ORAL ARGUMENT REQUESTED

Nos. 23-2180 & 23-2181

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Anthony Dunn, et al.,

Plaintiff-Appellants/Cross-Appellees,

v.

Santa Fe Natural Tobacco Co., et al.,

Defendants-Appellees/Cross-Appellants.

On Appeal From The United States District Court
For The District Of New Mexico

No. 1:16-md-2695-JB-LF (MDL No. 2695)
(The Honorable James O. Browning)

PRINCIPAL AND RESPONSE BRIEF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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INTRODUCTION

The claims in these putative consumer class actions arise from the description of Natural American Spirit ("NAS") cigarettes as containing "natural" and "additive-free" tobacco. Plaintiffs contend that these terms are misleading in two different but equally implausible ways. Their primary theory—the "safer cigarette" theory—is that implicit connotations of the terms "natural" and "additive-free" deceived consumers into believing that NAS cigarettes are safer than other cigarettes, even though every NAS package and advertisement during the relevant period said the opposite: "No additives in our tobacco does **NOT** mean a safer cigarette." And their secondary theory—the "menthol" theory, limited to NAS menthol cigarettes—is that "additive-free" is false because the natural menthol in the filters of those cigarettes should be considered a tobacco additive.

Santa Fe Natural Tobacco Company ("Santa Fe")[1] manufactures NAS cigarettes. Plaintiffs, consumers of those products, sought to litigate consumer-protection and unjust-enrichment claims for damages on behalf of twelve statewide classes of NAS consumers on their safer-cigarette theory, and either a nationwide class or eight statewide classes on their menthol theory. In the order

[1] Plaintiffs also sued two related entities: Reynolds American Inc. and R.J. Reynolds Tobacco Co. For simplicity, this brief refers only to Santa Fe.

under review, the district court held that Plaintiffs' safer-cigarette claims presented multiple issues that could be determined only on an individualized basis, and therefore that those claims failed to satisfy the "predominance" requirement of Rule 23(b)(3)—i.e., Plaintiffs' burden of showing that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The court reached the same conclusion as to the proposed nationwide menthol class. Yet the court ruled that Plaintiffs *had* satisfied the Rule as to six of the eight statewide menthol classes.

1. This Court should affirm the district court's denial of certification of the safer-cigarette classes. As the district court correctly recognized, those proposed classes are incompatible with class treatment for multiple reasons.

First, one fatal obstacle—for all of Plaintiffs' claims—is the need for each claimant to prove individually the most fundamental element of the claim: that she actually bought NAS cigarettes. As the court recognized, NAS consumers buy from retailers, not Santa Fe, and there are neither classwide records of purchase nor any other means of proving this element short of claimant-by-claimant litigation. As a result, any attempt to litigate these claims in a class action would necessarily devolve into thousands of individual mini-trials.

Second, the safer-cigarette claims would require individual inquiries into what representations each consumer saw—particularly the critical question

whether the consumer had the opportunity to see the disclaimer that disavowed any suggestion that NAS was a "safer cigarette." After all, if a consumer saw that disclaimer, she could not reasonably have understood the opposite.

Third, Plaintiffs' classwide damages model was not tailored to their theory of liability, as required by *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). As their damages expert *admitted*, Plaintiffs' model made no effort to measure the value of what Plaintiffs claim is unlawful: the purported representation that NAS cigarettes are safer than others. Instead, as the district court explained, Plaintiffs' model sweeps in the value of wholly unobjectionable meanings of "natural" and "additive-free," producing windfall damages in violation of *Comcast*.

2. For many of the same reasons, this Court should reverse the portion of the district court's order certifying six of the statewide menthol classes.

First, as to these claims, too, the need for thousands of mini-trials over whether each claimant purchased the product is fatal to Plaintiffs' ability to establish predominance. The court downplayed that fatal defect only by ignoring predominance and analyzing solely Rule 23(b)(3)'s "superiority" requirement. But the text of Rule 23 does not permit that bypassing of the predominance requirement, and the endless mini-trials necessary to litigate these claims make it impossible for Plaintiffs to show that common questions predominate.

Second, Plaintiffs' damages model violates *Comcast* as to the menthol claims just as it does for the safer-cigarette claims. Plaintiffs' theory is that the "additive-free" representation was inaccurate because menthol is an additive. Under *Comcast*, their model therefore must address how the cigarettes' price would change if *that alleged inaccuracy* were corrected—i.e., if purchasers of menthol cigarettes were told that the tobacco contains no additives other than menthol flavoring that migrates after manufacture from the filter into the tobacco. Yet Plaintiffs' model admittedly makes no effort to answer that question. Instead, it measures the entire value of excluding any number of additives—including the dozens of chemical additives contained in ordinary cigarettes but excluded from NAS products—and treats all of that value as attributable to the presence or absence of menthol as an additive. That makes no sense. A consumer who values both additive-free and menthol-flavored products would obviously prefer a menthol product with otherwise additive-free tobacco to one that includes dozens of other chemicals. Plaintiffs' model therefore fails to measure the damages attributable to their theory of liability, plainly violating *Comcast*.

In short, under the required "rigorous analysis" of whether Plaintiffs have satisfied the prerequisites of Rule 23 (*Brayman v. KeyPoint Gov't Sols., Inc.*, 83 F.4th 823, 837, 839 (10th Cir. 2023) (internal quotation marks omitted)), no part of this case is fit for class treatment.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2). 1 App. 158. This Court has jurisdiction under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). The district court entered its class-certification order on September 1, 2023. 4 App. 1. Each side timely petitioned for leave to appeal under Rule 23(f), and this Court granted both petitions. *Dunn v. Santa Fe Natural Tobacco Co.*, No. 23-705 (10th Cir. Oct. 19, 2023).

STATEMENT OF THE ISSUES

Plaintiffs' appeal from the denial of certification of their proposed safer-cigarette classes raises two questions:

1. Plaintiffs' safer-cigarette classes would require countless mini-trials to determine (among other things) whether each claimant actually purchased NAS products during the class period and what representations each individual saw before purchasing. Was the district court correct in holding that common questions do not predominate for the safer-cigarette classes?

2. Plaintiffs' safer-cigarette theory asserts that the terms "natural" and "additive-free" misled consumers into believing that NAS cigarettes are safer than others. But they admit that their damages model would not isolate the value of such a belief, and would instead sweep in the value of unobjectionable meanings of the challenged terms. Was the district court correct in holding that Plaintiffs' damages model is not sufficiently tailored to their safer-cigarette theory of liability, as required by *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)?

Defendants' cross-appeal, regarding the certification of six menthol classes, raises two related questions:

1. Plaintiffs' menthol classes would require mini-trials for many of the same issues as the safer-cigarette classes, including whether each claimant purchased NAS products. Did the district court err in holding that common questions nonetheless predominate for the menthol classes?

2. Plaintiffs' menthol theory asserts that representing the tobacco in menthol cigarettes as "additive-free" was false because some menthol in those cigarettes' filters eventually migrates into the tobacco. But they admit that their damages model would not isolate the value of a belief that the menthol is not an additive to the tobacco, and would instead sweep in the value of excluding many chemical additives found in other cigarettes but not in NAS cigarettes. Did the district court err in holding that Plaintiffs' damages model is nonetheless sufficiently tailored to their menthol theory of liability, as required by *Comcast*?

STATEMENT OF THE CASE

A. Santa Fe's marketing of NAS cigarettes.

Santa Fe makes and sells NAS cigarettes, including menthol and non-menthol varieties. 4 App. 8-10. In doing so, it uses tobacco that meets specific quality standards and that is free from additives commonly found in other cigarettes. *Id.* at 8. Until October 2017, all NAS packages and advertisements described the tobacco in NAS cigarettes as "natural" and "additive-free" (or "100% additive-free"). *Id.* at 11. Concurrently, all NAS packages and advertisements included disclaimers renouncing the idea that NAS cigarettes are safer than others. From 2000 to 2017—covering the entire period relevant here—the disclaimer stated: "No additives in our tobacco does **NOT** mean a safer cigarette." *Id.* at 19 (emphasis and capitalization in original).[2]

B. Plaintiffs' claims and theories of deception.

Plaintiffs began this litigation in 2015, alleging that Santa Fe's labeling and marketing of NAS cigarettes—including its use of the terms "natural" and "additive-free," as well as "organic" and certain "Native American imagery"—deceived consumers in violation of various states' laws. 1 App. 144; *see also* 4 App. 13-14. Plaintiffs originally brought their claims in thirteen actions filed in

[2] In October 2017, Santa Fe stopped using the "natural" and additive-free" descriptors and changed the disclaimer to state: "Natural American Spirit cigarettes are not safer than other cigarettes." *Id.* at 21, 23.

eight district courts; the Judicial Panel on Multidistrict Litigation subsequently transferred the cases to the District of New Mexico for consolidated pretrial proceedings. *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Pract. & Prods. Liab. Litig.*, 288 F.Supp.3d 1087, 1133 (D.N.M. 2017). Plaintiffs pleaded consumer-protection and unjust-enrichment claims based on two distinct theories of deception.[3]

Plaintiffs' "safer-cigarette theory" posits that Santa Fe's description of its tobacco as "natural" and "additive-free" misled consumers into believing that NAS cigarettes "are safer and healthier to smoke than other competing cigarettes"—notwithstanding the disclaimer on all packages and advertisements stating the opposite. 1 App. 145, ¶¶ 4-5; *see also id.* at 166, ¶¶ 49-50.

Plaintiffs' "menthol theory" posits that describing the tobacco as "additive-free" misled NAS menthol consumers, in particular, in a different manner. *Id.* at 174, ¶¶ 68-69. Santa Fe manufactures NAS menthol cigarettes with tobacco that contains no additives, but some natural menthol that Santa Fe puts into the cigarette filter "migrates" after manufacture from the filter into the tobacco, due to its chemical volatility. *Id.* Plaintiffs' menthol theory turns on the contention that purchasers of menthol cigarettes were deceived, because their

[3] The district court dismissed claims premised on a third theory of deception not relevant here. *Id.* at 1208.

cigarettes contain such natural menthol in both the filter and, due to this migration, in the tobacco. *Id.*

C. Plaintiffs' motion for class certification.

Plaintiffs sought to certify classes of consumers of NAS cigarettes and NAS menthol cigarettes to litigate their two theories of deception. They proposed twelve statewide safer-cigarette classes, each comprising "[a]ll persons who purchased [NAS] cigarettes in" the relevant state, to pursue consumer-protection and unjust-enrichment claims. *Id.* at 182-84, ¶¶ 107-18. They also proposed a nationwide class of NAS menthol consumers to pursue a claim for breach of express warranty, or, alternatively, eight statewide classes of NAS menthol consumers to pursue consumer-protection and unjust-enrichment claims—again, with each class comprising "[a]ll persons who purchased [NAS] menthol cigarettes in" the relevant jurisdiction. *Id.* at 184-86, ¶¶ 119-27.

