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-Appellees,

v.

WHIRLPOOL CORPORATION,

Petitioner-Appellant.

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division, Case Nos. 1:08-wp-65000 and 1:09-wp-65001

APPELLANT WHIRLPOOL CORPORATION'S PETITION FOR REHEARING EN BANC

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STATEMENT IN SUPPORT OF REHEARING EN BANC

The Panel decision conflicts with decisions of the United States Supreme Court and of this Court. En banc consideration is necessary to conform the Panel's decisions to binding Supreme Court authority and to maintain uniformity of this Court's decisions on questions of exceptional importance.

First, the Panel's Rule 23(a)(2) commonality ruling conflicts with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), because the Panel disregarded the Supreme Court's holdings that (i) factual dissimilarities within a proposed class impede "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation," 131 S. Ct. at 2551 (emphasis in original); (ii) commonality requires proof that all class members have suffered the same injury, *id.*; and (iii) a district court must rigorously examine the evidence to determine whether the plaintiffs have proven that they have met each applicable Rule 23 requirement, *id.* at 2552.

Second, the Panel's perfunctory, three-sentence treatment of Rule 23(b)(3) effectively eliminated the most demanding certification requirements—predominance and superiority—and conflicts with prior decisions of the Supreme Court and this Court. *See Dukes*, 131 S. Ct. at 2558; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997); *Pipefitters Local 636 Ins. Fund v. BCBS of Mich.*, 654 F.3d 618, 630 (6th Cir. 2011); *In re Am. Med. Sys.*, 75 F.3d 1069, 1084

(6th Cir. 1996). If the Panel's decision stands, district courts could ignore Rule 23(b)(3)'s stringent procedural protections wherever commonality is met.

Third, the Panel decision involves questions of exceptional importance because it conflicts with decisions of this Court holding that a predominance analysis must consider the elements and defenses of the underlying claims to determine how a class trial on the merits would be conducted. *See, e.g.*, *Rodney v. Nw. Airlines, Inc.*, 146 F. App'x 783, 786 (6th Cir. 2006); *Am. Med. Sys.*, 75 F.3d at 1084-85. The Panel failed to (i) identify the elements of the Ohio tort claims at issue, including that class members must prove actual injury to establish liability; (ii) recognize that, even under the Panel's selective, *de novo* review of the parties' evidence, Plaintiffs have not shown that they could prove any liability element with evidence common to the class; and (iii) consider Whirlpool's defenses or how a class trial could be conducted without depriving Whirlpool of those defenses.

These errors seriously distort class certification law in this Circuit, will result in an unmanageable trial that cannot but curtail Whirlpool's due process rights, and warrant the full Court's review.

BACKGROUND

Gina Glazer and Trina Allison ("Plaintiffs") sued Whirlpool claiming that a "common" design defect in Whirlpool Duet®, Duet HT®, and Duet Sport® high-efficiency front-loading clothes washers (the "Washers") causes interior surfaces to

accumulate excessive residue ("biofilm") that emits moldy odors (what Plaintiffs call the "Mold Problem"). Plaintiffs alleged that the "Mold Problem" is an aesthetic problem, not a safety risk. They moved to certify a damages class of all current Ohio residents who bought any of 21 various Washer models manufactured between 2001-2010, and alleged that the various Washers have a uniform design defect that Whirlpool at all times knew about but concealed and that will result at unspecified future times in uniform harm in the form of noticeable foul odor.

Whirlpool opposed certification and submitted evidence showing that (a) the designs of the 21 models changed materially over the nine-year class period; (b) Plaintiffs treated their Washers in materially different ways and failed to comply with Whirlpool's use and care instructions; (c) Whirlpool's knowledge of and disclosures regarding the potential for mold and odors changed materially over the nine-year class period; and (d) Plaintiffs and class members did not suffer the same purported harm. Whirlpool's evidence showed that Plaintiffs' claims are not susceptible to common proof and do not meet Rule 23(a)(2), (a)(3), or (b)(3).

The district court certified Plaintiffs' Ohio common-law claims for negligent design, failure to warn, and tortious breach of warranty. (R. 141 (Op. & Order) at 8, attached hereto for the Court's convenience as Ex. 1.) The 7.5-page order spends only 4 pages performing a cursory "Rule 23 Analysis" (*id.* at 4-8), relies solely on Plaintiffs' "allegations" and "theories," and does not identify, much less weigh,

any of the substantial evidence adduced at class certification (*id.* at 5-7).

