No. 11-983

IN THE
Supreme Court of the United States

TICKETMASTER; TICKETMASTER, LLC; ENTERTAINMENT PUBLICATIONS, INC.; AND IAC/INTERACTIVECORP, *Petitioners*,

v.

STEPHEN C. STEARNS, CRAIG JOHNSON, JOHN MANCINI, ET AL., *Respondents.*

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents understandably shy away from the jurisdictional issues at the heart of this Petition. The focal points of this case are (a) the 9th Circuit's holding that the standing of absent class members is irrelevant and (b) its theory that Article III standing (as well as Rule 23) can somehow be satisfied by a state law's "conclusive presumption" that one person's mere *payment* of money to another *automatically* constitutes an *injury* calling for "restitution." (See Br. in Opp., pp. 7-8 [purporting to rely on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)].)

That may be the law in a California state court proceeding but, as the 8th Circuit concluded when examining the same issue under the same California statute, it cannot be forced upon federal courts which are subject to the jurisdictional limitations of Article III. (*Avritt v. ReliaStar Life Ins. Co.*, 615 F.3d 1023, 1034 [8th Cir. 2010].) This presents a direct Circuit conflict on an important jurisdictional issue in federal class actions.

Regardless of Respondents' desire to ignore obvious Circuit conflicts (see Pet., pp. 14-18), confusion abounds in the lower courts on whether a putative class may contain members who did not suffer injury that was directly

caused by the defendant's actions. A definitive ruling from this Court is sorely needed.

I.

RESPONDENTS MISSTATE THE CLEAR HOLDING OF THE 9TH CIRCUIT — THAT THE STANDING OF ABSENT CLASS MEMBERS IS IRRELEVANT

The 9th Circuit's opinion relied heavily — indeed depended almost entirely — on the California Supreme Court's decision in *In re Tobacco II Cases*, 46 Cal.4th 298 (2009). In reversing the district court's denial of class certification, the 9th Circuit concluded broadly, "that case [i.e., *Tobacco II*] makes all the difference in the world." (Pet. App., p. 11.) *Tobacco II* held flatly that "standing requirements are applicable *only* to the class representatives, and not all absent class members." (46 Cal.4th at 306; emphasis added.) In adopting that holding, the 9th Circuit expressly approved language in its earlier case of *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (*en banc*) that the 9th Circuit is concerned *only* with whether one named plaintiff has standing. (Pet. App., p. 15.)

Respondents downplay the 9th Circuit's holding that absent class members don't

matter, asserting that the court below "found that the absent class members were injured and therefore had standing." (Br. in Opp., p. 10.) All else, they say, is dicta. (Br. in Opp., p. 16.)

Respondents are doubly wrong:

First (and setting aside the fact that Courts of Appeals do not make "findings"), the 9th Circuit said there was "injury" solely because class members paid money for a service they "did not use." (Br. in Opp., p. 11.) (E.g., Pet. App., pp. 13-14; Br. in Opp., pp. 8, 9, 10, 11, 12.) Under any rational use of the English language, this formulation does not automatically connote "damage" or "injury" or "causation." It could mean no more than that someone bought a service and then decided not to use it. Or simply forgot it was there. Or, in either event, was not fooled into buying it in the first place. Merely buying something and then not using it says nothing about deception, damage, or causation.

Attempting to shift the burden of properly establishing a class, Respondents assert that Petitioners failed to present evidence of any class member who actually intended to enroll in the program. (Br. in Opp., p. 10.) They have it backwards. As the proponents of class certification, it was Respondents' burden to

demonstrate that all Rule 23 and Article III requirements were met. (*Amchem Prods. v. Windsor*, 521 U.S. 591, 623 [1997].) As shown in the Petition (Pet., pp. 7-10) and nowhere discussed by Respondents, the underlying purpose of a class action is to band together parties who *each suffered injury caused by the defendant* into a litigation group. Nothing in either Rule 23 or Article III allows an assemblage of parties who do not satisfy all the Rule 23 and Article III benchmarks to make themselves plaintiffs if they otherwise would not be able to sue on their own. Yet that is what Respondents sought and the 9th Circuit established as law.

Second, by adopting the California rule that no standing is required of the absent class members, the 9th Circuit ignored this Court's clear admonition that Article III standing places a "hard floor" beneath the case-or-controversy concept that must be maintained. (*Summers v. Earth Island Inst.*, 555 U.S. 488, 497 [2009].)[1] The new 9th Circuit rule replaces

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[1] Contrary to both the 9th Circuit (Pet. App., p. 14) and the Respondents (Br. in Opp., p. 12), Petitioners' "real objection" is not to California's decision about how to shape its own law, but to the idea that such a radical change in standing law can be forced on federal courts contrary to clear Article III jurisprudence.

that hard floor with the shifting sands of varying state class action rules.

