rejected FDCPA class action defendants' arguments that individualized inquiry is necessary to determine whether a putative class member held a consumer debt so as to trigger the FDCPA in the first instance.[4]

Courts should not have it both ways. A court should not apply a fact-intensive test in an individual case to allow the possibility that the FDCPA may apply, but then apply a less fact-intensive test on the same inquiry in a class action to avoid manageability, superiority. and ascertainability problems. If there is a factual question of whether a debt would be "primarily" a consumer debt so as to trigger the FDCPA, the court should apply a consistent factual test -- whether applied to an individual plaintiff or a putative class member.[5] Also, when class actions are involved, courts should address whether the factual inquiry inherent in an FDCPA class-definition of the term consumer debt creates a recursive[6] fail-safe class definition[7] or leads to a due-process thwarting "say-so" class administration.[8]

This article addresses the effect of the factual inquiry as to whether a debt is "consumer" or "commercial" on certification of an FDCPA class action.

II. The Effect of the FDCPA's Consumer Requirement on Class Certification

A. Procedural Principles Governing Certification of FDCPA Class Actions

Rule 23, Class Actions, requires that a class action satisfy four criteria: numerosity; commonality; typicality; and adequacy of representation. Additionally, Rule 23 requires that "the court find that the 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."[9]

The "predominance" and "superiority" inquiries under Rule 23 require analysis of: "(A) the class membersí interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."[10] These factors, in particular, tend to guide courts addressing class certification under the FDCPA.

B. The Substantive Limitation of the FDCPA's Reach: The FDCPA Applies Only to Consumer Debts

1. Primarily for Personal, Family, or Household Purposes

As noted above at Part I., the FDCPA applies to consumer debts only, governing "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."[11] The words "primarily for personal, family, or household use" were borrowed from the Truth in Lending Act,[12] and are designed to exclude business transactions.[13] A consumer debt with a "minor" commercial purpose still triggers the FDCPA if the debt is was "primarily" a consumer obligation.[14]

2. In Individual FDCPA Cases, Courts Apply an Inherently Factual Test to Determine Whether a Debt is "Consumer" in Nature

Courts have not resolved with precision whether the "consumer" versus "commercial" nature of the debt is decided by examining the parties' intent at origination[15] or by the use of the funds/collateral over the

4. *See, e.g.*, Lewis v. Jesse L. Riddle, P.C., No. 97-0542, 1998 U.S. Dist. LEXIS 20465 (W.D. La. Nov. 18, 1998) ("a review of the published decisions may indicate that it is in the minority in not certifying a class based on concerns as to how this issue will be resolved), Grubb v. Green Tree Servicing, LLC, No. CV 13-07421 (FLW), 2017 WL 3191521, at *18 (D. N.J. July 27, 2017).

5. *Compare* Martin v. Pacific Parking Sys. Inc., 583 Fed. Appx. 803 (9th Cir 2014) (unpublished opinion) (affirming denial of class certification in a Fair and Accurate Credit Transactions Act of 2003 (FACTA) credit card digits truncation case because it could not be uniformly determined whether the cards used were consumer or business cards) *with* Roundtree v. Bush Ross, P.A., 304 F.R.D. 644 (M.D. Fla. 2015) *and* Gold v. Midland Credit Mgmt., Inc., 306 F.R.D. 623 (N.D. Cal. 2014).

6. "Recursion" is a term used in mathematics and logic when the application of a function to its own values generates an infinite sequence of values. *See, generally,* http://en.wikipedia.org/wiki/Recursion.

7. *See, generally* Hyman & Troutman, *Certification of Class Actions Under the Telephone Consumer Protection Act and the Prohibition against "Fail-Safe" Classes*, 68 Consumer Fin. L.Q. Rep. 326 (2014), *rep'd by* the Official Publication of the Consumer & Commercial Law Section of the State Bar of Texas, 10 J. Consumer. & Com. Law No. 1 (Fall 2015); *see generally*, Comment, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769 (April 2013).

8. *See generally*, Shackelford, Selinger & Van Nostrand, *Who's in the "Ascertainable" Putative Class?,* 129 L.A. Daily Journal No. 205 at 7 (Oct. 21, 2016).

9. *See generally,* Hyman & Kenney, *The Effect of the FDCPA's Class-Action Penalty Cap on Class Certification*, 69 Consumer Fin. L.Q. 137 (2016).

10. *See generally*, Kaye, *Satisfaction of Superiority Requirement for Class Actions under the Fair Debt Collection Practices Act, 15 U.S.C.A. §§ 1692 et seq.,* 51 A.L.R.Fed.2d 1 (2010 & Supp.).

11. FDCPA, 15 U.S.C. § 1692a(5). *See, generally,* Anno., *What Constitutes "Debt" and "Debt Collector" For Purposes of Fair Debt Collection Practice Act*, 62 ALR Fed. 552 (2001), 159 ALR Fed. 121 (2000).

12. TILA, 15 U.S.C. § 1602(h). The "consumer" versus "commercial" question under the FDCPA has been decided by some courts by relying directly on Truth in Lending Act decisions. *See, e.g.*: Bloom v. I.C. Sys., Inc., 972 F.2d 1067, 1068 (9th Cir. 1992); Thomson v. Prof'l Foreclosure Corp., No. 98 - CS - 478, 2000 WL 34335866 (E.D. Wash. Sept. 25, 2000), *aff'd*, 86 Fed. Appx. 352 (9th Cir. 2004) (unpublished).

13. *See* TILA, 15 U.S.C. § 1602(h). *See also*: Hunter v. Washington Mut. Bank, No. 2:08-cv-069, 2012 WL 715270 (E.D. Tenn. Mar. 1, 2012) (underlying obligation arose from business-motivated purchase of a multi-unit rental property and was not a consumer debt notwithstanding that the plaintiffs resided in one unit for a period time); Hall, FTC Informal Staff Opinion Letter (Apr. 11, 1988); Green, FTC Informal Staff Opinion Letter (Sept. 21, 1987); FTC Official Staff Commentary § 803(6)-1.

