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Speaker 1 (00:00):

First case is Kurtz v. Costco Wholesale Corporation.

Eamon Joyce (00:18):

Good morning, Judge Livingston. And may it please the court. I'm Eamon Joyce on behalf of Kimberly-Clark. I intend to focus on the arguments about the class action standards, deception, and causation. My friend, Mr. Matsui, will address the price premium related issues and article three standing. I have three primary points. First, the court aired as a matter of law in adopting pro certification presumptions. Contrary to plaintiff's suggestion, nothing about that was harmless. Second on this record, the court erred by finding deception, a common predominating issue, even though plaintiff failed to demonstrate how reasonable consumers understand flushable and Kurtz's own definition would require individualized evidence to prove nonconformance with the flushable label. Third, the court wrongly ignored individualized inquiries on causation, simply because the GBL has no reliance requirement, but what the court did was erroneously treat reliance and causation is identical. Despite that the New York Court of Appeals has said they're not the same thing. Starting with the first photo—

Judge Lohier (01:23):

Went out of its way to distinguish reliance and causation.

Eamon Joyce (01:26):

I don't think it did Judge [**inaudible**]. It said it was doing so, but under Judge Weinstein's interpretation, a case like Gail would make no sense. In Gail, the second department held that their plaintiff had pleaded a misrepresentation, but it found plaintiff's claim failed because plaintiff hadn't read the misrepresentation. It's not requiring reliance, but it's requiring a causal nexus. So to in Stuntman, if you look at what stuck—

Judge Calabresi (01:56):

But why isn't there a causal nexus—but maybe we should come back to that after you make your first argument, because I have you know, I have problem with first that what you say about Judge Weinstein. He had some thoughts, and he expressed them. But the question about we have held in any number of cases that it is asymmetrical in how we review a denial and a grant, and we've held that and that in the end, I don't think that's really terribly important because the issue is whether there is certification. But this notion with Judge Weinstein was biased is really quite remarkable.

Eamon Joyce (02:39):

I don't think it's about bias Judge Calabresi. To your point on different standards of review, this court most recently in Petrobras question whether that survives the Supreme Court's recent precedents, instead of had to get to it—

Judge Calabresi (02:53):

We question things, but as long as we have a case on our—that has been decided, that case remains a case for our law. And we're not—we shouldn't reverse a district court because it follows what we have said. But anyway, that isn't really the issue. The issue is there enough in common here for first—

Eamon Joyce (03:19):

Let me offer two quick responses to Your Honor's concern about the standards issue. First, I think if Judge Weinstein had followed through and actually resolved his doubts factually, he expressed doubts on deception on causation, on injury over and over and over again. And when you get to the opinion, he doesn't resolve any of those doubts. He observes that the same things are lacking on the evidence—

Judge Livingston (03:43):

But by that argument, it doesn't really matter—if that's what he did, then it doesn't matter what he said, right? Because if that's what he did then then he hasn't given us—

Eamon Joyce (03:51):

I agree, but Judge Livingston, I don't think you can ignore what he said on the presumptions and, both in the presumption section and the way he came at the case, he said this case cries out for a class-wide settlement. I can't understand why these parties haven't settled. You can't ignore that those things were in the mix when he decided this case.

Judge Livingston (04:14):

Could I ask you to address the argument about the deceptive statement? Cause I look at the statute and it seems to me that the statute almost seems to require that the meaning of the term "flushable" be shown by common proof. I mean, it's an objective standard that it is it to a reasonable consumer. So help me understand your argument about the problem with the proof has to certification on that.

Eamon Joyce (04:39):

It is an objective standard, Your Honor. But I don't think that means what the inquiry is going to look like to show conformance is necessarily one size fits all. And that's the problem. If you—

Judge Calabresi (04:52):

Why isn't this, just for the reason that Judge Livingston said, the type of case for which class action was created. I mean, here you have one statement, flushable, that meet any number of people. You have something that no one individual is going to find worthwhile bringing because it's too trivial in terms of the cost. And if you put them together, the question is what does to an ordinary person flushable mean? Why isn't, why isn't that the—

Eamon Joyce (05:29):

I don't disagree with Your Honor about the question is what does it mean to an ordinary reasonable person? I think it'd be one thing to forgive plaintiff's failure to demonstrate what it means to a reasonable person if the evidence showed that none of the definitions would require individualized proof. But the problem is that the definition that plaintiff himself testified he had, the one plaintiff's counsel said the consensus of consumers had, the one their expert said he had for consumers required these individualized inquiries. There's nothing on this record to suggest that a consumer had any standard that was testable through objective evidence.

