NO. 13-90023-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHAEL TERRILL, ROBERT BROWN, MICHAEL VOGLER, PALECIA BOYD, and DENISE PACK, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Georgia, Augusta Division, Case No. 1:08-cv-00030

# BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE ASSOCIATION OF HOME APPLIANCE MANUFACTURERS IN SUPPORT OF ELECTROLUX HOME PRODUCTS, INC.'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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## CERTIFICATE OF CORPORATE DISCLOSURE AND INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Rule 26.1-1 of the Rules of the Court of Appeals for the Eleventh Circuit, *Amici Curiae* the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the Association of Home Appliance Manufacturers hereby certify that each is a non-profit corporation, has no parent corporation, and has no stock. There is no person or entity known to *Amici Curiae* to have an interest in the outcome of this appeal other than those persons and entities who already have been named in Appellant's Certificate of Interested Persons and Corporate Disclosure Statement.

Dated this 1st day of November, 2013

Michael T. Williams
Attorney for *Amici Curiae*

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## INTERESTS OF THE AMICI CURIAE

*Amici curiae* respectfully submit this brief in support of Defendant-Petitioner Electrolux Home Products, Inc.'s Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f).[1] The three *Amici* together are leaders in representing vast and varied business interests across the United States. They have a strong interest in ensuring that the district courts protect their members' due process rights by undertaking the rigorous analysis required by Rule 23 before permitting a case to proceed as a class action.

*Amici* are troubled that the district court significantly relaxed the standards for class certification and departed from controlling precedents. In particular, the district court ruled at the outset that all "doubts related to class certification" should be resolved "in favor of certifying the class." (Order 12, ECF No. 201.) If courts in this Circuit followed this permissive standard, it could dramatically increase the *Amici* members' exposure to massively-overbroad class actions for money damages and allow courts to certify classes consisting of purchasers of consumer products who have suffered no harm and who could not maintain suit on their own behalf.

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[1] In compliance with Federal Rule of Appellate Procedure 29(c)(5), *Amici Curiae* state that no party's counsel in this case authored this brief in whole or part and that no entity or person, aside from *Amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for both parties have consented to submission of this brief.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than 3,000,000 U.S. businesses and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing *amicus curiae* briefs in cases implicating issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12,000,000 individuals, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across America.

The Association of Home Appliance Manufacturers ("AHAM") is a not-for-profit trade association representing over 150 manufacturers of major, portable, and floor care residential appliances. Electrolux is a member of AHAM. The home appliance industry, with approximately 65,000 direct industry employees in the United States, contributes significantly to American jobs and economic security.

## ARGUMENT

Guided by the anachronistic view that all doubts must be resolved "in favor of certifying the class," the district court vaulted over outcome-determinative differences among the facts and laws underlying Plaintiffs' claims and certified a Rule 23(b)(3) class of tens of thousands of mostly unharmed purchasers of Electrolux-built front-loading clothes washers. Plaintiffs alleged—and the district court readily accepted—that the Electrolux washers share a defect that renders them more likely than top-loading washers to develop mold and odors, which caused all purchasers to overpay for their appliances, regardless of whether the individual purchaser ever has experienced or will experience any manifestation of the alleged defect. The district court ignored Electrolux's evidence showing that the vast majority of class members would be unable to assert or prevail on any claim against Electrolux because more than 99% never experienced any mold or odors, many purchasers knew of the widely-publicized potential for odors before purchase, and among those purchasers who did have a problem, many received a free warranty replacement of the allegedly defective part.

The decision below, if permitted to stand, would substantially lower the bar to certification, directly contravening the Supreme Court's recent pronouncements in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-35 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011). The order would, in effect,

allow the plaintiffs' trial bar to replace satisfactory warranty programs with litigation. *Amici* urge this Court to review this significant case and ensure compliance with *Comcast* and *Dukes*.