Whirlpool filed a Rule 23(f) petition because the district court certified a class based solely on Plaintiffs' allegations, and Whirlpool urged this Court to establish that courts in this Circuit, like courts in every other Circuit, must consider evidence and preliminarily resolve disputed facts that are relevant to deciding whether Rule 23's requirements are met. This Court granted Whirlpool's Rule 23(f) petition to consider "the standard a district court must apply to factual disputes relevant in determining whether the plaintiff class satisfied the criteria for certification" under Rule 23. (R. 167 at 1.) After the Court granted Whirlpool's petition, but before the Panel heard the case, the Supreme Court decided *Dukes*.

The Panel affirmed the district court's certification of an Ohio tort liability class. (Slip op. at 2, attached hereto for the Court's convenience as Ex. 2.) Although the Panel opinion described the standard district courts must apply to disputed evidence relevant to a Rule 23 inquiry following *Dukes* (*id.* at 8-11), it ignored the district court's failure to apply that standard to the parties' Rule 23 evidence. Instead, the Panel engaged in its own selective, *de novo* review of that evidence and made its own unacknowledged, *de novo* evidentiary findings (none of which recognized Whirlpool's unrefuted evidence). In performing the role of fact finder, the Panel made obvious, material errors in finding facts not urged by Plaintiffs or suggested by the district court's order.

Further, in a circuitous attempt to deal with the undisputed fact that most class members have not experienced manifestation of the odor defect and the harm alleged by Plaintiffs—which precludes a class liability finding under the tort claims certified—the Panel relied on cases applying California consumer-protection laws to import into an Ohio tort case a novel theory of economic injury that Plaintiffs did not argue below or on appeal, that the district did not address, and that no court applying Ohio tort law has ever recognized. (Slip op. at 14-15.)

ARGUMENT

I. THE PANEL OPINION CONFLICTS WITH THE COMMONALITY ANALYSIS REQUIRED BY *WAL-MART STORES v. DUKES* AND AUTHORITATIVE DECISIONS OF THIS COURT

A. The Panel Opinion Conflicts with *Dukes* on the Role of Factual Dissimilarities in Rule 23(a)(2)'s Commonality Analysis

Satisfying commonality requires more than "[r]eciting [common] questions." *Dukes*, 131 S. Ct. at 2551. Plaintiffs must "show" that their class claims "depend upon a common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "Dissimilarities" within a proposed class "impede the generation of common answers." *Id.* There must be "glue" holding the class together so that "examination of all class members' claims . . . will produce a common answer." *Id.* at 2552.

The Panel identified, but failed to account for, factual dissimilarities within

Plaintiffs' contentions that will prevent the generation of common answers at trial. For example, it is undisputed that Whirlpool implemented numerous biofilm-limiting design changes, functional feature differences, and product literature changes throughout the nine-year class period in the 21 different models. (R. 103-4 ¶¶ 5-16, 35.) Whirlpool's unrefuted evidence showed that these changes reduced by 50% the already-low rate of reported "Mold Problems." (R. 103-29 ¶¶ 10, 13 & Tables 1-2.) Plaintiffs' engineering expert admitted that Whirlpool made these changes and that he had not evaluated them. (R. 93-9 at 10.)

In concluding that "the existence of a design defect" is a question "common to the class," the district court stated that "plaintiffs' theory is that notwithstanding Whirlpool's design changes since 2002, all of its front-loading washers use less and cooler water that fails to adequately rinse away odor-causing soil, suds, and biofilm."[1] (R. 141 at 5 (emphasis added).) That contention is not susceptible to a common answer in light of the undisputed record evidence.

This case is not like *Daffin v. Ford Motor Co.* (cited by the Panel and district court), which involved a single, identical auto part that was received by all class members and covered by an identical written warranty. *See* 458 F.3d 549, 553 (6th Cir. 2006). Here, Plaintiffs allege that the Washers' system is defective because it

[1]The district court's statement that the Washers' design uses "cooler" water is incorrect. The only record evidence on this point is that consumers are increasingly choosing to use cold-water wash cycles. (R. 103-4 ¶ 26.)

fails to adequately "self-clean." (R. 93-1 at 7-8.) But Plaintiffs admit that Whirlpool changed various Washers' systems in several respects to improve "self-cleaning." (*See, e.g.*, R. 93-9 at 10.)

