I. INTRODUCTION

Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") governs class action certification. The prerequisites of class action certification are numerosity, commonality, typicality, and adequacy of representation. When confronted with the issue of class certification, the United States Supreme Court stated that courts must rigorously apply the requirements of Rule 23. In recent decades, many circuits of the United States Court of Appeals have recognized that in addition to the express requirements of Rule 23, there is an implied requirement that a proposed class must be ascertainable. While this threshold of ascertainability is generally recognized by the circuit courts, there is a current divide regarding the precise definition or requirements of ascertainability.

3. Id. Rule 23 states that the four prerequisites to class certification are: (1) "[That] the class is so numerous that joinder of all members is impracticable;" (2) "There are questions of law or fact common to the class;" (3) "The claims or defenses of the representative parties are typical of the claims or defenses of the class;" (4) "The representative parties will fairly and adequately protect the interests of the class." Id.
4. See Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (emphasizing that a plaintiff class must satisfy the requirements of Rule 23(a) and provide evidence satisfactory to Rule 23(b)'s standards); Amgen Inc. v. Conn. Ret. Plans and Tr. Funds, 133 S. Ct. 1184, 1194 (2013) (referencing Dukes in affirming that a "rigorous" analysis of Rule 23 must be performed by courts in determining class certification); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011) (stating that certification is only warranted when the prerequisites of Rule 23(a) have been satisfied).
5. See Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., 821 F.3d 992, 995 (8th Cir. 2016) [hereinafter Sandusky III] (noting the trend of circuit courts imposing an ascertainability standard); EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (requiring proposed classes be readily identifiable); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-93 (3d Cir. 2012) (recognizing the importance that a class be ascertainable).
6. See Mullins v. Direct Dig., LLC, 795 F.3d 654, 657-58 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016) (rejecting the Third Circuit's test adhering to a rigorous analysis using Rule 23); Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015) (explaining the Third Circuit has a two part test to determine if a proposed class is ascertainable: (1) the class must be defined in reference to objective criteria, and (2) there must be a reliable and administratively feasible method for determining who the class members are); Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537-38 (6th Cir. 2012) (noting the Sixth Circuit currently requires a class be administratively feasible to presently determine who the members of the class are).
In Sandusky Wellness Center, LLC v. Medtox Scientific, Inc., the United States Court of Appeals for the Eighth Circuit pronounced that in order to certify a class, courts must adhere to the strict requirements of Rule 23, which includes a requirement that classes must be sufficiently defined and clearly ascertainable. The plaintiffs in Sandusky brought a class action lawsuit against a toxicology lab after receiving unsolicited advertisements to their fax machines. The Eighth Circuit reversed the United States District Court for the District of Minnesota’s denial of class certification after determining the class was ascertainable and satisfied the requirements of Rule 23.

This Note will discuss the Eighth Circuit’s standard of ascertainability and the issues that accompany it. First, this Note will present the facts and holding of Sandusky. Next, this Note will discuss the origins and evolution of Rules 23(a) and 23(b)(3). The United States Supreme Court’s precedent regarding class certification will then be discussed. This Note will also survey the recent circuit split on the meaning of ascertainability. Finally, this Note will argue the Eighth Circuit’s standard of determining ascertainability is too vague and creates the risk of district courts impermissibly inquiring on the merits of a case at the class certification stage.

II. FACTS AND HOLDING

In Sandusky Wellness Center, LLC v. Medtox Scientific, Inc., the United States Court of Appeals for the Eighth Circuit reversed the United States District Court for the District of Minnesota’s denial of class certification. Sandusky Wellness Clinic (“Sandusky”) brought a putative class action lawsuit under the Telephone Consumer Protection Act (“TCPA”) against Medtox Scientific Incorporated (“Medtox”).

7. 821 F.3d 992 (8th Cir. 2016).
8. Sandusky III, 821 F.3d at 996.
9. Id. at 994.
10. Id. at 997-98.
11. See infra notes 158-203 and accompanying text.
12. See infra notes 17-56 and accompanying text.
13. See infra notes 57-68 and accompanying text.
14. See infra notes 69-112 and accompanying text.
15. See infra notes 113-157 and accompanying text.
16. See infra notes 158-203 and accompanying text.
17. 821 F.3d 992 (8th Cir. 2016).
after receiving unsolicited faxes advertising Medtox’s lead testing services. Medtox amassed a contact list of 4,210 fax numbers and successfully sent advertisements to 3,256 numbers, including Sandusky. Medtox initially received Sandusky Wellness Center’s fax number from a health insurance company that obtained the clinic’s number from Dr. Bruce Montgomery, who worked at the clinic once a week. The owner of the clinic, Dr. Gregg D. Winnestaffer, was not the listed contact for the clinic. After receiving the unsolicited fax that did not contain a proper opt-out provision, as required by the TCPA, Sandusky’s legal counsel filed a class action lawsuit. Sandusky prayed for five hundred dollars in statutory damages and a permanent injunction against Medtox.

The proposed class was defined as (1) all individuals who, up to four years before filing the action, (2) were sent faxes regarding Medtox’s lead testing services, and (3) that did not contain a proper opt-out notice. Medtox initially moved to dismiss the case, arguing that a class action was not appropriate to adjudicate the matter. The district court denied certification of the class after determining that the class was not ascertainable. The primary support for the district court’s denial of class certification was the amount of individualized inquiry that would be required to determine who the recipients of Medtox’s unsolicited faxes were. In addition to the denial of class certification, the district court granted Medtox’s motion to dismiss in part.

After the denial of class certification, both parties moved for summary judgment. After determining that a settlement offer by

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20. See Sandusky III, 821 F.3d at 994 (recognizing the importance of the opt-out provision required by 47 U.S.C. § 227(b)(1)(E)).
21. Id.
22. Id.
23. Id.
24. Id. Medtox’s faxes contained information about its lead testing services and did not contain an opt-out provision. Id. According to the TCPA, however, the fax must contain an opt-out provision. 47 U.S.C. § 227(b)(2)(E).
25. Sandusky III, 821 F.3d at 996.
26. Id. at 996.
29. Id. The district court stated “[s]imply put, Sandusky’s class definition is untenable because it would take individualized discovery to determine who was ‘sent’ each of the thousands of faxes at issue.” Id.
30. Id. The claim that was dismissed pertained to a series of unsolicited faxes sent by Medtox, of which Sandusky was not a recipient. Id.
Medtox mooted Sandusky’s claim, the district court denied Sandusky’s motion, but granted Medtox’s motion for summary judgment. Medtox offered $3,500 and promised to never send unsolicited faxes to each plaintiff as a settlement. Because the settlement offer exceeded the five hundred dollars initially sought and the promise would accord the equitable relief sought, the district court granted Medtox’s motion for summary judgment. Sandusky appealed the denial of class certification and the ruling on the summary judgment motion to the Eighth Circuit.