Plaintiffs moved for certification of damages classes under Rule 23(b)(3), which required them to show (among other things) that "questions of law or fact common to the class predominate over any questions affecting only individual members."[4] Much of the class-certification hearing focused on predominance,

[4] Plaintiffs also sought certification of a Rule 23(b)(2) injunctive class. 1 App. 189. The district court denied that request (5 App. 126), and Plaintiffs do not challenge that denial.

and on *Comcast*'s related requirement that Plaintiffs have a viable classwide damages model that "measure[s] *only* those damages attributable to [the class's] theory" of liability. 569 U.S. at 35 (emphasis added).

Safer-Cigarette Classes. To try showing that liability on the safer-cigarette claims would turn predominantly on common questions, Plaintiffs argued that Santa Fe had made "*uniform* marketing representations" that were "false, deceptive, or misleading to a *reasonable consumer*." 4 App. 220 (citation omitted). Plaintiffs urged that this combination of uniform representations and a reasonable-consumer standard obviated the need for individual inquiries into deception and reliance, and thus facilitated certification under Rule 23(b)(3). *See id.* They relied on a report from Dr. Jennifer Pearson, who opined that consumers generally believe that "natural" or "additive-free" cigarettes "are or may be" safer, but who expressed no opinion on whether such perceptions actually affected consumers' purchasing behavior. 2 App. 4; *see also* 3 App. 81.

Santa Fe offered evidence that the studies Dr. Pearson reviewed do not support her conclusions and thus do not provide common evidence supporting Plaintiffs' claims. 3 App. 48-91. Additionally, one defense expert, Dr. Kent Van Liere, described his survey of 428 consumers who purchased NAS cigarettes between 2010 and 2015—the largest-ever NAS consumer-perception survey, and

representative of the putative class members here. 3 App. 91-94. Among other things, Dr. Van Liere found that:

- Fewer than 10% of NAS purchasers mentioned health perceptions as a reason for purchase.
- Nearly half of NAS purchasers did *not* report paying a premium for NAS cigarettes.
- Only about 5% of those who reported paying a premium mentioned health perceptions as a reason why.

Id. As these survey results reflect, most consumers bought NAS cigarettes for reasons unrelated to health perceptions.

More generally, Santa Fe demonstrated that other elements of Plaintiffs' claims would turn on individual questions much more than common ones. For example, Santa Fe showed that cigarettes are almost always bought at retail, and that there are no records identifying retail purchasers during the class periods. 4 App. 68; *see also Santa Fe*, 288 F.Supp.3d at 1233. Accordingly, individual mini-trials would be necessary to prove that the person seeking to recover damages for the purchase of NAS cigarettes *in fact purchased* NAS cigarettes. 3 App. 135-42. Moreover, even for a consumer who could prove that she purchased NAS cigarettes, the liability inquiry would hinge on whether she saw the disclaimer before her purchase—which could be determined only through fact-intensive, consumer-specific inquiries. *Id.* at 38-40, 125-27.

Menthol Classes. To support predominance for their menthol theory, Plaintiffs again relied on the idea that Santa Fe had made "uniform" misrepresentations to consumers, based on their claim that the presence of migrated natural menthol in the tobacco of NAS menthol cigarettes rendered the term "additive-free" tobacco literally false. *E.g.*, 4 App. 214, 219-20.

Santa Fe objected that Plaintiffs presented no evidence that consumers bought NAS menthol cigarettes because they believed (i) that natural menthol is not an additive to the tobacco (as opposed to the filter), or (ii) that no menthol migrates into the tobacco by the time of smoking. 3 App. 91. To the contrary, all five proposed menthol-class representatives testified that they were indifferent as to where the menthol is located, and that this did not affect their purchasing decisions. *E.g.*, 3 App. 99-100 ("Q. Did you care where in the cigarette the menthol came from? [Objection omitted.] A. Never even thought about that."); *see also id.* (collecting other proposed representatives' testimony).

Proposed Damages Model. When it came to showing a classwide method of proving damages, Plaintiffs relied on testimony from Dr. Jean-Pierre Dubé. Dr. Dubé has not actually developed a damages model for this case. 4 App. 55, 282. But he proposed one to determine the price premium attributable to the terms "natural" and "additive-free," using the statistical technique known as conjoint analysis. *Id.* at 57, 282. Dr. Dubé admitted that his model would not

isolate the price premium from what Plaintiffs claim was misleading: for their safer-cigarette theory, the alleged message that cigarettes with "natural," "additive-free" tobacco are safer; for their menthol theory, the failure to qualify "additive-free" with the information that some menthol migrates from the filter into the tobacco. 1 Supp. App. 150-52, 156. Instead, Dr. Dubé's model would measure the entire, undifferentiated value of each descriptor. *See id.*; *see also* 5 App. 3.

Santa Fe objected that Dr. Dubé's proposed damages model did not fit either of Plaintiffs' theories of liability, as *Comcast* requires. With respect to the safer-cigarette theory, for instance, Plaintiffs' own marketing expert, Dr. Timothy Dewhirst, *conceded* that the terms "natural" and "additive-free" convey multiple meanings that are unobjectionable even under Plaintiffs' theory of liability, such as "quality," "being earthy," "[s]ustainable farming," and "a cleaner taste or a more simple taste." 2 Supp. App. 201-02, 203, 204-05. Another of Plaintiffs' experts agreed that consumers have "many reasons" for choosing NAS. 1 Supp. App. 163. The price value of these permissible meanings is in no sense attributable to consumers being misled about safety, yet Dr. Dubé's model would sweep all of it into its calculation of "safer cigarette" damages. As a result, Santa Fe argued, Dr. Dubé's model went well beyond Plaintiffs' theory of liability, violating *Comcast*. 3 App. 105-07.

Dr. Dubé's testimony was similar when it came to measuring damages under the menthol theory, in that he conceded that his model makes no effort to focus on the value to consumers of whether menthol is found solely in the filter. 1 Supp. App. 157-59. Instead, he proposed to merely calculate the full value of "additive-free." *See id.*; *see also* 3 App. 108. Santa Fe argued that this, too, plainly violates *Comcast*, in that the price effect of telling purchasers of menthol cigarettes that menthol is an additive to the tobacco—to the extent it would have any price effect at all—is at best a small component of whatever value consumers place on NAS cigarettes being otherwise free of the dozens of chemical additives contained in many other cigarettes. Because Dr. Dubé's model makes no attempt to measure the damages actually resulting from Plaintiffs' theory of liability, Santa Fe argued, it (again) violates *Comcast*. 3 App. 108.

D. The district court's order.

The district court ruled that Plaintiffs had failed to carry their burden of satisfying Rule 23 as to any of their safer-cigarette classes and their nationwide menthol class. 5 App. 124-28. However, the court ruled that Plaintiffs *had* satisfied Rule 23 as to six of the eight proposed statewide menthol classes. *Id.* The court's analysis of several issues cut across the different classes. Three are especially relevant to these cross-appeals.

Need for Individual Proof of Purchase. The district court noted that this Court has not squarely addressed what is sometimes referred to as "ascertainability," i.e., whether the need for individual adjudications to determine who possesses a claim—here, proof that a claimant purchased the product—can foreclose certification. 4 App. 242-43. After surveying decisions from other circuits, the court explained that, were it ruling "[o]n a clean slate," it would adopt the "administrative-feasibility requirement" first set forth by the Third Circuit, which requires plaintiffs to establish "that identifying class members is a manageable process that does not require much, if any, individual factual inquiry." *Id.* at 252 & n.64 (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 307-08 (3d Cir. 2013)). As the court explained, "when the actual victims cannot be determined" in a feasible manner, "the question is why the class action … should go forward." *Id.* at 252.

Instead of following that logic to its conclusion, however, the district court "predict[ed]" that *this* Court would "adopt" an Eleventh Circuit decision that treated the need for individual adjudications of who purchased the product exclusively as a problem of "manageability" under Rule 23(b)(3)(D). *Id.* at 253-55 & n.65 (discussing *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021)). Under

this approach, the district court believed that this Court would "weigh administrative feasibility," but would not view it "as a prerequisite[,] the failure of which dooms a proposed class." *Id.* at 252-53.

Applying this prediction, the court found that Plaintiffs "will face substantial administrative difficulties" in identifying who actually purchased NAS cigarettes. *Id.* at 258. The court noted that Santa Fe lacks records capable of identifying class members, that Plaintiffs "have not demonstrated that any class members have retained receipts or purchase records," and that such retention was "unlikely," particularly for the full period (back to 2009). *Id.* at 257-58. Still, the court held—following the Eleventh Circuit decision—that "[t]his conclusion alone does not doom the proposed class[es]." *Id.* at 258; *see also* 5 App. 24, 52, 63, 88-89, 98-99, 108-09. The court thus said it would decline to certify a class on this basis only in conjunction with some *other* problem under Rule 23(b)(3)—for example, the need for individual inquiries into what representations each plaintiff saw. *E.g.,* 4 App. 258. The court thus did not consider whether individual inquiries into whether each claimant actually purchased NAS cigarettes would "predominate" over common questions.

Differing Representations. The district court agreed with Santa Fe that the liability inquiry for the safer-cigarette classes would vary significantly based on the representations a given consumer saw. 5 App. 17-19. Most fundamentally,

the court recognized that variability in how retailers displayed NAS cigarettes would affect whether the disclaimer—"No additives in our tobacco does **NOT** mean a safer cigarette"—would be visible to consumers before purchasing the cigarettes. At some retailers, the disclaimer would be visible; at others, it would not. *Id.*; *see also Santa Fe*, 288 F.Supp.3d at 1231-33. Whether any given consumer was able to see the disclaimer before purchasing was critical, because the express disclaimer would necessarily affect whether a consumer would understand Santa Fe as representing that NAS was a safer cigarette. 5 App. 18. Most importantly for class-certification purposes, whether any given consumer saw the disclaimer before purchasing could be determined only on an individual basis. This divergence within the class, the court concluded, "tilt[s] against" a finding that common issues predominate. *Id.* at 19.

Comcast. The district court reached contrasting conclusions as to whether Dr. Dubé's proposed damages model fit Plaintiffs' two theories of liability. The court first held that the model was "not an adequate fit" with the safer-cigarette theory of liability, because it did not "isolat[e]" the price premium from the health and safety misperceptions that "the Plaintiffs allege the challenged labels cause." 4 App. 287. In doing so, the court recognized that *non*-health-and-safety interpretations of the label "may contribute to [NAS] cigarettes' price premium," and so a model that treats the entire premium as safer-cigarette damages

fails under *Comcast*. *Id*. at 291-92.

