No. 20-8004

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BREANN HUDOCK, et al.,
Plaintiffs-Respondents,
v.

LG ELECTRONICS U.S.A., INC., BEST BUY CO., INC.,
BEST BUY STORES, L.P., BESTBUY.COM, LLC,
Defendants-Respondents.

On Appeal from the United States District Court
for the District of Minnesota, 0:16-cv-1220-JRT-KMM
Chief Judge John R. Tunheim

AMICUS BRIEF OF RETAIL LITIGATION CENTER, INC., CONSUMER TECHNOLOGY ASSOCIATION, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RULE 23(F) PETITION

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CORPORATE DISCLOSURE STATEMENT

Amici curiae certify that they have no outstanding shares or debt securities in the hands of the public, and they do not have a parent company. No publicly held corporation has a 10% or greater ownership in *amici curiae*.

/s/ Adam G. Unikowsky

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All parties consent to the filing of this amicus brief.[1]

STATEMENT OF INTEREST

The Retail Litigation Center, Inc. (the "RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 150 judicial proceedings of importance to retailers.

The Consumer Technology Association (CTA)® represents the U.S. consumer technology industry. CTA's membership is over 2000 American companies—80% of which are small businesses and startups. CTA also owns and produces CES®—the largest and most influential business event in the world.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

The Association of Home Appliance Manufacturers ("AHAM") represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's more than 150 members employ tens of thousands of people in the U.S. and produce more than 95% of the household appliances shipped for sale within the U.S. The factory shipment value of these products is more than $30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents 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. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Notably, *amici* are submitting this brief during the COVID-19 pandemic. Retailers, factories and global supply chains, including *amici's* members, are all

experiencing major disruptions as a result of the pandemic and the public health measures that are necessary to curb its spread.

Although *amici* are primarily focused on helping their members deal with the business exigencies presented by this unprecedented crisis, they are also participating in pending litigation that raises issues of greatest importance. Such litigation includes certain class action cases that present the highest concern, given that businesses, including *amici*'s members, are almost always defendants in class action litigation. Moreover, the uncertain nature of the current economy makes many businesses financially vulnerable and therefore even more susceptible to the unfair settlement pressure caused by the improper certification of massive classes. *Amici*'s members—and indirectly the customers, employees, and communities that depend on them—thus have a strong interest in ensuring that the rules governing class certification are applied properly.

SUMMARY OF ARGUMENT

The Court should grant the Rule 23(f) petition in view of the outsized importance of this case. The District Court certified a national class, in violation of long-established constitutional choice of law principles and settled requirements governing a plaintiff's burden to prove that Rule 23 has been satisfied. By doing so, the District Court issued an engraved invitation for class-action lawyers from across the nation to file lawsuits in the District of Minnesota on behalf of putative multistate

classes whose members lack any connection to the forum. The District Court procedurally and substantively weakened the Rule 23 standard for class certification, making it far too easy to certify a class presenting a host of highly individualized issues of fact and law. And the District Court's incorrect choice-of-law ruling ensured that the resultant class—which should never have been certified in the first place—will be far too big. As such, the District Court's decision will put enormous settlement pressure on defendants already reeling from the effects of COVID-19, even when plaintiffs' claims are meritless. This Court should grant the Rule 23(f) petition, reverse the District Court's decision, and ensure that the legal standard for class certification in this circuit aligns with the legal standard nationwide.

ARGUMENT

As Defendants' Rule 23(f) petition persuasively explains, the District Court's class certification decision contains three serious errors. It applies a choice-of-law-analysis that defies the precedent of this Court and the Supreme Court; permits plaintiffs to obtain class certification based on allegations rather than evidence; and strips defendants of their right to argue that class members did not rely on their purportedly fraudulent statements. The District Court's decision will cause significant harm to *amici*'s members and should be reversed.

I. The District Court's Class Certification Analysis Is Incorrect.

The District Court ruled that it was bound at class certification to accept the truth of plaintiffs' allegations, and disregarded the defendants' evidence establishing individualized issues of fact and law. By doing so, the District Court weakened the legal standard for class certification, both substantively and procedurally. Under the District Court's legal standard, a class-action lawyer can obtain class certification in virtually every consumer class action merely through artful pleading.

To obtain class certification, a plaintiff bears the burden of proving that all requirements of Rule 23 are satisfied, including—among others—that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To certify a damages class, the plaintiff bears the additional burden of showing, among other things, that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

Making this showing is difficult both procedurally and substantively—which is as it should be, given the high stakes of class certification. It is difficult procedurally because plaintiffs must *prove*—not only plead—that Rule 23's requirements are satisfied: "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v.*

Dukes, 564 U.S. 338, 350 (2011). Plaintiffs bear that burden even if proving class certification entails proving all or most of their underlying merits case: "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* at 351

It is difficult substantively because plaintiffs must prove not only that common questions *exist*, but that they *predominate*. That requirement has particular bite in the context of consumer class actions like the one at issue here. In such cases, class counsel is almost always able to come up with *some* question common to the class under Rule 23(a)(2), such as whether a particular statement by the defendant was false, or whether the defendant had a particular mental state. But it is more difficult to show that common questions *predominate*. Consumer fraud lawsuits will frequently present highly individualized issues, such as whether particular consumers relied on allegedly fraudulent statements. The presence of those issues may preclude a showing of predominance, even if class counsel can satisfy the threshold requirement of showing a question common to the class.

The District Court's decision fails to follow both the procedural requirements and the substantive requirements of Rule 23. As the Rule 23(f) petition recounts, the District Court certified the class based solely on Plaintiffs' *allegations* that there were questions common to the class, in direct contravention of Supreme Court precedent establishing that allegations are insufficient at the class certification stage.

