Nos. 14-4184, 14-4221

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re WHIRLPOOL CORPORATION FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION

GINA GLAZER and TRINA ALLISON,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellants/Cross-Appellees,

v.

WHIRLPOOL CORPORATION,

Defendant-Appellee/Cross-Appellant.

Appeal and Cross-Appeal from the United States District Court for the Northern District of Ohio, Eastern Division, Nos. 08-wp-65000 & -65001
The Honorable District Judge Christopher A. Boyko

SECOND BRIEF FOR DEFENDANT-APPELLEE/CROSS-APPELLANT WHIRLPOOL CORPORATION

Michael T. Williams
Allison R. McLaughlin
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth St.
Suite 4500
Denver, CO 80202
(303) 244-1800

Philip S. Beck
Eric R. Olson
Rebecca Weinstein Bacon
BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP
54 W. Hubbard St.
Suite 300
Chicago, IL 60654
(312) 494-4400

Stephen M. Shapiro
Timothy S. Bishop
Joshua D. Yount
MAYER BROWN LLP
71 S. Wacker Dr.
Chicago, IL 60606
(312) 782-0600

Counsel for Defendant-Appellee/Cross-Appellant

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Defendant-Appellee/Cross-Appellant

Whirlpool Corporation 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.

s/ Stephen M. Shapiro
Stephen M. Shapiro

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rules

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Whirlpool Corporation respectfully requests oral argument. Oral argument will provide the parties with the opportunity to address any questions this Court may have about the lengthy record or the jury's verdict following a three-week trial.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1332, 1441, and 1453. It entered final judgment on October 31, 2014. R.491, PageID#36774. Plaintiffs timely appealed on November 24, 2014. R.499, PageID#36854. Whirlpool Corporation timely filed a conditional cross-appeal on December 5, 2014. R.504, PageID#36878. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Plaintiffs sought and obtained a single certified class of buyers of 20 different washing machine models and agreed to jury instructions that required the class to prove that each of those models was defective. Did plaintiffs' consent to those instructions waive their right to challenge them on appeal, and were those instructions correct given plaintiffs' claims for liability across a single class?

2. Did the district court act within its broad discretion when it excluded previously undisclosed expert testimony and other marginally relevant but highly prejudicial health-related evidence?

3. Did the district court properly grant Whirlpool summary judgment on plaintiffs' failure-to-warn claim because plaintiffs had not asserted that Whirlpool failed to warn of a health danger?

4. Plaintiffs' counsel began voir dire by discussing class action lawyers and argued at closing that plaintiffs' lawyers benefit society. When plaintiffs'

counsel put themselves at issue in the trial, did the district court abuse its discretion when it permitted defense counsel reasonable latitude to refer, without objection, to plaintiffs' assertions?

5. Did the district court abuse its discretion when it permitted Whirlpool's counsel to question witnesses about bias and family financial relationships with plaintiffs' counsel?

The following three conditional questions arise only in the event of a remand:

6. Did the district court correctly refuse to instruct the jury on a discovery rule for tolling the statutes of limitations that does not apply under Ohio law?

7. Does evidence developed since the prior appeal demonstrate that this class must be decertified because the requirements of Rule 23 are not satisfied?

8. Must Whirlpool's comparative-fault, assumption-of-risk, and mitigation-of-damages defenses be put to the jury?

INTRODUCTION

After a three-week trial guided by instructions that plaintiffs embraced as "correct," the jury rejected plaintiffs' claims that Whirlpool negligently designed front-loading washers and breached an implied warranty of merchantability. Plaintiffs' brief recites the same one-sided view of the evidence that plaintiffs

presented to the jury throughout trial and laid out in a three-hour closing argument. It conspicuously ignores, however, the wealth of evidence that Whirlpool presented showing that the washers were not defective, that only a tiny percentage of buyers experienced mold or odor issues, that Whirlpool made frequent improvements in the washers and care instructions that further reduced the incidence of mold and odor, and that both plaintiffs failed to follow basic directions to keep their machines clean and odor-free. The jury, after hearing all of that evidence, ruled swiftly and decisively against plaintiffs.

Plaintiffs now challenge the district court's judgment calls on evidence, argument, and instructions that plaintiffs agreed to below. Plaintiffs' challenges do not go to the fundamental fairness or reliability of the verdict but to the district court's choices about how to manage the trial to avoid prejudice to the parties and confusion to the jury while allowing the parties broad latitude to present their cases.

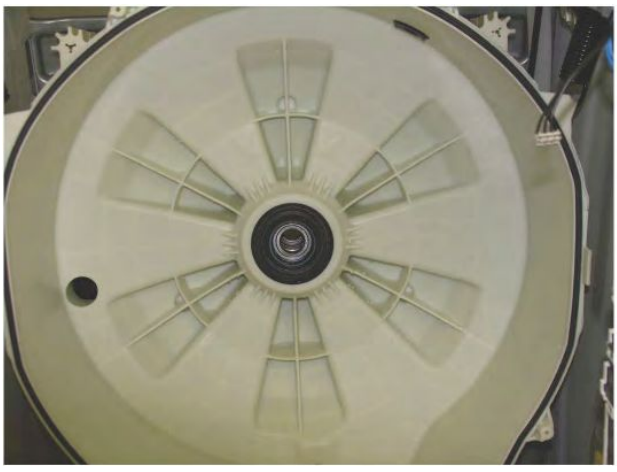
There is no legal basis to question the few rulings that plaintiffs attack. Plaintiffs cannot challenge most of those rulings on appeal because they did not object below. And each ruling correctly applied the law and fell well within Judge Boyko's "'very broad' discretion" to manage the trial. *United States* v. *Semrau*, 693 F.3d 510, 523 (6th Cir. 2012). The jury decided this case after hearing

testimony from 22 witnesses and reviewing 339 admitted exhibits. At the end of the day the jury found that the facts did not support plaintiffs' claims.

STATEMENT OF THE CASE

These appeals arise from a final judgment following a jury verdict resolving a suit brought by plaintiffs Gina Glazer and Trina Allison on behalf of Ohio residents who purchased high-efficiency front-loading clothes washers manufactured by Whirlpool under the Duet name ("Washers"). Plaintiffs alleged that design defects—namely, cavities in the tub and crosspiece—created an unreasonable propensity for the Washers to accumulate mold, mildew, and other debris ("biofilm") that could produce musty odors. 3d Am. Compl., R.80, PageID#1605-06; Trial Br., R.376, PageID#24617-18.

Tub **Crosspiece**



PX1123, R.518-137, PageID#38791, 38793. Plaintiffs asserted three Ohio common-law claims that are relevant on appeal: tortious breach of implied warranty, negligent design, and failure to warn.

A. Pretrial Rulings.

The district court certified an Ohio class over Whirlpool's objections that differences in the designs of Duet models and the circumstances of individual purchasers prevented certification. Certification Order, R.141, PageID#4903-07. In doing so, the district court explained that plaintiffs had assumed the burden of proving that "*none* of Whirlpool's design modifications fixed the defect." *Id.* at 4905 n.3.

Reviewing the class certification order, this Court affirmed based on the claims and evidence as they stood in 2010. *Glazer* v. *Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013). But, the Court explained, its class certification inquiry was "limited" and did not stop a jury from deciding that the answers to the defect question varied by model. *Id.* at 851-54.

On remand, plaintiffs sought to modify the class to exclude certain Duet models. R.330, PageID#22712-27. And Whirlpool moved to decertify based on a developed factual record. R.327-1, PageID#18669-708. The district court declined to decertify on the ground that this Court's prior affirmance foreclosed Whirlpool's "logical and articulate" Rule 23 arguments. R.366, PageID#24349-56. However, it trimmed the class by excluding all Duet models lacking the tub and crosspiece cavities, leaving 20 models manufactured between 2001 and 2009 on two different design platforms (the Access and Horizon platforms). *Id.* at 24331-49. Plaintiffs,

the court explained, still bore "the burden at trial of proving that 20 different Duet models" share "a common defect." *Id.* at 24342. The court identified differences among these models, including which platform they were built on and whether they had crosspiece crevices, a steam feature that created hot vapor inside the machine, a sanitary cycle that heated water to a higher temperature, or a maintenance or clean washer cycle:

Duet Models Within Class Definition

Model Number	Relevant Production Begins	Relevant Production Ends	Platform	Crosspiece Crevices?	Tub Crevices?	Steam Feature?	Sanitary Cycle?	Maintenance (M) or Clean Washer (CW) Cycle?
GHW9100	2/13/2001	6/29/2004	Access	Yes	Yes	No	No	No
GHW9200	3/5/2001	7/23/2003	Access	Yes	Yes	No	Yes	No
GHW9150	12/31/2002	10/13/2006	Access	Yes	Yes	No	No	Yes if after 7/05 (M)
GHW9250	1/6/2003	9/30/2004	Access	Yes	Yes	No	Yes	No
GHW9400	2/18/2003	11/22/2006	Access	Yes	Yes	No	Yes	Yes if after 7/05 (M)
GHW9160	5/25/2004	10/9/2006	Access	Yes	Yes	No	No	Yes if after 7/05 (M)
GHW9300	5/25/2004	11/1/2006	Access	Yes	Yes	No	Yes	Yes if after 7/05 (M)
GHW9460	5/25/2004	10/6/2006	Access	Yes	Yes	No	Yes	Yes if after 7/05 (M)
WFW8500	1/4/2006	7/2/2009	Horizon	No	Yes	No	Yes	Yes (CW)
WFW9200	1/9/2006	5/1/2009	Access	Yes	Yes	No	Yes	Yes (CW)
WFW8300 (Glazer)	1/12/2006	9/30/09	Horizon	No	Yes	No	No	Yes (CW)
WFW9400	2/6/2006	2/28/09	Access	Yes	Yes	No	Yes	Yes (CW)
WFW8410	7/14/2006	9/30/09	Horizon	No	Yes	No	No	Yes (CW)
WFW8400	9/11/2006	9/30/09	Horizon	No	Yes	No	Yes	Yes (CW)
WFW9600	11/20/2006	8/25/2008	Access	Yes	Yes	Yes	Yes	Yes (CW)

Model Number	Relevant Production Begins	Relevant Production Ends	Platform	Crosspiece Crevices?	Tub Crevices?	Steam Feature?	Sanitary Cycle?	Maintenance (M) or Clean Washer (CW) Cycle?
WFW9500	1/23/2007	2/28/09	Access	Yes	Yes	Yes	Yes	Yes (CW)
WFW8200	10/18/2007	11/30/2007	Horizon	No	Yes	No	No	Yes (CW)
WFW9300 (Allison)	4/21/2008	2/13/2009	Access	Yes	Yes	No	Yes	Yes (CW)
WFW9250	1/1/2009	9/30/09	Horizon	No	Yes	No	Yes	Yes (CW)
WFW9150	1/5/2009	9/30/09	Horizon	No	Yes	No	No	Yes (CW)

Id. at 24313, 24322.

Both sides sought summary judgment. The district court denied plaintiffs' motion. R.391, PageID#26777. But it granted Whirlpool's motion as to plaintiffs' failure-to-warn claim because Whirlpool had a duty to warn *only* about safety defects, which do not include "propensity for mold growth." *Id.* at 26790-96. The court denied Whirlpool summary judgment on the negligent-design and breach-of-implied-warranty claims, but reiterated that plaintiffs had to prove that the 20 Washer models "share a common defect." *Id.* at 26782-90.

As trial approached, the district court took up the parties' motions *in limine*. The court granted in part plaintiffs' motion to exclude references to plaintiffs' income or wealth, but permitted Whirlpool to "use non-photographic evidence of wealth to rebut Plaintiff Allison's testimony regarding the reasons she delayed in purchasing a new washer." R.426, PageID#30796. It granted in part plaintiffs' motion to forbid appeals to prejudice against trial lawyers. *Id.* at 30796-97. But the

court took no issue with Whirlpool's stated intent to ask about "how and when Plaintiffs selected counsel." MIL Resp., R.402, PageID#28075-76.

The court also granted Whirlpool's motion to exclude evidence of health risks supposedly created by the Washers, because there were "[n]o claimed health risks" and the "prejudice outweighs probative value" for any health-risk evidence. R.426, PageID#30798. The court stood by that conclusion when plaintiffs sought reconsideration 10 days into the trial and proffered a new expert declaration filled with previously undisclosed opinions. Recons. Mot., R.450, PageID#33048-55; Order, R.464, PageID#34988.

Before trial, the district court clarified plaintiffs' burden of proof in a class trial. After receiving briefing, the district court confirmed that "[i]n order to prevail, Plaintiffs must prove that all twenty (20) Duet Washing Machine models included in the Ohio certified class, regardless of when they were sold, suffered from the same alleged defect." R.427, PageID#30800.

B. Trial Evidence.

Plaintiffs' statement of facts is a one-sided account of their own trial evidence, which the jury reasonably rejected when it ruled decisively for Whirlpool. Plaintiffs never mention the wealth of evidence showing that the Washers were not defectively designed or unmerchantable, that biofilm and odor issues had other causes, and that plaintiffs' injury theory is baseless. And they

never sought judgment as a matter of law or a new trial, which waives any weight-of-the-evidence argument. See *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 403-04 (2006).

Historical Defect Evidence. As they did at trial, plaintiffs say (at 7-10) that Whirlpool admitted defects in documents discussing biofilm and odor. But Anthony Hardaway, a Whirlpool engineer who authored many of these documents, testified that they were part of a "breakthrough quality project" aimed at improving Duet washers by addressing a wide variety of customer issues, no matter how small. Tr., R.447, PageID#32287-89. Odor was number 23 on the list of issues because of the low "severity of the problem" and its "very small" service incident rate. *Id.* at 32287-88.

Other evidence confirmed that pre-2006 Washers did not have biofilm problems. Before the first Duet model went on the market, it passed industry standard tests for residue accumulation and water removal, just like every subsequent model. *Id.* at 32281-86. Some models also had a sanitary cycle that used super-heated water to further help prevent mold and odor. Tr., R.465, PageID#35225-26.

Expert analysis showed that mold and odor complaints for pre-2006 Washers averaged only 0.47% of buyers in the first year of ownership and 1.42% in the first five years. DX757, R.518-290, PageID#42377; Tr., R.470,

PageID#35540-52. For buyers with extended warranties, who had every incentive to call about mold problems, the complaint rate remained below 4.5%. DX637, R.518-275, PageID#41869; Tr., R.470, PageID#35552-54.

Guided by its "breakthrough quality project," Whirlpool continuously improved its Washers, taking additional steps to reduce the already low chance that a Duet owner would experience mold and odor. In 2005 and 2006, Whirlpool supplemented its instruction manuals ("Use and Care Guides") to explain how to clean the door seal, instruct owners to leave the door ajar between uses, and strengthen instructions on the use of high-efficiency ("HE") detergent. Tr., R.465, PageID#35217-23, 35230-33. Whirlpool also added a "clean washer cycle" that greatly reduced biofilm by flushing the tub with water and bleach. Tr., R.447, PageID#32376-77, 32433; Tr., R.465, Page ID#35231, 35236-39.

Whirlpool introduced a new engineering platform in 2006, Horizon, which further limited water pooling by removing the backward tilt of the Access platform's tub, tapering the tub's ribs, and using a smooth crosspiece. Tr., R.447, PageID#32296-98; Tr., R.470, PageID#35530-31. In 2007, Whirlpool started selling Duet models with a steam feature that improved clothes cleaning and enhanced the clean washer cycle. Tr., R.447, PageID#32377-78; Tr., R.470, PageID#35533. Whirlpool also began offering Affresh, a cleaning product that

enabled each clean washer cycle to eliminate 80% or more of biofilm. Tr., R.470, PageID#35532; Tr., R.447, PageID#32373-74, 32433.

These innovations dramatically reduced the Washers' already low mold and odor complaint rates. Tr., R.470, PageID#35546-47; DX757, R.518-290, PageID#42377. Indeed, average complaint rates for 2006-2009 are on par with those for the Sierra platform models that, according to plaintiffs (at 13 n.7), fixed the alleged defect by using a smooth tub and crosspiece. Tr., R.470, PageID#35547-52; DX757, R.518-290, PageID#42377.

U.S. Mold and Odor Complaint Rates for Allegedly Defective Models and Sierra Models

Platform	Model Years	First Year	First 5 Years	All Time
Access	2001-2005	0.47%	1.42%	1.73%
Access	2006-2009	0.25%	0.56%	0.68%
Horizon	2006-2009	0.24%	0.51%	0.60%
Sierra	2007-2009	0.35%	0.54%	0.61%

DX757, R.518-290, PageID#42377.

Ignoring this overwhelming evidence, plaintiffs continue to pretend (at 9) that 35% of owners experienced odor. A handful of 2004-05 Whirlpool documents refer to that figure. PX1063, R.518-117, PageID#38631. But Whirlpool presented evidence showing that those documents misunderstood a poorly conceived internet survey that many participants thought focused on *dish* washers. Tr., R.447, PageID#32333-34, 32340-42, 32349-50; see DX188, R.518-223, PageID#40846

("odors absorbed in the walls of the dishwasher"), 40847 ("leftover food?"), 40848 ("clothes washer or dishwasher?"). Even the answers regarding clothes washers were not limited to front-loaders, much less Duets, and mentioned odors having nothing to do with biofilm accumulation. *Id.* at 40847 ("oily rags"), 40848 ("urine from my bathroom rug"), 40850, 40851 ("agitator" found only in top-loaders).

Expert Defect Evidence. Plaintiffs place great weight on the testimony of their engineering expert, Dr. Gary Wilson. But Whirlpool thoroughly impeached Wilson and refuted his opinion that tub and crosspiece crevices made all 20 Washer models defective because the washers did not self-clean or allow owners easily to clean them. Tr., R.435, PageID#31200, 31284, 31304-06; R.436, PageID#31431-33. And Wilson admitted that 17 of 19 machines he inspected had no odor. Tr., R.436, PageID#31407-08. He never examined 13 of the 20 models at issue. DD11B, R.518-339, PageID#43318#43318. Wilson did not test whether post-2005 innovations like the clean washer cycle and steam feature reduced biofilm to avoid odor, or whether allegedly defective models did worse than non-defective models. Tr., R.436, PageID#31429-37, 31459. And he said that even if these features worked, the machines were still "defective because it is so hard to remember" to use these features. *Id.* at 31462. But witness after witness (including both plaintiffs) conceded that the Duet's maintenance instructions were easy to

follow. *E.g.*, Tr., R.439, PageID#31774 (Allison), 31864-68 (Gardner); Tr., R.448, PageID#32634-36 (Bicknell), 32702-03 (Glazer).

Whirlpool's engineering witnesses credibly testified that the Washers were not defective and that post-2005 innovations reduced the already low likelihood of odors. Tr., R.447, PageID#32390; Tr., R.465, PageID#35229, 35235; Tr., R.470, PageID#35537-39, 35597, 35600, 35614-17. A survey of Washer owners found that less than 6% were dissatisfied with their Duet and only 1% mentioned odor as a factor in purchasing their next washer. Tr., R.463, PageID#34844-49; DX771, R.518-295, PageID#42523, 42526-27.

Owner Experiences. Trial evidence demonstrated that the mold and odor experiences of the two plaintiffs here, and four Duet owners who are plaintiffs in other suits, resulted from factors other than the design of their Washers' tubs and crosspieces.