Judge Calabresi (06:11):

What kind of case—and you know, I'm not talking about the merits. You may very well win, but what kind of case would be suitable for class action? If a case of this sort is not?

Eamon Joyce (06:26):

100% olive oil, I think is a quintessential one Judge Calabresi. A reasonable person is going to understand what a 100% olive oil means. They indeed—that may be a case where you don't even need a consumer survey.

Judge Calabresi (06:37):

Excuse me, but I make olive oil and believe me 100% olive oil is anything but that clear. I mean, you can have one kind of olive and another kind—

Judge Lohier (06.47):

There's an entire *60 Minutes* episode on that.

Eamon Joyce (06:50):

Let me build out some further facts then Judge Calabresi and Judge Lohier. 100% olive oil when the product that's being sold is a completely different commodity called pomace that's traded for less money in the commodities markets. I think that makes it a different case. I see I'm over my time, but if I could circle back to your question, Judge Lohier about causation. I think the real problem here is causation and reliance often overlap, but they don't always overlap. And Stutmen makes that clear. Stutman, when it's talking about why normally there's causation in these cases says in—I think it's footnote two that where you have a material omission that satisfies the causation requirement. And what is the court cite there? It's cites affiliated ute. Affiliated ute doesn't take individualized issues off the table. It just says you've got a presumption.

Eamon Joyce (07:46):

But if there's a bunch of evidence that the person—excuse me, that the misrepresentation in fact had nothing to do with why the purchase was made or the security was purchased, they lose. So to here, it's—look, it would be possible in some cases to even have reliance but not causation. You think about a stock case where somebody is defrauded by their broker. The evidence might show the broker made horrible statements. There's a reliance on the statements. They've got it that far. But if the evidence further reveals that not only is the person purchase that security, but the person purchases—let's say it's a securities market of a through z. They not only purchase the security a on which they're miss reps. They purchased a through z and they just do it by rote. Reliance has met there, but causation is not. And

that's the problem we have here. We're not requiring reliance. We're saying causation isn't met. This case sets up like sergeant benevolence, which Your Honor, Judge Livingston wrote, it sets up like the 349 case that the Delaware Supreme Court dealt with in Teamsters. We know that, even after Mr. Kurtz determined the representation was in his view false, he kept buying and kept buying at the offered price.

Judge Calabresi (09:02):

Wait. Yeah. You're overtime. So we'll come back to that. Maybe.

Eamon Joyce (09:07):

Thank you, Your Honor.

Brian Matsui (09:25):

May it please the court. Brian Matsui on behalf of Costco. As Mr. Joyce mentioned, I'm going to address injury first and then article three standing with respect to injunctive relief. Now with respect to injury, the district courts certification decision is fatally flawed for three reasons. First Kurtz's export—expert supported none of his three price premium theories with evidence. Two of which were just mentioned in passing in a footnote. Second, the district court just assumed that there was a price premium injury here as a matter of common sense. And third, the court failed to address Costco's and Kimberly-Clark's significant expert testimony demonstrating that the methods that Mr. Weir articulate in this case would not actually work.

Judge Livingston (10:17):

If your theory is that there needed to be a finding by a preponderance that this methodology could establish a price premium or not, that the question could be answered with the experts analysis that Dr. Weir proposed to do, or Mr. Weir proposed to do.

Brian Matsui (10:35):

Yes. That's correct. That he needed to—

Judge Livingston (10:38):

[**inaudible**] really address that.

Brian Matsui (10:39):

No, he did not. I mean, there's ample portions of the opinion where he recites various expert testimony but doesn't actually resolve any of the disputes.

Judge Calabresi (10:49):

How much of that is an issue at class certification where it is said by your client and others how important the fact of flush ability is and so on, and how much of it is a question, and a very difficult question, on the merits of the case of actually showing that there has been a damages or other things. That is, I'm confused about what you need to save if there is enough of a link to have a class, because it looks likely that these people have this common injury of paying more because your own client says how important it is to their sales and that how important this is and what it is that is needed then for them to show actual damages when you come down to it. And, you know, we all know that the problem is that if

you get the classmen there tends to be settlements and all that, but that for us as lawyers—in terms of the law, the question of which it is, is a very important difference.

