NO. 24-7158

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONIECE DRAKE, et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

BAYER HEALTHCARE LLC,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of California (Case No. 22-cv-1085-MMA (JLB)) (District Judge Michael M. Anello)

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

Cory L. Andrews
Saad Gul
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus to oppose the certification of unwieldy and improper class actions under Rule 23. *See, e.g.*, *TransUnion v. Ramirez*, 594 U.S. 413 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

INTRODUCTION & SUMMARY OF ARGUMENT

Class certification under Federal Rule of Civil Procedure 23 requires that common questions of law or fact predominate, which typically includes common evidence of injury. Plaintiffs' own evidence here showed that many proposed class members were not injured. The district court nonetheless certified the class. This Court should reverse that decision and vindicate Rule 23 by rejecting an overly broad no-injury class action.

So much class litigation ignores the basic reality that some claims simply aren't amenable to class treatment. After all, a class action is "an exception to the usual rule that litigation is conducted by and on behalf of

* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Rule 23 thus "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). That is no tragedy. On the contrary, it is a virtue of our legal system's commitment to due process and the rule of law.

This lawsuit is part of a flood of class actions that seek massive payouts from manufacturers for failure to meet an arbitrary class action benchmark in labeling or packaging. Defendant Bayer sells a popular line of multivitamins. Plaintiffs seek to bring a class action against it. Simplified, the class action stands on the notion that Defendant misled consumers by claiming its multivitamins are "natural." As is typical in these cases, Plaintiffs relied on expert consumer surveys to try to prove that consumers were misled by the manufacturer's "natural" claim, leading to injury.

Critically, the survey results failed to establish common causation or harm. Instead, Plaintiffs' expert testified more than fifty times at her deposition that she had "no evidence that any consumers are confused by the word 'Natural' on the Bayer label." In other words, Plaintiffs lacked

common proof of injury. Their own evidence showed that almost no class member was harmed. Yet the district court certified the class anyway. That decision was wrong.

Under Article III and the Rules Enabling Act, 28 U.S.C. § 2072, uninjured plaintiffs lack standing to participate in a class action. The district court below conflated materiality and loss. But materiality alone does not prove uniform loss.

Beyond satisfying Article III, Plaintiffs must also meet Rule 23(b)(3)'s predominance requirement. Plaintiffs cannot satisfy Rule 23(b)(3)'s predominance test without a common damages model. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Many consumers may have purchased the multivitamins for unrelated reasons or paid the same price regardless of the advertising or packaging. Plaintiffs' inability to prove class-wide reliance or injury rendered certification improper. As noted above, many putative class members never relied on the "natural" label. Others would have purchased the product anyway.

That absence of *uniform* reliance destroys any showing of *class-wide* harm. Rule 23(b)(3) requires a shared method of proving both injury and reliance, yet there is no reliable damages model—such as a consistent

"price premium"—that applies to all consumers. As a result, individualized questions overwhelm any common ones.

Moreover, certifying a broad, no-injury class invites mischief. It dramatically inflates settlement pressure. Defendants confronting massive potential liability frequently settle frivolous suits to avoid a crushing verdict. This dynamic weakens the adversarial process and promotes meritless opportunistic litigation.

Beyond the settlement pressure, a no-injury class raises conflicts of interest between class counsel and class members. Maximizing fees is often at odds with maximizing class recovery. Meanwhile, unnamed class members exercise minimal control over the litigation yet remain bound by disadvantageous settlements.

Rule 23 attempts to address these dangers by requiring heightened scrutiny at both the certification and settlement stages. The Supreme Court and this Court have underlined similar concerns. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997) (underscoring the need for rigorous procedural safeguards); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (stressing strict review of class-action settlements).

In tandem with Article III, Rule 23 protects the integrity of the civil justice system by demanding proof of an actual, traceable injury for every class member. This standard preserves fairness in consumer-protection litigation by ensuring that redress is limited to genuinely harmed individuals. By failing to hold Plaintiffs to that demanding proof, the district court certified an unwieldy and improper class.

ARGUMENT

I. Constitutional And Statutory Constraints Bar A Rule 23 Class Certification Where There Is No Class-Wide Means Of Proving Injury.

Under Rule 23(a), a class must be so numerous that joinder is impracticable (numerosity), share common issues of law or fact (commonality), have representative plaintiffs with claims or defenses typical of the class (typicality), and ensure the representatives will fairly and adequately protect the class's interests (adequacy).

Commonality is thus more than a procedural requirement. The Supreme Court has held that Article III's standing requirements require a plaintiff to show, among other things, that it has suffered an actual or imminent injury that is traceable to the defendant's action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Put another way, at the

certification stage, Plaintiffs must "show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (citing *Comcast*, 569 U.S. at 38). If a particular plaintiff's harm is used as a proxy for other plaintiffs, as in the class action context, fairness and due process call for identical underlying facts, satisfying the commonality principle.