Glazer's 2006 Horizon Duet had a moldy odor when inspected. Tr., R.436, PageID#31401. But her failure to care for the machine was the cause. Glazer admitted using regular detergent—which creates many more suds than HE detergent, pushing residue to parts of the machine that are rinsed less frequently. And regular detergent was the only kind found in her house when her Washer was inspected. Tr., R.448, PageID#32697-700, 32753-55; Tr., R.470, PageID#35608. Glazer never used the clean washer cycle, bleach, or Affresh. Tr., R.448,

PageID#32700-03, 32725. And she never cleaned the door seal, which was filthy when inspected. *Id.* at 32704, 32755-58; Tr., R.470, PageID#35601-02.

Glazer Door Seal at Inspection

DX304, R.518-250, PageID#41267. Glazer had the same biofilm problems with her replacement top-loader. Tr., R.470, PageID#35609-14.

Allison's 2005 Access Duet did *not* have a moldy odor. Tr., R.436, PageID#31402; Tr., R.439, PageID#31800. She claimed only that her laundry smelled bad. Tr., R.439, PageID#31698. Tony Hardaway explained how bacteria embedded in fabrics, combined with wash habits using cold water, can create those odors with no contribution from machine biofilm. Tr., R.442, PageID#32133-54. And while inspection of Allison's Washer revealed some biofilm deposits, she had

not followed any of the use and care instructions for the previous four or five months (Tr., R.439, PageID#31777-83), or perhaps ever. Tr., R.470, PageID#35594-600.

The only thing Pramila Gardner said was wrong with her washer was that the door seal had mold. Tr., R.439, PageID#31858-61. But she conceded that she did nothing to clean the seal for the first three years she owned the machine. *Id.* at 31840-42, 31850-55.

As for Sylvia Bicknell and Tracy and Greg Cloer, their washers had no discernible moldy odor (Tr., R.436, PageID#31472, 31650-51), and Wilson, plaintiffs' expert, acknowledged that both washers were "clean as a whistle." *Id.* at 31472.

Cloer Tub

Cloer Crosspiece

Bicknell Tub **Bicknell Crosspiece**

PX1123, R.518-137, PageID#38829-30, 38837-38. The problem experienced by Bicknell and the Cloers was laundry odors that can occur regardless of machine biofilm. Tr., R.436, PageID#31560-61; Tr., R.448, PageID#32595-97, 32629-30.

The jury also heard about other Washers that experts examined without finding odors or biofilm buildup (*e.g.*, Tr., R.470, PageID#35537-39), including one returned to Whirlpool because of supposed odors that Wilson admitted was "virtually pristine" and "squeaky-clean." Tr., R.436, PageID#31403, 31420-24.

In short, the jury had ample grounds to find that Whirlpool was not negligent and that all of the Washers were of merchantable quality.

Injury Evidence. The jury likewise easily could have found that plaintiffs failed to prove any classwide injury proximately caused by the alleged defects. Plaintiffs chose to try to establish classwide injury by arguing that all class members paid too much for a defective washer. Trial Br., R.376, PageID#24621.

Plaintiffs' only evidence was the testimony of sociologist Sarah Butler, who opined that a survey of 148 non-class-members established that consumers, if told of the Washers' use and care steps before purchase, would demand a $419 discount to buy one. Tr., R.449, PageID#32813-14, 32819-20, 32829-32, 32869-70. Butler did not consider plaintiffs Glazer and Allison (*id.* at 32898-99) and admitted that her speculative theory would apply "regardless of whether the actual owner's machine after several years of use is clean as a whistle" (*id.* at 32907) or whether the maintenance steps "actually work" or are easy to perform. *Id.* at 32885-87, 32906. Her conclusion would "remain the same" for a non-defective washer with a smooth tub. *Id.* at 32893-94.

C. Trial Rulings.

During trial, Whirlpool twice moved for judgment as a matter of law. Tr., R.459, PageID#34719-65; JMOL Mot., R.473, PageID#35839-75. The district court denied those motions, except that it held "the jury may not consider" discovery-rule tolling of the statute of limitations based on the trial evidence and the court's independent review of the law. Tr., R.463, PageID#34817-19; Decertification/JMOL Order, R.482, PageID#36358. The district court also denied Whirlpool's renewed decertification motion. Motion, R.472, PageID#35797-829; Order, R.482, PageID#36357-58.

The district court dealt with a host of trial objections, making judgment calls balancing the prejudice to one side against the other side's right to put on its case, including Whirlpool's references to plaintiffs' lawyers and Allison's Porsche hobby. *Infra*, Part IV.B. When plaintiffs objected, the district court allowed questioning only to the extent that it went to credibility and bias, consistent with the court's *in limine* rulings. *Ibid.*

In the jury instructions, the district court fulfilled its promise to "clean up" any prejudice from statements by counsel or the court. Tr., R.459, PageID#34691-92. It cautioned the jury that the evidence "includes only what the witnesses said while they were testifying," the "exhibits that I allowed into evidence" and "stipulations that the lawyers agreed to," and not "lawyers' statements and arguments" or the court's own "comments and questions." Tr., R.488, PageID#36499. Plaintiffs never objected to that instruction or requested a different one.

Nor did plaintiffs object to the jury instructions requiring them to prove defective design and unmerchantability for "all 20 models of the Duet Washers." Tr., R.488, PageID#36516, 36519; R.476-1, PageID#36094, 36100. Plaintiffs stated that they had "no [o]bjection" to the jury instructions, save one statute-of-limitations instruction (JI Obj., R.483, PageID#36361), and that the instructions were "correct" and should be "given as issued." JI Br., R.481, PageID#36332. By

contrast, Whirlpool objected to the district court's refusal to instruct the jury on its comparative-fault, assumption-of-risk, and mitigation-of-damages defenses. R.476, PageID#36057-60; R.485, PageID#36415-18.

The jury swiftly rendered a verdict for Whirlpool (R.490, PageID#36765) and judgment was entered for Whirlpool. R.491, PageID#36774. Plaintiffs filed no post-judgment motions, forgoing their opportunity to have the judge who heard the evidence and managed the trial consider their arguments.

SUMMARY OF ARGUMENT

Plaintiffs contend that the district court erroneously instructed the jury that plaintiffs had to prove that all 20 Washer models were defective. But plaintiffs affirmatively waived that argument by telling the district court that they had "no objection" to those "correct" instructions.

Plaintiffs also fail to establish any error in the instructions, which follow the class certification order and other rulings plaintiffs say they contradict. The only alternative instruction proposed by plaintiffs would have violated the Rules Enabling Act, Ohio law, and Whirlpool's Due Process and Seventh Amendment rights. And the district court had no obligation to alter the class or postpone trial *sua sponte*, as plaintiffs now suggest.

The district court did not abuse its discretion when it excluded some evidence of supposed health risks. Plaintiffs did not argue that health risks were a

part of this case until long after the close of discovery and they waited until one business day before their expert testified at trial to offer his belated declaration on this subject. Even now, plaintiffs do not claim that any class member suffered health injury. And the class excluded any member claiming personal injury. The confusing and misleading nature of the excluded evidence, along with its belated disclosure, would have caused Whirlpool undue prejudice. The district court appropriately prevented plaintiffs from ambushing Whirlpool with undisclosed opinions on emotionally sensitive and irrelevant topics in the middle of trial. If anything, the court permitted plaintiffs too much leeway to introduce prejudicial and misleading evidence about health risks that had no connection to the Washers at issue and no bearing on the claims before the jury.

Plaintiffs challenge the grant of summary judgment to Whirlpool on their failure-to-warn claim. But the district court correctly determined that Ohio law requires a safety hazard to support such a claim and that plaintiffs asserted no safety hazard in opposing summary judgment.

Plaintiffs request a new trial based on argument and cross-examination by Whirlpool's counsel that referred to lawyers for class action plaintiffs, Allison's hobby of racing expensive cars, and other supposedly improper subjects. But plaintiffs never sought a mistrial or filed a new trial motion based on those references, which waives any appellate challenge. And the challenged argument

and cross-examination were invited by plaintiffs' counsel and constituted proper credibility and bias impeachment.

Finally, both sides conditionally raise issues that could arise on remand were this Court to reverse or vacate the judgment. The jury was not permitted to consider tolling of the statute of limitations under the discovery rule because that rule does not apply to commercial-transaction or general negligence cases. But the district court did err in refusing to decertify this class action for failure to satisfy the requirements of Rule 23. And the district court should have instructed the jury on Whirlpool's comparative-fault, assumption-of-risk, and mitigation-of-damages defenses. But these conditional arguments are moot because the judgment below is right and should be affirmed.

STANDARDS OF REVIEW

District court rulings regarding jury instructions, exclusion of evidence, counsel questioning and argument, and class decertification receive abuse-of-discretion review. *Flagg* v. *City of Detroit*, 715 F.3d 165, 175 (6th Cir. 2013) (exclusion of evidence); *Balsley* v. *LFP, Inc.*, 691 F.3d 747, 761 (6th Cir. 2012) (counsel conduct); *Randleman* v. *Fidelity Nat'l Title Ins.*, 646 F.3d 347, 355 (6th Cir. 2011) (decertification); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 536 (6th Cir. 2008) (jury instructions). *De novo* review applies to orders granting summary judgment or judgment as a matter of law. *Borman, LLC* v. *18718*

Borman, LLC, 777 F.3d 816, 821 (6th Cir. 2015) (summary judgment); *Kusens* v. *Pascal Co.*, 448 F.3d 349, 360 (6th Cir. 2006) (JMOL).

ARGUMENT

I. PLAINTIFFS WAIVED THEIR MERITLESS CHALLENGE TO THE LEGALLY CORRECT INSTRUCTIONS STATING THAT PLAINTIFFS HAD TO PROVE A DEFECT IN ALL 20 WASHER MODELS.

Plaintiffs contend that the district court erred by instructing the jury that plaintiffs had to prove the defect element of their negligent-design claim and the unmerchantability element of their breach-of-implied-warranty claim for "all 20 models of the Duet Washers" (Tr., R.488, PageID#36516, 36519), as required by the court's pretrial ruling on plaintiffs' burden. R.427, PageID#30800. Plaintiffs waived that challenge and their claims of error are in any event meritless.

A. Plaintiffs Waived Any Claim Of Error.

Under bedrock federal law plaintiffs waived any challenge to the "20 models" jury instructions. Plaintiffs not only failed to object to those instructions, but also *affirmatively agreed* to them by telling the district court expressly that they were "correct" (JI Br., R.481, PageID#36332) and that plaintiffs had "no [o]bjection" to them. JI Obj., R.483, PageID#36361.

Fed. R. Civ. P. 51(d)(1)(A) provides that a party may claim "error in an instruction actually given" *only* if it "properly objected"—that is, objected "on the record, stating distinctly the matter objected to and the grounds for objection," "at

the opportunity provided under Rule 51(b)(2).” Fed. R. Civ. P. 51(c). Rule 51(b)(2) provides an opportunity to object after the court informs the parties of its proposed instructions but “before the instructions and arguments are delivered” to the jury.

Consistent with Rule 51, “[t]he law in this circuit generally requires a formal objection” to preserve instructional error. *Woodbridge* v. *Dahlberg*, 954 F.2d 1231, 1237 (6th Cir. 1992). The only exception is “when it is plainly apparent” that “the judge was aware of a party’s dissatisfaction with the instruction, as read to the jury, and the specific basis for that claimed error or omission.” *Ibid.* This timely objection requirement “is not a ‘mere formality,’ but was developed to fulfill the basic purpose of Rule 51; that is, to alert the trial judge to potential problem areas so that the jury can be clearly and correctly instructed.” *Preferred RX* v. *Am. Prescription Plan*, 46 F.3d 535, 547 (6th Cir. 1995).

In the absence of proper objection, only plain error review is available. But even that narrow form of review is unavailing if the objection was “intentionally relinquished or abandoned, *i.e.*, affirmatively waived.” *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). And this Court finds affirmative waiver whenever a party states that it has no objection to or is satisfied with instructions. *Scott* v. *Miller*, 361 F. App’x 650, 652 (6th Cir. 2010); *Morgan* v. *Lafler*, 452 F. App’x 637, 646 n.3 (6th Cir. 2011).

These well-established principles foreclose review of plaintiffs' challenge to the "20 models" instructions. When the district court first provided its proposed jury instructions, they contained the "20 models" instructions. R.476-1, PageID#36094, 36100. Plaintiffs did not object, but instead praised the instructions as "correct" and "an appropriate balancing of the Parties' proposed instructions." R.481, PageID#36332. Plaintiffs said they "fit the facts of this case," "comply with Ohio substantive law," and should be "given as issued." *Ibid.*

In response to Whirlpool's objections, the district court revised some jury instructions, but not the "20 models" instructions. R.485-1, PageID#36449, 36455. Except for a revised statute-of-limitations instruction, plaintiffs continued to support the proposed instructions: "Plaintiffs have reviewed the Court's Revised Final Jury Instructions. With one minor, but critical, exception, **they have no Objection**." R.483, PageID#36361 (emphasis added). Having received no objection to the "20 models" instructions, the district court delivered them to the jury. Tr., R.488, PageID#36516, 36519. Plaintiffs still did not object.

Plaintiffs cite (at 32 n.13) earlier filings in which they debated the need to prove that all 20 models had a defect. But those filings were made before plaintiffs stated that they had "no objection" to the "correct" instructions that should be "given as issued." They were pre-trial objections to Whirlpool's proposed (and rejected) instructions on class proof (R.392, PageID#26820-23); pre-trial briefs on

the scope of class proof (R.400, PageID#27888-906; R.411, PageID#28847-54); and a footnote in a brief opposing class decertification. R.477, PageID#36127 n.3.

This Court routinely has found that parties waived challenges to jury instructions in similar circumstances. *E.g.*, *Howe* v. *City of Akron*, 723 F.3d 651, 660 (6th Cir. 2013) (failure to object at charge conference waived challenge raised in trial and motion briefs); *Libby-Owens-Ford* v. *Ins. Co.*, 9 F.3d 422, 428 (6th Cir. 1993) (trial brief). In *Woodbridge*, for example, plaintiffs waived any error in a liability instruction because they said they had no objections, even though they previously proposed a different instruction on the subject and argued their liability points in opposing dispositive motions. 954 F.2d at 1234-37. In *Scott*, plaintiff "affirmatively waived" any challenge to omission of an instruction by not objecting to defendant's request to omit the instruction and by stating he had no objection to the instructions after they were delivered. 361 F. App'x at 652-54; see also *Preferred RX*, 46 F.3d at 546-48 (saying "okay" when judge challenged objection and failing to object after instructions were given waived objection); *Morgan*, 452 F. App'x at 646 n.3 (expressing satisfaction with instruction affirmatively waived challenge). Under these authorities, plaintiffs' unambiguous approval of the "20 models" instructions affirmatively waived any challenge.

B. Plaintiffs' Claim Of Error Also Is Meritless.

The district court committed no error, much less plain error, when it instructed the jury that plaintiffs had to prove defective design and unmerchantability for all 20 Washer models.

1. The Instructions Were Consistent With The Class Certification And Summary Judgment Rulings.

According to plaintiffs, this Court's interlocutory ruling affirming class certification and the district court's rulings denying decertification and summary judgment established that all 20 Washer models were the same for purposes of deciding *at trial* whether all the Washers were defective. Plaintiffs assert that the district court contravened those rulings by announcing on the eve of trial that plaintiffs must "prove that all twenty (20) Duet Washing Machine models * * * suffered from the same alleged design defect." R.427, PageID#30800. Plaintiffs' arguments are legally and factually incorrect.

As a matter of law, class certification cannot take disputed factual issues away from a jury. This Court has agreed with the Fourth Circuit that "'[t]he jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding of any fact differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment.'" *Rodney* v. *Nw. Airlines*, 146 F. App'x 783, 789 n.1 (6th Cir. 2005). This Court's factual determinations in a class certification

appeal "d[o] not preclude the factfinder from ultimately concluding otherwise." *Ibid*.

That is the rule in every circuit to have considered the question. *E.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 & n.19 (3d Cir. 2008) ("Although the district court's findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits") (citing cases); 1 MCLAUGHLIN ON CLASS ACTIONS § 3:12, at 477 & nn.39-40 (10th ed. 2013) (citing cases). And the Supreme Court endorsed that rule in *Wal-Mart Stores* v. *Dukes* when it held that a class action securities-fraud plaintiff would have to prove market efficiency twice—at the class certification stage and "*again* at trial in order to make out their case on the merits." 131 S. Ct. 2541, 2552 n.6 (2011).

There was no eve-of-trial shift. Consistent with this law, this Court and the district court *always* made clear that plaintiffs bore the burden at trial to prove that all models are defective. When the district court ordered class certification, it expressly recognized that plaintiffs had assumed that burden because their

> theory of the case is that *none* of Whirlpool's design modifications [and] none of Whirlpool's recommended fixes were effective[.] If class counsel's theory of the case fails to a jury, all class members' claims are *res judicata*—even those who had easier, more individualized roads to recovery.

Certification Order, R.141, PageID#4905 n.3.

In the interlocutory appeal, plaintiffs never challenged that holding and this Court affirmed without reservation. This Court also stressed the "limited" scope of its class certification inquiry (*Glazer*, 722 F.3d at 851-52), which was intended neither to "adjudicate the case" (*id.* at 858-59) nor to serve as "a dress rehearsal for the trial on the merits." *Id.* at 851-52. These words are crystal clear. In discussing commonality, the Court **agreed** with the Seventh Circuit that "'[t]he basic question in the litigation—were the machines defective in permitting mold to accumulate and generate noxious odors?—is common to the entire mold class,'" even though there may be "'differences in design.'" *Id.* at 853-54 (quoting *Butler* v. *Sears, Roebuck & Co.*, 702 F.3d 359, 361 (7th Cir. 2012)). Likewise, in acknowledging that Whirlpool's Tony Hardaway believed differences among Duet models to be material, the Court wrote that "his credibility is ultimately an issue for the jury to determine." 722 F.3d at 854 n.1.

When the district court subsequently modified the class and denied decertification more than a month before trial it reiterated that class certification did not reduce plaintiffs' trial burden to "prove *all* Duet washing machine models in the class have a *common* design defect." R.366, PageID#24332-33. The district court explained that its modification of the class "still leaves Plaintiffs with the burden at trial of proving that 20 different Duet models * * * share a common defect." *Id.* at 24342.

Plaintiffs wrongly contend (at 28-29, 33-34) that a few other statements in the very same rulings somehow lifted their burden of proof. Those statements merely reflect the district court's conclusion that plaintiffs' need to "prove liability as to each separate model" *at trial* would not prevent *class certification* because whether all of the Duet models "across the manufacturing spectrum" had a defect that caused biofilm accumulation was a common, predominating question. *Glazer*, 722 F.3d at 849, 854; see Modification/Decertification Order, R.366, PageID#24350; Verdict, R.490, PageID#36765.

Plaintiffs likewise misunderstand the district court's summary judgment ruling. The district court *denied* the motions of *both* sides on the negligent-design and breach-of-implied-warranty claims—precisely because there were disputed issues of material fact to be determined by the jury. R.391, PageID#26777; see *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 248-50 (1986). The district court could not "say that every reasonable juror could only determine that Plaintiffs prevail on their claims," which left it to the jury to "render a judgment that will reveal whether Plaintiffs' view of the evidence is correct." R.391, PageID#26805-06. And it reiterated that plaintiffs bore "the burden at trial of proving that 20 different Duet models * * * share a common defect." *Id.* at 26785.

Plaintiffs offered evidence to show that all 20 Washer models had the same defect; Whirlpool presented contrary evidence. At the end of the trial, the district

court remained convinced that "reasonable jurors could differ on whether all Duet models included in the class suffer the same alleged defect." Decertification/JMOL Order, R.482, PageID#36358.