The Eighth Circuit first recognized that many circuit courts have noted Rule 23 contains an implied ascertainability requirement in addition to the explicit requirements. The implied ascertainability standard recognized by a number of circuit courts is that a proposed class must be readily identifiable. The court acknowledged that while there is a general recognition of an ascertainability requirement, there is a current circuit split on the precise definition of ascertainability. Explaining the split in the circuits, the Eighth Circuit discussed the opposing notions of ascertainability developed by the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Seventh Circuit. The Eighth Circuit outlined the Third Circuit’s elevated two-part ascertainability test, but noted how the Seventh Circuit rejected that approach. The Third Circuit’s test requires that a class must be defined in reference to objective criteria and there must be an accurate and administr-
tively practical method for determining who the class members are. 41 In contrast, the Seventh Circuit only applies the explicit requirements of Rule 23 without any additional analysis to determine ascertainability. 42 After explaining the reasoning utilized by other circuits, the Eighth Circuit stated the ascertainability requirement is evaluated using a rigorous analysis of Rule 23, which includes a requirement that a class be sufficiently defined and clearly ascertainable. 43

After announcing the standard of analysis to determine the ascertainability of a class, the court highlighted the presence of fax logs as a means to objectively measure the proposed plaintiff class. 44 The Eighth Circuit viewed fax logs, which display the numbers that received a fax from a sender, as a starting point to ascertain the proposed class of unsolicited Medtox fax advertisement recipients. 45 The Eighth Circuit rejected Medtox’s argument that because the fax logs only contained numbers and not names, the class could not be adequately measured. 46 In support of this argument, the court noted that the TCPA defines recipient not as the machines that received the fax, but as the individual or entity who receives the fax. 47 To connect the TCPA’s definition of recipient to fax machines receiving unsolicited faxes, the court looked to individuals who subscribed to the fax machines. 48 Because each fax machine contained information of its owner or lessee, individuals who either owned or leased the fax machine could be objectively ascertained. 49 The court noted that even though the subscriber to the fax machine may not have been the in-

41. Hayes v. Wal-Mart Stores, Inc. 725 F.3d 349, 355 (3rd Cir. 2013) (citing Marcus, 687 F.3d at 593-94).
42. Mullins v. Direct Dig., LLC, 795 F.3d 654, 658 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016).
43. Sandusky III, 821 F.3d at 996. In announcing this standard, the Eighth Circuit aligned with the Seventh Circuit regarding ascertainability by rejecting the Third Circuit’s two-part test, stating that a court should not analyze ascertainability as a preliminary requirement. Id. Sandusky has been subsequently cited by district courts within the Eighth Circuit as the guideline for ascertainability analysis. See In re Wholesale Grocery Prods. Antitrust Litig. No. 09-MD-2090 ADM/TNL, 2016 WL 4697338, at *5 (D. Minn. Sept. 9, 2016) (citing Sandusky to support the requirement that a class must be sufficiently defined and clearly ascertainable); Lafollette v. Lib. Mut. Fire Ins. Co., No. 2:14-cv-04147-NKL, 2016 WL 4083478, at *5 (W.D. Mo. Aug. 1, 2016) (citing Sandusky to state that class member ascertainability is not a stand-alone requirement).
44. Sandusky III, 821 F.3d at 997.
45. Id. at 996-97.
46. Id.
47. Id. at 997. The TCPA does not mention ownership of a fax machine, but rather enables a cause of action for a person or entity who suffers damage as a result of the violation. Id. (citing 47 U.S.C. § 227(b)(3)).
48. Id. “The best objective indicator of the ‘recipient’ of a fax is the person who subscribes to the fax number.” Id.
49. Id. (citing 47 U.S.C. § 227 (b)(1)(C)(ii)(I)).
tended or actual recipient of the unsolicited fax, the logs containing
the fax numbers of those who received unsolicited advertisements
made the class clearly ascertainable.\textsuperscript{50} The Eighth Circuit viewed the
presence of fax logs, which could be connected to individual subscrib-
ers, as objective indicators that could measure Sandusky’s proposed
class.\textsuperscript{51} As a result of such objective indicators to measure a class, the
Eighth Circuit determined its ascertainability requirement—that a
class be sufficiently defined and clearly ascertainable—was
satisfied.\textsuperscript{52}

Determining that Sandusky’s proposed class was sufficiently de-
finable and clearly ascertainable, the court then overruled the district
court’s decision that the proposed class failed to satisfy the commonal-
ity and predominance requirements of Rules 23(a)(2) and 23(b)(3).\textsuperscript{53}
The possibility that unsolicited faxes sent by Medtox may have vi-
olated the TCPA was sufficient to determine that a common question of
law predominated over the entire class.\textsuperscript{54} Additionally, whether indi-
viduals actually received unsolicited faxes was also a question of fact
found to satisfy the commonality and predominance requirements of
Rules 23(a)(2) and 23(b)(3).\textsuperscript{55} In determining that the proposed class
was ascertainable and the requirements of Rule 23 satisfied, the
Eighth Circuit reversed the district court’s denial of class certification,
vacated the judgment for Medtox, and remanded the case to the dis-
trict court.\textsuperscript{56}

III. BACKGROUND
A. THE CREATION AND DEVELOPMENT OF RULE 23

The roots of Rule 23 of the Federal Rules of Civil Procedure (“Rule
23”)\textsuperscript{57} are traceable to 1938, when the original Federal Rules of Civil
Procedure were enacted.\textsuperscript{58} The original rule emphasized the nature of
rights asserted by a group of plaintiffs and created three categories of
class actions: true, hybrid, and spurious.\textsuperscript{59} Rule 23 was amended in
1966 to shift the rights-based parameters to enable the rule to be more

\textsuperscript{50} Id. at 997-98.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 998.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Fed. R. Civ. P. 23.
\textsuperscript{58} See Fed. R. Civ. P. 23 advisory committee’s note to the 1937 adoption.
\textsuperscript{59} Robert Bone, Walking The Class Action Maze: Toward A More Functional Rule
common rights; whereas “hybrid” class actions involved several rights, but common
property was involved in the litigation. Id. Lastly, “spurious” class actions claimed sev-
The 1966 amendment added 23(c), which required notice to be provided to class members along with another explicit provision that all class members would be bound by a judgment. The Supreme Court further created the modern putative, or opt-out, form of class action, 23(b)(3) with this amendment. The purpose behind the creation of this form of class action was to create uniformity in small claims of money that would be unreasonable to litigate individually. From its inception, Rule 23(b)(3) held both predominance and superiority requirements. In the creation of Rule 23(b)(3), the 1966 Advisory Committee noted that a court should assess the advantages and difficulties of maintaining a class action, which includes developing means to efficiently progress massive class action litigation, along with evaluating any manageability issues for the court or parties.

