No. 11-1564

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

EQUIFAX INFORMATION SERVICES, LLC,

Defendant-Appellant,

v.

DONNA K. SOUTTER, for herself and on behalf of all similarly situated individuals,

Plaintiffs-Appellees.

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of appellant Equifax Information Services, LLC ("Equifax" or "defendant"), pursuant to Federal Rule of Appellate Procedure 29.[1]

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber also has filed amicus briefs in numerous cases addressing issues of class certification, including most recently, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The Chamber's members have a strong interest in the ruling below because the District Court's misapplication of Rule 23 could

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

provoke an avalanche of new class-action litigation on a broad array of subject matters, beyond consumer-credit issues. If allowed to stand, the ruling thus has the potential to dramatically increase the class-action exposure of the Chamber's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's class-certification order is fundamentally at odds with the U.S. Supreme Court's recent landmark ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In particular, the lower court failed to conduct the kind of "rigorous analysis" that the Supreme Court made clear is essential for class certification. *Id.* By deferring to the named plaintiff's allegations and arguments, the district court misapprehended its vital role in the class-certification process: ensuring that the plaintiff "affirmatively demonstrate[s] his compliance with . . . Rule [23]." *Id.*; *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (highlighting that "actual, not presumed, conformance with" Rule 23 is "indispensable"). The district court's perfunctory approach to the class-certification inquiry resulted in erroneous findings that plaintiff had satisfied the commonality and predominance requirements of Rule 23. These findings – and the resulting class-certification order – must therefore be reversed in light of *Dukes* and recent caselaw interpreting it.

A "rigorous analysis" of the Rule 23 prerequisites is critical to American businesses and consumers. This standard serves as an essential bulwark against frivolous and abusive class actions, ensuring that only those cases that are truly conducive to class treatment proceed as class actions. If left unchecked, the lower court's ruling thus has the potential to spawn abusive class actions that will threaten the vitality of American businesses and harm consumers with higher prices in the marketplace.

ARGUMENT

I. THE DISTRICT COURT FAILED TO CONDUCT THE KIND OF "RIGOROUS ANALYSIS" REQUIRED UNDER *DUKES*.

Plaintiff proposes to determine – on behalf of hundreds of thousands of consumers, in a single proceeding – whether Equifax used reasonable procedures in determining the status of judgments against those consumers in hundreds of disparate courts across the Commonwealth of Virginia. To date, plaintiff still has not shown how this could be done; indeed, her efforts have unwittingly demonstrated that the mass adjudication she proposes would be sprawling and inefficient. Equifax has shown the same thing: courts' practices of disclosing the information that winds up in credit reports vary one from another and have changed over time, and Equifax's vendors have used different methods over time and in different courts to collect this information.

The district court looked past all of this. Despite acknowledging the proposition that "[t]he *plaintiff* bears the burden of *proving* all requirements of Rule 23," *Soutter v. Equifax Info. Servs., LLC*, No. 3:10cv107, 2011 U.S. Dist. LEXIS 34267, at *12-13 (E.D. Va. Mar. 30, 2011) (emphases added), the district court accepted without any real analysis plaintiff's speculative arguments and unfounded promises that Rule 23's requirements could be satisfied in this case. In particular, it accepted plaintiff's assertion that the alleged inaccuracy of thousands of credit reports could be proven in a class setting, notwithstanding *plaintiff's* own concession that this task would "involve substantial work." *Id.* at *36. And it completely disregarded the different methods employed by different courts to keep track of judgments as any barrier to certification. Instead, it accepted plaintiff's argument that only the reasonableness of Equifax's conduct is at issue and that such reasonableness could be resolved on a classwide basis, *id.* at *39 – even though: (1) Equifax's "conduct" necessarily varied with the courts' varying procedures; (2) a jury could regard the reasonableness of Equifax's conduct differently depending on the nature of the alleged inaccuracy; and (3) in order to obtain statutory damages, a plaintiff must show not just unreasonable conduct, but willful unreasonableness, making the inquiry even more individualized.