The district court's commonality analysis was flawed because it failed to account for the impact that those Washer differences will have on the trial of Plaintiffs' Ohio tort claims, which are precisely the type of "dissimilarities" that preclude the generation of common answers. The district court made passing reference to the undisputed design differences, but found that the question whether all of those different designs are "defective" is common based solely on Plaintiffs' "theory" that they are. (R. 141 at 5.)

In reviewing the district court's commonality analysis, the Panel failed to adhere to the *Dukes* standard. Although the Panel acknowledged the "dozens of design changes" and 21 "different engineering models" (slip op. at 6-7), it nevertheless found the question whether the Washer designs are "defective" to be common (*id.* at 12-13). It failed to recognize that the evidence of those design differences will require individualized trial proofs that preclude the generation of common answers. *See Dukes*, 131 S. Ct. at 2551; *see also Am. Med. Sys.*, 75 F.3d at 1081 (commonality not satisfied where trial proofs differed by model and year).

The Panel, like the district court, mistakenly concluded that so long as Plaintiffs articulated a theory that all of the Washer designs are defective and that

all of the warnings are ineffective, those differences can be overlooked. That is exactly what *Dukes* instructs courts not to do. Courts are not simply to ask, *e.g.*, "Are the 21 Washer models defective?", while disregarding the evidence of factual dissimilarities that prevent the generation of common answers. Here, Plaintiffs will have to prove at trial, with proof unique to different Washer models with different warnings, that none of the successive design or literature changes sufficiently controlled the "Mold Problem," precluding a finding that commonality is satisfied.

B. The Panel's Analysis of Uninjured Class Members' Claims Conflicts with *Dukes* and Authoritative Decisions of This Court

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. of Sw. Co. v. Falcon*, 457 U.S. 147, 157 (1982)). Although the district court correctly observed that each class member's right to recover will depend on whether they can prove that their Washer manifested the alleged biofilm-odor defect (R. 141 at 5 n.1), it concluded that "whether any particular plaintiff has suffered harm is . . . not relevant to class certification" (*id.* at 2 (emphasis added)). That was error under *Dukes*, which makes proof that class members have suffered the same injury not only "relevant" but essential to class certification.

The Panel compounded this error. First, it ignored the Supreme Court's teaching that Rule 23(a)(2) requires the plaintiff to show that the class members have suffered the same injury. Second, the Panel misconstrued this Court's post-

Dukes decision in *Gooch v. Life Investments Insurance Co. of America*, 672 F.3d 402 (6th Cir. 2012). The Panel held that the undisputed fact that most class members have not experienced foul odors—and thus have not suffered the injury alleged by Plaintiffs—did not prevent certification of a Rule 23(b)(3) liability class, because "the challenged conduct" is "premised on a ground that is applicable to the entire class." (Slip op. at 14.) The Panel's reliance on *Gooch* to disregard evidence showing that class members have not suffered the same injury was error.[2]

Gooch involved a Rule 23(b)(2) class in which the plaintiff sought a declaration about the meaning of a provision of an insurance contract; it did not discuss Rule 23(a)(2)'s common-injury requirement. *Gooch*, 672 F.3d at 428. The *Gooch* language cited by the Panel has no relevance to the question whether it is appropriate after *Dukes* to certify a Rule 23(b)(3) liability class comprised mostly of uninjured class members. As *Dukes* noted, class money-damages claims require far more stringent protections than do declaratory-relief claims. 131 S. Ct. at 2558.

Thus, the Panel's attempt to use *Gooch*'s discussion of Rule 23(b)(2) to disregard evidence showing that Rule 23(a)(2) has not been satisfied here because class members have not suffered the same injury conflicts with *Dukes*.

[2]There are no data supporting Plaintiffs' allegation that the malodor complaint rate in 2004, before Whirlpool began making design changes, was 35%, and there is uncontradicted evidence showing that the cumulative complaint rate over five years is less than 3% for all Washers combined. (R. 103-29 ¶ 13 & Table 2.) Under either party's view, most class members (65% to 97%) have suffered no injury.

