Case Nos. 18-8014 and 18-8015

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAVID JOHNSON,
on behalf of himself and all others similarly situated,
Plaintiff-Respondent,

vs.

CORECIVIC and SECURUS TECHNOLOGIES, INC.,
Defendants-Petitioners.

On Petition for Permission to Appeal
from the U.S. District Court for the Western District of Missouri
Case No. 4:16-cv-00947-SRB

PLAINTIFF-RESPONDENT'S ANSWER TO RULE 23(f) PETITIONS FOR PERMISSION TO APPEAL ORDER GRANTING CLASS CERTIFICATION

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Corporate Disclosure Statement

Plaintiff-Respondent David Johnson is an individual.

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Introduction

Between 2011 and 2017, Defendants CoreCivic and Securus Technologies, Inc. ("Securus") recorded a minimum of 18,579 calls that detainees in CoreCivic's Leavenworth Detention Center ("LDC") made to 567 known attorneys. CoreCivic also recorded video of attorneys meeting with their clients in meeting rooms at LDC.

One of those attorneys, Plaintiff David Johnson, brought an action against the defendants alleging that these recordings violated the federal, Kansas, and Missouri anti-wiretap statutes. *See* 18 U.S.C. § 2510, *et seq.*; Kan. Stat. Ann. § 22-2514, *et seq.*; Mo. Rev. Stat. § 542.402, *et seq.* (collectively "Wiretap Acts"). He sought to certify a class of all attorneys who were or are representing or will represent detainees at LDC from August 2013 to the present and whose attorney-client communication the defendants intercepted, disclosed, or used. After reviewing more than 1,800 pages of briefing and exhibits, the district court entered a 25-page order rigorously analyzing the parties' claims and certifying four classes of attorneys.

The district court easily saw through the defendants' primary argument in opposition to certification: that their affirmative defense that attorneys or detainees consented to the recordings undermined Rule 23's certification factors. In rejecting this argument, the district court cited authority from this Court and the Supreme Court that this affirmative defense did not defeat class certification.

The district court invited the defendants to file motions for summary judgment, which it explained would be the proper remedy to obtain judgment on their affirmative defenses.

Instead of seeking that proper dispositive remedy below, the defendants now seek permission to appeal the certification order under Fed. R. Civ. P. 23(f). They present nothing more than the same untenable argument they made below, which CoreCivic now couches in Rule 23(f) wording. Securus does not even identify or attempt to address Rule 23(f)'s standards.

The defendants have not and cannot satisfy their burden under Rule 23(f) to demonstrate that the district court committed substantial error justifying the extraordinary procedure of interlocutory review. To the contrary, the district court's decision more than adequately demonstrates the propriety of class treatment, showing that evidence common to all class members establishes a prima facie case for each element of the plaintiff's Wiretap Act claims. Specifically, the evidence demonstrates: (1) the defendants recorded the class's calls and meetings; (2) class members were not adequately, properly, or unequivocally warned that the calls and meetings would be recorded; and (3) the defendants have no adequate measures in place to assure attorneys and detainees can have unrecorded communications, even when privatization of attorneys' numbers is requested.

While the defendants argue that adjudicating their consent defense requires individualized inquiry, the district court properly determined that the overarching question of whether the defendants' alleged admonitions legally constitute consent at the outset is common to class members. This and other common questions vastly outweigh any individualized issues. And CoreCivic repeats its misrepresentation to the district court attacking the plaintiff's standing that *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925 (8th Cir. 2016), stood for the proposition that "the recording of communications in a detention center, in the absence of a privatization request, 'traditionally has not provided the basis for a lawsuit in American courts'" (Doc. 199, p. 21), when this quote from *Braitberg* did not address this at all.

Under these circumstances, the defendants cannot satisfy the standards for extraordinary review under Rule 23(f). First, the district court's decision raises no novel issues or unsettled questions of law. To the contrary, its application of class action principles met the settled law of this Circuit and the Supreme Court. Second, there is no "profound error" justifying immediate review. The district court thoroughly reviewed both sides' extensive arguments and evidence and properly exercised its discretion in weighing Rule 23's factors. Finally, the defendants – nationwide, multibillion-dollar companies – do not face potentially ruinous liability if this case continues as a class action.