In addition to the creation of putative class actions under Rule 23(b)(3), Rule 23(a) was amended to include its four current prerequisites to class action certification: numerosity, commonality, typicality, and adequacy of representation. The Advisory Committee did not elaborate on the purpose of these requirements at length, stating only that they were necessary, but not sufficient, to achieve class certification. Since the shift away from the formal original rule marked by general rights or questions common to the class, but only bound individuals who chose to involve themselves in litigation. Id.

60. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment. The committee noted that the original terms used in Rule 23, primarily “joint” and “common,” were too obscure and led to uncertainty in class action certification. Id.


62. FED. R. CIV. P. 23(b)(3) (1966). The advisory committee noted the importance of creating this category of class action in that it would “achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing out undesirable results.” FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

63. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

64. FED. R. CIV. P. 23(b)(3) (1966). The rule read, “the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Id.

65. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

66. FED. R. CIV. P. 23(a) (1966). “The class is so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a)(1). “There are questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2). “The claims or defenses of the representative parties are typical of the claims or defenses of the class.” FED. R. CIV. P. 23(a)(3). “The representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4).

67. See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (stating that it is necessary for a plaintiff class to satisfy the four requirements of Rule 23(a) to maintain a class action). See also Bone, supra note 59, at 1104 (explaining that the Rule Committee did not elaborate on the application of the 1966 amendments to Rule 23 in great detail).
the amendments of 1966, the Supreme Court has not amended either Rule 23(a) or Rule 23(b)(3), which remain the same today.68

B. THE SUPREME COURT’S EVALUATION OF CLASS CERTIFICATION

In Eisen v. Carlisle and Jacquelin,69 the United States Supreme Court addressed the issue of class action certification.70 Eisen reached the Supreme Court after three rulings from the United States Court of Appeals for the Second Circuit, the last of which ultimately rested on questions of the notice requirement of Rule 23(c)(2) and the manageability requirement of Rule 23(b)(3)(D).71 Eisen was a class action lawsuit against securities traders with around six million members in the class.72 The plaintiffs were buyers and sellers of odd-lot trading, which are transactions trading less than one hundred shares at a time.73 The defendants held a ninety-nine percent share on odd-lot exchanges and were charging both a surcharge and a price differential to their odd-lot investors.74 The plaintiffs advanced the claim that because defendants had monopolized the odd-lot exchange market, they were able to determine price differentials for the exchanges, which violated provisions of the Sherman Act.75 The primary analysis conducted by the court hinged on whether the named plaintiffs were required to provide individual notice to all class members.76 The plaintiffs maintained that individual notice was not necessary because of the substantial cost associated with providing it.77 The United States District Court for the Southern District of New York determined that individual notice was required, but imposed ninety percent of the cost on the defendants.78 The United States Court of Appeals for the Second Circuit reversed, stating that the plaintiffs were required to bear the cost of individual notice.79 On appeal, the Supreme Court agreed with the Second Circuit’s conclusion.80

The Supreme Court also criticized the district court’s interpretation that the Rule 23 analysis included a determination as to whether the merits of a suit qualified for a class action.81 In its criticism, the

72. Id. at 159, 166.
73. Id. at 159-60 n.1.
74. Id. at 160.
75. Id.
76. Id. at 175.
77. Id. at 175-76.
78. Id. at 177.
79. Id.
80. Id.
81. Id.
Court stated that when conducting Rule 23 analysis, there is no authority in either the text of the rule or the history of it that allows for analyzing the merits of a case. The Court warned that if courts venture away from the strict application of Rule 23, substantial prejudice may be inflicted due to unwarranted fact-finding by a court.

In Wal-Mart Stores, Inc. v. Dukes, the Supreme Court addressed the commonality requirement of Rule 23(a). The Supreme Court reversed the United States Court of Appeals for the Ninth Circuit's decision that affirmed class certification of a plaintiff class alleging sex discrimination against Wal-Mart, Inc. The Court evaluated a plaintiff class of 1.5 million female employees of Wal-Mart, one of the largest ever presented to Supreme Court, by applying the requirements of Rule 23(a) and Rule 23(b)(2). The proposed class alleged sex discrimination in local Wal-Mart managers' promotion and pay practices. Wal-Mart's pay and promotion decisions were exercised at the discretion of managers of local stores. The plaintiffs alleged that Wal-Mart, by allowing local managers to exercise broad discretion in pay raises and promotion practices, endorsed local managers in engaging in sex-discrimination by excluding female employees from advancement. The plaintiff class sought injunctive and declaratory relief, along with backpay stemming from unrealized promotions.

The Supreme Court began its analysis by stating the rationale for strictly applying the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—is to ensure that class claims are fairly stated and represented by the named plaintiffs. The Court stated that complying with the strict requirements of Rule 23 is a necessity to achieving class certification.
Before evaluating the plaintiffs’ satisfaction of Rule 23(a), the Court noted that in performing Rule 23 analysis, the merits of a claim are occasionally evaluated simultaneously with the adequacy of the proposed class. The plaintiff class, by merely bringing a claim that Wal-Mart engaged in a pattern of discrimination, failed to satisfy the commonality requirement of Rule 23(a). The Court also stressed the importance of Rule 23(b)(3)’s requirements of the claim’s predominance over class members and the class action’s superiority over other methods of relief, particularly in class actions with small monetary claims.

Again in Comcast Corporation v. Behrend, the Supreme Court analyzed a class certification under Rule 23(b)(3). In Comcast, the Supreme Court reversed the United States Court of Appeals for the Third Circuit’s certification of a proposed plaintiff class for failure to satisfy the predominance requirement of Rule 23(b)(3). The proposed consumer class attempted to satisfy the predominance requirement through an expert’s calculation of individual damages based on regression analysis. The plaintiffs claimed that Comcast’s strategy of acquiring smaller cable companies and centralizing operations in the Northeast violated provisions of the Sherman Act through an increase in subscription cost by 23.9%. The plaintiffs supported their claim of anti-trust violations by using a regression model to display the increase in subscription prices that would result from Comcast’s continuing practice of acquiring smaller cable providers. Reaffirming its precedent of rigorous Rule 23 analysis, the Court stated that the requirements of Rule 23(b)(3) are even more stringent than those in Rule 23(a). Because the damage calculation presented by the plaintiff class failed to demonstrate that a common question of law or fact predominated over the entire class, the Court reversed the circuit court’s grant of class certification.

