Case No. 10-4188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GINA GLAZER and TRINA ALLISON,
Individually and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellees,

v.

WHIRLPOOL CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division
Case Nos. 08-wp-65000 and 09-wp-65001

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE

Pursuant to Sixth Circuit Rule 26.1, DRI - The Voice of the Defense Bar makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

/s/Mary Massaron Ross
Mary Massaron Ross (P43885)

DATED: May 18, 2012

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STATEMENT OF INTEREST

DRI is an international organization comprised of approximately 22,500 attorneys defending businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys around the globe. Therefore, DRI seeks to address issues germane to defense attorneys and to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system, and where the experience of its members may assist the Court in the decision-making process. This is such a case.

DRI members are regularly called upon to defend their clients in lawsuits brought as putative class actions, including cases where most or all of the putative class members have suffered no injury. DRI has a strong interest in assuring that courts follow the Supreme Court directive to conduct a "rigorous analysis" before certifying a class, which requires analyzing plaintiffs' claims under state law and determining if they require individualized proof such that class certification is not appropriate. Anything less will undermine defendants' right to defend against the claims of absent class members, which was one of the reasons that the Supreme Court recently reversed class certification in *Wal-Mart v.Dukes.* In addition, applying non-forum law to support certification in a way that grants rights where none exists undermines notions of federalism and the predictability that strengthens the rule of law. This, in turn, will increase defendants' exposure to "no injury" class actions regardless of forum law.

SUMMARY OF THE ARGUMENT

A useful litigation tool when class members are "united in interest," the class action mechanism results in needless and costly litigation when it grants uninjured persons a day in federal court to which they would not otherwise be entitled. Natasha Dasani, 75 Fordham L. Rev. 165, 167, *Class Actions and the Interpretation of Monetary Damages Under Federal Rule of Civil Procedure 23* (October 2006). Supreme Court and Sixth Circuit decisions have made it clear that Rule 23(a) and (b)(3) afford the parties important procedural protections that, if not enforced, will jeopardize their due process rights. The Panel ignored this by affirming a class without regard to the elements of proof required by forum law, thus relieving Plaintiffs of their burden to prove defect, proximate cause, and injury, and depriving Appellant of its right to defend the claims of absent class members by presenting defenses such as product misuse. In doing so, the Panel relied on out-of-state law to create a right of recovery where none exists, thus violating the Rules Enabling Act. This precedent-setting error is of exceptional public importance because it undermines the rule of law and increases defendants' class-action exposure by encouraging litigation regardless of whether there is any reasonable basis for liability under forum law.

ARGUMENT

I. This Court should ensure that the Panel's decision safeguards - not destroys - the requirement that class plaintiffs prove the essential elements of their claim as defined by controlling state tort law principles.

In order to conduct the "rigorous analysis" required by Rule 23, a court first must identify the elements of the plaintiffs' claims and then determine the proof that will be required

to establish those elements. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551-52 (2011) ("'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"). "If proof of the essential elements of the cause of action requires individual treatment, then predominance is defeated and a class should not be certified." *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (citation and quotation marks omitted). Ohio courts have recognized that when some class members have suffered injury, but others have not, class certification is not appropriate. *Hoang v. E*Trade Group, Inc.,* 151 Ohio App. 3d 363, 369-370; 784 N.E.2d 151, 155 (Ohio Ct. App. 2003).[1]

The Panel's opinion overlooked the elements of Plaintiffs' Ohio tort claims and by doing so, failed to consider whether the record evidence required individualized proof of defect in each Washer design, as well as individualized proof of proximate cause. *Op.* at 12. The result was to improperly relieve Plaintiffs of their burden to prove that each Washer design was defective, not just through the presence of biofilm (which exists in *all* washers), but through evidence that each design causes *excessive* biofilm accumulation resulting in foul odors and that there was a feasible alternative design to prevent it. *See Strong v. U-Hall Co. of Mass.*, 2007 WL 433268, *2 (S.D. Ohio 2007). By focusing on the Washer designs' failure to "eliminate" all biofilm – which Plaintiffs admitted no washer can do - to conclude

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[1] See *also Barber v. Meister*, 2003 WL 1564320 (Ohio 8th App. Dist. Mar. 27, 2003) and *Faralli v. Hair Today, Gone Tomorrow*, 2007 U.S. Dist. LEXIS 1977, at *21-25 (N.D. Ohio Jan. 10, 2007).

there was "commonality of defect," the Panel affirmed class certification not on proof of "defect" as defined by Ohio law, but on idiosyncratic characteristics common to an entire category of products (washers necessarily use water and contain soap and laundry residue).

This failure to analyze Ohio law also undermines Appellant's ability to challenge proximate cause for absent class members, including those with no injury. And it deprives Appellant of an opportunity to defend against the claims of absent class members by presenting evidence of alternative cause, product misuse, and other defenses. This was one of the precise reasons – that the defendant would have been precluded from litigating its statutory defenses to each class member's back-pay claims – that the *Dukes* Court rejected class certification. *Dukes*, 131 S.Ct. at 2557.