The Court should deny the defendants' petitions.

Statement of Facts

CoreCivic is a company that manages LDC, a detention facility in Leavenworth, Kansas (CoreCivic Pet. 5). Securus is a company that provided telephone services and recording capabilities to CoreCivic at LDC (Securus Pet. 3). The telephone system allowed detainees to place telephone calls outside LDC and enabled the defendants to record, monitor, and disseminate those calls (Doc. 199, p. 3).

During the relevant period, CoreCivic's default policy was to record all detainee telephone calls and in-person meetings, including those between attorneys and their clients (Doc. 199, p. 3; Doc 201, p. 9). CoreCivic and Securus admit they recorded calls from LDC detainees to attorneys during that period (Doc. 179-2, ¶¶70-71; Doc. 199, p. 9; Doc. 199-2, ¶14). Securus's data shows the defendants recorded 18,759 calls placed to 567 known attorneys between 2011 and 2017 (Doc. 179-2, ¶70). According to CoreCivic's data through June 2017, detainees placed 197,757 calls to 913 known attorneys (Doc. 179-2, ¶71).

When LDC's warden was asked, "Can you think of any reason … that there would be … to record attorney phone calls?" she responded, "A legitimate reason … No" (Doc. 179-4 p. 169). CoreCivic also admits that it recorded silent video of attorneys meeting with their clients at LDC (Doc. 199, p. 9; Doc. 199-2, ¶14).

When a detainee placed a telephone call subject to recording or monitoring, a pre-recorded message would play for him before the call

connected, which included this statement: "This call is subject to recording and monitoring" (Doc. 199, p. 8). The party on the receiving end of the call also would hear a pre-recorded message before the call connected containing the same statement (Doc. 199, p. 8). There was no admonition before recording the in-person meetings (Doc. 199-2, ¶14).

Before October 2016, CoreCivic's policy provided that detainees could place unrecorded, unmonitored phone calls to their attorneys by either (1) informing their attorneys that the attorneys could request their telephone numbers be added to a do-not-record list that CoreCivic and Securus call the privatization list or (2) placing a phone call from an LDC staff member's office telephone that was not subject to monitoring or recording (Doc. 199, p. 6). CoreCivic did not notify attorneys of this policy (Doc. 179-4, p. 181).

Beginning in October 2016, after the district court in a criminal case issued a cease-and-desist order directing LDC to stop recording attorney-client phone calls unless a court had authorized it advance, CoreCivic began allowing detainees themselves to request privatization of their attorneys' telephone numbers by submitting an "Attorney Verification Form" (Doc. 199, p. 6). When a detainee placed a call to a privatized number, the pre-recorded message that both parties to the call heard did not include the admonition that the call was subject to recording and monitoring (Doc. 199, pp. 8-9).

But CoreCivic and Securus admit that, even when the attorney or the detainee requested "privatization" for certain numbers, CoreCivic and Securus still recorded telephone calls placed to those numbers (Doc. 199, p. 11). Citing the district court's order, Securus claims that "at most, … calls were recorded, post-privatization requests, to only 14 numbers" (Securus Pet. 16). But the district court's order merely recited that CoreCivic argued this, not that the evidence showed it (Doc. 212, p. 14). In fact, Securus's data showed that the defendants recorded at least 203 separate phone calls to attorneys after either a detainee or attorney had requested privatization (Doc. 179-2, ¶83).