In short, the class certification and summary judgment rulings could not, and did not, take any defect issue away from the jury.

2. Plaintiffs Never Proposed A Proper Alternative Instruction.

Another insurmountable obstacle for plaintiffs is their failure to articulate a proper alternative to the "20 models" instructions. Federal appellate courts reject jury-instruction challenges when the appellant does not propose a proper alternative. *E.g.*, *McCann* v. *Wal-Mart Stores*, 210 F.3d 51, 55 (1st Cir. 2000) (the court is "freed from the chore" of deciding instruction challenge where party "did not offer a proper instruction").

The instruction plaintiffs proposed prior to and again at trial was grossly improper:

> You are not to resolve Gina Glazer's and Trina Allison's [class action] claims any differently than you would if this case were brought by them only as individuals. * * * You may assume that the evidence at this trial applies to all class members.

Proposed JI, R.466, PageID#35267; Trial Br., R.376, PageID#24671. In other words, they wanted the jury simply to *assume*, without proof, that a defect in Allison's and Glazer's Duets established a defect in all 20 Washer models.

Instructing the jury to make that assumption because this is a class action would have been legal error. The Rules Enabling Act forbids application of Rule 23 to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); see *Wal-Mart*, 131 S. Ct. at 2561 (Act forbids class litigation based on premise that defendant "will not be entitled to litigate its statutory defenses to individual claims"); *Cimino* v. *Raymark Indus.*, 151 F.3d 297, 312 (5th Cir. 1998) (Rules Enabling Act demands that proof "'*in no way hinges upon whether or not the action is brought on behalf of a class under Rule 23*'"). Plaintiffs' proposed instruction would have had just that forbidden effect.

Under Ohio law, a liability finding on a negligent-design claim requires that defective design be *proved*, not assumed, for the product purchased by the plaintiff. *Glazer*, 722 F.3d at 853. The same is true for the merchantability element of a breach-of-implied-warranty claim. *Ibid.*; *Temple* v. *Wean United*, 364 N.E.2d 267, 270 (Ohio 1977). Furthermore, "[a] defendant in a class action has a due process right to raise individual challenges and defenses." *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); see *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) ("a due process violation" results when "the right of defendants to challenge the allegations of individual plaintiffs is lost"). And the Seventh Amendment gives a defendant the right to insist that a jury determine liability as to class members based on their individual circumstances. *Cimino*, 151 F.3d at 319

(extrapolating causation findings, rather than having jury determine causation individually, violated Seventh Amendment). Plaintiffs' proposed instruction would have eviscerated Whirlpool's rights by requiring the kind of extrapolated class judgment based on evidentiary assumptions that courts have rejected. See *Wal-Mart*, 131 S. Ct. at 2561 (rejecting "Trial by Formula" based on sample of class members); *McLaughlin*, 522 F.3d at 231-32; *Cimino*, 151 F.3d at 309-10, 319-20.

Instructing the jury to "assume that the evidence at this trial applies to all class members" would have sown confusion and required the jury to make false assumptions. Allison and Glazer bought Duet models built on *different platforms*. Tr., R.488, PageID#36508-10. Both sides introduced evidence regarding numerous *additional* models with varied designs and self-cleaning features. *E.g.*, Tr., R.465, PageID#35216-39; Tr., R.470, PageID#35530-39; Tr., R.435, PageID#31123-27; PX1122, R.518-136, PageID#38783. Which trial evidence was the jury supposed to assume applied to all class members? For example, neither Glazer's nor Allison's machine had the steam feature and the only model with that feature that plaintiffs' expert inspected was "squeaky-clean." DD11B, R.518-339, PageID#43318; Tr., R.436, PageID#31420-24. Contrary to plaintiffs' proposed instruction, no "assumption" from the trial evidence could properly be used to find classwide liability. See *Decker* v. *GE Healthcare*, 770 F.3d 378, 396-97 (6th Cir. 2014) (affirming refusal to give confusing instruction).

3. The District Court Had No Obligation To Alter The Class Or Postpone The Trial.

Plaintiffs assert (at 34) that if the district court believed the 20 Washer models differed materially, "it should have: (1) further modified the class definition; (2) postponed the trial for supplemental expert work; or (3) 'create[d] subclasses.'" But plaintiffs never asked the district court to take any of those steps. Even after the court ruled that plaintiffs had to prove a defect for all 20 models and proposed jury instructions to that effect, plaintiffs defended the certified class (Decertification Opp., R.477, PageID#36124) and insisted that the case go to the jury without delay. JI Br., R.481, PageID#36332. They intentionally gambled on across-the-board victory.

A court has "no *sua sponte* obligation" to create subclasses or otherwise ease the way for class plaintiffs. *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 408 (1980); see *Butler* v. *Sterling, Inc.*, 210 F.3d 371, at *7 (6th Cir. 2000) (no *sua sponte* duty to subclass); *Steering Committee* v. *Exxon Mobil Corp.*, 461 F.3d 598, 603-04 (5th Cir. 2006) ("no obligation to *sua sponte* consider" "variations" on class treatment "not proposed by any party"). Plaintiffs recognized that *they* had the "obligation to come forward and tell the Court" as they "learn things that change [their] view of what the class should look like," "up to and even through trial." Hrg., R.286, PageID#8265.

Plaintiffs tried to win on all models instead of asking for the changes they now advocate. That leaves no basis to conclude that the district court abused its "broad discretion" in determining whether to subclass or use other case management tools. *Randleman* v. *Fidelity Nat'l Title Ins.*, 646 F.3d 347, 355 (6th Cir. 2011). Plaintiffs cite not a single authority finding reversible error in similar circumstances.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED CERTAIN HEALTH-RISK EVIDENCE.

Plaintiffs argue that the district court's decision to exclude certain evidence of health risks requires reversal. But plaintiffs failed to timely assert any health-risk claim, and they sought to introduce speculative and prejudicial evidence not related to any claim or plaintiff.

After full pretrial briefing showed that plaintiffs had waited until after discovery closed to first hint that they might rely on health-risk evidence, Judge Boyko granted Whirlpool's motion to exclude that evidence because there were "no claimed health risks" and "prejudice outweighs probative value" of the evidence. R.426, PageID#30799. Following another round of briefing and "discussions in chambers" on plaintiffs' mid-trial motion to reconsider, Judge Boyko again found that "Plaintiffs have not claimed health risks and the prejudicial effect outweighs the probative value." R.464, PageID#34988.

"In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters," a court of appeals must "afford broad discretion to a district court's evidentiary rulings." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008). And that "is particularly true with respect to Rule 403 since it requires an on-the-spot balancing of probative value" against the risk at trial of "unfair prejudice, confusing the issues, misleading the jury, undue delay, [or] wasting time." *Ibid.*; see *In re Air Crash Disaster*, 86 F.3d 498, 526 (6th Cir. 1996) ("the trial judge understands each item of evidence and its place in the web of other evidence in a way that no appellate court can"). As this Court has recognized, rulings "'based on considerations of relevance and prejudice'" will "'not be lightly overturned.'" *Tompkin* v. *Philip Morris USA*, 362 F.3d 882, 897 (6th Cir. 2004); see *United States* v. *Hart*, 70 F.3d 854, 858 (6th Cir. 1995) (recognizing that "the district court [that] observes the trial first hand" is "in 'the best position to assess the impact of the testimony within the context of the proceedings'").

Judge Boyko's carefully considered rulings on this fully aired dispute over health-risk evidence fell well within his "'very broad' discretion" to manage the trial and exclude prejudicial evidence with little probative value. *United States* v. *Semrau*, 693 F.3d 510, 523 (6th Cir. 2012). Those discretionary rulings provide no basis for a new trial, which was never sought below.

A. This Lawsuit Has Always Been About Odor, Not Health Risks.

The probative value of evidence is assessed in relation to the issues to be addressed in a case. See *Sprint*, 552 U.S. at 388 (one factor in the "fact based" inquiry into probative value is "how closely related the evidence is to the plaintiff's circumstances and theory of the case"); *United States* v. *Blackwell*, 459 F.3d 739, 753 (6th Cir. 2006). Here, health-risk evidence is "probative of almost nothing" (*Black* v. *Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 587 (6th Cir. 1994)), because —as Judge Boyko found—plaintiffs had "not claimed health risks" from alleged washer defects. Recons. Order, R.464, PageID#34988. Nor could they reasonably do so. Plaintiffs have never identified any plaintiff, any class member, or any washer user anywhere who has required medical care as a result of using a washing machine, or any scientific study documenting an actual health risk from doing so.

An important goal of the federal rules is to "identif[y] the real issues" in the litigation clearly and early to aid in "planning and management of litigation" and to "sav[e] time and expense for everyone." Fed. R. Civ. P. 16(c), 1983 Advisory Committee Notes. Here, from the start, plaintiffs said this case concerned biofilm causing odors, not health risks that never materialized. To be sure, plaintiffs' complaint cursorily alleged that the Washers carried "greater risks of foul odors and health hazards than an ordinary consumer would expect." R.80, PageID#1641. But the only "hazard" identified was "danger to children" from leaving the door

open (*ibid.*)—health risks from mold and bacteria were nowhere mentioned. Indeed, the complaint *defined* the "Mold Problems" allegedly "caused by the Design Defects" exclusively as "odors" in Washers, clothes, and homes. *Id.* at 1605-06, 1614-15. Plaintiffs expressly **stipulated** that they were "**not seeking recovery for personal injury** related in any way to the allegations" in their complaint. R.50, PageID#993.

Recognizing that individualized health claims would interfere with efforts to satisfy Rule 23's predominance requirement, plaintiffs stressed in class certification proceedings that "this isn't a case involving personal injuries." Hrg., R.134, PageID#4815. Plaintiffs' papers never mentioned health risks. Certification Motion, R.93, PageID#1966 (defining "Mold Problems" as development of mold "and/or associated foul odors"), 1981 (describing injury as "smell like mold"); Certification Reply, R.110, PageID#4152 ("uniform Defect" is "odor-causing residue build-up"); CA6 Br., 2010 WL 6599561, at *12 (No. 10-4188, 6th Cir.) ("bad smells develop"); S. Ct. Br., 2012 WL 6040607, at *4 (No. 12-322, U.S.) ("mold and resulting noxious odors"). Even when plaintiffs' counsel described the case to class members, they said it was about "unpleasant odors and ruined laundry," "not about personal injuries." Class Website, http://whirlpoolclass.com/faq.html#_1 (visited Apr. 21, 2015).

As would be expected given their six-year-long focus on odors, plaintiffs did not develop any record supporting the notion that biofilm posed any health danger to consumers; nor did they give Whirlpool any reason to gather evidence rebutting that notion.

When deposed, Ms. Allison denied any health problems. Asked whether she had "any belief that [her] washing machine has contributed to any health problems" with "you or any of your family?," she responded "No, I do not. * * * [N]ot at all." R.308-12, PageID#13116-17. Ms. Glazer said she had allergies to "many * * * things" (R.103-44, PageID#3331) including water and various aromas, but responded "No" to the question whether she alleged any "safety defect" or "safety hazard" with her Washer. R.308-11, PageID#13082.

The first report of plaintiffs' microbiologist/mycologist, Dr. Chin Yang, asserted generally that washer biofilm might harbor "pathogenic bacteria" (R.93-15, PageID#2216)—but his "Conclusion" made no mention of health risks, stating that (1) Duets provide an environment for biofilm growth and (2) "Biofilm formation can lead to undesirable and unpleasant odors" that "include musty, mildewy and moldy odors." *Id.* at 2222. See Fed. R. Civ. P. 26(a)(2) (requiring that experts provide in their reports "a complete statement" of all their opinions). When deposed, Yang conceded that while health risk to consumers seemed to him "a possibility," he lacked "firsthand knowledge of any reported * * * health effect":

"I believe that's a potential but * * * I don't have any high evidence or cases reported at all." R.453-1, PageID#33161-62; see *id*. at 33165 (I "don't know any cases of reported health effect").

Yang's second report cited Whirlpool documents mentioning health risks—the same ones plaintiffs reference on appeal. R.300-5, PageID#10063-66. But it again focused on "malodors" (*id.* at 10067), claiming nowhere that biofilm in washing machines *in fact* creates health risks for consumers. Deposed about this report, Yang repeated that he did not "know of any human being whose health has been affected by any growth in any washing machine anywhere in the world." R.453-2, PageID#33170.

When plaintiffs sought summary judgment, their description of the **"worst"** harm resulting from the "defect" was that "the washers developed foul odors." R.309, PageID#13375-76. They never mentioned health injuries. And when Whirlpool sought summary judgment—arguing that plaintiffs' common law claims require proof of health or safety dangers—plaintiffs responded *not* that this requirement was *satisfied* but that health and safety dangers were not required. R.329, PageID#22600-05. They also declared that "the Sixth Circuit" had "plainly understood this was not a case about safety or danger." *Id.* at 22601 n.7. Only in a footnote aside in their July 2014 reply in support of their summary judgment

motion did plaintiffs ever mention health risks. R.356-2, PageID#24084 n.3.[1] Accordingly, when the district court decided the parties' summary judgment motions it concluded that "the alleged design flaws carry no safety risk" because "Plaintiffs simply assert the flaws cause accumulation of mold in the washing machine, leading to bad-smelling homes and laundry." R.391, PageID#26783.

B. The District Court Acted Within Its Discretion In Excluding Untimely, Speculative And Irrelevant Evidence Of Health Risks.

The district court cannot be faulted for adhering to its ruling that plaintiffs never claimed safety risks when it granted Whirlpool's motion *in limine* to exclude health-risk evidence and refused to reverse course mid-trial. The history recited above shows the reasonableness of that ruling. Indeed, the fact that plaintiffs felt it necessary to submit an *entirely new* Yang declaration regarding health risks in support of their mid-trial motion to reconsider exclusion of health-risk evidence confirms that plaintiffs had not previously made those risks a basis for their claims.

Nor can the district court be faulted for concluding that the prejudicial effect of plaintiffs' belated effort to introduce health evidence outweighed any probative value. Plaintiffs argue (at 35) that their health-risk evidence is probative because it shows plaintiffs did not get what they bargained for, but that evidence adds nothing significant to plaintiffs' evidence regarding biofilm and odors. As Judge Boyko

[1] This footnote prompted Whirlpool's motion to exclude health-risk evidence. R.369, PageID#24437-39.

explained, the jury could find for plaintiffs if they merely proved that, because of a design defect, the washers "did not produce clean-smelling clothes" or "gave off a moldy odor." R.391, PageID#26787-88. Whether some machines contained pathogens that under hypothetical circumstances might be associated with some ailments would add nothing to proof of plaintiffs' classwide defect theory as articulated since the beginning of the litigation. See *Air Crash Disaster*, 86 F.3d at 531 (upholding exclusion of evidence "of marginal probative value" that could "have confused the jury"); accord *United States* v. *Moore*, 917 F.2d 215, 233 (6th Cir. 1990).

Beyond this, the excluded evidence would have done nothing to establish that plaintiffs or other class members faced real health injuries from the alleged defects. Yang's belated report speculated that human pathogens supposedly found in washing machines "create potential health risks." R.450-1, PageID#33064-68. But it cited only reports that associate "'damp or mouldy buildings'" with respiratory infections and asthma, rather than analyzing whether *washing machines* cause such conditions for ordinary consumers. *Ibid.* Speculation about "potential" health risks, far from being probative, is simply misleading in a case where plaintiffs lack any evidence that even one of the millions of Duet users—or of washing machines in general—ever contracted any disease from, or needed medical care as a result of, biofilm in their machine.

Excluded or redacted Whirlpool documents mentioning health risks—prepared by engineers, not medical or disease prevention experts—likewise point to no real health risk, let alone any case of actual infection. These documents made clear that the "*relationship between airborne mycotoxins and human health has not been established or documented*." R.379-5, PageID#25952-53 (emphasis added). Some relate to unproven health concerns for Whirlpool employees continually disassembling machines, which bear no relation to any risk faced by consumers. R.350-1, PageID#23522 (regarding lab worker concerns). Others addressed mold issues in vague and unscientific terms related to service technicians breaking down washers in customers' homes—not ordinary and intended washer use by consumers. *E.g.*, R.110-4, PageID#4220 (consumer complaints about unspecified "breathable air issues related to the repair person physically scrubbing the washer in their home"). And others did not address health problems created by washer biofilm at all. *E.g.*, R.379-10, PageID#26054-63 (describing EPA regulation of antimicrobial products, saying nothing about health risks from biofilm). Some of these documents addressed potential health issues in general, but gave no indication how washing machine users could experience those health effects. R.379-5, PageID#25952-53 (footnotes describing potential health effects in general); R.379-14, PageID# 26133-36 ("web-site descriptions" of health effects of organisms).

In the absence of any evidence that a single consumer ever suffered physical illness related in any way to their Washer, the excluded evidence had no probative value. A tiny percentage of Duet owners experienced odor, but *none at all* contracted disease—even though *manifestation* of a defect is a requisite for damages recovery under Ohio tort law; a "latent defect" is not enough. *Gentek Bldg. Prods.* v. *Sherwin-Williams Co.*, 2005 WL 6778678, at *11 (N.D. Ohio Feb. 22, 2005); see *Hoffer* v. *Cooper Wiring Devices*, 2007 WL 1725317, at *7-*8 (N.D. Ohio June 13, 2007); 1 MCLAUGHLIN ON CLASS ACTIONS § 5:56, at 1625-26 (10th ed. 2013) ("The majority view is that there is no legally cognizable injury in a product defect case, regardless of [legal] theory, unless the alleged defect has manifested itself in the product used by the claimant"); *Briehl* v. *Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (summarizing cases). As the Supreme Court has held, "threatened injury must be *certainly impending*," not merely "*possible*," to "constitute injury in fact." *Clapper* v. *Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013).

The prejudicial effect of allowing plaintiffs to present speculative health-risk evidence would have been significant. First, that evidence would unfairly have ambushed Whirlpool by changing the focus of the case from biofilm odors to biofilm health risks after fact and expert discovery had closed. See Fed. R. Civ. P. 26(a)(2)(D), 26(e), 37(c)(1). Most of the proffered testimony in Yang's mid-trial

declaration is found in neither his earlier reports nor his deposition testimony. Indeed, **only one of the 16 declaration sources had been cited previously**. R.453, PageID#33151-52. Had Yang's testimony been disclosed before the close of discovery, Whirlpool would have been able to depose Yang to test his new evidence and develop evidence of its own. Plaintiffs' unfair tactics deprived Whirlpool of any defense on this issue.

By itself, the prejudice from that sandbagging warranted exclusion of the health-risk evidence. See *Pride* v. *BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000) ("[d]istrict courts have broad discretion to exclude untimely disclosed expert-witness testimony"); *King* v. *Ford Motor Co.*, 209 F.3d 886, 901 (6th Cir. 2000) (excluding expert testimony where "unexcused failure to disclose" testimony prevented the other side from "prepar[ing] properly").

But the prejudice did not result just from timing. The excluded health-risk evidence makes baseless but sensationalist claims, including that some biofilm may contain "roundworms" that "can infect humans"; toxic pathogens "associated with human infections" such as "neonatal meningitis," "intestinal diseases," and "pneumonia"; fungi associated with asthma; and pathogens responsible for most "infections in intensive care unit patients." R.450-1, PageID#33064-68. After six years of litigation in which plaintiffs developed no actual evidence of such harms,

it would have been improper to allow plaintiffs to speculate about them in a class action they obtained by expressly *disavowing* claims of personal injury.

