No.

In the Supreme Court of the United States

WHIRLPOOL CORPORATION,

Petitioner,

v.

GINA GLAZER AND TRINA ALLISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is one of many nearly identical class actions against Whirlpool and other appliance manufacturers and retailers in which plaintiffs seeking to represent more than 10,000,000 consumers allege that all high-efficiency front-loading clothes washers emit moldy odors due to laundry residue and are therefore defective. In this bellwether case, the Sixth Circuit affirmed certification of a Rule 23(b)(3) class of some 200,000 Ohio residents who bought Whirlpool-brand front-loading washers from 2001 to the present, even though most of the buyers did not experience the alleged odor problem. The questions presented are:

1. Whether a class may be certified under Rule 23(b)(3) even though most class members have not been harmed and could not sue on their own behalf.
2. Whether a class may be certified without resolving factual disputes that bear directly on the requirements of Rule 23.
3. Whether a class may be certified without determining whether factual dissimilarities among putative class members give rise to individualized issues that predominate over any common issues.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner Whirlpool Corporation does not have a parent corporation. No publicly held company owns 10% or more of Whirlpool Corporation's stock.

Plaintiffs-Respondents are Gina Glazer and Trina Allison.

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PETITION FOR A WRIT OF CERTIORARI

Whirlpool Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 678 F.3d 409. The court of appeals' order denying rehearing en banc (App., *infra*, 34a-35a) is unpublished. The district court's order granting plaintiffs' motion for class certification (App., *infra*, 24a-33a) is available at 2010 WL 2756947.

JURISDICTION

The court of appeals issued its decision on May 3, 2012. A timely petition for rehearing en banc was denied on June 18, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Relevant portions of Federal Rule of Civil Procedure 23 are reproduced at App., *infra*, 36a-37a.

STATEMENT OF THE CASE

Plaintiffs-Respondents Gina Glazer and Trina Allison ("plaintiffs") claim that 21 different models of Whirlpool-brand high-efficiency front-loading clothes washers sold since 2001 contain a common design defect that causes, or will cause at some indeterminate time, moldy odors due to an accumulation of laundry residue ("biofilm"). Plaintiffs do not allege any safety issue. Pursuant to Fed. R. Civ. P. 23(b)(3), plaintiffs sought certification of a statewide class of approximately 200,000 Ohio residents who bought any of the 21 models of Whirlpool's Duet, Duet HT,

and Duet Sport washers (collectively, the "Washers") since 2001.[1]

Whirlpool opposed certification. It submitted voluminous evidence, much of it undisputed, showing that:

- the designs of the 21 models changed materially over the nine-year class period;
- buyers treated their Washers in materially different ways, including failing to comply with Whirlpool's use and care instructions regarding odor prevention;
- Whirlpool's knowledge of and disclosures regarding the potential for odors changed materially over the class period;
- only a tiny fraction of the putative class members ever reported mold or odors in their Washers; and
- Whirlpool's affirmative defenses, including product misuse and statutes of limitations, will require individualized fact-finding at trial.

Whirlpool's evidence showed that plaintiffs' claims are not susceptible to common proof and do not satisfy Rule 23(a)(2), (a)(3), or (b)(3).

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[1] *Glazer* is one of nine putative class actions that have been consolidated in the district court under the caption *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation*, No. 1:08-wp-65000. The eight related actions seek certification of 13 non-Ohio statewide classes that include more than 1,500,000 buyers of Whirlpool-brand washers.

In a 7.5-page order providing only a cursory four-page "Rule 23 Analysis" (App., *infra*, 27a-32a), the district court certified a class for trial of all liability issues arising from plaintiffs' Ohio common-law claims of negligent design, failure to warn, and tortious breach of warranty. *Id*. at 33a. The court did not cite any evidence or resolve any factual disputes bearing on satisfaction of the Rule 23 requirements. Instead, the court expressly relied solely on plaintiffs' allegations and "theor[ies]." *Id*. at 27a-31a.

The Sixth Circuit granted Whirlpool's Rule 23(f) petition to consider "the standard a district court must apply to factual disputes relevant in determining whether the plaintiff class satisfied the criteria for certification." App., *infra*, 22a. After briefing, but before oral argument, this Court decided *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Instead of applying *Dukes*, which would have required reversal of the district court's class certification order, the Sixth Circuit affirmed in an opinion that contains multiple errors of law and cannot be reconciled with *Dukes* and other decisions of this Court.

Although at least 97% of all Washer buyers have never experienced a problem with mold or moldy odors and therefore cannot show any cognizable injury under Ohio tort law, all Washer buyers in Ohio are now members of the certified "liability" class. This ruling contravenes *Dukes*' holding that named plaintiffs and absent class members must suffer "the same injury." 131 S. Ct. at 2551.

In an attempt to overcome this infirmity, the Sixth Circuit pronounced a "premium-price" injury theory under which class members could be deemed uniformly injured at the time of purchase, regardless

of the nonexistence of odor or mold during ownership, and regardless of model purchased or price paid. But plaintiffs had not even argued for (much less submitted evidence supporting) that liability theory, and Ohio tort law does not recognize it. See *infra* pp. 17-18. The Sixth Circuit did not cite a single case recognizing a "premium price" theory of harm under Ohio law, instead relying solely on out-of-circuit cases applying California law. It thereby ran afoul of this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-823 (1985), that using foreign law to expand the applicable jurisdiction's substantive law in order to certify a class violates the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1.

The impact of this case extends far beyond the 200,000 Ohio certified class members. This lawsuit is the bellwether action for eight similar cases against Whirlpool, involving more than 1,500,000 buyers and making this litigation one of the largest class proceedings ever maintained in federal court. Moreover, many other purported class actions, alleging nearly identical mold problems, are pending against other manufacturers and sellers of front-loading washers, including Samsung, General Electric, LG, Electrolux, BSH Home Appliances, Miele, and Sears.[2] In each case, only a small

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[2] See*, e.g., Spera v. Samsung Elecs. Am.*, 2:12-cv-05412 (D.N.J.); *Fishman v. Gen. Elec. Co.*, 2:12-cv-00585 (D.N.J.); *Montich v. Miele USA, Inc.*, 3:11-cv-02725 (D.N.J.); *Tait v. BSH Home Appliances Corp.*, 8:10-cv-00711 (C.D. Cal.); *Terrill v. Electrolux Home Prods., Inc.*, 1:08-cv-00030 (S.D. Ga.); *Harper v. LG Elecs. USA, Inc.*, 2:08-cv-00051 (D.N.J.); *Butler v. Sears Roebuck & Co.*, 1:06-cv-07023 (N.D. Ill.).

minority of putative class members experienced any mold or odor problem. Consumers Union's annual reliability surveys of tens of thousands of owners of front-loading washers have repeatedly shown that less than 1% of all Washer owners reported any odor issue during the first four years in service. See *infra* pp. 7-8. If the class certification order in this case is permitted to stand, it is likely to influence the class certification decisions in these similar actions. Collectively, the proposed classes alleging mold problems would greatly exceed in size "one of the most expansive class actions ever" considered by this Court. *Dukes*, 131 S. Ct. at 2547.

This Court should grant review to decide whether a class composed primarily of uninjured class members—consumers who would lack Article III standing to sue on their own behalf—may be certified, and to clarify the extent to which lower courts must resolve disputed factual questions bearing on class certification, particularly as they relate to the predominance requirement of Rule 23(b)(3).

A. Factual Background

Whirlpool began manufacturing and selling high-efficiency front-loading clothes washers for the United States market in 2001. D103-2 at 2.[3] The Washers were sold under the Whirlpool brand with the model names "Duet" and "Duet HT" and were built in Germany on an engineering platform referred to as the "Access platform." *Ibid.* Since 2007 Whirlpool also has manufactured in Mexico different Access-platform models referred to as "Sierra

[3] "D" refers to docket numbers assigned in the district court.

platform" models. *Id*. at 4. From 2001 through 2009 Whirlpool manufactured and sold seventeen differently engineered Access and Sierra models over a combined seven different platform generations. *Id*. at 2-4.

In 2006 Whirlpool began selling a smaller, lower-priced model built on a "Horizon" platform and sold under the model names Duet Sport and Duet Sport HT. *Id*. at 3. All Horizon models differ markedly from all Access/Sierra models, with the two platforms sharing only a few components. *Ibid*. Between 2006 and 2009, Whirlpool manufactured and sold four different Horizon models over two different platform generations. *Id*. at 3-4.

Plaintiffs Allison and Glazer are Ohio residents who bought a 2005 Duet HT model (the second of seven generations of Access/Sierra designs) and a 2006 Duet Sport model (the first of two generations of Horizon machines). D103-1 at 2. Both plaintiffs allegedly experienced moldy odor within a year after purchase. *Ibid*.; D103-42 at 5; D103-44 at 23. Although each claimed that she had followed all of Whirlpool's owner-manual instructions related to reducing the likelihood of odor, discovery revealed otherwise. D103-1 at 2; D104-31 at 3-11; D103-42 at 11, 15; D103-44 at 19, 22, 29-30, 32.

B. Class Certification Proceedings

Plaintiffs moved to certify a class of all current Ohio residents who bought any of the various Washer models since 2001. D93 at 1. Plaintiffs asserted that all of the Washers have a uniform design and contain a uniform defect that, at some indeterminate time, will result in noticeable moldy odors, even if the buyers follow Whirlpool's user

instructions. D93-1 at 4-8, 10, 16. Plaintiffs also asserted that Whirlpool knew of the defect before selling any of the Washers and uniformly concealed that defect for a decade. *Id*. at 11, 14-15. Plaintiffs further contended that Whirlpool's admittedly different and evolving user instructions and disclosures regarding the potential for moldy odors, as well as its recommended preventive maintenance steps, were "uniformly" inadequate. *Id.* at 7. Plaintiffs argued that "[i]n reviewing a class certification motion," the court should accept "as true the allegations in the complaint." *Id*. at 18.

In opposition, Whirlpool submitted voluminous evidence disputing plaintiffs' claims of "uniformity." D100 at 3-15; D103. For example, the evidence showed that most putative class members had not experienced any moldy odor at all and thus had incurred no cognizable tort injury from the alleged defects. Specifically, Whirlpool submitted undisputed field data showing that only 0.3% of all U.S. owners reported any odor problem in the first year of service. D103-29 at 6-7. Service data compiled by Sears—one of the largest retailers, and the largest service provider, of the Washers—showed that 97% of Access-platform Washer buyers and 98% of Horizon-platform Washer buyers who bought a three- or five-year extended service plan *never* reported any moldy odor. *Id*. at 8-10. Further, survey data compiled by Consumers Union—the nation's leading independent consumer organization whose *Consumer Reports* magazine is read by appliance shoppers and whose Annual Reliability Survey results are closely monitored by Whirlpool—showed that less than 1% of all Washer owners reported any odor issue during the first four years in service. See, *e.g.*, App., *infra*, 39a-42a (of the 11% of front-load washers with

reportable problems, only 8% had problems that "were caused by mold or mildew"); see also D103-4 ¶ 21; D103-14.

Plaintiffs offered no empirical data or analysis to counter this evidence. Instead, they relied on an Internet survey summary, and two documents that misstate the survey's substance, to argue that 35% of Washer buyers had "actual[ly] report[ed]" experiencing moldy odor. D93-1 at 17 (referencing D93-5, D93-30, and D93-31). The survey summary showed on its face, however, that it elicited information about dishwashers and about clothes washers in general, rather than the Whirlpool washers at issue here. D103-4 at 16-17. None of plaintiffs' experts determined the percentage of Whirlpool buyers who had complained of, or would experience, the alleged moldy odor. D103-28 at 3, 14; D103-31 at 4.