## I. INTERLOCUTORY REVIEW IS NECESSARY TO ENSURE THAT ELEVENTH CIRCUIT COURTS DO NOT APPLY OBSOLETE, PRE-*DUKES* RULE 23 STANDARDS

### A. The District Court Fundamentally Misunderstood Its Role in Determining Whether to Certify a Class Under Rule 23

To ensure that class actions remain "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Comcast*, 133 S. Ct. at 1431 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)), the Supreme Court recently has made clear that Rule 23 "imposes stringent requirements for certification that in practice exclude most claims," *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (emphasis added). A plaintiff "must affirmatively demonstrate his compliance" with each Rule 23 requirement and do so with "evidentiary proof." *Comcast*, 133 S. Ct. at 1432 (quoting *Dukes*, 131 S. Ct. at 2551). Courts must then "rigorous[ly]" scrutinize that evidence to determine if each requirement is met, even if doing so requires resolution of legal and factual issues that touch on the merits. *Id.* Courts may not employ "speculative" or "arbitrary" methods to resolve factual disputes on a classwide basis, nor may they rely on "assurance[s]" that issues can be resolved with common evidence. *Id.* at 1433-34.

Rather than follow these principles, the court reverted to the antiquated notion that "[t]he court resolves doubts related to class certification in favor of certifying the class."[2] (Order 12 (citing two pre-*Dukes* decisions).) The court also followed the principle that, "where the parties offer conflicting accounts of the facts and events in question," the court must "draw[] all inferences and present[] all evidence in the light most favorable to Plaintiffs." (Order 2; *see id.* at 12.)

Such a permissive standard runs contrary to the Supreme Court's recent pronouncements that "[a]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." *Dukes*, 131 S. Ct. at 2551. A presumption in favor of certification impermissibly shifts Rule 23 from a "strict burden of proof" to one in which the defendant is charged with proving that the proposed class does not comply with Rule 23. *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013) (district court abused its discretion when it "applied a less demanding standard whereby '. . . doubts may be resolved in favor of certification'"). The district court's presumption is clearly erroneous and conflicts with decisions from other circuits.[3]

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[2] Other courts in this Circuit recently have made the same legal error. *See, e.g.*, *Hughes v. Judd*, No. 8:12-cv-568-T-23MAP, 2013 WL 1821077, at *20 (M.D. Fla. Mar. 27, 2013), *report and recommendation adopted as modified*, No. 8:12-cv-568-T-23MAP, 2013 WL 1810806 (M.D. Fla. Apr. 30, 2013).

[3] *E.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008) (rejecting district court's finding that "the court should err in favor of allowing the

This Court should grant interlocutory review to clarify the certification standard and to ensure that the Supreme Court's mandates are followed.

### B. The District Court Eviscerated *Dukes* and *Comcast*'s "Rigorous Inquiry" Requirements for Rules 23(a) and 23(b)(3)

Ignoring the lessons of *Dukes* and *Comcast* (and, indeed, never even citing *Comcast*), the district court repeatedly avoided a rigorous analysis of those legal and factual issues relevant to the Rule 23 determination. Instead, the court accepted Plaintiffs' factual allegations as true and resolved all "disputed" questions of fact—even those Plaintiffs disputed without evidence—in favor of certification.

For instance, Plaintiffs presented no evidence of classwide injury, nor did they refute Electrolux's evidence showing that less than 1.0% of all purchasers requested warranty service for any mold or odor issue.[4] The court merely credited Plaintiffs' allegation that all purchasers were injured at the point of sale because they paid "too much" for a washer with a latent defect, even those purchasers who used their washers for years without any problem and who no longer own the washer and have zero risk of future harm. The court reasoned that the injury and

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class" and holding that "the court should not suppress 'doubt' as to whether a Rule 23 requirement is met"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006) ("[I]t is *not the defendant* who bears the burden of showing that the proposed class *does not comply* with Rule 23, but that it *is the plaintiff* who bears the burden of showing that the class *does comply* with Rule 23.").

[4] Perhaps even more remarkable, Plaintiffs conceded that they are subject to unique breach-of-warranty defenses because neither timely requested warranty service.

causation elements were common to all buyers because "Plaintiffs' assert . . . that the inherent defect reduced the value of the Washing Machines by inevitably causing mold and mildew problems." (Order 40.) There is no evidence of the alleged "inevitability," and the court never inquired as to what evidence Plaintiffs had to support their bald assertion that all buyers overpaid for their washers.

