UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Tanysha Newman, individually and on behalf of all others similarly situated, Plaintiff, v. Bayer Corporation and Bayer Healthcare LLC, Defendants.	:	Case No. 22-cv-7087-KMK-AEK

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, DECERTIFICATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Civil Rule 7.1.1, *amicus curiae* Chamber of Commerce of the United States of America (the "Chamber") states that it is a non-profit corporation organized under the laws of the District of Columbia. The Chamber has no parent corporation, and no publicly held corporation has 10% or greater ownership in the Chamber.

Amicus curiae American Tort Reform Association ("ATRA") states that it is a non-profit corporation organized under the laws of the District of Columbia. ATRA has no parent corporation, and no publicly held corporation has 10% or greater ownership in ATRA.

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STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

This Court has granted *amici* permission to file this brief. *See* ECF 136. As *amici*'s prior letters explain, *amici* regularly file *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including before the Second Circuit in this case. Many members of *amici* and the broader business community face putative class actions in which named plaintiffs seek certification of overbroad classes encompassing uninjured persons, without presenting common means of proving causation and injury. These actions present significant risks of deadweight economic loss because the cost to businesses (and ultimately to consumers) is not related to any actual injury for the majority of the class. *Amici* and their members thus

[1] No party or counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

have a strong interest in ensuring that common proof of injury is rigorously assessed and that classes do not contain uninjured persons.

PRELIMINARY STATEMENT

Article III of the U.S. Constitution demands evidence of injury to demonstrate standing. Reflecting Article III's charge, Federal Rule of Civil Procedure 23 requires, through the predominance inquiry, that a proposed class develop evidence that injury can be proven with common evidence. Here, however, the named plaintiff's proffered common evidence proves only that most class members suffered *no* concrete injury and provides no way to identify the minority of allegedly injured class members. Binding precedent thus requires that summary judgment be granted to defendants, or, in the alternative, that the class be decertified to remedy the jurisdictional defect.

This class action relies, like all too many, on a consumer survey to ground a debatable reading of a product label. But the named plaintiff's survey here, commissioned to show common proof that consumers understood the label the same way she did, instead showed the opposite. Almost three-quarters of consumers surveyed (72.9%) were not deceived by the "One A Day" brand name on the label at issue. ECF 128 at 3. Therefore, even if the survey accurately reflects class members' understanding of the product label, the overwhelming majority of "class members have not demonstrated concrete harm and thus lack Article III standing to sue." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021). Besides, even the remainder of the absent class members have not "set forth by affidavit or other evidence specific facts establishing [their] standing." *Saba Cap. Cef Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 111 (2d Cir. 2023) (citation modified).

Allowing the class to go forward as is would flout the fundamental purpose of the class-action device, which is "to achieve economies of time, effort and expense, uniformity of decisions, [and] the promotion of efficiency and fairness in handling large numbers of similar claims." 1 Joseph McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 1:1 (21st ed.

2024). After all, "at some time in the course of the litigation the district court will have to determine whether each of the absent class members has standing before they could be granted any relief." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1274 (11th Cir. 2019). Given the named plaintiff's failure of common proof, assessing standing will inevitably become an "individualized issue," *id.* at 1275, a reality at odds with the predominance requirement and the class-action device's goal of ensuring the efficient and economical resolution of claims.

In sum, this Court should grant partial summary judgment to defendants because the absent class members have not proven they have standing, or in the alternative decertify the class.

ARGUMENT

A. Article III and Rule 23 Preclude Granting Relief to Uninjured Class Members.

Article III, section 2 of the Constitution limits the federal judicial power to "Cases" and "Controversies." There is no case or controversy unless a plaintiff can demonstrate standing by showing injury, traceability, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must thus "establish[] that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized to him." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *TransUnion*, 594 U.S. at 427. In other words, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 431 (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C. J., concurring)).

These Article III limitations have particular pertinence in the context of a damages class action, where Rule 23 demands proof that class members suffered injury from "the *same*

injurious course of conduct underlying the plaintiffs' legal theory." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (emphasis added) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 34–38 (2013)). Further, Rule 23 requires plaintiffs to "show that they can prove, *through common evidence*, that all class members were . . . injured." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (emphasis added) (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013)). The imperative of proving standing, then, complements Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members," because absent common proof of injury "plaintiffs [cannot] demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion*, 594 U.S. at 431.[2] In short, without the common proof of injury required by Article III and Rule 23, individuals who have suffered no injury at all—and therefore could not recover were they to bring individual actions—would receive windfalls by virtue of joining a class action. That is why "any class member who claims a right to participate in a settlement or money judgment must demonstrate individual standing to recover." McLaughlin, *supra*, § 4:28.