A "curative jury instruction" that "there was no claim for physical injury" (Pl. Br. 41) would not have addressed any of *those* problems, which result not from the jury "'considering evidence for one purpose but not another'" (*ibid.*) but from the speculative yet inflammatory nature of this evidence never connected to any actual injury to a washer user. Unlike in *Koloda* v. *GM Parts Division*, 716 F.2d 373, 377-78 (6th Cir. 1983), the excluded evidence here would "have required a foray into collateral matters" designed to "appeal to the emotions or prejudices of the jurors."

The district court was entitled to conclude that plaintiffs' tactics would have had an "'undue tendency to suggest a decision based on improper considerations'" and would only "serv[e] to inflame the passions of the jury." *Sutkiewicz* v. *Monroe County Sheriff*, 110 F.3d 352, 360 (6th Cir. 1997); see *Woods* v. *Lecureux*, 110 F.3d 1215, 1219 (6th Cir. 1997) (upholding exclusion of evidence that "the jury might have given" "more weight than it deserved"). This Court is "obligated" to "defer to the trial court's assessment" that the excluded evidence "had a serious potential for confusing the jury and being misinterpreted." *Turner* v. *Allstate Ins.*, 902 F.2d 1208, 1214 (6th Cir. 1990).

The district court's "fact-intensive, context-specific inquiry" under Rule 403 (*Sprint*, 552 U.S. at 388)—informed by full briefing, a full evidentiary record, and a belated offer of proof from plaintiffs' expert—warrants great deference. In these circumstances, Judge Boyko acted well within his discretion when he decided that any marginal probative value of plaintiffs' proffered evidence was outweighed by its unfairly prejudicial nature.

C. Plaintiffs Were Allowed To Put On Evidence Related To Health Risks.

If the district court erred, it was in permitting plaintiffs to introduce too much evidence regarding their baseless assertion that the Washers somehow pose a health risk, prejudicing Whirlpool. For example, Judge Boyko permitted Glazer to tell the jury that she and her son have "a mold and mildew allergy" that was "[b]ad enough where I couldn't really go into the laundry room, while the washing machine was running." Tr., R.448, PageID#32664. She testified that she could "not enter the laundry room" because "[i]t aggravated my allergies bad." *Id.* at 32705-06; see also *id.* at 32661, 32724, 32755, 32761-62, 32770-72. Whirlpool did not object because this testimony went to actual experiences with her washer. However, plaintiffs offered no testimony from her physician or other expert that sought to link Glazer's allergies to her Washer.[2]

[2] Glazer was allowed to testify fully on this issue even though particular individuals have allergic responses to countless innocuous substances, and all have

Over Whirlpool's objection, plaintiffs' engineering expert Wilson explained that his use of protective clothing while disassembling and inspecting washing machines on Whirlpool premises was in accord with safety protocols used by Whirlpool's own technicians, who disassembled machines on a regular basis. Tr., R.435, PageID#31127-28, 31134-35. Wilson read the following portion of that protocol to the jury: "because repeated frequent exposure to mold and/or bacteria may cause adverse health effects, these precautionary safety measures are recommended to protect laboratory workers." R.436, PageID#31492-93. He also testified that the precautions were intended to protect against "bacteria and mold and fungus"—"a bug that maybe you're not used to" which "might not be healthy." *Id.* at 31495-96.[3] The district court permitted this testimony. *Ibid.* Finally, Yang testified at length as to types of mold and bacteria found in plaintiffs' washers, including "E-coli." R.455, PageID#33214, 33241-45.

Given all the health evidence that came in (often over Whirlpool's objections)—which plaintiffs were free to address in closing argument—plaintiffs were not "stymied" in their "trial presentation" in any meaningful way. Pl. Br. 41. Even if plaintiffs could show that excluded health-risk evidence was relevant and

---

different reactions to smells, including the smell of dirty laundry. Glazer never alleged contraction of disease, lost wages, or any medical expense.

[3] See also, *e.g.*, Tr., R.435, PageID#31134-35 (Hardaway told Wilson that "to be in that room where they are taking it apart" you had to wear protective gear because a machine "might have a bug in it that you're not used to").

non-prejudicial—which they cannot—the ample admitted health-risk evidence means that plaintiffs cannot demonstrate, as this Court and the federal rules require, that Judge Boyko's "discretionary decision" "results in substantial injustice." *Bowman* v. *Corrections Corp.*, 350 F.3d 537, 547 (6th Cir. 2003); see Fed. R. Evid. 103(a); Fed. R. Civ. P. 61. Plaintiffs do not come close to meeting their obligation in an appeal asking for a new trial to show that excluded "'evidence would have caused a different outcome at trial.'" *Dortch* v. *Fowler*, 588 F.3d 396, 402 (6th Cir. 2009). No request for a new trial was ever made in the court below.

III. THE DISTRICT COURT PROPERLY GRANTED WHIRLPOOL SUMMARY JUDGMENT ON THE FAILURE-TO-WARN CLAIM.

The district court properly granted Whirlpool summary judgment on plaintiffs' failure-to-warn claim because that "claim is cognizable in Ohio only if the allegedly inadequate warning addresses a *safety* defect," and plaintiffs in opposing Whirlpool's motion offered no evidence of any safety defects. MSJ Order, R.391, PageID#26791, 26796.

A. Ohio Law Requires Failure To Warn Of A Safety Hazard.

The Ohio Supreme Court repeatedly has limited failure-to-warn claims to unsafe or dangerous conditions. *E.g.*, *Freas* v. *Prater Constr.*, 573 N.E.2d 27, 30 & n.1 (Ohio 1991) (manufacturers are liable for "failure to warn foreseeable users of a product's hazardous or unreasonably dangerous condition"); *Crislip* v. *TCH*

Liquidating Co., 556 N.E.2d 1177, 1182 (Ohio 1990) (questions on failure-to-warn claim are "whether the defendant knew or should have known of the danger and whether the warning allowed the consumer to use the product safely"); *Temple* v. *Wean United*, 364 N.E.2d 267, 273 (Ohio 1977) (manufacturer liable for negligent failure to warn when it knows of a "defect rendering a product unsafe and fails to provide a warning"). This Court too has recognized that a defendant has "no duty to warn" under Ohio law where the plaintiff cannot demonstrate that the product "was dangerous." *Buck* v. *Ford Motor Co.*, 526 F. App'x 603, 607 (6th Cir. 2013); see *Broyles* v. *Kasper Mach.*, 517 F. App'x 345, 349 (6th Cir. 2013) (warning must "make the product safe when used as directed").

This rule is not confined to Ohio. It is a widely recognized rule stemming from the duty to warn's "genesis in a condition of danger." *Am. Optical Co.* v. *Weidenhamer*, 457 N.E.2d 181, 187-88 (Ind. 1983) ("The key words that run throughout the numerous opinions that have been written upon the duty to warn are 'dangerous' and 'unreasonably dangerous'"); *Black* v. *Henry Pratt Co.*, 778 F.2d 1278, 1283 (7th Cir. 1985) ("There is no duty to warn 'with respect to a product which is, as a matter of fact, not dangerous'"); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998) (liability arises when "omission of the instructions or warnings renders the product not reasonably safe"); 3 AMERICAN LAW OF PRODUCTS LIABILITY 3d § 32:1 (2013) ("dangerous").

The sparse authority plaintiffs cite is not to the contrary. Neither *Doe* v. *SexSearch.com*, 502 F. Supp. 2d 719, 736 (N.D. Ohio 2007), aff'd, 551 F.3d 412 (6th Cir. 2008), nor *Lawyer's Co-op. Publ'g* v. *Muething*, 1991 WL 188129, at *2-3 (Ohio Ct. App. Sept. 25, 1991), *rev'd*, 603 N.E.2d 969 (Ohio 1992), addressed whether Ohio failure-to-warn law requires a safety defect, let alone upheld a claim for failure to warn of a non-safety defect. In *Doe*, the court *dismissed* a claim against an internet dating service for failing to advise about potentially underage members. 502 F. Supp. 2d at 736-37. The court repeatedly referred to a condition of "danger," and considered whether "the danger here was open and obvious." *Id.* at 736. The court in *Lawyer's Cooperative* considered only the application of a statute of limitations to defendant's counterclaim based on failure to disclose that using plaintiff's legal forms could violate Ohio securities law. 1991 WL 188129, at *3-4. The Ohio Supreme Court ultimately reversed that decision. 603 N.E.2d 969. These cases provide no support whatsoever for plaintiffs' position.

Plaintiffs' reliance (at 45) on this Court's reference to failure-to-warn elements in the prior appeal is misplaced. This Court addressed only whether class certification was proper, not whether a failure-to-warn claim requires a safety defect under Ohio law. *Glazer*, 722 F.3d at 850-61. This Court would not have expanded Ohio's failure-to-warn liability in the aggressive way suggested by plaintiffs without directly addressing that issue. Nor is there any warrant to craft

such an expansion in this appeal. "[F]ederal courts must be cautious when making pronouncements about state law and [w]hen given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, * * * should choose the narrower and more reasonable path." *In re Darvocet Prods. Liab. Litig.*, 756 F.3d 917, 937 (6th Cir. 2014); see also 19 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507, at 207 (2d ed. 1996) ("Nor is it the function of the federal court to expand the existing scope of state law").

B. Plaintiffs Presented No Evidence Of A Safety Hazard.

This case proceeded for six years as one involving only allegations of odor. *Supra* Part II.A. Moving for summary judgment on plaintiffs' failure-to-warn claim, Whirlpool explained that Ohio law recognized such a claim only as to dangerous conditions and that plaintiffs claimed no condition of that sort. R.308, PageID#12903-04. In opposition, plaintiffs argued *only* that "Ohio law does not require a safety defect" and stressed that this Court had "plainly understood this was not a case about safety or danger." R.329, PageID#22601-02 & n.7. Plaintiffs did not argue, much less offer evidence, that alleged washer defects created unsafe conditions.

At the summary judgment stage, therefore, product safety was *not* a disputed issue of material fact. Summary judgment for Whirlpool on the failure-to-warn

claim was accordingly required. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986) (where "nonmoving party has failed to make a sufficient showing on an essential element of her case" there "can be 'no genuine issue as to any material fact'" and summary judgment is proper); *Cohn* v. *Nat'l Bd. of Trial Advocacy*, 238 F.3d 702, 704 (6th Cir. 2000).

IV. PLAINTIFFS' COMPLAINTS ABOUT THE CONDUCT OF WHIRLPOOL'S COUNSEL ARE WAIVED AND MERITLESS.

Plaintiffs seek a new trial based on supposedly improper cross-examination questions and comments by counsel for Whirlpool at trial. But plaintiffs waived the right to demand a new trial by failing to move for a mistrial or new trial below. Beyond this, the supposed misconduct provides no basis for a new trial.

A. Plaintiffs Waived Their Conduct Challenge.

A party must move for a mistrial before the verdict, or at the very least move for a new trial under Rule 59, to preserve a counsel-conduct challenge. See *Park West Galleries* v. *Hochman*, 692 F.3d 539, 543-49 (6th Cir. 2012) (issue preserved where party moved for new trial under Rule 59); *Jones* v. *Ill. Cent. R.R.*, 617 F.3d 843, 851-52 (6th Cir. 2010) (by failing to "request a mistrial" based on defense counsel conduct plaintiff "bet on the jury and lost" and was "not permitted now to seek a new trial" on appeal); *Morton Butler Timber Co.* v. *United States*, 91 F.2d 884, 890 (6th Cir. 1937) (counsel-conduct challenge "waived" by failure "to move for a mistrial" below); *Carter* v. *Tennessee*, 18 F.2d 850, 853 (6th Cir. 1927)

(objection to improper argument by prosecutor "waived by the failure" to "move for a mistrial").

Here, plaintiffs chose to "bet on the jury" rather than move for a mistrial. Then they failed to seek a new trial after they "lost" their bet. Plaintiffs deprived the trial court—which "is in a far better position to measure the effect of" an allegedly "improper question on the jury than an appellate court"—of the opportunity to address their arguments in a timely fashion. *Balsley* v. *LFP, Inc.*, 691 F.3d 747, 762 (6th Cir. 2012). Plaintiffs are in no position "now [to] demand a new trial" on appeal. *Jones*, 617 F.3d at 852.

B. Counsel's Questions And Comments Were Proper And Not Prejudicial.

The "power to set aside [a] verdict for misconduct of counsel" is "sparingly exercised." *Balsley*, 691 F.3d at 762. This Court analyzes "the totality of the circumstances, including the nature of [counsel's] comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close case), and the verdict itself." *Id.* at 761. Even if the Court finds a comment improper, the party seeking a new trial must also demonstrate a "reasonable probability" that it tainted the verdict. *Ibid.*; *Maday* v. *Pub. Libraries of Saginaw*, 480 F.3d 815, 819 (6th Cir. 2007). In evaluating prejudice, this Court affords a "high level of deference" to "the trial court." *Balsley*, 691 F.3d at 761-62.

And the high bar is raised even higher when there is no contemporaneous objection. *Ibid.* Counsel for Whirlpool did not commit any error under this standard, let alone one that prejudiced the trial.

1. Counsel Appropriately Cross-Examined Washer Owners On Issues Relevant To Credibility And Bias.

Plaintiffs complain about supposedly improper cross-examination of washer owners. But they ignore the context for that cross-examination, which makes clear that the questioning was "relevan[t]" to "issues before the jury," including the owners' credibility and bias. *Balsley*, 691 F.3d at 761. They also ignore a trial judge's broad discretion to permit cross-examination.

Trina Allison's Porsches. The questions and deposition video clip about Allison's ownership of Porsches did not "deride" her "wealth" (Pls. Br. 48) but rather went to her credibility and veracity. Allison testified at her deposition that despite supposedly terrible odors in her laundry for seven years, which were a "major problem" and caused her family regularly to complain about the smell of their clothing, she did not buy a new washer due to her "financial condition." R.402-4, PageID#28196-200. The district court properly ruled that Whirlpool could use "evidence of wealth to rebut Plaintiff Allison's testimony regarding the reasons she delayed in purchasing a new washer." R.426, PageID#30796; see *Balsley*, 691 F.3d at 762-63 (comments regarding party's wealth permissible where relevant to "credibility and bias"); 2 CLIFFORD S. FISHMAN, JONES ON EVIDENCE

§ 13:25, at 523 (7th ed. 1994) (evidence of a party's "financial condition is admissible" where "relevant to a specific issue").

The challenged questions and video clip fell squarely within the district court's ruling. The questions regarding Allison's ownership and use of Porsches all arose in the context of rebutting her financial explanations for delay in purchasing a new washer. See R.439, PageID#31791-94, 31797, 31809. The questions thus constituted appropriate impeachment. See *Williams* v. *Paint Valley Sch. Dist.*, 2003 WL 21799947, at *8 (S.D. Ohio July 16, 2003) (questions proper where they did not run afoul of *in limine* ruling and went to "credibility"), aff'd, 400 F.3d 360 (6th Cir. 2005). And the video and related comments in Whirlpool's opening statement properly challenged Allison's credibility by presenting her contradictory deposition testimony: they showed that at the same time she said her financial condition kept her from buying a new washer, she could not count how many Porsches she owned because there were so many. R.434, PageID#31095; see *Balsley* v. *LFP, Inc.*, 2011 WL 1298180, at *9 (N.D. Ohio Mar. 31, 2011) (appropriate to "note" "facts in opening" statement relevant to "credibility"), aff'd, 691 F.3d 747 (6th Cir. 2012).

Gina Glazer's Father. Counsel for Whirlpool asked Glazer about her father's legal experience and role in this case based on prior testimony relevant to her credibility and bias. Glazer testified at her deposition that she got involved in

this litigation after her father spoke with plaintiffs' counsel, and then testified at trial about work she did for her father's consulting businesses. Tr., R.448, PageID#32729-30. This testimony opened the door for Whirlpool's counsel to ask whether Glazer or her father had done any expert witness work—which he had—and to show that Glazer's father called plaintiffs' counsel first and referred her to them. *Id.* at 32727-35.

As explained at sidebar, this line of questioning went to her father's role in getting Glazer "involved in the case" and her potential "bias" in light of her father's "experience with lawyers" and as "an expert consultant." *Id.* at 32731-32. For that reason, the district court properly allowed limited questions on the subject. *Id.* at 32732-34; see *Balsley*, 691 F.3d at 762-63 (questions regarding witness interest in the case went to "credibility and bias" and therefore were permissible); *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974) (potential bias and "witness' motivation in testifying" are appropriate subjects of cross-examination).

Sylvia Bicknell's Son-In-Law. Plaintiffs (at 48) criticize a question during Bicknell's cross-examination about a potential benefit to her son-in-law for referring her to plaintiffs' counsel. But plaintiffs did not object when that question was asked (Tr., R.448, PageID#32615), making only a general objection much later. *Id.* at 32628-29.

This question was relevant to Bicknell's credibility and bias. Bicknell testified at her deposition that she became a plaintiff in a related suit against Whirlpool after consulting with her son-in-law, a lawyer, who she believed might want to represent class action plaintiffs one day. She brought up her son-in-law again at trial, testifying that he referred her to plaintiffs' counsel. Tr., R.448, PageID#32606. On cross-examination, defense counsel attempted to confirm Bicknell's deposition testimony that when she joined the class action, she thought her son-in-law might be interested in becoming a class action lawyer. *Id.* at 32609. When Bicknell responded "[n]o" and said that any comment along this line was mere "joking around" "after" her deposition (*ibid.*), Whirlpool counsel sought to impeach her. *Id.* at 32610-15.

It was in this context that Bicknell was asked whether she knew about any arrangement under which "the person who referred" her to plaintiffs' counsel would "share in" certain "legal fees," and she responded that she did not know. *Id.* at 32615. In light of Bicknell's earlier testimony, this question was relevant to explore her interest in the lawsuit and potential bias based on a referral benefit to her attorney son-in-law. See *Balsley*, 691 F.3d at 762-63 (questions regarding witness interest and relationship with counsel relevant to "credibility and bias"); *Davis*, 415 U.S. at 316 ("witness' motivation in testifying" subject to cross-

examination). If plaintiffs disagreed, the time to object was when this question was asked.

2. Counsel's References To Plaintiffs' Lawyers Were Appropriate And Invited By Plaintiffs.

Plaintiffs take issue with every mention of class action or plaintiffs' lawyers by Whirlpool's counsel at trial. But *plaintiffs' counsel* opened the door on this subject, beginning voir dire with these questions "to you all in the jury box": (1) "How many of you feel that the majority of class action lawsuits are meritless?"; and (2) "How many of you feel the majority of class action lawsuits are just a way for lawyers to make money?" Tr., R.430, PageID#30922. All venire members who indicated potential bias in response to these questions were stricken at plaintiffs' counsel's request. *Id.* at 30924-25, 30927, 30933-35. Plaintiffs' theory (at 51-52) that Whirlpool's counsel attempted to capitalize on anti-class-action bias exhibited during voir dire thus makes no sense: no one who expressed bias was on the jury, and it was plaintiffs who injected discussion of that bias.[4]

[4] Plaintiffs incorrectly claim (at 51-52) that a deliberating juror, Juror No. 50, expressed bias. After this juror mentioned at voir dire that he "maybe agree[d]" with prior comments about class actions, he clarified that he had not "made up his mind" (Tr., R.430, PageID#30935-36) and could "be fair and decide it on the law and the evidence." *Id.* at 30973. Based on this representation, the district court declined to strike him for cause. *Id.* at 30992-93.