Brian Matsui (12:04):

So that actually touches upon all three of my points, Your Honor. I mean, the first is that—

Judge Calabresi (12:10):

The last is a much more important one to me. And I'll want to hear about it. About the injunction and standing.

Brian Matsui (12:15):

With respect to the last point, there was ample evidence showing that hedonic regression and the survey techniques wouldn't work. I think starting with the survey techniques; these were only mentioned in a footnote. They're not at all tailored to the case. What we have here is nothing more from purchase expert, a mere promise that he will eventually come up with a model. He didn't actually have a model in this case. All he basically did is said, I basically know of these techniques, hedonic regression, for example, which work in completely dissimilar circumstances and then made a promise and intention that he would be able to do that in some other case.

Judge Livingston (12:53):

Am I understanding this correctly? I mean, other cases might—this might be one factor going to whether certification is proper or not, but in this case, this expert is the basis for establishing class-wide injury, not just damage, injury and causation essentially.

Brian Matsui (13:10):

That's correct, Your Honor, this is the only evidence that Kurtz has with respect to those requirements. And he didn't actually put forth any sort of model or evidence. This court doesn't need to decide in this case, what the floor is, what the bare minimum is as far as an expert to actually say a class can be certified. Because in this case, we have an absolute absence of any sort of evidence that would indicate that you could actually do this on a class-wide basis in this very case. All he basically did was identify five attributes. He acknowledged that he had evidence, but then he didn't actually try to apply any of that evidence.

Judge Lohier (13:50):

The expert disputes whether the had hedonic regression analysis can really work, but then goes through and says, well maybe it might work, but there's not enough data. Is that right?

Brian Matsui (14:02):

In this case? No, Your Honor, he acknowledges that he has a lot of data. He says it's an iterative process, but he doesn't actually do anything with that data that he has available.

Judge Lohier (14:12):

I know one of the other experts—one of the opposing experts I believe says it's not likely to work, but maybe an analysis under the right circumstances can work. But there's not enough data.

Brian Matsui (14:26):

So we're not saying that hedonic regression could never work in any sort of case. I don't think that the court would need to say that. But the fact is that under cases like Walmart and this court's IPO decision, there needs to be convincing proof. And it certainly can't be enough that if an expert basically says, there's this economic theory that I could potentially apply, and I will eventually do, that can't be enough to certify a class. That means that cases—

Judge Lohier (14:54):

It says that I can extract if I have enough data. And I don't think that there's a really right now a dispute about the sufficiency of the data that might be at another stage, but I can extract the price or the premium associated with specific product attributes. Right? Is that what it says?

Brian Matsui (15:14):

That's what Weir says he can do, but he doesn't. He says that that can be done because he cites journal articles, for example, where he looks at products like eggs that have organic eggs versus regular eggs that aren't organic. And he uses that theory to say that he could then apply that to flushable wipes. Now, the problem with that is our experts explained, which the district court never addressed, is there's no comparator product here that you can compare flushable wipes to. And so you won't know—

Judge Calabresi (15:45):

Excuse me, you're saying that you can't compare on unflushable to flushable, is that the difference? That you have organic eggs, but not organic eggs, but you don't have non-flushable to be compared with flushable?

Brian Matsui (15:59):

That's one of the problems with respect to hedonic regression in this case, and Weir certainly hasn't explained—

Judge Calabresi (16:06):

How does that then go to the issue, but you say he keeps buying these. If there's nothing else that he can buy that doesn't have this attribute. I mean, there seems to be an inconsistency. You're saying that one of his problems is that he keeps buying after he learns this. And yet if there's nothing else that he can buy that isn't—it's like saying, why does he keep buying organic eggs if they're the only ones on the market?

Brian Matsui (16:40):

And I think that that underscores some of the problems with respect to hedonic regression in this case. As Dr. Martin explained, when you would basically have a situation where the market would fundamentally change if you took away the flush ability representation, then you can't actually do the hedonic regression analysis.

Judge Livingston (16:59):

Dr. Martin concluded that this was a critically fallout analysis, not generally, but that it couldn't be applied in this case.

Brian Matsui (17:06):

That's correct, Your Honor.

Judge Livingston (17:08):

And did the judge resolve that a conflict between the experts?

