**NO. 15-11455-E**

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

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**ROBERT BROWN, et al.,**

**Plaintiffs-Appellees,**

**v.**

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

**Defendant-Appellant.**

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

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# 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 DEFENDANT-APPELLANT

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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 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 named in Appellant's Certificate of Interested Persons and Corporate Disclosure Statement.

Dated this 22nd day of June, 2015.

*s/Michael T. Williams*
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Attorney for *Amici Curiae*

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## INTERESTS OF THE AMICI CURIAE

*Amici Curiae* respectfully submit this brief in support of Defendant-Appellant Electrolux Home Products, Inc.[1] The *Amici* together are leaders in representing vast and varied business interests across the United States. They have a strong interest in ensuring that 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." (Doc. 201 - Pg. 12.) By resolving doubts in favor of certifying a class, the district court abdicated its responsibility to ensure that litigation of class claims does not violate due process. If courts in this Circuit were to follow the district court's permissive standard, they could certify classes filled with unharmed purchasers of consumer products who could not maintain suit on their own behalf, impose unfair defense costs and settlement pressures on the *Amici*'s members—who are routinely targeted in no-

[1] In compliance with Federal Rules of Appellate Procedure 29(a) and 29(c)(5), *Amici Curiae* state that all parties in this action have consented to the filing of this brief, 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.

injury class actions like this one—and increase their exposure to massively overbroad class claims for money damages.

The potential adverse impact of the decision below extends beyond Electrolux's exposure in this action. There is an immediate risk that this certification decision could be used to justify certification of classes that include uninjured consumers in numerous lawsuits both within and beyond the home appliance industry. If left undisturbed, the decision below would encourage the certification of such artificially constructed classes throughout courts in the Eleventh Circuit. Accepting this precedent would have significant and deleterious impact on the national business activities of *Amici*'s members through an unwarranted increase in their legal and business costs and by creating disincentives that will chill development of innovative new technologies that accomplish important national public policy goals.

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. 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 Supreme Court–rejected view that all doubts must be resolved "in favor of certifying the class," the district court disregarded 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 accepted—that the Electrolux washers share a defect that

renders them more likely than top-loading washers to develop mold and odors. As a result of this alleged latent defect, Plaintiffs claim that all buyers overpaid for their washers, regardless of whether a given buyer's washer develops mold or odor problems. The district court ignored Electrolux's evidence showing that (i) the vast majority of class members would be unable to assert or prevail on any claim against Electrolux because more than 99 percent never reported any mold or odor problem, (ii) many buyers knew of the widely-publicized potential for odors before purchase, and (iii) among those buyers who did have a problem, many received a free warranty replacement of the allegedly defective part. (Br. of Appellant at 11.)

The district court's decision, if permitted to stand, would substantially lower the bar to certification, directly contravene the Supreme Court's 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), and violate constitutional due process principles. The order's pro-certification standard would allow massively overbroad and expensive, one-size-fits-all class litigation to replace satisfactory warranty programs. And the lawyers are the only persons poised to benefit from the district court's decision. Empirical research has shown that the benefits of class actions for consumers have been vastly overstated by their proponents and that such actions can cause harm in the form of increased prices.

*Amici* urge this Court to avoid those outcomes by vacating the decision of the district court.

## I. THE DISTRICT COURT'S DECISION TO RESOLVE DOUBTS IN FAVOR OF CERTIFYING THE CLASS CONFLICTS WITH SUPREME COURT PRECEDENT AND SHOULD BE REVERSED

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 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 rigorously scrutinize that evidence to determine if each requirement is met, even if doing so requires preliminary 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. "What matters to class certification [is] the capacity of a classwide proceeding to generate common

answers apt to drive the resolution of litigation." *Dukes*, 131 S. Ct. at 2551 (quotation marks omitted).

Rather than follow these principles, the court below reverted to the Supreme Court–rejected notion that "[t]he court resolves doubts related to class certification in favor of certifying the class."[2] (Doc. 201 - Pg. 12 (citing two pre-*Dukes* decisions).) The court—which never even cited *Comcast*—also followed the view 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." (Doc. 201 - Pg. 2; *see id.*at 12.) That permissive standard would turn the Supreme Court's certification teachings on their heads. As the Court held in *Dukes*, "[a]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." 131 S. Ct. at 2551.

