No. 15-11455-E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT BROWN ET AL.,

Plaintiffs-Appellees,

v.

ELECTROLUX HOME PRODUCTS, INC., d/b/a FRIGIDAIRE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

REPLY BRIEF OF APPELLANT ELECTROLUX HOME PRODUCTS, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, Electrolux Home Products, Inc. hereby certifies that a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have interest in the outcome of the above-captioned appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party, is set forth in the Certificate Of Interested Persons & Corporate Disclosure Statement in Electrolux's opening brief.

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INTRODUCTION

Plaintiffs *do not dispute* that the district court cited the wrong standard for class certification, that the class consists of large numbers of washing-machine owners who have never had mold or odor problems, or that one of them never saw any advertisement by Electrolux prior to purchasing his machine. Nevertheless, they insist that certification should be upheld on the theory that all class members were uniformly injured and exposed to uniform misrepresentations. Plaintiffs' arguments repeat the district court's disregard for the *record evidence* – which should be central to a district court's rigorous analysis of class certification but was relegated to the periphery of the decision below. Thus, plaintiffs cannot justify affirmance on any of the three grounds of error.

First, the district court applied the wrong standard. Plaintiffs now admit that the district court invoked antiquated certification concepts but insist that it did not apply those standards, making review unnecessary. But the record proves otherwise, as the examples cited in plaintiffs' brief establish. Instead of resolving disputed law or facts, the court consistently deferred to plaintiffs and in doing so abused its discretion.

Second, the class is wildly overbroad. Plaintiffs contend that the court properly ignored the fact that not all class members were injured because injury is a merits issue, but that is not the case, as Supreme Court precedent makes clear.

Plaintiffs also contend that any overbreadth in damages is irrelevant because those problems can be resolved easily, but neither the law nor the record supports this contention.

Third, individualized issues predominate as to all of plaintiffs' claims. Contrary to plaintiffs' arguments, the record shows that this case does not involve uniform representations that reached the entire class (or even both named plaintiffs). And the legal principles governing plaintiffs' warranty claims will require individualized evidence that cannot be resolved in a class proceeding.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE PARTIES' AGREEMENT THAT THE DISTRICT COURT CITED AN ERRONEOUS STANDARD COMPELS REVERSAL.

As set forth in Electrolux's opening brief, the district court erred by applying an antiquated legal standard that falls far short of the Supreme Court's command to conduct a "rigorous analysis" before certifying a class. (DBr. 13-20.)[1] Plaintiffs now concede that the district court cited the wrong standard, agreeing that it was "an incorrect statement of law" that the district court was required to (1) "resolve[] any doubt in favor of class certification"; (2) "accept[] the allegations in the complaint as true"; and (3) view the "evidence in the light most favorable to Plaintiffs." (PBr. 2, 13 (internal quotation marks and citation omitted).)

[1] Citations to Electrolux's opening brief are to "DBr." and to "PBr." for plaintiffs' brief.

Plaintiffs nevertheless contend that this foundational error is "of no moment" because it was "not the standard the District Court actually followed," as demonstrated by the fact that its opinion was "lengthy," it mixed in correct statements about the class certification standard with the erroneous ones, and it considered *some* evidence in certifying the class. (PBr. 2, 11-13 & n.11.) As plaintiffs summarize it, Electrolux focuses on "three [erroneous] sentences" in an otherwise flawless analysis. (PBr. 13.)

This argument ignores Electrolux's brief, which set forth several examples of critical issues to which the district court *applied* the wrong standard. (DBr. 18-20.) Most notably, the district court ignored Electrolux's evidence that less than two tenths of one percent of class members required a visit by a service technician to address alleged problems related to mold, mildew or odor during the warranty period, even though Electrolux repeatedly and prominently relied on this evidence in its opposition to class certification. (*E.g.*, R.164 at 1, 5, 13; R.175 at 2.) Nor do plaintiffs address the district court's decision to grant certification on all issues – including damages – even though no evidence was offered to prove that damages could be established on a classwide basis. (DBr. 19.) These examples concretely establish that the district court did not "probe[] behind the pleadings and independently weigh[] the evidence to find that the Rule 23 prerequisites are satisfied on th[e] record." (PBr. 15.)

Plaintiffs' supposedly contrary examples only further illustrate error. Plaintiffs claim that the district court "carefully considered . . . and rejected" Electrolux's argument that some machines may have developed mold or odor for reasons unrelated to the machines' designs. (PBr. 12.) But the district court credited plaintiffs' unsupported "*assert[ion]* that every Washing Machine was defectively designed" in a way that "inevitably caus[es] mold and mildew problems" (R.201 at 40 (emphasis added)), while disregarding Electrolux's *evidence* that there are many causes of mold and odor other than product defects, such as consumer misuse (*see* R.164 at 20-22) and that most washers do not develop mold or odor in any event.