Yet the district court reached the opposite conclusion when it came to the menthol theory. 5 App. 3-4. The court held that Dr. Dubé's proposed model *did* fit that theory of liability, even though it would count as damages the entire price premium attributable to the descriptor "additive-free"—including the portion of the premium owing to the value that consumers place on Santa Fe's eschewing non-menthol additives, such as the dozens of chemical additives found in other cigarettes. The only reason that the court gave for this conclusion was its statement that damages under the menthol theory "do not rely on the consumers' interpretation of the label." *Id*. at 3.

E. The certified classes.

Again, the district court's baseline finding was that the need to individually determine whether each claimant purchased the product posed a major problem for all of the proposed classes. But the court did not regard that problem as a sufficient basis for declining to certify *any* class. Instead, it was only when the court found an *additional* obstacle to class treatment that it denied certification on the ground that common questions do not predominate. That explains the court's different treatment of the safer-cigarettes and menthol classes.

As to the safer-cigarette classes, the court determined that there *were* additional obstacles to certification, including the need for individual inquiries into

what representations each consumer saw and the lack of a viable classwide damages model. 4 App. 287-92; 5 App. 17-19. The court thus denied certification of all safer-cigarette classes. 5 App. 124-27. And the court reached the same result for the proposed nationwide menthol class, given that this would require applying the laws of all fifty states. *Id.* at 126; *see also* 4 App. 280-82.

Yet the court reached the opposite conclusion for six proposed statewide menthol classes, based on its prediction that this Court would not treat the need for extensive individual adjudications of which claimants purchased the product as alone foreclosing certification. Were it not for that prediction, the court would have denied certification across the board. 4 App. 252, 257-58. But the district court found no additional obstacle to class treatment, and so certified the six statewide menthol classes. Those classes comprise all NAS menthol purchasers in California, Florida, Illinois, New Jersey, New Mexico, and New York. The court certified the California class for purposes of statutory consumer-protection and unjust-enrichment claims, and the other classes exclusively for consumer-protection claims, reasoning that unjust-enrichment claims in those states entail inherently individual inquiries.[5] 5 App. 12-26, 43-54, 54-65, 80-90, 90-102, 102-

[5] The court declined to certify menthol classes in two states—Massachusetts and Washington—at least in part because it determined that those states require individual proof of reliance or causation. 5 App. 67-71, 120-21. Plaintiffs do not challenge the denial of certification as to those classes.

09. The class periods run from as early as 2009 (depending on the applicable statute of limitations) to October 2017. 5 App. 125-26.[6]

Plaintiffs and Santa Fe each petitioned for review of the district court's ruling under Rule 23(f), with Plaintiffs seeking reversal as to eleven of the denied statewide safer-cigarette classes and Santa Fe seeking reversal as to the six certified statewide menthol classes. This Court granted both petitions.

STANDARD OF REVIEW

This Court reviews *de novo* the question whether the district court applied the proper legal standard in ruling on class certification. *See, e.g.*, *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1217 (10th Cir. 2013). Provided that the district court applied the proper legal standard, this Court reviews the decision to certify or not for an abuse of discretion. *Id.*

SUMMARY OF ARGUMENT

None of Plaintiffs' claims are fit for class treatment. A class action is an "exception" to the "usual rule" that "litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). "In order to justify a departure from that rule," Rule 23 requires parties seeking to sue on behalf of a class to clear several hurdles. *Id.*

[6] Plaintiffs' proposed class periods extended later in time, but the district court shortened them to end October 1, 2017 (5 App. 17), and Plaintiffs have not challenged that portion of the order.

One hurdle for damages classes—often "the greatest obstacle to class certification"—is predominance. *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014). A damages class may be certified only if "the questions of law or fact common to the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Put differently, "the common, aggregation-enabling, issues in the case" must be "more prevalent or important" than "the non-common, aggregation-defeating, individual issues." *CGC Holding*, 773 F.3d at 1087 (citation omitted).

Plaintiffs had the burden of "affirmatively demonstrat[ing]" predominance for each proposed class (*Wal-Mart*, 564 U.S. at 350), and the district court "ha[d] an independent obligation to conduct a 'rigorous analysis' before concluding that" predominance was satisfied as to any class (*XTO Energy*, 725 F.3d at 1217 (quoting *Wal-Mart*, 564 U.S. at 350)).

Here, the district court properly determined that the proposed safer-cigarette classes could not be certified. Plaintiffs failed to demonstrate that common questions would predominate, because liability turns on multiple individual questions, including (1) the threshold element requiring each claimant to prove that she actually bought NAS cigarettes, and (2) the need to determine whether each claimant was able to see NAS's express disclaimer before purchasing. In addition, and independently, Plaintiffs' damages model does not fit the safer-

cigarette theory of liability, as *Comcast* requires. This Court should therefore affirm the order denying certification of the safer-cigarette classes.

For many of the same reasons, the order certifying six statewide menthol classes should be reversed. For this claim, too, there is no classwide method of proving whether each claimant bought the product, leaving no alternative—at least, none consistent with the Rules Enabling Act and Supreme Court precedent—to conducting thousands of individual mini-trials. The district court erred by failing to consider whether such extensive individual adjudications would predominate over common issues, and—once considered—it is plain that they would. In addition, Plaintiffs' damages model is just as poor a fit for their menthol theory as it is for their safer-cigarette theory, which precludes certification under *Comcast*. This Court should therefore reverse the district court's certification of the six statewide menthol classes.

ARGUMENT

I. The district court correctly refused to certify the safer-cigarette classes.

This Court should affirm the district court's order declining to certify the proposed safer-cigarette classes because common questions do not predominate over individual ones. This is true for two overarching reasons.

First, liability on the safer-cigarette claims turns on "noncommon, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S.

442, 453 (2015). Common questions do not just fail to predominate on the safer-cigarette claims; they are "overwhelmed" by the individual inquiries essential to proving multiple aspects of the claims. *XTO Energy, Inc.*, 725 F.3d at 1220. These inquiries include whether each claimant can prove that she purchased NAS cigarettes; which representations she saw before purchasing; and whether she relied on alleged misrepresentations about health and safety in making her purchase.

Second, Plaintiffs' proposed damages model fails to satisfy *Comcast*'s requirement that it "must measure *only* those damages attributable to [the class's] theory" of liability. 569 U.S. at 35 (emphasis added). Plaintiffs' model makes no effort to measure only the damages attributable to their safer-cigarette theory, and therefore runs afoul of *Comcast*. Without a viable classwide model, any measurement of damages would require "labyrinthine individual calculations" that are inconsistent with class treatment. *Id.* at 32 (citation omitted).

A. Santa Fe's liability on the safer-cigarette claims turns on individual questions, not common ones.

Rule 23 enables aggregate litigation of individual claims. *See, e.g.*, *Wal-Mart*, 564 U.S. at 348. But it is not a shortcut to *proving* those claims. *See id.* at 367 (disapproving "Trial by Formula"). Indeed, the adoption of shortcuts to facilitate class treatment is prohibited: "[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Id.* at 367

(quoting 28 U.S.C. § 2072(b)); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate.").

This fundamental point has important implications. One is that a plaintiff must prove the same elements whether suing individually or as part of a class, and a defendant is entitled to mount the same defenses whether confronting one plaintiff or a class of them. *See Wal-Mart*, 564 U.S. at 367; *XTO Energy*, 725 F.3d at 1220. Another is that the predominance inquiry must begin "with the elements of the underlying cause of action." *Black v. Occidental Petroleum Corp.*, 69 F.4th 1161, 1175 (10th Cir. 2023) (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)). Courts must "survey the elements of the class's … claims to consider (1) which of those elements are susceptible to generalized proof, and (2) whether those that are so susceptible predominate over those that are not." *CGC Holding*, 773 F.3d at 1087.

After surveying the elements of Plaintiffs' safer-cigarette claims, the district court correctly determined that individual questions predominate over common ones. Plaintiffs have never offered a way of avoiding these individual issues. Nor can the need for these individual inquiries be brushed aside: "[T]he court must not relax or shift the burden of proof to liberally construe Rule 23's requirements or resolve doubts in favor of certification." *Black*, 69 F.4th at 1174 (citing *XTO Energy*, 725 F.3d at 1218).

1. Individual inquiries are required to prove that each claimant in fact purchased NAS cigarettes.

a. An essential component of all of Plaintiffs' claims is that each claimant in fact purchased NAS cigarettes. If a plaintiff in an individual lawsuit could not prove such a purchase, her claim would fail out of the gate: there can have been no injury to someone who never bought the product. *See, e.g.*, *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("If this were an individual claim, a plaintiff would have to prove at trial he purchased [the product]."). And because "a class action cannot be certified in a way that … masks individual issues" (*id.*), plaintiffs suing as part of a class of consumers of a product must similarly prove that they bought the product.

The district court recognized that for claimants to prove purchases in this case would require countless individual mini-trials. 4 App. 257-58; *see also, e.g.*, 5 App. 16, 24, 39-40, 46, 63. Consumers purchase NAS cigarettes from retailers, and there is no evidence that retailers—or any other entities—inform Santa Fe of the individual purchases or the identities of the purchasers. 4 App. 68; *see also Santa Fe*, 288 F.Supp.3d at 1233. Nor have Plaintiffs made any showing that consumers of NAS cigarettes commonly retain receipts years after their purchase—let alone that they would have done so for the full class period going back to 2009. 4 App. 257-58.

Accordingly, the most basic element of each class member's claim—that she bought the product for which she is seeking damages—would have to be proven individually. And Santa Fe would be entitled to litigate defenses specific to each claimant, including by challenging each individual's claim to have bought NAS cigarettes.[7] *Id.*; *see also Wal-Mart*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims."); *Carrera*, 727 F.3d at 307 (similar). The result would be an "overwhelm[ing]" number of mini-trials on this issue, "de-stroy[ing]" predominance. *XTO Energy*, 725 F.3d at 1220. It is hardly surprising, then, that courts regularly deny certification in similar circumstances.[8]

b. Plaintiffs have never disputed that prevailing on their claims requires each individual to prove her purchases. To the contrary, they describe their claims as hinging on the idea that "consumers are willing to pay more for

[7] The risk of fraudulent claims is real. A recent study of roughly 600 class-action and mass-tort distributions found that "fraudulent claims have increased dramatically," with "more than 80 million" claims in 2023 alone bearing "significant indicia of fraud"—"an increase of more than 19,000% in just two years." Western Alliance Bank, *2024 Annual Report: Digital Payments in Class Actions and Mass Torts* 5 (report included at 1 Supp. App. 167-98).