II.

CALIFORNIA'S RULE ESTABLISHING A "CONCLUSIVE PRESUMPTION" OF DAMAGE AND CAUSATION CANNOT SATISFY ARTICLE III

The *only* way the 9th Circuit could infer that all absent class members were "damaged" was by adopting *Tobacco II*, which "create[d] what amounts to a *conclusive presumption*" of damage "without individualized proof of deception, reliance and injury." (46 Cal.4th at 320; Pet. App., pp. 13, 14, n. 13; see Br. in Opp., p. 7; emphasis added.)[2] But that simply confirms precisely what Petitioners have

[2] While the court below clearly *held* that the standing of absent class members is irrelevant (as discussed in Part I of this brief), its discussion of the "conclusive presumption" may well be dictum, rather than an alternative holding, as the quoted language in the opinion was introduced by the statement that "*One might even say* that California has ...." (Pet. App., p. 14, n. 13; emphasis added.) In any event, it may safely be said that district courts in that Circuit will at least be confused and may well adopt the "conclusive presumption" concept as the easier "holding" to follow.

charged: i.e., that the 9th Circuit has created a new standard of Article III standing (and Rule 23 compliance) based solely on a "presumption" of damage and causation — without proof of either — and further has made that presumption "conclusive." Bluntly, without the benefit of this presumption, nothing in the complaint or elsewhere links Petitioners' actions with actual damage caused to Respondents.[3]

The 9th Circuit clearly misunderstands *Lujan* and its application of Article III. *First*, *Lujan* requires "injury in fact." (504 U.S. at 560.) The 9th Circuit, on the other hand, is content to endorse a "conclusive presumption" of injury solely on the basis that money changed hands for a service that was not thereafter used. *Second*, *Lujan* requires a direct causal connection between the injury and the defendant's allegedly unlawful conduct.

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[3] Respondents want this Court to accept as fact that they have crafted a class that is uniform and contains parties who were uniformly injured by Petitioners. (Br. in Opp., p. 6.) But even Respondents and their counsel are not capable of drawing the proper lines. The 9th Circuit had to dismiss two of the *named* plaintiffs because they could not fit the assumed parameters of the class as described in the complaint. (Pet. App., pp. 10-11.)

(504 U.S. at 560.) The 9th Circuit dispenses with such a causal connection and settles for a hypothetical connection which assumes that injury presumptively results any time anyone parts with money, regardless of any other facts. The gravamen of this case (looking at actual, rather than presumed, facts) would be taking money *through a process that deceived the customer*. Focus on that necessary element of causation disappears from the 9th Circuit's formulation — not surprisingly, since 98% of those exposed to the allegedly deceptive process were concededly not deceived. *Third*, *Lujan* requires the ability to "redress" the "injury" through litigation. (504 U.S. at 561.) The 9th Circuit dispenses with the need to show that the conduct complained of caused any injury, so that any "redress" is fictional and directed toward paying money to one who has sustained only theoretical damage — if that. Nothing in *Lujan* supports the decision below. Quite the contrary.

Moreover, the new 9th Circuit presumption will plainly eviscerate the ability of class action defendants to defend themselves against the multitude of claims that can be swept beneath the class action umbrella — something this Court held was not permissible in its recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

Respondents seek solace from some securities cases, asserting that this Court does not require class members to "prove deception or reliance." (Br. in Opp., p. 13.) The cases cannot bear the freight loaded on them by Respondents. Simply put, they establish no general rule approving certification of classes whose members cannot prove reliance or injury. Rather, they recognize a limited presumption of reliance in Rule 10b-5 cases where securities have been traded in a well-developed market. (*See Basic, Inc. v. Levinson*, 485 U.S. 224, 243-44 [1988]; *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2185 [2011].) This "fraud-on-the-market" presumption is *rebuttable* (*Basic,* 485 U.S. at 248-49), unlike the *conclusive* presumption described in *Tobacco II*, which eliminates any need to prove that the conduct complained of caused injury to class members. Indeed, this Court has left no doubt that the element of reliance is essential for Rule 10b-5 liability. (*See Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 [2008] [citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994)]; *id.* at 159 [citing *Basic*, 485 U.S. at 243]; *Halliburton*, 131 S.Ct. at 2184-85.)