In 2016, David Johnson, an attorney whose calls and meetings with clients were recorded both before and after requesting privatization, brought a claim against CoreCivic and Securus under the federal, Kansas, and Missouri Wiretap Acts, which make it unlawful to knowingly or intentionally intercept any wire, oral, or electronic communication, and to use or disclose those obtained communications (Doc. 32). (The defendants argue the district court should have divided these claims into subclasses for each statute, but all three statutes require identical proof of identical elements, making that unnecessary.) He then moved to certify a class of all attorneys who were representing, are representing, or will represent clients who are detainees at LDC from August 2013 to the present, and whose communication with those clients the defendants intercepted, disclosed, or used (Doc. 179).

In response to the plaintiff's petition, as an affirmative defense CoreCivic and Securus contended that the admonition at the beginning of non-privatized calls constitutes consent, so their recording and monitoring those calls do not violate the Wiretap Acts (Doc. 56, p. 14; Doc. 67, pp. 8-9). They then argued this affirmative defense defeats every Rule 23 requirement for class certification (Doc. 199; Doc. 201).

The class certification proceedings were extensive, including more than 1,800 pages of pleadings and exhibits, and a hearing. The district court ultimately granted the plaintiff's motion for class certification, dividing the proposed class into four separate classes to reflect the timing of both its cease-and-desist order and the termination of Securus's contract (Doc. 212, pp. 23-24). As to the defendants' affirmative defense of consent, the court noted that "[c]lass certification is not the time to address the merits of the parties' claims and defenses" (Doc. 212, p. 11 (quoting *Elizabeth M. v. Montenez*, 458 F.3d 779, 786 (8th Cir. 2006)); (see also Doc. 212, pp. 15, 17, 23). So, "[a]n analysis of the consent defense, which goes to the merits of the claim, is not relevant to determining whether the prerequisites for class certification are satisfied. … Defendants have made clear they will file a motion for summary judgment, and the Court will entertain any timely filed motion" (Doc. 212, p. 11) (see also Doc. 212, pp. 15, 17, 23).

The defendants then timely filed petitions under Rule 23(f) asking this Court for permission to appeal that interlocutory order.

Standard of Review

Interlocutory review of a class-certification order is a rare exception to the final judgment rule. When Rule 23(f) of the Federal Rules of Civil Procedure was added in 1998, the Advisory Committee foresaw interlocutory appeals as permitted only "with restraint." Adv. Com. Subd. (f), (1998). "[F]amiliar and almost routine issues" do not warrant interlocutory review. *Id.* In setting out guiding principles, the Committee suggested consideration of whether the certification turns on novel or unsettled questions of law, whether the class decision would likely dispose of the litigation, or whether the class decision "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Id.*; *see also Elizabeth M.*, 458 F.3d at 784.

This Court has not adopted a particular standard for review of petitions under Rule 23(f). *See Liles v. Del Campo*, 350 F.3d 742, 746 n.5 (8th Cir. 2003). But in *Elizabeth M.*, 458 F.3d at 783, the Court cited with approval *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000). There, the Eleventh Circuit advised "restraint in accepting Rule 23(f) petitions", as interlocutory appeals are "disruptive, time-consuming, and expensive, and consequently are generally disfavored." *Id.* at 1266-67; *accord Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288,

294 (1st Cir. 2000). So, "the standards of Rule 23(f) will rarely be met." *In re Sumitomo Copper Litig.*, 262 F.3d 134,140 (2d Cir. 2001).

The Eleventh Circuit in *Prado-Steiman* considered five factors in evaluating a Rule 23(f) petition: (1) whether immediate appeal "will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself;" (2) the nature and status of the litigation before the district court; (3) "the likelihood that future events may make immediate appellate review more or less appropriate;" (4) whether the petitioner shows "a substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion"; and (5) "whether the District Court's ruling is likely dispositive of the litigation by creating a 'death knell' for either plaintiff or defendant." 221 F.3d at 1271-77; *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002) (finding immediate review appropriate if the decision is the death-knell for the litigant, presents an unsettled and fundamental issue of law, or is manifestly erroneous); *accord In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002).

The defendants have not established that this relatively modest class action is suitable for interlocutory appeal – a procedure that should be reserved only for extraordinary cases – or that any of the Rule 23(f) factors support granting their petitions.