Nor did the district court inquire into whether Texas or California recognizes an injury theory for latent product defects. Had the court engaged in such a legal analysis, it would have found that California allows a latent defect to support a warranty or consumer-fraud claim only if it is "substantially certain to result in malfunction during the useful life of the product," *Am. Honda Motor Co. v. Super. Ct.*, 132 Cal. Rptr. 3d 91, 98 (Cal. Ct. App. 2011), and that Texas law forbids such claims if the injury "might never happen," *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 306 (Tex. 2008). Plaintiffs never submitted any evidence showing that all washers were substantially likely to develop mold or odor problems. This absence of evidence prevents them from being able to prove injury, causation, and damages on a classwide basis—making the court's analysis a paradigmatic example of the very sort of "arbitrary" and "speculative" approach the Supreme Court has rejected. *Comcast*, 133 S. Ct. at 1433; *see Dukes*, 131 S. Ct. at 2551.

Beyond this, whether a particular buyer overpaid for a washer must necessarily be answered on a purchaser-by-purchaser basis. For instance, a

purchaser who used the machine trouble-free for several years and then left it behind when she moved received precisely what she bargained for. *See In re Canon Cameras Litig.*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) (purchaser of a camera "that never malfunctions over its ordinary period of use cannot be said to have received less than what he bargained for"). This is true even if a small percentage of other owners experienced an odor problem. *See O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009) (rejecting argument that owners did not receive benefit of bargain for non-malfunctioning cribs; bargain "did not contemplate the performance of cribs purchased by other consumers"). Determining which buyers did or did not receive what they bargained for turns on individual facts.

The district court never explained how the value of a washer that operated perfectly could be decreased by some other owner's unique experience. Nor did the court explain how a buyer who bought an Electrolux washer with actual knowledge that front-loading washers have a slightly increased chance of developing noticeable moldy odors (*e.g.*, after reading any one of multiple *Consumer Reports* or other popular press articles), or who experienced odors but already received a free component replacement that resolved the issue, was harmed, much less how all buyers could have been harmed in the same way.

*Comcast* makes clear that such a "speculative" method of proof of common injury cannot support class certification, 133 S. Ct. at 1432-33, while *Dukes* makes clear that courts may not use Rule 23 to expand class members' substantive rights, 131 S. Ct. at 2561. The district court erred in ignoring these teachings.

## II. LEFT UNTOUCHED, THE DISTRICT COURT'S DECISION WILL ADVERSELY AFFECT MANUFACTURERS AND BUSINESSES

The decision below harms manufacturers and other product sellers, which are increasingly targeted by class-action lawsuits. Under it, classes may be certified whenever a few consumers assert that a mass-produced product did not meet their expectations—even if most buyers never experienced the alleged problem, or received free repairs to replace the allegedly defective component, or knew of the potential for problems before making their purchase decision. Such outcomes cannot be reconciled with the Supreme Court's admonition that Rule 23's "stringent requirements" "in practice exclude most claims." *Am. Express*, 133 S. Ct. at 2310.

Given the hydraulic pressure to settle created by an order certifying a massive no-injury class, defendants rely on courts to faithfully apply Rule 23 and to rigorously construe the plaintiffs' claims and evidence before determining that those claims are susceptible to classwide proof. When courts fail to discharge that duty properly, they deprive defendants of their basic due process right to present individual defenses to plaintiffs' claims.

## CONCLUSION

The Court should grant interlocutory review to clarify that the Rule 23 certification standard adheres to *Dukes* and *Comcast* and hold that classes may not be certified where they would consist almost entirely of uninjured persons.

Dated: November 1, 2013

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2013, the foregoing **Brief of *Amici Curiae* The Chamber of Commerce of The United States of America, The Association of Home Appliance Manufacturers, and The National Association of Manufacturers in Support of Electrolux Home Products, Inc.'s Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f)** was filed by hand with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit. I further certify that all counsel of record for the parties will be served via electronic delivery:

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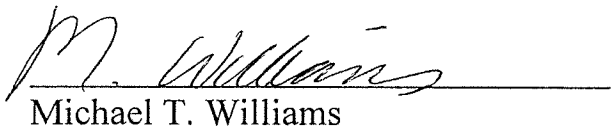

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