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,
Respondents-Appellants,

v.

WHIRLPOOL CORPORATION,
Petitioner-Appellee.

On Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division

BRIEF OF THE BUSINESS ROUNDTABLE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT WHIRLPOOL CORPORATION'S PETITION FOR REHEARING EN BANC

J. Philip Calabrese
phil.calabrese@squiresanders.com
SQUIRE SANDERS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8500
(216) 479-8780 (fax)

Pierre H. Bergeron
pierre.bergeron@squiresanders.com
Emily E. Root
emily.root@squiresanders.com
SQUIRE SANDERS (US) LLP
221 E. Fourth St., Suite 2900
Cincinnati, OH 45202
(513) 361-1200
(513) 361-1201 (fax)

Attorneys for the Business Roundtable,
the Chamber of Commerce of the United States of America, and
the National Association of Manufacturers as *Amici Curiae*

Of Counsel:

Maria Ghazal
The Business Roundtable
300 New Jersey Avenue N.W.
Suite 800
Washington, DC 20001
(202) 872-1260

Robin S. Conrad
Kathryn Comerford Todd
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Quentin Riegel
National Association of Manufacturers
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3058

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-4188 Case Name: Glazer, et al. v. Whirlpool Corporation

Name of counsel: J. Philip Calabrese and Emily E. Root

Pursuant to 6th Cir. R. 26.1, The Business Roundtable
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on May 17, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Emily E. Root

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-4188 Case Name: Glazer, et al. v. Whirlpool Corporation

Name of counsel: J. Philip Calabrese and Emily E. Root

Pursuant to 6th Cir. R. 26.1, Chamber of Commerce of the United States of America
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Chamber has no parent corporation, and no publicly held corporation owns any portion of the Chamber.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No. The Chamber is not aware of any publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of this appeal.

CERTIFICATE OF SERVICE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 10-4188 Case Name: Glazer, et al. v. Whirlpool Corporation

Name of counsel: J. Philip Calabrese and Emily E. Root

Pursuant to 6th Cir. R. 26.1, National Association of Manufacturers
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

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STATEMENT OF INTEREST

The Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies with over $6 trillion in annual revenues and more than 14 million employees. BRT was founded in the belief that businesses should play an active and effective role in the formation of public policy and, therefore, participates in litigation as *amicus curiae* in cases where important business interests are at stake.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding

among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

BRT, the Chamber, and NAM have a significant interest in the legal issues presented in this case.[1] The panel's decision is the first significant class certification ruling in this Circuit following the Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and one of the first such post-*Dukes* rulings in any Circuit. Accordingly, the panel's decision has the potential adversely to affect many members of BRT, the Chamber, and NAM, particularly in "no injury" consumer class actions.

SUMMARY OF THE ARGUMENT

In *Dukes*, the Supreme Court made clear that a district court may not simply rely on the plaintiffs' allegations in ruling on class certification; rather, the court must consider, weigh, and resolve disputed questions of fact relevant to the Rule 23 inquiry. Here, the district court failed to identify *any* record evidence or to weigh and preliminarily resolve disputed facts relevant to the Rule 23 inquiry, instead analyzing the plaintiffs' "allegations" and "theories."

The panel compounded the district court's errors when it failed either to reverse the class certification order or to remand for the district court to resolve the

[1] No part of this brief was authored in whole or in part by counsel for a party. No party or its counsel contributed money intended to fund preparing or submitting this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund this brief's preparation or submission.

relevant factual disputes. Indeed, the panel searched the record, marshaling only the Plaintiffs' evidence for class certification, resulting in certification of a class that (1) includes individuals without Article III standing because they have not been harmed and (2) suffers from a fatal lack of commonality and predominance, as the panel's concluding discussion of potential sub-classes shows. In this way, the panel's decision conflicts with *Dukes* and the law of other Circuits[2] and presents questions of exceptional importance regarding the proper procedure and standard of review for disputed factual issues at class certification, in addition to those issues identified in Whirlpool's petition.