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94. Id. at 350-51. The Court conceded that in conducting a strict analysis of a class definition using Rule 23(a), there may be overlap between the adequacy of the class and the merits of the claim “that cannot be helped.” Id. at 351.
95. Id. at 353 (citing Falcon, 457 U.S. at 159 n.15) (explaining that to satisfy the commonality requirement of Rule 23(a), a plaintiff must show either (1) a biased testing procedure used to evaluate employees, or (2) substantial proof that an employer advanced a general policy of discrimination).
96. Id. at 362.
99. Comcast, 133 S. Ct. at 1435.
100. Id. at 1431.
101. Id. at 1430.
102. Id. at 1430-31.
103. Id. at 1432 (quoting Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 623-24 (1997)).
104. Id. at 1435.
Lastly, in Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, the Supreme Court affirmed the United States Court of Appeals for the Ninth Circuit’s class certification of a group of investors alleging securities fraud against Amgen, a biotechnology company. Connecticut Retirement Plans and Trust Funds alleged that Amgen committed fraud on the market by making false representations in its publicly available information. Because of this fraudulent information, the plaintiffs claimed that the price they paid for Amgen stock did not accurately reflect the strength of the corporation. The defendant challenged the certification based on the predominance requirement of Rule 23(b)(3). The Court stated that Rule 23(b)(3) requires common questions of law or fact to predominate over an entire class, not that the class would prevail on the common questions. The Court rejected the defendant’s argument to conduct a more searching analysis that would overlap with the merits of the plaintiffs’ claim. Because it decided not to evaluate the merits of the plaintiffs’ claim and instead opted to only evaluate whether the common questions of law or fact predominate over individual questions, the Court affirmed the Ninth Circuit’s grant of class certification.

C. The Current Circuit Split in the Ascertainability Standard

Despite the lack of express language in Rule 23 regarding ascertainability, many circuit courts of appeal have recognized that the rule contains an implicit requirement that a class must be objectively ascertainable. The United States Court of Appeals for the First

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107. Amgen, 133 S. Ct. at 1191.
108. Id. at 1190-91.
109. Id. at 1191.
110. Id.
111. Id. at 1194-95. The Court opined, “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” Id.
112. Id. at 1203-04.
113. See EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (stating Rule 23 contains an implied requirement that class members be readily identifiable using objective criteria); Matamoros v. Starbucks Corp., 699 F.3d 129, 139 (1st Cir. 2012) (noting that if objective standards can be used to identify class members, a class is ascertainable); Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537-38 (6th Cir. 2012) (explaining “[b]efore a court may certify a class pursuant to Rule 23, ‘the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class.”) (citations omitted).
Circuit requires objective criteria to measure ascertainability. The United States Court of Appeals for the Sixth Circuit also requires a class definition to contain objective criteria to ascertain the class in order to ensure administrative feasibility.

In *Young v. Nationwide Insurance Co.*, the United States Court of Appeals for the Sixth Circuit affirmed the United States District Court for the Eastern District of Kentucky’s certification of ten proposed subclasses defined as Nationwide policy holders in Kentucky. The state of Kentucky had a law that taxes insurance companies on the sale of insurance products. Nationwide subsequently passed the cost of the tax to its policyholders, which included a collection fee. The plaintiff class brought suit against Nationwide claiming policyholders were over-charged on collection fees of taxes paid to local governments. The Sixth Circuit recognized that before engaging in Rule 23 analysis, a class definition must be precise enough to be administratively feasible for the court to determine who the individual class members are. The defendants argued the policyholders in Kentucky were so numerous that discerning individual class members was not administratively feasible. The Sixth Circuit rejected this argument, stating that the size of a proposed class does not necessarily lead to unfeasibility, so long as there is an objective means to determine who the individual class members are.

Nationwide also contested that the proposed definition created an impermissible fail-safe class. The Sixth Circuit stated that a definition creates an impermissible fail-safe class when the court would be required to resolve the merits of a case before determining who the members of a proposed class are. The court cited *Randleman v. Fidelity National Title Insurance Co.*, to emphasize that if a class definition allows parties to be excluded from a class after a resolution

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114. See, e.g., *Matamoros*, 699 F.3d at 139 (mentioning that job titles were objective measurements indicating that a class was ascertainable).
115. See, e.g., *Young*, 693 F.3d at 537-38 (explaining that before class certification under Rule 23, a class definition must be sufficiently precise to ensure administrative feasibility in determining who the members of the class are).
116. 693 F.3d 532 (6th Cir. 2012).
117. *Young*, 693 F.3d at 535.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 537-38 (quoting 5 James W. Moore et al., *Moore’s Federal Practice* § 23.21(1) (3d ed. 1997)).
122. *Id.* at 539.
123. *Id.* at 540.
124. *Id.* at 538.
125. *Id.*
126. 646 F.3d 347 (6th Cir. 2011).
of the merits, the definition was fail-safe and thus impermissible.\textsuperscript{127} The court emphasized that resolution of the merits of a fail-safe class would require a great number of individual determinations, which creates administrative feasibility issues.\textsuperscript{128} The class definition included persons who were charged taxes on their payment of premiums that were either not due at all or due at impermissibly high rates.\textsuperscript{129} The Sixth Circuit determined that because the class members of this case would be included at the resolution of the merits of the case (the determination of liability for potentially unfair rates), the class definition was not impermissibly fail-safe.\textsuperscript{130} Because the class definition (1) enabled administrative feasibility to determine who individual class members were based on the presence of objective measurement, and (2) was not an impermissible fail-safe class, the Sixth Circuit affirmed the district court’s class certification.\textsuperscript{131}

The United States Court of Appeals for the Third Circuit recognized that the prerequisite of ascertainability of a proposed class must be satisfied before engaging in Rule 23 analysis.\textsuperscript{132} The Third Circuit currently applies a two-part ascertainability test: (1) the class must be defined by objective criteria, and (2) there must be a reliable and administratively feasible method of determining whether class members fit the proposed definition.\textsuperscript{133}