The issue here is the absence of commonality. There are no uniform damages. Nor, given the countless reasons consumers bought Defendant's products, does any realistic model exist that may help calculate them. And damages are a prerequisite to recovery.

There are legal and constitutional constraints barring compensation to uninjured plaintiffs. Article III precludes federal courts from offering relief to an uninjured plaintiff, even in a class action. *TransUnion*, 594 U.S. at 431 (cleaned up). Article III requires a case or controversy involving concrete injury. *Id.* An uninjured plaintiff is thus constitutionally precluded from recovery under a class action. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012).

Permitting liability without concrete harm "blur[s] the distinction between vindicating public rights and private rights." *Spokeo,* 578 U.S. at

349 (Thomas, J., concurring). Article III's requirement of a concrete, particularized injury for every plaintiff "remains firmly grounded in the Constitution's text and purpose." *Id*. at 340.

An uninjured plaintiff would never recover in an individualized action. It follows that the same uninjured plaintiff cannot recover in a class action. The class action is a creature of the Federal Rules of Civil Procedure. And the Rules Enabling Act bars courts from using those procedural rules to "abridge, enlarge, or modify any substantive right." *Wal-Mart*, 564 U.S. at 351; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); 28 U.S.C. § 2072(b).

Allowing any uninjured plaintiff to recover by use of a procedural device is a textbook modification of a substantive right. The same uninjured plaintiff could not recover in an individualized proceeding—that is, without the fig leaf of Rule 23.

Nor can Plaintiffs evade this issue by clever class definition. When a class is defined in a manner that encompasses multitudes of uninjured members, it is too broad to permit certification. *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 670 n.14 (9th Cir. 2022) (en banc). The two proposed classes here would encompass all purchasers of

Bayer's "Natural Fruit Bites" multivitamins in New York or California from May 31, 2020, to May 30, 2023. Not even Plaintiffs suggest that each class member suffered a concrete, particularized injury. Like *Olean*, each of these classes contain multitudes of uninjured members, precluding certification. *Id.*

Neither may a court create a "fail-safe" class defined to include individuals with bona fide injuries. *Id. Cf. Genenbacher v. CenturyTel Fiber Co. II*, 244 F.R.D. 485 (C.D. Ill. 2007) (fail-safe class is one where membership is defined by the ultimate merits of the case.) So Plaintiffs cannot rid themselves of the uninjured plaintiff anchor by tautologically revising their class definition to "the injured purchasers of products in New York or California from May 31, 2020, to May 30, 2023."

II. No Class-Wide Proof Of Injury Exists Here, Which Precludes Certification.

Plaintiffs allege they were misled into purchasing "natural" multivitamins. But they provide no concrete, class-wide evidence of harm. And a class cannot be certified unless each member suffered a cognizable injury in fact. *Mazza*, 666 at 594. Speculation about a misled, hypothetical "reasonable consumer" does not suffice to show that all, or even most, class

members suffered a loss. Each class member must demonstrate personal harm that is "fairly traceable" to the defendant's alleged misconduct. *Id.*

Where, as here, Plaintiffs try to certify a mammoth class of everyone who purchased "natural" multivitamins, they must come forward with evidence that each putative class member was deceived or overpaid due to that specific label. The harm is not self-evident. In fact, FDA regulations prohibit label statements that naturally occurring vitamins are superior to synthetic vitamins, 21 C.F.R. § 101.9(k)(4). Stressing the potential materiality of the word "natural" is no substitute for establishing that every purchaser was harmed—and that there was a uniform cause for that harm. Nor does it establish a class-wide method of establishing damages.

Materiality may suggest relevance to consumers, but it does not establish that all class members suffered harm or relied on the "natural" claim. Defendant notes that 95% of the product was composed of natural ingredients. 3-ER-388. A multivitamin pill consisting entirely of natural micro-nutrients would be "the size of a golf ball." *Do Vitamins in Pills Differ from Those in Food?*, Scientific American (Mar. 5, 2001), https://perma.cc/5WK8-XRE6. Some purchasers may have concluded that minimal chemical content did not negate the overall "natural" character

of the product. 2-ER-266. Many may have purchased products based on brand reputation, price, or convenience. Rule 23 requires evidence that *all* class members paid a price premium or were otherwise *harmed*.