Here, there is no proof of common injury; indeed, there is evidence that a material number of class members are uninjured, with no way to identify those allegedly injured. Thus, this Court will have to conduct mini-trials for each plaintiff to determine whether he or she was injured by the allegedly unlawful conduct, as class members would have to "rely[] on individual testimony to establish the existence of an injury." *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th

[2] In addition to the violation of Article III and Rule 23, "permitting uninjured claimants to recover money damages in federal court merely because they are aggregated with injured claimants in a class action violates the Rules Enabling Act, Rule 82 . . . and due process." 1 Joseph McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 4:28 (21st ed., 2024).

459, 469 (9th Cir. 2023). Each unnamed class member would need to come forward with individualized evidence that he or she read the label and understood "One A Day" to mean "one gummy a day" and not "one serving a day"—though, given the results of the named plaintiff's survey, it is more likely the vast majority of class members understood the opposite, if they relied on the label at all. Inquiry into these individualized issues will "predominate over common issues susceptible to class-wide proof." *Cordoba*, 942 F.3d at 1275. Consequently, with the benefit of full discovery, it is clear that this action cannot satisfy Rule 23's predominance requirement. Proceeding further would undermine the premise of class actions, which is "to advance judicial economy by trying claims together that lend themselves to collective treatment." *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004).

These concerns are only heightened now that a class has been certified, and defendants face the prospect of trial and approximately $100 million in statutory damages. Given the reality that the overwhelming majority of class members were not injured by the alleged statutory violations, there is no need to put both sides to the expense and burden of a class-wide trial. At summary judgment, of course, a plaintiff can "no longer rest on [ ] mere allegations," but must submit "specific facts" through an "affidavit or other evidence" to show injury. *Lujan*, 504 U.S. at 561 (citation modified). More fundamentally, Article III requires that class members have standing "at all stages of litigation." *TransUnion*, 594 U.S. at 431.

TransUnion aptly illustrates the waste of judicial and party resources that can accompany a trial involving an overbroad, largely injury-free class. There, a district court certified a class even though a majority (77.4%) of its members had no injury in fact, but only a statutory injury. *See id.* at 417–18. At trial, the plaintiffs obtained a $40 million verdict, which the Ninth Circuit affirmed. *Id.* at 418. But the Supreme Court reversed because "[e]very class member must have

Article III standing in order to recover individual damages." *Id.* at 431. This Court should take this opportunity to avoid the error corrected in *TransUnion* by resolving or at least substantially narrowing this case before trial.

B. Materiality Cannot Provide Class-Wide Proof of Injury.

Too often, named plaintiffs alleging misleading product labels or advertising conflate the need for common evidence of injury with the legal standard for materiality. Unable to prove with common evidence that all buyers interpreted a term—and were injured by it—in the same way, plaintiffs encourage courts to sidestep that problem by noting that the relevant standard for materiality uses a "reasonable person" or "reasonable consumer" test. If a reasonable person would be influenced by the term, they argue, no further class-wide proof of materiality is necessary, and materiality may do double-duty for proof of injury. *See*, *e.g.*, *In re ConAgra Foods, Inc.,* 90 F. Supp. 3d 919, 983 (C.D. Cal. 2015); *Goldemberg v. Johnson & Johnson Consumer Cos.*, 317 F.R.D. 374, 389 (S.D.N.Y. 2016).

Not so. The requirements of standing and predominance, that there be common evidence of *injury*, are distinct from the requirement, on *the merits* of the claim, that the alleged misrepresentation be material. Collapsing these inquiries violates Rule 23 and Article III.

Consider the guidance the Supreme Court provided in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), *as revised* (May 24, 2016). In *Spokeo*, a consumer brought a class action alleging a violation of the Fair Credit Reporting Act because a website published inaccurate information about him. *Id.* at 333. The Ninth Circuit found that the plaintiff had sufficiently alleged an injury to establish Article III standing because his statutory rights were violated and he had a personal interest in the handling of his information. *Id.* at 340. The Supreme Court reversed because "an injury in fact must be both concrete *and* particularized" and concrete injuries "must actually

exist." *Id.* For that reason, the plaintiff "could not allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 341.

