a "rigorous analysis" of the Rule 23 criteria is alone sufficient to invalidate the class certification. District courts are not permitted to certify a class without a proper record. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006) (finding record insufficient for district court to have conducted the required analysis); *In re Am. Med. Sys.*, 75 F.3d at 1083 (same).[16]

The district court concluded that the absence of a genuine record could be disregarded because it was, it said, already familiar with the facts. *See* Certification Op., R. 2590 at PageID # 413589 (relying on the court's own "extensive knowledge"). But just as there was no record to permit the court to perform a rigorous analysis of plaintiffs' assertions, there is no record upon which the district court's findings can be sustained by this

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[15] Plaintiffs supplied declarations from the lawyers who were proposed as class counsel, but those declarations discussed only those lawyers' experience and qualifications to serve in that role. *See, e.g.*, Carter Dec., R. 1820-1 Ex. A; Flessner Dec., R. 1821.

[16] The district court's observation that defendants "never asked for or filed a motion seeking [class-related] discovery," Certification Op., R. 2590 at PageID # 413588, ignores that it was *plaintiffs'* burden as the "party seeking class certification [to] affirmatively demonstrate … compliance with the Rule." *Wal-Mart*, 564 U.S. at 350.

Court. "Rule 23 demands significantly greater analytical rigor and precision" from a certifying court, and "relying on a reviewing court to connect the dots, is not enough." *Vega*, 564 F.3d at 1269. Thus, "a plaintiff still bears the burden of making *some* showing, affording the district court the means to make a *supported* factual finding, that the class actually certified meets [Rule 23's] requirement[s]." *Id.* at 1267 (second emphasis added); *see also In re Am. Med. Sys.*, 75 F.3d at 1083 (district court cannot act "without a record and without any meaningful findings of fact"); *Reeb*, 435 F.3d at 644 (similar). And the materials generically cited by the district court – "entries on the MDL docket" and a "glut" of "relevant pleading[s]," Certification Op., R. 2590 at PageID # 413589 – are not *evidence* that could support factual findings on the specific requirements set forth in Rule 23. *See In re Am. Med. Sys.*, 75 F.3d at 1079 (certification "should be predicated on more information than the pleadings will provide") (internal marks and citation omitted).

B. Predominance Is Not Satisfied

It is undisputed that class certification here required compliance with the requirement of Rule 23(b)(3) that common issues "predominate." *See* Pls. Answer to Pet. Permission Appeal at 15, *In re: McKesson Corp.*, No. 19-305 (6th Cir. filed Oct. 7, 2019), ECF 18; *see also Amchem*, 521 U.S. at 623.

Plaintiffs' sole proffer on this issue consisted of a series of charts in their brief that purported to compare a subset of the causes of action asserted in a sample of class members' complaints to show that some class members had some causes of action in common. *See* Pls. Certification Motion, R. 1820-1 at PageID # 56736. Even if this were evidence (as opposed to mere assertions in a brief), it would not support a finding of predominance, as it does not address the right question.

The predominance prong of Rule 23(b)(3) does not ask whether there is an overlap in the *causes of action* asserted by class members. Rather, it asks whether "members of a proposed class will need to present *evidence* that varies from member to member" or whether "the same *evidence* will suffice for each member." *Tyson Foods, Inc. v. Bouaphakaeo*, 136 S. Ct. 1036, 1045 (2016) (emphases added). Predominance, in other words, is about the *proof* required to establish individual class members' claims. *See In re Am. Med. Sys.*, 75 F.3d at 1081 (finding predominance unsatisfied where proof would "vary from plaintiff to plaintiff"). So even if credited, plaintiffs' unsupported (and inaccurate) assertion that most of the class had "brought identical common law and statutory claims," Pls. Certification Motion, R. 1820-1 at PageID # 56737, would be beside the point.

Here, plaintiffs were seeking certification of a class of tens of thousands of government entities across the United States that have presented claims under the laws of all 50 states and some territories. It is self-evident that resolution of these varying claims cannot be accomplished predominantly through common, class-wide proof, because there is a substantial variation in the circumstances of each class member, which would present a host of individualized issues.