Whirlpool also submitted unrefuted evidence showing that Whirlpool's knowledge about combating Washer odor changed materially over the class period and that Whirlpool's laboratory and field testing of prototype Washers had not revealed the existence of any odor issue when Whirlpool first sold them in 2001. D103-4 at 11-13.

Whirlpool submitted additional evidence showing that in late 2003 and early 2004, when several hundred thousand Access washers were in consumers' homes, Whirlpool's and Sears' call centers were receiving complaints at a rate less than *two-tenths of one percent per year* related to mold and moldy odors. *Id.* at 7-8. Nevertheless, in April 2004, Whirlpool assembled an engineering team to identify the root causes of the complaints and recommend design, manufacturing, and product literature changes that would reduce the already remote

chance of noticeable mold or odor. *Ibid*. By December 2004, the team identified several factors that could further reduce the rate, including owner-use factors that arose from owners' unfamiliarity with the new machines—*e.g.*, failure to use high-efficiency detergents that prevent excess suds, to keep the Washer door ajar between uses, and to clean the machine periodically. *Id*. at 8-10.

Whirlpool's evidence opposing class certification showed that as Whirlpool acquired information over time, it made dozens of Washer design and literature changes to reduce the chance of noticeable odor and to make the Washers more resistant to different consumer use and care practices. *Id*. at 13-16. These design modifications included changes to the plastic tub and aluminum crosspiece, two key Washer components that plaintiffs allege are part of the "defect." *Id*. at 15. Due to these feature, design, and literature changes, material differences exist among the various Washer models. *Id*. at 3-4.13-16. These changes also resulted in even fewer moldy odor reports. D103-29 at 6-8, 12.

Plaintiffs adduced no evidence to dispute these facts. To the contrary, their engineering expert, Dr. Wilson, admitted that some of Whirlpool's design changes reduced biofilm buildup. D103-28 at 12-13, 24-27. He testified that Whirlpool's tub design change prevented it from collecting debris, which he saw as a "major design flaw" in the original design that caused "the eventual growth of odor producing bacteria." D93-4 at 10; D103-28 at 23-24. He further admitted that he had not conducted any test to evaluate whether any of Whirlpool's design or literature changes were effective in limiting biofilm. D100 at 8; D103-28 at 11. And he conceded that

biofilm exists in *all* clothes washers after a period of use and that the amount "depends on the use and habits * * * of the consumer" and the "environment that the machine sits in." D103-28 at 9, 22.

C. The District Court's Certification Order

The district court certified a Rule 23(b)(3) class consisting of all current Ohio residents who bought a Washer in Ohio for personal, family, or household purposes. App., *infra*, 33a. The order's short "Rule 23 Analysis" (*id*. at 27a-32a) does not refer to *any* evidence submitted by the parties, or resolve any of the disputed fact questions central to whether plaintiffs satisfied Rule 23. Those questions include whether there was a common Washer design, whether there were common Washer instructions and "warnings," what percentage of buyers experienced moldy odor, and whether moldy odor is caused by factors other than the alleged defect. *Ibid*. Instead, the court relied exclusively on plaintiffs' allegations and "theory of the case" to conclude that their tort claims satisfy the Rule 23(a) and (b)(3) requirements. *Id*. at 29a-32a. The court declined to certify the question of damages for class determination, leaving damages for innumerable individual trials. *Id*. at 32a.

The district court expressly declined to consider Whirlpool's empirical evidence showing that the supposedly uniform harm is exceedingly rare and not common to the putative class members. App., *infra*, 25a. Even though Whirlpool's evidence was crucial to determining whether the class definition was fatally over-inclusive because it included tens of thousands of members who suffered no tort injury, and because the liability elements of causation and injury were not susceptible to class-wide proof, the court refused

to consider that evidence or resolve the disputed issues. Instead, the court stated that whether a "particular plaintiff has suffered harm is a merits issue not relevant to class certification," citing this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Id.* at 25a.

Although recognizing that Whirlpool had made design changes to the Washers throughout the class period, the district court ignored Whirlpool's evidence showing that those differences produced nonuniformity among the various designs and that the changes were intended to and did reduce the odor complaint rate. App., *infra,* 29a, 30a n.3. Instead, the court based its commonality and predominance analyses solely on plaintiffs' "theory" that all Washers are uniformly defective in design, and on plaintiffs' allegations that Whirlpool "knew at the outset" that all Washers "had a defect" and that "none of Whirlpool's public disclosures about the mold problems were sufficient." *Id.* at 29a-30a. In short, the court failed to explain why the many factual dissimilarities within the proposed class do not preclude plaintiffs' tort claims from being resolved on a class-wide basis.

D. The Sixth Circuit's Decision

The Sixth Circuit granted Whirlpool's Rule 23(f) petition. App., *infra*, 22a-23a. After briefing, but before argument, this Court decided *Wal-Mart, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), a decision important to the issues here. Despite *Dukes*, the court of appeals affirmed. App., *infra*, 1a-21a.

In an opinion authored by Judge Stranch, the Sixth Circuit first rejected Whirlpool's argument that the district court had improperly avoided considera-

tion of the merits and failed to conduct the required "rigorous analysis." App., *infra*, 13a. The panel pronounced, without citation to the record, that the district court had "closely examined the evidentiary record and conducted the necessary 'rigorous analysis' to find that the prerequisites of Rule 23 were met." *Ibid*. In fact, the Sixth Circuit engaged in its own selective, *de novo* review of the evidence and made its own evidentiary findings. *Id*. at 13a-21a. Its opinion credited literally *none* of Whirlpool's unrefuted evidence, much less weighed Whirlpool's evidence against plaintiffs' conflicting evidence on the crucial factual issues.

The Sixth Circuit also rejected Whirlpool's argument that, because the vast majority of class members had not experienced moldy odor, commonality and predominance were lacking and the class was fatally overbroad. The court instead held that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." App., *infra*, 18a. According to the court, class certification is appropriate so long as "class members complain of a pattern or practice that is generally applicable to the class as a whole," thereby relying on the standard stated in Rule 23(b)(2) to affirm certification under Rule 23(b)(3). *Ibid*.

The court of appeals then imported into this Ohio tort case a "premium price" injury theory not recognized under Ohio law: "[T]he class plaintiffs may be able to show that each class member was injured at the point of sale upon paying a premium price for the Duet as designed, even if the washing machines purchased by some class members have not developed the mold problem." App., *infra*, 18a. In

so holding, the court relied on Ninth Circuit cases applying California, not Ohio, consumer-protection laws. *Id.* at 18a-19a. Plaintiffs had not argued this theory to either the district court or the Sixth Circuit, and the district court never addressed it. D93-1 at 1-30; App., *infra*, 24a-33a.

The Sixth Circuit next affirmed the district court's commonality analysis. Despite acknowledging the "dozens of changes," the court found the question whether the Washer designs are "defective" to be common. App., *infra*, 8a. The court further found that issues of proximate causation and the adequacy of Whirlpool's warnings "are capable of classwide resolution because they are central to the validity of each plaintiff's legal claims and they will generate common answers likely to drive the resolution of the lawsuit." *Id.* at 15a-16a. In so holding, the court failed to acknowledge that Whirlpool's evidence regarding those design and disclosure differences requires individualized trial determinations and precludes the generation of common answers. See *Dukes*, 131 S. Ct. at 2551.

The Sixth Circuit focused almost exclusively on commonality, addressing the "far more demanding" predominance requirement (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-624 (1997)) only abstractly in a single sentence: "In light of all that we have already said, we have no difficulty affirming the district court's finding that common questions predominate over individual ones and that the class action mechanism is the superior method to resolve these claims fairly and efficiently." App., *infra*, 19a. The court failed to identify the elements of the Ohio tort claims actually at issue, much less consider how plaintiffs could overcome all the differences among

Washer buyers to prove each element through common proof at trial. And the court omitted any mention of Whirlpool's fact-specific defenses, such as product misuse and statutes of limitations, which apply differently among named plaintiffs and absent class members.

The court further recommended that those "class members who have not experienced a mold problem * * * be placed in a Rule 23(b)(2) subclass to allow any declaratory or injunctive relief necessary to protect their interests." App., *infra*, 20a. But plaintiffs had not sought certification under Rule 23(b)(2), much less proved that Rule 23(b)(2) subclass certification is appropriate.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision contradicts *Dukes* on commonality, *Amchem* on predominance, and other decisions of this Court. It also exacerbates a circuit split over the significance of unharmed class members to class certification. If uncorrected, the decision will adversely affect not only Whirlpool and clothes-washer manufacturers in many related actions, but thousands of manufacturers and other businesses throughout the United States that repeatedly are sued for alleged performance problems with products or services that affect only a small fraction of purchasers. Review should be granted to address these frequently recurring questions of broad importance to class-action litigants and the lower courts.

I. Certification Of A Class Composed Primarily Of Uninjured Product Buyers Is Inconsistent With This Court's Precedents And Deepens A Circuit Conflict.

A. The decision below conflicts with the *Dukes* requirement that named plaintiffs and absent class members share a common injury.

This Court made clear in *Dukes* that merely pleading "common questions" of fact or law cannot satisfy Rule 23(a)(2)'s commonality requirement. Putative class representatives must "demonstrate that the class members 'have *suffered the same injury*'" and identify a common question for trial that will generate a common answer for all proposed class members. 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982)) (emphasis added).

Although the Sixth Circuit gave lip-service to *Dukes*, see App., *infra*, 14a, it failed to adhere to that precedent. It is undisputed that most absent class members have not experienced the moldy odor allegedly experienced by plaintiffs—97% according to Whirlpool's and Sears' undisputed service records, 99% according to Consumer Reports surveys, and 65% according to plaintiffs' own refuted theory. Although the court of appeals acknowledged that "[t]o demonstrate commonality, plaintiffs must show that class members have suffered the same injury" (App., *infra*, 14a), the court bypassed the "same injury" requirement by ruling that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Id.* at 18a. The court of appeals thereby sustained the district court's erroneous ruling that "whether any particular plaintiff has suffered harm

is * * * *not relevant* to class certification." App., *infra*, 25a (emphasis added).

The Sixth Circuit made no attempt to square its opinion with *Dukes*. Instead, the court relied on language from Rule 23(b)(2)—a provision neither invoked by plaintiffs nor cited in the district court's certification order—and a Sixth Circuit decision in a Rule 23(b)(2) declaratory relief action (one that did not even discuss Rule 23(a)(2)'s common-injury requirement). According to the court of appeals, certification of a Rule 23(b)(3) class comprising mostly uninjured members is appropriate because "the challenged conduct" is "premised on a ground that is applicable to the entire class." App., *infra*, 18a (quoting *Gooch v. Life Investors Ins. Co.*, 672 F.3d 402, 428 (6th Cir. 2012)). That conclusion contradicts this Court's holding in *Dukes* that the circumstances warranting certification of a Rule 23(b)(2) class are insufficient to certify a class under Rule 23(b)(3). See *Dukes*, 131 S. Ct. at 2558-2559 (Rule 23(b)(3)'s predominance and superiority requirements "are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*").