The same failure to rigorously analyze the record is apparent in plaintiffs' other two examples concerning uniform representations and pre-suit notice. (PBr. 13.) The court inexplicably concluded that representations were uniform even though plaintiffs identified only one advertisement (DBr. 40); there was no evidence anyone saw it; and one of the plaintiffs testified that he never saw *any* advertisement prior to purchase (DBr. 40). And while the court "address[ed]" Electrolux's notice argument with respect to plaintiffs' warranty claims (PBr. 13), the court did not *resolve* the issue on the erroneous ground that the threshold *legal*

question of whether notice is required is somehow a common question that supported class treatment.[2]

In short, the district court's error is not limited to "three sentences contained within an otherwise careful 64-page opinion." (PBr. 13.) Rather, those three sentences drove the entire analysis and led the district court to "side-step[]" the "tough questions." *Sher v. Raytheon Co.*, 419 F. App'x 887, 891 (11th Cir. 2011). On this ground alone, the order should be reversed.[3]

II. PLAINTIFFS' ARGUMENTS THAT OVERLY BROAD CLASSES ARE PERMISSIBLE LACK MERIT.

A. Certification Was Inappropriate Because The Vast Majority Of Class Members Did Not Suffer A Cognizable Injury.

As Electrolux explained in its opening brief, "actual injury is a *prima facie* element of [plaintiffs'] claims under Texas and California law – requiring

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[2] For these reasons, plaintiffs' reliance on *Gooch v. Life Investors Insurance Co. of America*, 672 F.3d 402 (6th Cir. 2012) and *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011) (cited in PBr. 14-15) – for the proposition that invocation of the wrong standard can be forgiven when the right one is applied in substance – is misplaced. In those cases, the district courts *did* consider "all of the relevant documents that were in evidence," *Gooch*, 672 F.3d at 418, and "did not simply take as true all of the [plaintiffs'] allegations," *Zurn Pex*, 644 F.3d at 618. Not so here.

[3] Plaintiffs also bizarrely contend that since they now agree the district court recited the wrong standard, review is no longer appropriate. (PBr. 15-16.) In fact, plaintiffs' concession strengthens rather than weakens the case for review. *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) (interlocutory review is "appropriate" when "the district court expressly applies the incorrect Rule 23 standard").

classwide proof that the proposed class members actually experienced a problem with their machines" (R.197 at 5) – an element that the district court ignored by certifying a wildly overbroad class (DBr. 23). Plaintiffs respond by arguing that: (1) overbreadth is a merits issue, relying on *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013); (2) manifestation of defect is not required to certify a class; and (3) bifurcated discovery prevented plaintiffs from presenting evidence on the incidence of mold and odor. The first two contentions are meritless, and the third misstates the record.

First, overbreadth is not a merits issue – as *Amgen* and cases applying it demonstrate. *Amgen* was a securities-fraud case that centered on whether the plaintiffs should have been required to prove materiality prior to class certification in order to demonstrate predominance under Rule 23(b)(3). *Amgen*, 133 S. Ct. at 1195. The Supreme Court concluded they need not do so, for two reasons. *Id.* First, the Court focused on the fact that the question of materiality was an "'objective one'" that could "be proved through evidence common to the class." *Id*. (citation omitted). Second, the Court found that there was "no risk whatever that a failure of proof on the common question of materiality will result in individual questions predominating" because "the failure of proof on the element of materiality would end the case for one and for all; no claim would remain in which individual reliance issues could potentially predominate." *Id.* at 1196.

Amgen does *not* mean – as plaintiffs would have it – that any issue bearing on the merits is off limits at the certification stage. Indeed, while plaintiffs twice chastise Electrolux for not citing *Amgen* (PBr. 3 n.4, 25 n.16), *plaintiffs* fail to cite the Supreme Court's more recent decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2416 (2014), which clarified the very narrow scope of *Amgen*'s reasoning and its irrelevance here. In *Halliburton*, the Supreme Court acknowledged that *Amgen*'s rule governs *materiality* because it is an inherently common issue by virtue of its objective nature and therefore does not risk injecting individualized issues into a trial if its resolution is left to the merits. *Id.* But the Supreme Court *reversed* the court of appeals decision in *Halliburton* because it erroneously applied *Amgen*'s rule to *other* issues that must be addressed up front to prevent certification of a class that devolves into individualized issues. *Id.*[4] *See also In re Photochromic Lens Antitrust Litig.*, MDL No. 2173, 2014 WL 1338605, at *22 & n.23 (M.D. Fla. Apr. 3, 2014) (noting that "the element of antitrust impact is distinguishable from the element of materiality addressed in *Amgen*" because unlike materiality, "[a]ntitrust impact . . . is not an 'objective' question," and under

[4] The Sixth Circuit erred in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013), in the same manner as the appellate court in *Halliburton* by extending *Amgen* beyond its very limited scope. (*See* PBr. 27-28.)

the circumstances, it required "*individualized*" rather than "generalized" proof) (emphasis added, internal quotation marks and citation omitted).