*Comcast* and *Dukes* do not demand formalistic adherence to mere procedural niceties. The rigorous analysis mandated by the Court, *Comcast*, 133 S. Ct. at 1432, is rooted in fundamental principles of constitutional due process. Rule 23 cannot be used to paper over material deficiencies in putative class members'

[2] Other courts in this Circuit 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).

claims in the service of "judicial economy" or "efficient" resolution of disputes.[3] But that is precisely what the lower court did here, by accepting Plaintiffs' factual allegations as true and resolving 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 only 0.2% of all washer buyers made a service call complaining of mold or odor issues.[4] The court credited Plaintiffs' bald allegation that all buyers were injured at the point of sale because they paid "too much" for a washer containing a latent defect—even those buyers who used their washers for years without any problem and who no longer own the washer and thus have zero risk of future harm. (Doc. 201 - Pg. 40.) The court reasoned that the injury and 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." (*Id.*) All of the available evidence contradicts this alleged "inevitability," and the court never inquired as to the evidentiary basis for Plaintiffs' claim that all buyers overpaid for

[3] *See, e.g.*, *Dukes*, 131 S. Ct. at 2561 (rejecting proposal for "trial by formula" in lieu of class members' burden to prove their individualized claims because the Rules Enabling Act, 28 U.S.C. § 2072(b), forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right.").

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

their washers. Had the district court probed beyond Plaintiffs' allegations, it would have easily determined that there was no evidentiary basis for Plaintiffs' claim.

Nor did the district court inquire into whether Texas or California (where the named Plaintiffs live) recognizes an injury theory for latent, unmanifested product defects. Had the court done so, it would have found that California allows a latent defect to support a warranty or consumer-fraud claim only if the alleged defect 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 evidence showing that all washers were substantially likely to develop mold or odor problems. That lack of evidence should have prevented the district court from finding that Plaintiffs could prove at trial the fact of injury, causation, and damages on a classwide basis. Rather, because it fails to analyze the elements of the claims, or Plaintiffs' classwide evidence (or lack thereof) for each element, the district court's analysis epitomizes the type of "arbitrary" and "speculative" certification 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 clothes washer must be answered on a purchaser-by-purchaser basis. For instance, a purchaser who used

the machine trouble-free for several years before leaving it behind when she moved to a new home received what she bargained for. *See In re Canon Cameras Litig.*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) (buyer 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"). Here, determining which buyers did or did not receive what they bargained for turns on individual facts.

The district court did not even offer a hypothesis as to how the value of a washer that operated perfectly could be decreased by some other owner's uniquely troubled experience. Nor did the court explain how a consumer 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 who received a free part 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 both of those teachings.

By failing to grapple with deficiencies in proof of classwide impact and instead resolving doubts in favor of certifying a class, the district court abdicated its responsibility to ensure that litigation of claims on behalf of a class does not violate due process. The district court put its thumb on the scale in favor of allowing claims to go forward on behalf of putative class members with doubtful Article III or statutory standing. Individuals who would not be able to pursue a claim in their home state's courts—such as the Texas class members pursuing claims for unmanifested product defects—will be permitted to pursue such claims in federal court through improper use of the Rule 23 procedure. The overwhelming majority of washer buyers who have suffered no injury—because their washers never developed odors—will be lumped with the tiny fraction of customers who did lodge such complaints. This result raises serious constitutional concerns and should be rejected.

This Court is not the first to face a district court decision that has improperly relaxed Rule 23's stringent requirements. Other appellate courts around the country have reviewed district court opinions that similarly failed to apply standards treating class actions as the exception rather than the rule. This Court should

follow the sound actions of its sister circuits cited below in reversing these flawed decisions.

For instance, in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013), the Tenth Circuit concluded the district court abused its discretion when it "applied a less demanding standard whereby '[c]lass certification requirements are liberally construed, and doubts may be resolved in favor of certification.'" The Tenth Circuit reasoned that "[r]elaxing and shifting Rule 23(a)'s 'strict burden of proof'" constituted an abuse of discretion. *Id.* The Third and Fourth Circuits have come to the same conclusion. *See EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014) (reversing district court's decision to certify, concluding the district court abused its discretion because "it failed to rigorously analyze whether the administrative burden of identifying class members . . . would render class proceedings too onerous" and because "the court improperly lowered the burden of proof the plaintiffs must satisfy to demonstrate the prospective classes' compliance with Rule 23(a)'s commonality requirement."); *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 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."). This Court should follow the lead of its sister circuits in these cases and the Supreme Court's clear teachings in *Dukes* and *Comcast*.