[8] *See, e.g.*, *In re Petrobras Sec.*, 862 F.3d 250, 273 (2d Cir. 2017); *In re Tropicana Orange Juice Mktg. & Sales Pracs. Litig.*, 2018 WL 497071, at *11 (D.N.J. Jan. 22, 2018); *Ault v. J.M. Smucker Co.*, 310 F.R.D. 59, 64-65 (S.D.N.Y. 2015); *In re Wellbutrin XL Antitrust Litig.*, 308 F.R.D. 134, 150 (E.D. Pa. 2015); *Bello v. Beam Glob. Spirits & Wine, Inc.*, 2015 WL 3613723, at *11 (D.N.J. June 9, 2015); *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 689-90 (S.D. Fla. 2014).

cigarettes they think are less harmful" (Pls.' Br. 33-34), and describe "paying too much" as the "causal link" between "the defendant's deceptive conduct" and "class members' injury" (*id.* at 35). Of course, "paying too much" requires buying the product. So while Plaintiffs claim that "*the identity* of absent class members … is not an element of the plaintiffs' claims" (*id.* at 56 (emphases added)), proof that each individual claimant purchased the product surely *is* an essential element. And the need to individually prove an element of the claim necessarily affects the predominance calculation. Indeed, Plaintiffs themselves recognize that in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), which they call "the Supreme Court's leading case on predominance," the predominance requirement was unsatisfied because "individual questions went to causation—an element of the claims." Pls.' Br. 56. So too here.

Plaintiffs also do not seriously dispute that it would take mini-trials to determine whether any particular individual bought NAS cigarettes during the class period. They make a fleeting reference to a "consumer database" (*id.* at 58), but offer no evidence that this database contains the information necessary to identify purchasers of NAS cigarettes. And for good reason: the evidence is uncontroverted that this database is not a record of NAS purchasers. Instead, it is a marketing database that tracks a subset of consumers of dozens of cigarette brands—not just NAS—who opted into providing information. 3 App. 42-43.

Attesting to the database's irrelevance here, nine of the twelve named plaintiffs either are not in the database at all or did not self-report NAS as a brand they ever used or preferred. *Id*. No wonder Plaintiffs say only that the database "could be used to help verify" affidavits that putative class members would submit. Pls.' Br. 58. But even that is beyond the database's capabilities.[9] Moreover, reliance on affidavits, in place of proof at trial, is precisely the sort of shortcut that *Wal-Mart* forbids, and even individual litigation through affidavits would be the *opposite* of "generalized, class-wide proof." *Tyson Foods*, 577 U.S. at 453.

Plaintiffs attempt to dismiss the need for individual litigation of who purchased the product as a mere matter of "post-trial claims administration," relevant to the superiority inquiry of Rule 23(b)(3) but not the predominance requirement. Pls.' Br. 49-50. They accordingly maintain that there is no need to consider how any plaintiff will prove she purchased NAS cigarettes until after Santa Fe is found liable. *See id.* at 56 ("Questions about class membership … will arise only *after* liability is determined.").

This gets things exactly backwards, contrary to precedent, the Rules Enabling Act, and basic logic. Whether someone bought NAS cigarettes is an essential element of the claim that must be proven *before* liability can be established.

[9] The district court noted Santa Fe's explanation of the database's limitations, in the course of concluding that Plaintiffs "will face substantial administrative difficulties" in identifying purchasers of NAS cigarettes. 4 App. 256-58.

An individual litigant would have to prove her purchase of the product at trial, just like any other element; she would not be entitled to judgment in her favor until *after* she had proved this essential element. It cannot be treated as a lesser issue and relegated to after trial. The same is necessarily true of class plaintiffs, because the class-action device cannot change what must be proved at trial; a class action cannot "abridge, enlarge or modify any substantive right." *Wal-Mart*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)). The need for mini-trials to adjudicate this issue therefore must be "rigorous[ly] analy[zed]" as part of the predominance inquiry. *Id.* at 351.

Plaintiffs next try to avoid the need for proof of individual claims by saying they seek an "aggregate" damages award—a "class fund"—that Santa Fe would pay "regardless of how many purchasers ultimately make claims." Pls.' Br. 57; *see also id*. at 55.[10] But that too puts the cart before the horse. Awarding "aggregate" damages as something other than the sum of the successful claims by class members is irreconcilable with the principle that a class action is merely an aggregation of individual claims. *See Wal-Mart*, 564 U.S. at 348. Rule 23 authorizes representative plaintiffs to litigate large numbers of individual claims through common proof. It does not authorize those plaintiffs to obtain—or federal courts

[10] Though Plaintiffs do not say so, presumably any unclaimed amount would be turned into *cy pres* relief. *Cf.* Br. for National Consumer Law Center as *Amicus Curiae* 9.

to award—"aggregate" damages judgments *independent* of successful claims by the individual class members.

Plaintiffs' cited authorities undermine their argument. Pls.' Br. 57. In *Mullins v. Direct Digital, LLC*, the Seventh Circuit distinguished cases in which "the addition or subtraction of particular class members affects neither the defendant's liability nor the total amount of damages it owes"—such as where "a class of employees" fights over "a $50 million pension fund"—from cases in which "the total amount of damages cannot be determined in the aggregate." 795 F.3d 654, 670 (7th Cir. 2015). Plaintiffs ignore that the court put "[m]ost consumer fraud class actions" in this latter category, because "the calculation of each member's damages affects the total amount of damages [the defendant] owes to the class." *Id.* at 670-71. In such circumstances, "the defendant must be given the opportunity to raise individual defenses and to challenge the calculation of damages awards for particular class members." *Id.* And the Ninth Circuit in *Briseno v. ConAgra Foods, Inc.* "agree[d] with the Seventh Circuit" that there are cases where "addition or subtraction of particular class members" does not matter, and cases where it does. 844 F.3d 1121, 1132 (9th Cir. 2017). This case is in the latter category.[11]

[11] Plaintiffs are additionally wrong—even under their own mistaken position on aggregate damages—in suggesting that the total liability could be calculated as a simple function of the total number of cigarettes sold multiplied by the

c. Ultimately, Plaintiffs (and their *amici*) resort to generic policy arguments—specifically, the concern that including individualized adjudications of who actually purchased NAS cigarettes in the predominance analysis would make it too difficult to win certification in cases involving "small-dollar claims." Pls.' Br. 51-52, 58; Br. for Gerard Hanshe as *Amicus Curiae* 6-9; Br. for National Consumer Law Center as *Amicus Curiae* 23-25 ("NCLC Br.").

Plaintiffs' ends-over-means perspective cannot trump the plain language of Rule 23(b)(3). The rule unambiguously requires that common questions predominate over questions affecting only individual members. It contains no exception for individual questions about who purchased the product. Nor does it exempt class actions pressing only "small-dollar claims."

In any event, Plaintiffs' concern is overstated. The unavailability of common proof of purchases in *this* case hardly means the same will be true in all other consumer class actions. Indeed, Plaintiffs' *amici* identify class actions in which there *was* common evidence of purchase (or some other fundamental component of the class's claims). *See* NCLC Br. at 14-16, 19-22 (discussing cases

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allegedly unlawful price premium. Pls.' Br. 57. For example, even if a jury found liability to *some* consumers, it could well determine that there is no liability to consumers who saw the express NAS disclaimer. The total number of sales subject to liability could then be determined only by identifying—on an individual basis—which consumers saw the disclaimer and which did not, and then calculating the number of cigarettes bought by those who did not.

involving classes of purchasers of household products who could be identified from warranty records, and involving individuals on a do-not-call list). Courts, too, have recognized that in appropriate cases "retailer records may be a perfectly acceptable method of proving" purchase. *Carrera*, 727 F.3d at 308; *see also* 4 App. 252 (district court recognizing that "in many low-value consumer cases, the consumer is readily ascertainable," because "the defendant knows its customers, and the information can be ascertained from the defendant's documents"). In this case, however, such records do not exist.

Furthermore, and as the district court rightly recognized, it is unclear "why the class action—largely manufactured by attorneys—should go forward when the actual victims cannot be determined." 4 App. 252. The answer cannot be that class-action defendants must nevertheless face liability, as this just assumes away defendants' right to have claims against them—all elements—actually proven, just as would be required in individual litigation.

Finally, Plaintiffs' policy arguments rest on a flawed premise: that certifying a class action to pursue low-value claims will vindicate the rights of an appreciable number of absent class members. In fact, class actions in cases like this rarely result in any appreciable vindication of rights, because only a minuscule portion of the class ever files a claim: the claims rates in consumer class actions are "shockingly low." Christopher R. Leslie, *The Significance of Silence: Collective*

Action Problems and Class Action Settlements, 59 Fla. L. Rev. 71, 119, 120 (2007); *see also, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (citing evidence that "consumer claim filing rates rarely exceed seven percent, even with the most extensive notice campaigns" (citation omitted)).[12]

* * *

In sum, no claimant could prevail on her claims without proving that she purchased NAS cigarettes, and the district court correctly recognized that this would require countless individual mini-trials. That, alone, clearly establishes that common questions do not predominate, and thus that certification of the safer-cigarette classes was properly denied.

2. Individual inquiries are required to determine what representations each claimant saw.

Individual inquiries would also be needed to determine what representations each consumer saw before purchasing NAS cigarettes. The safer-cigarette theory depends on the idea that the challenged descriptors misled consumers

[12] *See also* Federal Trade Commission, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (Sept. 2019) (analyzing 149 consumer class-action settlements and finding median claims rate of nine percent, with weighted mean of four percent), https://tinyurl.com/33zs796a. This almost certainly overstates claims rates in cases like this one, where there is no practicable means of identifying and delivering personal notice to class members. *Cf. id.* at 26-27 (noting "marked differences" in claims rates based on method of notice).

about the safety of NAS cigarettes, making it imperative to know what messages each consumer saw.

a. As the district court recognized, class members will inevitably differ in the messages they saw before buying NAS cigarettes. *See, e.g.*, 5 App. 17-19; *see also Santa Fe*, 288 F.Supp.3d at 1232-34. Those varying messages could include the different descriptors (*e.g.*, "natural," "additive-free," "organic"); other elements that allegedly contributed to the deception (*e.g.*, "Native American imagery" that supposedly reinforces the perception that NAS cigarettes are natural); and, most importantly, the disclaimer included on all advertisements and packages during the relevant period ("No additives in our tobacco does **NOT** mean a safer cigarette"). Indeed, even Plaintiffs have acknowledged such consumer-to-consumer differences. *See* 1 Supp. App. 165 (Plaintiffs' counsel showing retail display of NAS cigarettes and emphasizing that disclaimer was not visible to all consumers); *id.* at 147 (Plaintiffs observing that, "as with the 'additive-free' disclaimer, the 'organic' tobacco disclaimer on product packaging would not necessarily have been seen by a consumer prior to purchase"); *see also* 4 App. 24 (district court noting Plaintiffs' concession in this regard).

