No. 18-16344

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUU NGUYEN, individually, and on behalf of
a class of similarly situated individuals,

Plaintiff-Appellant,

v.

NISSAN NORTH AMERICA, INC., a California corporation,

Defendant-Appellee.

Appeal from the U.S. District Court for the
Northern District of California,
No. 5:16-cv-05591-LHK (NCx)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America and the National Association of Manufacturers certify that they are non-profit membership organizations with no parent company and no publicly traded stock.

/s/ *Ashley C. Parrish*
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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber has a strong interest in ensuring that courts undertake the rigorous analysis required under Rule 23 before permitting a case to be litigated as a class action.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda

that helps manufacturers compete in the global economy and create jobs across the United States.

Both the Chamber and the NAM regularly file *amicus curiae* briefs in cases raising issues of concern to the nation's business community, including cases like this one. Their members depend on courts to apply "a rigorous analysis" to putative class actions to ensure that both "the prerequisites of Rule 23(a)" and "Rule 23(b)(3)'s predominance criterion" have been satisfied before any class is certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (quotation marks and citations omitted). In this case, the district court conducted the required analysis and correctly denied the motion for class certification. In response to this appeal under Rule 23(f), the Chamber and the NAM both have a strong interest in ensuring that the district court's order is affirmed and that courts in this Circuit protect businesses and consumers by requiring plaintiffs to comply with Rule 23's essential requirements.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amici curiae*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

Appellee Nissan North America, Inc. has consented to the filing of this brief. Appellant Huu Nguyen has also consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Rule 23 are not mere conveniences for streamlining litigation; they are crucial safeguards "grounded" in fundamental notions of constitutional due process. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Before a plaintiff may take advantage of the class-action device, he must prove that class members possess claims presenting a "common question" that, if adjudicated collectively, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In addition, a plaintiff must satisfy the "far more demanding" requirement of proving that common questions "predominate" over individual ones. *Comcast*, 133 S. Ct. at 1432; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). These essential requirements protect the rights of both absent class members and defendants.

In this case, plaintiff-appellant, Huu Nguyen, seeks to certify a class of Californians who purchased Nissan vehicles equipped with a manual transmission containing an allegedly defective part. Nguyen alleges that the transmission's concentric slave cylinder did not transfer

heat as effectively as it could and, for that reason, might result in the driver experiencing a "sticky" clutch under certain conditions. 1 ER 002, 005. Nissan allegedly knew or should have known about this purported defect but failed to disclose it to purchasers.

To prove that common issues predominate, a plaintiff must propose a damages model "establishing that damages are capable of measurement on a classwide basis." *Comcast*, 569 U.S. at 34. Although the amount of damages suffered by any individual class member need not be certain or calculated with precision, the model must reflect and be consistent with the plaintiff's theory of liability. *Id.* at 35. It cannot ignore significant differences between class members or result in an "arbitrary" or "speculative" measure of damages. *Id.*

The district court correctly concluded that Nguyen has not satisfied this threshold requirement. His damages model treats all purchasers the same by awarding all of them the full average cost of replacing the allegedly defective part. But, as the district court explained, that model is inconsistent with Nguyen's theory of liability and would award an arbitrary windfall to many class members. Although Nguyen's damages model presumes that the allegedly defective part lacks any value to

purchasers, he has not provided evidence to support that presumption. 1 ER 010. In fact, the evidence shows just the opposite. *See id.* Nguyen drove his vehicle for many years before experiencing any problems and, even then, the dealership replaced the allegedly defective part for free because it was still under warranty. A vast majority of Nissan owners have never experienced a "sticky" clutch, many have warranties that would cover the cost of any repair, and many would not care about the design changes that Nguyen prefers and contends should be required. As a result, his damages model would overcompensate many individual class members because it fails to account for the actual value of the allegedly defective part and incorrectly assumes that all class members suffered the same injury.

The district court's well-reasoned decision should be affirmed. Nguyen cannot show that the court abused its discretion or that he satisfied his burden to justify class treatment. His invitation to relax the standards for class certification is meritless and inconsistent with binding Supreme Court precedent. Moreover, there are strong policy reasons not to certify a class where, as here, the plaintiff has not proposed a viable model for measuring class-wide damages.

ARGUMENT

This case is not suitable for class treatment. Nguyen's damages model does not account for the individual circumstances of each putative class member. Because his flawed model would provide an arbitrary windfall to many class members and is inconsistent with his theory of liability, the district court properly rejected it.