Argument

I. The defendants have not raised any novel or unsettled issues of law that would support immediate review.

To justify immediate review of a class-certification decision, any unsettled legal issues must be likely to escape review without an interlocutory appeal and be so acute that this Court should "take earlier-than-usual cognizance of [them], thus contributing to both the orderly progress of complex litigation and orderly development of the law." *Mowbray*, 208 F.3d at 293-94 (noting Rule 23(f) review of an unsettled legal issue is appropriate only if the issue is "important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case"); *Lorazepam*, 289 F.3d at 103 (same); *cf. Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002) (granting immediate review to resolve interpretation of HUD regulations). "[A] novel legal question will not compel immediate review unless it is of fundamental importance to the development of the law of class actions and it is likely to escape effective review after entry of final judgment." *Sumitomo*, 262 F.3d at 140.

The defendants do not raise any such issue here. To the contrary, the district court's order straightforwardly applied this Court's decisions in *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005), and *Elizabeth M.*, 458 F.3d at 786, and the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), *Amgen Inc. v.*

Conn. Ret. Plans & Trust Funds, 568 U.S. 455 (2013), and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

There is nothing novel or unsettled about the district court's application of these decisions and other class certification standards. *See* § II, *infra.*

The defendants' arguments primarily center around their affirmative defenses. The district court did not decide those defenses' merits, which simply do not raise a novel or unsettled legal issue relevant to the class-action analysis. Instead, it is well-established that "individual affirmative defenses generally do not defeat predominance." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016). Whether supposed individualized issues related to an affirmative defense are likely to predominate over class-wide issues is not a "novel" issue but is instead a classic, run-of-the-mill weighing of factors every court performs when it decides whether to certify a class. Here, the district court weighed them correctly. *See* § II(B), *infra.*

And CoreCivic's citing this Court in *Braitberg*, 836 F.3d at 930 for the proposition that "the recording of communications in a detention center, in the absence of a privatization request, 'traditionally has not provided the basis for a lawsuit in American courts'" (Doc. 199, p. 21) is both plain wrong, as the district court noted (Doc. 212, p, 8) and misrepresents the law. As the plaintiff pointed out in reply below, this Court later found that "[a] substantial privacy interest is anything

greater than a de minimis privacy interest." *Am. Farm Bureau Fed'n v. U.S. Envt'l Prot. Agency*, 836 F.3d 963, 970 (8th Cir. 2016) (citation omitted). An individual "may have a substantial individual privacy interest in the disclosure of the operations' records if the disclosure of those files would harm the owner personally." *Id.* at 970. It is difficult to imagine a situation where the interception or disclosure of confidential communications, such as the communications at issue here, would *not* harm the persons communicating.

Finally, this litigation does not require disclosing attorney-client communications, because it belies reason that a detainee would be contacting an attorney for anything other than legal advice. And as the plaintiff pointed out at the hearing below (Tr. 47, 51, 53), those issues go to damages: i.e., the number of communications, not that a communication occurred. Here, a class member would have had to have more than 100 separate days of communications for this to be an issue, as the statutory damage threshold is $10,000. *See* 18 U.S.C. § 2520(c)(2)(B). Finally, even if a limited inquiry is necessary, the district court has broad discretion to implement procedures to avoid the disclosure of attorney-client communications, such as appointment of a special master, *in camera* review, and many other mechanisms.

The defendants' mere disagreement with the district court's conclusions is insufficient to establish a novel or unsettled issue of law that would warrant the extreme measure of interlocutory review.

II. The defendants have not shown that the district court's decision contains a substantial weakness or profound error of law.