The disclaimer is especially relevant to the liability question that the jury would need to decide as to any given claimant. As the district court recognized, no reasonable consumer who read the disclaimer could believe that the lack of

additives *does* mean a safer cigarette. 5 App. 18; *see also Santa Fe*, 288 F.Supp.3d at 1232-34. And the disclaimer would also inevitably affect whether that consumer interpreted "natural" tobacco as meaning a safer cigarette. As Santa Fe argued below, many consumers—including many of the named plaintiffs—view "natural" as synonymous with "additive-free." 3 App. 127. Accordingly, the liability question that a jury would have to answer for a consumer who *did* see that disclaimer on packages or in advertisements is entirely different from the one for a consumer who had no such opportunity.

As the district court further recognized, because of retailer-to-retailer differences in displays, the disclaimer on packages would be visible to consumers before purchase at some but not all retailers. 5 App. 17-19; *see also Santa Fe*, 288 F.Supp.3d at 1232-34. Likewise, the disclaimers were prominently featured in all NAS advertisements. 5 App. 17-18; *see also Santa Fe*, 288 F.Supp.3d at 1233. Accordingly, whether any given consumer saw the disclaimer before purchasing can be determined only through individual adjudication. 5 App. 18-19.

b. Plaintiffs have no cogent response to these differences. While they frame this as a case about "uniform" statements (Pls.' Br. 3, 5, 24, 27), the question for purposes of adjudicating the safer-cigarette claims—and thus for predominance—is not whether Santa Fe *used* the same descriptors and disclaimer, but whether the various class members *saw* the same descriptors and disclaimer.

And Plaintiffs themselves emphasized the variation in consumers' ability to see the disclaimer before purchasing. *Supra* at 34. Thus, whether a particular consumer saw the disclaimer can be answered only through individualized determinations, which would include having a jury evaluate the credibility of a claimant who alleges that she saw the descriptors but not the disclaimer. This is an essential determination, because those who did see the disclaimer are very differently situated, from a liability standpoint, from those who did not.

Plaintiffs attempt to escape the import of this need for individualized adjudication by arguing that the district court erred in determining the effectiveness of the disclaimer. Pls.' Br. 27-33. According to Plaintiffs, the "effect" of the disclaimer is "a question for the jury" at the merits stage, and is one that can be addressed through common proof. *Id.* at 29.

That argument fails. A disclaimer explicitly stating that NAS cigarettes are *not* safer than other cigarettes obviously prevents a reasonable consumer from believing the opposite.[13] At the very least, the effectiveness of the disclaimer

[13] Notwithstanding their position that the district court should not have considered the disclaimer's effectiveness, Plaintiffs repeatedly tout evidence that the disclaimer is purportedly ineffective. Pls.' Br. 29, 32-33. But Santa Fe refuted Plaintiffs' evidence, as the studies they rely on failed to test the disclaimer as it actually exists in the marketplace. 3 App. 129. Moreover, numerous courts have held that, as a matter of law, a clear disclaimer *is* effective to preclude a reasonable consumer from believing the message disclaimed. *See, e.g., Penod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 252 (3d Cir. 2011) ("The words

is an additional issue requiring individualized determination; surely at least *some* consumers who see it will not believe the *opposite* is true. In any event, even if the disclaimer's effectiveness as to all class members *could* be addressed through common proof, it is still necessary to determine—on an individualized basis—whether each claimant did or did not see the disclaimer before purchasing. At a minimum, a consumer who saw the "natural" and "additive-free" descriptors in conjunction with an express admonition that "No additives in our tobacco does **NOT** mean a safer cigarette" is fundamentally differently situated from one who saw the descriptors with no such disclaimer. And the only way to determine the category to which each consumer belongs is through individual inquiries.

Nor did the district court, in considering the disclaimer, improperly "step in as factfinder on a question the jury will resolve." Pls.' Br. 31. Defendants do not believe the district court definitively ruled one way or the other on the effectiveness of the disclaimer. But the court did recognize—correctly—that the liability question for a class member who saw the disclaimer before purchasing is fundamentally different from the liability question for one who did not—and

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'Havana Club' … cannot mislead a reasonable consumer who is told in no uncertain terms that 'Havana Club' is a brand of rum made in Puerto Rico."); *Bowring v. Sapporo U.S.A., Inc.*, 234 F.Supp.3d 386, 390 (E.D.N.Y. 2017) (similar*); see also McGinty v. Proctor & Gamble Co.*, 69 F.4th 1093, 1098-99 (9th Cir. 2023) (reasonable consumer cannot ignore statements on back of label that clarify ambiguous representations on front). That is particularly so for disclaimers included on every package and advertisement.

whether a particular consumer saw the disclaimer can be determined only by individual adjudication. This was entirely appropriate, because "[f]requently, [the required] rigorous analysis [under Rule 23] will entail some overlap with the merits of the plaintiffs' underlying claim." *Wal-Mart*, 564 U.S. at 351. It was thus proper for the court to consider the disclaimer's role in assessing how Plaintiffs would attempt to prove their safer-cigarette claims. *See id.*; *see also Comcast*, 569 U.S. at 34 (holding that "the Court of Appeals ran afoul" of precedent "[b]y refusing" to consider arguments "that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits").

Indeed, the only way the disclaimer could properly be ignored at the class-certification stage is if it were deemed ineffective as a matter of law. But even Plaintiffs do not take that position, instead asserting at most that "the efficacy of the disclaimer is a question for the jury" and that "deceptiveness depends on context, including the presence of a disclaimer or similar clarifying language." Pls.' Br. 30, 33 (citations omitted). Plaintiffs thus effectively concede that this issue will require individualized determinations.

In sum, differences in whether consumers saw the disclaimer at retail or in advertisements means differences in the messages that consumers received before purchasing NAS cigarettes, which means "different possible consumers" within each class (App. 5 at 18-19), and therefore different liability questions

within each class. The only way to determine what each class member saw is through thousands of individual inquiries that would "overwhelm" any common ones, "destroy[ing]" predominance. *XTO Energy*, 725 F.3d at 1220.

3. Individual inquiries are needed to establish reliance and injustice.

The need for individual inquiries continues. Most of Plaintiffs' statutory consumer-protection claims require proving reliance, and their unjust-enrichment claims require proving that the defendant's retention of the benefit at issue is "unjust." Both are individual issues.

Reliance. In seven states, reliance (sometimes framed as causation) is another individual issue standing in the way of class certification, because Plaintiffs have not proved any price premium specifically tied to the alleged fraud. As to these states, the district court concluded that payment of a price premium on the basis of a fraudulent representation can provide classwide proof of reliance or causation. 5 App. 49-50 (Florida), 68-70 (Massachusetts), 75-77 (Michigan), 85-88 (New Jersey), 96-97 (New Mexico), 106-07 (New York), and 121 (Washington). But the court held that Plaintiffs had failed to put forth such proof, because their damages model does not measure any price premium resulting from a belief that NAS cigarettes are safer than others. *See id.*[14] Plaintiffs argue that this was

[14] As to Plaintiffs' claims under California law, the district court held that classwide reliance can be inferred if a misrepresentation was material, and that

error, "[b]ecause the plaintiffs' damages model is common evidence that the price of NAS cigarettes was inflated for all class members due to the defendants' misleading statements." Pls.' Br. 37.

Plaintiffs' contention is wrong. As explained below with regard to the *Comcast* issue, the district court correctly held that Plaintiffs' damages model does not fit their safer-cigarette theory of liability, and thus is incapable of proving any price premium resulting from the alleged fraud. *Infra* Part I.B. Because Plaintiffs' model does not isolate the supposed price premium attributable to a belief that NAS cigarettes are safer than others, their damages model cannot provide common evidence that consumers paid more because of any alleged "safer cigarette" message.

Given the flaw in their damages model, Plaintiffs gain no support from *Kurtz v. Kimberly-Clark Co.*, 321 F.R.D. 482 (E.D.N.Y. 2017). Pls.' Br. 35. *Kurtz* involved a class of consumers who purchased moist wipes labeled "flushable," but which allegedly "clog household toilets." 321 F.R.D. at 492. Because there was only one possible understanding of the allegedly false "flushable" representation, any price premium associated with "flushable" necessarily was caused

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materiality is subject to an objective standard and thus "susceptible to common proof." 5 App. 20-23. Defendants do not challenge that conclusion. But as the district court rightly recognized, individual issues still predominate over common ones for Plaintiffs' proposed safer-cigarette classes under California law. *Id.* at 24-25.

by the fraud. But here, Plaintiffs' own experts agree that the challenged descriptors carry a range of possible meanings (such as quality, taste, and sustainable farming), most of which are unrelated to their safer-cigarette theory of liability yet potentially valuable to consumers. *Supra* at 13; *see also Santa Fe*, 288 F.Supp.3d at 1236 ("natural is a word with many meanings").[15] In that circumstance, a price premium provides no evidence that the alleged safer-cigarette implication of the descriptors, rather than the multiple other potential meanings, caused consumers to pay a premium.

Separately, Plaintiffs take issue with the district court's holding that their Illinois statutory claims require "actual deception," which is inherently an individual question. Pls.' Br. 37-38. Plaintiffs rely on *Connick v. Suzuki Motor Company*, 675 N.E.2d 584, 593 (Ill. 1996), for the proposition that it is unnecessary to show actual deception. Pls.' Br. 37. But in a subsequent case, the Illinois Supreme Court held that under the relevant statute "a plaintiff must allege that he was, in some manner, deceived." *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 164 (Ill. 2002). Plaintiffs try to distinguish *Oliveria* (Pls.' Br. 37 n.10), but courts have found it on point in cases like this one. *See, e.g., Oshana v. Coca-Cola Co.*, 472 F.3d

[15] Plaintiffs also fail to mention that the Second Circuit remanded the grant of class certification in *Kurtz*, with instructions for the district court to reassess "whether the Plaintiffs have affirmatively demonstrated [their] compliance with Rule 23(b)(3)'s predominance requirement." 768 F.App'x 39, 41 (2d Cir. 2019) (citation omitted).

506, 514-15 (7th Cir. 2006) (relying on *Oliveira* in affirming the denial of class certification where the proposed class "could include millions who were not deceived"); *Langendorf v. Skinnygirl Cocktails, LLC*, 306 F.R.D. 574, 582 (N.D. Ill. 2014) ("Langendorf argues that it is irrelevant why each class member purchased the product, because 'the simple fact is that Plaintiff and the Class did not get what they paid for[.]' … But 'what they paid for' is precisely the question, and it is an individual one." (citation omitted)).

Injustice. Courts have recognized that "common questions will rarely, if ever, predominate [in] an unjust enrichment claim." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009). Consumer-fraud cases, in particular, require "individualized inquiries concerning the reasons each class member purchased [the product] … in order to determine whether [the defendant's] retention of the purported price premium would be 'unjust' or otherwise inequitable.'" *In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919, 995 (C.D. Cal. 2015).