Moreover, plaintiffs' counsel touted the virtues of class action attorneys as a key part of their trial strategy. Indeed, they began closing argument with a paean of praise to plaintiffs' lawyers:

> We represent children of families killed in crashes due to defects in automobiles * * *. And we represent ordinary hard-working folks * * * who get sold defective goods. We represent people who can't afford to hire [Whirlpool's counsel]. * * * [W]ithout lawyers like us * * * people like that would have no chance for justice at all. That's what Plaintiffs' lawyers do. And * * * let's talk a little bit about class actions. * * * [W]ithout class actions, * * * ordinary people who get cheated out of small amounts of money * * * would have no chance at justice.

R.488, PageID#36527-29. Plaintiffs' closing argument referred to plaintiffs' lawyers and class action lawyers *a dozen times*. *Id.* at 36527-30, 36601, 36743-44.

By contrast, mentions of plaintiffs' attorneys by Whirlpool's counsel were routine and proper—and certainly not so "inflammatory" as to run afoul of the district court's *in limine* ruling on "comments regarding Plaintiffs' trial attorneys." R.426, PageID#30796-97. Many were perfunctory references to opposing counsel to be expected at any trial. *E.g.*, R.434, PageID#31063 (referring to plaintiffs' lawyers' burden of proof); R.474, PageID#36040-41 (referring to what plaintiffs' lawyers previously did or asked at trial), 35894 (quoting expert report mentioning plaintiffs' lawyers) ; R.455, PageID#33274, 33284, 33421 (referring to plaintiffs' lawyers' contact with experts).

None of these references to plaintiffs' lawyers appealed to prejudice. They addressed why consumers became involved in this and related lawsuits, including why they chose to file a lawsuit instead of or before seeking relief under their warranties. See R.434, PageID#31089 (opening: Allison "explained in her deposition" that she "learned that class action lawyers were advertising" and "joined the lawsuit" instead of seeking relief under her warranty); R.488, PageID# 36625 (closing: instead of pursuing warranty claims, plaintiffs chose to "sig[n] up" as "class action Plaintiffs"); R.439, PageID#31661 (asking whether the Cloers "went to a lawyer website before" they "first emailed Whirlpool").

Such questions about witness bias and "motivation in testifying" are standard and appropriate subjects of cross-examination. *Davis*, 415 U.S. at 316. And because this is a warranty case, Whirlpool unquestionably was entitled to ask owners why they chose to file suit rather than or prior to attempting to get the warranty relief they say Whirlpool should have provided. Because it was "relevant" to "credibility," it also was appropriate for Whirlpool's counsel to "make note of facts in opening and closing arguments" about named plaintiffs' decisions to pursue a lawsuit rather than warranty claims. *Balsley*, 2011 WL 1298180, at *9; see also *Balsley*, 691 F.3d at 762-63.

If plaintiffs had objections they should have raised them at the time, but many questions and comments about which plaintiffs now complain elicited no

contemporaneous objection. That is true of the questions to the Cloers and statements during opening and closing arguments. R.434, PageID#31089; R.439, PageID#31661; R.488, PageID#36625. And it is true of the vast majority of other trial references to plaintiffs' lawyers. *E.g.*, R.434, PageID#31087, 31089; R.435, PageID#31230, 31313; R.436, PageID#31403, 31603; R.439, PageID#31836, 31844; R.448, PageID#32608-09; R.488, PageID#36633, 36691. Plaintiffs' failure to object leaves them no room to protest the district court's response to these references.

And if plaintiffs wanted to avoid mention of class action attorneys at trial, they should not have opened the door to that subject during voir dire and then touted the virtues of such attorneys at trial. It is black-letter law that arguments "provoked by arguments of opposing counsel do not amount to reversible error." 75A AM. JUR. 2D *Trial* § 470 (2007) ("The law indulges a liberal attitude toward comments which are a fair retort or response"); see *Balsley*, 691 F.3d at 763 (whether comments are "made in response to" the opposing party's "own argument" is important).

3. Plaintiffs Cannot Show Prejudice Requiring Reversal.

Even if plaintiffs had shown that a question or comment by Whirlpool's counsel was improper—and they have not—they cannot establish any prejudice, let alone meet the high bar required for reversal (or even higher bar for reversal based

on comments to which they failed to object). The discrete questions and statements cited by plaintiffs are small parts of a long, "hard-fought" trial. R.488, PageID#36753. Courts frequently find even inappropriate conduct was not prejudicial when viewed in the larger trial context. *E.g.*, *Bridgeport Music* v. *Justin Combs Publ'g*, 507 F.3d 470, 478 (6th Cir. 2007) (no prejudice "[i]n the context of the entire closing argument and trial"); *Static Control Components* v. *Lexmark Int'l*, 749 F. Supp. 2d 542, 566 (E.D. Ky. 2010) (no prejudice "under the totality of the circumstances"), aff'd, 697 F.3d 387 (6th Cir. 2012), aff'd, 134 S. Ct. 1377 (2014).

The lack of prejudice is especially clear given the "strength" of Whirlpool's case and the jury's unanimous and swiftly reached verdict. *Balsley*, 691 F.3d at 761. There was abundant evidence that the Washers were not defective. *Supra*, pp. 8-16. And there was no proof of classwide injury. *Supra*, pp. 16-17, 32. It cannot be said that some line of cross-examination or comment from Whirlpool's counsel, rather than plaintiffs' failures of proof, led the jury to return a defense verdict.

Any possibility of prejudice was eliminated by the district court's clear instruction to the jury at the end of trial that "[t]he lawyers' statements and arguments" and "questions" "are not evidence." R.488, PageID#36499. This Court repeatedly has held that such an instruction cures any error caused by improper comments. See *Balsley*, 691 F.3d at 765 ("district court cured the error by

instructing the jury that arguments of counsel are not evidence"); *Michigan First Credit Union* v. *Cumis Ins. Soc'y*, 641 F.3d 240, 249 (6th Cir. 2011) (same); *Maday*, 480 F.3d at 818 (same). The district court here went further, instructing the jury that it "may not infer anything from the fact that this is a class action" (R.488, PageID#36513) and telling the jury just before deliberations: "We've had a lot of side-bars. * * * It's the heat of the battle. But it doesn't mean that [opposing counsel] don't respect each other." *Id.* at 36752-53.

Plaintiffs are therefore wrong in saying (at 53-54) that the district court made no "clean up" efforts at the end of trial. If plaintiffs now think the instructions were insufficient, they have only themselves to blame. They requested no additional curative instructions. Instead, they affirmatively represented that they had *no objection* to the instructions given. JI Obj., R.481, PageID#36332. Plaintiffs decided to "bet on the jury" and prop up class action attorneys at closing instead of asking for further instructions or moving for a mistrial or new trial. See *Jones*, 617 F.3d at 852.

The conduct of Whirlpool's counsel is far removed from that found to be prejudicial in cases relied on by plaintiffs. See *Igo* v. *Coachmen Indus.*, 938 F.2d 650, 653-55 (6th Cir. 1991) ("pervasive" "misconduct of Plaintiffs' counsel," including stating that defendant "hoped" plaintiffs "would not survive long enough to go to trial"); *Pingatore* v. *Montgomery Ward*, 419 F.2d 1138, 1142-43 (6th Cir.

1969) (plaintiffs' counsel's "deplorable" conduct included swearing and "[t]earing sheets of paper used by opposing counsel * * * while dramatically saying 'lies'"); *City of Cleveland* v. *Peter Kiewit Sons' Co.*, 624 F.2d 749, 752-58 (6th Cir. 1980) (plaintiffs' counsel made "obviou[s]" attempts "to prejudice the jurors" even "after the trial court explicitly reprimanded him"); *Whittenburg* v. *Werner Enters.*, 561 F.3d 1122, 1128-29 (10th Cir. 2009) (plaintiff's counsel fabricated admissions by defendant and unjustifiably accused defendant of mounting a "dishonest defense").

The conduct at issue here is no more prejudicial than conduct found to create no prejudice in other cases. In *Maday*, for example, defense counsel made "disparaging" remarks about plaintiff's counsel "throughout the course of trial," comparing his voice to "nails on a chalkboard," making "inappropriate facial gestures," and "accusing [him] of lying." 480 F.3d at 817-18. This Court nevertheless found no prejudice because "sparring between trial attorneys" is common "'in the heat of battle.'" *Id.* at 818; see also *Balsley*, 691 F.3d at 764; *Static Control*, 749 F. Supp. 2d at 566. Given that the inappropriate and properly contested conduct in those cases did not result in a new trial, the conduct in this case plainly does not warrant one.

ARGUMENT ON CONDITIONAL ISSUES

Because the judgment below should be affirmed, there is no need for this Court to reach three issues that arise only in the event of a remand: plaintiffs'

contention that the district court erred by refusing to instruct the jury on the discovery rule for tolling the statute of limitations, and Whirlpool's cross-appeal arguments that the class should have been decertified and that the jury instructions and verdict form should have included three Whirlpool defenses.

V. THE DISTRICT COURT CORRECTLY HELD THE DISCOVERY RULE INAPPLICABLE.

The two-year statute of limitations for plaintiffs' causes of action began to accrue "when the injury or loss * * * occur[red]." Ohio Rev. Code Ann. § 2305.10(A). Plaintiffs say that happened when they purchased their washers. *Glazer*, 722 F.3d at 857. Each plaintiff bought her machine more than two years before this suit commenced on June 2, 2008. Tr., R.448, PageID#32657; R.439, PageID#31690. Absent tolling, therefore, plaintiffs' claims are untimely.

After receiving extensive briefing and "independently" reviewing the law, the district court concluded that "the jury may not consider discovery rule tolling as a matter of law." Tr., R. 463, PageID#34818-19. That ruling was correct.[5]

Ohio's "narrow" discovery rule "exception" does not apply in cases like this one. See *Lutz* v. *Chesapeake Appalachia*, 717 F.3d 459, 473, 474 (6th Cir. 2013)

[5] Initially, the district court believed the discovery rule applied. MSJ Order, R.391, PageID#26801-03. It relied on *Kay* v. *City of Cleveland*, 2003 WL 125280 (Ohio Ct. App. Jan. 16, 2003), which misread an Ohio Supreme Court decision that in fact confirms the narrow scope of the discovery rule. See *Norgard* v. *Brush Wellman, Inc.*, 766 N.E.2d 977, 980 (Ohio 2002). Recognizing its error, the district court reversed course after briefing on Whirlpool's JMOL motion and declined to submit the discovery rule to the jury. Tr., R.463, PageID#34818.

("Ohio courts have not judicially adopted the discovery rule in strictly commercial transaction cases in the absence of fraud"); *Investors REIT One* v. *Jacobs*, 546 N.E.2d 206, 211 (Ohio 1989) (no discovery rule for general negligence claim). Longstanding Ohio Supreme Court case law confines the discovery rule to claims of bodily injury, medical malpractice, and wrongful death. See, *e.g.*, *Norgard*, 766 N.E.2d at 979-80 (negligent exposure to beryllium); *Collins* v. *Sotka*, 692 N.E.2d 581, 585 (Ohio 1998) (wrongful death); *Liddell* v. *SCA Servs. of Ohio*, 635 N.E.2d 1233, 1239 (Ohio 1994) (negligent exposure to toxic gas); *Browning* v. *Burt*, 613 N.E.2d 993 (Ohio 1993) (medical malpractice). Plaintiffs have not alleged that the Washers caused them bodily injury. *Supra*, Part II.

Plaintiffs' only other argument is that because the district court submitted fraudulent-concealment tolling to the jury, it was required also to submit discovery-rule tolling. But this Court has rejected plaintiffs' theory that the discovery rule is subsumed within the fraudulent concealment doctrine. *Lutz*, 717 F.3d at 473-74. The possibility that plaintiffs could "invoke tolling on equitable principles under the fraudulent concealment doctrine" does not make the discovery rule applicable. *Ibid*. Fraudulent concealment involves a wholly distinct inquiry into whether "'specific actions by defendants somehow kept'" plaintiffs "'from timely bringing suit.'" *Doe* v. *Archdiocese of Cincinnati*, 849 N.E.2d 268, 278-79 (Ohio 2006). Putting fraudulent-concealment tolling to the jury did not require the

district court to do the same with discovery-rule tolling. The issue is, of course, mooted by the jury's finding of no liability.[6]

VI. THE TRIAL PROVED CLASS CERTIFICATION WAS IMPROPER.

This Court affirmed class certification *based on the record as of 2010*, but later developments proved that Rule 23's requirements are not satisfied. If this Court were to vacate or reverse the judgment, it should also decertify the class.

Whirlpool moved to decertify the class before trial because the expanded record showed that common issues did not predominate and plaintiffs were neither typical nor adequate class representatives. R.327-1, PageID#18669-711. The district court found Whirlpool's motion "logical and articulate" but denied it without "undertak[ing] a careful and thorough analysis." R.366, PageID#24351. Whirlpool moved again for decertification before closing arguments because the trial evidence confirmed that plaintiffs did not satisfy Rule 23. R.472, PageID#35797-831. The court denied that motion also, ruling that "Whirlpool has not met its heavy burden of demonstrating that continued class action treatment is improper." R.482, PageID#36357. The district court erred.

[6] Allison's claims could not be saved by application of the discovery rule because she knew of the alleged defect more than two years before this lawsuit was filed. See Tr., R.439, PageID#31698, 31746, 31763-65.

A. The District Court Applied The Wrong Decertification Standard.

The district court applied the wrong legal standard in denying decertification. See *Tanner* v. *Yukins*, 776 F.3d 434, 442 (6th Cir. 2015). It ruled that "decertification is a drastic measure" and that Whirlpool faced a "heavy burden." R.482, PageID#36357. But *plaintiffs* had the burden to satisfy Rule 23 throughout the proceedings. See *White* v. *NFL*, 756 F.3d 585, 594 (8th Cir. 2014); *Marlo* v. *UPS*, 639 F.3d 942, 947-48 (9th Cir. 2011). Under the correct standard, the district court should have "withdraw[n] class certification" based on the evidence at trial. *Binta B. ex rel. S.A.* v. *Gordon*, 710 F.3d 608, 618 (6th Cir. 2013).

B. Common Issues Did Not Predominate At Trial.

Rule 23(b)(3) demands that "common questions predominate over individual ones." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013). And an issue raises a common question only if it permits a "common answer" "in one stroke" for each class member. *Wal-Mart*, 131 S. Ct. at 2551. The trial evidence proves that common questions do not predominate.

Defect. Because the trial testimony demonstrated real and meaningful differences among the 20 Washer models, defect could be made a common question only by instructing the jury—as the district court did—that Plaintiffs had to prove that all 20 Washers were defective. If, as plaintiffs claim, the district court erred by doing so, then defect must be considered an individual question because it

could not be resolved "in one stroke" for the entire class. *Wal-Mart*, 131 S. Ct. at 2551. The trial showed that there were material differences among the 20 models at issue. *Supra*, pp. 8-16. Without the "20 models" jury instruction, these "[d]issimilarities" among the Washers would "impede the generation of common answers" because the jury could find that one model was defective while another was not. *Wal-Mart*, 131 S. Ct. at 2551; *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc).

Proximate Cause. Proximate cause also was individualized. Plaintiffs admitted that both sides "asked repeated questions" about witnesses' "individual use and care habits." Decert. Opp., R.477, PageID#36129. Plaintiffs' expert testified that user care affects biofilm growth and that different user care was the "only thing" explaining why Glazer's machine had significant buildup while Bicknell's was "so clean." Tr., R.435, PageID#31311; Tr., R.436, PageID#31411-13. Moreover, the trial established that there are many owner-specific causes of malodor, including laundry room cleanliness and humidity, soils and bacteria on laundry, the type and amount of detergent used, use of fabric softener, and water quality. Tr., R.442, PageID#32136-51; Tr., R.455, PageID#33200, 33206. Proximate causation was not a common question. See *In re Am. Med. Sys.*, 75 F.3d 1069, 1084 (6th Cir. 1996).

Injury. For injury to be a common question, plaintiffs had to be able to "prove, through common evidence, that all class members were in fact injured." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). Plaintiffs were unable to do that. The trial evidence proved that most class members had no odor problems and were satisfied with their washers. Tr., R.463, PageID#34844-46. And plaintiffs could not establish classwide injury through their expert's opinion that buyers paid too much for their washers because the expert's model "*assumes*" injury and "will always produce damages." Tr., R.477, PageID#36131. Injury was not a common question. See *Rail Freight*, 725 F.3d at 252.

Defenses. Whirlpool's statute-of-limitations defense turned on class members' individual circumstances. Allison, for example, complained of odors more than two years before filing suit. Tr., R.439, PageID#31701-02, 31746, 31763-66. Because individual trials were needed to determine which class members' claims were time barred, predominance was lacking. See *Thorn* v. *Jefferson-Pilot Life Ins.*, 445 F.3d 311, 321-29 (4th Cir. 2006).

Whirlpool's comparative-fault defense was equally individualized. Some class members did not properly care for their washers and thus proximately caused any odor problems. Glazer, for example, did not use HE detergent, run her machine's cleaning cycle, use bleach or Affresh, or clean her door seal. Tr., R.448,

PageID#32699-701, 32704, 32725. The comparative-fault defense overwhelmed any common issues. See *Gunnells* v. *Healthplan Servs.*, 348 F.3d 417, 438 (4th Cir. 2003).

C. The Named Plaintiffs Lacked Typicality And Adequacy.

The trial proved that plaintiffs failed Rule 23(a)'s typicality and adequacy requirements. Named plaintiffs are not "typical" when they are dissimilarly situated to the other members of the class and are not "adequate" when "class members have interests" that are "antagonistic to one another" or the representative cannot "vigorously prosecute the interests of the class." *Stout* v. *J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000).

Plaintiffs lacked typicality because they purchased only two of the 20 Washers. Given the differences across models, proof of plaintiffs' individual claims "would not necessarily have proved anybody else's claim." *Sprague*, 133 F.3d at 399. Plaintiffs also did not "suffe[r] the same injury" (*Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 157 (1982)), as most class members did not experience odor problems (Tr., R.463, PageID#34846; Tr., R.470, PageID#35554-56) and were satisfied with their Washers. Tr., R.463, PageID#34844-48.

Plaintiffs also were subject to "unique defenses" that were "a major focus" at trial. *In re Schering Plough ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009); accord *Romberio* v. *UnumProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009).

For instance, Allison did not file suit within the statute of limitations. *Supra*, p. 67 n.6. And Glazer did not follow her washer's use and care instructions. *Supra*, pp. 13-14.

There were also "antagonistic" intra-class conflicts. *Stout*, 228 F.3d at 717. For example, because the clean washer cycle effectively manages biofilm (Tr., R.447, PageID#32376-77; R.465, PageID#35236-39), class members whose washers lacked that feature had an interest in *not* being swept into a class with owners whose washers had that feature.

D. The Class Is Filled With Uninjured Members.

Most class members experienced no injury from the alleged Washer defects. *Supra*, pp. 9-12. As a result, those class members lacked any standing or right to bring their own individual suits. See *Clapper*, 133 S. Ct. at 1147. Under the Rules Enabling Act, that obstacle cannot be overcome by lumping them into a sweeping class action. See *Wal-Mart*, 131 S. Ct. at 2561.

VII. THE DISTRICT COURT ERRED BY EFFECTIVELY GRANTING PLAINTIFFS JMOL ON THREE WHIRLPOOL DEFENSES.

If the Court revives any of plaintiffs' claims, Whirlpool also seeks reversal of the district court's decision to exclude Whirlpool's comparative-fault, assumption-of-risk, and mitigation-of-damages defenses from jury consideration. Those well-recognized, properly pleaded, and fully tried defenses were supported

by substantial evidence. JI Obj., R.476, PageID#36057-60; JI Obj., R.485, PageID#36415-18.