14. *See, e.g.*: Graham v. Manley Deas Kochalski L.L.C., No. 08-cv-120, 2009 WL 891743 (S.D. Ohio Mar. 31, 2009) (refinancing of a mortgage on a residence was covered, since only 10% of the proceeds was used for investment purposes); Randolph v. Crown Asset Mgmt., L.L.C., 254 F.R.D. 513 (N.D. Ill. 2008) ($60.00 business-related expense was included in $12,602.69 credit card debt).

15. *See* Martin v. Wells Fargo Bank, 91 Cal.App.4th 489 (2001) (the California Court of Appeal recognized in other contexts that the "uncertainty caused by the potentially shifting status of the goods is not desirable in the commercial world." Hence, the court of appeal adopted the rule that it is the parties' intent at the time they enter into the contract, rather than the purpose for which the credit is used, that controls).

debt's life-span.[16] The courts generally agree that whether a debt is a consumer debt under the FDCPA depends on its intended use,[17] and that the transaction must be examined as a whole (*i.e.*, neither the lender's motives nor the manner in which the loan is documented solely controls).[18]

A debt that originally was incurred primarily for consumer purposes can remain a consumer debt even if those purposes change and even if there were non-consumer aspects to the original transaction, so long as the transaction as a whole remained primarily consumer-based.[19] Conversely, a commercial transaction can acquire consumer purposes and trigger the FDCPA if the transaction as a whole, on balance, was primarily consumer-based.

In *Slenk v. Transworld Sys. Inc.*,[20] for example, the United States Court of Appeals for the Ninth Circuit examined both point-of-sale conduct as well as the buyer's use of the collateral after the purchase. The facts were as follows. Slenk's Builders purchased a backhoe. The invoice charged it to "Slenk Bldrs," which allowed Slenk's Builders to pay a significantly lower sales tax than Slenk would have paid as ordinary consumer, and the Slenks' tax returns characterized the backhoe as a business asset belonging to Slenk's Builders, thus enabling the Slenks to expense the backhoe's cost. However, the loan documentation indicated that the debt was consumer in nature, that Slenk used the backhoe to build his family home, that Slenk never once used the backhoe for any other purpose, and that he then sold it.[21]

In *Slenk*, the Ninth Circuit found a triable issue of fact as to whether the backhoe was purchased for consumer purposes, thus subjecting the defendant to the FDCPA:

> In making this determination, we have elevated substance over form, holding that "[n]either the lender's motives nor the fashion in which the loan is memorialized are dispositive of this inquiry" and [w]e must therefore "look to the substance of the transaction and the borrower's purpose in obtaining the loan, rather than the form alone."[22]

Slenk involved an individual case under the FDCPA. *Slenk* demonstrates, however, the factual inquiry in which courts engage to potentially trigger the FDCPA. As is shown below, however, courts addressing commonality, manageability, and ascertainability in class actions often refuse to apply such a fact-based inquiry in determining whether the FDCPA applies or to engage in a fact-based inquiry of putative class members.

C. In FDCPA Class Actions, Some Courts Have Applied a Simpler, Non-Fact Based Test in Order to Certify FDCPA Classes

The inherently factual question of whether a consumer debt was involved can and should affect class certification.[23] True, courts evaluating Truth-in-Lending putative class actions generally have found that the consumer-versus-commercial inquiry is not an impediment to class certification.[24] And, courts have rejected FDCPA class action defendants' arguments that individualized inquiry is necessary to determine whether a putative class member held a "consumer" debt so as to trigger the FDCPA.[25] These decisions often engage in little factual analysis, instead focusing on the defendants' lack of recordkeeping[26] or the FDCPA's

16. *See, e.g.,* Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC, 214 F.3d 872 (7th Cir. 2000) (intended use is determined at the time the debt is incurred, not at the time of collection).

17. *See, e.g.*: Bloom v. I.C. Sys., 972 F.2d 1067 (9th Cir. 1992); *In re* Baroni, BAP. No. CC-14-1578-KuDta, 2015 WL 6956664, at *12 (9th Cir. BAP (Cal.), 2015) (Ninth Circuit BAP found that a debt secured by investment property was not an consumer "debt" under the FDCPA); Bush v. Loanstar Mortgagee Servs., LLC, 286 F. Supp. 2d 1210 (N.D. Cal. 2003) (prior characterization of the loan as a business obligation did not judicially estop the plaintiff from arguing that there was a consumer purpose for the debt).

18. *See, e.g.*: Shapiro v. Haenn, 222 F. Supp. 2d 29 (D. Me. 2002); Garner v. Kansas, No. CIV.A.98-1274, 1999 WL 262100 (E.D. La. Apr. 30, 1999); Brown v. Palisades Collection, L.L.C., No. 1:11-cv-00445-JMS-TAB, 2011 WL 2532909 (S.D. Ind. June 24, 2011); Hetherington v. Allied Int'l Credit Corp., 2008 WL 2838264 (S.D. Tex. July 21, 2008); Moss v. Cavalry Inv., L.L.C., No. 3-03-cv-2653-BD, 2004 WL 2106523 (N.D. Tex. Sept. 20, 2004). However, loan documents designating the proceeds as having a consumer use trigger the FDCPA -- absent conflicting evidence of a commercial purpose or use. *See, e.g.*, Bitah v. Global Collection Servs., Inc., 968 F. Supp. 618 (D.N.M. 1997). Thus, a FDCPA plaintiff's actual personal use of a commercial credit card controlled over the commercial designation of the card, in: Perk v. Worden, 475 F. Supp.2d 565 (E.D. Va. 2007); and Smith v. EVB, 438 Fed. Appx. 176 (4th Cir. 2011).

19. Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, and Clark, L.L.C., 214 F.3d 872 (7th Cir. 2000); Bloom v. I.C. Sys., Inc., 972 F.2d 1067 (9th Cir. 1992).

20. Slenk v. Transworld Sys. Inc., 236 F.3d 1072 (9th Cir. 2001).

21. *Id.* At 1075 – 76.

