

grounds that formed the basis of my ruling: ascertainability, predominance and superiority. Arguing that Plaintiffs' arguments have all been previously considered and rejected by the Court, Defendants assert that reconsideration is not appropriate.

4. The purpose of a motion for reconsideration made pursuant to Federal Rule of Civil Procedure 59(e) "is to correct manifest errors of law or fact or to present newly discovered evidence." Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)). A motion for reconsideration must rely upon one of the following grounds: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." Lazaridis v. Wehmer, 591 F.3d 666, 669 (3d Cir. 2010) (citing N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). "It is improper on a motion for reconsideration to ask the Court to rethink what it had already thought through—rightly or wrongly." Andrews v. Sias, 2012 WL 6650809, at *1 (E.D. Pa. Dec. 20, 2012) (quoting Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)).
5. Plaintiffs first argue that I incorrectly conflated the predominance inquiry with ascertainability when stating that numerous individualized inquiries would be required to determine which class members would fall within the class definition. Plaintiffs specifically focus on my statements that "Plaintiffs' ascertainability problems are compounded by the complex nature of the pharmaceutical and insurance industries," and that "[m]any individualized questions must be answered in order to determine whether an individual falls within the class definition, such as: Was the individual a brand loyalist?;

What was the individual's copay for branded as opposed to generic Provigil?; Was the individual a member of a group plan that provided full or partial reimbursement?; What, if any, rebates factored into the consumer payment?" (Doc. No. 438, p. 22.)

6. As noted in the Opinion, ascertainability is a two-part inquiry, "requiring a plaintiff to show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015) (quoting Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013)). In this context, administratively feasible means "that identifying class members is a manageable process that does not require much, if any, individual factual inquiry." Carrera v. Bayer Corp., 727 F.3d 300, 306 (3d Cir. 2013) (citations omitted).
7. Plaintiffs are correct that the predominance requirement generally assesses whether individualized inquiries will predominate common questions and evidence. However, it is clear from the precedent cited above that assessing whether a proposed ascertainability methodology is administratively feasible, the court may also consider the extent of individualized inquiry. As noted in the opinion:

I have carefully considered the guidance provided in Byrd that overbreadth of a class raises questions of predominance as opposed to ascertainability. Byrd, 784 F.3d at 168; see also Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 184-85 (3d Cir. 2014) (by focusing on the individualized inquiry required to establish harm in its ascertainability analysis, the district court conflated predominance with ascertainability). However, by choosing to define its class with eight specific exclusions, Plaintiffs have created the need for a structured, multi-stepped, individualized fact-finding process in order to determine which individuals would fall within the class definition and which would fall within one of the eight exclusions.

(Doc. No. 438, p. 21 n.14.) The questions that I posed in my Opinion regarding ascertainability that Plaintiffs focus upon are necessary to determine whether a person who has purchased Provigil actually falls within the class definition. Therefore, I do not agree with Plaintiffs' assertion that I have conflated predominance and ascertainability.¹

8. Next, Plaintiffs argue that I misapplied the law in Byrd in concluding that a fund administration process at the conclusion of the case does not satisfy the ascertainability requirement. However, Plaintiffs misunderstand and misconstrue the Third Circuit's statements in Byrd.²
9. The court's statement that "there will always be some level of inquiry required to verify that a person . . . is actually among the 895 customers identified by the Byrds" recognized that the plaintiffs had already provided a list of class members, which was maintained by the defendant. Byrd, 784 F.3d at 170-71. Similarly, with respect to the "household members," the plaintiffs had also provided government documents that would identify those individuals. Id. at 169-70. Thus, verification that a prospective plaintiff was actually one of those class members previously identified would not lead to mini-trials or render the methodology administratively unfeasible. At no point, however, did Byrd

¹ Even if Plaintiffs were correct that individualized inquiries with respect to the class definition should be considered under the predominance requirement as opposed to the ascertainability requirement, that would simply provide more support for my determination that Plaintiffs were unable to demonstrate predominance.

