No. 14-1230

IN THE

Supreme Court of the United States

WELLS FARGO BANK, N.A.,

Petitioner,

v.

VERONICA GUTIERREZ AND ERIN WALKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

RICHARD M. HEIMANN
MICHAEL W. SOBOL
ROGER N. HELLER
JORDAN ELIAS
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415.956.1000

SAMUEL ISSACHAROFF
Counsel of Record
40 Washington Square South, 411J
New York, NY 10012
212.998.6580
si13@nyu.edu

Attorneys for Respondents
(Additional counsel on signature page)

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ARGUMENT

Petitioner impermissibly seeks to turn this case into an abstract vehicle for certiorari disconnected from the facts of record. According to Petitioner, the decision of the Third Circuit in *Neale v. Volvo Cars of* North *America, LLC*, __ F.3d _, No. 14-1540, 2015 WL 4466919 (July 22, 2015), confirms a Circuit split on whether Article III standing must be proven for all class members at the threshold stage of class certification. The Petition then alternatively seeks to have this Court grant certiorari as a companion vehicle to the presentation of this issue in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146.

The supplemental filing elides the critical issue in this case: Unlike every other case mentioned in the claimed Circuit split, this case was tried to judgment and the trial court concluded, affirmed by the Ninth Circuit, that the plaintiffs below had proven harm to every class member. App. 183a-188a. The claim that an individual class member may lack standing if he or she has not yet been injured is of no bearing in this case. Under the relevant state laws, all class members were proven to have been injured and were awarded compensation based upon individual-by-individual calculations of harm. App. 183a-187a, 211a-213a.

All of the cases Petitioner invokes, with the sole exception of *Tyson,* are pretrial disputes over the threshold for class certification. *Neale* is no different. The question addressed by Judge Smith of the Third Circuit was whether the possible inclusion in a class of car owners whose cars had not yet manifested the complained of harm would impermissibly create

standing for class members without a cognizable case or controversy. 2015 WL 4466919 at *3. By the time all class members have proven their individual damages at trial, the threshold question of whether there is such a cognizable controversy is long past. If a trial had concluded, under the facts alleged in *Neale,* that all Volvo owners had suffered damage to their cars as a result of a defective sunroof, or incurred an economic loss to themselves, the standing issue would fall aside and the only issue on appeal would be the sufficiency of the proof.

Indeed, the quality of the proof at trial is the dominant issue in *Tyson* – for reasons entirely unrelated to the present case. Petitioner's Brief on the Merits in *Tyson* presents two issues for the Court's review. First, Tyson challenged the use of composite statistics to prove a theory of harm that did not correspond to the actual experience of any member of the plaintiff class: "These averages, however, were not 'common' evidence justifying class certification because they were not probative of any individual plaintiff's actual injury or damages. Instead, they were 'proof' only of the injury and damages suffered by a non-existent hypothetical plaintiff." Pet. Br. at 33-34. This is the so-termed "Trial by Formula" issue that is immaterial to this case, where the proof at trial was of the particularized harm suffered by each individual class member, not a statistical composite. Nor does the particular issue of proof under the Fair Labor Standards Act raised in *Tyson*, *id.* at 40, yield any issue that bears on consumer misrepresentations under California law.

Second, the Petitioner in *Tyson* disputes the award of damages to individuals whose fact of harm had not been established. As expressed in the Petitioner's Brief on the Merits: "Class certification is improper unless plaintiffs either prove that all class members were injured or ensure that uninjured class members do not contribute to the defendant's liability or share in any class recovery." Pet. Br. at 44. Not to belabor the point, but this is precisely what did happen in the present case. Plaintiffs went to trial and proved that all class members were injured, and the total award was based on adding up the amount improperly charged to each class member's bank account. That amount was computed not by sampling, not by averaging, not by assuming harm, but by proof of the losses in each account as established at trial. Nothing presented to the Court in *Tyson* would have any bearing on the fact that Wells Fargo was proven to have unlawfully deceived the class members and ordered to pay to each one what was improperly taken.

As the Third Circuit in *Neale* properly concluded, "Constitutional standing ensures that litigants are truly adverse to one another and are not merely 'suitors in the courts of the United States.'" 2015 WL 4466919 at *2 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 476 (1982)). Petitioner evinces much concern for matters of standing. Yet nowhere in the Petitioner's supplemental filing is there even a mention that this case actually went to trial and that the awards were computed individual-by-individual. The attempt to cast a case with proven

individual harm as turning on threshold issues of certification asks a certiorari question perhaps addressed elsewhere but not here. One should not be a "suitor in the courts of the United States," even on certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

RICHARD M. HEIMANN
MICHAEL W. SOBOL
ROGER N. HELLER
JORDAN ELIAS
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415.956.1000

SAMUEL ISSACHAROFF
Counsel of Record
40 Washington Square South, 411J
New York, NY 10012
212.998.6580
si13@nyu.edu

RICHARD D. MCCUNE
MCCUNEWRIGHT, LLP
2068 Orange Tree Lane
Suite 216
Redlands, CA 92374
909.557.1250

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Attorneys *for Respondents*