22. *Id.* at 1076, *citing* Riviere, et al. v. Banner Chevrolet, Inc., 184 F.3d 457, 462 (5th Cir. 1999). *See also*: Ellis v. Phillips and Cohen Associates, Ltd., No. 3:14-cv-05539-EJD, 2016 WL 3566981, at *3 – 5 (N.D. Cal. 2016) (defendant's summary judgment motion was denied due to a triable issue of material fact as to whether the business credit card was subject to the FDCPA); Ordinario v. LVNV Funding, LLC, No. BCV 2804-LAB(NLs), 2016 WL 852843, at *1 – 2 (S.D. Cal. 2016) (FDCPA plaintiff's motion for summary judgment was denied due to a triable issue of material fact as to whether the personal credit card also had business purchases); Davis v Hollins Law, 968 F. Supp. 2d 1072 (E.D. Cal. 2013) (fact that the debtor took out a business credit card was not dispositive as to the inapplicability of the FDCPA and Rosenthal Act); Yee v. Ventus Capital Servs., Inc., No. C 05–03097 RS, 2006 US Dist Lexis 32180 (N.D. Cal., May 12, 2006); Ballard v. Equifax Check Servs., Inc., 158 F. Supp. 2d 1163, 1172 (E.D. Cal. 2001) (placing the burden on the debt collector to demonstrate that transactions by members of the class were not consumer in nature).

23. NCLC, Fair Debt Collection § 6.6.2.2.2 at 436 – 37 (8th Ed. 2015) ("Defendants sometimes contend that numerosity (as well as commonality) is not established because a portion of the collection efforts may have involved business debt in some instances."); *id.*, at § 6.6.2.2.3 ("Courts likewise generally reject the defense argument that there must be determination in each case of whether the transaction was for a consumer or business purpose.").

24. *See, e.g.*: Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1165 n. 4 (7th Cir. 1974) (observing that the possibility that some transactions were commercial rather than personal would probably not prevent certification in a Truth in Lending Act class action because commercial transactions are "frequently…readily identified by the listing of the name of the business as the purchaser"); Beasley v. Blatt, No. 93-C-4978, 1994 WL 362185, at *5 (N.D. Ill. July 11, 1994) (finding that a common issue predominated over individual issues because determining whether the class members entered into their automobile leases for business or personal reasons would be "easy"); Bantolina v. Aloha Motors, 419 F. Supp.1116, 1122 (D.Haw.1976) ("while there may be some difficulties in determining whether some class members are barred from claiming relief under the Truth in Lending Act because of the commercial nature of the transaction…this Court does not believe that such a potential complexity is overly serious or overshadows the advantages the class-action device provides in this case").

25. Lewis v. Jesse L. Riddle, P.C., No. 97-0542, 1998 U.S. Dist. LEXIS 20465 (W.D. La. Nov. 18, 1998) ("a review of the published decisions may indicate that it is in the minority in not certifying a class based on concerns as to how this issue will be resolved").

26. *See, e.g.*: Luther v. Convergent Outsourcing, Inc., No. 15-10902, 2016 WL 1698396, *4 (E.D. Mich. 2016) ("There is no evidence that Plaintiff disades purchased or referred Convergent any other debt than a consumer debt."); Gold v. Midland Credit Mgmt., Inc., No. 13-CV-02019-BLF, 2014 WL 5026270, *3 – *5 (N.D. Cal. Oct. 7, 2014) ("as many other courts have determined in considering class certification under the FDCPA, the mere fact that the debt collection agency does not segregate business and consumer debt accounts is not enough to thwart class certification" and finding it sufficiently administratively feasible to identify that class members and the nature of the their purchases by consulting the creditor's records and by propounding questions in a court-approved notice and claim form); Tourgeman v. Collins Financial Services, Inc.,

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remedial purposes[27] in order to justify certifying the class under a less stringent inquiry of each class members' debt. Some courts simply exclude "business" or "commercial" debts from the class definition altogether, and say that is sufficient.[28]

When courts do engage in some factual analysis, they focus on the ability to prove the "consumer nature" of the debt through the defendants' own records,[29] or even on the consumers "say-so," rather than applying the legal standard that the transaction as a whole must be evaluated under in order to determine the debt's consumer purpose.[30] Thus, some courts find that the nature of the debt can be determined through the claims process, such as by examining the face of the instrument[31] or on the debtor's "say-so," when responding to claims questions during claim administration.[32]

For example, in *Macarz v. Transworld Systems, Inc.*,[33] the plaintiff sought to represent a class composed of residents who were sent a letter by a debt collector that involved a "non-business debt." The defendant debt collector opposed class certification on the basis that its recordkeeping did not distinguish between consumer and commercial debts and, therefore, the class was not ascertainable. The district court made short shrift of the debt collector's argument by backing into class certification through the common tautology that a defendant cannot defeat class certification because its recordkeeping was inadequate:

> Should a debt collection company as large and as sophisticated as Transworld be able to avoid class action liability by mere fact of inadequate record-keeping, the Congressional purpose behind the statute would indeed be thwarted. Given the number of claims that have been pursued against Transworld and the number of classes that have been certified, defendant's claim that their records are not up to the task of differentiating the debts it collects rings hollow. In addition, any disputes regarding whether a particular class member's debt is consumer or commercial can be remedied through proper drafting of the claim form, and at the damages phase of this case. Defendant's objection to class certification on grounds that the class cannot be readily identified is overruled.[34]

26. *(Continued from previous page)*

No. 08cv1392-CAB(NLS), 2012 WL 1327824, at *8 (S.D. Cal. April 17, 2012) ("Indeed, the Court will not deny class certification because of defendants' own failure to keep adequate records regarding the nature of the debt."); *Grubb*, 2017 WL 3191521, at *18.

27. *See, e.g.*: Selburg v. Virtuoso Sourcing Grp., LLC, No. 1:11-cv-1458-RLY-MJD, 2012 WL 4514152, *3 (S.D. Ind. Sept. 29, 2012) ("If [the need to show that the transactions involved in a particular case are consumer transactions] alone precluded certification, there would be no class actions under the FDCPA.'"); Walker v. Equifax Check Services, Inc., No. IP-98-0885-C-D/F, 2006 WL 8075204, at *5 (S.D. Ind. Mar. 7, 2006) ("We find the Sledge court's reasoning persuasive. Thus, we reject Equifax's position that the need to classify the nature of each class member's debts precludes certification under Rule 23(b).").