In failing to require plaintiff to *prove* the certifiability of her claims, the district court improperly placed the onus on defendant to show that class treatment

– "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 (internal quotation marks and citation omitted) – is not appropriate in this case. Had the court actually conducted a "rigorous analysis" and "probe[d] further into the facts," *Corwin v. Lawyers Title Ins. Co.*, No. 09-13897, 2011 U.S. Dist. LEXIS 84232, at *12-13 (E.D. Mich. Aug. 1, 2011) (applying *Dukes* in denying motion for class certification), it would have recognized that plaintiff's highly individualized Fair Credit Reporting Act ("FCRA") claim cannot be proven on a classwide basis.

The district court's lax attitude toward class certification is contrary to Rule 23's requirements and has been rejected by numerous federal and state courts, including, most recently, the U.S. Supreme Court. In *Dukes*, the Supreme Court expounded upon the "rigorous analysis" that is a prerequisite to class certification. This Court should apply the reasoning of *Dukes* and the cases that have followed it and reverse the class-certification decision below.

Dukes was an employment-discrimination case consisting of approximately 1.5 million women who worked in any of Wal-Mart's roughly 3,400 stores across the United States. 131 S. Ct. at 2547-48. The plaintiffs asserted claims under Title VII of the Civil Rights Act of 1964, alleging that Wal-Mart discriminated against women with regard to promotion, hiring, firing and compensation decisions. *Id.* The district court granted the motion for class certification, and the Ninth Circuit

"substantially affirmed." *Id.* at 2549-50. But the Supreme Court reversed, holding that the putative class had not satisfied the requirement of commonality under Rule 23(a). *Id.* at 2556-57.

In reversing the lower court's ruling, the Supreme Court highlighted that "Rule 23 does not set forth a mere pleading standard." *Id.* at 2551. To the contrary, the Court explained, a plaintiff "must affirmatively demonstrate his compliance with the Rule." *Id.* Therefore, the plaintiff must "prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Id.*; *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006) ("district courts must conduct a 'rigorous analysis' to ensure compliance with Rule 23, paying 'careful attention to the requirements of that Rule'") (internal quotation marks and citations omitted).

Dukes made clear that this burden of proof means identification of *evidence* in hand that can do the work of proving multiple claims at once – not mere *allegations* or *argument* that classwide resolution is possible. After all, "[a]ny competently crafted class complaint literally raises common 'questions." *Dukes*, 131 S. Ct. at 2551 (internal quotation marks and citation omitted). Thus, the proper "rigorous analysis" of a class proposal will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim." *Id.*; *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 317 (3d Cir. 2008) (instructing

district courts faced with class-certification motions to conduct a "rigorous analysis" that may "'include a preliminary inquiry into the merits'") (internal quotation marks and citation omitted); 552 F.3d at 307 (explaining that the court must conduct a "rigorous analysis" of "all relevant evidence and arguments presented by the parties") (emphasis added); *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig*., MDL No. 1967, 2011 U.S. Dist. LEXIS 73375, at *6 (W.D. Mo. July 5, 2011) (in conducting a "rigorous analysis," the court must "look[] behind the pleadings and ascertain[] the nature of Plaintiffs' claims as well as the nature of the evidence"). Thus, the Supreme Court interred once and for all the long-misunderstood sentence from its *Eisen* decision that many courts had misconstrued as barring any inquiry into the merits on class certification. *Dukes*, 131 S. Ct. at 2552 n.6 (flatly rejecting principle that "Rule 23 [does not] give[] 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") (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)). In sum, "[t]he necessity of touching aspects of the merits in order to resolve" the question of class certification is now firmly established. *Id.* at 2552.