This case falls under the latter category because the record shows that not all class members sustained a cognizable injury, and that a class trial would therefore be inherently individualized. *See id.* (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013)) (noting that a class cannot be certified based on a theory "that include[s] uninjured plaintiffs within the putative class" because such a class would "contravene[] *Comcast*'s 'command[]' that courts take a 'hard look at the soundness of statistical models that purport to show predominance'" in antitrust cases). Thus, *Halliburton* and *Comcast* confirm that overbreadth of the sort at issue here must be addressed before class certification, and *Amgen* does not hold otherwise.

Second, plaintiffs' argument that manifestation is not required to recover under Texas and California law lacks merit.

For one thing, plaintiffs are wrong that the Court should ignore any cases cited by Electrolux that involved decisions on summary judgment or a motion to dismiss. (PBr. 21-23.) To the contrary, such cases are highly relevant because they explicate the substantive requirements of state law – which are fundamental to a class certification analysis. After all, the search for common questions "begins, of course, with the elements of the underlying cause of action." *Local 703, I.B. of*

T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248, 1253 (11th Cir. 2014) (internal quotation marks and citation omitted). The purpose of examining the substantive elements is to determine "how specific issues will play out" at trial to develop a sense of whether they are amenable to common proof. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (internal quotation marks and citations omitted). Summary judgment and dismissal decisions inform this determination because they illustrate what sort of allegations and evidence are necessary to sustain a claim under state law – and thus what evidence would be pertinent in a class proceeding. Indeed, this Court has cited summary judgment cases in addressing claims that class certification is inappropriate. *E.g.*, *Local 703*, 762 F.3d at 1259 (citing *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1310 (11th Cir. 2011), a summary-judgment case, to explain relevant considerations in rebutting the presumption of an efficient market at the class certification stage).[5]

[5] Plaintiffs argue that *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales Practices & Products Liability Litigation*, 288 F.R.D. 445 (C.D. Cal. 2013) supports certification but it does not; that case held that UCL and California warranty claims could not be certified where "the majority" of class members had no problem with their cars. 288 F.R.D. at 450. Plaintiffs also dismiss *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) as somehow irrelevant because it involved a multistate-class case (PBr. 24), but in doing so, they ignore its express statement that class treatment was improper in part because Texas warranty claims require manifestation of defect (DBr. 24).

Nor do plaintiffs' cases undercut Electrolux's arguments. For example, plaintiffs contend that *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545, 547 (5th Cir. 2003), holds that manifestation is not a requirement for an implied-warranty claim under Texas law. (PBr. 22, 48-50, 52.) But as the Texas Court of Appeals explained just two years after *McManus* was decided, *McManus* "involv[ed] [a] manifested defect." *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 852 (Tex. App. 2005). Specifically, the alleged defect – a motor-home's inability to tow 3,500 pounds without supplemental brakes – was manifest in every motor home in *McManus* because the motor homes lacked that capacity at the time of purchase and thus could not be used for an "ordinary purpose." *McManus*, 320 F.3d at 551-52. Here, by contrast, plaintiffs have not contended that Electrolux washers could not be used for their ordinary purpose, to wash clothing, at the time of purchase. To the extent the alleged defect ever interferes with that purpose, it does so only once mold or odor manifests, and only then would a plaintiff potentially be injured under Texas law. *Everett*, 178 S.W.3d at 855 (no implied-warranty claim could be maintained where allegedly defective seat belts never failed).[6]

[6] Plaintiffs inexplicably argue that *Everett* should not be followed because it "conflict[s] with the Fifth Circuit's opinion in *McManus*." (PBr. 23.) But the cases do not conflict, as *Everett* explained, and in any event, the Fifth Circuit's construction of substantive state law must yield to a subsequent conflicting

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Plaintiffs also rely on *Keegan v. American Honda Motor Co.*, 284 F.R.D. 504 (C.D. Cal. 2012), for the proposition that a defect need not manifest to certify a class under California law. (PBr. 22.) But as a subsequent federal district court decision in California made clear, *Keegan*'s approach to injury makes no sense because failing to apply a manifestation requirement would "render[] meaningless any durational limits on implied warranties, as [e]very defect that arises could conceivably be tied to an imperfection existing during the warranty period." *Daniel v. Ford Motor Co.*, No. 2:11-02890 WBS EFB, 2013 WL 3146810, at *5 (E.D. Cal. June 18, 2013) (internal quotation marks and citations omitted). And in any event, the *Keegan* court acknowledged that the decision in *American Honda Motor Co. v. Superior Court*, 199 Cal. App. 4th 1367, 132 Cal. Rptr. 3d 91 (2011) (cited in DBr. 24-25), made clear that an alleged design defect must be substantially certain to manifest in a malfunction during the product's useful life to permit certification and denied certification of a class where the defect had manifested as to only four percent of the class. 284 F.R.D. at 528. *Keegan*'s principal reason for declining to follow *American Honda* was because it felt bound

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decision by a state appellate court. 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4507 (2d ed. 1996) (explaining that state "intermediate appellate court" constructions of state substantive law should be followed by federal courts absent "other persuasive data that the highest court of the forum state would decide the matter in a different fashion").