In Marcus v. BMW of North America, LLC,\textsuperscript{134} the Third Circuit applied its two-part ascertainability test to a proposed plaintiff class.\textsuperscript{135} In Marcus, the Third Circuit vacated the United States District Court for the District of New Jersey’s certification of a plaintiff class who brought claims of fraud and products liability against BMW.\textsuperscript{136} The proposed class definition included all current or former BMW owners or lessees who purchased Bridgestone run-flat tires in New Jersey from 2006 to 2007 that had gone flat and been replaced.\textsuperscript{137} BMW attacked the class definition on the grounds that BMW’s records could not determine individuals who purchased cars secondhand, and another company manufactured the complained-of

\begin{thebibliography}{10}
\bibitem{127} Young, 693 F.3d at 538. The Sixth Circuit stated in Randleman that a class definition is fail-safe when “[e]ither the class members win or, by virtue of losing, they are not in the class, and therefore, not bound by the judgment.” Randleman v. Fidelity Nat’l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011).
\bibitem{128} Id.
\bibitem{129} Id.
\bibitem{130} Id.
\bibitem{131} Id. at 538-40, 546.
\bibitem{132} Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592-93 (3d Cir. 2012).
\bibitem{133} Byrd v. Aaron’s Inc., 784 F.3d 154, 163 (3d Cir. 2015).
\bibitem{134} 687 F.3d 583 (3d Cir. 2012).
\bibitem{135} Marcus, 687 F.3d at 593-94.
\bibitem{136} Id. at 588.
\bibitem{137} Id. at 590.
\end{thebibliography}
tires, which made it unfeasible to determine who individual class members were.138

The court stated that a class definition is not administratively feasible if the district court must conduct extensive fact-finding to determine who class members are.139 The Third Circuit further stated that if a defendant corporation is unable to apply the class criteria to its internal databases to discern who individual class members are, the definition is not administratively feasible and thus is not ascertainable.140 In vacating class certification, the Third Circuit highlighted the administrative difficulties the defendant would face in determining which individuals were in the class.141 First, BMW of North America did not have a parts manifest detailing the history of the complained-of vehicles.142 Further, BMW claimed it sometimes replaced Bridgestone tires with other types of tires at the request of the customer, and moreover, some flat Bridgestone tires that were replaced were taken to dealers other than BMW, thereby making BMW's task to determine potential class members very difficult.143 Because of these two challenges, the Third Circuit determined the class definition could not provide who individual class members were in an administratively feasible manner, thus failing the second prong of its ascertainability test.144

On the other hand, in Mullins v. Direct Digital, LLC,145 the United States Court of Appeals for the Seventh Circuit rejected the heightened ascertainability standard set forward by the Third Circuit.146 In Mullins, the Seventh Circuit upheld the United States District Court for the Northern District of Illinois's certification of a consumer class.147 The consumer class filed suit against a dietary supplement seller, alleging fraud in its marketing practices.148 The plaintiffs alleged that defendant Direct Digital claimed its product, Instaflex, within the applicable statute of limitations of the respective Class States for personal use until the date notice is disseminated.149

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138. Id. at 593-94.
139. Id. at 593.
140. Id.
141. Id. at 594.
142. Id. at 593.
143. Id. at 593-94. BMW argued that “even if the proper cars with the proper tires could be identified, defendants' records would not indicate whether all potential class members’ Bridgestone [run-flat tires] 'have gone flat and been replaced’ as the class definition requires, because the class is not limited to those persons who took their vehicles to BMW dealers to have their tires replaced.” Id. at 594.
144. Id. at 593-94.
145. 795 F.3d 654 (7th Cir. 2015).
147. Mullins, 795 F.3d at 657.
148. Id. at 658. The plaintiffs defined the class as consumers “who purchased Instaflex within the applicable statute of limitations of the respective Class States for personal use until the date notice is disseminated.” Id.
stafllex, would improve joint mobility and relieve discomfort and pain.\textsuperscript{149} However, the plaintiffs claimed that because the primary ingredient of the medication was nothing more than sugar, the advertisement claims were fraudulent.\textsuperscript{150}

The Seventh Circuit began its analysis by acknowledging that classes must be objectively defined to be certified.\textsuperscript{151} The court stated that class definitions that are defined by subjective criteria—for example, by someone’s state of mind—cannot be certified.\textsuperscript{152} The Seventh Circuit explained that an indicator of objective rather than subjective criteria used to define a class is the allegedly unlawful conduct of the defendant, rather than an individual’s reaction to that act.\textsuperscript{153} However, the court rejected the heightened test used by the Third Circuit, opting to evaluate class definitions by solely applying Rule 23 requirements.\textsuperscript{154} In rejecting the requirement of administrative feasibility, the court was primarily concerned with protecting low-cost consumer class actions.\textsuperscript{155} Instead, the court noted that Rule 23(b)(3)(D) already addresses administrative feasibility.\textsuperscript{156} After determining the proposed class was objectively measurable based on a definite time frame, the court also decided that the proposed class satisfied the commonality requirement of Rule 23(a) and affirmed the lower court’s certification.\textsuperscript{157}

IV. ANALYSIS

In \textit{Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.},\textsuperscript{158} the United States Court of Appeals for the Eighth Circuit examined the adequacy of a class for certification, which was comprised of recipients of unsolicited fax advertisements from MedTox, a toxicology lab.\textsuperscript{159} The appeal in \textit{Sandusky} arose from the United States District

\begin{itemize}
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} at 659 (citing \textsc{William B. Rubenstein, Newberg on Class Actions § 3:3 (5th ed. 2015); Joseph M. McLaughlin, McLaughlin on Class Actions § 4:2 (11th ed. 2014)).}
\item \textsuperscript{152} \textit{Id.} at 659-60 (citing several cases with short general parentheticals about state of mind).
\item \textsuperscript{153} \textit{Id.} at 660 (citing \textsc{William B. Rubenstein, Newberg on Class Actions § 3:3 (5th ed. 2015))}.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} at 662. The court stated “[t]he stringent version of ascertainability effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do.” \textit{Id.}
\item \textsuperscript{156} \textit{Id.} at 663. Rule 23(b)(3)(D) mandates that one factor in certifying a class is the “likely difficulties in managing a class action.” Fxn. R. Civ. P. 23(b)(3)(D).
\item \textsuperscript{157} \textit{Mullins, 795 F.3d at 660-61, 673-74.}
\item \textsuperscript{158} 821 F.3d 992 (8th Cir. 2016).
\item \textsuperscript{159} \textit{Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc, 821 F.3d 992, 994 (8th Cir. 2016)}.\end{itemize}
Court for the District of Minnesota’s determination that the proposed plaintiff class was not ascertainable. The Eighth Circuit declared its standard to determine ascertainability requires application of a strict analysis of Rule 23, which contains an implicit requirement that a class be sufficiently defined and clearly ascertainable. Using this pronounced standard, the Eighth Circuit determined the class was ascertainable because the class members could be objectively measured by connecting individuals or businesses to fax numbers. Therefore, the Eighth Circuit reversed the district court’s denial of class certification and remanded the case to the district court.