The district court thus correctly declined to certify nine proposed classes of unjust-enrichment claims.[16] As the court explained, "individual inquiries will predominate, particularly around … [whether] circumstances make it unjust for

[16] The district court did err in certifying a class of California unjust-enrichment claims, as argued below. *Infra* Part II.A.2.

the Defendants to retain the benefit without compensation," because "individuals may have purchased [NAS] cigarettes not based on the challenged labels, or may not have believed that they were healthier." 5 App. 41. In so concluding, the court followed other holdings that the law of each relevant state forecloses certification of unjust-enrichment claims like those here.[17]

Plaintiffs argue that this Court's decision in *Menocal v. GEO Group, Inc.*, required a different result, because their "'theory of injustice' focuses on a 'common course of conduct.'" Pls.' Br. 39 (quoting 882 F.3d 905, 925-26 (10th Cir. 2018)). But as the district court recognized, *Menocal* "is not a blanket authorization to grant any unjust enrichment class certification motions." 5 App. 41. Indeed, this case lacks *Menocal*'s key premise, because Plaintiffs' unjust-enrichment claims do *not* turn on "common circumstances." *Id.* at 41-42. As the district court explained, some consumers "may have purchased Natural American cigarettes not based on the challenged labels, or may not have believed that they

[17] *See, e.g., ConAgra*, 90 F.Supp.3d at 990 (Colorado); *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913, at *9 (S.D. Fla. Jan. 10, 2013) (Florida); *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 519 (7th Cir. 2011) (Illinois); *Abla v. Brinker Rest. Corp.*, 279 F.R.D. 51, 58 (D. Mass. 2011) (Massachusetts); *Jackson v. Wal-Mart Stores, Inc.*, 2005 WL 3191394, at *5 (Mich. Ct. App. Nov. 29, 2005) (Michigan); *Payne v. Tri-State CareFlight, LLC*, 332 F.R.D. 611, 696-97, 703-04 (D.N.M. 2019) (New Mexico); *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *11 (S.D.N.Y. Aug. 5, 2010) (New York); *Harrison v. Wal-Mart Stores, Inc.*, 2004 WL 5202760, at ¶¶ 32-33 (N.C. Super. Ct. Mar. 5, 2004) (North Carolina); *Converse v. Vizio, Inc.*, 2020 WL 729804, at *8 (W.D. Wash. Feb. 13, 2020) (Washington).

were healthier." *Id.* at 41. Some may have seen and believed the disclaimer. Others might have understood "natural" and "additive-free" to mean that the products were more environmentally friendly. And yet others may have understood that all cigarettes are equally unhealthful regardless of what a manufacturer said.

"Accordingly, a jury would have to review the facts surrounding each purchase to determine whether its circumstances were unjust," and "[t]hese individual inquiries would overwhelm the common inquiries." *Id.* at 42. That is exactly right, and it distinguishes *Menocal*, where the putative class members intended to rely on "facts that are shared amongst the class." 882 F.3d at 925.[18]

* * *

The district court correctly determined that Santa Fe's liability to the safer-cigarette classes predominantly turns on individual inquiries, not common ones.

[18] Plaintiffs fare no better with their other cited authorities. Pls.' Br. 40. The court in *Kelley v. Microsoft Corp*. certified an unjust-enrichment class alleging an inherently *classwide* theory of harm: that Microsoft "artificially inflated the demand for and price of" personal computers. 251 F.R.D. 544, 559 (W.D. Wash. 2009). But the court noted that the outcome would have differed "[i]f the inequity [were] that Microsoft deceived consumers"—which would require assessing "whether Microsoft actually deceived consumers (an individual inquiry) to determine whether any benefit conferred on Microsoft was unjust." *Id*. And *Allegra v. Luxottica Retail N. Am.*, involved allegations of overpayment based on fraudulent omissions—meaning all consumers were denied the same information before purchase. 341 F.R.D. 373, 459 (E.D.N.Y. 2022); *see also Philip Morris USA Inc. v. Hines*, 883 So.2d 292, 294-95 (Fla. Dist. Ct. App. 2003).

Indeed, individual proof is needed for nearly every element of the claims—from whether a claimant purchased NAS cigarettes and thus could even possibly have been harmed, to whether there was a misrepresentation, to whether there was reliance and injustice. Given these many individual issues, the court properly denied certification of the safer-cigarette classes.

B. *Comcast* independently precludes certification of the safer-cigarette classes, because Plaintiffs' damages model does not fit their theory of liability.

The district court's refusal to certify the safer-cigarette classes was also correct because Plaintiffs' damages model fails to satisfy *Comcast*'s requirements. Plaintiffs' only offer of common proof of damages is a model that one of their experts, Dr. Dubé, proposed to develop. And Dr. Dubé conceded that his model would not identify the price premium attributable to the alleged belief that NAS cigarettes are *safer* than other cigarettes—in other words, it would not fit the safer-cigarette theory of liability within the meaning of *Comcast*. That independently precludes certification.

a. In *Comcast*, the Supreme Court held that because plaintiffs are "entitled *only* to damages resulting from" the conduct for which the defendant is liable, the class's damages model "must measure *only* those damages attributable to [the class's] theory" of liability. 569 U.S. at 35 (emphases added). "If the model does not even attempt to do that, it cannot possibly establish that damages

are susceptible of measurement across the entire class," and so "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id*. at 34. The Court thus required a "rigorous analysis" at the certification stage to determine whether a class's "damages case [is] consistent with its liability case." *Id*. at 35.

Following *Comcast*, courts have recognized that plaintiffs in consumer-fraud class actions must tailor their damages model to the precise manner in which the complaint alleges that the consumers were deceived. *ConAgra* is a good example.[19] There, the plaintiffs sought to certify a class of purchasers of cooking oil labeled "100% Natural," claiming that this was misleading because the oil was made from genetically modified organisms. 302 F.R.D. at 547. But the district court denied certification, in part because plaintiffs' damages model did not fit that theory of liability. As the court explained, the model would have "calculate[d] the price premium attributable to use of the term '100% Natural' and all of the meanings consumers ascribe to it"—including, for example, "free of synthetic chemicals" or "free of preservatives"—rather than "isolat[ing] the

[19] There are many similar decisions denying certification based on the failure to fit the classwide damages model to the theory of liability. *See, e.g.*, *Townsend v. Monster Bev. Corp.*, 303 F.Supp.3d 1010, 1051 (C.D. Cal. 2018); *Davidson v. Apple, Inc.*, 2018 WL 2325426, at *22 (N.D. Cal. May 8, 2018); *Opperman v. Kong Techs.*, 2017 WL 3149295, at *12 (N.D. Cal. July 25, 2017); *In re POM Wonderful LLC*, 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014).

price premium associated with misleading consumers" about the use of GMOs specifically. 302 F.R.D. at 551, 579.[20]

The same defect applies here, as the district court held. 4 App. 287. Plaintiffs' proposed damages model "incorporates *all* possible values which consumers may associate with the challenged labels and which may contribute to [NAS] cigarettes' price premium, as opposed to isolating" the value attributable to the alleged beliefs "that Natural American cigarettes are *safer* than other cigarettes." *Id.* (emphases added). Indeed, the district court noted, "Dr. Dubé concedes that his model does not consider other possible interpretations of the label's language." 5 App. 3. But this conflicts with *Comcast*, because Plaintiffs themselves acknowledged below that consumers might well pay more for "natural" cigarettes for reasons unrelated to any belief that those cigarettes are safer than others—for instance, an understanding that "natural" bespeaks "quality and wholesomeness," or "sustainability and eco-consciousness." 3 App. 106-07; *see also* 4 App. 287-88. So did two of their other experts. 1 Supp. App. 163; 2 Supp. App. 201-02, 203, 204-05; *see also* 3 App. 81-82. Because Dr. Dubé *admitted* that his

[20] Plaintiffs downplay *ConAgra* by citing another court's characterization of that decision. Pls.' Br. 48-49 (citing *Gunaratna v. Dennis Gross Cosmetology LLC*, 2023 WL 5505052, at *20 (C.D. Cal. Apr. 4, 2023)). But *Gunaratna* merely recognized that a *revised ConAgra* damages model was later approved when the revised model *did* focus on the relevant meaning of the "100% Natural" descriptor—something that has never happened here. 2023 WL 5505052, at *20.

proposed model "does not consider other possible interpretations of the label's language" that may account for part or all of the price premium (5 App. 3), his model is incapable of isolating the premium attributable to the allegedly unlawful conduct: misleading consumers into believing that NAS cigarettes are safer. Under *Comcast*, that precludes class certification.[21]

b. On appeal, Plaintiffs try retrofitting their theory of liability to align with Dr. Dubé's proposed damages model. They now portray their theory as focused on the use of "misleading terminology" generally, and claim that their damages model accurately "translates" the "harmful event" (the "use of misleading terminology") into the "economic impact of that event" (the "price premium resulting from the use of those terms"). Pls.' Br. 43-44.

This wordplay fails. As the district court recognized, Plaintiffs' safer-cigarette theory of liability, dating back to their complaint, has always been that Santa Fe was able to "charge a price premium for [NAS] cigarettes" for a specific reason: "because consumers believe that they are healthier and safer." 4 App. 294 (quoting 1 App. 179, ¶ 89). This theory has never been about the use of

[21] Plaintiffs cite a pair of cases for the proposition that the word "natural" in cigarette advertising conveys "an implied health assurance." Pls.' Br. 46 (citing *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 536 (6th Cir. 2012); *United States v. Philip Morris USA, Inc.*, 449 F.Supp.2d 1, 924-25 (D.D.C. 2006)). But neither case purported to decide that it conveys *only* a health assurance, and not other meanings like quality, taste, or sustainability.

"misleading terminology" generally. Pls.' Br. 43. Indeed, even within the same argument, Plaintiffs shift back to a more accurate characterization of their "theory of liability": "that the challenged terms would lead a reasonable consumer to believe that NAS cigarettes are *less harmful* than other cigarettes." *Id.* at 47 (emphasis added). The district court was thus entirely correct. *Comcast* requires Plaintiffs to "translat[e] [their] legal theory of the harmful event"—namely, leading consumers to perceive NAS cigarettes as safer than others—"into an analysis of the economic impact *of that event.*" 569 U.S. at 38 (citation omitted)). But their model undisputedly does not do so. 5 App. 3.[22]

Plaintiffs further argue that the district court "conflated [their] theory of liability with their theory of injury," and say that their damages model "'assum[es]' the truth of their theory of liability"—namely, that "the challenged terms would lead a reasonable consumer to believe that NAS cigarettes are less harmful than other cigarettes." Pls.' Br. 47. The suggestion seems to be that a favorable verdict would reflect a jury's conclusion that the challenged terms

[22] Plaintiffs argue that conjoint analysis is a "'well-established' methodology" (Pls.' Br. 44-45), but the district court recognized that this is a red herring (4 App. 288): The dispute here is not about whether conjoint analysis may be used to determine a price premium. It is about whether determining the premium resulting from *all* meanings of "natural" and "additive-free"—rather than from the alleged "safer cigarette" belief—is permissible under *Comcast*.

mean *only* that NAS cigarettes are safer than others, such that the entire price premium associated with those terms counts as damages.