I. The District Court Did Not Abuse Its Discretion in Finding That Nguyen Failed to Satisfy His Burden Under Rule 23.

Because Nguyen seeks class certification under Rule 23(b)(3), he must meet the "demanding requirement" of proving 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); *Comcast*, 569 U.S. at 34; *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The burden rests on Nguyen to come forward with evidence establishing that common issues exist and that those issues predominate over individual ones. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045–46 (2016).

The Supreme Court has stressed that plaintiffs must "affirmatively demonstrate" their compliance with Rule 23's requirements before a case may proceed as a class action. *Comcast,* 569 U.S. at 33–34. Moreover, a court must conduct a "rigorous analysis" to determine whether common issues predominate over individual ones. *Id.* As part of that analysis, a court must consider whether the plaintiff's damages model matches his class-wide theory of liability. *Id.* at 35. A court also must take a "close look" to determine whether the model actually measures damages "across the entire class." *Id.* at 34–35. It is not enough that a plaintiff propose "*any* method[ology] . . . so long as it can be applied classwide." *Id.* at 35–36. The proposed methodology cannot generate damages that are "arbitrary" or "speculative." *Id.*

Nguyen's damages model does not satisfy these essential requirements. As the district court recognized, there is a fundamental disconnect between Nguyen's damages model and his theory of liability. His damages model would overcompensate most of the class, by awarding many individual purchasers an arbitrary windfall far exceeding any injury they may have suffered from the alleged defect. *See* 1 ER 009–012.

Nguyen asserts that all purchasers of Nissan vehicles are inherently injured because their vehicles allegedly came with a defective clutch system that under certain aggressive driving conditions could overheat, resulting in a "sticky" clutch. Nguyen's theory of liability is that Nissan owners have been deprived of the benefit of the bargain because they purportedly would have "paid less than the sticker price or not bought the vehicle at all" if Nissan had disclosed the purported defect. Op Br. 10. But Nguyen's damages model does not match that theory of liability because it does not identify the difference between what customers paid and what they would have paid absent Nissan's alleged omissions. *See Miller v. Fuhu Inc.*, No. 2:14-cv-06119, 2015 WL 7776794, at *19 (C.D. Cal. Dec. 1, 2015) (noting that when plaintiff pleads a diminution-of-value theory, the plaintiff must provide a model that assesses "the difference between what [plaintiffs] paid for the [product] and what they would have paid had the alleged defect been disclosed"). In particular, the model does not measure the damages that each class member allegedly suffered because it does not take into account the value of the clutch system to individual purchasers *even with the alleged defect*. As a result, the model does not reflect the individualized nature of each

class member's alleged injury. Courts have often denied class certification in alleged defect cases where plaintiffs have relied on a damages model that does not account of the value of the alleged defective part. *See, e.g., Victorino v. FCA US LLC,* 326 F.R.D. 282, 304-05 (S.D. Cal. 2018); *Philips v. Ford Motor Co.*, No. 14-CV-02989, 2016 WL 7428810, at *21–22 (N.D. Cal. Dec. 22, 2016), *aff'd*, 726 F. App'x 608 (9th Cir. 2018); *McVicar v. Goodman Global, Inc.*, No. 13-1223, 2015 WL 4945730, at *14–15 (C.D. Cal. Aug. 20, 2015).

The model's flaw is not, as Nguyen suggests, that class members' damages are "uncertain" or that the model results in an "imprecise" estimate of damages. Op. Br. 17. The problem is more fundamental: Nguyen's damages model does not measure the actual damages (if any) tied to the actual injuries (if any) suffered by individual class members. As the district court recognized, the model fails because restoring the benefit of a bargain requires accounting for the actual value received by each class member, and Nguyen's damages model does not accomplish that task. *See generally Shepard v. Cal-Nine Farms,* 252 F.2d 884, 886 (9th Cir. 1958) (noting that the "benefit of the bargain" is "the difference

in value of the thing as represented and as it actually is"). There is no evidence that the allegedly defective clutch system had zero value.

Indeed, even though Nguyen seeks to recover on an implied warranty theory of liability, he has not shown that every putative class member's vehicle malfunctioned or is even substantially certain to do so. *See American Honda Motor Co. v. Superior Court.*, 199 Cal. App. 4th 1367, 1375 (2011). It is undisputed that many Nissan owners did not experience "sticky" clutch issues. Nor has Nguyen proven that Nissan's failure to disclose the alleged defect was material to all class members. The evidence shows that many class members do not drive their vehicles in a way that would likely cause the clutch to stick.