Moreover, the rationale for the presumption of reliance in *Basic* is limited to the *sui generis* context of securities transactions. Securities

change hands without any communication between buyer and seller — the parties deal directly with the market and only indirectly with each other. Thus, each is presumed to rely on any misrepresentation embedded in the market price of a security. (*Basic*, 485 U.S. at 244; *Halliburton*, 131 S.Ct. at 2185.) It is this concern with market integrity (and recognition of market efficiency) that distinguishes securities fraud claims from other fraud-based claims. (*See Basic*, 485 U.S. at 244, n. 22 ["Actions under Rule 10b-5 are distinct from common-law deceit and misrepresentation claims, and are designed to add to the protection provided investors by the common law"] [internal citations omitted]; *Stoneridge*, 552 U.S. at 157 [Rule 10b-5 reliance limited to Section 10(b) liability]; *id*. at 161-62 [Rule 10b-5 is distinct from common law fraud].) No such presumption — especially not a "conclusive" one — is sufficient to establish Article III standing in a federal court in a non-securities case.

In any event, the *Basic* presumption only applies to transaction causation and not to loss causation — a separate causation element that, along with the fact of loss itself, must be proven on a class-wide basis without the benefit of any presumption. (*See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 [2005] ["The statute thereby makes clear Congress' intent to permit

private securities fraud actions ... only where ... plaintiffs adequately allege and prove the traditional elements of causation and loss"]; *Halliburton*, 131 S.Ct. at 2185-86).[4]

In short, nothing about *Basic* and its progeny suggests that class certification would be consistent with Article III standing requirements if causation and injury could be conclusively presumed with respect to all class members.

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[4] Respondents conflate transaction and loss causation by mistakenly suggesting that the *Basic* presumption — which relates to transaction causation — may only be rebutted by disproving loss causation. (Br. in Opp., p. 14.) To the contrary, the inquiries are entirely separate, and the presumption may be rebutted only by evidence that disproves transaction causation itself — *i.e.*. by evidence showing that class members did not rely on the alleged misrepresentation or the integrity of the market price. (*See Basic*, 485 U.S. at 248-49.) Neither *Basic* nor *Halliburton* relieves plaintiffs of the need — also made clear in *Dura* — to ultimately prove loss causation on a class-wide basis at trial.

III.

RESPONDENTS CANNOT MAKE THE CONFLICTS AMONG THE LOWER COURTS GO AWAY BY *IPSE DIXIT*

Respondents engage in wordplay by insisting that any contrary language in *Avritt* (the 8th Circuit decision that is diametrically opposed to the decision below on the conflict between California's *Tobacco II* decision and federal class action and standing law) is merely "dicta." (Br. in Opp., p. 24.)

Respondents are simply wrong. *Avritt* was another case brought under California's UCL. It involved the defendant's annuity interest-crediting practices. The plaintiffs claimed that any differences among class members were mooted by *Tobacco II* which, they said, eliminated the need to show individual reliance and causation. The 8th Circuit needed to decide that issue to decide the case. It was in that context that it held that, "to the extent that *Tobacco II* holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by the federal courts." (615 F.3d at 1034.)

Thus, the 9th Circuit imported California's *Tobacco II* into federal class action standing jurisprudence while the 8th Circuit firmly rejected it.

Respondents also wholly misunderstand the importance of the 3rd Circuit's *en banc* decision in *Sullivan v. DB Investments, Inc.*, 2011 U.S. App. LEXIS 25185 (3rd Cir. 2011) (en banc). As explained in the Petition (Pet., pp. 16-17), the difference between the majority and dissenting Judges demonstrated confusion over the need for class member standing in general, and the impact of this Court's recent *Wal-Mart* decision in particular. The majority held that a settlement class could be certified without regard to whether each putative class member "ha[d] a 'colorable' claim." (*Id*. at *13.) The dissent concluded, to the contrary, that the class would lack commonality and therefore include class members without standing. Respondents simply summarize the majority opinion, ignore the dissent, and conclude that it presents no problem. The dissent's opening sentence says it all, demonstrating the conflict and the need for this Court's intervention:

> "This is the Majority's considered view of the law: in certifying a class action, it makes no difference whether the class is defined to

> include members who lack any claim at all." (*Id*. at *46.)

The remaining cases discussed by both Petitioners and Respondents (compare Pet., pp. 15-18 with Br. in Opp., pp. 16-24) merely demonstrate the conflict by collecting cases going both ways.[5]

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[5] The 7th Circuit cases so heavily noted by Respondents are in hopeless conflict (compare *Kohen v. Pac. Inv. Mgmt. Co, LLC*, 571 F.3d 672 [7th Circuit 2009] with *Oshana v. Coca-Cola Co.*, 472 F.3d 506 [7th Circuit 2006]), and provide support only for the proposition that this Court's review is required.