Within a given plaintiff jurisdiction, the nature and scope of harms allegedly associated with opioid misuse and addiction vary across numerous factors – including economic conditions, demographics, the mix of available illegal drugs, and local regulation of prescribing and dispensing practices. *See* Appellants' Opp., R. 1949 at PageID # 119767. Differences in the state laws that would govern class members' claims further compound these disparities. *See Amchem*, 521 U.S. at 624 (differences in state law "undermin[e] class cohesion"); *Pilgrim*, 660 F.3d at 946 (same).

Apparently recognizing these overwhelming challenges, the district court tried to avoid the problem by declining to analyze predominance for the claims of the class as a whole. Instead, in an effort to circumvent the predominance hurdle, the district court simply eliminated from consideration the numerous non-common issues and claims, including all

the state-law claims asserted by class members. It "certified" only federal RICO claims, notwithstanding the fact that a large proportion of the class – including some class representatives – do not even assert RICO claims.[17] The court also relied on "issue" certification for two issues under the federal Controlled Substances Act.[18]

Even if it were permissible to manufacture predominance by looking only at a gerrymandered subset of claims and issues, the district court's analysis was flawed on its own terms. Courts regularly decline to certify RICO classes, because proving causation for RICO claims typically necessitates individualized proof. *See, e.g.*, *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 87 (2d Cir.

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[17] Five class representatives have not asserted RICO claims. *See* Appellants' Opp. Ex. 2, R. 1949-2. RICO claims are similarly non-existent among the hundreds of class members who have cases pending in state court. *See id.* Ex. 4, R. 1949-4.

[18] Those issues were "the nature of each Defendant's obligations under the Act and the question of whether each Defendant complied with those obligations." Certification Op., R. 2590 at PageID # 413605. The district court did not assert (and could not have reasonably asserted) that resolution of these "issues" would have resolved any claims. There is no private right of action under the Controlled Substances Act, and its indirect significance – if any – to the claims asserted by class members is hotly disputed. Moreover, there was (and could be) no showing that either of these "issues" could be resolved through common proof as to the activities of all defendants within the jurisdictions of all class members during all pertinent time periods.

2015); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-65 (9th Cir. 2004). Individualized causation issues would predominate here.

To establish causation, a RICO plaintiff must allege a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). This would require examination of the marketing, distribution, and/or sale of prescription opioids *by each defendant*, with specific reference to *each plaintiff's jurisdiction*. Excessive distribution of opioids in a town in Montana would be irrelevant to the claims of a county in Alabama – and vice versa. In other words, the evidence required for each jurisdiction to show that the alleged practices of a given defendant *directly* caused it harm would substantially "vary from plaintiff to plaintiff." *In re Am. Med. Sys*, 75 F.3d at 1081 (decertifying class); *see also Wal-Mart*, 564 U.S. at 343-54, 356-60 (rejecting certification where establishing liability required reference to evidence specific to local events affecting each plaintiff).

Again avoiding difficult questions by ignoring them, the district court focused on a small piece of the causation inquiry: whether plaintiffs asserting misrepresentation-based RICO claims can assert third-party reliance rather than proving that they themselves relied on the alleged misrepresentations. *See* Certification Op., R. 2590 at PageID # 413604.

Because class members with misrepresentation-based RICO claims could *theoretically* prove third-party reliance through class-wide proof, the district court declared that the entire question of causation was "common." *Id.* at PageID # 413605-06.

Regardless of whether the district court's view of third-party reliance was correct, it would not follow that the causation element of a RICO claim could be proven against all of these defendants through common evidence.[19] Misrepresentation-based RICO claims are asserted against only *some* of the defendants (the manufacturers of prescription opioids); the RICO claims against the wholesale distributors are based on an entirely different theory. *See* Certification Op., R. 2590 at PageID # 413590.[20]

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[19] It also says nothing about whether the *other* elements of a RICO claim could be established through common proof. Plaintiffs offered a few broad assertions on this subject in their briefs, but they identified no specific *evidence* that would, for example, allow a plaintiff in Jefferson County, Alabama to prove excessive shipments or dispensing in its jurisdiction by *each of the defendants* based on the same proof presented on those points by Grand Forks, North Dakota. Plaintiffs did not even purport to establish that every defendant does business in all of the class jurisdictions.