Brian Matsui (17:12):

Not at all, Your Honor. The judge said—the district court here said that it was premature and declined to do that. And that's a problem because when you have an issue, even if it overlaps somewhat with the merits at the certification stage, under cases like IPO and Walmart, the district court needs to actually resolve that dispute. Now to your point Judge Calabresi as to whether or not the flush ability representation is a valuable attribute, there needs to be some evidence to demonstrate that there would be a price premium associated with that and that it could be shown on a class-wide basis. And there are cases—

Judge Calabresi (17:49):

Class certification rather than at [**inaudible**] stage.

Brian Matsui (17:53):

Yes, because there was an overlap here between the merits and the class certification. And we have here—sorry Your Honor.

Judge Calabresi (17:59):

You're way over time. And I just want to be sure that somebody on your side, whether it's this one or the [**inaudible**] argues the injunction issue, because that's a difficult issue. And I just don't know, you know, in this who is going to be arguing it—

Judge Livingston (18:16):

You were going to address the injunction.

Brian Matsui (18:20):

I was going to address the injunction.

Judge Livingston (18:22):

Why do you take a few moments to address that.

Brian Matsui (18:23):

Certainly Your Honor. I mean, the district court, in this case violate article three by certifying an injunctive relief class as this court is well aware, every sort of—form of relief must satisfy article three's requirements, which means for an injunctive relief Kurtz need to show a certainly impending injury. This court's Nicosia decision really is on all fours with what we have here. Kurtz has not—

Judge Calabresi (18:46):

Basically, you're saying the district court is incorrect to say that there is standing because of its effect on New York customers generally, which is what the court said. And I think, you know, I don't see how one can avoid that problem, that you have to have individuals standing, not the whole thing of New York. But my question is this. If these people had said, and I'm not saying that they did, if they had said we have to keep buying these and paying this higher price, which you're questioning whether there is because we don't know whether these people will be telling the truth or not. It is something of that sort, which I don't know that they did. One of them certainly didn't and the other one may have, but probably didn't. Would—that might have been enough for standing. So would the appropriate thing there is to send that back for possible amendment. You see, they would be willing to you know—if they amend their complaint to state something of that sort that might establish standing, might not, but they wouldn't have asked to amend because they won. They won what you say is incorrect theory, and I'm inclined to agree with you, but what would that be appropriate?

Brian Matsui (20:18):

No, Your Honor. It wouldn't. I mean, first of all, I don't—this court has never held that that would confer article three standing—

Judge Calabresi (20:24):

I didn't say we did. I'm just saying that is a possibility that has not been discussed here at the district court itself was dubious about that.

Brian Matsui (20:36):

But in this case, with respect to Dr. Kurtz, he has provided no indication, has had an ample opportunity to say whether or not he would buy flushable wipes in the future.

Judge Livingston (20:47):

He's been deposed already.

Brian Matsui (20:48):

He has been deposed and he—I'm sorry, Judge.

Judge Calabresi (20:50):

I didn't hear—

Judge Livingston (20:51):

I just asked—I was just saying is he's already been deposed.

Brian Matsui (20:55):

He has been deposed. And he said that he is not buying flushable wipes. There's no allegation in the complaint that would indicate that he has any indication. It would certainly seem to be prejudicial for the defendants to allow an amendment now at this stage in the litigation, which has been pending for four years. Yes, Your Honor. And there was ample opportunity for the plaintiff in this case to say that he intended to buy a flushable wipes in the future. No further [**inaudible**]

Doug Wilens (21:35):

May it please the court. My name is Doug Wilens, and I represent the plaintiff, Joseph Kurtz, who's a consumer of flushable wipe products advertised and sold by defendants, Kimberly-Clark and Costco. The district court did not abuse its discretion in certifying two New York class actions of—consisting of consumers who purchased wipes. And we alleged the wipes are in violation of the New York consumer protection laws. In fact, I think that the opinion shows that the district court rigorously analyzed the class certification requirements in this case—

Judge Lohier (22:11):

Your adversaries say that Judge Weinstein, in fact, didn't resolve these disputes between and among the experts on both sides. What's your response to that?

Doug Wilens (22:22):

I think if you look at the order and look at how—I mean and how he addressed it, he certainly summarized in the early part of his decision what each expert said. He laid out what Mr. Weir said about the hedonic regression and what that means. He then addressed the criticisms of that posed by both Kimberly-Clark's counsel and Kimberly-Clark's expert and Costco's expert. And then later in the opinion he said, I've reviewed that. I understand the criticisms. He cited back to those specific portions of his order, and then said, I find that—the Mr. Weir's hedonic regression is sufficient to satisfy the predominance requirement of Rule 23. I think that's all that's required.