28. *See, e.g.*: Lang v. Winston & Winston, P.C., No. 00 C 5516, 2001 WL 641122, at *2 (N.D. Ill. June 4, 2001) ("At this stage, it is sufficient if the proposed class is defined to exclude commercial purchasers and individuals who, as indicated by defendant's records or the records of the creditors for whom the letters were sent, made purchases primarily for business use"); Roundtree v. Bush Ross, P.A., 304 F.R.D. 644, 651 – 52 (M.D. Fla. 2015) ("While several courts have certified FDCPA classes despite objections that individual issues related to classification of the debt preclude predominance, in most of those cases, the class definition excluded non-consumer debts…The class definitions recommended by Judge Porcelli, with the possible exception of the Overshadowing Class, do not limit class members to those whose debts were incurred for personal, family, or household purposes. Accordingly, the class definitions will be revised to include only debts incurred for personal, family, or household purposes. Bush Ross's argument that "mini-trials" would be necessary to determine whether the debts incurred were primarily for personal, family, or household purposes is no longer a concern."); Piper v. Portnoff Law Associates, 215 F.R.D. 495, 501 – 02 (E.D. Pa. 2003) ("This court finds that it is appropriate to exclude businesses, corporations and real persons who own their property for business purposes from the class"). *See generally,* Newberg & Conte, Newberg on Class Actions, § 21.12, at 449 (4th ed.) ("Commonality may be preserved in some cases by limiting the definition of the class to those persons who obtain consumer loans.").

29. *See, e.g.*: Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1165 n. 4 (7th Cir. 1974) ("…defendant argues here apparently for the first time that the finding of commonality of questions of law and fact is negatived by the possibility that some purchases were made for commercial rather than personal purposes and that counterclaims will be filed with respect to delinquent accounts. While we need not decide these points at this time, there is no indication that the commercial users of credit at this retail home furnishings establishment are other than minimal in the overall picture. [citation omitted] Such commercial purchases would frequently be readily identified by the listing of the name of the business as the purchaser in the contract. Even if it is necessary to review the contracts individually to eliminate business purchases, as was pointed out in *Beard v. King Appliance Co.,* 61 F.R.D. 434, 438 (E.D. Va.1973), 'such a task would be neither hereculean, inhibiting, nor for that matter…unique.'"); Jenkins v. Pech, No. 8:14CV41, 2015 WL 3658261, at *13 (D. Neb. June 12, 2015) ("there are sufficient administratively feasible methods of ascertaining class members without a fact-intensive inquiry….Jenkins will first begin with identifying prospective class members using

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the defendants' records. For example, if the applicant is a business, which the defendants' records would show, the applicant would be excluded…Additionally, as the defendants admit, to the extent it possesses account statements, such '"records of the original creditors,"…would show how and why the class members incurred their debts.'…If further identification is needed, Jenkins can identify class members through use of a court-approved notice and claim form."); Karnette v. Wolpoff & Abramson, L.L.P., No. 3:06cv44, 2007 WL 922288, at *12 (E.D. Va. Mar. 23, 2007) ("W & A argues that it will be hard to parse out personal credit card use from business credit card use, and that this will make the class unmanageable. Plaintiffs convincingly note, however, that the class covers alleged debt 'shown, by W & A's records, to be primarily for personal, family, or household purposes.' In addition, the Plaintiffs note that courts have been considerably inhospitable to this style of objection."); Qureshi v. OPS 9, LLC, No. 14-1806, 2016 WL 6434345, at *2 (D.N.J. Oct. 28, 2016) ("Plaintiff argues that the information contained in each default judgment application can be used to identify whether the debt was incurred by an individual or business. In particular, the dishonored checks attached to the applications feature information including the name and address of the person or entity that wrote the check, the identity of the person or entity to whom the check was written, and in some cases, drivers' license information. Sett Aff. ¶ 6, Dkt. No. 60-1. Plaintiff asserts that the name of the account holder, nature of the check (*i.e.*, personal or business), and identity of the entity receiving the check (*i.e.*, whether the entity transacts consumer business) provide enough evidence to determine which debts represent consumer debts.").

30. *See, e.g.*: Cynthia Darrington v. Assessment Recovery of Washington, LLC, NO. C13-0286-JCC, 2013 WL 12107633, at *6 (W.D. Wash. November 13, 2013) ("The Court is satisfied that to the extent this inquiry cannot be resolved upon review of Defendants' and their clients' records, it can easily be resolved by asking class members whether they purchased their condominium for private residential or commercial purposes."); Butto v. Collecto Inc., 290 F.R.D. 372, 382 (E.D. N.Y.2013) ("There is no reason to believe that the information could not be obtained from Verizon's own customers"); Wells v. McDonough, 188 F.R.D. 277, 279 (N.D. Ill. 1999) ("Moreover, in the event Defendants' liability is established, the few exceptions, if any, to this general premise can be weeded out by asking the class members one question before determining the amount of liability. The fact that class certification here may require the parties to ask the individual class members one question does not automatically establish that individual issues "predominate" over the common issues of the class.").

31. *See, e.g.*: Muzuco v. Re$submit, L.L.C., 297 F.R.D. 504 (S.D. Fla. 2013); Gradisher v. Check Enforcement Unit, Inc., 203 F.R.D. 271 (W.D. Mich. 2001).

32. *See, e.g.*: Tourgeman v. Collins Fin. Serv., Inc., No. 08CV1392-CAB (NLS), 2012 WL 1327824 at *8 (S.D. Cal. Apr. 17, 2012); Wilkerson v. Bowman, 200 F.R.D. 605 (N.D. Ill. 2001) (As this court's colleagues have noted, the need to show that the transactions involved in a particular case are consumer transactions is inherent in every FDCPA class action. If that need alone precluded certification, there would be no class actions under the FDCPA."); Macarz v. Transworld Sys., Inc., 193 F.R.D 46, 57 (D. Conn. 2000); Sledge v. Sands, 182 F.R.D. 255, 258 (N.D. Ill. 1998); Borcherding-Dittloff v. Transworld Systems, Inc., 185 F.R.D. 558, 563 (W.D. Wis. 1999) ("Undoubtedly, separating consumer debts from commercial debts will take

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some effort. In some instances it may require scrutiny of the type of debt. But in many others, the determination may require only a simple check whether the debtor is an individual or business. In sum, the task of identifying consumer debts will not be such a "massive undertaking" as to preclude certification.").

33. 193 F.R.D. 46, 58 (D. Conn. 2000).