The Sixth Circuit next side-stepped *Dukes* by suggesting, illogically, that all class members—including, for example, persons who sold their houses with their Washers in place after years of use without any moldy odor issue—might have been injured when they bought their Washers even if they never experienced any odor problem. The court raised *sua sponte* a theory that "each class member was injured at the point of sale upon paying a premium price for the Duet as designed." App., *infra*, 18a. Plaintiffs did not make that argument below or

in the court of appeals, and it is not supported by any evidence in the record or by Ohio law. The panel's speculation that plaintiffs "may be able" to show a common injury contravenes *Dukes'* holding that the proponents of class certification *must* "affirmatively demonstrate" satisfaction of each Rule 23 prerequisite, including that class members have "suffered the same injury." *Dukes*, 131 S. Ct. at 2551.

Furthermore, the Sixth Circuit's ground for certifying this class violates Whirlpool's constitutional rights and runs afoul of other decisions of this Court. In proposing its "premium-price" theory, the Sixth Circuit relied on three California state and federal cases, each of which interpreted *California*'s consumer protection laws. App., *infra*, 19a (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011); *Montanez v. Gerber Childrenswear, LLC*, 2011 WL 6757875, at *1-2 (C.D. Cal. Dec. 15, 2011)[4]; *Kwikset Corp. v. Superior Ct.*, 246 P.3d 877, 895 (Cal. 2011)). The Sixth Circuit did not cite any decision applying Ohio law that recognizes such a tort injury theory, and there is none. See Ohio Rev. Code §§ 2307.71(A)(7), 2307.79(A) (product liability plaintiffs may recover economic loss only if they prove "harm" in the form of personal injury or physical damage to property other than the product in question); *Delahunt v. Cytodyne Techs.*, 241 F. Supp. 2d 827, 832-834 (S.D. Ohio 2003) (dismissing fraud claim alleging that class members experienced only financial harm in the form of diminished

[4] In *Montanez*, the plaintiffs' attorneys include the husband and son of Judge Stranch, who authored the Sixth Circuit opinion in this case. They are class action attorneys at Judge Stranch's former law firm.

product value); *Hoffer v. Cooper Wiring Devices, Inc.*, 2007 WL 1725317, at *7-*8 (N.D. Ohio June 13, 2007) (economic loss is not recoverable under Ohio tort law unless the alleged defect is manifest in the product purchased by plaintiff); *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 2005 WL 6778678, at *11 (N.D. Ohio Feb. 22, 2005) ("a plaintiff has not suffered a present injury * * * until the very product in question has caused some harm to person or property, even if the product in question contains a latent defect that has manifested in other, identical products").

By applying California substantive law to a class of Ohio residents who bought and used their Washers in Ohio, the Sixth Circuit contravened this Court's precedent establishing that due process requires application of the law of the relevant State when addressing class certification. See, *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). In *Shutts*, Kansas courts had applied Kansas substantive law to every transaction at issue in that class action, even though 97% of the plaintiffs had no connection to Kansas. 472 U.S. at 815-816. This Court reversed, holding that applying Kansas law to all class members—and relying on the uniform elements of Kansas law to certify a class—violated constitutional limitations on choice of law mandated by the Due Process and Full Faith and Credit clauses. *Id.* at 821-822. Instead, the substantive law "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of * * * law is not arbitrary or unfair." *Ibid.* (quoting *Hague*, 449 U.S. at 312-313).

By relying on a novel injury theory under California law to uphold class certification in a case governed by Ohio law, which does not recognize that theory, the Sixth Circuit did precisely what *Shutts* prohibited: it applied the law of an unrelated jurisdiction solely to facilitate class certification, thereby violating Whirlpool's constitutional rights. See also *Hague*, 449 U.S. at 312-313.

B. The Sixth Circuit's decision broadens a circuit split regarding certification of classes that include uninjured members.

The inclusion of uninjured absent class members in a proposed class is an issue that arises frequently. See, *e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012); *Stearns*, 655 F.3d at 1021; *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-264 (2d Cir. 2006). It has been addressed in different ways by the lower courts, creating a mature circuit split. See Poon & Evanson, *Class Distinctions: The Circuits Have Invoked a Variety of Different Standards in Certifying Classes for Litigation*, L.A. Law., Feb. 2011, at 18, 21 (discussing circuit split over whether a class containing members without standing may be certified). The circuits that have addressed the issue are divided into three camps.

The Second and Eighth Circuits have made clear that a class cannot be certified if it includes persons who lack Article III standing. See *Avritt*, 615 F.3d at 1034; *Denney*, 443 F.3d at 263-264; see also 7AA Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1785.1 (3d ed. 2005).

In *Denney*, 443 F.3d at 263-264, the Second Circuit explained that, while each member of a class need not submit evidence of personal standing, the class must be defined in such a way that anyone within it would have standing, and "no class may be certified that contains members lacking Article III standing." The court reasoned that standing is a threshold, constitutional requirement that may not be relaxed or modified through the procedural device of Rule 23. *Id.* at 264 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999)). In *Avritt*, 615 F.3d at 1034, the Eighth Circuit likewise held that enabling "a single injured plaintiff [to] bring a class action on behalf of a group of individuals who may not have had a cause of action themselves" would be "inconsistent with the doctrine of standing," which "is equally applicable to class actions." See also *Blades v. Monsanto Co.*, 400 F.3d 562, 571-574 (8th Cir. 2005) (denying certification where "not every member of the proposed classes can prove with common evidence that they suffered impact" from the alleged violation).

The Seventh Circuit has taken an intermediate position: class members need not have Article III standing, but the class definition cannot be overbroad. In *Kohen*, 571 F.3d at 676, the court held that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." The court reasoned that proving a class member was not injured leads to a dismissal on the merits, not a dismissal for lack of jurisdiction. *Id.* at 677. However, *Kohen* also held that certification is improper when "it is apparent that [the class] contains a great many persons who have suffered no injury at the hands of the defendant." *Ibid.* That is because "a proper class

definition cannot be so untethered from the elements of the underlying cause of action that it wildly overstates the number of parties that could possibly demonstrate injury." *Id.* at 679. Because the defendant in *Kohen*, unlike Whirlpool here, had failed to adduce evidence of how many class members were uninjured by the challenged conduct, certification was upheld. *Ibid.*

The Third, Ninth, and now the Sixth Circuits represent the other end of the spectrum. In these circuits, class-member standing is irrelevant to the class-certification determination. See *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 275 (3d Cir. 2009) ("the critical question is whether the named plaintiffs who were actually before the District Court had standing irrespective of whether each absent class member could establish standing"); *Stearns*, 655 F.3d at 1021; *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010). These courts view the question whether absent class members suffered any injury at all as a damages issue, not a standing issue.

In *Stearns*, for example, the Ninth Circuit ruled that Article III standing in the class certification inquiry focuses only on whether at least one named plaintiff meets the standing requirement. 655 F.3d at 1021. The court rejected the defendant's argument that certification was improper because most absent class members had not been harmed by the challenged conduct and, thus lacked standing to assert a claim. The court stated that "our law keys on the representative party, not all of the class members," and "has done so for many years." *Ibid.*

The Ninth Circuit went a step further in *Wolin*, holding that a class can be certified regardless of

whether anyone in that class actually had experienced the alleged defect. The plaintiffs there alleged that a vehicle had a defect that caused its tires to wear out too quickly. The district court denied certification on predominance grounds because the plaintiffs had not credibly shown that "even a majority of the class members have experienced the defect." *Gable v. Land Rover N. Am., Inc.*, 2008 WL 4441960, at *4-5 (C.D. Cal. Sept. 29, 2008). The Ninth Circuit reversed, holding that "proof of the manifestation of a defect is not a prerequisite to class certification" but rather goes to "whether class members can win on the merits." *Wolin*, 617 F.3d at 1173.

The Sixth Circuit here followed the Ninth Circuit, citing *Stearns* and *Wolin*. App., *infra*, 18a-19a. As in *Wolin*, the district court below ruled that "whether any particular plaintiff has suffered harm is a merits issue not relevant to class certification." App., *infra*, 25a. In affirming, the Sixth Circuit rejected Whirlpool's argument that a class comprising primarily uninjured persons without standing in their own right cannot be certified. Instead, the court agreed with *Wolin* that "proof of the manifestation of a defect is not a prerequisite to class certification" and held that "[c]lass certification is appropriate * * * [e]ven if some class members have not been injured by the challenged practice." App., *infra*, 18a-19a.

Review by this Court is required to resolve this deep and mature circuit conflict.

C. A class of mostly uninjured product buyers may not be certified under Rule 23(b)(3).

This Court has noted time and again 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.'" *Dukes*, 131 S. Ct. at 2550; accord *Falcon*, 457 U.S. at 155. Filing a suit as a class action—on behalf of unnamed absent parties—does not override the substantive requirement that each tort claimant must suffer actual injury. See Ohio Rev. Code § 2307.73(A); *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 270 (Ohio 1977); *Hanlon v. Lane*, 648 N.E.2d 26, 28 (Ohio Ct. App. 1994); *Kurczi v. Eli Lilly & Co.,* 160 F.R.D. 667, 675 (N.D. Ohio 1995) ("It is obvious that each plaintiff will have to show that she has sustained an injury, just as it is obvious that any plaintiff in any tort action must show that she or he has sustained an injury").

As this Court repeatedly has explained, the "Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)); accord *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 612-613. Moreover, "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 612-613. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Thus, a class cannot be certified if it is composed primarily of consumers who were not actually injured by the alleged tort and who therefore lack Article III standing.

Lower courts should not be permitted to gloss over these Article III and substantive liability requirements by certifying a sprawling class of uninjured persons who cannot sue in their own right. Before a class may be certified, the question whether class members have suffered an injury sufficient to bestow standing must be answered in the affirmative for all (or, at a minimum, the vast majority of) class members with evidence common to the class. If, as here, a determination of class-member injury can be made only on an individual basis, the proposed class does not satisfy either the common-injury requirement of Rule 23(a)(2) or the predominance requirement of Rule 23(b)(3).

The Sixth Circuit's "premium-price" injury theory cannot avoid this common-injury requirement. Whether any particular class member overpaid for a Washer is an individual question. See *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 748 (7th Cir. 2008) (rejecting argument that all class members paid a premium for dryers, because some may have bought the dryer at a discount and others may prefer even an allegedly defective dryer over other dryers). If, for example, a class member paid $800 for a Washer in 2002 that never developed any moldy odor during the life of the Washer (as the vast majority of all Washers have not), the buyer did not pay a "premium price." This is true regardless of whether some small percentage of other owners experienced a moldy odor. Those who did not experience odors received precisely what they bargained for, and determining which members did or did not receive what they bargained for is an inherently individualized inquiry. See *Dukes*, 131 S. Ct. at 2561, and *Ortiz*, 527 U.S. at 845 (warning

against "novel" and "adventurous" applications of Rule 23 that override individualized factual issues).

In sum, allowing a class to be certified even though it encompasses many individuals without injury contravenes Article III, as well as the Rules Enabling Act and Rule 23. Identifying which of the vast number of Washer buyers actually suffered injury requires individual fact inquiries that cannot be conducted in a single class action. Certiorari is warranted to resolve the inter-circuit conflict on these points and to ensure proper and uniform application of this Court's precedents.[5]

II. This Court's Precedents Require Resolution Of Factual Disputes Relevant To Class Certification Before A Class May Be Certified.