Despite the lack of evidence, Nguyen's damages model presumes that all class members suffered the same injury and are entitled to recover the same damages — the average cost of repairing the clutch system. Under that model, however, a substantial portion of class members would receive an arbitrarily high recovery: instead of recovering the benefit of the bargain, they would receive both the average cost of replacement *plus* the value of their vehicle's existing clutch systems. The model would thus award all class members the value of a

new part even if individual purchasers had driven with their allegedly defective part for hundreds (even thousands) of miles without incident — and even if they had already received a free warranty repair.

As the district court recognized, Nguyen's model fails because there is no reasonable connection between the average cost to replace the alleged defective part and how much individual purchasers purportedly overpaid as a result of Nissan's failure to disclose that the part was allegedly defective. 1 ER 008. That requires identifying "the price premium attributable" to Nissan's alleged "omissions." *NJOY, Inc. Consumer Class Action Litig.*, No. CV-14-428, 2016 WL 787415, at *5 (C.D. Cal. Feb. 2, 2016). Nguyen's model fails to satisfy that basic requirement. It does not distinguish between putative class members who received full recovery under warranty, those who sought repairs both in and out of warranty (such as Mr. Nguyen), and those who received free or discounted repairs regardless of their warranty. 1 ER 010. Nor does the model account for purchasers who sold their vehicle before detecting the alleged defect or purchasers who willing continued driving even with knowledge of it. Nor does the model address purchasers who might have engaged in varying degrees of self-help. In short, "[t]he damages model

errs in assuming that all consumers would discount the amount they would be willing to pay for the vehicle by the full replacement cost" of the allegedly defective part, even though different consumers valued the part differently. *Id.*

II. Nguyen's Invitation to Weaken the Requirements for Class Certification Should Be Rejected.

Unable to make the affirmative showing that Rule 23(b)(3) requires, Nguyen urges the Court to "apply a relaxed standard." Op. Br. 16; *but cf. Amchem*, 521 U.S. at 623–24 (noting that Rule 23(b)(3)'s predominance requirement is "far more demanding" than the commonality requirement). But relaxing Nguyen's burden would violate the Supreme Court's repeated admonition that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 569 U.S. at 33–34 (citation omitted). Because it is a procedural device "ancillary to the litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), a class action is inappropriate unless the plaintiff makes an affirmative showing sufficient to satisfy all of Rule 23's demanding requirements, *see Wal-Mart*, 564 U.S. at 350.

A. Merely Pleading That A Part is Allegedly Defective is Insufficient.

Nguyen suggests that because he has alleged that a part in Nissan's clutch system is "defective," the Court should assume that all customers are entitled to damages equal to the average cost of repair (the full, average replacement cost). But as Nissan explains, Nguyen has not made any evidentiary showing that the part completely lacks value. *See* Resp. Br. 20–21. To the contrary, he concedes that he drove his vehicle for more than two years before the clutch needed repair, which occurred at no charge under the warranty. *See* Op. Br. 8.

The Supreme Court has made clear that "plaintiffs wishing to proceed through a class action must actually *prove* — not simply plead — that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Halliburton*, 573 U.S. at 275 (emphasis in original). Because class certification often requires a preliminary review of the merits, it is never enough merely to plead that an allegedly defective part is worthless. If that were adequate, any customer subjectively dissatisfied with a product could easily turn his case into a sweeping class action simply by characterizing any preferred change or improvement as an alleged

undisclosed defect. Instead, the burden rests on the plaintiff to produce evidence supporting his liability theory. Nguyen has not met that burden.

B. Merely Asserting That Damages Are "Uncertain" is Insufficient.

Nguyen also emphasizes that "damage calculations *alone* cannot defeat certification." *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) (emphasis added); *see also Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1182 (9th Cir. 2017) ("uncertain damages calculations should not defeat certification"), *cert. granted on other grounds*, 138 S. Ct. 2675 (2018). That statement is correct, as far as it goes. But Nguyen misunderstands the principle.

Especially in the wake of *Comcast*, courts may not default to the principle that damages calculations do not defeat class certification without first undertaking the rigorous analysis that Rule 23 mandates. There is a significant difference between, on one hand, not being able to calculate with precision the *amount* of damages that any class member may be entitled to recover if the plaintiff's theory of liability has merit and, on the other, appropriately identifying the type of injury that each class member suffered. Because the class-action device cannot be used

to strip defendants' of their individual defenses or if it would prejudice the rights of absent class members, it is plaintiff's burden to propose a class-wide damages model that matches his theory of liability, measures any alleged injury on a class-wide basis, and results in a non-arbitrary damages award.