[20] In fact, third-party reliance could not be a basis to establish predominance even against the manufacturers. As the Second Circuit observed in *Sergeants Benevolent Ass'n*, third-party reliance will typically not be susceptible to common proof in the pharmaceutical marketing context, given "the individualized nature of physicians' prescribing

The district court's reliance on issue certification was equally misplaced. Issue certification under Rule 23(c)(4) is available only when a trial is contemplated. For example, the Rule may be used to permit "class litigation as to liability" issues "while leaving damages for individual determinations." *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 792 (6th Cir. 2016). Thus, "[a]n issue-class approach contemplates … common issues [for the class being] tried first, followed by individual trials on [individualized] questions." Manual for Complex Litigation (Fourth) § 21.24. By contrast, courts do not rely on issue certification to certify settlement classes (which require the settlement of entire *claims*) – and it is likewise logically irrelevant to any class certified to "negotiate" the settlement of claims.

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decisions." 806 F.3d at 90 (internal marks and citation omitted). No record was established here to support a contrary conclusion. Moreover, even when third-party reliance is relevant to the causation question, it cannot alone resolve that question. Plaintiffs must still prove a "chain of causation" that ties the misrepresentation and reliance to their own injuries. *Id.* at 94; *see UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 133 (2d Cir. 2010) ("[W]hile [plaintiffs' own] reliance may not be an element of the cause of action, … the plaintiffs … must prove, third-party reliance as part of their chain of causation."); *see also Poulos*, 379 F.3d at 665 (plaintiffs must "connect the dots" between misrepresentations and their own injury).

The most fundamental flaw in the district court's attempt to deal with predominance by "certifying" only as to RICO claims and two issues is that they were no more than a sliver of what the class was certified to "negotiate." The court certified the class to negotiate (and attempt to settle) "*any* … claims," state or federal, "arising out of a common factual predicate." Certification Op., R. 2590 at PageID # 413617. Indeed, the court suggested that the negotiation class "process is … likely to promote global settlement" of the opioid litigation. *Id.* at PageID # 413580.

The district court's focus on RICO claims and two CSA issues was ultimately nothing more than an attempt to circumvent Rule 23's requirement that predominance be established for the *entirety* of the claims that a class is certified to address.[21] In addition to the broad variation in the facts and evidence bearing on individual class members'

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[21] It is not unusual for a district court to certify a proposed class for only some of the claims presented in a complaint. *See, e.g.*, *In re Myford Touch Consumer Litig.*, 2016 WL 7734558, at *23-28 (N.D. Cal. Sept. 14, 2016); *In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 221, 239 (D. Kan. 2010). But in those situations the "class" aspect of the case proceeds only with respect to those claims. A court cannot certify a class with respect to only some claims and then permit the case to proceed on a class basis with respect to others.

claims, most of the claims that would be included in any negotiations for this "negotiation class" are *state law* claims – such as claims for public nuisance, for which state laws vary dramatically.[22] And this Court has repeatedly warned that differences in applicable state laws will "cast a long shadow over any common issues of fact plaintiffs might establish." *Pilgrim*, 660 F.3d at 946; *see also Amchem*, 521 U.S. at 625 (noting that mass tort claims are "ordinarily not appropriate for class treatment" as such cases are "likely to present significant questions, not only of damages but of liability and defenses of liability, affecting … individuals in different ways") (internal marks and citation omitted). The district court's discussion of predominance ignores this fact.

Under the district court's approach, virtually any class could be certified so long as a court managed to identify any issue bearing some relation to class members' claims. But, as the Supreme Court has observed,

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[22] Plaintiffs' own estimates indicate that between 88.2% and 100% of the class has asserted public nuisance and negligence claims – each under the law of the plaintiff's home state. *See* Pls. Certification Motion, R. 1820-1 at PageID # 56736. Because the district court chose not to address these state-law claims, it did not have occasion to confront the record demonstrating that state laws on claims of public nuisance vary widely. *See* Appellants' Opp., R. 1949 at PageID # 119770-71 & n.29; Defs.' Br. Viability Public Nuisance Claims Nationwide, R. 1404 at PageID # 38745-66.

while "[a]ny competently crafted class complaint literally raises common questions," Rule 23 requires considerably more for class certification. *Wal-Mart*, 564 U.S. at 349 (internal marks and citation omitted).