By refusing to instruct the jury on these defenses or include them in the verdict form (Tr., R.480, PageID#36324-25), the district court effectively granted judgment as a matter of law. See *Lawyers Title Co.* v. *Kingdom Title Solutions*, 592 F. App'x 345, 352-53 (6th Cir. 2014). That ruling receives *de novo* review. See *Burley* v. *Gagacki*, 729 F.3d 610, 621 (6th Cir. 2013). And the Court must "construe the evidence and all permissible inferences therefrom most strongly in favor of" Whirlpool. *Potti* v. *Duramed Pharm.*, 938 F.2d 641, 645 (6th Cir. 1991).

"[T]o support a jury instruction there only needs to be some evidence in the record which would support a verdict on that instruction." *Hurt* v. *Coyne Cylinder Co.*, 956 F.2d 1319, 1326 (6th Cir. 1992). JMOL on a defense "is appropriate only where" the defendant "fails to adduce any evidence on the essential elements" of the "defense." *Bentley* v. *Stewart*, 594 N.E.2d 1061, 1062 (Ohio Ct. App. 1992).

Under these standards, refusal to instruct on Whirlpool's defenses was error. Each defense was supported by substantial evidence. *E.g.*, JI Obj., R.476, PageID#36057-60; JMOL Mot., R.473, PageID#35851-53; Trial Br., R.377, PageID#24779-80. The district court erred by taking these defenses away from the jury. See *Wellman* v. *Norfolk & W. Ry.*, 711 N.E.2d 1077, 1080 (Ohio Ct. App. 1998); *Webster* v. *Edward D. Jones & Co.*, 197 F.3d 815, 821 (6th Cir. 1999)

(because defendant "presented sufficient evidence to warrant a mitigation of damages instruction," failure to give instruction was reversible error).

Plaintiffs argued that only pre-sale conduct is relevant to Whirlpool's defenses under their point-of-sale injury theory. But post-sale evidence—such as Glazer's failure to follow Whirlpool's use-and-care instructions—is highly relevant to those defenses. JMOL Mot., R.473, PageID#35851-53; Tr., R.448, PageID#32699-701, 32704, 32725. A reasonable juror could have found that plaintiffs' injuries, if any, occurred not at the point of sale but when they experienced malodors. The jury could have found that Glazer's admitted failure to follow user instructions constituted "want of ordinary care" without which her "injury would not have occurred." *Brinkmoeller* v. *Wilson*, 325 N.E.2d 233, 235 (Ohio 1975). A jury also could have found that ignoring user instructions constituted failure to mitigate damages through "reasonable effort or expenditure." *Dunn* v. *Maxey*, 693 N.E.2d 1138, 1140 (Ohio Ct. App. 1997).

Whirlpool also presented significant *pre*-sale evidence supporting its defenses. Whirlpool publicized information about potential mold and odor issues and proper care on its website. *E.g.*, Tr., R.439, PageID#31828-29, 31843-57. Third-party websites and publications relayed similar information to consumers. *E.g.*, Tr., R.436, PageID#31563-65; *Consumer Reports*, R.518-224, PageID#40870. And Glazer knew prior to purchase that she should leave her

washer door open and use HE detergent. Tr., R.448, PageID#32661, 32699-700. In light of this evidence, Whirlpool was entitled to instructions on failure to mitigate and comparative fault. See *Brinkmoeller*, 325 N.E.2d at 235. Whirlpool also should have been permitted to argue assumption of risk because plaintiffs knew about the need for biofilm-related maintenance before buying their washers. See *Carrel* v. *Allied Prods. Corp.*, 677 N.E.2d 795, 800-01 (Ohio 1997) (where "plaintiff knew of the condition," the "plaintiff voluntarily exposed himself or herself to the condition").

In the event of a retrial, the jury should be given Whirlpool's comparative-negligence, assumption-of-risk, and mitigation defenses to consider.

CONCLUSION

The judgment of the district court, entered after a three-week jury trial, should be affirmed.

Respectfully submitted.

/s/ Stephen M. Shapiro

Michael T. Williams
Allison R. McLaughlin
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth St.
Suite 4500
Denver, CO 80202
(303) 244-1800

Philip S. Beck
Eric R. Olson
Rebecca Weinstein Bacon
BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP
54 W. Hubbard St.
Suite 300
Chicago, IL 60654
(312) 494-4400

Stephen M. Shapiro
Timothy S. Bishop
Joshua D. Yount
MAYER BROWN LLP
71 S. Wacker Dr.
Chicago, IL 60606
(312) 782-0600
sshapiro@mayerbrown.com

Counsel for Defendant-Appellee/Cross-Appellant Whirlpool Corporation

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) because it contains 16,447 words excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6th Cir. R. 32(b)(1).

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman.

s/ Stephen M. Shapiro
Stephen M. Shapiro

ADDENDUM

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS*

Docket No.	Description of Relevant Document	PageID#Range
1	**Transfer Order by JPML transferring cases to Northern District of Ohio**	**1-4**
7	Master Class Action Complaint	267-332
40	First Amended Master Class Action Complaint	730-796
43	**Order instructing plaintiffs to amend underlying complaints**	**873**
50	Stipulation Concerning Personal Injury Claims	993-996
52	Stipulation of Withdrawal of Named Plaintiff	1010-1012
66	Second Amended Master Class Action Complaint	1330-1399
77	**Amended Opinion and Order on motion to dismiss**	**1565-1597**
80	Third Amended Master Class Action Complaint	1605-1672
83	Answer and Affirmative Defenses to Third Amended Master Class Action Complaint	1786-1835
93	Plaintiffs' Motion to Certify an Ohio Class	1956-1960
93-1	Brief in Support	1961-1998
93-2	Affidavit	1999-2002
93-3	Exhibit 1 - 6/24/04 New meeting request from A. Hardaway	2003-2005
93-4	Exhibit 2 - Wilson 1/4/09 Supplemental Report	2006-2020
93-5	Exhibit 3 - 2005 CET TDP Package Bio Film Quick Fix Presentation	2021-2036
93-6	Exhibit 4 - 9/2008 Affresh Add	2037-2044
93-7	Exhibit 5 - Zahrn 10/7/09 Deposition	2045-2051

* In accord with Sixth Circuit Rules, we identify below district court orders and filings that are potentially relevant to the appeal and cross-appeal in this case, regardless of which litigant may have submitted or relied upon the document. A document's inclusion in the table below implies nothing about its significance to the appeal and cross-appeal or its accuracy, relevance, foundation, or admissibility for purposes of motion practice or trial in this or any other case.

Docket No.	Description of Relevant Document	PageID#Range
93-8	Exhibit 6 - Hardaway 8/19/08 Affidavit	2052-2066
93-9	Exhibit 7a - Wilson 11/16/09 Supplemental Report	2067-2116
93-10	Exhibit 7b - Wilson 11/16/09 Supplemental Report Continued	2117-2173
93-11	Exhibit 8 - 9/20/07 Affresh Washer Cleaner Team Memo	2174-2176
93-12	Exhibit 9 - Hardaway 9/15/09 Deposition	2177-2194
93-13	Exhibit 10 - 3/1/06 Biofilm & Corrosion Presentation	2195-2204
93-14	Exhibit 11 - 11/5/04 Memorandum	2205-2208
93-15	Exhibit 12 - Yang 1/4/10 Expert Rebuttal Report	2209-2232
93-16	Exhibit 13 - 1/24/05 Biofilm in Washers Presentation	2233-2251
93-17	Exhibit 14 - 11/24/04 Letter	2252-2256
93-18	Exhibit 15 - 10/18/04 E-mail	2257-2262
93-19	Exhibit 16 - 10/26/04 Meeting Minutes	2263-2265
93-20	Exhibit 17 - 9/22/04 “Biofilm in HE Washers” Presentation	2266-2275
93-21	Exhibit 18 - 9/23/04 E-mail	2276-2277
93-22	Exhibit 19 - 10/26/04 Meeting Minutes	2278-2280
93-23	Exhibit 20 - 4/29/04 E-mail	2281-2283
93-24	Exhibit 21 - 4/28/04 E-mail	2284-2285
93-25	Exhibit 22 - Hilsee 11/16/09 Expert Report	2286-2464
93-26	Exhibit 23 - Glazer 6/17/09 Deposition	2465-2500
93-27	Exhibit 24 - Allison 6/10/09 Deposition	2501-2546
93-28	Exhibit 25 - 1/27/10 Glazer Declaration	2547-2550
93-29	Exhibit 26 - 1/27/10 Allison Declaration	2551-2553
93-30	Exhibit 27 - 2/7/05 Memorandum	2554-2557
93-31	Exhibit 28 - Whirlpool Phone Survey	2558-2581
93-32	Exhibit 29 - Oliver 11/16/09 Expert Report	2582-2589

Docket No.	Description of Relevant Document	PageID#Range
93-33	Exhibit 30 - Def.'s First Supp. Resp. to Consolidated Pls. First Set of Interrogs.	2590-2606
101	Appendix of Key Facts Showing the Difference Among Plaintiffs' and Owners' Experiences with Their Washers	2737-2809
102	Appendix B: Summary of Individual Questions of Law and Fact that Must Be Individually Litigated by Each Putative Class Member	2810-2820
103	Evidentiary Submission in Support of Opposition to Plaintiffs' Motion to Certify an Ohio Class (Part 1)	2821-2829
103-1	Exhibit 1 - Table Summarizing appendix	2830-2837
103-2	Exhibit 2 - Conrad Declaration and exhibit A	2838-2867
103-3	Exhibit 3 - Zahrn Dep. excerpts	2868-2872
103-4	Exhibit 4 - Hardaway Declaration	2873-2894
103-5	Hardaway Declaration Exhibit A	2895-2905
103-6	Hardaway Declaration Exhibit B	2906-2912
103-7	Hardaway Declaration Exhibit C	2913-2919
103-8	Hardaway Declaration Exhibit D	2920-2924
103-9	Hardaway Declaration Exhibit E	2925-2931
103-10	Hardaway Declaration Exhibit F	2932-2938
103-11	Hardaway Declaration Exhibit G	2939-2947
103-12	Hardaway Declaration Exhibit H	2948-2955
103-13	Hardaway Declaration Exhibit I	2956-2962
103-14	Hardaway Declaration Exhibit J	2963-2970
103-15	Hardaway Declaration Exhibit K	2971-2974
103-16	Hardaway Declaration Exhibit L	2975-2976
103-17	Hardaway Declaration Exhibit M	2977-2978
103-18	Hardaway Declaration Exhibit N	2979-2980
103-19	Hardaway Declaration Exhibit O	2981-2982
103-20	Hardaway Declaration Exhibit P	2983-2984
103-21	Hardaway Declaration Exhibit Q	2985-2986

Docket No.	Description of Relevant Document	PageID#Range
103-22	Hardaway Declaration Exhibit R	2987-2988
103-23	Hardaway Declaration Exhibit S	2989-2992
103-24	Hardaway Declaration Exhibit T	2993-2996
103-25	Hardaway Declaration Exhibit U	2997-3000
103-26	Hardaway Declaration Exhibit V	3001-3004
103-27	Hardaway Declaration Exhibit W	3005-3008
103-28	Exhibit 5 - Wilson Dep. excerpts	3009-3038
103-29	Exhibit 6 - Rebuttal Expert Report of Paul M. Taylor, Ph.D. (12-16-09)	3039-3082
103-30	Exhibit 7 - Taylor Sur-Rebuttal (1-16-10)	3083-3145
103-31	Exhibit 8 - Yang Deposition	3146-3149
103-32	Exhibit 9 - Martin Declaration and exhibit A	3150-3164
103-33	Exhibit 10 - Gentek v. SW Feb. 22 2005	3165-3199
103-34	Exhibit 11 - Christine Piersol Declaration	3200-3203
103-35	Exhibit 12 - Expert Report of M. Laurentius Marais, Ph.D. (12-16-09)	3204-3234
103-36	Exhibit 13 - Marais Sur-Rebuttal (1-19-10)	3235-3242
103-37	Exhibit 14 - Megan Connell Declaration (3-1-10)	3243-3245
103-38	Exhibit 15 - Declaration of Chris Dow (3-03-10)	3246-3249
103-39	Exhibit 16 - Declaration of Sandy Perry in Opposition to Class Certification	3250-3253
103-40	Exhibit 17 - Mark L. Rodio in Opposition to Class Certification	3254-3257
103-41	Exhibit 18 - Phyllis Yates Declaration (3-1-10)	3258-3260
103-42	Exhibit 19 - Allison Deposition	3261-3292
103-43	Exhibit 20 - Gina Glazer's Response to Whirlpool Corporation's First Set of Interrogatories	3293-3298
103-44	Exhibit 21 - Glazer Deposition	3299-3334
103-45	Exhibit 22 - Bonnie Beierschmitt's Response to Whirlpool Corporation's First Set of Interrogatories	3335-3339
103-46	Exhibit 23- Beierschmitt Deposition	3340-3388

Docket No.	Description of Relevant Document	PageID#Range
103-47	Exhibit 24 - Bicknell Interrog. Resp.	3389-3402
103-48	Exhibit 25 - Bicknell Deposition	3403-3437
103-49	Exhibit 26 - Paula Call	3438-3443
103-50	Exhibit 27 - Call Deposition	3444-3480
103-51	Exhibit 28 - Mara Cohen's Response to Whirlpool Corporation's First Set of Interrogatories	3481-3486
103-52	Exhibit 29 - Cohen Deposition	3487-3518
103-53	Exhibit 30 - Pramila Gardner's Response to Whirlpool Corporation's First Set of Interrogatories	3519-3525
104	Evidentiary Submission in Support of Opposition to Plaintiffs' Motion to Certify an Ohio Class (Part 2)	
104-1	Exhibit 31 - Gardner Deposition 07/31/09	3527-3560
104-2	Exhibit 32 - Jeff Glennon's Response to Whirlpool Corporation's First Set of Interrogatories	3561-3566
104-3	Exhibit 33 - Glennon Deposition 6/15/09	3567-3602
104-4	Exhibit 34 - Karen Hollanders Response to Whirlpool Corporation's First Set of Interrogatories	3603-3609
104-5	Exhibit 35 - Hollander Deposition 6/17/09	3610-3637
104-6	Exhibit 36 - Rebecca Nordan's Response to Whirlpool Corporation's First Set of Interrogatories	3638-3643
104-7	Exhibit 37 - Nordan Deposition 06/10/09	3644-3680
104-8	Exhibit 38 - Maggie O'Brien's Response to Whirlpool Corporation's First Set of Interrogatories	3681-3687
104-9	Exhibit 39 - O'Brien Deposition 06/09/09	3688-3725
104-10	Exhibit 40 - Victoria Poulsen's Response to Whirlpool Corporation's First Set of Interrogatories	3726-3731
104-11	Exhibit 41 - Victoria Poulsen Deposition 07/01/09	3732-3764
104-12	Exhibit 42 - Henrik Poulsen Deposition 08/03/09	3765-3766
104-13	Exhibit 43 - Sonja Sandholm-Pound's Response to Whirlpool Corporation's First Set of Interrogatories	3777-3783
104-14	Exhibit 44 - Sandholm-Pound Deposition 6/11/09	3784-3840

Docket No.	Description of Relevant Document	PageID#Range
104-15	Exhibit 45 - Shannon Schaeffer's Response to Whirlpool Corporation's First Set of Interrogatories	3841-3846
104-16	Exhibit 46 - Schaeffer Deposition 6/18/09	3847-3884
104-17	Exhibit 47 - Tracie Snyder's Response to Whirlpool Corporation's First Set of Interrogatories	3885-3890
104-18	Exhibit 48 - Snyder Deposition 6/9/09	3891-3921
104-19	Exhibit 49 - Andrea Strong's Response to Whirlpool Corporation's First Set of Interrogatories	3922-3927
104-20	Exhibit 50 - Strong Deposition 6/19/09	3928-3955
104-21	Exhibit 51 - Phillip Torf's Response to Whirlpool Corporation's First Set of Interrogatories	3956-3961
104-22	Exhibit 52 – Torf Deposition 6/29/09	3962-3996
104-23	Exhibit 53 - Jane Werman's Response to Whirlpool Corporation's First Set of Interrogatories	3997-4002
104-24	Exhibit 54 - Werman Deposition 06/12/09	4003-4042
104-25	Exhibit 55 - Benson Declaration 01/29/10	4043-4045
104-26	Exhibit 56 - Englert Declaration 08/31/09	4046-4048
104-27	Exhibit 57 - Hand Declaration 11/24/09	4049-4051
104-28	Exhibit 58 - C. Piersol Declaration 02/01/10	4052-4055
104-29	Exhibit 59 - L. Piersol Declaration 03/02/10	4056-4060
104-30	Exhibit 60 - Tharp Declaration 09/01/09	4061-4064
104-31	Exhibit 61 - Taylor Report 11/16/09	4065-4083
105-1	Whirlpool's Corrected Opposition to Plaintiffs' Motion to Certify an Ohio Class	4088-4127
110	Reply Memorandum in Support of Plaintiffs' Motion to Certify an Ohio Class	4144-4171
110-1	Supplemental Appendix	4172-4173
110-2	Exhibit 1 - Hardaway 9/15/09 Deposition	4174-4214
110-3	Exhibit 2 - 4/27/04 Data form	4215-4217
110-4	Exhibit 3 - 3/8/04 E-mail	4218-4220
110-5	Exhibit 4 - Chapman 10/5/09 Deposition	4221-4228

Docket No.	Description of Relevant Document	PageID#Range
110-6	Exhibit 5 - "Biofilm in Automatic Washers"	4229-4275
110-7	Exhibit 6 - 11/16/06 "Clean Out" Game Plan Powerpoint	4276-4291
110-8	Exhibit 7 - 4/21/04 E-mail	4292-4294
110-9	Exhibit 8 - 11/2/04 Meeting Minutes	4295-4299
110-10	Exhibit 9 - 11/16/04 E-mail	4300-4302
110-11	Exhibit 10 - 9/22/04 Powerpoint	4303-4312
110-12	Exhibit 11 - Laurie Rubinow 3/26/10 Declaration	4313-4317
110-13	Exhibit 12 - Tharp 3/24/10 Declaration	4318-4321
110-14	Exhibit 13 - Marais 2/4/10 Deposition	4322-4332
123	Amended Notice of Filing of Declaration of Anthony H. Hardaway to Correct Misstatement Regarding Online Consumer Survey	4535-4537
123-1	Exhibit 1 - Hardaway Declaration	4538-4540
123-2	Exhibit A to Hardaway Declaration	4541-4550
123-3	Exhibit B to Hardaway Declaration	4551-4574
124	Plaintiffs' Response to Whirlpool Corp.'s Amended Notice of Filing of Declaration of Anthony H. Hardaway To Correct Misstatement Regarding Online Consumer Survey	4575-4580
126	Reply to Plaintiffs Response to Notice of Filing of Declaration of Anthony H. Hardaway to Correct Misstatement Regarding Online Consumer Survey	4618-4624
126-1	Exhibit 1 – Williams Affidavit	4635-4630
127	Notice of Filing of Declaration of Anthony H. Hardaway to Correct Misstatement Regarding Horizon Next Generation Tub Design	4631-4633
127-1	Exhibit 1 - Hardaway Declaration	4634-4636
127-2	Exhibit A to Hardaway Declaration	4637-4638
130	Plaintiffs' Filing of Exhibits Pursuant to the 5/27/10 Class Certification Hearing	4700-4704
130-1	Exhibit 1 - 2/14/05 Procter & Gamble Memorandum	4705-4708