For all these reasons, this Court should reverse the trial court's improper presumption in favor of class certification.

## II. CERTIFICATION OF NO-INJURY CLASS ACTIONS WILL CHILL INNOVATION AND HARM BUSINESSES AND CONSUMERS WITHOUT PROVIDING ANY COMENSURATE PUBLIC BENEFIT

Overbroad and insupportable class certification orders like the one here dampen innovation while imposing undue burdens, waste, and costs on businesses and consumers alike. The ruling below, if affirmed, effectively would impose a tax on business innovation and punish Electrolux for compliance with government regulations. Further, no-injury certifications like this one harm consumers by imposing high transactional costs on businesses and class members while yielding little benefit, and those costs get passed on to consumers in the form of higher prices for future products and services. Recent empirical research and the outcomes of two similar class actions against other manufacturers confirm the economic harm caused by such overbroad certification rulings.

### A. Certification of No-Injury Classes Dampens Business Innovation

Across American industries, companies now spend $2 billion on class-action

defense each year. Carlton Fields Jorden Burt, *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation,* at 3, http://ClassActionSurvey.com/. Fifty-four percent of major companies are currently engaged in class-action litigation, an increase from 2012 and 2013. *Id.* at 6. And consumer fraud class actions, like this one, are the most prevalent type of class action. *Id.* at 7. If the Court were to allow the certification to stand, it would encourage more no-injury class actions in this Circuit and increase the associated litigation taxes—increased burdens and costs—on business and consumers alike.

This litigation presents a particularly stark example of the threat that no-injury class actions present to American industries. In just this one example in the home appliance industry, the plaintiffs' bar already has filed more than two dozen consumer class actions in federal courts against all the manufacturers and retailers of the leading brands of front-loading washers—Bosch, GE, Electrolux, LG, Samsung, Sears, and Whirlpool—alleging similar mold and odor defects.[5] Based

[5] *See, e.g., Leonard v. Sears, Roebuck & Co.*, No. 1:06-cv-07023 (N.D. Ill. filed Dec. 19, 2006) (Kenmore washers); *Seratt v. Sears Roebuck & Co.*, No. 1:07-cv-00412 (N.D. Ill. filed Jan. 22, 2007) (Kenmore washers); *Glazer v. Whirlpool. Corp.*, Case No. CV 08 661066 (Ohio Comm. Pleas Ct., Cuyahoga Cty., filed June 2, 2008) (Whirlpool washers); *Dunham v. LG Elecs. USA, Inc.*, No. 2:08-cv-01888-FSH-PS (D.N.J. filed April 18, 2008) (LG washers, consolidated with *Harper, infra*); *Harper v. LG Elecs. USA, Inc.*, No. 2:08-cv-00051-FSH-PS (D.N.J. filed Jan. 4, 2008) (LG washers); *Napoli v. Sears, Roebuck and Co.*, No. 1:08-cv-

only on isolated complaints about musty odors in the machines, these cases treat technological innovations designed to accomplish important public policy goals as product defects. All of the certified and proposed classes across the country pursue theories of liability on behalf of all purchasers of the clothes washers, including those consumers who claim no injury.

During the past two decades, the appliance industry implemented innovations in clothes washer designs in response to federal regulations that