Judge Livingston (23:10):

I mean, I don't dispute—I think you've amply summarized the opinion, but he essentially, in one part of the opinion lays out the different expert statements. Some of the expert statements do go to this—the question whether this analysis can be done at all. And then when he comes back to it, many pages later, he has a lot to address and he is—he basically says the model is sufficient for certification. He doesn't say why Martin's analysis doesn't trump Dr. Weir's. And he concludes Dr. Weir will be able to perform this analysis and will be able to give us a definitive answer, a price premium or not. And my concern in this case is it does seem like that here in the structure of this case, this expert's testimony is essentially what is establishing the fact of injury and causation. And if I'm wrong about that, help me—

Doug Wilens (24:04):

I think our evidence of both causation and injury is predominantly relying upon the—both the decision—I'm sorry, the expert declaration and the rebuttal declaration of Mr. Weir. And I—but I think if you wait—listen, did he do it perfectly and say ABC and then here are the reasons why, no, but he did lay out all the reasons. He cross-referenced those reasons. And I think the importance here is that—

Judge Calabresi (24:31):

What you're saying. Just—I want to be clear is what you're saying that while he may not have said I find this expert to be more believable than the other one, you didn't use those what we've so often call robotic incantations, but that his holding in effect had to mean that. Is that—

Doug Wilens (24:56):

Yes. I think that's exactly—

Judge Calabresi (24:58):

In other situations, we have said that robotic incantations are not enough, but in a classic situation, do we require somebody to say something like that?

Doug Wilens (25:09):

I certainly agree with what you're saying. And I think that's right in that, you know, he certainly understood what the experts were saying. Did he say it in the most perfect way? I think we—it's a 130-page order. We can go through as both of us have done and, you know, certainly nitpick and find he could have said things better, you know, on, certainly on the pleading standards that day, when he's talked about a pleading burden, you know, I think that was some in artful language, but if you look at the order as a whole, he—

Judge Calabresi (25:37):

Disagreed with you, what should we do then? Do a Jacobson remand back to Judge Weinstein and say, did you hold this? I mean, what is it that would be wanted to do more? If we don't agree with you that the decision in effect did.

Doug Wilens (26:02):

But if you're starting from the premise of, if you disagree with me, I guess my preference would be that you send it back to Judge Weinstein so he can clear it up. I think, I mean, I think that certainly within the realm of what you can do. I obviously think that's not necessary but that would be a preferable result to a reversal on that class certification issue.

Judge Livingston (26:22):

And the issue of predominance, the district court did have to make a finding to a standard of proof that predominance had been shown. Right? And to the extent that Dr. Weir's testimony and ability to do this analysis establishes causation and injury, then you really seem to meet and to make a determination as to whether he can actually do what he says he is going to do. More than just saying, you know, sometimes some experts you say, okay, it's let the jury hear it, but here it does seem to me to be critical to your case.

Doug Wilens (26:56):

I think you have to look at—we're still at the class certification stage—

Judge Livingston (27:00):

Critical to establishing the appropriate basis for class.

Doug Wilens (27:04):

Yes and what Mr. Weir said—what he said in his first declaration, what he said in his rebuttal declaration, both of which the court cited and referenced is that these are all class issues. I can—he said one—here's the model I propose. Here is how it would work in practice. Here is the elements that I will use to do that. And then he punctuated that by saying, but—and these were all class issues. It's all based on information that has nothing to do within any individual class member. So when you look at what he said and how—and he rebutted that very strongly in his rebuttal declaration. He said, no the

defendant's experts are incorrect. There no individual inquiry here that's required to determine causation—

Judge Calabresi (27:50):

What is the counsel said that one of the problems with this way of doing as against the egg case is with there is no alternative

Doug Wilens (28:01):

That is not our theory of causation in this case. Comparing it to a different product that's non-flushable. What Mr. Weir says he can do is he can isolate the attribute of flush ability and then assign a price value to that. And that is where, so if he can do that, that the price premium in and of itself establishes the injury and the causation is it's related—it's attributable to that representation. That's what he's saying he can do. So cases that—and he specifically addressed that in his rebuttal declaration and said I'm not doing a side-by-side analysis of one product versus a non flushable product. He's saying I can isolate this attribute. And he laid out exactly what he could do. It's been accepted in other cases. It's accepted in the literature that he cited.