34. The district court also cited to other decisions that also had rejected the debt collector's argument. *Marcarz,* 193 F.R.D. 46, at 58 ("The defendant's protestations of impossibility do not alter the Court's conclusion that class certification is appropriate here. First, several courts have rejected the identical argument, and concluded that difficulties in differentiating consumer and commercial debts does not serve as a bar to class certification, if all the other prerequisites of Rule 23 are met. *See* Wilborn v. Dun & Bradstreet, 180 F.R.D. 347 (N.D. Ill.1998) ("The need to show that the transactions involved in a particular case are consumer transactions is inherent in every FDCPA class actions

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Similarly, in *Wilborn v. Dun & Bradstreet Corp.*,[35] the court held that the claims of the class representative were typical of the putative class because "[t]he claims asserted by plaintiff on behalf of himself and the class members are based on the nature of the collection letter, not the nature of the underlying debt." The court rejected the defendant's argument that "individual issues predominate because only non-business debts are subject to the requirements of the FDCPA, and it is not clear whether each class member's debt was business-related." As in *Macarz*, the district court focused on the inadequacy of the defendant's recordkeeping rather than ascertainability or due process:

> Defendant, however, argues that an "in-depth" inquiry as to the nature of each class member's debt will be required because – contrary to plaintiff's assertions – it cannot determine by looking at its own records which debts, if any, are business-related. The need to show that the transactions involved in a particular case are consumer transactions is inherent in every FDCPA class actions. If that need alone precluded certification, there would be no class actions under the FDCPA. In this case, the process of determining whether the debts at issue are consumer debts should be relatively straightforward.[36]

In *In re CBC Companies, Inc. Collection Letter Litigation*,[37] the court addressed the issue only within the context of commonality, and not ascertainability or superiority. CBC suggested that "the need to determine whether each class member's debt was for business or personal purposes ruins commonality in both [classes at issue]."[38] As a matter of class administration, the court was not troubled by a purported "say-so" class:

> The burden rests with possible class members to prove they are part of the class; that is, to prove they incurred debts for personal purposes. Individuals unable to prove their debts were incurred for personal purposes are excluded from the class. Under CBC's reasoning, it would be impossible to bring a FDCPA class action if there was a chance a possible class member used a credit card for a business purpose. Only those classes whose claims revolve around debts which on their face could definitively be associated with personal purposes could bring a class action under the FDCPA. Such a finding would be contrary to the clear remedial goals of the FDCPA. The fact that some of the proposed class members may not ultimately meet the requirements to be part of the class does not defeat commonality.[39]

D. Courts Cannot Apply Different Legal Analyses to the FDCPA's Requirement of a Consumer Debt Depending on Whether the Claim is Individual or Class-Based

Lewis v. Jesse L. Riddle, P.C.[40] is illustrative. There, the court denied class certification based in part on the difficulty of determining whether the debts were incurred by consumers or businesses. Although the court recognized that it was at odds with the weight of authority certifying FDCPA class actions in similar situations, the court rejected the notion that it would be a simple matter to determine the nature of the transaction, usually based upon readily available documentation. The record before the court did not show that the business/consumer nature of the debts could be determined from either the records of the defendants or their clients. Specifically, and not uncommonly, the defendants represented that they avoid having to distinguish between consumer and business debts by treating all debts as consumer debts and attempting to observe the FDCPA unless it is clearly communicated by the client that a debt is non-consumer.

The *Lewis* court recognized that its finding was against the majority of case law, but distinguished such case law as being "based on a finding that determination of the issue is simple because of access to explanatory documentation or a belief that resolution is virtually self-evident from the nature of the business at issue." The *Lewis* court properly, and implicitly, recognized that the standard for determining consumer versus commercial use must be the same for individual and class cases: the court did "not believe that a mere inference is sufficient to satisfy the burden of proof on a point that is challenged at trial. There may be a simple means of resolving the issue in this case, but the plaintiffs have not articulated it to the court, so they have not satisfied their burden."

TILA cases are not inapposite. For example, in *Parker v. George Thompson Ford, Inc.*,[41] the court denied certification because individual issues predominated, specifically "credit was used to purchase motor vehicles, including trucks, and at least some of these vehicles were evidently used primarily for business purposes." Implicit in the court's decision was that the defendant did not have recordkeeping deficiencies, but was able to put forth evidence specifically showing the business purpose of some purchases.

34. *(Continued from previous page)*

(sic). If that need alone precluded certification, there would be no class actions under the FDCPA.")); *In re* CBC Companies, 181 F.R.D. 380, 385 (N.D. Ill.1998) ("Under CBC's reasoning, it would be impossible to bring a FDCPA class action if there was a chance a possible class member used a credit card for a business purpose. Only those classes whose claims revolve around debts which on their face could definitively be associated with personal purposes could bring a class action under the FDCPA. Such a finding would be contrary to the clear remedial goals of the FDCPA.").

35. 180 F.R.D. 347, 352 (N.D. Ill. 1998).

36. *Id.* at 357.

37. 181 F.R.D. 380, 385 (N.D. Ill.1998).

38. *Id.*

39. *Id.*

40. No. 97-0542, 1998 U.S. Dist. LEXIS 20465 (W.D. La. Nov. 18, 1998).

41. 83 F.R.D. 378, 381 (N.D. Ga.1979).

E. The FDCPA's Remedial Purpose is an Insufficient Basis upon Which to Certify Class and Ignore the Requirements of FRCP 23

Although the FDCPA mirrors both TILA's language and its remedial purpose, not all TILA cases have concluded that the consumer-versus-commercial inquiry can be discarded by certifying a class. Defendants have been successful in prevailing on courts to deny class status in TILA actions because common questions did not predominate over individual questions concerning whether each class member participated in a transaction for business or personal reasons.[42]

F. Simply Excluding Commercial Debts from the Class Definition in Order to Simply Obtain Class Certification Can Result in an Improper "Fail-Safe" Class

Rule 23 and due process require that plaintiffs propose a class that is definite[43] and ascertainable based on objective criteria that do not require the court to delve into the merits of the claims.[44] Courts properly look below the surface of a class definition to determine whether the actual process of ascertaining class membership will require determination of the merits of every class member's claim.[45] Such merit-inquiring class definitions are called "fail-safe" classes, and, generally, they are prohibited by the Federal Manual for Complex Litigation, by the Sixth and Seventh Circuit United States Courts of Appeals, the United States Court of Appeals for the Ninth Circuit, and by most California U.S. District courts and state courts.[46] Courts have found some FDCPA class definitions to constitute prohibited "fail-safe" classes.[47]

Simply excluding "business" debts from the class definition creates inherent "fail-safe" problems. A putative class member must prove the merits of his or her claim in order to gain class membership (*i.e.*, the class member must prove that his or her debt is not a "business" debt). Such merits-inquiring class definitions are fail-safe classes, and are prohibited.