This Court confirmed in *Dukes* that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Ibid.* The district court must make findings as to whether this burden has been satisfied, which requires the court to engage in a "rigorous analysis" that "[f]requently * * * will entail some overlap with the merits of the

[5] Underscoring the need for this Court's guidance, the Northern District of Illinois recently denied certification of a proposed moldy odor class in *Butler v. Sears Roebuck & Co.*, No. 1:06-cv-07023 (N.D. Ill. July 20, 2012), after the plaintiffs submitted the Sixth Circuit's opinion in this case as supplemental authority. See *id.*, Docket Nos. 323, 328.

plaintiff's underlying claim." *Ibid.* (quoting *Falcon*, 457 U.S. at 161).

Dukes emphasized the "necessity of touching aspects of the merits in order to resolve [the] preliminary matte[r]" of class certification. 131 S. Ct. at 2552. The Court thereby dispelled confusion that had arisen in the lower courts following this Court's opinion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), which stated in dictum that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." This language "led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits." *In re IPO Sec. Litig.*, 471 F.3d 24, 33 (2d Cir. 2006).

The district court here showed that it is one of those misguided courts. Even though common injury is needed for certification, and even though manifestation of the defect and actual harm in the form of moldy odors is necessary to prove liability under Ohio tort law, the district court refused to consider Whirlpool's undisputed evidence showing that the supposedly uniform harm is, in fact, experienced by only a small minority of class members. Relying on *Eisen*, the court deemed this evidence irrelevant because it goes to "a merits issue not relevant to class certification." App., *infra*, 25a. The court instead relied exclusively on plaintiffs' allegations and "theor[ies]" to find the Rule 23 elements satisfied. *Ibid.*

Before the Sixth Circuit issued its decision, this Court held that such an expansive reading of *Eisen*

was "mistaken[]." *Dukes*, 131 S. Ct. at 2552 n.6. This Court emphasized that its *Eisen* dictum is not applicable in "determin[ing] the propriety of certification under Rules 23(a) and (b)." *Ibid.* Instead, courts must consider and resolve any "merits question" that bears on class certification, even if the plaintiff "will surely have to prove [the point] *again* at trial in order to make out their case on the merits." *Ibid.*

Despite *Dukes*, the Sixth Circuit refused to acknowledge that the district court relied entirely on plaintiffs' allegations and theories, not on evidence, and failed to resolve disputed fact questions essential to determining the propriety of class certification. The Sixth Circuit merely pronounced, without citation to the record or the certification order, that the district court had "closely examined the evidentiary record and conducted the necessary 'rigorous analysis' to find that the prerequisites of Rule 23 were met." App., *infra*, 13a. But the face of the cursory certification order shows that the district court did nothing of the sort. App., *infra*, 24a-33a.

The Sixth Circuit's decision conflicts not only with *Dukes* but with post-*Dukes* decisions in other courts of appeals. See, *e.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (a district court must resolve disputed facts relevant to Rule 23's criteria by "judging the persuasiveness of the evidence presented"); *Bennett v. Nucor Corp.*, 656 F.3d 802, 814-816 (8th Cir. 2011) (affirming denial of certification where the district court "was confronted with contradictory evidence in a voluminous class certification record" and made findings that rejected plaintiffs' assertions that defendant's practices were uniform). This Court should review the ruling below

to ensure that district courts weigh conflicting evidence and resolve disputed factual questions that bear on the propriety of class certification.

III. The Sixth Circuit's Perfunctory Predominance Ruling Conflicts With This Court's Precedents And Underscores The Need For Further Guidance.

A. The Sixth Circuit's predominance ruling conflicts with this Court's precedents.

In affirming the district court's order, the Sixth Circuit devoted a single cursory sentence to Rule 23(b)(3)'s predominance requirement: "In light of all that we have already said, we have no difficulty affirming the district court's finding that common questions predominate over individual ones and that the class action mechanism is the superior method to resolve these claims fairly and efficiently." App., *infra*, 19a.

That is a remarkable conclusion because predominance was mentioned in only two sentences in the district court's order. See App., *infra,* 27a-28a. And what the Sixth Circuit had "already said" was merely that "plaintiffs have produced evidence of alleged common design flaws in the Duet platforms." App., *infra*, 17a. At best, this amounts to a "some evidence" standard that other circuits have rejected. See *IPO*, 471 F.3d at 33 ("the requirements of Rule 23 must be met, not just supported by some evidence"); accord *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008). The Sixth Circuit's ruling cannot be reconciled with this Court's insistence in *Dukes* that "[a] party seeking class certification must *affirmatively demonstrate*" and provide "*convincing*

proof" of compliance with Rule 23. 131 S. Ct. at 2551, 2556 (emphasis added).

This Court has made clear that "the predominance criterion is far more demanding" than the commonality requirement. *Amchem*, 521 U.S. at 623-624. It requires courts to engage in a "rigorous" inquiry regarding "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Ibid*. Such inquiry "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). Affirmative defenses also must be considered under Rule 23(b)(3) because they may create individual questions of fact or law that predominate over common questions, thereby precluding class certification. *E.g.*, *Ortiz*, 527 U.S. at 844 n.20 (a class that raises "the likelihood that significant questions * * * of liability and defenses of liability" affect "individuals in different ways" does not comply with Rule 23).

In *Dukes*, this Court discussed, in the commonality context, the importance of analyzing dissimilarities before certifying a trial class:

> What matters to class certification * * * is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Dukes, 131 S. Ct. at 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). The Court noted that it had

"consider[ed] dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* '[e]ven a single [common] question.'" *Dukes*, 131 S. Ct. at 2556. Under Rule 23(b)(3), the existence of a liability question common to all class members must be weighed against individual questions to determine which would predominate at trial. That is, predominance requires inquiries reaching far *beyond* commonality (see *Amchem*, 521 U.S. at 623-624), and factual dissimilarities among class members are even more important to the predominance inquiry.

But no rigorous inquiry into predominance occurred below. The Sixth Circuit concluded—in the portion of its opinion addressing commonality—that the presence of one or two common questions was sufficient. The court did not identify the elements of the Ohio tort claims that plaintiffs seek to try on a classwide basis, much less consider whether plaintiffs could prove the elements of those claims with evidence common to the class or whether any common issues would predominate over individualized issues at trial.

For example, the court offered no means (other than the legally flawed "premium-price" theory imported from California) to overcome the undisputed fact that most class members had never experienced the injury alleged by plaintiffs. See *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 611 (3d Cir. 2012) ("If class members could have known of the alleged defects and the evidence shows that they do not react to information about the cars and tires they purchased or leased in a sufficiently uniform manner, then individual questions related to

causation will predominate"). Nor did the court of appeals consider the individualized nature of Whirlpool's affirmative defenses of product misuse or statutes of limitations, or how any class trial could be conducted without stripping Whirlpool of its right to present those defenses. See *Dukes*, 131 S. Ct. at 2561 ("a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims"). Individualized defenses on injury and causation often lead courts to reject requests for class certification. *E.g.*, *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (rejecting certification of class of car buyers alleging unexpected air bag deployments).

In short, the court of appeals treated the predominance requirement dismissively, contrary to this Court's insistence on a rigorous analysis.

B. This Court's guidance is needed to clarify the scope of the Rule 23(b)(3) predominance inquiry.

Although *Dukes* clarified the commonality requirement, this Court has not similarly clarified or addressed the impact of *Dukes* on Rule 23(b)(3)'s more demanding predominance requirement. Indeed, it has been 15 years since this Court last addressed the predominance requirement. See *Amchem*, 521 U.S. at 623-624.

In *Amchem*, the Court insisted that a class be "sufficiently cohesive." *Id.* at 623. It did not elaborate on criteria that judges could use in implementing the "cohesi[on]" standard. *Ibid.*; see Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1060 (2005) (*Amchem* did not fully articulate

standards "to evaluate the relative significance of unity and disunity (or similarity and dissimilarity) among claims and defenses"). Because of this, the predominance requirement has resulted in courts' applying "a myriad of vague and distinct formulations." *Id*. at 1058-1060 (citing cases).

Given the critical importance of the predominance inquiry to any Rule 23(b)(3) class, this Court's review is necessary to address the role of factual dissimilarities in conducting the predominance evaluation. See Fed. R. Civ. P. 23(b)(3), 1966 Advisory Committee Note (if a tort action would "degenerate" into "multiple lawsuits" on "liability," "damages," and "defenses," "affecting the individuals in different ways," economies cannot be achieved and the predominance test is not satisfied).

IV. The Questions Presented Have Exceptional Practical Importance To The Administration Of Civil Justice In Federal Courts.

This class action does not exist in a vacuum. It is but one of many lawsuits filed against Whirlpool and other appliance manufacturers and sellers alleging nearly identical moldy odor problems in front-loading washing machines. See *supra* pp. 2 & n.1, 4 & n.2.

These proposed class actions include millions of additional front-loading washer purchasers. As here, those lawsuits involve only a small minority of class members who have experienced any alleged moldy odor problem. See, *e.g.,* Def.'s Opp'n to Pls.' Renewed Mot. for Class Certification, D164 at 1, *Terrill v. Electrolux Home Prods., Inc.*, 1:08-cv-00030 (S.D. Ga. filed Aug. 24, 2011) (submitting evidence showing that "less than *two-tenths of one percent* of the likely putative class members" required a visit by a service

technician to address alleged problems relating to odor, mold or mildew during the warranty period). Without this Court's intervention, the Sixth Circuit's decision will have a substantial impact on the certification decisions in those pending cases. See, *e.g.*, Ltr. from Pls.' Counsel to Judge Hochberg, D274, *Harper v. LG Elecs. USA, Inc.*, No. 2:08-cv-00051 (D.N.J. filed May 3, 2012) (submitting the Sixth Circuit's decision in this case as supplemental authority and asserting that "the facts in *Whirlpool* are substantially identical to the facts here").

But these moldy odor cases are only a small part of a wider class-action crisis in the lower courts. Class action filings, particularly in the consumer arena, are increasing at a dramatic pace. Since CAFA was enacted just over seven years ago, tens of thousands of class actions have been filed in or removed to federal court. A Federal Judicial Center study analyzing data through June 2007 put the annual number of new class actions in federal courts at between 4,000 and 5,000. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, App. B fig. 1 (Federal Judicial Center, Apr. 2008).[6] More than two-thirds of these new filings and removals were consumer and employment class actions, which have continued to proliferate. See *id.* at 1, 4 & App. B. fig. 7.

Without this Court's review, the Sixth Circuit's decision will influence the certification of innumerable other cases alleging problems with products or services that affect only a small fraction of

[6] Available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Fourth%20Interim%20Report%20Class%20Action.pdf.

purchasers. As this Court long has recognized, the decision to certify can put tremendous pressure to settle on a defendant, even where the plaintiffs' likelihood of success on the merits is slight. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification 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"); Fed. R. Civ. P. 23(f), 1998 Advisory Committee Note ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

Given the importance of the certification decision to class litigation, as well as the number and size of similar class actions pending across the country, this Court's review is warranted to address the critical issues raised here which repeatedly confront class litigants and the lower federal courts.[7]

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[7] This Court recently granted certiorari to consider a narrower issue—the significance of expert testimony in the class certification inquiry. *Comcast Corp. v. Behrend*, No. 11-864 (U.S. June 25, 2012). This case presents three different issues—whether a class may be certified (i) where it is composed primarily of uninjured tort claimants, (ii) without evaluating undisputed evidence showing lack of commonality and predominance, and (iii) without rigorously scrutinizing the predominance issue. Plenary review or summary reversal of the Sixth Circuit's decision is appropriate to resolve the broad conflict with *Dukes* and the intercircuit conflicts described in this petition in a case of extraordinary scope and practical importance. See *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (summarily reversing).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2012

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In re WHIRLPOOL CORPORATION FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION.