Judge Calabresi (28:53):

You can give a value to an attribute to something which is worth enough so that people are advertising and save that as a price value.

Doug Wilens (29:06):

Yes, that is what Mr. Weir says he can do in this case.

Judge Lohier (29:09):

You do that based on certain data, including corporate documents, including how much spent on certain attributes by the company and so on.

Doug Wilens (29:22):

It would be sales data. It would be company documents. I think he cited in his report he could get data from Amazon.com that shows sales information, and then he conducts his hedonic regression and, you know, provides a result. And if there is a price premium then that's on the merits. If he cannot establish one, then we lose on the merits. But the point is, what defendants are arguing is they want the merits now. They want us to show flexibility can be determined now.

Judge Livingston (29:53):

Well better than that. They say, if he can't do that, if the data that he would need—he referred to data sets. The experts on the other side said I don't think there are—the data is going to be available. If he can't do it, you can't establish injury with the price premium.

Doug Wilens (30:08):

And then we would lose on the merits.

Judge Livingston (30:10):

But if he can't do that and looking at the affidavits and the deposition and making a determination now, then the case shouldn't be certified, right? Because there's no way to establish injury or causation.

Doug Wilens (30:24):

But I think you're putting the cart before the horse. I'd—class certification, all he is saying is that I have a model. This is how the model would work in practice. It applies class-wide. And therefore the class-wide issues—

Judge Livingston (30:37):

I guess I'm—I guess—and this is very helpful. There's a merits question. If the judge determines that this analysis can be done by an expert and a definitive answer can arise, then there's a—you can use this as a method of establishing injury on a contract basis. If on the other hand the data in the circumstances of this case doesn't exist, if there's no ability to run their regressions because of some flaw, and as one of the experts says it's critically flawed as applied to the circumstances of this case, then if this is the only way you plan to show injury on a class-wide basis then it would seem to me you have an established by a preponderance that you can show injury on a class-wide basis. And I shouldn't think about that as one of the elements that goes into a predominance or commonality.

Doug Wilens (31:31):

Well I think still inherent in your question is there's a class-wide issue that has to be—we don't have to prove the injury exists now. Mr. Weir has said in his declaration that the information is out there. He said my process is iterative in that I have to run money multiple regressions. He said but the information is available. I can use it. I could run this. He strenuously disagreed with defendant experts that these—anything is individualized here. It's all based on market information, sales information. And that if you go back and look at what Comcast—

Judge Calabresi (32:08):

At the least you're saying that this is a war between two experts and that is not something that we have to decide now. Is that what you're saying?

Doug Wilens (32:18):

No. What I'm saying is that for class certification—I would say on the ultimate merits of the case, and it does, will his model actually establish an injury? That is a war of the experts that Judge Weinstein correctly said would occur later. What we're saying now and what Comcast says and a lot of decisions of this court following is we just have to show that his model is susceptible of proving that there's a class-wide issue here.

Judge Livingston (32:46):

The difference between will establish and can it establish in the circumstances of this case. Will it establish is the merits. Can it establish is a question that has to be grappled with at class certification.

Doug Wilens (32:58):

I think that's correct. And what Judge Weinstein said—and he—again, he may not have said it as artfully as defendants would have liked, but I certainly believe if you look at the context of the opinion as a whole that he looked at the class services—

Judge Lohier (33:14):

[**inaudible**], he must have concluded that it can establish. Otherwise he would have stopped it. I mean, the implication of the decision—you don't write this long decision unless you believe that one of the experts—and, you know, this is a difficult set of issues, but one of the experts in your case Mr. or Dr. Weir could establish through this [**inaudible**] regression analysis, some commonality—some predominance.

Doug Wilens (33:46):

Yes.

Judge Lohier (33:47):

There's a way—I think, but maybe I'll be corrected to read this opinion and conclude that Judge Weinstein, who was a very smart person didn't come to a conclusion—didn't arrive at some conclusion, even if he acknowledged it was close to equipoise, but we're talking about a preponderance, which is 51%.