This Analysis will argue the Eighth Circuit erred by not maintaining that objective criteria are necessary for a proposed class to be sufficiently defined and clearly ascertainable. Under the Eighth Circuit’s analysis, there is a risk that lower courts will improperly expand ascertainability analysis, and as a result, impermissibly evaluate the merits of the case when determining the adequacy of a proposed class definition. This Analysis will further argue the express requirements of Rule 23 sufficiently evaluate whether a class is ascertainable without the need for additional analysis.

A. The Eighth Circuit’s Ascertaintability Standard is Impermissibly Vague

In the last decade, United States Supreme Court case law has repeatedly stated that putative class certification is dependent on a rigorous application of the requirements of Rules 23(a) and 23(b)(3). The Supreme Court expressly stated that, at the class certification stage, Rule 23 does not grant courts the authority to examine the merits of a case and instead, only allows courts to determine if a class may

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160. Sandusky III, 821 F.3d at 994.
161. Id. at 996. The Eighth Circuit’s analysis to determine the adequacy of the proposed definition rested on the presence of objective indicators—namely, subscribers to phone numbers associated with fax logs—to discern potential class members. Id. at 997-98.
162. Id. at 997-98.
163. Id. at 998.
164. See infra notes 167-203 and accompanying text.
165. See infra notes 167-182 and accompanying text.
166. See infra notes 183-203 and accompanying text.
167. See Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (emphasizing that a plaintiff class must satisfy the requirements of Rule 23(a) and provide evidence satisfactory to Rule 23(b)(3)’s standards); Amgen Inc. v. Conn. Ret. Plans and Tr. Funds, 133 S. Ct. 1184, 1194 (2013) (referencing Dukes in affirming that a rigorous analysis of Rule 23(b)(3) must be performed by courts in determining class certification); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011) (stating that certification is only warranted when the requirements of Rule 23(a) have been satisfied).
be certified. The announced standard in *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.* to determine whether a class is ascertainable includes the Supreme Court’s rigorous analysis, but also states that a class must be sufficiently defined and clearly ascertainable. This standard, without any further guidance, is not clear enough to direct lower courts to only evaluate a class for certification and does not prevent lower courts from expanding ascertainability analysis. Because of the vagueness in this standard, the United States Court of Appeals for the Eighth Circuit went beyond what Supreme Court precedent dictates.

While the Eighth Circuit declared that it adhered to the rigorous analysis standard as set forward in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*, there is no express language in Rule 23 stating that a class must be sufficiently defined and clearly ascertainable. The requirements of Rule 23 do not pertain to the merits

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168. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974). The Court opined, “[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” *Eisen*, 417 U.S. at 177.

169. 821 F.3d 992 (8th Cir. 2016).


171. Compare *Amgen*, 133 S. Ct. at 1195 (noting merits-based questions may only be considered to the extent they are relevant to determining whether the requirements of Rule 23 are satisfied), *with Sandusky III*, 821 F.3d at 996 (pronouncing that in order for a class to be certified pursuant to Rule 23, the class must be sufficiently defined and clearly ascertainable), and *In re Wholesale Grocery Prods. Antitrust Litig., No. 09-MD-2090 ADM/TNL*, 2016 WL 4697338, at *5 (D. Minn. Sept. 9, 2016) (stating that in order for a proposed class to be ascertainable, the class members must be administratively feasible to identify).

172. Compare *Eisen*, 417 U.S. at 177 (explaining that there is nothing in the text of Rule 23 that grants courts the ability to engage in a preliminary inquiry of the merits of a case), *and Dukes*, 564 U.S. at 351 (emphasizing that Rule 23 allows district courts to engage in inquiries related to the merits of the case which are preliminary in nature only when necessary), *with Marcus v. BMW of N. Am.*, 687 F.3d 583, 591 (3d Cir. 2012) (stating that Rule 23 allows courts to make factual findings when determining whether Rule 23’s requirements are satisfied), *and Sandusky III*, 821 F.3d at 998 (expounding on its pronounced ascertainability standard that a finding of common evidence to resolve a claim satisfies Rule 23(b)(3)’s predominance requirement).


175. Compare *Sandusky III*, 821 F.3d at 996 (stating that the Eighth Circuit adheres to a strict application of Rule 23, which includes that a class definition must be sufficiently defined and clearly ascertainable), *and Dukes*, 564 U.S. at 350-51 (emphasizing that actual conformance with Rule 23(a) is absolutely necessary to certify a proposed class), *and Comcast*, 133 S. Ct. at 1432 (stating that courts must thoroughly analyze a proposed class definition to determine the requirements of Rule 23(a) are satisfied) (emphasis added), *with Fero*. R. Civ. P. 23(a)(2) (stating that a proposed class must have common questions of law or fact), *and Fero*. R. Civ. P. 23(b)(3) (stating that a court must find that there are common questions of law or fact that predominate over the entire proposed class), *and Mullins v. Direct Dig., LLC*, 795 F.3d 654, 663 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016) (rejecting heightened ascertainability analy-
of the case, and any additional requirements to certify a class must be applied with this in mind. By engaging in ascertainability analysis separately from the requirements of Rules 23(a) and 23(b)(3), the Eighth Circuit erred in not defining what constitutes a sufficiently defined and clearly ascertainable class.

While the court in Sandusky did not reach the merits of the case and primarily discussed the objective means of measuring the proposed class, the court’s announced standard does not prevent the expansion of ascertainability analysis. The Eighth Circuit’s announced standard only stated that the class must be sufficiently defined and clearly ascertainable. This standard leaves too much room for courts to go beyond evaluating the ascertainability of classes using objective measurements. If district courts apply this standard to promote policy goals not discussed by the Eighth Circuit in Sandusky, ascertainability analysis may expand to meet these policy goals. This lack of guidance could result in an impermissible expansion by stating that the express requirements of Rule 23 already address issues of ascertainability.

176. Compare Mullins, 795 F.3d at 657 (noting that a heightened ascertainability requirement improperly allows courts to analyze merits-based questions at the class certification stage), with EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (stating that a court should only evaluate merits-related questions as necessary to determine whether the prerequisites of Rule 23 are satisfied).

177. Compare Marcus, 687 F.3d at 592-93 (stating that proposed classes must be clearly ascertainable based on objective criteria), and Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537-38 (6th Cir. 2012) (stating that proposed plaintiff classes must be administratively feasible to measure and subject to only one class definition), with Sandusky III, 821 F.3d at 996-97 (stating that a class must be sufficiently defined and clearly ascertainable, but not elaborating on what a class must show to satisfy that standard, and instead focusing on the presence of objective measurements to ascertain class members).

178. Sandusky III, 821 F.3d at 997. Even though the Eighth Circuit announced this standard in Sandusky, a district court within the circuit has determined that objective measurement promotes the goal of administrative feasibility, despite the lack of discussion of that topic within the Eighth Circuit’s analysis. In re Wholesale Grocery Products, 2016 WL 4697338, at *5.