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01832 (N.D. Ill. filed March 31, 2008) (Kenmore washers); *Cobb v. BSH Home Appliances*, No. 8:10-cv-00711-DOC-AN (C.D. Cal. filed June 3, 2010) (Bosch and Siemens washers); *Fishman v. Gen. Elec. Co.*, No. 2:12-cv-00585-WJM-CLW (D.N.J. filed Jan. 31, 2012) (GE washers); *Durso v. Samsung Elecs. Am.*, No. 2:12-cv-05352-WJM-MF (D.N.J. filed Aug. 24, 2012) (Samsung washers); *Spera v. Samsung Elecs. Am.*, No. 2:12-cv-05412-WJM-MF (D.N.J. filed Aug. 28, 2012) (Samsung washers); *Chowning v. Samsung Elecs. Am.*, No. 2:12-cv-05440-WJM-MF (D.N.J. filed Aug. 29, 2012) (Samsung washers); *Huffman v. Electrolux N. Am., Inc.*, No. 3:12-cv-02681-JGC (N.D. Ohio filed Oct. 26, 2012) (Frigidaire washers). Nine more cases—*Gardner v. Whirlpool Corp.*, No. 1:08-cv-405 (W.D. Mich. filed May 1, 2008); *Beierschmitt v. Whirlpool Corp.*, No. 1:08-cv-03177-JBS-JS (D.N.J. filed June 19, 2008); *Sandholm-Pound v. Whirlpool Corp.*, No. 1:08-cv-04098-JBS-JS (D.N.J. filed Aug. 13, 2008); *Seeherman v. Whirlpool Corp.*, No. 1:08-cv-07289-LAK (S.D.N.Y. filed Aug. 18, 2008); *Dijols v. Maytag Corp.*, No. 0:09-cv-61353-WPD (S.D. Fla. filed Aug. 28, 2009); *Cloer v. Whirlpool Corp.*, No. 1:09-cv-11707-MLW (D. Mass. filed Oct. 14, 2009); *Scott v. Whirlpool Corp.*, No. 4:09-cv-00002-D (E.D. N.C. filed Jan. 7, 2009); *Klein v. Whirlpool Corp.*, No. 3:10-cv-02019-RDM (M.D. Penn. filed Sept. 29, 2010); and *Martin v. Whirlpool Corp.*, No. 1:13-wp-65000-CAB (N.D. Ohio filed Aug. 5, 2013)—involve Whirlpool washers and have been consolidated by the United States Panel on Multidistrict Litigation with the *Glazer* action. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, Case Nos. 1:08-wp-65000 & MDL-2001 (N.D. Ohio).

addressed ambitious energy and water conservation goals.[6] Achieving the U.S. Department of Energy's ("DOE") resource efficiency targets and attaining the anticipated individual and societal benefits required groundbreaking innovations by appliance manufacturers. Electrolux and the other manufacturers met that challenge by turning, in large part, to front-loading designs, which had not been commonly used in the United States before the year 2000, because they consume far less water and energy than conventional top-loading machines.

But Plaintiffs here and in other front-loading washer cases argue that the innovative features that foster resource efficiency goals—in particular, use of less water in front-loading machines and a tight rubber seal to prevent water leaks from the machine's front door—are design defects because of the potential to result in complaints from a small minority of purchasers about laundry residue buildup, stagnant water, and musty odors.

By certifying a class of plaintiffs making those arguments, the lesson of the decision below is that routine levels of complaints about a new product can spawn ruinous class-action exposure. Yet a small incidence of defects and complaints is expected for any mass-produced product. For example, the October 2005 issue of *Consumer Reports* publishes the percentage of five-year-old products with and

[6] U.S. Dept. of Energy, *Residential Clothes Washers*, http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/39 (last visisted June 21, 2015).

without a warranty that have ever been repaired or had a serious problem and shows that every product has some percentage of units that require service during that time.[7]

Because technology rapidly improves in an iterative fashion and new products are continually emerging, it is "impossible for developers to anticipate and design against all risks." Seldon J. Childers, *Don't Stop the Music: No Strict Products Liability for Embedded Software*, 19 U. Fla. J.L. & Pub. Pol'y 125, 172 (2008). Thus, businesses routinely address complaints about new products and services by introducing new and improved designs, updates, and enhancements.

Under the district court's reasoning, however, any product or service that has some rate of customer complaints could justify a massive class action if plaintiffs' lawyers can identify a few customers who are dissatisfied. If the certification decision below were good law, any innovator that failed to achieve the impossible—a 0.0% rate of complaints for a new or improved product or service—can expect that any complaints that do occur will provide a basis for class claims.