C. The Panel's Erroneous Assumption That the District Court Resolved Disputed Facts Relevant to Rule 23 Conflicts with the Supreme Court's and This Court's Authoritative Decisions

It is Plaintiffs' burden to "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. at 2251 (emphasis in original). District courts must conduct a "rigorous analysis [to determine whether] the prerequisites of Rule 23(a) have been satisfied." *Bacon v. Honda of Am. Mfg. Inc.*, 370 F.3d 565, 569-70 (6th Cir. 2004); *see also Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). In performing this rigorous analysis, a district court may not assume allegations in the complaint to be true, but must "'resolv[e] factual and legal issues that strongly influence the wisdom of class treatment.'" *Gooch*, 672 F.3d at 417 (quoting *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001)). Following *Dukes*, a district court must resolve disputed facts relevant to Rule 23's criteria by "judging the persuasiveness of the evidence presented," *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011), under the preponderance-of-the-evidence standard.[3]

The district court never evaluated the substantial evidence adduced by the

[3]This Court has not articulated the Rule 23 burden of proof standard, *Gooch*, 672 F.3d at 418 n.8, but Plaintiffs admit that it is the preponderance of the evidence standard (Appellee Br. at 1), and other Circuits agree. *See Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 811 (7th Cir. 2012); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320-22 (3d Cir. 2009); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.2d 221, 229 (5th Cir. 2009); *Teamsters Local 455 v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

parties and simply adopted Plaintiffs' abstract allegations and theories. (R. 141 at 5-7.) For example, with respect to negligent failure to warn and tortious breach of warranty claims, the court concluded that Whirlpool's knowledge of the alleged defect and the adequacy of its "warnings" were common trial questions because "plaintiffs' theory" is that Whirlpool knew about potential Mold Problems from "the outset" and that, "despite buyers' varying exposure to Whirlpool's disclosures about mold problems," none of the different disclosures was "sufficient." (*Id.* at 6.)

The Panel failed to acknowledge that the district court relied entirely on Plaintiffs' allegations and theories, not on any evidence, and in fact never used the word "evidence" in the cursory, four-page "Rule 23 Analysis." (R. 141 at 4-8.) The Panel conclusorily stated, without citation to the record, that the district court had "closely examined the evidentiary record and conducted the necessary 'rigorous analysis' to find that the prerequisites of Rule 23 were met" (slip op. at 10-11), even though the district court's order reveals just the opposite.[4]

II. THE PANEL'S PERFUNCTORY RULE 23(b)(3) ANALYSIS CONFLICTS WITH SUPREME COURT PRECEDENT AND THIS COURT'S AUTHORITATIVE DECISIONS

"The Rule 23 (b)(3) predominance inquiry tests whether proposed classes

[4]The Panel's citation to *Gooch* (slip op. at 11) highlights its error. There, the certification order showed that the district court "consider[ed] all of the relevant documents [] in evidence," making the district court's misstatement of the Rule 23 standard "harmless" error, particularly because the "core" certification issues were legal, rather than factual. *Gooch*, 672 F.3d at 417-18.

are sufficiently cohesive to warrant adjudication by representation" and is "far more demanding" than the commonality requirement. *Amchem*, 521 U.S. at 623-24. Key facts and law must be "applicable in the same manner" to each class member. *Falcon*, 457 U.S. at 155 (citation and quotation marks omitted).

Like the district court, the Panel focused almost exclusively on commonality, addressing predominance only abstractly in a single sentence and superiority in two more sentences. (*See* R. 141 at 6, 7; slip op. at 15.) The Panel's failure to perform the required predominance and superiority analysis conflicts with the Supreme Court's and this Court's decisions, *Dukes*, 131 S. Ct. at 2558-59; *Amchem*, 521 U.S. at 623-24; *Pipefitters*, 654 F.3d at 630-31; *Am. Med. Sys.*, 75 F.3d at 1084-85, and effectively overrides Rule 23(b)(3)'s requirements.

III. THE PANEL FAILED TO CONSIDER THE ELEMENTS OF OR DEFENSES TO THE OHIO TORT CLAIMS IT CERTIFIED, OR HOW A CLASS TRIAL WOULD BE CONDUCTED

The Panel's decision conflicts with decisions of this Court holding that a proper Rule 23(b)(3) predominance analysis must consider the elements of the underlying liability claims, as well as the defenses to those claims, to determine how a trial on the merits would be conducted if a class were certified. *See, e.g.*, *Rodney*, 146 F. App'x at 786-87; *Am. Med. Sys.*, 75 F.3d at 1085. Such defenses may create individual questions of fact or law that predominate over common questions and preclude class certification. *Ortiz v. Fireboard Corp.*, 527 U.S. 815,

844 n.20 (1999); *Am. Med. Sys.*, 75 F.3d at 1081.