That does not follow. Crediting Plaintiffs' theory of liability would mean only that *one* reasonable understanding of the challenged terms is that NAS cigarettes are safer than others. But this would not foreclose other meanings associated with those terms that could contribute to a price premium. And under *Comcast*, Plaintiffs' damages model must be capable of isolating the meaning specifically attributable to a safety perception.

None of Plaintiffs' cited decisions leads to a different conclusion. Nearly all of them addressed representations that were plausibly subject to only a single interpretation, unlike the descriptors challenged here. In *Carriuolo v. General Motors Co.*, for instance, the defendant labeled a car as having "perfect five-star [safety] ratings" when in fact it had never received *any* safety ratings. 823 F.3d 823, 981-82 (11th Cir. 2016). And in *Fitzhenry-Russell v. Dr. Pepper Snapple Group*, the defendant labeled Canada Dry ginger ale as being "Made From Real Ginger." 326 F.R.D. 592, 598 (N.D. Cal. 2018). Those cases are nothing like this one, as consumers could understand "perfect five-star [safety] ratings" or "Made From Real Ginger" only one way. *See* 4 App. 291 ("[I]t does not matter what the 'Made From Real Ginger' label's possible interpretations were."). There was thus no need for the damages models in those cases to isolate the price premium

attributable to any particular mistaken belief: any price premium attributable to the false description would be the result of the allegedly deceptive conduct, consistent with *Comcast*. Here, by contrast, "even if a jury determines that [NAS] labels misled a reasonable consumer to believe that the cigarettes are safer, other interpretations of the label nevertheless may contribute to the cigarettes' price premium." 4 App. 291-92. The district court was thus correct to reject Plaintiffs' reliance on such cases.[23]

* * *

The district court rightly determined that Plaintiffs failed to "establish that damages are susceptible of measurement across the[ir] entire [safer-cigarette] class[es] for purposes of Rule 23(b)(3)." *Comcast*, 569 U.S. at 35. That independently warrants affirming the court's decision declining to certify the safer-cigarette classes.

[23]Several other decisions that Plaintiffs cite in passing similarly involved representations that could reasonably be understood only one way. *See Gunaratna*, 2023 WL 5505052, at *2 (C.D. Cal. Apr. 4, 2023) (plaintiffs challenged "+Collagen" label as misleading because product lacked collagen); *McMorrow v. Mondelēz Int'l*, 2021 WL 859137, at *1 (S.D. Cal. Mar. 8, 2021) (plaintiffs challenged "nutritious" label as misleading because product "increase[s] the risk of serious diseases"); *Goldemberg v. Johnson & Johnson Consumer Cos.*, 317 F.R.D. 374, 383, 387 (S.D.N.Y. 2016) (plaintiffs challenged "Active Naturals" label as "*in and of itself*" misleading" because product was made of synthetic ingredients). And in another they cite, the court failed to undertake the rigorous analysis that *Comcast* requires. *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552 (N.D. Cal. 2020).

II. The district court erred in certifying six statewide menthol classes.

For many of the same reasons that precluded certification of the safer-cigarette classes, Plaintiffs' menthol classes are likewise unfit for class certification. In nonetheless certifying six statewide classes, the district court made three errors of law. *First*, the court failed to rigorously analyze whether the extensive individual adjudications necessary to determine whether each claimant purchased NAS menthol cigarettes would predominate over common questions. *Second*, the court mistakenly concluded that Plaintiffs could rely on their damages model to establish classwide reliance or causation for their statutory consumer-protection claims, and that Plaintiffs need not put forward individual evidence of injustice for their California unjust-enrichment claim. *Third*, the court erred in holding that Plaintiffs' damages model fit their menthol theory of liability under *Comcast*, even though the model failed to isolate the damages from what was allegedly misleading—in the very same way that the court rightly recognized was fatal for the safer-cigarette theory. Each error independently justifies reversing the order insofar as it certified menthol classes.

A. The extensive individual questions raised by the menthol claims strongly predominate over common ones.

1. Proof that a claimant purchased NAS menthol cigarettes is an essential element of each claim, and can be determined only on a claimant-by-claimant basis.

a. As discussed above, a fundamental component of all of Plaintiffs' claims—under both theories—is that a putative class member actually purchased NAS cigarettes. *Supra* Part I.A.1. For the menthol theory, that means proving purchase of NAS menthol cigarettes. It is obvious that if a plaintiff suing individually could not prove that she bought NAS menthol cigarettes, her claim would necessarily fail. This remains true when the same claim is asserted within a class action: the class action is a procedural mechanism that permits proof through common evidence, but it does not (indeed, cannot) change what must be proved. *See, e.g.*, *Wal-Mart*, 564 U.S. at 367; *Carrera*, 727 F.3d at 307.

The district court correctly recognized that to prove purchases in this case would require thousands of mini-trials. *Supra* at 25. Consumers buy NAS cigarettes—including NAS menthol cigarettes—from any number of retailers. Plaintiffs did not show any likelihood that class members have retained receipts or other objective evidence of purchases made years ago. And there is no database of purchases or other mechanism for proving those purchases short of claimant-by-claimant adjudication, subject to cross-examination and the other rights and defenses that Santa Fe would have in individual litigation. 4 App. 256-58; *see*

also Wal-Mart, 564 U.S. at 367. For these reasons, the court agreed with Santa Fe that this basic element of each consumer's claim would have to be proven through fact-intensive, claimant-specific inquiries. 4 App. 256-58.

Under these circumstances, the district court should have denied certification of *all* of the proposed classes—including the menthol classes—because liability cannot be determined without an overwhelming number of individual inquiries into this fundamental element of the claims. Instead, however, the court expressly *declined* to assess whether the need for these individual inquiries defeated predominance, and held that it could deny certification only if a proposed class presented some *other* problem *in addition to* the need for mini-trials about purchase. 4 App. 258.

In doing so, the district court employed a mistaken understanding of how the need for these individual inquiries factors into the Rule 23 analysis. Noting that this Court has not yet addressed this specific issue—which is often referred to, somewhat imprecisely, as "ascertainability"[24]—the district court surveyed

[24] The ordinary meaning of "ascertainability" focuses on whether the class is defined sufficiently clearly and based on objective criteria. The issue here—the effect of individual inquiries needed for class members to prove their basis for asserting a claim—is a distinct one, even though it, too, is often described as a question of the "ascertainability" of who is a member of the class. *See, e.g.*, *Carrera*, 727 F.3d at 307.

the approaches that other circuits have taken. 4 App. 234-55. Some treat ascertainability as a standalone requirement of Rule 23; others view it as a part of the inquiry into predominance or superiority; and still others take hybrid approaches. *See Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466, 471-72 (6th Cir. 2017) (surveying the approaches).[25]

After reviewing the cases, the court concluded that "the Third Circuit's rule is the best." 4 App. 252, 253-55 n.65. That Circuit has read Rule 23 as requiring an "administratively feasible" means of identifying class members as a prerequisite to certification. *Id.* at 238-39 (discussing *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012), and *Carrera*, 727 F.3d 300). But the district court "d[id] not believe" *this* Court "will follow the Third Circuit's rule," and instead "predict[ed]" without explanation that this Court would agree with the approach taken by the Eleventh Circuit in *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021). 4 App. 252-53 & n.65. *Cherry*, in turn, held that the need for fact-intensive individual inquiries into class membership (i.e., into which claimants actually bought the applicable product) "has relevance" only as part of "the

[25] This Court last year issued an unpublished order that regarded ascertainability as "a sub-requirement of numerosity." *Evans v. Brigham Young Univ.*, 2023 WL 3262012, at *5 (10th Cir. May 5, 2023). The order did not address how to weigh a need for fact-intensive individual litigation over class membership in the Rule 23(b)(3) predominance analysis.

manageability criterion of Rule 23(b)(3)(D)," and so "do[es] not alone doom a motion for certification." 986 F.3d at 1303-04. Instead, the need for such inquiries must be "balance[d] … against other considerations." *Id.* Implementing this approach, the district court considered itself bound to hold that the need for individual inquiries into class membership cannot alone "doom a proposed class." 4 App. 258; *see also, e.g.*, 5 App. 24. Thus, the court never analyzed the effect of these extensive individual determinations on the predominance inquiry.

b. The district court's approach cannot be squared with the plain text or purpose of Rule 23(b)(3). Under that plain text, the need for individual inquiries into whether class members purchased the relevant product is subject to the same predominance analysis as any other element of class plaintiffs' claims. That rule is consistent with the view adopted by a majority of circuits that have considered the issue, which hold that the need for individual inquiries into class membership entirely forecloses certification—or at least bears on whether common questions predominate. *See, e.g.*, *In re Petrobras Securities*, 862 F.3d 250, 273 (2d Cir. 2017) ("classes that require highly individualized determinations of member eligibility" may fail on predominance grounds); *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 133 (3d Cir. 2023) (construing Rule 23 as containing "an implicit requirement that class members be ascertainable" through "administratively feasible methods"); *Kadel v. Folwell*, 100 F.4th 122, 160 (4th Cir. 2024)

("This Circuit, and many others, have recognized an implicit requirement in [Rule 23(b)(3)] cases that members of a proposed class be 'readily identifiable.'"); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare*, 863 F.3d 460, 473-74 (6th Cir. 2017) ("the difficulty of identifying class members" is a valid basis for denying certification); *cf. In re Nexium Antitrust Litig.*, 777 F.3d 9, 19-21 (1st Cir. 2015) (requiring an "administratively feasible" "mechanism for distinguishing the injured from the uninjured class members" (citation omitted)).

Rule 23(b)(3) allows certification only if "the questions of law or fact common to the class predominate over any questions affecting only individual members." The word "any" in this sentence is important. It modifies "questions affecting only individual members," and means "indiscriminately of whatever kind." Webster's Third New Int'l Dictionary 97 (1976); *see also* Bryan A. Garner, Garner's Modern American Usage 57 (4th ed. 2016) (defining "any" in this sense as "no matter which"). Rule 23(b)(3) thus requires that common questions predominate over *any type* of question affecting only individual members. The district court's approach contravenes that plain text, by exempting from the predominance inquiry one type of question affecting only individual members—whether claimants in fact purchased the product in a consumer class action—and holding that it can *never* alone "doom the proposed class." 4 App. 258.