GINA GLAZER, individually and on behalf of all others similarly situated; Trina Allison, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

WHIRLPOOL CORPORATION,
Defendant-Appellant.

No. 10–4188.

Argued: January 12, 2012.
Decided and Filed: May 3, 2012.

Before KENNEDY, MARTIN, and STRANCH, *Circuit Judges*.

OPINION

JANE B. STRANCH, *Circuit Judge*.

Whirlpool Corporation brings this interlocutory appeal of the district court's decision to certify an Ohio plaintiff liability class under Federal Rule of Civil Procedure 23(a) and (b)(3). The case involves multi-district litigation concerning alleged design defects in Whirlpool's Duet®, Duet HT®, Duet Sport®,

and Duet Sport HT® front-load washing machines ("the Duets").[1] Named plaintiffs Gina Glazer and Trina Allison alleged on behalf of the class that the Duets do not prevent or eliminate accumulating residue, which leads to the growth of mold and mildew in the machines, ruined laundry, and malodorous homes.

As certified, the liability class is comprised of current Ohio residents who purchased one of the specified Duets in Ohio primarily for personal, family, or household purposes and not for resale, and who bring legal claims for tortious breach of warranty, negligent design, and negligent failure to warn. Proof of damages is reserved for individual determination. Because the district court did not abuse its discretion in certifying the Ohio plaintiff liability class, we AFFIRM.

I. BACKGROUND

The named plaintiffs are Ohio residents. In 2005 Trina Allison purchased a Whirlpool Duet HT® washing machine. In 2006 Gina Glazer bought a Duet Sport® washing machine. Allison used high efficiency ("HE") detergent in her washing machine, while Glazer used a reduced amount of regular detergent. Within six to eight months after their purchases, the plaintiffs noticed the smell of mold or mildew emanating from the machines and from laundry washed in the machines. Allison found mold growing on the sides of the detergent dispenser, and Glazer noticed mold growing on the rubber door seal. Although both plaintiffs allowed the machine doors

[1] Whirlpool is supported in this appeal by the Product Liability Advisory Council as amicus curiae.

to stand open as much as possible and also used ordinary household products to clean the parts of the machines they could reach, their efforts achieved only temporary relief from the pungent odors.

Allison contacted Whirlpool about the problem. A company representative told her to use the washer's monthly cleaning cycle, add an Affresh™ tablet to that cleaning cycle, and manually clean under the rubber door seal. Allison followed this advice, but when the problem persisted, she placed a service call. The technician who examined the washing machine advised Allison to leave the door open between laundry cycles to let the machine air-dry.

Glazer also complained to Whirlpool. A company representative advised her to switch to HE detergent and Glazer did so. Whirlpool's Use & Care Guide recommended adding bleach to the washer's cleaning cycle, but Glazer did not utilize the cleaning cycle or use bleach to clean her washing machine.

Allison and Glazer continued to experience a mold problem. Neither of them knew at the time of purchase that a Duet washer could develop mold or mildew inside the machine. They allege that, if this information had been disclosed to them, their purchase decisions would have been affected.

Whirlpool began selling the Duet® and Duet HT® front-load washing machines in 2002. These washers are built on the "Access" platform and are nearly identical, although certain models have functional or aesthetic differences. In 2006, Whirlpool began selling the smaller-capacity Duet Sport® and Duet Sport HT® front-load washing machines, which are built on the "Horizon" platform. These machines are also nearly identical, although some models have func-

tional or aesthetic differences. The "Access" and "Horizon" platforms are nearly identical to each other. The two differences are that the "Access" platform is slightly larger than the "Horizon" and the "Access" is tilted a few degrees from the horizontal axis, while the "Horizon" is not.

In contrast to a top-load washing machine, a front-load washer contains a wash basket within a tub that rotates on a horizontal axis to create a tumbling mechanical wash action instead of the agitation characteristic of top-load machines. A front-load washing machine offers the consumer greater water and energy savings than a top-load machine because it needs less energy to heat water, it maintains lower temperatures during the wash, and the "tumbling" mechanical motion is more energy efficient than the "spinning" of a top-load machine. Front-load washing machines are designed for use with HE detergent. While all washing machines have the potential to develop some mold or mildew after a period of use, front-load machines promote mold or mildew more readily due to lower water levels, high moisture, and reduced ventilation.

In support of their motion for class certification, plaintiffs produced the report of an expert who opined that the common design defect in the Duets is their failure to clean or rinse their own components to remove residue consisting of dried suds, fabric softener, soil, lint, body oils, skin flakes, and hair. Bacteria and fungi feed on the residue, and their excretions produce offensive odors. Plaintiffs allege that the Duets fail to clean the back of the tub that holds the clothes basket, the aluminum bracket used to attach the clothes basket to the tub, the sump area, the

pump strainer and drain hose, the door gasket area, the air vent duct, and the detergent dispenser duct.

Plaintiffs' evidence shows that Whirlpool knew the design of its Access and Horizon platforms contributed to residue buildup resulting in rapid fungal and bacterial growth. As early as September 2003, Whirlpool began receiving two to three customer complaints each day about the problem. When Whirlpool representatives instructed consumers to lift up the rubber door gaskets on their machines, the common findings were deposits of water, detergent, and softener, along with mold or mildew. Service call reports confirmed problems around the rubber door gaskets, as well as residue deposits and black mold inside the drain hoses. Whirlpool also knew that numerous consumers complained of breathing difficulties after repair technicians scrubbed the Duets in their homes, releasing mold spores to the air.

In 2004 Whirlpool formed an internal team to analyze the problems and formulate a plan. In gathering information about the complaints, Whirlpool learned that the mold problem was not restricted to certain models or certain markets. Whirlpool also knew that mold growth could occur before the Duets were two to four years old, that traditional household cleaners were not effective treatments, and that consumer laundry habits and use of non-HE detergent might exacerbate the problem, but did not cause it. Whirlpool contemplated whether it should issue a warning to consumers about the mold problem. To avoid alarming consumers with words like "mold," "mildew," "fungi," and "bacteria," Whirlpool adopted the term "biofilm" in its public statements about mold complaints.

Later in 2004, Whirlpool engineers discussed the need to redesign the tub on the "Horizon" platform because soil and water pooling served as the nucleation site for mold and bacterial growth. Chemical analysis Whirlpool conducted showed that the composition of biofilm found in the "Horizon" and "Access" platforms was identical. Engineers determined that the "Access" platform's webbed tub structure was extremely prone to water and soil deposits, and the aluminum basket cross-bar was extremely susceptible to corrosion from biofilm. Whirlpool found a number of design factors contributing to corrosion, including insufficient draining of water at the end of a cycle and water flowing backward after draining through the non-return valve between the tub and the drain pump. The company made certain design changes to later generations of Duets.

By 2005, Whirlpool unveiled a special cleaning cycle in the Duets, but the company was aware that the new cycle would not remove all residue deposits. Engineers remained concerned whether the cleaning cycle would be effective to control odor and whether the use of bleach in the cleaning cycle would increase corrosion of aluminum parts. By March 2006 Whirlpool acknowledged that consumers might notice black mold growing on the bellows or inside the detergent dispenser, and that laundry would smell musty if the machine was "heavily infected."

By late 2006, having received over 1.3 million calls at its customer care centers and having completed thousands of service calls nationwide, Whirlpool internally acknowledged its legal exposure, noting that it had already settled a class action concerning its Calypso machines, and that Maytag, another

of Whirlpool's brands, had settled a class action concerning the Neptune washer.

At this point, Whirlpool decided to formulate a new cleaning product for all front-load washing machines, regardless of make or model. Whirlpool expected the "revolutionary" product to produce a new revenue stream of $50 million to $195 million based on the assumption that fifty percent of the 14 million current front-load washer owners might be looking for a solution to an odor problem with their machines.

In September 2007 Whirlpool introduced to the market two new front-load washer cleaning products: Affresh™ tablets for washers in use from zero to twelve months, and Affresh™ tablets with six door seal cleaning cloths for machines in use more than twelve months. To encourage sales, the company placed samples of Affresh™ tablets in all new Whirlpool and Maytag HE washers. Whirlpool marketed Affresh™ as "THE solution to odor causing residue in HE washers." The company changed its Use and Care Guides for Whirlpool, Maytag, and Amana brands to advise consumers to use an Affresh™ tablet in the first cleaning cycle to remove manufacturing oil and grease. Whirlpool believed this advice would encourage consumers to use the cleaning cycle and Affresh™ tablets regularly, like teaching vehicle owners to change the oil in their cars. Service technicians and call centers were instructed to recommend the use of Affresh™ to consumers. But as plaintiff Allison learned from experience, even using Affresh™ tablets in the washer's special cleaning cycle did not cure the mold problem.

Whirlpool shipped 121,033 "Access" platform Duet washers to Ohio from 2002 through March

2009. Whirlpool shipped 41,904 "Horizon" platform Duet Sport washers to Ohio during the period 2006 through March 2009.

In the district court, Whirlpool opposed class certification primarily on the grounds that: the vast majority of Duet owners have not had a mold problem with their washing machines and the incidence of mold is actually rare; Whirlpool made dozens of changes between 2002 and 2009 to increase customer satisfaction and reduce service costs; washers owned by class members were built on different platforms, involve twenty-one different engineering models, spanning nine model years; and consumer laundry habits and experiences with the Duets are so diverse that even the two named plaintiffs do not present a common liability question. Whirlpool contended that numerous liability questions exist as to each of the legal claims, requiring individual proof of the elements of each claim by each consumer.

In support of its arguments, Whirlpool presented copies of its Use & Care Guides, various articles from *Consumer Reports*, deposition excerpts, affidavits from employees and satisfied Duet owners, expert reports, internal company documents, and photographs. Whirlpool also provided its data showing that the rate of consumer complaints about the mold problem was far less than the plaintiffs alleged. The company contends that its figures undercut the plaintiffs' assertion that thirty-five percent of Whirlpool customers complained about mold. Whirlpool requested permission to present live testimony at the class action certification hearing, but ultimately did not do so.

After reviewing the factual record and hearing the parties' oral arguments, the district court deter-

mined that the Rule 23(a) and (b)(3) prerequisites were met as to liability on plaintiffs' claims for tortious breach of warranty, negligent design, and negligent failure to warn. The court certified the following liability class:

> All persons who are current residents of Ohio and purchased a Washing Machine (defined as Whirlpool Duet®, Duet HT®, and Duet Sport® Front-Loading Automatic Washers) for primarily personal, family or household purposes, and not for resale, in Ohio, excluding (1) Whirlpool, any entity in which Whirlpool has a controlling interest, and its legal representatives, officers, directors, employees, assigns, and successors; (2) Washing Machines purchased through Whirlpool's Employee Purchase Program; (3) the Judge to whom this case is assigned, any member of the Judge's staff, and any member of the Judge's immediate family; (4) persons or entities who distribute or resell the Washing Machines; (5) government entities; and (6) claims for personal injury, wrongful death, and/or emotional distress.

Whirlpool appeals the district court's decision to certify this class.