Innovation—the end goal of research and development efforts—is important to all sectors of the United States economy. The social benefits from innovative new technology far exceed the private gains to the companies that develop them,

[7] Consumer Reports, "*Repair it or Replace it?*", Oct. 2005, at 29.

making people more efficient, more productive, safer, and healthier.[8] For these reasons, current government policy fosters a business environment that promotes technological innovation, invention, and creativity.[9] If innovators are exposed to the risk that uninjured consumers will be aggregated into certified class actions that characterize innovations as actionable defects, breaches of warranty, or statutory violations, the threat of liability exposure decreases businesses' incentive to explore and implement useful and beneficial innovations that promote economic growth. *See, e.g.*, Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 Vand. L. Rev. 257, 287-88 (2013) (noting that "expanding the scope of products liability should decrease economic activity such as production, employment, innovation, and business openings"). And the enormous cost of defending class actions (see Part II.C *infra*) means that more money will be invested in litigation defense while less money is available for innovation.

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[8] *See* F.T.C., *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* 1 (Oct. 2003), available at http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[9] WhiteHouse.gov, Issues: Technology, http://www.whitehouse.gov/issues/technology (last visited June 21, 2015) (setting forth the government's initiatives to promote technology and innovation); WhiteHouse.gov, *A Strategy for American Innovation: Securing Our Economic Growth and Prosperity*, http://www.whitehouse.gov/innovation/strategy (last visited June 21, 2015).

### B. Empirical Research Shows That Consumers Do Not Benefit From Overbroad Certification Rulings Like the District Court's Order

Adding to the irrational disincentives to business innovation and the unjustified liability exposures are the illusory benefits to consumers of such overbroad class certification rulings. In an effort to move the debate about whether class actions help or hurt consumers beyond competing anecdotes, in December 2013 the Chamber partnered with law firm Mayer Brown LLP to bring objective evidence to the discussion. The Chamber's study[10] is an empirical analysis of a neutrally-selected sample set of 148 putative consumer and employee class actions filed in or removed to federal court in the calendar year 2009. The study's conclusion can be boiled down to one sentence: "The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys." Chamber Study at 2.

The Chamber Study analyzes and discusses several pieces of evidence to support its conclusion that class-action litigation benefits attorneys more than it

[10] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, available at https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf (last visited June 21, 2015) ("Chamber Study").

benefits plaintiffs and class members.[11] Most significant is the net transfer of money from corporate defendants to plaintiffs' lawyers. The study concludes that because class-action plaintiffs' lawyers commonly pursue overbroad class allegations as a tool to increase settlement leverage on the defendant, class actions are "almost always resolved on a claims-made basis, and the actual amount of money delivered to class members in such cases almost always is a miniscule percentage of the stated value of settlement." *Id.* at 7. The Chamber Study shows class actions disproportionately allocate funds to attorneys' fees. *Id*. at 10-12.

The same concerns are present here. The district court's certification order—which sweeps in unharmed washer buyers, who are the overwhelming majority of purchasers, along with the tiny fraction of buyers who may be able to show harm—encourages more class litigation, market inefficiencies, and wasteful transactional costs like those revealed in the Chamber Study.

### C. Overbroad Class Certifications Negatively Affect Consumers by Diminishing Business Investment and Increasing Prices

If left undisturbed, the district court's decision will sanction the certification of inflated no-injury classes. In this regard, acceptance of the district court's order

[11] The Chamber Study's results are consistent with other empirical research regarding the results of product liability litigation. *See, e.g.*, A. Mitchell Polinsky and Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1469-70 & n.137 (2010) (estimating that plaintiffs in product liability actions receive less than half of every dollar paid by defendants).

would have major consequences because it will increase business costs, which will diminish the resources available to businesses to invest in new research and development and which will be passed along to future buyers in the form of a litigation tax on the prices for goods and services. Consumers will have to pay for the transaction costs that benefit lawyers by paying increased prices and accepting a slower pace of innovation. *See* Polinsky & Shavell, *supra*, at 1470-72.