The district court's approach also defies precedent. While this Court has not squarely addressed ascertainability, it has held that Rule 23(b)(3) requires courts to "*characterize* the issues in the case as common or not, and then *weigh* which issues predominate." *CGC Holding*, 773 F.3d at 1087. Where purchase of a product is an issue, there is no basis for exempting inquiries into purchase from the predominance analysis. *See id.*; *see also Black*, 69 F.4th at 1175 (recognizing that predominance must train on "the elements of the underlying cause of action" (quoting *Erica P. John Fund*, 563 U.S. at 809)). And where individual inquiries into purchase will "overwhelm" any common questions, the class may not be certified—period. *XTO Energy*, 725 F.3d at 1220.

The district court was therefore required to consider the individual adjudications necessitated by this issue just like those required for any other issue essential to proving Plaintiffs' claims. Moreover, as explained earlier regarding the safer-cigarette claims, the need for full adversarial litigation of whether each claimant actually purchased the product cannot be avoided by procedural shortcuts—such as Plaintiffs' proposal of claimant affidavits (Pls.' Br. 58). Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," claims within a class action may not be held to any lesser standard of proof than would apply in individual litigation of the claim. *Wal-Mart*, 564 U.S. at 367 (citations omitted); *see also Carrera*, 727 F.3d at

307 ("ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership").

c. To be sure, and as the district court recognized, class membership often *can* be proven with common evidence, including in many consumer-protection class actions. *Supra* at 31-32. But not here. In this case, the district court rightly recognized that fact-intensive individual inquiries would be necessary to identify each member of each proposed class. The court simply erred in failing to take the next step and recognize that these thousands of mini-trials would "overwhelm those questions common to the class" and thereby "destroy[]" predominance. *XTO Energy*, 725 F.3d at 1220. This alone requires reversal of the court's order certifying the six statewide menthol classes.

2. Individual inquiries are needed to establish reliance and injustice.

In any event, as to the six certified menthol classes, the district court should have denied certification even under the test it adopted, because proving those claims would require additional individual inquiries—namely, individual evidence of reliance (for the statutory consumer-protection claims) and injustice (for the California unjust-enrichment claim).

For the statutory claims, the district court concluded that payment of a price premium can provide classwide proof of reliance or causation. *Supra*

Part I.A.3. But as explained below, Plaintiffs' damages model does *not* isolate the price premium specifically tied to their menthol theory of liability—namely, the premium associated with a belief that the tobacco in NAS menthol cigarettes does not contain some migrated, natural menthol. *Infra* Part II.B. That model therefore fails to provide common evidence that consumers paid more for NAS menthol cigarettes because of a false understanding of the "additive-free" tobacco descriptor. Reliance and causation would thus turn on individual proof for each class member, defeating predominance.

The same is true when it comes to proving injustice. The district court recognized this for the most part, refusing certification of all the unjust-enrichment claims except those under California law. 5 App. 23-24. The only difference was that the court analogized the California claim to a "quasi-contract" claim, and followed a decision certifying a class raising "quasi-contract and breach of express warranty claims." *Id.* (citing *Astiana v. Kashi Co.*, 291 F.R.D. 493, 505-06 (S.D. Cal. 2013)). This analogy was inapt: *Astiana* did not involve an unjust-enrichment claim, and California courts have squarely held that such claims should not be certified where the unjustness of a defendant's retention of a benefit will depend on individual circumstances. *See, e.g., Savaglio v. Wal-Mart Stores, Inc.*, 2003 WL 25676640, at *26 (Cal. Super. Ct. Nov. 6, 2003) (denying

certification where unjust-enrichment claims were predicated on employer failing to pay employees for certain time worked, because "review of the equitable considerations will require an inquiry into the specifics of each employee's knowledge, expectations, and situation"). There simply are "no distinguishing features of California's law of unjust enrichment that would compel a different conclusion" from the district court's refusal to certify all of the other unjust-enrichment classes. *In re Ford Motor Co. E-350 Van Prod. Liab. Litig. (No. II)*, 2012 WL 379944, at *32 (D.N.J. Feb. 6, 2012).

B. Plaintiffs' classwide damages model does not fit the menthol theory of liability.

The district court further erred in failing to recognize that Plaintiffs' menthol theory violates *Comcast* just as their safer-cigarette theory does: their proposed damages model does not "measure *only* those damages attributable to [the operative] theory" of liability." 569 U.S. at 35 (emphasis added); *supra* Part I.B. This independently warrants reversal as to the six certified menthol classes.

a. Plaintiffs' menthol theory posits that consumers were misled into paying a premium for NAS menthol cigarettes because the tobacco in those cigarettes was described as "additive-free," when in fact some natural menthol placed in each cigarette's filter migrates from the filter to the tobacco. Under

Comcast, Plaintiffs' damages model thus needed to measure the damages specifically attributable to that theory of wrongdoing. 569 U.S. at 35. In other words, the model needed to pinpoint the difference between the value to menthol consumers of two kinds of cigarettes: (1) those that do not have *any* additives whatsoever in the tobacco; and (2) those that have no additives in the tobacco *except* for some natural menthol that is the defining feature of a *menthol* cigarette and that migrates from the filter to the tobacco by the time of smoking. *See, e.g.*, *Townsend v. Monster Bev. Corp.*, 303 F.Supp.3d 1010, 1051 (C.D. Cal. 2018) ("[T]o tie a damages model for a misleading statement to a theory of liability, a plaintiff must show that the price premium paid was for the attribute consumers believed the product contained."). After all, a purchaser of an otherwise additive-free menthol cigarette would not be surprised to learn that the product contained menthol, though she would surely be surprised if it contained dozens of other additives.

Once again, it is undisputed that Plaintiffs' damages model does not do this. Indeed, Plaintiffs' damages expert, Dr. Dubé, admitted that his "methodology for doing the calculations does not depend on [the] exact meanings" of the descriptors. 1 Supp. App. 161; *see also* 3 App. 105, 108. His proposed model thus would not account for the possibility that consumers pay more for NAS menthol cigarettes because those cigarettes lack the chemical additives found in

most other cigarettes—even though Plaintiffs themselves recognize that consumers *will* pay more for a cigarette with fewer additives. 1 App. 147-55, ¶¶ 12-24. Instead, Plaintiffs' model would capture the *entire* value of the "additive-free" tobacco descriptor, without accounting for the portion of that value that comes from all factors *other* than the absence of migrated menthol in the tobacco. 1 Supp. App. 150-52, 156-59, 161; *see also* 3 App. 105, 108. In other words, Dr. Dubé's model would treat the "additive-free" descriptor as if it tricked consumers into buying cigarettes chock-full of additives, when the menthol theory of deception is far more limited and technical: that Santa Fe allegedly deceived purchasers of menthol cigarettes into thinking that the menthol in those cigarettes was not in the tobacco (as opposed to the filter). Given this disconnect, Dr. Dubé's model "cannot possibly establish that damages are susceptible of measurement across the entire class." *Comcast*, 569 U.S. at 35.

Put differently, Plaintiffs' model would count as damages any value that consumers place on smoking cigarettes made without certain additives found in other cigarettes, and it would do so even though Plaintiffs in fact received cigarettes that lack those additives. That violates *Comcast*—not to mention common sense. If milk were marketed as "fat free" but actually contained 0.001% fat, the measure of damages would not be the difference between the price of fat-free milk and whole milk (assuming fat-free milk were more expensive). It would be

the difference between what consumers were told they were getting (milk with no fat) and what they received (milk with 0.001% fat). Any viable damages model would have to isolate that differential. So too here.

b. As explained above, the district court recognized that this problem—lack of fit—plagued all of Plaintiffs' safer-cigarette classes. *Supra* Part I.B. The court's only reason for reaching the opposite conclusion as to the menthol classes was its view that the menthol theory "aligns more closely" with a handful of decisions from district courts in other circuits that "involve[d] misleading labels which d[id] not rely on the consumers' interpretation of the label such that the plaintiffs' damages model need[ed] to worry about different categories of harm." 5 App. 3 (citing *Hilsley v. Ocean Spray Cranberries, Inc.*, 2018 WL 6300479 (S.D. Cal. Nov. 29, 2018); *Broomfield v. Craft Brew All., Inc.*, 2018 WL 4952519 (N.D. Cal. Sept. 25, 2018); *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326 (D.N.H. 2017); *Price v. L'Oreal USA, Inc.*, 2018 WL 3869896 (S.D.N.Y. Aug. 15, 2018); *Goldemberg*, 317 F.R.D. 374).

The court did not explain the "align[ment]" or how it makes the damages model here an adequate fit. Nor does the suggestion of an "alignment" withstand scrutiny. In each of the cases the court cited, the consumers did not receive *any* value associated with the challenged representations, so their damages

model necessarily measured the value attributable to the supposed misrepresentation. The juices in *Hilsley* allegedly contained "artificial flavoring chemicals" despite a label promising "no artificial flavors" (*Hilsley*, 2018 WL 6300479, at *1, *13-15); the beer in *Broomfield* was held out as being brewed in Hawaii when it was not (2018 WL 4952519, at *1-2, *14); the soap in *Dial* allegedly falsely promised to "Kill[] 99.99% of Germs" (320 F.R.D. at 330-31); the products in *Price* included "Keratin" in their names despite not containing keratin (2018 WL 3869896, at *1, * 9-10); and the products in *Goldemberg* were made from "synthetic" ingredients despite marketing that promised "only high-quality natural ingredients" (317 F.R.D. at 394). So even assuming those cases were correctly decided, they each involved a misrepresentation that *fully* deprived consumers of the promised benefit—which is not true here.

This case is different. The presence of menthol in the tobacco of menthol cigarettes that are otherwise additive-free could deprive menthol-cigarette purchasers of only a *fraction* of the value associated with the descriptor "additive-free" tobacco. By letting Plaintiffs treat the *entire* value of the descriptor as menthol-theory damages, the district court accepted "a methodology that identifies damages that are not the result of the [alleged] wrong." *Comcast*, 569 U.S. at 37. That error independently requires reversal as to the certified menthol classes.

CONCLUSION

This Court should affirm the portion of the district court's order denying certification of the safer-cigarette classes and reverse the portion of the order certifying six statewide menthol classes.

Dated: June 4, 2024

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

This case presents important issues related to class certification under Federal Rule of Civil Procedure 23, including some issues of first impression in this Circuit. Oral argument will aid the Court's resolution of these issues.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i) because it contains 15,299 words. It complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Calisto MT font.

Dated: June 4, 2024

/s/ Melanie B. Stambaugh

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2024, I electronically filed the foregoing brief with Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

Dated: June 4, 2024

/s/ Melanie B. Stambaugh

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