As this Court has recognized, the principle that uncertainty over the amount of damages will not automatically defeat certification applies only if the plaintiff first identifies "a common methodology for calculating damages." *Doyle v. Chrysler Grp., LLC*, 663 F. App'x 576, 579 (9th Cir. 2016); *see also* Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011), *available at:* https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf. (The "first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event."). "[A] methodology for calculation of damages that [cannot] produce a class-wide result [i]s not sufficient to support certification." *Jiminez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014). Accordingly, although "the need for individualized findings as to the amount of damages does not defeat class certification," *Doyle*, 663 F. App'x at 579 (citation omitted), that is true only if damages

are "capable of measurement on a classwide basis," and the damages model measures only those damages that are appropriately attributable to plaintiff's theory of liability. *Comcast*, 569 U.S. at 35.

More broadly, although uncertainty over the amount of damages *alone* does not defeat certification, that does not mean that variations in damages between class members are wholly irrelevant. Congress included no exception in Rule 23(b)(3) for damages. Nor should the Court invent one. It is incumbent on the plaintiff to show that a class action is superior to other modes of adjudication and that common issues predominate over individual ones. Even if variations in damage calculations on their own will not defeat certification, that does not mean that uncertainties in damage calculations should not be considered when other individualized issues also undercut the case for class treatment. *See, e.g., McVicar*, 2015 WL 4945730, at *15 (noting that, even if uncertainty over the amount of damages does not preclude class certification, failure to show that individual customers' alleged injuries were caused by the alleged defect does). As the Fifth Circuit has explained, "the predominance inquiry that is a prerequisite to certification requires assessing all the issues in a case — including

damages — and deciding whether the common ones will be more central than the individual ones." *Crutchfield v. Sewerage and Water Bd. of New Orleans*, 829 F.3d 370, 378 (5th Cir. 2016). When damages are uncertain and difficult to calculate — and where (as here) there are also other reasons a class action is inappropriate — courts should be especially careful to ensure that a putative class action satisfies Rule 23's requirements.

C. Average Cost of Repair Is Not An Appropriate Measure of Damages.

Nguyen seeks expectation damages, defined as an individual's "interest in having the benefit of his bargain by being put in as good a position as he would have been in" had the wrong not occurred. *ALLTEL Info. Servs. v. FDIC*, 194 F.3d 1036, 1039 n.3 (9th Cir. 1999) (quoting Restatement (Second) of Contracts § 344 (1981)). He also seeks to recover under the Song-Beverly Act, which provides that damages "shall include the cost of repairs necessary to make the goods conform." Cal. Civ. Code § 1794(b)(2).

A one-size-fits-all *average* cost of repair is not consistent with either of these theories of recovery. The Song-Beverly Act envisions individualized damages tied to the actual cost of repair only in situations

where the purchaser experiences a defect and where the repairs are needed to make the purchaser's goods conform. Moreover, the default measure of expectation damages is an approximation of the fair market value of a party's bargained-for position. Cost-of-repair damages are supposed to be awarded only "[i]n cases where measurement of market value is not available." Douglas R. Burnett, *Recovery of Cable Repair Ship Cost Damages from Third Parties That Injure Submarine Cables*, 35 Tul. Mar. L.J. 103, 112 (2010). Even then, "the total cost method is highly disfavored" because a plaintiff can walk away with a recovery unbound by the actual injury suffered. *Cavalier Clothes, Inc. v. United States*, 51 Fed. Cl. 399, 419 (2001).

Commentators have observed that "[t]he great majority of courts do not permit an award of cost-of-repair damages" when repair costs would compensate parties beyond the alleged injuries suffered. James M. Fischer, *The Puzzle of the Actual Injury Requirement for Damages*, 42 Loy. of L.A. L. Rev. 197, 209 (2008). That is especially true when repair costs would result in "a windfall" because "the replacement or repair leaves [the plaintiff] with an asset that is newer or better than the asset

that was taken or damaged." Mark P. Gergen, *Theory of Self-Help Remedies in Contract*, 89 B.U. L. Rev. 1397, 1420 (2009).

Courts have often refused to award full repair costs to plaintiffs who operated an allegedly defective product without needing a repair. Although the available remedies and choice of a damages methodology are questions of law, those questions necessarily turn on the underlying facts of the dispute and the alleged injury suffered by any particular plaintiff. *See Guest v. Phillips Petroleum Co.*, 981 F.2d 218, 221 (5th Cir. 1993) (observing that courts "have held that it is improper to award damages . . . for the cost of repair, if the award of those damages results in economic waste"); *see also Housley v. City of Poway*, 20 Cal. App. 4th 801, 810 (1993) (measuring tortious injury as "'diminution in value' or 'cost of repair,' whichever is less").