In reaffirming the requirement of a "rigorous analysis," the Court also added significant heft to Rule 23(a)'s commonality requirement, holding that "[c]ommonality requires the plaintiff to demonstrate that the class members have

suffered the same injury" – not "merely that they have all suffered a violation of the same provision of law." *Id.* at 2551 (internal quotation marks and citations omitted). It is not enough in a Title VII case, for example, to allege that the class has suffered discrimination – even "in a single company." *Id.* Rather, the "claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor." *Id.* In other words, the Court explained, there must be "some glue holding the alleged reasons for all th[e allegedly discriminatory] decisions together," such that "examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.* at 2552. The class proposed in *Dukes* – which alleged only a discriminatory "corporate culture," *id.* at 2553 – was "worlds away" from meeting even the commonality requirement of Rule 23, *id.* at 2554.

Thus, *Dukes* makes clear that it is not enough that a *question* be "common" to the class. Rather, a classwide proceeding is only proper if it will "'generate common *answers* apt to drive the resolution of the litigation.'" *Id.* at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). This holding is significant because it essentially recast the commonality requirement, under which courts had previously looked for common questions without going further to determine whether those questions had common answers.

The import of *Dukes* is already being manifested throughout the federal judiciary as lower courts have relied on *Dukes* in strengthening their class-certification inquiries. In the wake of *Dukes*, these courts have applied the "rigorous analysis" standard and interpreted the commonality factor to require a clear showing that critical issues in the litigation are truly common. *See, e.g.*, *Cruz v. Dollar Tree Stores, Inc.*, Nos. 07-2050 SC, 07-4012 SC, 2011 U.S. Dist. LEXIS 73938, at *16-18 (N.D. Cal. July 7, 2011) (decertifying class in light of *Dukes*, which requires "common proof of class-wide liability in order to justify class certification," because plaintiffs "failed to provide common proof to serve as the 'glue' that would allow a class-wide determination of how class members spent their time on a weekly basis"); *Martin v. State Farm Mut. Auto. Ins. Co.*, No. 3:10-0144, 2011 U.S. Dist. LEXIS 93799, at *34 (S.D. W. Va. Aug. 22, 2011) (relying on *Dukes* and reasoning that because "the varying claims presented by the proposed class will require an intensive, individual fact-finding . . . of [the] claims . . . the class proposed by Plaintiffs fails to meet the commonality requirement"); *In re Bisphenol-A*, 2011 U.S. Dist. LEXIS 73375, at *20-21 (finding commonality unmet under *Dukes* because each "[p]laintiff's actions, decisions, knowledge, and thought processes are unique to that Plaintiff" and even simple questions like "Did each Plaintiff purchase a product manufactured by Defendant" did not constitute "common question[s]" because they were "not

capable of classwide resolution"); *Haynes v. Planet Automall, Inc.*, No. 09-CV-03880 (JBW) (RER), 2011 U.S. Dist. LEXIS 89640, at *34-35 (E.D.N.Y. Aug. 12, 2011) ("As to the critical two disputed questions – whether Pro Fees, Dlr Fees and retained portion of the warranties are part of the finance charge pursuant to TILA – plaintiff has not shown that they can be answered uniformly on a class-wide basis" under *Dukes*); *Corwin*, 2011 U.S. Dist. LEXIS 84232, at *14-19 (denying motion for class certification in light of *Dukes* because "although there are questions common to the absent class members and the plaintiff that must be decided before liability is established, the critical inquiry without which liability cannot attach requires individualized determination"); *see also Tire Kingdom, Inc. v. Dishkin*, No. 3D08-2088, 2011 Fla. App. LEXIS 10550, at *21-22 & n.12 (Fla. Dist. Ct. App. July 6, 2011) (decertifying class where the purportedly common questions – such as whether defendant's representations were misleading, likely to deceive, or in violation of Florida law – were "indistinguishable in kind from the common question rejected as insufficient" in *Dukes*).