This Court affords considerable discretion to a district court's decision to certify a class. *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 736 (8th Cir. 2014). To justify interlocutory intervention, the district court's decision must exhibit "substantial weakness" or a "profound error of law." *Prado-Steiman*, 221 F.3d at 1274, 1277. A substantial weakness means "the decision likely constitutes an abuse of discretion." *Id.* at 1274; *accord Glover*, 283 F.3d at 959. "Such a situation may exist, for example, when the district court expressly applies the incorrect Rule 23 standard or overlooks directly controlling precedent." *Prado-Steiman*, 221 F.3d at 1275. Any profound or manifest error should be readily discernible from the petition. *Chamberlan*, 402 F.3d at 959. "If it is not, then consideration of the petition will devolve into a time consuming consideration of the merits, and that delay could detract from planning of the trial in the district court." *Id.*

The defendants' petitions do not satisfy these standards. The district court examined more than 1,800 pages of briefing and exhibits, including significant data analysis by the plaintiff's Fed. R. Evid. 1006 witness, and conducted a full hearing. As is apparent from the face of the district court's well-reasoned certification order, the district court rigorously applied the correct rules and precedents and properly applied

the law to the facts. The district court did not simply assume the plaintiffs' allegations to be true, but instead drew plausible conclusions from the evidence presented. Ultimately, it correctly concluded that the class satisfies all the prerequisites for certification.

A. The district court correctly held that the defendants' affirmative defenses do not preclude class certification.

The district court used the proper standard under Rule 23 and determined the defendants' consent defense does not undermine class certification because "the same evidence will suffice for each member [of the class] to make a prima facie showing." *Blades*, 400 F.3d at 566.

In their Rule 23(f) petitions, except for CoreCivic's arguments related to *Braitberg* and the review of phone calls, addressed *supra* at pp. 11-12, the defendants concentrate on their affirmative defense that the admonitions to parties to non-privatized calls constitute consent to recording and monitoring. Just as they did below, they argue this vitiates every certification requirement – that *if* they are correct on the merits of their affirmative defense, then anyone who heard the admonition would lack standing (CoreCivic Pet. 18-19), the class the plaintiff requests would not be ascertainable or numerous (CoreCivic Pet. 12-13, 20-21; Securus Pet. 16), the plaintiff's claims would be atypical (CoreCivic Pet. 21-23; Securus Pet. 16), the plaintiff would not adequately protect class members' interests (CoreCivic Pet. 19-20;

Securus Pet. 15-17), individualized consent issues would predominate over the class's claims (CoreCivic Pet. 2, 11-18; Securus pet. 14-15), and a class action would not be a superior method for litigating the claims (CoreCivic Pet. 1, 9-11).

The district court correctly rejected this argument and grounded its reasoning in established precedent, citing this Court's decisions in *Blades* and *Elizabeth M.* and the Supreme Court's decisions in *Wal-Mart*, *Amgen*, and *Comcast*. It determined that the merits of the defendants' affirmative defense were relevant only to the extent they related to the class-certification factors. As it explained, "while Defendants contend that various forms of consent are present in the case, that suggestion only goes to inform the prevailing common legal question of whether such warnings of potential recording and monitoring … rise to the level of the consent, which applies to the class as a whole" (Doc. 212, p. 21). It determined that because the evidence to adjudicate the consent defense is largely determinable on class-wide proof, the existence of the defense did not undermine commonality or predominance, even if it involved some individualized issues.

This holding was not an abuse of discretion. The court correctly determined that, given the class-wide nature of the defense, whether the defense would succeed had no place in the class-certification analysis. "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." *Amgen*, 568 U.S. at 459. In *Amgen*, for example, while the plaintiffs had to prove "materiality" as an element of the fraud-on-the-market theory of their cause of action, at the class-certification stage "the pivotal inquiry is whether proof of materiality is needed to ensure that the questions of law or fact common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses." *Id.* at 467. In *Amgen*, the answer was "no", because the plaintiff's allegation that the fraud was material could "be proved through evidence common to the class." *Id.* The same is true here with respect to the defendants' affirmative defense of consent.