G. Allowing Putative Class Members to Check a Box that Their Debt was Consumer in Nature in Order to Gain the Benefits of Class Membership Creates Unfair "Say-So" Class Administration

The "fail-safe" nature of the consumer versus commercial inquiry parallels the caution against "say-so" class administration.[48] When considering a plaintiff's proposed mechanism for ascertaining a class, courts have cautioned "against approving a method that would amount to no more than ascertaining by potential class members' say so[,]" by, for example, "having potential class members submit affidavits" that they meet the class definition.[49] Until recently, district courts within the Ninth Circuit were split on whether the Federal Rules of Civil Procedure permit

42. *See, e.g.*: Rodriguez v. Family Publications Service, Inc., 57 F.R.D. 189, 193 (C.D. Cal. 1972) ("The questions of law or fact here common to the members of the class do not predominate over any questions affecting only individual members. Section 104 of the Act, 15 U.S.C. § 1603 (1970), provides for an exemption for extensions of credit for business or commercial purposes. That exemption will require an individual analysis of the circumstances surrounding each customer's contract with defendant to determine if it applies."); Zeltzer v. Carte Blanche Corp., 76 F.R.D. 199, 203 (W.D. Pa. 1977) ("In such circumstances, where a critical question of fact is wholly individual – *i.e.*, a business or a consumer use of defendant's airline charge plan – I do not think it can be said that class-common questions of law or fact predominate over individual questions requiring individual determinations as to each class member. Obviously, as plaintiff urges, there exist legal and factual questions common to the asserted class – no doubt the commonality prerequisite embodied in 23(a)(2) is met in this case. What is lacking here is that 'predominant commonality' required by 23(b)."); Lewis v. Jesse L. Riddle, P.C., No. 97-0542, 1998 U.S. Dist. LEXIS 20465 fn. 2 (W.D. La. Nov. 18, 1998). *See generally*: Katz v. Carte Blanche Corp., 496 F.2d 747 (3rd Cir. 1974); and Newberg & Conte, Newberg on Class Actions, § 21:12 at 447 (4th Ed.).

43. *See generally*: Rubenstein, Newberg on Class Actions, Rule 23(a) Prerequisites for Class Certification: Implicit Requirements – Definiteness § 3.6 (5th Ed. 2014); NCLC, Consumer Class Actions § 10.6.2.1 at 194-95 (9th ed. 2016).

44. McLaughlin on Class Actions, Prerequisites to Class Certification § 2.2 (2014).

45. *Id. See also* Shackelford, Selinger & Van Nostrand, *Who's in the 'Ascertainable" Putative Class?,* 129 L.A. Daily Journal No. 205 at 7 (Oct. 21, 2016) ("These differences [between the federal Circuit Court as to what ascertainability means or has been met] have become sharper since the 3rd U.S. Circuit Court of Appeals held in *Carrerra v. Bayer Corp*. that a class was not ascertainable where no objective data in defendant's possession identified the classmembers. Without such data, class members could be determined only by self-identification, and the 3rd Circuit rejected 'say-so' classes as not ascertainable in *Marcus v. BMW of North America, LLC*.").

46. *See, generally* Hyman & Troutman, *Certification of Class Actions Under the Telephone Consumer Protection Act and the Prohibition against "Fail-Safe" Classes*, 68 Consumer Fin. L.Q. Rep. 326 (2014), *rep'd by* the Official Publication of the Consumer & Commercial Law Section of the State Bar of Texas, 10 J. Consumer & Com. Law No. 1 (2015).

47. *See, e.g.*: Cox v. Sherman Capital LLC, No. 1:12-cv-01654-TWP-MJD, 2016 WL 274877, at *5 (S.D. Ind., Jan. 22, 2016) ("For instance, the FDCPA sub-class contains the criterion that the Defendants' collection activities violate the FDCPA…Accordingly, as defined, the Plaintiffs' proposed sub-classes are improperly fail-safe"); Zarichny v. Complete Payment Recovery Services, Inc., 80 F. Supp.3d 610, 625 – 26 (E.D. Pa. 2015) ("Both classes Zarichny defined are fail-safe classes…Zarichny's putative FDCPA claim requires a finding that CPRS did not send a written notice pursuant to 15 U.S.C. § 1692g, which would impermissibly require us to certify a class solely on potential class members' say so."); Alhassid v. Bank of America, N.A., 307 F.R.D. 684 (S.D. Fla. 2015) ("mortgagors' proposed class definitions is an impermissibly fail-safe classes"); Thomasson v. GC Services Limited Partnership, 275 F.R.D. 309, (S.D. Cal. 2011) (rejecting the argument that the plaintiff's FDCPA class definition was not "fail-safe"), *rev'd and remanded* Thomasson v. GC Services Ltd. Partnership, 539 Fed.Appx. 809 (9th Cir. 2013).

48. *See* Zarichny v. Complete Payment Recovery Services, Inc., 80 F. Supp.3d 610, 617 (E.D. Pa. 2015) (striking a FDCPA class as a "fail safe" class because it "would impermissibly require us to certify a class solely on potential class members' say-so."). *See generally Note, Class Ascertainability,* 124 Yale L.J. 2354, 2364 – 65 (May 2015) (suggesting that "say-so" classes are not manageability problems, but problems of unclear class definitions -- a minimally clear definition distinguishes a class of "young people" from a class of people under eighteen, but it does not distinguish a class of people under eighteen who show their identification from a class of people under eighteen who simply "say so." "This modest idea that a class definition must be intelligible and clear is nothing new, and insisting on such a definition need not serve as an independent bar to certification except in unusual cases. It would not, for instance, block a class of Snapple purchasers, Marlboro smokers, or users of a weight loss supplement -- three examples of classes dismissed for lack of ascertainability.").