II. ANALYSIS

A. Standard of Review

The district court has broad discretion to decide whether to certify a class. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). We review class certification for an abuse of discretion. *Pipefitters Local Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 629 (6th Cir. 2011). An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard,

misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment. *Id.*

B. The Class Action Determination

1. *The requirements of Rule 23(a) and (b)(3)*

To obtain class certification, the plaintiffs must show that "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequate representation serve to limit class claims to those which are fairly encompassed within the claims of the named plaintiffs. *Wal–Mart Stores, Inc. v. Dukes*, -– U.S. -–, 131 S.Ct. 2541, 2550 (2011).

The proposed class must also meet at least one of the three requirements listed in Rule 23(b). *Id.* at 2548; *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). The plaintiffs sought class certification under (b)(3), which requires a demonstration that questions of law or fact common to the class predominate over individual questions and that the class action is superior to other available methods to adjudicate the controversy fairly and efficiently. The plaintiffs had the burden to prove that the class certification prerequisites were met, *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079, and the plaintiffs, as class representatives, were required to establish that they possess the same interest and suffered the same injury as the class members they seek to represent. *Dukes*, 131 S.Ct. at 2550.

2. Eisen *and consideration of the merits at the class certification stage*

Class certification is appropriate if the court finds, after conducting a "rigorous analysis," that the requirements of Rule 23 have been met. *Dukes*, 131 S.Ct. at 2551; *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006). Ordinarily, this means that the class determination should be predicated on evidence the parties present concerning the maintainability of the class action. *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079. "[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," *Gen. Tele. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982), and "rigorous analysis" may involve some overlap between the proof necessary for class certification and the proof required to establish the merits of the plaintiffs' underlying claims. *Dukes*, 131 S.Ct. at 2551. There is nothing unusual about "touching aspects of the merits in order to resolve preliminary matters ... [because doing so is] a familiar feature of litigation." *Id.* at 2552.

Like some other federal courts, this Court had ruled that a district judge need not consider the merits of a case when entertaining a class certification motion in light of the Supreme Court's statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that "nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *See e.g.*, *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 560 (6th Cir. 2007) (quoting *Eisen* to hold that district court did not have to inquire into the merits of the suit to resolve Rule 23 issues). In

Dukes, however, the Supreme Court clarified that courts may inquire preliminarily into the merits of a suit to determine if class certification is proper, although courts need not resolve all factual disputes on the merits before deciding if class certification is warranted. *Dukes*, 131 S.Ct. at 2551–52 & n.6 ("To the extent the quoted statement [from *Eisen*] goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.").

We have indicated, both before and after *Dukes*, that *Eisen* "merely stand[s] for the proposition that ... the relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 432 (6th Cir. 2012) (quoting *Thompson v. Cnty. of Medina, Ohio*, 29 F.3d 238, 241 (6th Cir. 1994)) (alteration in original) (internal quotation marks omitted). "[W]hether the class members will ultimately be successful in their claims is not a proper basis for reviewing a certification of a class action." *Daffin*, 458 F.3d at 552.

Other federal appellate decisions are in accord with the view of Supreme Court precedent articulated by this Court. For example, the Third Circuit held after *Dukes* that courts need not address at the class certification stage any merits inquiry that is unnecessary to the Rule 23 determination and that any findings made for class certification purposes do not bind the fact-finder on the merits. *Behrend v. Comcast Corp.*, 655 F.3d 182, 190 (3d Cir. 2011). *Behrend* is consistent with the Third Circuit's pre-*Dukes* jurisprudence holding that "*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement" and

noting that other courts of appeal had agreed. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 & n.17 (3d Cir. 2008) (and cases cited therein). Similarly, the Fourth Circuit had held before *Dukes* that "*Eisen* simply restricts a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to prevail ultimately on the merits." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004). The Seventh Circuit recently observed that a district court must resolve factual disputes necessary to class certification, but that "the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012).

Whirlpool contends that the district court improperly relied on *Eisen* to avoid consideration of the merits of plaintiffs' legal claims, failed to conduct the required "rigorous analysis" of the factual record, and failed to make specific findings to resolve factual disputes before certifying the liability class. We disagree. The district court closely examined the evidentiary record and conducted the necessary "rigorous analysis" to find that the prerequisites of Rule 23 were met. *See Gooch*, 672 F.3d at 418 (rejecting a similar argument and concluding that the district court "probed behind the pleadings, considering all of the relevant documents that were in evidence").

3. *Plaintiffs' proof on the Rule 23(a) prerequisites*

a. Numerosity

Like the district court, we can safely conclude that the numerosity requirement of Rule 23(a)(1) is met. While no strict numerical test exists, "substantial" numbers of affected consumers are sufficient to

satisfy this requirement. *Daffin*, 458 F.3d at 552. The evidence shows that Whirlpool shipped thousands of Duet washers to Ohio for retail sale. This is sufficient evidence to support the certification of a class of all Ohio residents who purchased a Duet in Ohio.

b. Commonality, typicality, and fair representation

Rule 23(a)(2) requires plaintiffs to prove that there are questions of fact or law common to the class, and Rule 23(a)(3) requires proof that plaintiffs' claims are typical of the class members' claims. To demonstrate commonality, plaintiffs must show that class members have suffered the same injury. *Dukes*, 131 S.Ct. at 2551. "Their claims must depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* The court's inquiry focuses not on whether common questions can be raised, but on whether a class action will generate common answers that are likely to drive resolution of the lawsuit. *Id.*

Commonality and typicality "tend to merge" because both of them "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 131 S.Ct. at 2551 n.5. These two factors also tend to merge with the requirement of adequate representation, although the latter factor also brings into play concerns about

competency of class counsel and any conflicts of interest. *Id.* Accordingly, we will consider these factors together. *See Gooch*, 672 F.3d at 429 (considering typicality and adequate representation together).

Whirlpool contends that plaintiffs cannot show commonality because the Duets were built over a period of years on different platforms, there were approximately twenty-one different models manufactured during that time, and consumer laundry habits vary widely by household. Whirlpool also suggests that the district court erroneously identified the alleged design defect as the use of "less and cooler water."

The district court did not make the mistake that Whirlpool alleges. Whirlpool's own lead engineer stated that the Duets' use of less and cooler water, among other factors, encouraged mold growth. The district court well understood the proof to show that there were various alleged design defects in the Duets that allowed "biofilm" to collect and mold to grow. More importantly, the district court reached the conclusion that the issues relating to the alleged design defects and the adequacy of Whirlpool's warnings to consumers are likely to result in common answers, thus advancing the litigation. *See Dukes*, 131 S.Ct. at 2551; *Gooch*, 672 F.3d at 427. "[T]here need only be one question common to the class[,]" *Sprague*, 133 F.3d at 397, and "[n]o matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

Based on the evidentiary record, the district court properly concluded that whether design defects in the Duets proximately caused mold or mildew to

grow and whether Whirlpool adequately warned consumers about the propensity for mold growth are liability issues common to the plaintiff class. These issues are capable of classwide resolution because they are central to the validity of each plaintiff's legal claims and they will generate common answers likely to drive the resolution of the lawsuit.

Whirlpool asserts that proof of proximate cause will require individual determination, but the record shows otherwise. Whirlpool's own documents confirm that its design engineers knew the mold problem occurred despite variations in consumer laundry habits and despite remedial efforts undertaken by consumers and service technicians. Plaintiffs' expert, Dr. Gary Wilson, opined that consumer habits and the home environment in which a Duet sits could influence the amount of biofilm buildup, but those factors were not the underlying cause of biofilm buildup. Whirlpool contends that Dr. Wilson did not evaluate later design changes to the Duets to see if they rectified the mold problem. As we read the pertinent testimony and expert report, Dr. Wilson acknowledged that Whirlpool made some changes to the "Access" platform tub design, but there continued to be other areas in the machine that collected debris. He also examined a new "Horizon" platform washer and found that it still had cavities on the inside of the tub exposed to the water side, increasing the likelihood of biofilm collection. Dr. Wilson testified that even removing those cavities would not eliminate the biofilm problem. *See Samuel–Bassett v. KIA Motors Am., Inc.*, 34 A.3d 1, 13 (Pa. 2011) (rejecting claim that design changes defeated commonality and predominance where modifications did not significantly alter the basic defective design).

Because the plaintiffs have produced evidence of alleged common design flaws in the Duet platforms, this case is dissimilar to *In re Am. Med. Sys.*, 75 F.3d 1069, a case on which Whirlpool relies. In that case, the commonality factor was not satisfied because plaintiffs did not allege any particular defect common to all plaintiffs where there were at least ten different prosthesis implant models that had been modified over the years. *Id.* at 1080–81. The plaintiffs' medical histories were also at issue and proof varied from plaintiff to plaintiff because complications from an implanted prosthesis could be due to a variety of factors, including surgical error, improper use of the device, anatomical incompatibility, and infection, among others. *Id.* at 1081. A similar situation is not presented here. As the plaintiffs argue, this case is more like *Daffin*, 458 F.3d at 550, in which the plaintiff class alleged that a defective throttle body assembly installed in vehicles caused the accelerators to stick. In this case, the plaintiffs established the existence of common issues among class members that warrant certification of a liability class.

In addition, Glazer and Allison are typical of the class members. They purchased Whirlpool washing machines, used their washers for domestic purposes, and experienced problems with mold despite remedial efforts. While Allison may have followed Whirlpool's suggested care instructions more conscientiously than Glazer did, Whirlpool's own internal documents point to the conclusion that, no matter what consumers did or did not do, the mold problem persisted. Whirlpool's own engineers recognized that the Duets provided the ideal environment for bacteria and mold to flourish. The district court did not abuse its discretion in finding that Glazer and Alli-

son are typical of class members, and that they and their class counsel will adequately represent the class.

Whirlpool insists that the class as certified is overly broad because it includes Duet owners who have not experienced a mold problem. Additionally, Whirlpool argues, Glazer and Allison are not typical of consumers swept into the class who have had no problems and are pleased with their Duets.

The liability class as defined is not too broad. "What is necessary is that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class." *Gooch*, 672 F.3d at 428 (internal quotation marks omitted). Class certification is appropriate "if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Id.* (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)) (internal quotation marks omitted).

Additionally, the class plaintiffs may be able to show that each class member was injured at the point of sale upon paying a premium price for the Duet as designed, even if the washing machines purchased by some class members have not developed the mold problem. In *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010), a car manufacturer successfully argued before the district court that class certification was inappropriate because the named class plaintiffs did not prove that an alignment geometry defect causing premature tire wear manifested in a majority of the class members' vehicles. The Ninth Circuit reversed and remanded for class certification, holding that

"proof of the manifestation of a defect is not a prerequisite to class certification[,]" and that "individual factors may affect premature tire wear, [but] they do not affect whether the vehicles were sold with an alignment defect." *Id.* Similarly, in *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011), the Ninth Circuit concluded that the plaintiff class sufficiently established injury for standing purposes by showing that "[e]ach alleged class member was relieved of money in the transactions." *See also Montanez v. Gerber Childrenswear, LLC*, No. CV09–7420, 2011 WL 6757875, *1–2 (C.D. Cal. Dec. 15, 2011) (holding injury shown where class members spent money on defective infant clothing that was less valuable than Gerber represented it to be); *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 895 (2011) (observing diminishment in value of an asset purchased by the consumer is sufficient to establish injury). The Third Circuit recently observed that "Rule 23(b)(3) does not ... require individual class members to individually state a valid claim for relief" and the "question is not what valid claims can plaintiffs assert; rather, it is simply whether common issues of fact or law predominate." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297, 305 (3d Cir. 2011) (en banc) (reviewing settlement classes). These cases support the plaintiffs' position that the class as certified is appropriate.