C. Conflicts of Interest Precluded a Finding of Adequacy of Representation.

The "negotiation class" certified by the district court also failed to satisfy the requirement of Rule 23(a)(4) that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

This Court generally evaluates two criteria to determine adequacy of representation: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012) (quoting *In re Am. Med. Sys.*, 75 F.3d at 1083).[23] As with the other requirements of Rule 23, the district court must conduct a

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[23] *See also Amchem*, 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013) (reversing adequacy determination due to conflict among class members); *Schlaud v. Snyder*, 785 F.3d 1119, 1126 (6th Cir. 2015) (adequacy not satisfied due to conflict between class members).

"rigorous analysis" to determine whether adequacy of representation has been established. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851 (6th Cir. 2013).

When a class proposal relates to judicial approval of a settlement under Rule 23(e), adequacy of representation should be "scrutinized more closely, not less," because the district court "cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation – namely, the class." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718, 721 (6th Cir. 2013); *see also Amchem*, 521 U.S. at 620 (adequacy of representation requires "undiluted, even heightened, attention" in settlement context). If a "negotiation class" were permissible at all, this enhanced standard would apply logically in that context as well.

Here, the structure of the negotiation class itself precludes the required finding that the class representatives "will vigorously prosecute the interests of the class." *Young*, 693 F.3d at 543. Unlike a class certified for litigation under Rule 23(b) or for entry of judgment on a settlement under Rule 23(e), the class representatives here are not required to prioritize prosecution of the interests of the class in negotiating a settlement over and above their own litigation interests. Because the class was certified without reference to the class representatives' own lawsuits,

they remain free to pursue litigation of those suits without considering the interests of absent class members. This is fundamentally inconsistent with the concept of class representatives "adequately" representing the class.

Ordinarily, proposed class representatives are deemed inadequate if their independent litigation interests are not in alignment with the interests of the class. *See, e.g.*, *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013).[24] Here, any choice of the named plaintiffs to pursue "negotiations" in preference to litigation of their own claims would be voluntary; no *duty* is imposed on them to prioritize the interests of the class over their own litigation interests. Indeed, the district court stressed that parties remain free, not merely to litigate their claims independently, but also to enter into individual *settlements*. *See* Certification Order, R. 2591 at PageID # 413623.[25] The district court's opinion failed entirely to grapple with the fact that class representatives would not be subject to the usual

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[24] Representatives of a settlement class have by definition foregone the ability to litigate their own claims in favor of the settlement.

[25] The inconsistency between this situation and the fundamental obligations of a class representative was conceded by plaintiffs with respect to Summit County, which was originally proposed as a class representative but was withdrawn after it settled its individual claims with several of the defendants. *See* Class Counsel's Am. Supp. to Renewed Am. Mot., R. 2583 at PageID # 413493. Nothing in the court's certification order prohibits any class representative from doing the same.

duty to prioritize the interests of the class, and its finding of adequacy is invalid for this reason alone.

Conflicts of interest exist across multiple other dimensions as well. *First,* the negotiation class fixes future settlement allocations only at the county level. The allocations *within* a county – including to towns, cities, and other municipalities, all of whom are also class members – are left for future negotiation and, if necessary, resolution by the court.[26] Since any final approval of a settlement and entry of judgment by the court must incorporate the actual allocation to each class member, *see, e.g.*, *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531 (E.D. Mich. 2003), deferral of this issue means that the design of any actual settlement will require negotiation, not just with defendants, but within the class itself.