Docket No.	Description of Relevant Document	PageID#Range
130-2	Exhibit 2 - 10/26/04 Meeting Minutes	4709-4711
130-3	Exhibit 3 - Hardaway 8/19/08 Affidavit	4712-4715
130-4	Exhibit 4 - Hardaway 6/24/04 Memorandum	4716-4718
130-5	Exhibit 5 - 9/22/04 "Biofilm in HE Washers" Presentation	4719-4722
130-6	Exhibit 6 - Allison 6/10/09 Deposition	4723-4735
134	Transcript of 5/27/10 Oral Argument	4774-4829
141	**Opinion and Order on class certification**	**4900-4907**
227	**Order Reassigning Case from the Honorable James S. Gwin to the Honorable Christopher A. Boyko**	**6995**
263	Plaintiffs' Motion to Lift the Partial Discovery Stay and to Modify Class Definition	7865-7884
263-1	Exhibit - Harper v. LG	7885-7904
263-2	Exhibit - Amicus Letter	7905
263-3	Exhibit - Hardaway 1/14/11 Declaration	7906-7929
266	Whirlpool Opposition to Motion to Lift the Partial Stay and Motion to Modify the Class Definition	7972-7991
266-1	Exhibit A - Plaintiffs' Court Approved Class-Certification Notice	7992-7999
276	Motion for Leave to File a Supplemental Brief in Opposition to Plaintiffs' Motion to Modify the Class Definition	8131-8135
276-1	Exhibit A - Supplemental Brief	8136-8147
276-2	Exhibit 1 to Supplemental Brief - Wilson 1/23/13 Supp. Expert Report	8148-8161
276-3	Exhibit 2 to Supplemental Brief - Wilson 5/22/13 Deposition	8162-8166
277	Plaintiffs Brief in Opposition to Whirlpool's Motion for Leave to File a Supplemental Brief	8167-8182
277-1	Exhibit 1 - Selbin Declaration	8183-8185
277-2	Exhibit 2 - Lichtman Declaration	8186-8187

Docket No.	Description of Relevant Document	PageID#Range
277-3	Exhibit 3 - 2/28/14 E-mail	8188-8190
284-1	Corrected Reply to Whirlpool's Supplemental Brief	8242-8260
286	Transcript of 4/23/04 Oral Argument	8262-8306
289	**Order on modification of class definition**	**8311-8315**
300-5	Exhibit 5 - 4-26-13 Yang Report	10033-10118
308	Whirlpool's Motion for Summary Judgment	12874-12877
308-1	Brief in Support	12878-12922
308-2	Exhibit 1 - Wilson 2/25/10 Deposition	12923-12954
308-3	Exhibit 2 - Wilson 11/25/11 Report	12955-12964
308-4	Exhibit 3 - Wilson 4/26/13 Report	12965-12968
308-5	Exhibit 4 - Wilson 5/22/13 Deposition	12969-13017
308-6	Exhibit 5 - Wilson 11/16/09 Report	13018-13022
308-7	Exhibit 6 - Wilson 1/23/13 Report	13023-13026
308-8	Exhibit 7 - Groppel 12/3/12 Deposition	13027-13056
308-9	Exhibit 8 - Timeline	13057-13058
308-10	Exhibit 9 - Transcript of 4/23/14 Oral Argument	13059-13064
308-11	Exhibit 10 - Glazer 6/17/09 Deposition	13065-13088
308-12	Exhibit 11 - Allison 5/30/13 Deposition	13089-13130
308-13	Exhibit 12 - Yang 2/23/10 Deposition	13131-13152
308-14	Exhibit 13 - Yang 5/17/13 Deposition	13153-13162
308-15	Exhibit 14 - Allison 6/10/09 Deposition	13163-13280
308-16	Exhibit 15 - Chapman 10/5/09 Deposition	13281-13287
308-17	Exhibit 16 - Allison 3/18/13 Declaration	13288-13290
308-18	Exhibit 17 - Bresnahan 8/23/13 Report	13291-13294
308-19	Exhibit 18 - Taylor 3/8/13 Supp. Report	13295-13304
308-20	Exhibit 19 - Allison's Resp. to Interrog.	13305-13318
308-21	Exhibit 20 - Glazer's Resp. to Interrog.	13319-13334
308-22	Exhibit 21 - Scott Glazer 5/29/13 Deposition	13335-13340
308-23	Exhibit 22 - Butler 11/2/12 Report	13341-13347
308-24	Exhibit 23 - Gopalakrishnan 3/8/13 Report	13348-13352

Docket No.	Description of Relevant Document	PageID#Range
308-25	Exhibit 24 - Taylor 12/16/09 Expert Reb. Report	13353-13360
308-26	Exhibit 25 - Allison Rule 26(a)(1)(A) Disclosures	13361-13365
309	Plaintiffs' Motion for Summary Judgment	13366-13396
309-1	Exhibit 1 - Plaintiffs' Statement of Facts	13397-13415
309-2	Exhibit 2 - 8/6/03 Consumers Union	13416-13465
309-3	Exhibit 3 - 3/2008 Affresh Brand Book	13466-13481
309-4	Exhibit 4 - 7/22/04 Access Odor E-mail	13482-13483
309-5	Exhibit 5 - Conrad 5/21/14 Deposition	13484-13493
309-6	Exhibit 6 - Gopalakrishnan 12/3/13 Deposition	13494-13500
309-7	Exhibit 7 - Gopalakrishnan 4/19/13 Deposition	13501-13504
309-8	Exhibit 8 - 7/14/07 Workshop	13505-13531
309-9	Exhibit 9 - 3/28/07 Clean Out CET Tollgate Presentation	13532-13569
309-10	Exhibit 10 - Simonson 4/22/13 Deposition	13570-13573
309-11	Exhibit 11 - Wilson 1/23/13 Supp. Expert Report	13574-13587
309-12	Exhibit 12 - Groppel 12/3/12 Deposition	13588-13592
309-13	Exhibit 13 - Glazer 6/17/09 Deposition	13593-13595
309-15	Exhibit 15 - 7/25/07 Affresh Final Confim. Testing	13598-13620
309-16	Exhibit 16 - Affresh FAQ	13621-13628
309-17	Exhibit 17 - 10/26/04 Technology Letter of Findings	13629-13632
309-18	Exhibit 18 - 3/15-17 Meeting Minutes	13633-13642
309-19	Exhibit 19 - 4/16/07 Cleanout Powerpoint	13643-13654
309-20	Exhibit 20 - 6/2006 Affresh Deck for Best Buy	13655-13673
309-21	Exhibit 21 -Yang 2/23/10 Deposition	13674-13676
327	Whirlpool's Motion to Decertify the Ohio Class	18665-18668
327-1	Brief in Support	18669-18711
327-2	Exhibit 1 - Wilson 11/25/11 Report	18712-18721
327-3	Exhibit 2 - Wilson 4/26/13 Report	18722-19019
327-4	Exhibit 3 - Yang 5/17/13 Deposition	19020-19031

Docket No.	Description of Relevant Document	PageID#Range
327-5	Exhibit 4 - Wilson 5/22/13 Deposition	19032-19087
327-6	Exhibit 5 - Wilson 1/23/13 Report	19088-19183
327-7	Exhibit 6 - Wilson 9/15/10 Report	19184-19242
327-8	Exhibit 7 - Wilson 2/25/10 Deposition	19243-19252
327-9	Exhibit 8, Part 1 - Taylor 3/18/13 Report	19253-19340
327-10	Exhibit 8, Part 2 - Taylor 3/18/13 Report	19341-19408
327-11	Exhibit 8, Part 3 - Taylor 3/18/13 Report	19409-19501
327-12	Exhibit 8, Part 4 - Taylor 3/18/13 Report	19502-19593
327-13	Exhibit 9 - Miller 12/6/12 Deposition	19594-19608
327-14	Exhibit 10 - Conrad 3/15/10 Declaration	19609-19638
327-15	Exhibit 11 - Groppel 12/3/12 Deposition	19639-19658
327-16	Exhibit 12 - Hardaway 6/13/14 Declaration	19659-19667
327-17	Exhibit 13 - Evolution of Tub & Crosspiece Design	19668-19669
327-18	Exhibit 14 - Timeline of Tub & Crosspiece Design	19670-19672
327-19	Exhibit 15 - Wilson 1/4/09 Report	19673-19687
327-20	Exhibit 16 - Bresnahan 3/8/13 Report	19688-19770
327-21	Exhibit 17 - Taylor 12/16/19 Report	19771-19814
327-22	Exhibit 18 - Taylor 1/15/10 Report	19815-19877
327-23	Exhibit 19 - Gopalakrishnan 3/8/13 Report	19878-20022
327-24	Exhibit 20 - Butler 11/2/12 Report	20023-20044
327-25	Exhibit 21 - Butler 4/26/13 Report	20045-20150
327-26	Exhibit 22 - Butler 12/12/12 Deposition	20151-20190
327-27	Exhibit 23 - Van Audenrode 5/10/13 Report	20191-20212
327-28	Exhibit 24 - Gans 10/10/13 Report	20213-20262
327-29	Exhibit 25 - Van Audenrode 7/10/13 Deposition	20263-20296
327-30	Exhibit 26 - Gans 8/8/13 Deposition	20297-20317
327-31	Exhibit 27 - Sandholm-Pound 6/11/09 Deposition	20318-20331
327-32	Exhibit 28 - Timeline of Public Information	20331-20334
327-33	Exhibit 29 - Conrad 5/21/14 Deposition	20335-20369
327-34	Exhibit 30 - Bresnahan 8/28/13 Report	20370-20459

Docket No.	Description of Relevant Document	PageID#Range
327-35	Exhibit 31 - Simonson 3/22/13 Report	20460-20728
327-36	Exhibit 32 - Allison 6/10/09 Deposition	20729-20741
327-37	Exhibit 33 - Allison 5/30/13 Deposition	20742-20770
327-38	Exhibit 34 - Glazer 6/17/09 Deposition	20771-20801
327-39	Exhibit 35 - Scott Glazer 5/29/13 Deposition	20802-20810
327-40	Exhibit 36 - Yang 2/23/10 Deposition	20811-20821
327-41	Exhibit 37 - U.S. Census Bureau Mobility Rates	20822-20826
327-42	Exhibit 38 - Van Audenrode 12/19/13 Deposition	20827-20846
327-43	Exhibit 39 - Oliver 6/3/13 Deposition	20847-20852
327-44	Exhibit 40 - Chart Regarding Differing Preferences	20853-20854
327-45	Exhibit 41 - Members Chart	20855-20856
327-46	Hardaway 6/13/14 Affidavit	20857-20864
328	Opposition to Plaintiffs' Motion for Summary Judgment	20865-20893
328-1	Exhibit 1 - Taylor 3/8/13 Report	20894-21240
328-2	Exhibit 2 - Wilson 2/25/10 Deposition	21241-21274
328-3	Exhibit 3 - Wilson 11/25/11 Report	21275-21284
328-4	Exhibit 4 - Yang 5/17/13 Deposition	21285-21304
328-5	Exhibit 5 - Taylor 12/16/09 Report	21305-21348
328-6	Exhibit 6 - Gopalakrishman 3/8/13 Report	21349-21493
328-7	Exhibit 7 - Gopalakrishman 6/21/13 Report	21494-21560
328-8	Exhibit 8 - Hardaway 9/15//09 Deposition	21561-21582
328-9	Exhibit 9 - Wilson 5/22/13 Deposition	21583-21659
328-10	Exhibit 10 - Yang 2/23/10 Deposition	21660-21682
328-11	Exhibit 11 - Gopalakrishman 12/3/13 Deposition	21683-21704
328-12	Exhibit 12 – 8/19/13 Odor Sampling Form	21705-21725
328-13	Exhibit 13 - Wilson 4/26/13 Report	21726-22023
328-14	Exhibit 14 - Allison 6/10/09 Deposition	22024-22043
328-15	Exhibit 15 - Allison 5/30/13 Deposition	22044-22069
328-16	Exhibit 16 - Breshnahan 3/8/13 Report	22070-22169

Docket No.	Description of Relevant Document	PageID#Range
328-17	Exhibit 17 - Glazer 6/17/09 Deposition	22170-22188
328-18	Exhibit 18 - Simonson 3/22/13 Report	22189-22457
328-19	Exhibit 19 - Wilson 9/15/10 Report	22458-22516
328-20	Exhibit 20 - Ernst 5/10/13 Deposition	22517-22529
328-21	Exhibit 21 - Product Application Reports	22530-22536
328-22	Exhibit 22 - Conrad 5/21/14 Deposition	22537-22584
329	Opposition to Whirlpool's Motion for Summary Judgment	22585-22622
329-1	Exhibit 1 - Affresh FAQ	22623-22630
329-2	Exhibit 2 - Glogowski 11/29/12 Deposition	22631-22635
329-3	Exhibit 3 - Childers 11/28/12 Deposition	22636-22639
329-4	Exhibit 4 - Hardaway 9/17/13 Deposition	22640-22642
329-5	Exhibit 5 - Groppel 12/03/12 Deposition	22643-22645
329-6	Exhibit 6 - Allison 6/10/09 Deposition	22646-22652
329-7	Exhibit 7 - Glazer 6/17/09 Deposition	22653-22657
329-8	Exhibit 8 - Hardaway 9/15/09 Deposition	22658-22661
329-9	Exhibit 9 - Gans 5/10/13 Report	22662-22711
330	Renewed Motion to Modify the Class Definition	22712-22729
330-1	Exhibit 1 - Timeline of Relevant Events	22730-22732
330-2	Exhibit 2 - Selbin 6/20/14 Declaration	22733-22735
330-3	Exhibit 3 - Hardaway 9/17/13 Deposition	22736-22738
330-4	Exhibit 4 - Miller 12/06/12 Deposition	22739-22741
349	Whirlpool's Reply in Support of Motion for Summary Judgment	23332-23366
349-1	Exhibit A - Ex. 5 to Glazer 6/17/09 Deposition	23367-23419
349-2	Exhibit B - Glazer 6/17/09 Deposition	23420-23424
349-3	Exhibit C - Duet & Duet HT Warranties	23425-23431
349-4	Exhibit D - Glazer Supp. Rule 26(a)(1)(A) Disclosures	23432-23437
349-5	Exhibit E - Ex. 6 to Glazer 6/17/09 Deposition	23438-23440
349-6	Exhibit F - Ex. 8 to Glazer 6/17/09 Deposition	23441-23442

Docket No.	Description of Relevant Document	PageID#Range
349-7	Exhibit G - Gans 8/8/13 Deposition	23443-23474
349-8	Exhibit H - Yang 2/23/10 Deposition	23475-23486
350-1	Exhibit 1 - 2/5/08 E-mail	23521-23524
350-2	Exhibit 2 - 9/4/08 E-mail	23525-23533
350-3	Exhibit 3 - Biofilm Lab Photo	23534-23535
350-4	Exhibit 4 - Taylor 12/16/09 Report	23536-23540
350-5	Exhibit 5 - 12/6/11 Presentation	23541-23554
350-6	Exhibit 6 - 11/24/08 E-mail	23555-23562
350-7	Exhibit 7 - Wilson 2/25/10 Deposition	23563-23565
350-8	Exhibit 8 - Oliver 2/10/10 Deposition	23566-23568
350-9	Exhibit 9 - Biofilm in Automatic Washers Memo	23569-23615
350-10	Exhibit 10 - Invention Disclosure Sheet	23616-23618
350-11	Exhibit 11 - Patent Application	23619-23641
350-12	Exhibit 12 - 3/2/05 E-mail	23642-23645
350-13	Exhibit 13 - 2007 Cleanout Memo	23646-23657
350-14	Exhibit 14 - 3/20/05 Biofilm Executive Summary	23658-23660
350-15	Exhibit 15 - 4/24/08 E-mail	23661-23663
350-16	Exhibit 16 - 1/12/05 Invention Disclosure Sheet	23664-23665
350-17	Exhibit 17 - Groppel 12/3/12 Deposition	23666-23669
350-18	Exhibit 18 - 1/99 Access Quality Plan	23670-23699
350-19	Exhibit 19 - Hardaway 9/15/09 Deposition	23700-23704
350-20	Exhibit 20 - 2/26/05 E-mail	23705-23708
350-21	Exhibit 21 - 8/14/07 Affresh Draft FAQ	23709-23719
350-22	Exhibit 22 - 5/5/08 Affresh Presentation	23720-23798
350-23	Exhibit 23 - 6/8/04 E-mail	23799-23801
351	Whirlpool Opposition to Renewed Motion to Modify the Class Definition	23802-23821
351-1	Exhibit 1 - Def.'s Slides	23822-23846
351-2	Exhibit 2 - Williams 7/21/14 Declaration	23847-23850

Docket No.	Description of Relevant Document	PageID#Range
351-3	Exhibit 1 to Williams Decl. - Alpha Features for Whirlpool Brand	23851-23856
351-4	Exhibit 2 to Williams Decl. - Alpha Washer & Dryer Project Update	23857-23864
351-5	Exhibit 3 to Williams Decl. - Alpha Models Launch	23865-23868
351-6	Exhibit 3 - Wilson 2/25/10 Deposition	23869-23892
351-7	Exhibit 4 - Wilson 5/22/13 Deposition	23893-23909
352	Plaintiffs' Opposition to Motion to Decertify the Ohio Class	23910-23937
352-1	Exhibit 1 - Miller 12/6/12 Deposition	23938-23941
352-2	Exhibit 2 - Chart Showing That the Evidentiary Sources Cited in Whirlpool's Footnotes Do Not Support the Propositions for Which They Are Cited	23942-23946
352-3	Exhibit 3 - Chart Showing That Whirlpool's Decertification Motion Repeats Factual Arguments Previously Made in Whirlpool's 2010 Class Certification Opposition	23947-23952
352-4	Exhibit 4 - Whirlpool's 4/10/13 Brief Filed in the Sixth Circuit	23953-23966
352-5	Exhibit 5 - Whirlpool's 4/5/13 Brief Filed in the Sixth Circuit	23967-23979
356-2	Plaintiffs' Corrected Reply in Support of Motion for Summary Judgment [Exhibits Thereto on File at Docket No. 350]	24077-24109
357	Whirlpool Reply in Support of Motion to Decertify the Ohio Class	24110-24138
357-1	Exhibit 1 - 6/23/14 Letter from Balmert to Boyko	24139-24140
357-2	Exhibit 2 - Chart Showing Whirlpool's Statement of Facts	24141-24218
357-3	Exhibit 3 - 7/25/14 E-mail from Lichtman to Cohen	24219-24220
357-4	Exhibit 4 - Chart Showing Differences Among Class Models	24221-24226
357-5	Exhibit 5 - Conn 7/17/14 Deposition	24227-24237