Deception or premium payments cannot be automatically assumed. Defendant never claimed the product was 100% natural or "all natural." *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093, 1098 (9th Cir. 2023). A reasonable consumer would read the label language in context. *Hairston v. S. Beach Beverage Co.*, No. CV 12 -1429-JFW (DTbx), 2012 WL 1893818 (C.D. Cal. May 18, 2012). Or consult the ingredient list. *Id.*

And certification under Rule 23(b)(3) requires that Plaintiffs establish both that common issues predominate and that damages "are capable of measurement on a class wide basis." *Comcast*, 569 U.S. at 34. If their claim rests on the notion that "natural" labeling induced an inflated purchase price, Plaintiffs must provide a pricing or market-based model that applies uniformly to all class members. Mere conjecture that "some" portion of the purchase price reflects a "natural" premium is not enough.

If a large segment of the proposed class was unaffected by the "natural" label, they suffered no injuries. Consequently, individualized

inquiries into each person's reasons for purchase and knowledge of the product's composition overwhelm any supposed common questions. Courts must deny certification in such scenarios. *See Mazza*, 666 F.3d at 596.

The Supreme Court has held that the crux of the commonality inquiry is the capacity of the proposed class action "to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (citation omitted). If absent class members were never deceived by the "natural" representation or did not care about the product's precise ingredients, then the key question—"Did you rely on the label to your detriment?"—demands individualized investigation.

That individualized question cannot be resolved in one stroke on a class-wide basis. That, in turn, precludes commonality and predominance under Rule 23(a)(2) and Rule 23(b)(3). The district court erred in holding otherwise.

III. No-Injury Class Actions Distort The Civil Justice System and Impose Unwarranted Costs On Businesses And Consumers.

No-injury class actions like this one have deviated far from their ostensible purpose. They promote opportunistic litigation rather than compensate for actual harm. These lawsuits create hydraulic settlement

pressures, generate excessive costs, and enrich class action attorneys at the expense of businesses and consumers.

Class actions consolidate numerous claims, forcing defendants into high stakes litigation. The Supreme Court has recognized that such cases create an opportunity for abuse. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). A defendant that fights risks ruinous liability. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Consequently, even weak claims generate payouts to avoid "breaking the company." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

As a result, companies settle frivolous claims to avoid staggering potential exposure and legal costs. Hardly any cases go to trial. *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). Almost all settle. *CE Design Ltd. v. King Supply Co.*, 791 F.3d 722, 726 (7th Cir. 2015).

Even the most absurd cases carry risks. For example, one California resident sought to bring a class action suit against the manufacturer of Cap'n Crunch cereal, contending that the defendant had misled consumers to believe that "Crunchberries" were made of fruit. *Sugawara v. Pepsico, Inc.*, No. 08-CV-1335, 2009 WL 1439115, at *1 (E.D. Cal. May 21, 2009); s*ee also Carrea v. Dreyer's Grand Ice Cream, Inc.*, 475 F. App'x

113, 115 (9th Cir. 2012) ("Original Vanilla"); *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013) ("the reasonable consumer is aware that [the pasta products] are not springing fully formed from Ravioli trees and Tortellini bushes.")

The problem is made even worse by the internal dynamics of no-injury class actions. It is the attorneys, rather than the ostensible plaintiffs, who control the litigation. For example, *Sugawara* had been litigated earlier by the same attorneys, using a different plaintiff, but with an identical outcome. These dynamics result in a significant conflict of interest between class action plaintiffs' counsel and their purported clients, with the former focused on fees, and the latter on the class award. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014). Class counsel select the plaintiffs. *Id*. The plaintiffs have little control over the litigation but are bound by the judgment. "Attorneys' fees are the driving engine of class actions: without the prospect of substantial fees, lawyers would not bring them." Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 Geo. Wash. L. Rev. 428, 440 (2011).

Moreover, these fees have to be generated. This results in higher prices for consumers, less investment for corporations, lower

compensation for employees, and reduced employment for labor. And class action settlements leave ever-dwindling R&D budgets for future projects.

No-injury class actions also result in overloaded dockets, overworked judges, packed courts, and a justice system reengineered to a rent-seeking enterprise rather than a dispute resolution mechanism. Should courts fail to police class actions by requiring strict proof of commonality as required by Rule 23, real victims will be pushed out of the courthouse amid a flood of frivolous claims.

Because Plaintiffs have not shown that each proposed class member suffered a distinct injury attributable to the "natural" label, they cannot establish Article III standing. Nor can they satisfy Rule 23's exacting prerequisites. Alleging that "natural" was material does not establish actual class-wide harm. Some may have relied on the representation. Many others were indifferent. And others still may have been oblivious. With no uniform proof of reliance, damages, or causation, Plaintiffs cannot meet class certification standards.

CONCLUSION

This Court should reverse the district court's certification order.

Respectfully submitted,

/s/ Cory L. Andrews
Cory L. Andrews
Saad Gul
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,697 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amicus Curiae
Washington Legal Foundation

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