(incorrectly) by a Ninth Circuit ruling issued prior to *American Honda*. Here, by contrast, there is no such binding precedent, and the Court should follow the more recent decision of the state court in *American Honda*.[7]

Plaintiffs finally rely on the Sixth and Seventh Circuit's rulings in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), and *Whirlpool*, 722 F.3d 838 (PBr. 26-28), but these cases are not persuasive. In the first place, *Whirlpool* involved claims under Ohio law – not California or Texas law. 722 F.3d at 844. Whatever Ohio law might allow, California and Texas require proof that an alleged defect has manifested or is substantially certain to do so. Although *Butler* concluded otherwise, it did so on the basis of unelaborated citations, and even then, concluded only that Texas "possibly" allows recovery without manifestation. *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012). For the

[7] Plaintiffs contend *American Honda* should not be followed because it applied California's class certification requirements (PBr. 22-23), but they identify no material difference between those requirements and Rule 23, and in any event, Electrolux relies on *American Honda* for its *substantive* holding of California law that a plaintiff must show a substantial likelihood of product malfunction to establish injury. By contrast, the Court should disregard *Baker v. Microsoft Corp.*, 785 F.3d 315 (9th Cir. 2015) (cited in PBr. 21, 22, 49, 50), because that decision involved a motion to strike class allegations, not a plenary class certification decision, and expressly disclaimed any view on the certifiability of the plaintiffs' claims, *id.* at 323.

reasons set forth in Electrolux's briefing, the court misapplied California and Texas law.[8]

Third, plaintiffs' various attacks on Electrolux's evidence regarding the very low incidence of complaints about mold and odor (PBr. 18-19) miss the point because it was *plaintiffs'* burden to *prove* that class certification was appropriate. Plaintiffs speculate that the incidence rate is higher than two tenths of one percent, even relying on expert submissions in *other* litigation concerning *different products*, but certification requires evidence, not speculation. *Cf. Hydrogen Peroxide*, 552 F.3d at 311-12 (explaining that the "burden" is on plaintiffs to "demonstrate that the element of [injury] is capable of proof at trial through evidence that is common to the class").

Plaintiffs also blame the district court's discovery plan for their failure of proof (PBr. 18), contending that class and merits discovery were bifurcated, preventing them from obtaining evidence on the prevalence of mold or odor (PBr. 6 n.8). But overbreadth was a focus of the litigation from its earliest stages, when Electrolux moved to strike the class definition and to stay discovery pending resolution of that motion. (R.43-2 at 2-3 & n.2.) Plaintiffs responded at the time

[8] Plaintiffs' amici argue that the Court should not "create a circuit split regarding the application of *Comcast* in product-defect class actions." (Amici Br. of Public Justice, P.C. et al. at 12.) But *Whirlpool* and *Butler* were wrongly decided for the reasons set forth above, and amici acknowledge that other circuit decisions should not be followed if "plainly wrong." (*Id.* at 13.)

that "any such legitimate matters regarding the scope of the putative class can be appropriately handled by the parties and the Court on class certification" (R.45 at 8) – obviously contemplating that overbreadth was not merely a merits issue.[9] It is also clear that plaintiffs *actually did discover* evidence relating to incidence rates. For example, plaintiffs sought and obtained information relating to incidence rates through interrogatories propounded during discovery. (*E.g.*, R.141-3, Ex. B at 7.) And plaintiffs offered evidence regarding numerosity from sampled email exchanges with customers produced by Electrolux in discovery to show that there were at least 36 class members in Georgia, 25 in Texas, and 28 in California who supposedly had mold or odor problems. (R.141 at 5-6.) Given these numbers, it is likely that plaintiffs failed to pursue or present further evidence of incidence rates because it was so unfavorable to their positions.

For all of these reasons, the class is significantly overbroad, the district court abused its discretion in concluding otherwise, and its decision should be reversed.

B. Certification Was Inappropriate Because Damages Would Be Highly Individualized.

As set forth in Electrolux's opening brief, the district court also abused its discretion because the overbreadth of plaintiffs' classes makes it impossible to

[9] Plaintiffs also opposed the motion to stay discovery on the ground that they needed discovery of incidence rates to oppose the motion to strike and permit "the Court to conduct a 'rigorous analysis' as required by Rule 23." (R.49 at 5-7.)

resolve damages on a classwide basis. (DBr. 27-33.) Plaintiffs offer several responses, none of which has merit.