Second, there is an inherent conflict between class members who are seeking monetary recovery to address the past effects of an opioid crisis in

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[26] *See* Class Counsel's Notice Plan Ex. A, R. 2583-1 at PageID # 413507 ("Counties and their constituent cities, towns, and boroughs may distribute the funds allocated to the county among all of the jurisdictions in any manner they choose. If the county and cities cannot agree on how to allocate the funds, the Class website reflects a default allocation that will apply .... Any of the affected jurisdictions may ask a Special Master to apply a different formula.").

their geographic areas and others who are more focused on seeking forward-looking, prophylactic injunctive relief.[27] Plaintiffs reductively suggested that no member of the class "has any interest other than in abating the epidemic by maximizing relief to cities and counties," Pls. Reply Br. Supp. Renewed Am. Mot. Cert., R. 2076 at PageID # 286368, and that "all plaintiffs here are aligned in seeking to hold Defendants accountable for the same common course of conduct," *id.* at PageID # 286371. This argument is accurate only in the superficial sense that all plaintiffs want to win; it fails to account for the different types of *relief* that different class members would seek. *See Amchem*, 521 U.S. at 626 (finding "the interests of those within the single class … not aligned" given differing interests in "immediate payments" or "future"-oriented relief).

The district court brushed aside these and other serious conflict of interest issues, asserting, without meaningful analysis, that there is no

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[27] Plaintiffs offered no evidence to address this issue, although Appellants identified it as an important consideration that had already come up in this MDL. For example, a group of public health organizations had previously filed an *amicus* brief urging the court to ensure that any settlement funds be used for forward-looking addiction treatment and recovery programs. *See* Amicus Br., R. 1607-1 at PageID # 45070-71. The City of St. Louis filed a brief in response arguing that local governments should retain the discretion to disperse funds how they saw fit, including to cover past costs. Mem. Pl. City of St. Louis Resp. Br., R. 1623 at PageID # 45184.

"fundamental conflict" here. Certification Op., R. 2590 at PageID # 413598. This conclusory statement fell far short of satisfying the district court's obligation to conduct a rigorous analysis of the specific concerns that opponents of certification had identified. The district court was similarly incorrect in suggesting that no adequacy of representation problem could exist unless there was one "set of interests shared by all counties that fundamentally conflicts with one set of interests shared by all cities." Certification Op., R. 2590 at PageID # 413599. It was not necessary for the interests of *all* counties to conflict with those of *all* cities (or any other segment of the class). Rule 23 instead requires courts to evaluate "whether the class members have interests that are … antagonistic to one another." *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000). In the context of this class, the answer is plainly "yes."[28]

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[28] Conflicts of interest also arise because the counsel for many class representatives also represent other clients whose interests are adverse to that of the class, including states. Plaintiffs conceded that any "global peace" in this litigation would require negotiation with the states. Pls. Certification Motion, R. 1820-1 at PageID # 56666. Having attorneys on both sides of these negotiations is an irreconcilable conflict that alone should defeat a finding of adequacy. *See Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002) (holding that adequacy evaluation must consider both the class representative and its counsel, as "it is counsel for

III. The Class Notice Approved by the District Court Does Not Satisfy Due Process.

Rule 23(c)(2)(B) requires "the court [to] direct [notice] to class members" that "clearly and concisely state[s] in plain, easily understood language" the information class members need in order, *inter alia*, to make an informed decision on whether to opt out of the class. *Id.*; *see Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 423 (6th Cir. 2012) (notice must "contain information reasonably necessary to make a decision to remain a class member") (citation omitted); *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23 protections are "grounded in due process").

The notice approved by the district court was fundamentally deficient. Rather than providing all of the necessary information in the notice itself, class members were instead referred to a website maintained by plaintiffs for critical details about the proposal. *See* Class Counsel's Notice Plan Ex. A, R. 2583-1 at PageID # 413507. But most of the *content* of that website is neither in the record nor mandated by the district court's

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the class representative … who direct and manage" its actions in the litigation) (citation omitted). Recognizing this as an issue, the district court appointed as "class counsel" only members of the PEC who did not also represent states. Certification Op., R. 2590 at PageID # 413601-02. But the court then proceeded to appoint as class representatives numerous parties whose counsel have the same conflict of interest. *See* Appellants' Opp. Ex. 2, R. 1949-2.

order certifying the class. Plaintiffs did not present, nor did the district court order, any expert or other evidence to guarantee the accuracy and reliability of the formulas, programming, and data the website uses to inform class members of their projected shares of any settlement. And in fact, the website's content has already changed in ways nowhere reflected in the record. *Compare* Appellants' Opp. Ex. 1, R. 1949-1 at PageID # 119794-816 (describing the website and providing screenshots of some of the pages that have since been changed), *with* https://opioidsnegotiationclass.info/.