² In a notice of supplemental authority discussing the Third Circuit's ruling in Neale v. Volvo Cars of North America, LLC, 2015 WL 4466919 (3d Cir. July 22, 2015), Plaintiffs note that the court quoted Byrd for the proposition that "we do not expect a plaintiff to be 'able to identify all class members at class certification.'" Neale, 2015 WL 4466919, at *10 (quoting Byrd, 784 F.3d at 163). However, my ascertainability decision was not based on Plaintiffs' failure to identify all class members. Instead, I was concerned that Plaintiffs had failed to demonstrate by a preponderance of the evidence that the "class members can be identified," or that "a reliable and administratively feasible mechanism [exists] for determining whether putative class members fall within the class definition." Byrd, 784 F.3d at 163 (emphasis in original) (quoting Carrera, 727 F.3d at 308 n.2; Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013)).

state that a claims administration process at the conclusion of the case, which would require a case-by-case assessment of numerous documents and contracts for thousands of potential class members in order to determine whether they actually fall within the class definition, was an acceptable method of identification. To the contrary, the Third Circuit has repeatedly instructed that Plaintiffs bear the burden of demonstrating both elements of the ascertainability inquiry at the time of class certification. See Shelton v. Bledsoe, 775 F.3d 554, 559 (3d Cir. 2015) (class members must be “identifiable at the moment of certification”). I previously explained my disagreement with Plaintiffs on this issue, finding that “fund administration and the rigorous analysis required by the Third Circuit for establishing ascertainability are separate and distinct.” (Doc. No. 438, p. 23.)

10. Plaintiffs also point to sparse pieces of evidence in the record in an effort to establish a methodology of identifying class members, all of which I previously carefully considered in denying the motion for class certification. That said, Plaintiffs’ reconsideration motion does not respond to my primary concerns on the issue of ascertainability. Plaintiffs’ own expert acknowledged that he had no methodology of identifying class members and Plaintiffs have failed to present any evidence that shows a methodology of identifying class members would be administratively feasible.

11. Plaintiffs also argue that I erred in finding that Plaintiffs had failed to establish predominance in that I applied the wrong standard for antitrust impact. Plaintiffs acknowledge that I correctly recited the Third Circuit’s standard for predominance set forth in In re Hydrogen Peroxide Antitrust Litigation:

Plaintiffs’ burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at

trial through evidence that is common to the class rather than individual to its members.

552 F.3d 305, 311 (3d Cir. 2008). Plaintiffs insist, however, that I applied a more exacting standard, requiring them to identify and remove, on a class-wide basis, uninjured class members. I do not agree.

12. While I noted that “Plaintiffs have not identified a methodology that would identify and remove [uninjured] persons on a class-wide basis,” that was not the reason I denied Plaintiffs’ motion. Instead, Plaintiffs’ inability to distinguish between injured and uninjured persons was relevant to the predominance inquiry because, as a result, establishing antitrust impact led to “fact-intensive, individualized analysis of the contracts between various entities and the consumer as well as the purchasing history of a particular consumer.” (Doc. No. 438, p. 34.) “Indeed, when every class member has the potential to be a brand loyalist, a person with a flat copay or a consumer who never paid out-of-pocket for their prescriptions, and the only way to identify persons who fall within those groups is individualized inquiry, individualized inquiry would predominate.” (*Id.* at pp. 34-35.) Plaintiffs are incorrect that class certification was denied simply because they could not establish impact as to every member of the class—instead, predominance was not satisfied because the evidence before me revealed that the presence of uninjured class members required extensive individualized analysis.

13. While Plaintiffs cite to cases that have held that the presence of uninjured class members does not defeat predominance as to antitrust impact, this precedent is not binding. Further, other cases support the approach adopted by this Court. See Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 2010 WL 3855552, at *26 (E.D. Pa. Sept. 30, 2010) (“I cannot fathom and the plaintiffs have not

put forth, a method for identifying which individual purchasers would [be uninjured] through analysis of common information”).