179. Sandusky III, 821 F.3d at 996. While the Eighth Circuit did not state what specifically would satisfy this requirement, the court emphasized the presence of objective indicators of individual class members, which made the class sufficiently defined and clearly ascertainable. Id. at 996-97.

180. Compare Lafollette v. Lib. Mut. Fire Ins. Co., No. 2:14-cv-04147-NKL, 2016 WL 4083478, at *5 (W.D. Mo. Aug. 1, 2016) (incorporating ascertainability analysis into Rule 23’s requirements by evaluating the administrative feasibility of discerning individual class members to satisfy Rule 23(b)(3)’s predominance requirement), and In re Wholesale Grocery Products, 2016 WL 4697338, at *5 (stating that in order for a proposed class to be ascertainable, the class members must be administratively feasible to identify), with Hayes v. Wal-Mart Stores, Inc. 725 F.3d 349, 355 (3d Cir. 2013) (emphasizing the purpose of requiring an objective measurement is to prevent fact-finding by the court at the certification stage).

181. Compare In re Wholesale Grocery Products, 2016 WL 4697338, at *5 (applying Sandusky to ensure the objective measurement of class members, which promotes ad-
pansion of ascertainability analysis, which leads to an improper evaluation of the merits of a case when certification should be the only question answered by Rule 23.\textsuperscript{182}

B. \textbf{T}he \textbf{E}xpress \textbf{R}equirements of \textbf{R}ule 23 \textbf{A}lready \textbf{A}ddress \textbf{A}s\textbf{c}ertainability

The United States Court of Appeals for the Seventh Circuit stated in \textit{Mullins v. Direct Digital, LLC}\textsuperscript{183} that Rules 23(a) and 23(b)(3)s' requirements can be applied to determine if a class is ascertainable.\textsuperscript{184} Rule 23(a)(2) presents a commonality requirement.\textsuperscript{185} Also, Rule 23(b)(3) requires that common questions of law or fact must predominate over the entire proposed class for certification.\textsuperscript{186} Applying the commonality requirement of Rule 23(a)(2) addresses the implied threshold of ascertainability by evaluating the definitiveness of the claim brought by the plaintiff class.\textsuperscript{187} Strictly evaluating a class definition subject to the prerequisites of Rules 23(a) and 23(b)(3) when certifying a proposed class prevents a court from evaluating the merits of a case.\textsuperscript{188} Therefore, applying the commonality requirements of

\textsuperscript{182}Compare \textit{Eisen}, 417 U.S. at 177 (emphasizing that district courts have no authority to conduct inquiries into the merits of a suit at the certification stage), and FED. R. CIV. P. 23 advisory committee's note to 2003 amendment (stating that evaluating the probable outcome of a case is not proper at the certification stage), and \textit{Mullins}, 795 F.3d at 659 (explaining that the purpose of evaluating ascertainability is to only evaluate the adequacy of a definition), with \textit{Sandusky III}, 821 F.3d at 996 (failing to delineate the scope of the requirements of ascertainability beyond the presence of objective measurement, which leaves open the possibility of expanding the ascertainability analysis beyond the pronounced standard that a proposed class must be sufficiently defined and clearly ascertainable).

\textsuperscript{183}795 F.3d 654 (7th Cir. 2015).

\textsuperscript{184}Mullins v. Direct Dig., 795 F.3d 654, 658 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016).

\textsuperscript{185}FED. R. CIV. P. 23(a)(2). “[T]here are questions of law or fact common to the class . . . .” \textit{Id.}

\textsuperscript{186}FED. R. CIV. P. 23(b)(3). “[T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members . . . .” \textit{Id.}

\textsuperscript{187}Compare \textit{Mullins}, 795 F.3d at 658 (critiquing enhanced ascertainability analysis when it emphasized that the policy concerns behind applying heightened ascertainability are better served by applying the explicit requirements of Rule 23(a)), \textit{with Sandusky III}, 821 F.3d at 996 (citing a number of cases to state that the Rule 23's requirements include an implicit requirement that a class must be sufficiently defined and clearly ascertainable), and \textit{Temasters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.}, No. 05 Civ. 1808(SAS), 2006 WL 2161887, at *3 (S.D.N.Y. Aug. 1, 2006) (stating that Rule 23(a)'s commonality requirement implicitly requires that individual class members are identifiable).

\textsuperscript{188}Compare \textit{Mullins}, 795 F.3d at 657-58 (noting that a heightened ascertainability requirement upsets the balance between the difficulty of managing a class action lawsuit with the superiority of the class action to adjudicate a controversy),
Utilizing the commonality requirements in Rule 23(a)(2) and Rule 23(b)(3) to determine if a class is ascertainable successfully prevents class certification if the definition of the proposed class is too vague. Additionally, Rule 23’s express requirements effectively prevent certification of classes defined by subjective criteria. Fail-safe classes, which are defined based on the premise that class members will be included or excluded upon the resolution of the merits of the case, will also fail to be certified by carefully applying Rule 23’s requirements. Lastly, considerations a court must make when determining whether to certify a class under Rule 23(b)(3) include issues of manageability of the litigation by the parties and the court, which is essentially administrative feasibility. Therefore, even without additional ascertainability analysis, inadequate class definitions will still properly fail to meet Rule 23’s requirements.

189. Compare Mullins, 795 F.3d at 672 (stating that a plaintiff’s failure to satisfy the superiority requirements of Rule 23(b)(3) adequately addressed concerns that a proposed class must be ascertainable), with Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (emphasizing that rigorous Rule 23 analysis may necessarily overlap with merits-related questions, but application of the express requirements of Rule 23(a) and Rule 23(b)(3) are vital).

190. Compare Comcast, 133 S. Ct. at 1433 (explaining that plaintiffs’ damages model could only calculate damages under one theory, thus failing to satisfy Rule 23(b)(3)), with Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011) (noting that the plaintiffs’ theory of nationwide discrimination practices by their employer, Wal-Mart, was too imprecise to satisfy the commonality requirement of Rule 23(a)).

191. See Mullins, 795 F.3d at 660 (stating that a class defined by a person’s mental state was subjective and thus would not satisfy the objectivity requirement of Rule 23).

192. See Randleman v. Fidelity Nat’l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011) (noting that a class definition in which individuals could be excluded from a class if the case ultimately was resolved against them is impermissible).

193. Compare Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment (stating that a court must actively assess issues of litigation management when evaluating the superiority requirement of Rule 23(b)(3), and Mullins, 795 F.3d at 672 (explaining that issues of administrative feasibility are already addressed by the superiority requirement of Rule 23(b)(3)), with Marcus, 687 F.3d at 593 (explaining a primary objective of applying the administrative feasibility requirement of ascertainability analysis prevents administrative burdens which go against the efficiencies sought after by class action litigation).