As the 2003 amendments to Rule 23 make clear, it is "critical" to the class certification decision to "determine how the case will be tried." Fed. R. Civ. P. 23(c)(1)(A) advisory committee notes, 2003 amendments. A court must inquire into the merits to "identify the nature of the issues that actually will be presented at trial" and "test[] whether [those issues] are susceptible of class-wide proof." *Id.* Certifying a class without resolving challenges to the plaintiff's claims about the nature of the "class" issues conflicts with this guidance. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 318-20.

Here, the Panel failed to identify the elements of the Ohio tort claims at issue, much less consider whether Plaintiffs at trial could prove each element of those claims through common proof. Had the Panel considered how this case would be tried, it would have been clear that Plaintiffs must prove, among other things, that (i) each of the many changes Whirlpool made to the different models in different years failed to control the rate of problem-level biofilm accumulation, *i.e.*, foul odor; (ii) Whirlpool knew that each such change was inadequate; (iii) each of the many changes Whirlpool made to its consumer literature failed to tell buyers what to do to prevent malodor; (iv) each class member read and followed his or her Washer's instructions; and (v) each class member actually experienced biofilm malodor, rather than ordinary levels of washing-machine biofilm that Plaintiffs

admit occurs in all clothes washers, of any make or model.

Like the district court, the Panel recognized that proof of injury and damages in this tort case would require individualized fact-finding. The district court sought to circumvent this obstacle by certifying a "liability-only" class, leaving damages determinations to individual trials. (R. 141 at 4-5 n.1.) As Whirlpool pointed out on appeal, that approach is fundamentally flawed because the Ohio tort claims at issue require proof of actual injury as a substantive liability element. *See, e.g.*, *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 270 (Ohio 1977); *Hanlon v. Lane*, 648 N.E.2d 26, 28 (Ohio Ct. App. 1994); *Floyd v. Pride Mobility Prods. Corp.*, No. 1:05-CV-00389, 2007 WL 4404049, at *10 n.2 (S.D. Ohio Dec. 12, 2007).

The Panel not only omitted the Ohio tort law requirement of proof of manifestation of the alleged defect to establish liability, but also compounded the district court's error by inventing a new "premium purchase price" theory of injury that Plaintiffs did not argue, that the district court did not adopt, and that no Ohio court has ever recognized. As support for that novel theory of injury, the Panel cited only out-of-circuit cases discussing statutory standing under California's consumer protection statutes, including an unpublished Central District of California order that Plaintiffs never cited.[5] (Slip op. at 14-15.) The Panel offered

[5]The Panel failed to cite a published order from the same court rejecting that novel injury theory in a nearly identical case. *See Webb v. Carter's, Inc.*, 272 F.R.D. 489, 499-500 (C.D. Cal. 2011).

no other means to address the undisputed fact that most class members have not experienced the injury alleged by Plaintiffs and therefore have no Ohio tort claim.

Finally, the Panel failed to consider the individualized nature of Whirlpool's defenses or how any class trial could be conducted without stripping Whirlpool of its right to present those defenses. *See Am. Med. Sys.*, 75 F.3d at 1081; *Rodney*, 146 F. App'x at 787; *Butler v. Sterling, Inc.*, No. 98-3223, 2000 WL 353502, at *6 (6th Cir. Mar. 31, 2000). The procedural protections prescribed in Rule 23 are "grounded in due process." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Whirlpool has a constitutional right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). That right cannot be swept away in the interest of facilitating the class-action method of adjudication, and the Panel's certification ruling necessarily will deprive Whirlpool of its right. The full Court should review the Panel ruling to prevent such a result.

CONCLUSION

For all these reasons, the petition for rehearing en banc should be granted.

Dated: May 17, 2012

Respectfully submitted,

s/ Malcolm E. Wheeler

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2012, a copy of the foregoing *Appellant Whirlpool Corporation's Petition for Rehearing En Banc* was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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