REASONS FOR GRANTING REHEARING EN BANC

Instead of weighing the evidence and resolving the factual disputes relevant to class certification as required by the Supreme Court's recent decision in *Dukes*, the district court expressly stated that it was reviewing only *the Plaintiffs' theories*. *See, e.g.*, R.141 (Op. & Order) at 5-7. The district court did not address the facts

[2] The Supreme Court in *Dukes* has now made clear that a rigorous analysis of the Rule 23 prerequisites is necessary and that a district court must resolve factual disputes before certifying a class, even if those factual disputes touch on merits issues. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The *Dukes* holding builds on prior case law from the Courts of Appeals, which also require the district court to make findings before certifying a class. *See, e.g.*, *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24, 40 (2d Cir. 2006); *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 503 (5th Cir. 2004); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675–76 (7th Cir. 2001).

or evidence offered by Whirlpool. Without proper district court findings to review, the panel conducted its own *de novo* review, searching the record for evidence supporting the Plaintiffs' class allegations while disregarding contrary evidence. By failing simply to reverse or to remand for the proper Rule 23 analysis and by conducting its own improper review, the panel created a new standard far below the "rigorous analysis" for "actual, not presumed, conformance" with Rule 23 that class certification requires. *Dukes*, 131 S. Ct. at 2551.

I. The Panel Failed to Require—or Conduct—the "Rigorous Analysis" Required by *Dukes*.

The panel's decision to conduct its own flawed review of the record underscores the need for the district court to create a proper class certification record for review in the first instance. As but one example, the panel finds that by late 2006 Whirlpool had received "over 1.3 million calls" from customers relating to the washers at issue (slip op. at 5). The undisputed evidence, though, shows that from 2001 to 2009, Whirlpool and Sears collectively received fewer than 50,000 relevant complaints and service calls for all Whirlpool-brand and Kenmore-brand front-loading washers combined (a "complaint rate" of less than 1%).[3] R. 103-29 (Expert Rebuttal Report of Paul M. Taylor), ¶ 8. The record contains no evidence

[3] The Kenmore washers are not at issue in this case.

supporting the panel's finding that there were 1.3 million calls, and the Plaintiffs never argued that there were so many calls, on appeal or below.

By relieving the district court of its obligation to conduct the "rigorous analysis" mandated by the Supreme Court in *Dukes*, the panel creates a split with the Second, Fourth, Fifth, and Seventh Circuits, which even pre-*Dukes* required district courts to make reviewable findings on questions of fact at the class certification stage in similar situations. *See, e.g.*, *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24, 40 (2d Cir. 2006) ("there are often factual disputes in connection with Rule 23 requirements, and such disputes must be resolved with findings"); *Vizena v. Union Pac. R.R. Co.*, 360 F.3d 496, 503 (5th Cir. 2004) (per curiam) (remanding because the district court certified a class without making factual findings); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("[T]he factors spelled out in Rule 23 must be addressed through findings"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675–76 (7th Cir. 2001) (remanding because "factual and legal inquiries are necessary under Rule 23").

Where district courts do not conduct the "rigorous analysis" or resolve disputed factual questions as required by *Dukes*, the weight of authority requires reversing, *see, e.g.*, *Miles*, 471 F.3d at 42, or remanding to create a proper record, *see, e.g.*, *Vizena*, 360 F.3d at 503; *Szabo*, 249 F.3d at 678; *Gariety*, 368 F.3d at 366.

Meaningful appellate review requires, at minimum, that the district court articulate the reasons for granting class certification based on the evidentiary record before it.

The panel compounded the district court's failure to make a proper record for review by improperly creating a new sufficiency of the evidence standard and then searching the record only for evidence favoring certification. In doing so, the panel adopted the approach—soundly rejected by the Supreme Court in *Dukes*—of allowing a plaintiff to rely on allegations, not evidence, at the class certification stage. *See, e.g.*, *Dukes*, 131 S. Ct. at 2551 (plaintiffs must prove "*in fact*" that the Rule 23 prerequisites are met (emphasis in original)); *Szabo*, 249 F.3d at 675 ("The proposition that a district judge must accept all of the complaint's allegations which deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."); *see also Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228–29 (5th Cir. 2009) (per curiam); *Teamsters Local 455 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008). While the panel pays lip-service to *Dukes*, it circumvents the ruling by substituting its own findings and affirming a decision that lacks factual findings.