As this Court observed in *Blades*, "[i]n conducting [its] preliminary inquiry" into "whether common questions predominate" the district court may "loo[k] behind the pleadings …." 400 F.3d at 566. But it "must look only so far as to determine whether, given the factual setting of the case, if the plaintiff[']s general allegations are true, common evidence could suffice to make out a prima facie case for the class." *Id.* So, just as the district court reminded the parties, "class certification is not the time to address the merits of the parties' claims and defenses …." *Elizabeth M.*, 458 F.3d at 786. Instead, "such disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the

plaintiff's general allegations were true, to make out a prima facie case for the class." *Blades*, 400 F.3d at 567.

Affirmative defenses, even ones that may require some individual proof, typically do not defeat predominance. First and foremost, they are irrelevant to the class's prima facie case. *See id.* Second, individualized issues related to affirmative defenses rarely predominate over common questions. *See Brown*, 817 F.3d at 1240. That is especially true where, as here, the affirmative defense relies primarily on communications made to the class as a whole. As the district court explained, whether the defendants' admonitions about recording and monitoring legally constitute consent in the first instance is a question common to the class. If their affirmative defense succeeds, that merely means a class-wide issue has been resolved in the defendants' favor.

Moreover, most of the supposed individualized issues CoreCivic raises as to its affirmative defense (CoreCivic Pet. 12) are either speculative or are not truly individualized. For example, it states that whether the inmate heard pre-recorded warnings is an individualized issue. In fact, the defendants had a policy of providing those warnings unless privatization had been requested. CoreCivic also complains that some parties to the call might have "otherwise consented" to the recording, but it offers no evidence that this ever actually happened, even though it bears the burden on its affirmative defense. "Bald speculation" that some class members might have consented in other,

imaginary ways "do[es] not undermine class cohesion." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 122 (2d Cir. 2013); *accord Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 644 (5th Cir. 2016).

The fact that CoreCivic could conjure up some individualized facts peculiar to a few class members does not defeat predominance. In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court explained that if the plaintiff can establish *his* case by class-wide proof, a unique affirmative defense will not defeat class certification:

> When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."

136 S.Ct. 1036, 1045 (2016) (citation omitted).

So, "the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." *Bridging Cmtys. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016) (citation omitted) (holding that defendant's allegation that some class members may have given consent to spam faxes did not defeat predominance; denial of certification reversed).

The few decisions the defendants now cite in their petitions as being "on all fours with the present case" (CoreCivic Pet. 14) are inapposite and predate *Tyson Foods*.

For example, they cite *Medina v. Cty. of Riverside*, 308 Fed.Appx. 118 (9th Cir. 2009) (Securus Pet. 11; CoreCivic Pet. 13-15). But as the district court observed, *Medina*'s holding that the inmates consented to the recording was as part of affirming a summary judgment, not an appeal from a class certification decision (Doc. 212, pp. 9-10). Moreover, the *Medina* plaintiffs' proposed class was overbroad, as it included "all County inmates who made any phone call from the facility … regardless of whether any calls were to their attorneys" and "any attorney representing any such inmate, regardless of whether the attorney ever received a phone call from an inmate client from a County jail or facility" (CoreCivic Add., p. 27) (emphasis in the original). So, "the class plainly encompasse[d] persons who have no claim against Defendants" and so the plaintiffs had not defined a precise and ascertainable class (*id.* at 27-28). As the district court explained, the class definition here is much narrower and only includes attorneys whose phone calls the defendants actually recorded. The Ninth Circuit's decision in *Medina* is not even close to being "on all fours" with this case.

Given the district court's thorough, thoughtful decision, this Court should reject the defendants' request to pause the case and, despite all the precedent to the contrary, delve into the merits to second-guess the district court's decision. The district court did not commit any error, much less an error egregious enough to warrant interlocutory review.

B. The district court correctly determined that the class satisfies all elements of Rule 23.

Regarding the rest of its class-certification analysis, the district court thoroughly analyzed all the elements of Rule 23 and issued a well-reasoned decision that contains no "substantial weakness" or "profound error of law." *Prado-Steiman*, 221 F.3d at 1274, 1277.