That is because businesses defending no-injury class actions face a prisoner's dilemma whether to spend a substantial amount of money to either (a) settle the overbroad class claims or (b) try the class claims to verdict and accept the risk of potentially ruinous classwide liability. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). Further, the settlement pressure increases as the size of a plaintiff class grows. *See* Keith N. Hylton, *The Law and Economics of Products Liability*, 88 Notre Dame L. Rev. 2457, 2512-13 (2013). And where the class overwhelmingly consists of uninjured purchasers, settlement pressure yields a highly inefficient outcome because the settlement will be structured to distribute

the bulk of the proceeds to class counsel and uninjured class members, all at the expense of the few class members who may have stronger injury and liability claims.[12] Although such settlements attempt to account for the weakness of most class members' claims by providing negligible returns to individual class members, the aggregation of nominal individual settlements across an enormous class of mostly uninjured consumers still has the potential to yield a large sum.

These concerns are not speculative; they are being borne out in the front-loading washing machine cases against other manufacturers, which illustrate the problems created by the no-injury class actions that plague numerous product and services industries. For example, in *Cobb v. BSH Home Appliances Corp.*, the Ninth Circuit allowed a no-injury class certification ruling to stand when that court declined to hear BSH's Rule 23(f) petition, resulting in a multi-million-dollar, claims-made settlement by BSH of the certified class claims.[13] Conversely, Whirlpool Corporation—when faced with the prospect of either settling the class

[12] Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1139 (2005) ("Class certification also can lead to unfair treatment of plaintiffs. Class counsel, not their clients, call the shots; class members with more serious and complex claims may be simply 'lumped into' the class and not given the individualized attention needed to fully adjudicate their claims.").

[13] Emily Field, "Cash Settlement Proposed in BSH Moldy Washer Class Action," *Law360*, Dec. 15, 2014. There, each purchaser of a Bosch or Siemens brand front-loading washer was offered a $55 cash settlement payment regardless whether he or she ever experienced mold or musty odor in the machine.

claims against it or putting the plaintiffs to their burden of proof—took the unusual step of trying a certified class action to a jury in October 2014.[14] Had class certification properly been denied in *Cobb* and *Whirlpool*, those companies would not have been forced to spend the substantial amounts needed to properly defend themselves against the claims of uninjured consumers. And the taxpayers would not have had to pay for the court, its staff, and 12 jurors to give weeks of their time to hold a class trial in *Whirlpool*.

Regardless of which economically inefficient option a defendant company chooses, the litigation becomes a cost of doing business. *See* Hylton, *supra*, at 2459. And, to be sure, the cost of defending class actions is astronomical. *See 2015 Carlton Fields Jorden Burt Class Action Survey*, at 3. In most bet-the-company and high-risk class actions, the cost of defense exceeds several million dollars per year. *Id.* at 14. In fact, the cost to try a certified class action like this one easily exceeds the reasonable recovery for the less than 1% of class members who complained about mold or bad odors.

As a result of the enormous defense costs and the multiplier effect of potential classwide liability, no-injury class certifications create enormous pressure on the defendant to settle. To the extent that certification of classes filled with

[14] Sinduh Sundar, "Jury Vindicates Whirlpool in Moldy Washer Trial," *Law360*, Oct. 30, 2014. That case is *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, Case No. 1:08-wp-65000 (N.D. Ohio).

uninjured persons tends to coerce the defendant into a class settlement (and a larger, overbroad settlement class at that), the uninjured class members and plaintiffs' lawyers are likely to share in the settlement to the detriment of persons who can prove actual injury (i.e., those who can prove they experienced an odor problem in their washing machine). And the company cannot recover its substantial trial defense or settlement costs unless it raises prices of future products or services. Thus, consumers ultimately pay the litigation levy down the road.

Further, if a business makes the tough decision to try an overbroad class action, the class action may have another adverse effect on class members. That is, class counsel's decision to pursue inflated class claims, and the district court's decision to sanction those no-injury claims, may cause all class members to lose at trial, including the tiny fraction of purchasers who potentially could have won if they had pursued individual lawsuits or far narrower class claims.

The Supreme Court's teachings in *Dukes* and *Comcast*, as well as the lessons learned in *Cobb* and *Whirlpool*, should be heeded here. This Court should vacate the class certification order to prevent an unfair result in this case and to reduce the harm to businesses and consumers caused by no-injury class actions like this one.

## CONCLUSION

For all these reasons and those stated in Electrolux's brief, the Court should vacate the district court's decision and hold that classes may not be certified where they would consist almost entirely of uninjured persons.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 5,582 words.

s/ *Michael T. Williams*
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## 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 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.

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