4. *The Rule 23(b)(3) prerequisites: predominance and superiority*

In light of all that we have already said, we have no difficulty affirming the district court's finding that common questions predominate over individual ones and that the class action mechanism is the superior method to resolve these claims fairly and efficiently.

This is especially true since class members are not likely to file individual actions because the cost of litigation would dwarf any potential recovery. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (finding that in drafting Rule 23(b)(3), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'"); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (noting that "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits" because of litigation costs). Further, the district court observed, any class member who wishes to control his or her own litigation may opt out of the class under Rule 23(b)(3)(A).

Assuming plaintiffs are successful regarding liability or the parties resolve the case by settlement, we urge the parties and the district court to revisit the issue of whether the liability class should be subdivided into subclasses in order to determine appropriate remedies. For the purpose of determining damages, class members who were injured at the point of sale and also experienced a mold problem might be placed in one Rule 23(b)(3) subclass, while class members who were injured at the point of sale but have not yet experienced a mold problem might be placed in a separate Rule 23(b)(3) subclass. Alternatively, the class members who have not experienced a mold problem might be placed in a Rule 23(b)(2) subclass to allow any declaratory or injunctive relief necessary to protect their interests. *See Gooch*, 672 F.3d at 428–29; *Pella Corp. v. Saltzman*, 606 F.3d 391, 395 (7th Cir. 2010) (per curiam).

III. CONCLUSION

For all of the reasons stated, we conclude that the Rule 23(a) and (b)(3) prerequisites were met. Plaintiffs' proof established numerosity, commonality, typicality, and adequate representation. In addition, plaintiffs' proof showed that common questions predominate over individual ones and that the class action is a superior method to adjudicate the claims. The district court did not abuse its discretion in certifying a class on the issue of liability. Accordingly, we **AFFIRM.**

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In re WHIRLPOOL CORPORATION,
Petitioner.

No. 10-0312.

[Filed September 28, 2010]

Before MERRITT, MARTIN, and COOK, *Circuit Judges*.

ORDER

Whirlpool Corporation, under Fed. R. Civ. P. 23(f), moves for permission to appeal a district court's order granting class certification. The class plaintiffs are current residents of Ohio who purchased a Whirlpool front-loading washing machine for personal use. Whirlpool asserts that interlocutory review is warranted because the appeal would raise an important, unsettled issue concerning class certification. What is the standard a district court must apply to factual disputes relevant in determining whether the plaintiff class satisfied the criteria for certification in Federal Rule of Civil Procedure 23? The class plaintiffs oppose the motion to appeal.

Rule 23(f) permits an appeal from an order denying class-action certification. We see no reason it does not grant the same authority when a grant of class-action certification has occurred. In determining our authority we consider: (1) whether the peti-

tioner is likely to succeed on appeal under a deferential abuse-of-discretion standard; (2) whether the costs of continuing the litigation for either the plaintiff or the defendant presents such a barrier that subsequent review is hampered; (3) whether the case presents a novel or unsettled question of law; and (4) the procedural posture of the case before the district court. *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002).

Whirlpool raises a question of law that is unsettled in this circuit, thus the panel hearing the merits may determine if the granting of class certification was appropriate or grant such other relief as it believes is appropriate.

The motion is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

In re WHIRLPOOL CORP. FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION

No. 1:08–WP–65000.

July 12, 2010.

OPINION & ORDER [Resolving Doc. 93.]

JAMES S. GWIN, *District Judge*.

In this multidistrict products liability litigation based on Defendant Whirlpool's allegedly defective front-loading washing machines, Plaintiffs Gina Glazer and Trina Allison move to certify their Ohio tort, warranty, and fraud claims as a class action under Federal Rule of Civil Procedure 23(b)(3). [Doc. 93–1.] As explained below, because the plaintiffs have met the Rule 23(a) prerequisites, because common questions predominate, and because a class action is the superior method for adjudicating this controversy, the Court **GRANTS** class certification with one exception.

I. BACKGROUND

Plaintiffs Allison and Glazer allege that the Whirlpool washing machines they purchased (in 2005 and 2006, respectively) contain a design defect that prevents them from rinsing away all detergent and fabric softener and from completely draining the laundry drum. This defect, the plaintiffs contend,

causes the machines to accumulate mold, resulting in unpleasant odors and ruined laundry. The plaintiffs further allege that Whirlpool knew of the machines' propensity to experience mold problems yet failed to disclose that knowledge to the plaintiffs before they bought their machines. The mold problems in their machines allegedly persisted despite their various efforts to implement Whirlpool's suggested remedies. The plaintiffs thus brought claims under Ohio law for negligent design, negligent failure to warn, tortious breach of warranty, and violation of the Ohio Consumer Sales Practice Act. They now seek certification of a class of Ohio plaintiffs who purchased Whirlpool's front-loading washers.

II. BREADTH OF CLASS

At the outset, Whirlpool argues that the proposed class is too broad for certification because it includes many plaintiffs whose washers have not manifested any mold problems—and thus who do not have viable claims. [Doc. 105–1 at 17–20.] But whether any particular plaintiff has suffered harm is a merits issue not relevant to class certification. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *see also Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006).

III. CERTIFICATION OF OCSPA CLAIM

Whirlpool also reiterates its argument that the plaintiffs may not maintain their OCSPA claim as a class action because they fail to identify any Ohio Attorney General rule or state court decision determin-

ing Whirlpool's conduct to be deceptive or unconscionable under Ohio Revised Code § 1345.09(B).

The plaintiffs argue that—notwithstanding O.R.C. § 1345.09(B)—as long as both the Rule 23(a) prerequisites and the Rule 23(b)(3) standard are satisfied, Federal Rule 23 says that "[a] class action *may* be maintained." Fed. R. Civ. P. 23(b) (emphasis added). They argue that because O.R.C. § 1345.09(B) conflicts with Rule 23 here—*i.e.*, it implicitly prohibits the plaintiffs from maintaining their OCSPA claim as a class action because Whirlpool's conduct was not previously declared to be deceptive—it cannot apply in this diversity action unless Rule 23 is ultra vires. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1437 (2010).

Rule 23 is not ultra vires under the *Shady Grove* plurality's approach because, looking solely at the federal rule, it "'really regulate[s]'" procedure. *Id.* at 1442–43 (plurality op.) (citation omitted).

But Rule 23 *is* ultra vires under the approach of Justice Stevens (the crucial fifth vote in *Shady Grove*) because it "would abridge, enlarge, or modify [Ohio's] rights or remedies, and thereby violate the [Rules] Enabling Act." *Id.* at 1457 (Stevens, J., concurring in part and concurring in judgment) (directing courts to focus ultra vires inquiry on substantive/procedural nature of state law at issue, rather than federal rule). Here, O.R.C. § 1345.09 purports to define Ohio's substantive rights and remedies by creating a cause of action for defrauded consumers and declaring the relief available to them. *See* Ohio Rev. Code § 1345.09 ("For a violation of Chapter 1345 of the Revised Code, a consumer has a cause of action and is entitled to relief as follows . . . ."). The class action restriction in O.R.C. § 1345.09(B) is in-

timately interwoven with the substantive remedies available under the OCSPA. *See Shady Grove*, 130 S.Ct. at 1456 (Stevens, J.) ("[I]f a federal rule displaces a state rule that is 'procedural' in the ordinary sense of the term, but sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way.") (citation and internal quotation marks omitted). Unlike the New York rule at issue in *Shady Grove*, O.R.C. § 1345.09(B) is not a pan-substantive rule that applies to federal claims or to claims based on other states' laws. *Cf. Shady Grove*, 130 S.Ct. at 1457 (Stevens, J.). Rather, it applies only to "a violation of Chapter 1345 of the [Ohio] Revised Code"—indicating its substantive nature. Ohio Rev. Code § 1345.09.

Thus, because under Justice Stevens's approach in *Shady Grove*, applying Rule 23 here would "abridge, enlarge, or modify [Ohio's] rights or remedies," *id.* at 1457, it is ultra vires under the Rules Enabling Act, 28 U.S.C. § 2072(b), and must give way to O.R.C. § 1345.09(B). Accordingly, the Court **DENIES** certification of the plaintiffs' OCSPA claim.

IV. RULE 23 ANALYSIS

To justify certification on their other three Ohio claims—negligent design, negligent failure to warn, and tortious breach of warranty—the plaintiffs must satisfy the four Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation, as well as the Rule 23(b)(3) predominance and superiority requirements.

As to the first Rule 23(a) prerequisite, Whirlpool does not dispute that the class is so numerous that

joinder would be impracticable. *See* Fed. R. Civ. P. 23(a)(1).

Second, both the Rule 23(a)(2) commonality requirement and the Rule 23(b)(3) predominance requirement depend on the nature of the claims asserted. *See* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1785 (3d ed. 2005) (courts must "consider what will have to be proved at trial and whether those matters can be presented by common proof or whether individual proof will be required").

Here, the plaintiffs' claims fall into two categories. The negligent design claim requires the plaintiffs to establish (1) a design defect in their washers that (2) actually caused the mold problems, (3) resulting in damages. *State Auto Mut. Ins. Co. v. Chrysler Corp.*, 36 Ohio St.2d 151, 304 N.E.2d 891, 894–95 (Ohio 1973). The plaintiffs concede that the damages element is not common to the class and that (assuming they prevail on the first two issues) individual class members will have to prove the damages they suffered, likely resulting in varying awards.[1] [Doc. 93–1 at 26.] But the Sixth Circuit has explained that the presence of a single common question is enough for certification—as long as resolution of that question will advance the litigation. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc)*; see also Sterling v. Velsicol*

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[1] Requiring proof of individual damages bars recovery by plaintiffs whose washers have not manifested any defects, thus addressing Whirlpool's concern that the class is too broad. *See Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 630 (8th Cir. 1999); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (Easterbrook, J.).

Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) ("No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action."). Moreover, the first two elements of the plaintiffs' negligent design claim—the existence of a design defect and actual causation—are common to the class. The plaintiffs' theory is that notwithstanding Whirlpool's design changes since 2002, all of its front-loading washers use less and cooler water that fails to adequately rinse away odor-causing soil, suds, and biofilm.[2] Resolution of those common questions will significantly advance the litigation, leaving only the damages issue for individual determination.

The plaintiffs' remaining two claims—negligent failure to warn and tortious breach of warranty—require the plaintiffs to establish that (1) Whirlpool knew of a design defect in its washers; (2) Whirlpool failed to adequately warn buyers of that defect; (3) the withheld information about the design defect was material; and (4) the plaintiffs suffered damages. *See*, *e.g.*, *Hanlon v. Lane*, 98 Ohio App.3d 148, 648 N.E.2d 26, 28 (Ohio Ct. App. 1994) (failure to warn); *Temple v. Wean United*, *Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267, 273 (Ohio 1977). The first element is common to the class because, on the plaintiffs' theory, Whirlpool knew at the outset that its wash-

[2] Whirlpool argues that because different owners attempted different remedies, actual causation is necessarily an individualized inquiry. But Ohio law requires that the design defect be only a substantial factor or "important link" in the chain of causation—not the sole cause of each plaintiff's damages. *E.g.*, *Taylor v. Webster*, 12 Ohio St.2d 53, 231 N.E.2d 870, 872–73 (Ohio 1967).

ers had a defect.[3] Likewise, the second element is common across the class because—despite buyers' varying exposure to Whirlpool's disclosures about mold problems—the plaintiffs' theory is that none of Whirlpool's public disclosures about mold problems were sufficient. And the third element is common to the class because under Ohio law, "[w]hen there is nondisclosure of a material fact, courts permit inferences or presumptions of inducement and reliance," rather than requiring individualized proof of actual reliance. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 727 N.E.2d 1265, 1274–75 (Ohio 2000). Thus, as with the design defect claim,

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[3] This case presents a common class certification problem: In an effort to obtain certification (and thus to make small claims economically viable), class counsel adopts a theory of the case that relies on common questions, even though some class members may also be able to prove their claims through individualized—and potentially easier—routes. (For example, in this case, the plaintiffs' theory of the case is that *none* of Whirlpool's design modifications fixed the defect, that Whirlpool knew of the defects *from the outset*, that *none* of Whirlpool's disclosures about the defect were sufficient, and that *none* of Whirlpool's recommended fixes were effective.) If class counsel's theory of the case fails to a jury, all class members' claims are *res judicata*—even those who had easier, more individualized roads to recovery.