194. Compare Dukes, 564 U.S. at 356 (noting that the plaintiff class definition failed to satisfy the commonality requirement of Rule 23(a) due to a failure to establish that the defendant created a policy of discriminatory actions), and Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012) (stating that the class definition challenging a specific policy of the defendant satisfied the four prerequisites of Rule 23(a)), with Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539 (6th Cir. 2012) (applying the
Further, Rule 23(a) contains requirements of numerosity, commonality, typicality, and adequacy of representation by the named plaintiffs. Under Supreme Court precedent, strictly applying these four requirements is necessary to determine whether a class may be certified. Both Rules 23(a)(2) and 23(b)(3) are measures to prevent vagueness in a proposed class definition. If a proposed class's claims are too dissimilar or vaguely identified, the class will fail to be certified, thereby avoiding the need to address objective ascertainability.

If a class definition satisfies all of Rule 23(a)'s requirements, a proposed putative class must still be defined properly under Rule 23(b)(3). Primarily, a question of law or fact common to all class members must exist, and a class action lawsuit must be the best solution to resolve that question. As such, Rules 23(a) and 23(b)(3) expressly provide two requirements of commonality that address the adequacy of a class definition. By strictly applying the express requirements of administrative feasibility to determine that the time needed for defendant to determine individual class members was not dispositive).

196. See Comcast, 133 S. Ct. at 1432 (explaining that plaintiffs must prove the four requirements of Rule 23(a) to be certified); and Dukes, 564 U.S. at 350-51 (emphasizing that class certification is only proper after proving strict compliance with the requirements of Rule 23(a)).
197. See Comcast, 133 S. Ct. at 1434-35 (emphasizing that the proposed class's use of hypothetical models to show common damages was impermissibly vague); Marcus 687 F.3d at 598 (noting that the class definition of purchasers of defective tires failed to satisfy Rule 23(b)(3) because of the variation in car model driven along with the preexisting knowledge each class member had regarding his or her service).
198. Compare Comcast, 133 S. Ct. at 1435 (stating that the damage calculations failed to meet Rule 23(b)(3)'s requirement that a single question of law or fact predominates over an entire class), with EQT Prod. Co. v. Adair, 764 F.3d 347, 366 (4th Cir. 2014) (noting that an alleged uniform practice of improper employment practices was not sufficient to satisfy the predominance standard of Rule 23(b)(3) and that individual cases would need independent fact analysis).
199. Compare Comcast, 133 S. Ct. at 1432 (emphasizing that Rule 23(b)(3)'s predominance requirement is more demanding than Rule 23(a)), with Amgen, 133 S. Ct. at 1194 (stating that the importance of Rule 23(b)(3) is to ensure that there are common questions of law or fact, which predominate over any individual questions, and compliance is a necessity).
200. See Amgen, 133 S. Ct. at 1191 (stating that a prerequisite to satisfying Rule 23(b)(3) is a showing by a plaintiff that common questions of law or fact predominate over all others). See also Mullins, 795 F.3d at 663 (explaining that the superiority requirement of Rule 23(b)(3) already addresses concerns of administrative feasibility, primarily whether a class action would be the most efficient judicial vehicle for the plaintiffs' claims).
201. Compare Adair, 764 F.3d at 369 (noting the need for individual proof in the form of lease language would strongly affect the outcome of Rule 23(a) analysis), with Dukes, 564 U.S. at 359 (stating the purpose of Rule 23(b)(3) is that a common question of law or fact predominates over all others, and Rule 23(a)(2) requires that there is a common question of law or fact which pertains to the entire class which includes the
quirements in Rule 23, a class that would otherwise be unascertainable will fail class certification. Therefore, the additional ascertainability analysis promulgated by Sandusky was unnecessary.

V. CONCLUSION

In Sandusky Wellness Center, LLC v. Medtox Scientific, Inc., a plaintiff class sought certification in a suit against a toxicology lab after receiving unsolicited fax advertisements. The United States Court of Appeals for the Eighth Circuit announced that class certification is proper if the class definition satisfies the requirements of Rule 23 and is sufficiently defined and clearly ascertainable. The Eighth Circuit overturned the United States District Court for the District of Minnesota’s denial of class certification. The court found that the class was ascertainable due to the presence of objective measurements.

The Eighth Circuit’s announced standard for class action certification, which requires that a proposed class must be sufficiently defined and clearly ascertainable, is impermissibly vague because it did not state that objective measurement was necessary for a class to be ascertainable. Further, the express requirements of Rule 23(a) and 23(b)(3) address issues of ascertainability, making any additional analysis regarding ascertainability unnecessary.

If the Eighth Circuit wishes to retain its current ascertainability standard and ensure that district courts will only evaluate the adequacy of damages sought, and Amgen, 133 S. Ct. at 1191 (stating that a prerequisite to satisfying Rule 23(b)(3) is a showing by a plaintiff that common questions of law or fact predominate over all others). Compare Dukes, 564 U.S. at 366-67 (opining that a class definition was insufficient because of the predominance of individual treatment despite an alleged violation of a single statute), with Amgen, 133 S. Ct. at 1197 (noting that proof of similar, if not exact, fraudulent misrepresentations was sufficient to satisfy the commonality requirements of Rule 23(b)(3)). Compare Mullins, 795 F.3d at 662 (stating that more stringent standards of ascertainability do not further any interest which is currently protected by the express requirements of Rule 23), with Sandusky III, 821 F.3d at 998 (emphasizing that the proposed class satisfied Rule 23(a)(2)’s commonality requirement and Rule 23(b)(3)’s predominance requirement by alleging a violation of federal law by sending unsolicited faxes). 821 F.3d 992 (8th Cir. 2016). Sandusky Wellness Ctr., LLC v. Metox Sci., Inc., 821 F.3d 992, 994 (8th Cir. 2016).

Sandusky III, 821 F.3d at 996.

Id. at 998.

Id. at 997.

See supra notes 167-182 and accompanying text.

See supra notes 183-203 and accompanying text.
quacy of the proposed class definition at the certification stage instead of improperly engaging in fact-finding by applying the current test, the court should state that objective measurement is necessary for ascertaintability. This express requirement would prevent courts from potentially expanding the ascertainability requirement to evaluate administrative feasibility. Alternatively, expanded ascertainability analysis by circuit courts nationwide is not endorsed by United States Supreme Court precedent nor the express text of Rule 23. In order to simplify the class certification process, district courts should adhere to the strict application of Rule 23, which contains provisions that address ascertainability.

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