Where, as here, a federal rule is interpreted so expansively that it overrides state tort principles that are supposed to govern the claims of the class members, it has a pernicious effect and undermines the delicate balance of "Our Federalism." The concept of "Our Federalism," as it has been called since the unionizing of the states, recognizes the need for "sensitivity to the legitimate interests of both State and National Governments," and encourages a system in which "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44; 91 S. Ct. 746; 27 L.Ed.2d 669 (1971). *See also Camps Newfound/Owatonna, Inc. v Town of Harrison, Maine*, 520 U.S. 56, 611; 117 S. Ct. 1590; 137

L.Ed.2d 852 (1997). Underlying the decision-making process is the concern about infringing on state sovereignty, federalizing too many areas of the law, and intruding into matters that should be left to the states and local governments.

II. The consistency and predictability that is so vital to our civil justice system is lost when a federal court relies on out-of-state and out-of-circuit case law in making class certification decisions.

By relying on Ninth Circuit and California district court decisions interpreting standing under California law to affirm certification of a class containing members with no injury under Ohio tort law, the Panel created a right to recover where one otherwise would not exist. *Op.* at 14-15. The Ohio Product Liability Act ("OPLA") precludes a claimant from recovering for economic damages alone. *Mitchell v. Proctor & Gamble*, 2010 WL 728222, at *3 (S.D. Ohio 2010) (citing Ohio Rev. Code § 2307.71(G), (M) (defining a "product liability claim" as one seeking to "recover compensatory damages...for death, physical injury to person, emotional distress, or physical damage to property other than the product in question," and clarifying that "[e]conomic loss is not 'harm'")). Yet, the Panel ignored this law, relying on *Wolin v. Jaguar Land Rover North America,* 617 F. 3d 1168 (9th Cir. 2010),[2] and other inapplicable law, to conclude that "the class plaintiffs may be able to show that each class member was injured at the point of sale upon paying a premium price for the Duet as designed, even if the washing machines purchased by some class members have not developed the mold

[2] Further, even non-controlling California law, which the Panel relied upon, rejects the "point of sale" basis for class certification set forth in *Wolin*. *Honda Motor Co. v. Superior Court*, 199 Cal. App. 4th 1367, 1375; 132 Cal. Rptr. 3d 91, 98 (2011).

problem." *Op.* at 14. This clearly violated well established Ohio law. *See, e.g., Temple v. Wean United, Inc.,* 50 Ohio St. 2d 317, 322 (1977) (injury is an element of tortious breach of warranty claims); *Hoffer v Cooper Wiring Devices, Inc.*, 2007 U.S. Dist. LEXIS 42871 (N.D. Ohio June 13, 2007) (rejecting certification of class containing members without manifestation of alleged defect in product); *see also Delahunt v Cytodyne Technologies, et. al.*, 241 F.Supp.2d 827 (S.D. Ohio 2003). In this way, the Panel permitted a procedural rule to modify substantive rights, in violation of the Rules Enabling Act. *See* 28 U.S.C. § 2072 (procedural "rules shall not abridge, enlarge or modify any substantive right").

DRI has a strong interest in assuring that a state's law provides accurate guidance to parties seeking to ensure their conduct complies with that law. This is undermined by the Panel's use of a procedural rule to apply non-forum law to grant a right to recovery not recognized by forum law.

III. Left to stand, the Panel's decision will encourage needless litigation and dramatically increase class-action exposure to business and individuals.

The Supreme Court has required careful consideration of the propriety of certifying class actions, most recently in its decision reversing the Ninth Circuit's decision to certify the largest employment class action in history. *Dukes,* 131 S.Ct. at 2556-57. In this decision, the Supreme Court recognized that when class actions are used to circumvent the requirements of the law, they create great potential for abuse. Class actions of this magnitude place defendants in the untenable position of betting the company on the outcome of a trial, creating intense pressure to settle. See *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742,

745 (7th Cir. 2008). The Panel's opinion contributes to these problems by affirming a class with members who were not injured and depriving Appellant of its ability to defend absent class member claims, which the Supreme Court identified as error in *Dukes*. For this reason, this Court should re-hear this case and correct the errors of the Panel.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* DRI respectfully requests this Court grant Appellant's Petition for Rehearing En Banc and reverse the Panel's decision.

Respectfully submitted,

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By: s/Mary Massaron Ross

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CERTIFICATE OF SERVICE

MARY MASSARON ROSS, attorney with the law firm of PLUNKETT COONEY, being first duly sworn, deposes and says that on the 18th day of May, 2012, she caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the United States Court of Appeals for the Sixth Circuit, and via U.S. Mail to any counsel not registered to receive electronic copies from the court, by enclosing same in a sealed envelope with first class postage fully prepaid, addressed to the above, and depositing said envelope and its contents in a receptacle for the US Mail.

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