49. *See, e.g*. Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593 (3d Cir. 2012). *See also*: Leyse v. Lifetime Entertainment Services, LLC, 2017 WL GS9894 (2nd Cir. 2017); City Select Auto Sales, Inc. v. BMW Bank of North America Inc., No. 13-4595 (NLH/JS), 2015 WL 5769951, at *7 (D.N.J. Sept. 29, 2015) ("The Court finds that Plaintiff fails to demonstrate that the class is ascertainable. The Court notes that Plaintiff's proposed method of ascertaining the class is not based only on the 'say so' of the prospective class members, in that the Creditsmarts database may provide an additional layer of verification. However, after carefully considering the Third Circuit case law, the Court cannot conclude that Plaintiff has met its burden of demonstrating that the class is ascertainable."); Royal Mile Co., Inc. v. UPMC, 40 F. Supp.3d 552, 586 (W.D. Pa. 2014) (Under those circumstances, the class would be ascertained based upon an individualized inquiry of potential class members and based only upon their say so without discovery or the ability to cross-examine those potential class members, which "would have serious due process implications" for UPMC and Highmark because they would be forced "to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability."); Stewart v. Beam Global Spirits & Wine, Inc., No. 11-5149 (NLH/KMW), 2014 WL 2920806, at *6 (D.N.J. June 27, 2014) ("Although Defendants did not have the opportunity to challenge the specifics of Plaintiffs' proposed mechanism for ascertaining the class, they do generally oppose any method which involves submission of affidavits because such a method amounts to mere reliance on putative class members' 'say so'").

"say-so" classes; *i.e.* classes that are ascertainable solely on the basis of the putative class members' "say-so."[50] "The Ninth Circuit has not addressed whether self-identification by members in a consumer class action is sufficient to satisfy an ascertainability requirement" and "[d]istrict courts [were] divided on the issue whether a class of consumers is ascertainable when there is no other means to cross-check self-identification."[51]

In *Briseno v. ConAgra Foods, Inc.*,[52] however, the Ninth Circuit arguably answered the question of whether "say-so" classes were acceptable. Appellant ConAgra argued that there was no administratively feasible means of identifying class members that purchased cooking oil labeled "100% Natural" over numerous years in eleven states.[53] ConAgra argued that consumers would not be able reliably remember their cooking oil purchases, nor were they likely to have retained receipts, to self-identify as class members.[54] In factually similar situations, the Eleventh Circuit had held that allowing consumers to submit affidavits self-identifying as class members would result in mini-trials, and therefore class certification should be denied.[55] Looking to the plain language of Rule 23, however, the Ninth Circuit came down on the other side and held that "[w]e have never interpreted Rule 23 to require…a showing [of ascertainability], and, like the Sixth, Seventh, and Eighth Circuits, we decline to do so now."[56] In systematically dismissing the reasoning of the Eleventh Circuit, the Ninth Circuit found that the manageability criterion under Rule 23(b)(3) provides sufficient protection and that there was no need to read additional requirements into Rule 23.[57]

The Third and Eleventh Circuits, however, have held that class certification based on self-identification or "say-so" class administration creates obvious due process concerns, and TILA-analog cases have so held. In *Berkman v. Sinclair Oil Corp.*,[58] for example, the court found that due process considerations were inherent in trodding over the consumer versus commercial inquiry of putative class members' credit card use in a TILA case:

> Furthermore, the substantial difficulty which would be encountered by the parties in proving various members of the class use their cards primarily for business rather than for personal use has already been demonstrated with regard to the named plaintiff, Adelman. The [Truth in Lending] Act is primarily directed at consumer protection rather than business credit. Defendants contend that they have the "due process" right to require proof as to whether the primary use of the credit card during the months in question was personal or business from each of its credit card holders. The necessity for such proof makes this action entirely unmanageable. A shorter route of proof might well deprive defendants of "due process" rights which under Rule 23(b)(3) is strictly prohibited.[59]

Similarly, non-TILA decisions also recognize due process concerns inherent in "self-identification" classes or "say-so" class administration,[60]

50. Shackelford, Selinger & Van Nostrand, *Who's in the "Ascertainable" Putative Class?*, 129 L.A. Daily Journal No. 205 pp. 7 (Oct. 21, 2016) ("The split between the circuits [on the permissibility of "say-so" classes] likely will not be as wide after the 9th Circuit finishes deciding the trio of cases before it").

51. Morales v. Kraft Foods Group, Inc., LA CV14-04387 JAK (PJWx), 2015 WL 10786035, at *12 (C.D. Cal. June 23, 2015) ("Some courts have rejected the reasoning in *Marcus* and *Carrera*, because it would, in effect, preclude the low cost consumer class action. *E.g., McCrary v. Elations Co., LLC,* No. ED-CV-13-00242-JGB-OPx, 2014 WL 1779243, at *7 – 8 (C.D. Cal. Jan. 13, 2014) ('Carrera eviscerates low purchase price consumer class actions in the Third Circuit' by disallowing certification 'in any case where the consumer does not have a verifiable record of purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers'); *accord Astiana v. Kashi Co.,* 291 F.R.D. 493, 500, 508 (S.D. Cal.2013) (class of consumers challenging alleged misrepresentations that consumer products were 'all natural' or contained 'nothing artificial' was ascertainable notwithstanding that the consumers did not have records proving purchase). Similarly, in *Chavez v. Blue Sky Natural Beverage Co.,* 268 F.R.D. 365, 376 – 77 (N.D. Cal.2010), a class action alleging that defendants misled consumers as to the origin of the products at issue, the court concluded that a class of all those who had purchased the product bearing the alleged misleading label was ascertainable. Other district courts have rejected self-identification. *E.g., Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 450 (S.D. Cal.2014). In *Algarin*, consumers challenged representations made about certain makeup products. These included that, once the makeup was applied, it would remain in place for at least 24 hours and there would be 'No Transfer.' The defendants argued that the class was not ascertainable because it included uninjured purchasers – those that did not rely on the alleged misrepresentations – and that members of the class could not be readily determined because of the absence of purchase records. *Id.* at 454. The court rejected the reliance arguments raised by the defendants, but found that the proposed class was unascertainable. It found self-identification by class members would be unreliable. *Id.* at 455 – 56; *accord In re Clorox Consumer Litig.*, 301 F.R.D. 436 (N.D. Cal.2014) (adopting Carrera in denying certification of a class challenging representations about the effectiveness of a cat litter product because 'affidavits from consumers alone are insufficient to identify members of the class,' (*id.* at 440) particularly where sufficient purchasing records were not available from 14 of the 16 retailers the plaintiffs contacted.").

52. Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1131-32 (9th Cir. 2017). *See also*: Meyer v. Bebe Stores, Inc., No. 14-cv-00267-YGR, 2017 WL SS8017 (N.D. Cal.2017); No.SA-CV-16-2149-DOCGTCGx), 2017 WL 433998 (CD.Cal.2017).

53. *Briseno*, 844 F.3d at 1123.

54. *Id.* at 1124; *see also* Melgar v. CSK Auto, Inc., No. 16-15373, 2017 WL 836595, at *1 (9th Cir. Mar. 3, 2017).

55. Karhu v. Vital Pharmaceuticals, Inc., 621 Fed.Appx. 945, 947 – 48 (11th Cir. 2015).

56. *Briseno*, 844 F.3d at 1123.

57. *Id.* at 1127.

58. Berkman v. Sinclair Oil Corp., 59 F.R.D. 602, 609 (N.D. Ill., 1973).

59. *Id.* at 609.

60. *See, e.g.*: Karhu v. Vital Pharmaceuticals, Inc., 621 Fed.Appx. 945, 948 – 49 (11th Cir. 2015) ("A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible…Similarly, a plaintiff cannot satisfy the ascertainability requirement by proposing that class members self-identify (such as through affidavits) without first establishing that self-identification is administratively feasible and not otherwise problematic. [citations omitted] On the other hand, protecting defendants' due-process rights by allowing them to challenge each claimant's class membership is administratively infeasible, because it requires a 'series of mini-trials just to evaluate the threshold issue of which [persons] are class members.' [citations omitted] A plaintiff proposing ascertainment via self-identification, then, must establish how the self-identification method proposed will avoid the potential problems just described. In light of these standards, the district court's ascertainability holding was not an abuse of discretion."); Marcus v. BMW of North America, LLC, 687 F.3d 583, 594 (3rd Cir. 2012) ("Forcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."); Shepherd v. Vintage Pharmaceuticals, LLC, 310 F.R.D. 691, 696 (N.D. Ga. 2015) ("Even if self-identification were an acceptable means of determining the class, Plaintiffs have not proffered any plan for how to address issues of ascertainability beyond contending that Plaintiffs could submit affidavits that they purchased these birth control pills."); Marquis v. Google, Inc., No. SUCV2011-02808-BLS1, 2014 WL 4180400, at *15 (Mass.Super. July 27, 2014) ("As noted earlier, Massachusetts' own appellate courts have yet to weigh in on this implicit requirement for class certification, but the Third Circuit's analysis has much to recommend it. If a plaintiff, such as Marquis, brought an individual claim, she would have to prove that her email was secretly intercepted. 'A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues…A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim'."); Dapeer v. Neutrogena Corporation, No. 14-22113-Civ-Cooke/Torres, 2015 WL 10521637, at *11 (S.D. Fla. December 1, 2015) ("We conclude in reviewing our record that there is an incredibly high probability that locating and vetting class members will devolve into the exact mini-trials that the ascertainability requirement is designed to prevent. And that conclusion is self evident when we consider the supporting record on the motion. Our reasoned judgment is that this class simply is not ascertainable.").

although some decisions believe that due process concerns are ameliorated at the damages phase of trial.[61]

III. Conclusion

Certification of FDCPA class actions where there are factual questions inherent in the consumer versus commercial nature of the debt should not be easy. Certification of such class actions raises questions of management, superiority (*i.e.*, "fail-safe"), and of constitutional due process (*i.e.*, "say-so" class administration). Courts should closely heed their obligation to ensure fairness in determining whether FDCPA class actions can be certified where there are contested issues of consumer versus commercial use amongst the putative class members.

61. Other courts have held that "[a]s long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected." *See, e.g.*: Mullins v. Direct Digital, LLC, 795 F.3d 654, 671 (7th Cir. 2015); Steigerwald v. BHH, LLC, NO. 1:15 CV 741, 2016 WL 695424, at *5 (N.D. Ohio, February 22, 2016) ("The court cited cases finding that a defendant's interest is only in the total amount of damages for which it would be liable, and not in the identities of those receiving damage awards. Plaintiff herein points out that where no purchaser records exist, the use of an affidavit in the claims process is the standard method employed to address potential false claims. At that point, defendant could challenge individual claims appearing problematic."); Morales v. Kraft Foods Group, Inc., No. LA
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61. *(Continued from previous column)*

CV14-04387 JAK (PJWx), 2015 WL 10786035, at *12 (C.D. Cal. June 23, 2015) ("But, putting aside these potential means of establishing or confirming membership in the Class, for several reasons, self-identification through sworn statements makes sense in this case."); Lilly v. Jamba Juice Company, 308 F.R.D. 231, 239 (N.D. Cal. 2014) ("But Plaintiffs are not proposing to establish the fact or extent of a defendant's liability through the notice and claim administration process. The notice process is a way to deliver class members their relief, but the amount of liability will be proven at trial. Defendants would certainly be entitled to object to a process through which a non-judicial administrator "ascertains" each applicant's class membership
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61. *(Continued from previous column)*

on the basis of the applicants' own self-identification, gives a defendant no opportunity to challenge that determination, and then racks up the defendant's bill every time an individual submits a form. But the fact and extent of Defendants' liability will be proven by admissible evidence submitted at summary judgment or at trial, or it will not be proven at all. In other words, it is Plaintiffs' burden is to establish, with admissible evidence, that Defendants' challenged labeling practices violated the law, and to produce evidence of the total damages to which the Class is entitled. Plaintiffs cannot lighten their burden by leaning on the responses to the class notice (unless those responses are provided, in admissible form, as evidence to the Court, subject to Defendants' right to challenge and object). But neither can Defendants shortcut the class action process by claiming that these responses will have some impact on their liability").