First, plaintiffs argue that individualized damages do not always preclude certification and that an expert damages model is not always "required prior to class certification." (PBr. 29-31, 34-35.) But the problem here was not the lack of an expert damages model; rather, it was the lack of any evidence that damages could be resolved on a classwide basis. As such, the district court could only speculate as to whether it would be feasible to resolve all issues in a class proceeding, making certification improper. *E.g.*, *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014) (denying class certification in a consumer-protection case because "under *Comcast*, the plaintiff is required to provide 'evidentiary proof' showing a classwide method of awarding relief that is consistent with plaintiff's theory of liability," and the plaintiff "provided no damages evidence") (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)).[10]

[10] Plaintiffs' cases do not address this question. For example, they quote *Butler* for the proposition that common damages are not required (PBr. 30 (citing *Butler*, 727 F.3d at 801)), but *Butler* (like *Whirlpool*) recognized that the issue of damages was *not* suitable for class treatment and thus did not address circumstances, like those here, where plaintiffs seek class treatment of both liability and damages. (*See* DBr. 32-33.) *See Doster Lighting, Inc. v. E-Conolight LLC*, No. 12-C-0023, 2015 U.S. Dist. LEXIS 78499, at *56-62 (E.D. Wis. June 17, 2015) (making same distinction). The appellate decisions in *Roach v. T.L. Cannon* *(cont'd)*

Second, contrary to plaintiffs' arguments, the evidentiary requirements of Rule 23 cannot be met by promising that the damages inquiry will be a simple one. *Cf. Hydrogen Peroxide*, 552 F.3d at 318 ("A party's assurance to the court that it intends or plans to meet the [class-certification] requirements is insufficient."). Plaintiffs insist that *Bussey v. Macon County Greyhound Park, Inc.*, 562 F. App'x 782 (11th Cir. 2014) (per curiam), does not apply here because the damages issues there were "many times more complex" than those in this case. (PBr. 32.) But this argument misstates *Bussey*'s reasoning. *Bussey*'s central premise is that *Comcast* makes clear "that class certification is an *evidentiary* question," and that a finding of predominance – even concerning damages – must be based on a rigorous analysis of the evidence. 562 F. App'x at 790. As the Court summarized, the error was "deferring resolution of important [damages] questions bearing on the class certification analysis to the merits stage of the case," *id.* – precisely what happened here (*see* PBr. 36 (explaining that no damages evidence was offered because certification preceded expert discovery)).

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Corp., 778 F.3d 401 (2d Cir. 2015) (cited in PBr. 29) and *Neale v. Volvo Cars of North America, LLC*, No. 14-1540, --- F.3d ----, 2015 WL 4466919 (3d Cir. July 22, 2015) are similarly inapposite because both stand only for the proposition that variations in damages do not categorically preclude certification, which Electrolux has not disputed here.

Plaintiffs' argument that this case involves relatively simple damages calculations is in any event unsupported. Indeed, it is barely explained, beyond the assertion that class members each seek a new gasket and associated labor costs. (PBr. 36.) In fact, the calculus would be much more complicated than that because Electrolux offered free gasket replacements to some consumers – including Mr. Brown – meaning that any calculation would have to be adjusted to account for the value already received by class members who accepted such offers. (DBr. 9.)[11] Moreover, as plaintiffs acknowledge, gasket replacement is only "one measure of damages sought" (PBr. 3-4), and it might not even be desired by many class members whose washers are working or who, like Mr. Brown, simply are not "interested." (R.164-10, 46:17-20.) Plaintiffs also seek alleged economic losses resulting from the ostensible loss of value attributable to the minute risk of developing mold or odor. (PBr. 43, 54 n.27.) This measure is inherently individualized in a case, like this one, involving a consumer product that consumers "buy . . . for myriad reasons," *In re POM Wonderful LLC*, MDL No. 2199, 2014 WL 1225184, at *4 (C.D. Cal. Mar. 25, 2014), because the supposed revelation of a small risk of developing mold would be valued differently depending on a number of factors. For example, some owners would have already

[11] Plaintiffs' repeated assertion that all consumers were required to pay for replacement bellows (*e.g.*, PBr. 25) lacks record support and is contradicted by Mr. Brown's experience.

been aware of the risk at the time of purchase, and some owners would have gotten many years of use out of their machines before encountering any problems. Finally, the operative complaint seeks "actual, general, special, incidental, statutory, and consequential damages" (R.66 at 26), and no method of manageably resolving any of these items in a classwide proceeding has been proposed.

Third, plaintiffs' assertion that the district court's failure to rigorously analyze damages issues can be corrected with a remand order calling for submission of an expert report or certification is erroneous. As this Court held in *Bussey*, the proper remedy for this sort of error is to reverse the order certifying the class. 562 F. App'x at 791. Nor is a ruling that modifies the trial court order to certify only an issues class proper. As Electrolux explained in its opening brief, Eleventh Circuit courts have rejected such an "issues class" approach to resolving predominance problems. (DBr. 33 n.10.)