Reliance on plaintiffs' website for class notice, without any supervision or input from the court, was an abdication of the district court's duty "to provide the best notice practicable .... [and] to protect against a misleading or one sided presentation." *In re: Se. Milk Antitrust Litig.*, 2011 WL 13122693, at *1 (E.D. Tenn. Jan. 19, 2011) (citing *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985)); *see also Chemi v. Champion Mortg.*, 2006 WL 7353427, at *8-9 (D.N.J. June 21, 2006) (noting "improper distribution of notice (mainly by posting information

about the lawsuit on a website) … without the input or participation of defense counsel or the court").[29]

Second, the website and approved class notice are strikingly incomplete in their explanation of how the allocation operates – especially with respect to the intra-county allocation of funds, where there is only a proposal of how settlement funds *might* be apportioned. Indeed, the notice is not only incomplete but affirmatively misleading insofar as it suggests to class members that they will be guaranteed a portion of any settlement, when that is not accurate. The reality is that *no* class member truly knew at the time of the opt-out period's expiration the full formula that will determine its share of any settlement; at best, class members were informed only of a *possible* allocation.

Plaintiffs attempted below to dismiss concerns about their notice plan on the basis that knowledge of this litigation is widespread. *See* Pls. Reply Br. Supp. Renewed Am. Mot. Cert., R. 2076 at PageID # 286362 (noting

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[29] Appellants do not contend that it is inappropriate to use a website to supplement the information that can be conveniently supplied in the notice document mailed or emailed to class members. The flaw here was in the district court's abdication to plaintiffs' counsel of responsibility for the *content* of that website, making no effort to direct the content of the website or even to make a record of its content.

extensive media coverage). This misses the point. The information that was lacking included the actual mechanics of this novel class structure, what a particular class member could reasonably expect, and what its options would be. The notice here was deficient in providing this critical information.

IV. Appellants Have Standing to Bring this Appeal.

In opposing Appellants' petition for review under Rule 23(f), plaintiffs took the position that Appellants lack standing to bring this appeal because the district court's class certification order does not require any Appellant to engage with the Negotiation Class. There is no merit to this argument.

Appellants, all of whom are defendants in the MDL proceedings below, are "aggrieved" by the district court's class certification decision, *i.e.*, they have a "stake in the controversy" for purposes of appellate standing. *City of Cleveland v. Ohio*, 508 F.3d 827, 836-38 (6th Cir. 2007) (quoting *Bryant v. Yellen*, 447 U.S. 352, 368 (1980)); *see Vogel v. City of Cincinnati*, 959 F.2d 594, 599 (6th Cir. 1992) ("if there is some detriment to the party challenging the decree, that party has sufficient standing"). Appellants face material harm from the improper certification, as it diverts resources away from permissible modes of resolving cases in this national MDL towards an

unauthorized mechanism that is independent of any judicial function, is replete with conflicts of interest, cannot be relied upon to achieve meaningful results, and is structured so that any settlement that might be reached would be vulnerable to attack.

Appellants also have a concrete interest in reversal of the district court's certification based on inaccurate and unsupported Rule 23 findings. The district court attempted to wall off those findings from potential future application by stating that its decision would have no precedential effect and even prohibiting parties from attempting to invoke it for that purpose. Certification Order, R. 2591 at PageID # 413623-24 ("[N]o class member or any party … to this proceeding may cite this Order or the accompanying Memorandum Opinion as precedent" and "Persons not parties to this proceeding are informed that [the Order and Memorandum] are not intended to serve as a precedent in support of, or in opposition to, any motion for class certification of any type pursued in any court on opioid-related matters."). As of this writing, this prohibition has already been ignored by parties in one set of opioid cases, who seek to rely on the district court's purported Rule 23 findings in support of certification of a litigation class. *See* NAS Guardians' Consolidated Mem. Law Supp. Mot. Class Cert.

Mot., R. 3066-1 at PageID # 477677-744 (citing the Negotiation Class Order and Memorandum more than a dozen times).

Appellants also have an interest in ensuring that any class certification in this litigation complies with the requirements of Rule 23 and Article III, because the "negotiation class" mechanism is of practical value only if, at the end of the day, it generates enforceable settlements. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 337 (1980) ("a concern that … success in some unspecified future litigation would be impaired by *stare decisis* or collateral-estoppel application of the District Court's ruling … [will] suppl[y] the personal stake in the appeal required by Art[icle] III").