In *Corwin*, for example, the plaintiff brought a putative class action against a title insurance company, asserting a claim for unjust enrichment. The plaintiff alleged that the company overcharged her by failing to provide a discounted rate that must be granted when the purchaser of a title policy provides evidence that she had previously purchased other title insurance on the subject property. *Corwin*,

2011 U.S. Dist. LEXIS 84232, at *2-3. The plaintiff moved for class certification, "alleging that the defendant's common practice of demanding strict proof of a prior title policy is common to all the claims of the absent class members and the requirements of Federal Rule of Civil Procedure 23 have been satisfied." *Id.* at *10.

The district court denied the plaintiff's motion for class certification, concluding that she had failed to satisfy the requirements of commonality and predominance under Rule 23. *Id.* at *19. In conducting its "rigorous analysis" of the Rule 23 factors, the court relied on *Dukes*, recognizing that "[t]he Court is not bound to accept the allegations on the face of the complaint as true, and should *probe further into the facts* where necessary to determine whether these requirements have been met." *Id.* at *12-13 (citing *Dukes*, 131 S. Ct. at 2551-52) (emphasis added). With respect to Rule 23(a)(2), the court explained that "generalized or abstract commonality will not suffice." *Id.* at *14-15. The court reasoned that while plaintiff was able to identify a number of common questions – including whether the defendant could require the policy purchaser to present evidence of a prior policy to obtain the discount – "the ability to articulate common questions does not by itself satisfy Rule 23(a)(2)." *Id.* at *16 (citing *Dukes*, 131 S. Ct. at 2551). "'What matters to class certification'" under *Dukes*, the court explained, "'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.'" *Id.* at *17 (quoting *Dukes*, 131 S. Ct. at 2551). Thus, the court determined that plaintiff's purportedly common question could not be answered on a classwide basis because recovery under an unjust enrichment theory required class members to prove that there was a previous policy issued on the specific property at issue. *Id.* According to the court, "[s]uch proof is uniquely individualized; it cannot be established on a classwide basis." *Id.* Because liability could not be established "in one stroke," the court concluded that there was a lack of sufficient commonality. *Id.* at *17-18. The court similarly found that plaintiff could not satisfy Rule 23(b)(3)'s predominance requirement in light of the "substantial, individual inquiries" presented by her class claim. *Id.* at *19 (internal quotation marks and citation omitted).

Had the district court performed the type of "rigorous analysis" demanded under *Dukes* and applied in *Corwin*, it necessarily would have concluded that plaintiff's FCRA claims are uncertifiable. This is so because there is no "glue" that holds the class together – no "common answer to the crucial question": whether a class member's report was inaccurate – and if so, whether such inaccuracy was the result of unreasonable reporting procedures. *Dukes*, 131 S. Ct. at 2552.

In finding that plaintiff had satisfied the requirements of commonality and predominance, the district court flouted its obligation to conduct a "rigorous analysis" by simply regurgitating five purportedly common questions set forth in plaintiff's motion for class certification. *Soutter*, 2011 U.S. Dist. LEXIS 34267, at *21-22 (listing "common" questions as whether Equifax's procedures were unreasonable, whether those procedures violated the FCRA, whether credit reports were inaccurate, whether the violations were willful, and what is the proper damage measure per violation) (citing Pl.'s Mem. in Supp. of Mot. for Class Certification at 17). But as courts applying *Dukes* have recognized, "the ability to articulate common questions does not by itself satisfy Rule 23[.]" *Corwin*, 2011 U.S. Dist. LEXIS 84232, at *16 (rejecting as insufficient plaintiff's reliance on eight supposedly common questions); *Cruz*, 2011 U.S. Dist. LEXIS 73938, at *17 (similar).