III. PLAINTIFFS' PREDOMINANCE ARGUMENTS REST ON ALLEGATIONS OF FACT REFUTED BY RECORD EVIDENCE AND ON MISCONSTRUCTIONS OF APPLICABLE STATE LAW.

Finally, the district court also abused its discretion because individualized issues predominate as to each of plaintiffs' claims. As Electrolux set forth in its opening brief, predominance is largely a question of "'how specific issues will play out'" at trial, which requires a court to "'examine the elements of plaintiffs' claim[s]'" and resolve threshold legal disputes. (DBr. 49 (citations omitted).)

Plaintiffs respond that the district court is owed significant deference on predominance (PBr. 37), but this argument ignores the fact that the district court misapplied the certification standard by failing to resolve disputes of law and fact with respect to each cause of action and thereby abused its discretion, making any such deference inappropriate (*see* DBr. 11).

A. The Undisputed Evidence Shows That Certification Of Plaintiffs' Consumer Protection Claims Was Improper Because Reliance, Causation, And Injury Are Individualized.

1. Individualized Issues Predominate With Respect To Plaintiffs' DTPA Claims.

As set forth in Electrolux's opening brief, the district court erred by invoking a presumption of reliance with respect to plaintiffs' DTPA claims and then concluding that certification was proper because reliance was a common issue. (*See* DBr. 34-39.) *No other court* has ever adopted a presumption of reliance to facilitate class certification under this statute; accordingly, as one court put it, the DTPA's reliance requirement makes certification of such claims "'a near-impossibility.'" *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 446 (N.D. Cal. 2014) (citation omitted). Plaintiffs defend the district court ruling by arguing that reliance should be presumed here, *for the first time ever in a DTPA case*, because it is "common sense" that all consumers would rely on Electrolux's alleged "deception" insofar as "'they purchased Machines to clean and freshen their clothes rather than to soil and odorize them.'" (PBr. 47 (quoting R.201 at 56).)

This argument should be rejected. For one thing, the district court, exercising diversity jurisdiction, should not have radically altered Texas law. And even if such innovation were appropriate in any circumstances, it would not be appropriate here because the record in this case conclusively demonstrates that reliance is an individualized issue. After all, Mr. Brown never saw any Electrolux advertisements; he only researched price before buying his washer. (DBr. 8.) Mr. Vogler could only recall one representation in one advertisement relating to energy efficiency. (DBr. 7.) And as the *Consumer Reports* articles illustrate, consumers buy washers based on a range of considerations, and many purchase front-loaders with knowledge of the potential for odor or mold. (DBr. 3-5.)

On a similar record, the Texas Supreme Court *rejected* class treatment of DTPA and other claims in *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002), a case on which plaintiffs rely in their brief. (*See* PBr. 44-45.) There, the plaintiffs sought to represent a class of purchasers of dental-practice management software, alleging that the software was represented as "providing automated practice solutions for dentists" but was plagued by various "operational problems." 102 S.W.3d at 683. The Texas Supreme Court rejected class treatment because reliance was individualized. The court acknowledged the *theoretical* point – emphasized in plaintiffs' brief – that "class-wide proof [of reliance] is possible *when class-wide evidence exists*." *Id.* at 693 (emphasis added). But its *holding* –

not mentioned by plaintiffs – was that such evidence *did not exist*. *Id.* at 694 (agreeing that there was evidence that the defendant "*wanted* purchasers to rely on its advertisements," but concluding that there was *no* evidence "that purchasers *actually did* rely on Schein's statements so uniformly that common issues of reliance predominate over individual issues"). Here too, there is no classswide evidence of reliance; the evidence shows that one plaintiff did not rely on any statement by Electrolux and the other relied, at most, on a statement relating to energy efficiency.

Plaintiffs' attempt to reframe the reliance issue as "common sense" because all purchasers of washing machines expect the machines to clean rather than soil their clothes does not change the analysis. There is no evidence that *all* Electrolux washing machines have mold or odor problems. Rather, the issue in this case is an alleged *risk* of mold or odor – and a very slight one at that. Thus, the proper question is whether "common sense" dictates that all purchasers of washing machines would avoid a slight risk of mold or odor above all other considerations. The record does not support such a conclusion; to the contrary, it precludes it. Neither plaintiff testified to employing such a litmus test, and *Consumer Reports* regards front-load machines as the best overall performers notwithstanding such a risk. Accordingly, even if there were an initial presumption of reliance, the

evidence in this case roundly rebutted it and class treatment was plainly inappropriate.