Doug Wilens (34:10):

I mean, I think that's correct in that he certainly did not abuse his discretion, which is I think the standard, I—

Judge Calabresi (34:18):

Think it's very dangerous to assume that Judge Weinstein did not reach a conclusion. That would be a very dangerous—big—

Judge Lohier (34:28):

I think he did reach a conclusion.

Judge Calabresi (34:30):

And could you address the injunction issue?

Doug Wilens (34:33):

Sure. I think when—you have to look at what the law requires and what defendants are saying that you—if you accept what they say is the standard under article three, a consumer could never obtain an injunction—

Judge Calabresi (34:47):

No, no, Nope, Nope. I don't believe—I mean, they may be arguing, but I—that's an argument that I have problems with. That somebody who is going to buy something because they know now that any time in the future they will not be—they don't have a standing, that goes too far, but the argument I take it they

are making is with this consumer has no intention of buying in the future. If this consumer had an intention of buying him for future, this consumer could say, given what they've done in the past, I don't know whether they're telling the truth or not. And that might be enough to grant standing, but they're that Judge Weinstein did not grant standing on that basis, that he granted standing of a basis of generalized harm to New York. And that is not enough for article three standing. And when I asked, but couldn't they then amend having one, of course they didn't need to ask for amend, couldn't they amend to say that they want to buy in the future and then be harmed. And the answer they gave me is they stated, or at least Kurtz stated quite clearly that he had no intention whatever of buying. So my question, is in that context, where is standing. Not on their theory—

Doug Wilens (36:24):

Okay. I think I understand what you're saying. I would say this—the shorter answer is there's no magic words in the complaint or in his deposition testimony where he says I will continue to buy, but I think—what a point that defendants have made over and over again is even after he filed the complaint, he still continued to purchase these products. And what we say is that is sufficient because he purchased them, but didn't—

Judge Lohier (36:48):

That's sort of heads right into the [**inaudible**]. So I told my law clerks. I'm a little surprised at the breadth of Nicosia having been on the panel, but we said what we said and we seem to have required in that case some more—yeah. Some more affirmative statement that I anticipate continuing to buy. Do you agree with that?

Doug Wilens (37:12):

I think Nicosia is very broad, as you say. I think a distinguishing factor in that case that is not present in this case is the fact that they took the products there off the market. So there was no need for—

Judge Lohier (37:25):

Yes but we went beyond that.

Doug Wilens (37:28):

Yes. And then you said well there's no allegation in that complaint that he'll ever buy anything off of Amazon again. Well, I think the conduct here shows that he does want to continue to buy these products. He never said—and I don't believe in going through his testimony he ever affirmably said I will never buy these. I think that's an assumption—

Judge Calabresi (37:46):

That is not the basis on which was district court found standing for the injunction.

Doug Wilens (37:52):

I think he did not—no, you are correct that he didn't do that. So if it requires us to go back and add the magic words, I think we're certainly able to do that. I'm sorry.

Judge Lohier (38:07):

A little late? I mean—

Doug Wilens (38:08):

No, we're still at the class—I mean, listen. This case has been around a very long time, but we're still only at the class certification stage. And I think that it's certainly something that if that's the issue, I mean, he certainly intends to buy these products again. He just doesn't believe he can rely on the representation, which brings us to what we say is Nicosia is the standard in this case. But if you look at the Davidson case at the Ninth Circuit, which involved the same plaintiff—the same defendant, the same flushable wipe, and the Ninth Circuit came up with a two-prong test that would cover article three standing issues. And I guess our concern, I know you have a problem with it Judge Calabresi, but—not with the decision, but with—

Judge Calabresi (38:54):

Well, article three standing is something that we have to find exists.

Doug Wilens (39:00):

Exactly.

Judge Calabresi (39:01):

And a generalized statement about harm to people all over we've held any number of times is not enough to confer that standing. So I want to know whether a that—what is sufficient for article three standing is there. At that point, if there is article three standing, then the damage to New York in general might be one of the issues again of[**inaudible**], but I got to have article three standing to begin with.

Doug Wilens (39:29):

And the other point I was making is I think we have to be careful under Nicosia and even Davidson of interpreting article three standing too narrowly such that no consumer could obtain—provided under the consumer protection statutes. If, unless the panel has any other question, I rely on the arguments in my papers and request that the court or from the district court's judgment. Thank you.