14. In a notice of supplemental authority, Plaintiffs assert that the Third Circuit’s recent ruling in Neale v. Volvo Cars of North America, LLC, 2015 WL 4466919 (3d Cir. July 22, 2015) requires reconsideration. The Neale court held that “unnamed, putative class members need not establish Article III standing. Instead, the ‘cases or controversies’ requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class.” Id. at *5. The Third Circuit also noted, however, that standing did not end the inquiry, and “that Volvo may have legitimate Rule 23 challenges” as a result of the potential presence of uninjured class members. Id. at *11.

In [Neale], certification requires the District Court to determine what differing factual and legal circumstance might mean for the class: Can the named plaintiffs adequately represent the class . . . pursuant to Fed. R. Civ. P. 23(a)(4)? Are the claims of the representatives typical of the class pursuant to Fed. R. Civ. P. 23(a)(3)? And do any relevant distinctions affect the commonality and predominance analysis pursuant to Fed. R. Civ. P. 23(a)(2) and (b)(3)?

Id. As my decision to deny class certification did not rely upon a perceived failure to establish Article III standing, and Neale recognized that the presence of uninjured class members may raise Rule 23 issues, Neale does not constitute a change in law or a clear error of law.

15. Plaintiffs next argue that I erred in crediting the testimony of Dr. Hughes over that of Dr. Hartman with regard to the various categories of uninjured persons and TPPs that required individualized inquiry.

16. While Plaintiffs attempt to discredit Dr. Hughes' testimony by maintaining that certain categories of uninjured persons identified by him are speculative, there are other categories of uninjured persons, such as brand loyalists and consumers with flat co-pays, that Plaintiffs do not contest. Without a means of identifying these persons, as previously discussed, every single potential class member would be subject to highly individualized inquiry. Plaintiffs' criticisms of Dr. Hughes do not change that fact. Moreover, simply arguing that I should have credited Dr. Hartman's testimony over Dr. Hughes' testimony is not proper grounds for reconsideration. "[L]itigants should recognize that what may seem to be a 'clear error of law or fact' may simply be a disagreement between the Court and the litigant, which does not justify reconsideration." E.E.O.C. v. Farmer's Pride, Inc., 2014 WL 1053482, at *7 (E.D. Pa. Mar. 18, 2014) (citing Drysdale v. Woerth, 153 F. Supp. 2d 678, 682 (E.D. Pa. 2001)); see also Harrod v. Cox, 165 Fed. Appx. 988, 991 (3d Cir. 2006) ("It is well within the discretion of the District Court as the trier of fact to assess the credibility of witnesses and to accept or reject their testimony accordingly").
17. Finally, Plaintiffs argue that I erred in analyzing superiority. First, Plaintiffs contend that because I did not provide a separate superiority analysis on the state antitrust laws, reconsideration is appropriate. However, Plaintiffs sought certification of two classes: one class that included claims under state antitrust and consumer protection laws, and the other that included state unjust enrichment claims. Therefore, the superiority analysis of Plaintiffs' consumer protection claims, wherein I found that the differences between the laws of the various jurisdictions would make class treatment unmanageable and were likely to confuse a jury, was the same class in which Plaintiffs sought to certify their antitrust claims.

18. In establishing superiority, a plaintiff must demonstrate that resolution by class action will achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results.” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997). To the extent that Plaintiffs now seek the opportunity to separately certify a stand-alone state law antitrust class, the problems identified with respect to ascertainability and predominance, and the multiple individualized inquiries addressed in those sections of the opinion would clearly cause problems with case management. See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 191-92 (3d Cir. 2001) (individualized inquiries regarding injury may create manageability problems that defeat superiority).

19. Furthermore, I am not convinced by Plaintiffs’ argument that my superiority analysis is incorrect because fourteen states provide that unjust enrichment claims are decided by the court, and two states do not allow a jury to decide consumer protection claims. The claims that Plaintiffs argue would be decided by the Court instead of a jury do not address the vast majority of variations in the state laws that show a class action would be unmanageable and would not be a superior method of trying this case.

WHEREFORE, it is hereby **ORDERED** that “End-Payor Plaintiffs’ Motion for Reconsideration of the Court’s June 11, 2015 Order Denying Class Certification” (Doc. No. 445) is **DENIED**.

BY THE COURT:

/s/ **Mitchell S. Goldberg**

Mitchell S. Goldberg, J.