Here, as in *Corwin*, the district court failed to explain how the five purportedly common questions could be *answered* on a classwide basis. Nor could it. As set forth in appellants' brief, the court would have to undertake a multitude of individualized inquiries just to determine whether an individual class member's report was inaccurate for purposes of the FCRA. *See* Defendant-Appellant's Br. at 29-31; *see also, e.g.*, *Owner-Operator Indep. Drivers Ass'n v. USIS Commercial Serv., Inc.*, 537 F.3d 1184, 1194 (10th Cir. 2008) (holding that trial court properly

denied class certification in FCRA case; "whether a report is accurate may involve an individualized inquiry"); *Harper v. Trans Union, LLC*, No. 04-3510, 2006 U.S. Dist. LEXIS 91813, at *23-25 (E.D. Pa. Dec. 20, 2006) (determining whether class members' reports were inaccurate "will require highly individualized proofs").

The district court here believed that the question of "inaccuracy" could be assessed on a classwide basis by resorting to a hypothetical database using judgment information from the Supreme Court of Virginia. *Soutter*, 2011 U.S. Dist. LEXIS 34267, at *34-36. But this belief was misplaced because the "inaccuracy" of the database itself was demonstrated when plaintiff could not find her own case in it. *See id.* at *16-17. And even if the database could be employed, the court would still have to cross-match hundreds of thousands of consumer reports against the database, a "Sisyphean task" that "would be a burden on the court and require a large expenditure of valuable court time." *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981).

In addition, plaintiff was also required to show that the second question – whether Equifax engaged in "reasonable procedures to assure maximum possible accuracy," 15 U.S.C. § 1681e(b) – could be answered with classwide proof. The district court failed to conduct a "rigorous analysis" with respect to this question too by conflating the wholly separate questions of inaccuracy and reasonableness, *Soutter*, 2011 U.S. Dist. LEXIS 34267, at *39-40. According to the court, a

finding of inaccuracy was tantamount to a finding of unreasonableness. *Id.* ("even if different courts use different docketing procedures, that will present no barrier to proof of whether the procedures used by Equifax, . . . on its behalf, reasonably accurately capture the results").

In so doing, the court disregarded the *differing* procedures used by Equifax and LexisNexis at *different* times during the applicable class period. For example, throughout the class period, LexisNexis used in-person review procedures, which varied across jurisdictions, to collect disposition data for circuit court proceedings. Dkt. 77-12, at 8. During the same period, LexisNexis employed at least three different means to obtain data from district court proceedings. Dkt. 77-12, at 3-4. These widely divergent procedures would have to be considered to determine whether Equifax's practices were unreasonable. And as the Supreme Court explained in *Dukes*, the class-action device cannot be used to relieve individual class members of the burden to prove the essential elements of their claims. *Dukes*, 131 S. Ct. at 2561. To the contrary, the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)). Thus, Equifax must be allowed to challenge, on an individual basis, whether each putative class member's report was inaccurate – and whether such inaccuracy was the product of willfully unreasonable reporting practices. *Id.* at 2561.

The district court also ignored the individualized nature of calculating statutory damages under the FCRA, which range anywhere from $100 to $1000. 15 U.S.C. § 1681n(a)(1). According to the court, "[t]he amount of individual statutory damages for each consumer will necessitate a *very simple* individualized computation of damages." *Soutter*, 2011 U.S. Dist. LEXIS 34267, at *42 (emphasis added). But the court failed to explain how such a calculation could be conducted on a classwide basis, disregarding without any real analysis Equifax's argument that the amount of statutory damages would depend on the circumstances of each individual class member. *Id.* As Judge Wilkinson recently explained, while "[t]he statute does not specify what factors a jury should consider when selecting a number within [the $100 to $1000] range," it is clear that "evidence about *particular class members* is highly relevant to a jury charged with this task." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 277 (4th Cir. 2010) (Wilkinson, J., concurring) (emphasis added). As a result, the "individualized nature of this determination is strong evidence that class treatment may not be the required course." *Id.*

In short, the district court shirked its obligation to conduct a "rigorous analysis," resulting in a deeply flawed class-certification ruling that runs afoul of *Dukes*. The district court's ruling, which could potentially engender looser class certification standards throughout the Fourth Circuit, should therefore be reversed.