Pet. 15-19. That procedural error was compounded by a second, substantive error. As a matter of common sense, some—probably most—class members do not understand the concept of a "refresh rate," let alone buy a television on the basis of statements about a "refresh rate." Whether any class member did rely on any such statements is an individualized inquiry that should have foreclosed class certification. Yet the District Court nonetheless certified the class, on the basis of its incorrect view that the defendants could be liable to a class member even if the class member did not rely on the allegedly fraudulent statements. Pet. 19-23.

The effect of the District Court's two legal errors is that sophisticated class counsel can obtain class certification in virtually any consumer class action merely by drafting a properly-written complaint. Class counsel merely has to allege all class members bought the same item that was advertised in a particular way. They do not have to *prove* these allegations to obtain class certification; nor do they even have to *allege* that all class members relied on the allegedly false advertising. This is far too weak a standard for class certification.

Making matters worse, not only did the District Court err in certifying the class at all, but the class it did certify was far too big. The District Court concluded that anyone who bought a television anywhere in the country could assert a claim under Minnesota or New Jersey law. As the petition explains, that ruling is clearly wrong. Pet. 8-15. Contrary to the District Court's reasoning, the mere fact that a

court may have personal jurisdiction over the parties does not establish that it is constitutional to apply a particular state's law. Rather, the state must have "a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

A court must conduct an individualized choice-of-law analysis for every putative class member—and that analysis will inevitably differ for different putative class members. As the District Court recognized, one factor in choice-of-law analysis is the parties' expectations. Add. 21, 26. In its analysis of that factor, the District Court asserted: "[T]o the extent that a consumer contemplated potential choice-of-law issues when purchasing a television—a generous assumption—they likely thought that either the law of the state of purchase, the law of Minnesota, where Best Buy is headquartered, or perhaps the law of New Jersey, where LG is headquartered would apply." Add. 22. That analysis was incorrect. The District Court should not have addressed what a generic "consumer" would "likely" have "thought," but what specific consumers actually did think. Because that analysis differs from consumer to consumer, common issues do not predominate and out-of-state plaintiffs should not be in the class.

The District Court's decision also violates the Rules Enabling Act. The Rules Enabling Act bars courts from using the class-action device in a way that would

"abridge … any substantive right" of any party. 28 U.S.C. § 2072(b). If class members had brought individual lawsuits, then the defendants could have made individualized arguments that the applicable law for a particular plaintiff was a different state's law—and asserted a defense to liability based on that state's law. But the District Court eschewed that analysis, instead focusing on speculation about a generic consumer. As a result, the District Court certified a class composed of consumers from all 50 states—without regard to the expectations of any, let alone all, class members.

In sum, this class should not have been certified at all—even as to Minnesota or New Jersey residents. Yet as a result of the District Court's multiple legal errors, the District Court certified a *nationwide* class on the question whether the defendants' alleged statements about "refresh rates" violated Minnesota or New Jersey law. Remarkably, that class that includes consumers who have no idea that their television purchases had any connection to Minnesota or New Jersey and who have no idea what a "refresh rate" means.

II. The District Court's Decision Will Have Harmful Consequences.

The District Court's decision will cause substantial harm to Minnesota corporations and parties that do business with them. Henceforth, plaintiffs nationwide who have any claim against a company that makes or sells consumer products that is incorporated in, or has its principal place of business in, Minnesota

will flock to the District of Minnesota to file suit. Under the District Court's reasoning, classes will be certified merely based on the allegation that multiple putative class members bought the same item that was the subject of purportedly false advertising—regardless of whether those allegations are proved, and regardless of whether the plaintiffs relied on that advertising. Worse yet, *nationwide* classes will be certified, thus obviating the need for plaintiffs to prove their claims under the laws of their home states.

If that outcome transpires, defendants will inevitably be forced to settle weak claims. It is well known that when a class is certified, a defendant may be "coerce[d] ... into settling on highly disadvantageous terms regardless of the merits of the suit." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011). Class certification "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017) (noting that "an order granting [class] certification may force a defendant to settle rather than run the risk of potentially ruinous liability" (quotation marks, ellipses, and brackets omitted)).

This problem is worse when, as here, nationwide classes are certified. The larger the class, the larger the potential judgment. Thus, even for *very* weak claims, the value of a judgment involving a nationwide class can be so staggering that a

defendant will be forced to settle. And the problem is yet worse when a defendant faces financial struggles. A financially stable company may be willing to defend against an abusive class action despite the small risk of an adverse judgment, so as to avoid the risk of copycat class actions. But a financially struggling company may not be willing to face the risk of a judgment that could force it into bankruptcy.

In the current environment, where so many of *amici*'s members and other companies face financial hardship, the District Court's decision creates a perfect storm—it weakens the standard for class certification at a time when businesses are least able to defend against a class action suit after the class is certified. The Court should grant review and reverse this harmful decision.

CONCLUSION

This Court should grant the Rule 23(f) petition.

Dated: April 20, 2020

Respectfully Submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), and Local Rule 31.1(c) and 28.3(d), the undersigned counsel for *amici curiae* certifies as follows:

1. I am a member of the bar of this Court.

2. This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 2,506 words, excluding the parts of the brief exempted by Rule 32(f).

3. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

4. A virus detection program, Microsoft Security Essentials, has been run on the file and no virus was detected.

I understand that a material misrepresentation may result in the Court's striking the brief and imposing sanctions. If the Court so desires, I will provide an electronic version of the brief and/or copy of the work or line print-out.

Dated: April 20, 2020

Respectfully Submitted,

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that that on April 20, 2020 I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: April 20, 2020

/s/ Adam G. Unikowsky