But this troubling possibility does not preclude certification for two reasons. First, any plaintiff is free to opt out of the class action and pursue her claims under a more individualized theory. *See* Fed. R. Civ. P. 23(c)(2)(B)(v). Second, for claims too small to justify individual actions, class actions may still be the most attractive option: Because class actions are exceedingly unlikely to go to trial, *see In re Bridgestone/Firestone*, 288 F.3d at 1015–16, class actions are likely to obtain at least some recovery via settlement—and something is better than nothing.

these common issues predominate over the individualized issue of damages.

Third, the claims of Glazer and Allison are typical of the class. *See* Fed. R. Civ. P. 23(a)(3). They both purchased Whirlpool front-loading washers. They both read and followed the instructions in Whirlpool's use and care guide. They both used their washers for domestic purposes. And they both experienced mold problems despite implementing Whirlpool's recommended fixes. Because they will tend to prove other class members' claims by proving their own claims, they satisfy the typicality requirement. *See Sprague*, 133 F.3d at 399.

Fourth, for the same reason, the named plaintiffs' interests align with the class's interests, rendering them adequate to represent the class. *See* Fed. R. Civ. P. 23(a)(4). Whirlpool does not, moreover, contend that the named plaintiffs' counsel is unqualified, inexperienced, or unable to conduct the litigation. *Cf. Senter v. Gen. Motors Corp.*, 532 F.2d 511, 524–25 (6th Cir. 1976) (adequacy of representation prerequisite demands that "the representatives will vigorously prosecute the interests of the class through qualified counsel").

Finally, the plaintiffs have satisfied the requirements of Rule 23(b)(3). As explained above, common questions predominate over individual ones.[4] Moreo-

[4] The weight of authority is against Whirlpool's argument that because its affirmative defenses will vary from owner to owner, common questions do not predominate. *See In re Energy Sys. Equip. Leasing Sec. Litig.*, 642 F. Supp. 718, 752–53 (E.D.N.Y. 1986) ("Courts have been nearly unanimous . . . in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs,

ver, a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3), because each owner's damages are likely too small to justify bringing an individual action. *See*, *e.g.*, *Amchem Prods.*, *Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (in drafting Rule 23(b)(3), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'") (citation omitted); *see also Carnegie v. Household Int'l*, *Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.") (emphasis in original). Any owner who wishes to control the prosecution of her own claims may, of course, opt out. *See* Fed. R. Civ. P. 23(b)(3)(A).

V. CONCLUSION

For the reasons discussed above, the Court **DECLINES TO CERTIFY** the plaintiffs' OCSPA claim as a class action.

However, because the plaintiffs' negligent design, negligent failure to warn, and tortious breach of warranty claims satisfy both the Rule 23(a) prerequisites

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does not preclude certification of a class action so long as the necessary commonality and ... predominance, are otherwise present.") (citing cases). In any event, even if Whirlpool's statute of limitations defense differs across individual class members, it will be relatively easy to resolve on an individual basis. Moreover, individual differences in Whirlpool's owner misuse defense do not preclude certification because (according to the plaintiffs' theory) the mold problems persisted *regardless* of whether owners followed Whirlpool's recommended fixes.

and the Rule 23(b)(3) requirements, the Court **CERTIFIES** the following class of Ohio plaintiffs:

> All persons who are current residents of Ohio and purchased a Washing Machine (defined as Whirlpool Duet®, Duet HT®, and Duet Sport® Front-Loading Automatic Washers) for primarily personal, family or household purposes, and not for resale, in Ohio, excluding (1) Whirlpool, any entity in which Whirlpool has a controlling interest, and its legal representatives, officers, directors, employees, assigns, and successors; (2) Washing Machines purchased through Whirlpool's Employee Purchase Program; (3) the Judge to whom this case is assigned, any member of the Judge's staff, and any member of the Judge's immediate family; (4) persons or entities who distribute or resell the Washing Machines; (5) government entities; and (6) claims for personal injury, wrongful death, and/or emotional distress.

The Court appoints named plaintiffs Glazer and Allison as class representatives. Further, after considering the Rule 23(g)(1) factors, the Court appoints Leiff, Cabraser, Heimann & Bernstein LLP as class counsel. Finally, the Court directs class counsel to provide the best notice practicable to class members as required by Rule 23(c)(2)(B).

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In re WHIRLPOOL CORPORATION FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION.

GINA GLAZER, individually and on behalf of all others similarly situated, et al., *Plaintiffs-Appellees*,

v.

WHIRLPOOL CORPORATION, *Defendant-Appellant*.

No. 10–4188.

[Filed June 18, 2012]

Before KENNEDY, MARTIN, and STRANCH, *Circuit Judges*.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges* of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

* Judge Moore recused herself from participation in this ruling.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX E

RULE 23, FEDERAL RULES OF CIVIL PROCEDURE (excerpt)

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

APPENDIX F

Washers & Dryers: Time to Clean Up with Lower Prices, Rebates,
CONSUMER REPORTS, Feb. 2010, at 44
(Dist. Ct. Dkt. D103-14) (excerpt)

If it seems you're always doing laundry, join the club. We can't lighten the load, but here's a real brightener: The price of many washers has dropped by as much as 33 percent compared with a year ago. Plus in our months of testing we found a few CR Best Buys, including a $650 Frigidair front-loader and a $480 GE conventional top-loader.

Many of the tested washers are very energy- and water-efficient, which can save you money in the long run. Energy Star models might also qualify for a rebate of up to $250 under the federally funded State Energy Efficient Appliance Rebate Program, also known as Cash for Clunkers for Appliances. Rebates vary by state, but one thing's certain: They're expected to go fast. For more information, read "Rebates for New Appliances" on page 8.

Our tests of 76 models also revealed some problems. The $600 LG WM2010C front-loader moved several inches during testing. Its SpinSense option, which is designed to help reduce or eliminate vibration, kept the machine in its place but extracted about 20 percent less water. So the laundry took longer to dry. Despite its new Sound Silencer Plus technology, the $500 Frigidair FTW3014K top-loader was pretty noisy. It was also a mediocre performer.

Washers have become more efficient, but dryer technology hasn't changed dramatically in the past decade. The Department of Energy says that most

use about the same amount of energy; that's why there are no Energy Star models, and state rebates won't apply. The Select Ratings on page 48 highlight dryers that offer impressive performance and value. Here's what else we found:

Hidden costs uncovered. Most top-loaders that cost less than $500 didn't wash as well, used more energy or water, couldn't hold as much, or were tougher on laundry than more expensive models. And an inefficient machine can cost an added $130 or more to operate per year than our most efficient models. The $330 Estate ETW4400W, a conventional top-loader frayed fabrics, earning it a poor rating for gentleness. The $750 Whirlpool Duet Sport HT WFW8400T front-loader scored only fair for gentleness. That tough treatment could mean fabrics won't last as long.

Special cycles multiply. First there were allergy cycles and steam settings. Now there's Whirlpool's FanFresh and Maytag's Fresh Hold. Both are supposed to help prevent the odor that can develop when you leave clean laundry in the washer for too long. A fan brings in room air and circulates it through the clean laundry, and the laundry tumbles every 15 minutes for up to 10 hours. Try as we might — we left laundry, including loads of heavy plush towels, in those and other machines for up to two days — none of the laundry developed an odor, whether we used the feature or not. The Maytag and Whirlpool were fine washers.

Mold problems persist. Readers tell us about mold and odors developing in their front-loaders. Our Annual Product Reliability Survey found that 8 percent of front-loader problems were caused by mold or mildew. LG and Maytag front-loaders were slightly

more susceptible than most brands surveyed. (See our laundry advice in "Soap Sense," on page 47.)

How to choose

If your laundry room is near living spaces, check our noise and vibration ratings and look for models that let you silence end-of-cycle signals. Remember that concrete floors can absorb vibrations well, unlike wood-framed floors. Then consider: **Top- or front-loader?** Most top-loaders with a center-post agitator cost the least and wash the fastest. But they aren't stellar performers and they use more energy and water. In high-efficiency top-loaders the traditional agitator is replaced with other methods of moving the wash, so those machines can hold more laundry. They use less water and spin at high speeds, so you save energy by using the dryer for shorter periods. Front-loaders generally use the least water and spin even faster, making them the most efficient, capacious washers.

Focus on features. An auto temperature control blends hot and cold water to provide a consistent temperature and wash performance on a given setting.

Manufacturers claim that steam settings and allergen cycles clean better and remove most allergens. Steam did clean stains slightly better in our tests, but machines with that option washed very well even with the steam option turned off. Steam settings might also increase energy use. But to kill allergens such as dust mites, wash water needs to be around 127°F for 12 minutes. Reduce your exposure to allergens by vacuuming frequently and covering mattresses, box springs, and pillows with dust mite-proof covers.

Skip extended warranties. Our surveys show they're usually not worthwhile.

Soap sense

Washing machines and detergents have changed and so should your laundry habits.

Pick the right detergent. Regular detergents are too sudsy and can affect the performance of front-loaders and high-efficiency top-loaders. That's why manufacturers recommend HE detergents. Using regular detergents might void the washer's warrant.

Measure the correct amount. Don't just pour detergent into the washer or fill the cap to the top. Today's detergents are more concentrated, so you need less. Too much detergent can affect performance and prolong the wash cycle. Follow directions and highlight fill lines as a reminder.

Prevent mold and odors. The front-loader's door seal can trap moisture and debris that can cause mold and odor. If young children aren't running about, leave the washer door ajar, allowing air to circulate, and wipe dry the door gasket and glass. Clean dispensers monthly. Some companies suggest regularly running an empty load with bleach added. Wipe under and around the dispenser and run another load after that to remove residual bleach. Affresh tablets are claimed to prevent odor by removing residue, but in our tests the residue remained.

Most and least reliable

Among top-loaders, Estate and Roper (two no-frills brands) were among the more reliable, and Fisher & Paykel was among the more repair-prone brands. No brands stood out among front-loaders.

Fisher & Paykel was also the most repair-prone brand of electric dryers. That's what we found when we asked more than 215,000 readers who bought a washer or a dryer between 2005 and 2009 about their experiences. The graph shows the percentage of brands that needed a repair or had a serious problem. Differences of fewer than 3 points (dryers) and 4 points (washers) aren't meaningful, and we've adjusted the data to eliminate differences linked solely to age and use of the appliance. Models within a brand might vary, and design or manufacture changes might affect future reliability. Still, choosing a brand with a good repair history can improve your odds of getting a reliable model.