Similarly, here plaintiffs have argued that a reasonable person would be deceived by the phrase "One A Day," so there is no need for class-wide proof of injury. Without more, however, this contention at most asserts a "bare procedural violation" of the consumer-protection statute without proving that anyone was injured by it. *Id.* In reality, some class members might not share the view that "One A Day" is deceptive. Indeed, plaintiff's own survey suggests that a majority of consumers do not share her interpretation. They could view "One A Day" as meaning one serving per day in accord with the supplement facts. Or they could understand "One A Day" as merely a familiar brand name—since it was the "One A Day" brand that mattered to them, they got what they paid for. Or, like the named plaintiff, they might always take one gummy daily regardless of label or instructions. *See* ECF 85 at 11–12, 15–17. Such consumers could not allege an injury "actually exist[s]." *Spokeo*, 578 U.S. at 340. After all, if a hypothetical reasonable consumer would be misled by the terms of an advertising label, but an actual consumer before the court was *in fact* never misled, then the real person seeking relief suffered no concrete injury to justify it. *See id.*; *see also TransUnion*, 594 U.S. at 433 ("As Judge Tatel phrased it in a similar context, 'if inaccurate information falls into' a consumer's credit file, 'does it make a sound?'" (quoting *Owner-Operator Independent Drivers Assn., Inc. v. U.S. Dep't. of Transp.*, 879 F.3d 339, 344 (D.C. Cir. 2018))).

Thus, a theory of materiality cannot replace the proof of injury that Article III and Rule 23 require. As discussed above, conflating the two leads courts down a blind alley of predominance problems that invite individualized adjudications of injuries. *See Cordoba*, 942 F.3d at 1274. That risk is very real here, because the named plaintiff's own expert's survey

affirmatively showed that the majority of class members suffered no concrete harm, and there is no evidence from which a factfinder could determine that *any* absent class member suffered concrete harm. In fact, the internal Bayer studies provide plaintiffs no help because they do not show which consumers, if any at all, were confused by the label. *See* ECF 128 at 9–10. Nor can plaintiff's damages theory, such as it is, fill the gap because it merely assigns value to an unproven injury. *See TransUnion*, 594 U.S. at 433–42 (reversing award of damages to uninjured class members); *Gerboc v. ContextLogic, Inc.*, 867 F.3d 675, 680–81 (6th Cir. 2017) ("To recover damages, a plaintiff must have suffered an injury or loss.").

C. Class Actions with Uninjured Plaintiffs Distort the Litigation System and Impose Unwarranted Costs on Businesses and Consumers.

The bedrock Article III and Rule 23 principles in this case have serious implications for businesses nationwide. Certifying a class consisting mostly of uninjured individuals significantly increases unwarranted settlement pressure on defendants. Evidence-based analysis of the Rule 23 factors is "a crucial part of avoiding the procedural unfairness to which class actions are uniquely susceptible." *In re Ford Motor Co.*, 86 F.4th 723, 729 (6th Cir. 2023) (per curiam). Without such rigorous analysis, defendants will be pressured to settle class actions, at deadweight economic loss to businesses and, ultimately, consumers.

Litigating class actions is expensive. Among large companies alone, class-action litigation costs reached $4.21 billion in 2024 and are expected to surpass $4.5 billion in 2025. *See* Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 6–7 (2025), available at https://tinyurl.com/2pa7txds. And the potential liability can be far higher.

Class certification heightens settlement pressure to the point that "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick,

An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 812 (2010). The Supreme Court has long recognized the "risk of 'in terrorem' settlements that class actions entail," *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022) (cleaned up), as companies opt to avoid at trial "even a small chance of a devastating loss" magnified by the claims of persons who lack standing, which therefore never should be tried in the first place, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *accord Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003). After "a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (Lee J., dissenting). Even "the mine-run case" risks "'potentially ruinous liability.'" *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (quoting Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment). "[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "[W]here questionable lawsuits are allowed to proceed, companies have to choose between entering into 'in terrorem' settlements or rolling the dice on a class trial and relying on the judgment of an unpredictable jury." U.S. Chamber of Com. Inst. for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 22 (2022), available at http://tinyurl.com/2jvv33az.

Damages classes involving significant numbers of potentially uninjured individuals exert settlement pressure that exceeds any legitimate measure of liability—especially when, as here, statutory penalties can magnify available damages. *See* ECF 128 at 1. A "statutory damages

defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009).

Although uninjured individuals in theory should be denied damages in the end, the costs of litigating against such a class, and the risk that such individuals will not actually be excluded, intensify pressure to settle. Requiring valid common evidence of injury before trial prevents this "unjustified settlement pressure" and the waste of resources that would result if a court did "conclude at final judgment that significant portions of the certified class lack standing." U.S. Chamber of Com. Inst. for Legal Reform, *TransUnion and Concrete Harm: One Year Later* 51 (2022), available at https://tinyurl.com/nheb29w4.

CONCLUSION

This Court should grant partial summary judgment to defendants on the claims of all the absent class members or in the alternative decertify the class.

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Dated: September 26, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Your Honor's Rule II.B, I certify that the foregoing brief of *amici* the Chamber and ATRA, which was prepared using Times New Roman 12-point typeface, contains 3,221 words, excluding the parts of the document that are exempted by Local Civil Rule 7.1(c). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is correct and true.

Dated: September 26, 2025

/s/ Daniel M. Sullivan
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