The panel's analysis of Plaintiffs' allegations creates conflicts between the Supreme Court's decision in *Dukes*, the law of this Circuit and others, and permits certification of nearly every class. Because of the structural pressures on defendants inherent in class litigation, *see, e.g.*, *Thorogood v Sears, Roebuck & Co.*,

547 F.3d 742, 745 (7th Cir. 2008) (noting that class action defendants are "under great pressure to settle even if the merits of the case are slight"), the panel's easing of certification is of great interest and concern to the *amici curiae* and their members and warrants rehearing en banc.

II. The Panel's Improper Review Compounded Other Serious Problems that Also Require Rehearing.

The panel's improper *de novo* review resulted in additional errors that may also have far-reaching influence. These include:

- Defining the class to include consumers who have not had any problems with their washers (that is, who are not injured), creating a serious question whether the class has Article III standing and undermining the commonality and typicality of the class. *See* R. 103-4 (Hardaway Declaration), ¶ 21 & Exs. D-F, H-J (*Consumer Reports* articles confirming that causation and injury were not common issues across all Duet owners); *Denny v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."); *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 747–48 (7th Cir. 2008) (reversing certification because many class members had not experienced problems with their clothes dryers).

- Adopting a new "premium price" theory of injury, not advanced in the certification proceedings or included in the certification order, and rejected by other Circuits. *See, e.g.*, *Thorogood*, 547 F. 3d at 747–48 (noting numerous flaws with such a theory, including that consumers may buy at a discount, not pay a premium, or pay a premium for other features).

- Urging, *sua sponte*, the district court to create sub-classes to cure the obvious deficiencies in the class, even though there are no representatives of each proposed sub-class. *See, e.g.*, *Silva v.*

Vowell, 621 F.2d 640 (5th Cir. 1980) (each sub-class must be represented by a named plaintiff).

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that rehearing en banc is necessary for the Court to address the issue on which it granted Whirlpool's Rule 23(f) petition for interlocutory appeal. If allowed to stand, the panel's decision threatens to affect the members of BRT, the Chamber, and NAM adversely.

Dated: May 17, 2012

Respectfully submitted,

/s/ *J. Phillip Calabrese*
J. Philip Calabrese
phil.calabrese@squiresanders.com
SQUIRE SANDERS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8500
(216) 479-8780 (fax)

Pierre H. Bergeron
pierre.bergeron@squiresanders.com
Emily E. Root
emily.root@squiresanders.com
SQUIRE SANDERS (US) LLP
221 E. Fourth St., Suite 2900
Cincinnati, OH 45202
(513) 361-1200
(513) 361-1201 (fax)

Attorneys for The Business Roundtable, the Chamber of Commerce of the United States of America, and the National

Association of Manufacturers as *Amici Curiae*

Of Counsel:

Maria Ghazal
Vice President and Counsel
Business Round Table
300 New Jersey Avenue N.W.
Suite 800
Washington, DC 20001

Robin S. Conrad
Kathryn Comerford Todd
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062
Chamber of Commerce of the United States of America

Quentin Riegel
Vice President, Litigation & Deputy General Counsel
National Association of Manufacturers
733 10th Street, NW, Suite 700
Washington, DC 20001

CERTIFICATE OF SERVICE

The foregoing Brief of the Business Roundtable, the Chamber of Commerce of the United States of America, and the National Association of Manufacturers as *Amici Curiae* in Support of Appellant Whirlpool Corporation's Petition for Rehearing En Banc was electronically served via the court's electronic filing system this 17th day of May, 2012.

/s/ Emily E. Root
One of the Attorneys for
the Business Round Table,
the Chamber of Commerce of
the United States of America, and
the National Association of Manufacturers
as *Amici Curiae*