Through the evidence, the plaintiff's counsel identified at least 567 attorneys who met the plaintiff's objective class definition, making the classes sufficiently numerous (Doc. 212, pp. 11-13). CoreCivic's argument that the class is not ascertainable falls flat given that at least 567 class members already have been ascertained. The class definition on its face uses objective criteria, and this Circuit does not have a separate ascertainability requirement. *See Sundusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016). As the district court noted, it is feasible to identify calls made to attorneys through the defendants' own records and a "subpoena of attorney bar records" (Doc. 212, p. 13). Further, the district court noted that "upon additional discovery and analysis, the class may be further refined" (Doc. 212, p. 13).

The class also satisfies the commonality requirement. Class members suffered the same injury: they had their confidential conversations intercepted, which in itself is a violation of their privacy. *Am. Farm Bureau*, 836 F.3d at 970. The interception of their

confidential conversations was the result of the defendants' class-wide, unlawful policies. Therefore, there are questions of law and fact common to the class (Doc. 212, pp. 16-17).

Common questions of fact and law also predominate over questions affecting only individual members of the class, as common evidence will suffice to make out a prima facie case for the class. This includes, among other things, evidence of the defendants' policies, evidence that the calls and meetings were recorded, and evidence that there were no measures in place that actually ensured attorneys and detainees could have unrecorded conversations (Doc. 212, pp. 19-21). As explained *supra* at § II(B), the defendants' affirmative defenses do not shift the predominance inquiry and render class certification inappropriate.

Plaintiff Johnson's injury also was typical of the class (Doc. 212, pp. 17-18). He and the qualified, experienced attorneys representing him adequately would represent the class's interests (Doc. 212, p. 18). And it would be judicially uneconomical to entertain hundreds of individual claims, none of which yet has been brought, making a class action a superior method of litigation (Doc. 212, pp. 21-23).

Accordingly, the district court's decision shows no substantial weakness or profound error warranting interlocutory review.

III. Declining review would not place insurmountable pressure on the defendants to settle.

CoreCivic argues that "the significant financial burden associated with litigating the case will place undue pressure on Defendants to settle" (CoreCivic Pet. 3, 23). It says this is because it "faces expensive discovery and potential liability that could exceed $10 million dollars" (CoreCivic Pet. 23). CoreCivic cites nothing to support these statements, and Securus does not make a similar argument.

CoreCivic's argument lacks merit. CoreCivic is the second-largest private corrections company in the United States and is publicly traded on the New York Stock Exchange. *See CoreCivic Reports Fourth Quarter and Full Year 2017 Financial Results* (Feb. 14, 2018), http://ir.corecivic.com/news-releases/news-release-details/corecivic-reports-fourth-quarter-and-full-year-2017-financial. Its total revenue in 2017 was $1.77 billion. *Id.* And while Securus is a private company, it has enough revenue and capitalization to invest $600 million over three years on new products and technologies alone. *See Securus Technologies Announces Direct Investment of +$600 Million in the Last Three Years for New Products and Technologies for Corrections and Law Enforcment* (July 28, 2016), https://www.prnewswire.com/news-releases/securus-technologies-announces-direct-investment-of-600-million-in-the-last-three-years-for-new-products-and-technologies-for-corrections-and-law-enforcement-300305997.html.

This case focuses on phone recordings and electronic monitoring in a single facility. Certification of this relatively modest class will not force these defendants to settle this action rather than defend it. *See Chamberlan*, 402 F.3d at 960 (finding exposure of $100 million not sufficient absent proof defendant lacked resources to defend case to a conclusion and appeal if necessary); *Delta Air Lines*, 310 F.3d at 961 (denying interlocutory review although plaintiffs sought nearly $1 billion in damages, because potential liability did not create "undue pressure" on airlines to settle, court's certification of subclasses could be revisited in the future, and issues were so enmeshed with merits of case as to disfavor immediate review).

Conclusion

The Court should deny CoreCivic's and Securus's Rule 23(f) petitions.

Respectfully submitted,

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by /s/Jonathan Sternberg

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/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that on October 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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