II. THE SUPREME COURT'S "RIGOROUS ANALYSIS" STANDARD IS CRITICAL TO PROTECTING AMERICAN BUSINESSES FROM ABUSIVE CLASS-ACTION SUITS.

Reversing the decision below is all the more important because of the serious policy goals that the "rigorous analysis" requirement is intended to promote. As the Supreme Court explained in *Dukes*, class actions are the "exception," not the rule. 131 S. Ct. at 2550. This statement is not merely one of historical fact. It is an admonition: courts *should not* routinely certify class actions.

Before certifying a class, a court must therefore be *certain* that, if the plaintiff's allegations are correct, it likely means that the defendant's conduct injured everyone in the class *in the same way*. Otherwise, the plaintiff can use the class-action device to threaten the defendant with liability that far exceeds the extent of any damage realistically attributable to the alleged conduct. *See, e.g.*, Jim Copland, *These Actions Have No Class*, Manhattan Institute for Policy Research, Sept. 15, 2004, http://www.manhattan-institute.org/html/_sfe-these_actions.htm ("Class actions are the litigation industry's weapons of choice because they aggregate so many claims"). Such illegitimate leverage can in turn be used to extract a ransom from corporate defendants in the form of inflated settlements. *See, e.g.*, David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN Prod. Liab. L. & Strategy (Feb. 2009) (because "certification is the whole shooting match" in most cases, defendants faced with improvidently

certified, meritless lawsuits often feel intense pressure to settle before trial). The resulting windfall to plaintiffs' lawyers is paid for by businesses, which must then recoup their illegitimate losses through higher prices to consumers. *See* Sarah Rajski, *Comment: In re Hydrogen Peroxide: Reinforcing Rigorous Analysis for Class Action Certification*, 34 Seattle Univ. L. R. 577, 607 (2011) ("These class action settlements and jury awards cost hundreds of millions of dollars – costs that must be recovered through higher prices for goods and services, which ultimately affect the economy as a whole."); Towers Watson, 2010 Update on U.S. Tort Costs Trends, at 3 (2010) (reporting that the tort lawsuit industry cost Americans $248.1 billion in 2009).

Properly applied, the rigorous-analysis requirement works to prevent these untoward results by directing courts to "ensure[] that each of the prerequisites for certification [has] actually been satisfied." *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, No. 09-2607, -2011 U.S. App. LEXIS 16624, at *24 (6th Cir. Aug. 12, 2011). This exacting scrutiny begins with the premise that *none* of the class-action requirements is satisfied unless and until the plaintiff proffers evidence that it is. *See Dukes*, 131 S. Ct. at 2551. And even that evidence should not be accepted at face value; rather, it should be considered in light of all of the available evidence – including evidence proffered by the defendant tending to show that class treatment is improper. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at

307 (courts must consider "*all* relevant evidence and arguments presented by the parties") (emphasis added). Such an approach ensures that only "exceptional" cases are certified and "that litigation-related unfairness is prevented." F. Ehren Hartz, *Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707, 718 (2009).

For all of these reasons, the Court should reverse the decision below and emphasize the importance of the rigorous-analysis requirement. A clear statement about the robust and exacting qualities of this requirement will reduce the incidence of improper class certifications and protect businesses and consumers from the far-reaching adverse consequences of class-action abuse. *See, e.g.*, *Stillmock*, 385 F. App'x at 276 (Wilkinson, J., concurring) (urging the district court to "address[] the real possibility that the suggested class could bankrupt an entire chain of supermarkets").

CONCLUSION

For the foregoing reasons, and those stated by appellant Equifax, the Court should reverse the district court's certification order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,369 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

Date: September 6, 2011

s/John H. Beisner
JOHN H. BEISNER

CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Amicus Curiae was filed with the Court via the Court's ECF system on September 6, 2011, and a copy of the brief was served on all counsel of record by operation of the ECF system on the same date.

s/John H. Beisner
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