Similarly, Appellants have a legitimate interest in making sure that any class notice procedures comply with Rule 23 for the simple reason that any settlement reached through this negotiation class mechanism would otherwise be subject to future collateral attack on this ground. *See, e.g.*, *Gooch*, 672 F.3d at 420. An effort to resolve another unusually large mass tort litigation – the asbestos litigation – was undone by the Supreme Court precisely because the class was improperly certified. Other mass settlements have suffered a similar fate when due process was lacking. *See, e.g.*, *Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d

135, 158-66 (2d Cir. 2016) (overturning "free and clear" sale provision in GM's 2009 bankruptcy plan as applied to litigation brought after the plan's confirmation by plaintiffs who did not receive adequate notice of the plan).

V. Conclusion

The district court's certification of a "negotiation class" should be reversed.

DATED: February 7, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,813 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1).

This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in Georgia, 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2020, the undersigned electronically filed the foregoing with the Clerk of Court using the Court's CM/ECF System, which will send notification of the filing to all counsel of record.

Dated: February 7, 2020 /s/ Sonya D. Winner

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g), the following documents from the District Court are relevant to this appeal:

Rec. No.	Description	Page ID # Range
1404	Defendants' Brief on Viability of Public Nuisance Claims Nationwide	38745-66
1607-1	Public Health Organizations' Amicus Brief Supporting Settlement with Favorable Public Health Outcomes	45070-71
1623	Memorandum of Plaintiff City of St. Louis in Response to Public Health Organizations' Amicus Brief	45184
1690-1	Plaintiffs' Corrected Memorandum in Support of Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	47101, 47109
1723	Certain Pharmacy Defendants' Opposition to Plaintiffs' Corrected Motion for Certification	51619-21
1726	Attorney Generals' Letter re: Plaintiffs' Corrected Notice of Motion and Motion for Certification	51634-38
1727	Attorney Generals' Letter re: Plaintiffs' Notice of Motion and Motion for Certification	51639-53
1745	Order Granting Leave to Amend Plaintiffs' Motion for Certification	51786
1820-1	Plaintiffs' Memorandum in Support of Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class	56649-790
1821	Declaration of Mark A. Flessner Supporting His Appointment as Class Counsel	56811-12
1949	Memorandum of Certain Defendants in Opposition to Plaintiffs' Renewed and Amended Motion for Certification	119733-119789

	of Rule 23(b)(3) Cities/Counties Negotiation Class	
1949-1	Declaration of Jessica Merry Samuels	119794-816
1949-2	Proposed Class Representative Complaints Defendants Sued and Claims Asserted	119818-834
1949-3	Randomly Selected Class Members' Complaints Defendants Sued and Claims Asserted	119836-47
1949-4	Texas Opioid MDL Cases Defendants Sued and Claims Asserted	119849-57
1951	Attorney Generals' Letter re: Plaintiffs' Renewed and Amended Notice of Motion for Certification	119886-97
1955	Attorney General of Nevada's Letter re: Plaintiffs' Renewed and Amended Notice of Motion for Certification	119914
1958	Certain Plaintiffs' Memorandum in Opposition to Renewed and Amended Motion for Certification	129866-80
1973	Attorney General or Ohio's Letter re: Plaintiffs' Renewed and Amended Notice of Motion for Certification	209115-19
2076	Plaintiffs' Reply Brief in Further Support of Renewed and Amended Motion for Certification	286362-68
2529	Order Directing Special Master Yanni to Assess Fairness of Allocation and Voting Proposals to Non-Litigating Entities	408958
2583	Interim Co-Lead Class Counsel's Amendment and Supplement to Renewed and Amended Motion for Certification	413489-93
2583-1	Proposed Class Action Notice and Frequently Asked Questions	413496-510
2590	Memorandum Opinion Certifying Negotiation Class	413578-617

2591	Order Certifying Negotiation Class and Approving Notice	413618-25
3066-1	The NAS Guardians' Consolidated Memorandum of Law in Support of Their Motion for Class Certification	477677-744