2. Individualized Issues Predominate With Respect To Plaintiffs' UCL Claims.

As Electrolux's opening brief showed, class treatment of plaintiffs' UCL claims is improper because plaintiffs failed to present evidence of "a uniform material misrepresentation to the class – that is, a representation with respect to mold or odor that reached every class member and was so different from every class member's expectation that it would have been material to him or her." (DBr. 40.) Indeed, the record conclusively establishes that exposure *was not* uniform – one plaintiff saw an advertisement, but the other did not (DBr. 7-8) – and the *Consumer Reports* articles show that even if exposure had been uniform, causation and injury would vary because consumers value different attributes in selecting washing machines depending on their personal preferences (DBr. 3-5, 40). Plaintiffs again ignore all of this record evidence, instead arguing that the UCL claim was properly certified under the UCL's fraudulent-business-practice prong because of an alleged "uniform failure to disclose" and under the statute's unfair-practice prong because Electrolux did not oppose certification on that theory. (PBr. 39-47.) These arguments too should be rejected.

First, there is no evidence of a "uniform failure to disclose," and plaintiffs do not identify any record evidence that suggests otherwise. Instead, their theory

appears to be that Electrolux never stated that its washers could develop mold or odor and that this alleged silence constitutes a "uniform failure to disclose." (PBr. 43.) This argument fails because an omission is not actionable unless there is a uniform representation, as detailed in Electrolux's opening brief. (DBr. 44 n.11 (citing authority).) Because the record concretely establishes that there is no single representation that reached *even the two plaintiffs* – much less the entire class – plaintiffs' reliance on an allegedly "uniform failure to disclose" lacks support and cannot save certification of the UCL claim.

Plaintiffs barely address the separate flaw in the district court's analysis – that there was no evidence that any alleged representation or omission concerning mold or odor actually caused injury to all class members. (DBr. 45-46.) Plaintiffs simply assert that a "reasonable consumer would not have purchased and used this machine had he or she been aware of the alleged defective design." (PBr. 42-43 (internal quotation marks and citation omitted).) But this argument again rests on the false premise that mold or odor problems manifest in all machines. In fact, as the record demonstrates, they manifest only rarely. Any alleged misrepresentation or omission could not have caused injury to *all* consumers because the slight possibility of mold or odor problems in front-load washing machines has been well aired in the same consumer publications that recommend such machines as the best

overall performers. (DBr. 46.) For this reason, too, the certification order is fatally flawed.

Second, plaintiffs are also wrong that Electrolux "did not dispute" certification under the UCL's unfair-practice prong. (PBr. 39-41.) Plaintiffs assert that they clearly sought certification under that prong (PBr. 40), but their record citations show otherwise. Indeed, as plaintiffs' own descriptions reveal, their motion for class certification only "generally" moved to certify UCL claims (PBr. 40), and they do not dispute that the UCL section of that motion focused on Electrolux's alleged misrepresentations (*see* DBr. 47). The fact that the prong was discussed in *other* papers (*see* PBr. 40 (citing R.124 at 39 and R.167 at 30 n.26)) does not alter the analysis. It was plaintiffs' burden to show why class certification was proper in their motion for certification and Electrolux's burden to respond – not to anticipate what other theories plaintiffs might invoke.

In any event, as Electrolux previously explained, there was no need to address the prongs separately because any argument advanced under the unfair-practice prong was premised on the same alleged misrepresentation theory offered in support of the fraudulent-practice prong. (DBr. 48.) Plaintiffs ignore this point, focusing only on a different aspect of the case cited by Electrolux in support of this proposition, *Knapp v. AT&T Wireless Services, Inc.*, 195 Cal. App. 4th 932, 124 Cal. Rptr. 3d 565 (2011). Specifically, plaintiffs contend that *Knapp* is inapposite

because it involved "misrepresentations [that] were *not* uniform." (PBr. 41.) This attempted distinction of *Knapp* does not address the point for which Electrolux cited it: that there is no difference between the fraudulent- and unfair-practice prongs where the allegations are based on alleged misrepresentations. Thus, Electrolux's arguments against the fraudulent-practice prong applied with equal force to the unfair-practice prong and should have been acknowledged as such – and not as any sort of "agree[ment]" (R.201 at 47 n.20) that certification was proper.

For all of these reasons, the district court erred in certifying the UCL claim under both the fraudulent and unfairness prongs.

B. The District Court Abused Its Discretion In Failing To Resolve Threshold Legal Issues With Respect To Plaintiffs' Warranty Claims.

As Electrolux documented in its opening brief, the district court refused to resolve threshold legal disputes regarding the requirements of warranty claims under California and Texas law because it mistakenly believed that the legal disputes themselves were common to the class. (DBr. 49-56.) Plaintiffs ignore this error, in effect conceding it. Instead, they argue that they had the better argument as to each legally disputed point. (*See* PBr. 48-51.) Plaintiffs are wrong.