Brian Matsui (40:02):

Thank you, Your Honor. I'd like to just turn back to injury briefly. I think that what we have here with Mr. Weir is a promise to do something, not actually any sort of attempt to do something. And I think that that's important when we look at the context of class certifications in general, because if it can be such that an expert really only needs to go in and say there's this mathematical technique and then not actually apply it to the facts of the case. And then that's enough to say that there are common issues that warrant class-wide certification of injury. Then that means every 349 case will be certifiable on the injury requirement because—

Judge Lohier (40:41):

Would you then address on top of Mr. or Dr. Weir the assumption that was made I guess—or the description by Judge Weinstein of these other factors. You know, the fact that people don't buy flushable wipes just because they're flushable wipes. There's some—there's got to be some premium associated with it. I'm just articulating I think his comment—what he called a common sense view.

Brian Matsui (41:10):

Yes, Your Honor. And I think—

Judge Lohier (41:11):

It's not just the—it's not just this battle of the experts.

Brian Matsui (41:15):

But that wouldn't be a price premium injury. That's the problem here. Just because consumers would buy something because they like that attribute doesn't mean that they paid a price premium for that.

Judge Calabresi (41:26):

But the question before us is if there is all of that—if there is—I'm not saying there is—all of this common sense notion that people are buying these and that your client is pushing views and spending money on these because they have the—it is something that sells, then is it in that context enough, in that particular context, to have an expert who says I will be able to show to you that there is a price plus. Is that—that's a question that if there weren't any indication events of that sort, then somebody saying I may be able to in the future to say something might look like something, but it might conceivably look different in a context where most people would say yeah, well, that's what's going on, but can these people prove something? And the guy says yeah, I'll be able to.

Brian Matsui (42:24):

But again, Your Honor, that's not actually evidence. It's a mere assumption. Now we have products that are out there, like in the McLaughlin case, you had light cigarettes and full-flavored cigarettes and the light was a valuable attribute. And yet, those cigarettes were always priced the same. You have Diet Coke and regular—

Judge Calabresi (42:41):

McLaughlin case turned of question of represent—of reliance. And so we're back to the difference between reliance and causation and McLaughlin went specifically on reliance and that's not an issue here. Causation is an issue, and they are separate—

Judge Lohier (43:00):

Very focused on causation.

Brian Matsui (43:02):

But what I'm showing though, Your Honor, is that just because there's an attribute that may drive the market, such as Coke and Diet Coke. You have a diet label that drives the market, but Diet Coke is always priced the same as regular Coke. You can't just assume that there's a price premium in the case. And if you did, then that means plaintiffs would be better off in cases, like Comcast and McLaughlin, in all these cases, not actually having their expert do any of the work to show that it could be tailored to the case because that's what would get them in trouble.

Judge Lohier (43:32):

Let me ask you something about the consumer survey or the absence of a consumer survey. If they'd had a consumer survey just say in the context of the New York class action where the survey showed

that consumers were willing to pay slightly higher price for flushing—for the flushability or dispensability of these wipes would that make a difference?

Brian Matsui (44:00):

I—that certainly would be some evidence as Dr. Ugone and Dr. Martin explained. The problem with consumer surveys as they just measure consumer preference. They're not actually tethered to the supply side. And so the fact that a consumer might be willing to pay more doesn't actually indicate whether or not the manufacturer would actually be charging more like Coke and Diet Coke. They want to sell more soda. So they don't actually charge more.

Judge Lohier (44:23):

You're tell me that if Procter & Gamble finds out the consumers are prepared to pay more, they wouldn't charge more.

Brian Matsui (44:29):

They may be able to sell less of the product if they actually charge more. And so they may be better off actually charging less than whatever alternative products might be there. That's what Dr. Martin said. That there were times when you looked at baby wipes versus flushable wipes. Baby wipes were—would costs more, even though they didn't have any sort of flushability representation. That's why this case is really about a failure of proof on the part of the expert.

Judge Calabresi (44:58):

Your economics is killing me on the notion that something is desirable and a seller does not charge more for it. I'm sorry, but I'm having a little bit of trouble with econ [**inaudible**].

Brian Matsui (45:15):

If there are no further questions, we would ask the court to reverse.

Judge Calabresi (45:22):

Thank you.

Brian Matsui (45:23):

Thank you.

Judge Livingston (45:24):

Thank you very much. We'll take it under advisement. Well argued by both sides. Thank you.

Judge Calabresi (45:29):

Yes, very well argued. Thank you both.

[*end of the recording*]