These principles are especially important in the class-action context because the plaintiff has the burden to prove causation, injury, and actual damages. Even assuming that repair costs are an available remedy under the relevant California statutes, they still might be an inappropriate recovery for many putative class members because, as the

district court correctly observed, they would result in a windfall for many members of the putative class.

III. Strong Policy Reasons Counsel Against Relaxing the Standards for Class Certification.

Strong policy reasons also support rejecting Nguyen's invitation to relax the standards for class certification and overrule the district court's well-reasoned decision. Under Nguyen's approach, a customer with a grievance may essentially sue on behalf of *everyone* who has purchased a product, regardless of customers' individual experiences or injuries. Virtually all products engender a small percentage of customer complaints, and it is not difficult to plead that an isolated problem or subjective shortcoming represents a broader product-wide defect. But manufacturers do not guarantee that their vehicles will be free from all defects that any customer might allege. Instead, they provide purchasers a specific warranty. If accepted, Nguyen's approach would force manufacturers to act as guarantors of complaint-free products, undercut the warranty system, and harm consumers.

There is no reason class action law should be contorted in this fashion. The warranty system ensures that individual customer complaints are properly addressed on an individual basis. Especially in

the automotive industry, manufacturers provide warranties for their products, and by doing so, they are able to deal with the inevitable problems that arise when selling products to a large, diverse base of customers and in contexts where attempting to eliminate all potential defects is impracticable.

This case confirms the point. When Nguyen first experienced problems with his clutch, two years after purchasing his vehicle, his Nissan dealership replaced the allegedly defective part for free because the vehicle remained under warranty. Op. Br. 8. The warranty system thus worked to address Nguyen's individualized concerns. Indeed, in California, a plaintiff must notify the seller of an alleged breach of warranty before bringing suit. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011). That rule is "designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements." *Pollard v. Saxe & Yolles Dev. Co.*, 525 P.2d 88, 92 (Cal. 1974). The warranty system, which is consistent with this rule, is in the interest of both the manufacturer and its customers.

More broadly, in the comparatively rare situation where an alleged defect raises safety concerns — a showing that Nguyen has not made — customers are also protected by federal regulations. *See United States v. General Motors Corp.*, 518 F.2d 420, 427 (D.C. Cir. 1975) (noting that whether a defect "exists in a particular case thus turns on the nature of the component involved, the circumstances in which the failures occurred, and the number of failures experienced"). The National Highway Traffic Safety Administration ("NHTSA") has jurisdiction over manufacturers' products, and federal regulations require vehicle manufacturers to "furnish a report" to the agency for each defect in a vehicle touching on safety. 49 C.F.R. § 573.6(a). Moreover, Congress has given the agency authorization to seek remedies against manufacturers for defects relating to motor vehicle safety, including requiring manufacturers to repair or replace vehicles or their component parts. 49 U.S.C. § 30120(a). The agency is also authorized to bring civil enforcement actions and to seek civil penalties for noncompliance. *Id.* §§ 30121, 30163, 30165.

In this context, and especially when the injuries purportedly caused by an alleged defect are not measurable on a class-wide basis, there is no

reason to relax the standards for class certification; in fact, burdensome class action procedures are often counterproductive. Questions concerning what alleged and potential defects are acceptable involve careful trade-offs between competing goals — not only to protect consumers, but also to ensure that they can obtain access to the products they demand at reasonable prices.

Accepting Nguyen's approach to relaxing Rule 23's requirements would mean that every potential or alleged glitch becomes a massive class-action-in-waiting, regardless of how the glitch might affect individual customers. Moreover, although nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010), *available at:* https://www.fjc.gov/sites/default/files/2012/ClassGd3.pdf. Because of the costs of discovery and trial, certification unleashes "hydraulic" pressure to settle. *Newton v. Merrill Lynch, Pierce, Fenner &*

Smith, Inc., 259 F.3d 154, 165 (3d Cir. 2001); *see also* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 639 (1989). As the Supreme Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also* Fed. R. Civ. P. 23(f) advisory committee's notes, 1998 Amendments (noting defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). The resulting economic distortion harms not only defendants but also consumers.

Nguyen's damages theory is a symptom of a larger problem in a case predominated by individual issues. The district court struck the right balance and properly exercised his discretion in enforcing the requirements of Rule 23(b)(3). That judgment should be respected.

CONCLUSION

This Court should affirm the denial of class certification.

Respectfully submitted,

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Dated: February 4, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(g)(1), Fed. R. App. P. 32(a)(7)(B), and Fed. R. App. 29(a)(5) because this brief contains 4,723 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Respectfully submitted,

/s/ *Ashley C. Parrish*
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Counsel for Amici Curiae

Dated: February 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully submitted,

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