Manifestation of defect. As set forth in Electrolux's briefing and above, plaintiffs' warranty claims cannot be proven on a classwide basis because they

require proof that each putative class member's washing machine manifested a defect. (DBr. 50-53.) Plaintiffs respond that their theory is that the alleged defect existed at the time of sale and that manifestation is irrelevant to class treatment. (PBr. 48-49.) But for the reasons set forth above, that point-of-sale theory cannot be alleged on behalf of class members who have not experienced mold or odor problems with their machines. Moreover, plaintiffs do not even attempt to reconcile their argument with the district court's prior dismissal of Mr. Vogler's express-warranty claim on the ground that his "allege[d] problems with [his] machine[]" arose outside the one-year warranty period. (R.124 at 13-16; DBr. 52.) California and Texas law would likewise bar warranty claims concerning problems that arose outside the one-year period, meaning that liability to individual class members would turn in part on when (if ever) they encountered mold or odor problems in their machines.

Causation. As Electrolux argued in its opening brief, the district court did not address the fact that class members would need to show that any mold or odor they experienced was the result of a defect rather than some other cause. (DBr. 53.) Plaintiffs respond that Electrolux "never identifies what that cause might be" and that the district court in any event did address causation. (PBr. 49-50.) Both arguments lack merit. First, Electrolux did specifically identify consumer misuse as an alternative cause both in its opening brief and in the trial court. (DBr. 53; *see*

R.164 at 20-22.) Second, plaintiffs' contention that the district court properly resolved this issue (PBr. 49) is also wrong. Indeed, plaintiffs' cited passages highlight the court's erroneous refusal to resolve threshold issues. In one passage, for example, the district court rejected Electrolux's causation argument because plaintiffs alleged that "the inherent defect reduced the value of the Washing Machines by inevitably causing mold and mildew problems" – and "[w]hether Plaintiffs are correct is a common issue that will produce a common answer." (R.201 at 40 (cited in PBr. 49).) This conclusion erroneously accepted plaintiffs' defect allegation without determining whether it would be possible to establish it on a classwide basis consistent with state law, which does not recognize liability in implied warranty for a defect that does not manifest. The court also misread the record because there is *no* evidence supporting the notion that all class members sustained "mold and mildew problems"; by contrast, the evidence showed that there are many causes of mold and mildew that have nothing to do with alleged product defects. (*See* R.164 at 21 (citing R.164-11 ¶¶ 8, 9).) Thus, plaintiffs' causation arguments only make the case for reversal.

Notice. As Electrolux previously explained, the district court also abused its discretion by certifying a class despite the fact that notice of defect is a prerequisite to an express-warranty claim under California law and an implied-warranty claim under Texas law. (DBr. 53-55.) Plaintiffs first object that Electrolux's authority

does not apply because it consists of dismissal or summary judgment rulings, and that the individualized nature of notice "would mean that no warranty claims could *ever* be certified" as class actions. (PBr. 50.) This argument is foreclosed by the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)). In other words, if class certification would deprive a defendant of valid state-law defenses, then the class must not be certified. *Id.* (a "class cannot be certified on the premise that [a defendant] will not be entitled to litigate its . . . defenses to individual claims"). Plaintiffs also contend that warranty claims were certified in *Baker* and *McManus* (PBr. 50) (even though *Baker* expressly does not address certification), but neither case concerned notice. The warranty issue addressed in *Baker* was causation, and in *McManus*, it was injury. *See Baker*, 785 F.3d at 321; *McManus*, 320 F.3d at 552.[12] Thus, these cases do not support the district court's erroneous ruling.

Opportunity to cure. Plaintiffs do not specifically address opportunity to cure under Mr. Brown's express-warranty claim, instead grouping it with their argument about notice. (PBr. 50.) Nor do they cite any cases that have granted

[12] Plaintiffs also argue that California does not require consumers to provide notice, citing *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963). (PBr. 51 n.25.) But *Greenman* did not arise under the Song-Beverly Act, as Mr. Brown's claim does, and that Act does require notice by consumers. (R.124 at 21 (citing Cal. Civ. Code § 1793.2(c)); R.201 at 34 n.16.)

certification over an objection that express-warranty claims require classwide proof of an opportunity to cure. And they ignore *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123 (N.D. Cal. 2010) (cited in DBr. 56), which denied class treatment of express-warranty claims under California law because determining whether the defendant had an opportunity to cure raised individualized issues, *see id.* at 1147-48. Thus, they fail to refute Electrolux's argument that the district court erred in certifying plaintiffs' warranty claims for this reason too.

CONCLUSION

For the foregoing reasons and those set forth in Electrolux's opening brief, the Court should reverse the order granting class certification.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,951 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.

/s/John H. Beisner
John H. Beisner

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically via the Court's ECF system, which caused one copy to be delivered via electronic mail to plaintiffs' counsel of record. Pursuant to 11th Circuit Rule 31-3, seven paper copies of the foregoing have also been transmitted to the Court via Federal Express.

/s/John H. Beisner
John H. Beisner