Docket No.	Description of Relevant Document	PageID#Range
358	Plaintiffs' Reply in Support of Renewed Motion to Modify the Class Definition	24238-24258
358-1	Exhibit 1 - 8/6/14 Whirlpool Chart	24259-24264
358-2	Exhibit 2 - Proposed Modified Class Definition	24265-24266
358-3	Exhibit 3 - Wilson 2/25/10 Deposition	24267-24271
358-4	Exhibit 4 - Yang 2/23/10 Deposition	24272-24275
366	**Opinion and Order on modification of class definition and decertification of class**	**24312-24357**
368	Plaintiffs' Motions *in Limine*	24371-24402
369	Whirlpool's and Maytag's Omnibus Motions *in Limine*	24420-24448
369-7	Exhibit 7 - Whirlpool Website	24515-24522
369-8	Exhibit 8 - Glazer 6/17/09 Deposition	24523-24531
369-9	Exhibit 9 - Yang 2/23/10 Deposition	24532-24538
369-10	Exhibit 10 - Allison 6/10/09 Deposition	24539-24547
369-11	Exhibit 11 - Ishii v. Sears Complaint	24548-24578
370	**Amendment to Opinion and Order on modification of class definition and decertification of class**	**24588-24589**
376	Trial Brief filed by Plaintiffs' Co-Lead Counsel	24608-24749
377	Trial Brief filed by Whirlpool Corporation	24750-24798
377-1	Exhibit 1 - Wilson 11/16/09 Report	24799-24809
377-2	Exhibit 2 - Taylor12/16/09 Rebuttal Report	24810-24839
377-3	Exhibit 3 - Taylor 3/8/13 Report	24840-24970
377-4	Exhibit 4 - Simonson 3/22/13 Report	24971-25004
377-5	Exhibit 5 - Gopalakrishnan 3/8/13 Report	25005-25037
377-6	Exhibit 6 - St. Joseph Technology Center Lab Report	25038-25046
377-7	Exhibit 7 - Groppel 12/3/12 Deposition	25047-25057
377-8	Exhibit 8 - Chart with Material Design Differences	25058-25059
377-9	Exhibit 9 - Wilson 1/23/13 Supplemental Report	25060-25073

Docket No.	Description of Relevant Document	PageID#Range
377-10	Exhibit 10 - Wilson 4/26/13 Supplemental Report	25074-25095
377-11	Exhibit 11 - Wilson 5/22/13 Deposition	25096-25144
377-12	Exhibit 12 - Wilson 2/25/10 Deposition	25145-25172
377-13	Exhibit 13 - Butler 11/2/12 Report	25173-25194
377-14	Exhibit 14 - Yang 2/23/10 Deposition	25195-25204
377-15	Exhibit 15 - Yang 5/17/13 Deposition	25205-25213
377-16	Exhibit 16 - Gopalakrishnan 6/21/13 Report	25214-25228
377-17	Exhibit 17 - Glazer 6/17/09 Deposition	25229-25266
377-18	Exhibit 18 - Allison 6/10/09 Deposition	25267-25290
377-19	Exhibit 19 - Bresnahan 3/28/13 Report	25291-25357
377-20	Exhibit 20 - Conrad 5/21/14 Deposition	25358-25390
377-21	Exhibit 21 - Allison 5/30/13 Deposition	25391-25410
377-22	Exhibit 22 - Exhibit 7 from Allison 6/10/09 Deposition	25411-25487
377-23	Exhibit 23 - Exhibit 5 from Glazer 6/7/09 Deposition	25488-25540
377-24	Exhibit 24 - Allison's Resp. to Interrog. No. 2	25541-25554
377-25	Exhibit A - Whirlpool's Proposed Witness List	25555-25563
377-26	Exhibit B - Whirlpool's Proposed Jury Instructions	25564-25806
377-27	Exhibit C - Whirlpool's Special Interrogs. and Verdict Form	25807-25827
379	Plaintiffs' Response to Omnibus Motion in Limine	25847-25877
379-3	Exhibit 3,11-14-06 Presentation	25887-25932
379-4	Exhibit 4, 2-5-08 e-mail	25933-25936
379-5	Exhibit 5, 2-21-05 biofilm update	25937-25957
379-6	Exhibit 6, 7-26-05 biofilm update	25958-25983
379-7	Exhibit 7, 1-06 sanitization presentation	25984-25999
379-8	Exhibit 8, 2-06 sanitization presentation	26000-26015
379-9	Exhibit 9, 12-8-06 biofilm update	26016-26052
379-10	Exhibit 10, 2-12-07 EPA presentation	26053-26063
379-11	Exhibit 11, 3-22-06 presentation	26064-26095

Docket No.	Description of Relevant Document	PageID#Range
379-12	Exhibit 12, 6-2-06 discussion	26096-26121
379-13	Exhibit 13, 9-3-08 e-mail	26122-26130
379-14	Exhibit 14, 4-26-05 e-mail	26131-26138
380-3	Exhibit 3 - Allison 6-10-09 Dep.	26282-26325
380-4	Exhibit 4 - Allison 5-30-13 Dep.,	26326-26385
380-5	Exhibit 5 - Wilson 5-22-13 Dep.,	26386-26391
380-6	Exhibit 6 - Glazer Dep.,	26392-26407
380-18	Exhibit 18 - Ex 8 to Glazer Dep.,	26509-26510
391	**Memorandum and Order on summary judgment motions**	**26776-26806**
392	Plaintiffs' Reply to Whirlpool's Trial Brief	26807-26878
392-1	Exhibit 1 - Amended Proposed Verdict Form	26879-26882
393	Whirlpool's Response to Plaintiffs' Trial Brief	26883-26887
393-1	Exhibit A - Objections to Plaintiffs' Proposed Jury Instructions and Special Verdict Form	26888-26950
396	Whirlpool's Amended Response To Plaintiffs' Motions In Limine [Exhibits thereto on file at Docket No. 380]	27328- 27390
399	Whirlpool's Supplemental Trial Brief Regarding Burden of Proof on Class Claims	27693-27704
399-1	Exhibit A - Scrap Metal Jury Instructions	27705-27765
399-2	Exhibit B - Special Verdict Form	27766-27773
399-3	Exhibit C - Final Jury Instructions	27774-27868
399-4	Exhibit D - Bouaphakeo Final Jury Instructions	27869-27887
400	Plaintiffs' Supplemental Trial Brief	27888-27906
400-1	Exhibit 1 - Behr Process Jury Instructions	27907-27911
400-2	Exhibit 2 - Masonite Verdict Form	27912-27914
400-3	Exhibit 3 - Engle Phase I Verdict Form	27915-27927
400-4	Exhibit 4 - Exxon Valdez Verdict Forms	27928-27943
400-5	Exhibit 5 - Homestore Verdict Form	27944-27960
400-6	Exhibit 6 - Household Int'l Jury Instructions	27961-27964

Docket No.	Description of Relevant Document	PageID#Range
400-7	Exhibit 7 - Adderley Jury Instructions	27965-27968
400-8	Exhibit 8 - Universal Service Fund Jury Instructions	27969-27975
400-9	Exhibit 9 - JDS Uniphase Corp. Verdict Form	27976-27979
400-10	Exhibit 10 - Apollo Group Jury Instructions	27980-27985
400-11	Exhibit 11 - Apollo Group Verdict Form	27986-28005
400-12	Exhibit 12 - California Civil Jury Instruction 115	28006-28010
400-13	Exhibit 13 - Urethane Antitrust Jury Instructions	28011-28017
400-14	Exhibit 14 - Urethane Antitrust Verdict Form	28018-28021
400-15	Exhibit 15 - LCD Antitrust Jury Instructions	28022-28024
401	Plaintiffs' Letter Regarding Plaintiffs' Motion *in Limine*	28025
401-1	Exhibit 1 - Social media content	28026-28031
401-2	Exhibit 2 - Social media content	28032-28038
401-3	Exhibit 3 - Social media content	28039-28047
402	Whirlpool's Amended Response to Motion *in Limine*	28048-28110
402-1	Exhibit 1 - Groppel 12/3/12 Deposition	28111-28115
402-2	Exhibit 2 - Molloy 6/24/13 Deposition	28116-28121
402-3	Exhibit 3 - Allison 6/10/09 Deposition	28122-28165
402-4	Exhibit 4 - Allison 5/30/13 Deposition	28166-28225
402-5	Exhibit 5 - Wilson 5/22/13 Deposition	28226-28231
402-6	Exhibit 6 - Glazer 6/17/09 Deposition	28232-28247
402-7	Exhibit 7 - Conrad 1/14/11 Declaration	28248-28251
402-8	Exhibit 8 - Bicknell 6/23/09 Deposition	28252-28258
402-9	Exhibit 9 - Conrad 10/29/09 Deposition	28259-28262
402-10	Exhibit 10 - Conrad 5/21/14 Deposition	28263-28271
402-11	Exhibit 11 - Wilson 4/1/11 Deposition	28272-28275
402-12	Exhibit 12 - Wilson 11/16/09 Report	28276-28279
402-13	Exhibit 13 - Rysman 2/14/14 Report	28280-28284
402-14	Exhibit 14 - Yang 5/16/12 Declaration	28285-28307

Docket No.	Description of Relevant Document	PageID#Range
402-15	Exhibit 15 - Yang 12/20/10 Declaration	28308-28336
402-16	Exhibit 16 - Van Audenrode 7/10/13 Deposition	28337-28343
402-17	Exhibit 17 - Van Audenrode 12/19/13 Deposition	28344-28348
402-18	Exhibit 18 - Ex. 8 to Glazer 6/17/09 Deposition	28349-28350
402-19	Exhibit 19 - Wilson 2/25/10 Deposition	28351-28362
402-20	Exhibit 20 - Rysman 7/1/14 Deposition	28363-28366
402-21	Exhibit 21 - Van Audenrode 11/4/13 Report	28367-28369
405	Stipulation Concerning Testimony of Dr. R. Gary Wilson	28383-28385
407	Transcript of 9/26/14 Final Pretrial Conference	28387-28418
411	Plaintiff's Reply Supplemental Trial Brief	28847-28854
411-1	Exhibit 1 - Tenth Circuit decision in Urethane	28855-28902
414	Whirlpool's Response to Plaintiffs' Supplemental Trial Brief	29952-29959
414-1	Exhibit A - Adderly Jury Instructions	29960-29984
423	**Order Regarding *Daubert* Motions**	**30232-30295**
426	**Order on motions *in limine***	**30795-30799**
427	**Order on Scope of Proof**	**30800**
428	**Order on the Admissibility of Exhibits at Trial**	**30801-30802**
430	Trial Transcript, Vol. 1A (10/7/14 a.m. voir dire)	30875-30998
434	Trial Transcript, Vol. 1B (10/7/14 p.m.)	31003-31097
435	Trial Transcript, Vol. 2 (10/8/14)	31098-31342
436	Trial Transcript, Vol. 3 (10/9/14)	31343-31609
439	Trial Transcript, Vol. 4 (10/10/14)	31618-31880
442	Trial Transcript, Vol. 5 (10/14/14)	31896-32156
447	Trial Transcript, Vol. 6 (10/15/14)	32248-32523
448	Trial Transcript, Vol. 7 (10/16/14)	32524-32803
449	Trial Transcript, Vol. 8 (10/17/14)	32804-33047
450	Plaintiffs' Motion to Reconsider *in Limine* Ruling with Respect to Health Risks and Offer of Proof	33048-33058
450-1	Exhibit 1 - Yang 10/17/14 Declaration	33059-33070

Docket No.	Description of Relevant Document	PageID#Range
452	Plaintiffs' Trial Brief in Support of Requested Jury Instruction Regarding Duet Design	33121-33129
452-1	Exhibit 1 - 8/18/14 Williams E-mail, Washer Model Chart & Photographs	33130-33136
452-2	Exhibit 2 - Klyn 10/13/14 Deposition	33137-33143
453	Opposition to Plaintiffs' Motion to Reconsider *in Limine* Ruling as to Health Risks	33144-33157
453-1	Exhibit 1 - Yang 2/23/10 Deposition	33158-33166
453-2	Exhibit 2 - Yang 5/17/13 Deposition	33167-33176
454	Opposition to Plaintiffs' Trial Brief in Support of Requested Jury Instructions Regarding Duet Design	33175-33182
455	Trial Transcript, Vol. 9 (10/20/14)	33183-33429
459	Trial Transcript, Vol. 10 (10/21/14)	34522-34767
461	Plaintiffs' Trial Brief Regarding Statute of Limitations Tolling	34778-34788
461-1	Exhibit - Tolling Timeline	34789
462	Whirlpool's Brief in Support of Its Oral Motion for Judgment as a Matter of Law	34790-34799
462-1	Exhibit A - Allison Resp. to First Set of Interrogs.	34800-34813
463	Trial Transcript, Vol. 11 (10/22/14)	34814-34987
464	**Order on plaintiffs' motion to reconsider *in limine* ruling with respect to health risks and offer of proof**	**34988**
465	Trial Transcript, Vol. 12 (10/23/14)	34989-35242
466	Plaintiffs' Amended Proposed Jury Instructions	35243-35287
467	Whirlpool's Revised Proposed Jury Instructions	35288-35328
467-1	Exhibit A - In re Scrap Metal Jury Instructions	35329-35389
467-2	Exhibit B - Cook v. Rockwell Jury Instructions	35390-35484
467-3	Exhibit C - Ashby v. Farmers Jury Instructions	35485-35505
468	Plaintiffs' Amended Proposed Verdict Form	35506-35512
469	Whirlpool's Revised Proposed Special Verdict Form	35513-35526

Docket No.	Description of Relevant Document	PageID#Range
470	Trial Transcript, Vol. 13 (10/24/14)	35527-35782
471	Whirlpool's Amended Revised Proposed Special Verdict Form	35783-35796
472	Whirlpool's Renewed Motion to Decertify the Ohio Class	35797-35831
472-1	Exhibit A - DD11B	35832-35833
472-2	Exhibit B - DD12B	35834-35835
472-3	Exhibit C - Allison's 1st Resp. to Interrog. No. 2	35836-35838
473	Whirlpool's Motion for Judgment as a Matter of Law	35839-35877
473-1	Exhibit 1 - Def.'s Cross Ex. 39	35878-35879
473-2	Exhibit 2 - Gans 8/8/13 Deposition	35880-35885
474	Trial Transcript, Vol. 14 (10/27/14)	35886-36051
475	Whirlpool Proposed Jury Instructions	36052-36055
476	Whirlpool's Objections to the Court's Jury Instructions and Verdict Form	36056-36071
476-1	Exhibit A - Jury Instructions	36072-36112
476-2	Exhibit B - Verdict Form	36113-36119
477	Plaintiffs' Opposition to Renewed Motion to Decertify the Ohio Class	36120-36135
478	Plaintiffs' Opposition to Motion for Judgment as a Matter of Law	36136-36183
478-1	Exhibit 1 - Plaintiffs' Allegations Concerning Gina Glazer's Use and Care Habits	36184-36188
479	Plaintiffs' Opposition to Defendant Whirlpool's Motion to Strike Trial Questions	36189 -36195
479-1	Exhibit 1 - 3/28/07 "CleanOut" CET Tollgate Document	36196-36233
479-2	Exhibit 2 - Hardaway 9/17/13 Deposition	36234-36236
479-3	Exhibit 3 - Whirlpool's Response to Notice of Videotaped Deposition	36237-36250

Docket No.	Description of Relevant Document	PageID#Range
479-4	Exhibit 4 - Excerpts from Trial Transcript, Vol. 6 (10/15/14)	36251-36254
479-5	Exhibit 5 - Excerpts from Trial Transcript, Vol. 5 (10/14/14)	36255-36258
479-6	Exhibit 6 - 8/08 E-mail	36259-36262
479-7	Exhibit 7 - Chart Tracking Market Share of Front-Load Washing Machines	36263-36268
479-8	Exhibit 8 - Excerpts from Trial Transcript, Vol. 8 (10/17/14)	36269-36272
480	Trial Transcript, Vol. 15 (10/28/14)	36273-36326
481	Plaintiffs' Response in Opposition to Whirlpool's Objections to the Court's Jury Instructions and Verdict Form	36327-36350
481-1	Exhibit 1 - Chart Demonstrating That Whirlpool Raises No New Arguments	36351-36355
482	**Order on Whirlpool's renewed motion to decertify the Ohio class, motion for judgment as a matter of law, and oral motion to strike**	**36356-36360**
483	Plaintiffs' Objections to the Court's Revised Jury Instructions	36356-36360
484	Whirlpool's Response to Plaintiffs' Objections to the Court's Revised Jury Instructions	36365-36370
484-1	Exhibit A - Revised Jury Instructions	36371-36413
485	Whirlpool's Objections to the Court's Revised Jury Instructions and Verdict Form	36414-36426
485-1	Exhibit A - Revised Jury Instructions	36427-36469
485-2	Exhibit B - Revised Verdict Form	36470-36475
486	Final Witness List Entered by the Court	36476-36477
487	List of Exhibits Admitted by the Court	36478-36490
488	Trial Transcript, Vol. 16 (10/29/14)	36491-36756
489	Trial Transcript, Vol. 17 (10/30/14)	36757-36763
490	Verdict	36764-36768
491	**Judgment in a Civil Case**	**36774**

Docket No.	Description of Relevant Document	PageID#Range
499	Notice of Appeal	36854-36857
504	Notice of Cross-Appeal	36878-36881
517	Joint Motion to Accept the Parties' Stipulation for Filing of Admitted Trial Exhibits	37049-37052
517-1	Proposed Order	37053
518	Joint Proposed Stipulation for Filing of Admitted Trial Exhibits	37054-37056
518-1	Plaintiffs' Trial Exhibit No. P2	37057-37058
518-2	Plaintiffs' Trial Exhibit No. P3	37059-37060
518-3	Plaintiffs' Trial Exhibit No. P4	37061-37062
518-4	Plaintiffs' Trial Exhibit No. P5	37063-37064
518-5	Plaintiffs' Trial Exhibit No. P7	37065-37066
518-6	Plaintiffs' Trial Exhibit No. P8	37067
518-7	Plaintiffs' Trial Exhibit No. P9	37068-37076
518-8	Plaintiffs' Trial Exhibit No. P10	37077
518-9	Plaintiffs' Trial Exhibit No. P11	37078-37082
518-10	Plaintiffs' Trial Exhibit No. P12	37083
518-11	Plaintiffs' Trial Exhibit No. P13	37084-37085
518-12	Plaintiffs' Trial Exhibit No. P14	37086-37089
518-13	Plaintiffs' Trial Exhibit No. P15	37090-37092
518-14	Plaintiffs' Trial Exhibit No. P16	37093-37094
518-15	Plaintiffs' Trial Exhibit No. P20	37095-37097
518-16	Plaintiffs' Trial Exhibit No. P21	37098-37112
518-17	Plaintiffs' Trial Exhibit No. P22	37113-37115
518-18	Plaintiffs' Trial Exhibit No. P23	37116-37117
518-19	Plaintiffs' Trial Exhibit No. P25	37118-37126
518-20	Plaintiffs' Trial Exhibit No. P26	37127-37141
518-21	Plaintiffs' Trial Exhibit No. P27	37142-37143
518-22	Plaintiffs' Trial Exhibit No. P28	37144-37150
518-23	Plaintiffs' Trial Exhibit No. P35	37151-37163

Docket No.	Description of Relevant Document	PageID#Range
518-24	Plaintiffs' Trial Exhibit No. P42	37164-37201
518-25	Plaintiffs' Trial Exhibit No. P46	37202-37227
518-26	Plaintiffs' Trial Exhibit No. P47	37228-37249
518-27	Plaintiffs' Trial Exhibit No. P49	37250-37284
518-28	Plaintiffs' Trial Exhibit No. P57	37285-37287
518-29	Plaintiffs' Trial Exhibit No. P61	37288-37296
518-30	Plaintiffs' Trial Exhibit No. P65	37297-37305
518-31	Plaintiffs' Trial Exhibit No. P66	37306-37317
518-32	Plaintiffs' Trial Exhibit No. P69	37318-37324
528-33	Plaintiffs' Trial Exhibit No. P80	37325-37325
518-34	Plaintiffs' Trial Exhibit No. P87	37328-37337
518-35	Plaintiffs' Trial Exhibit No. P88	37338-37339
518-36	Plaintiffs' Trial Exhibit No. P89	37340-37342
518-37	Plaintiffs' Trial Exhibit No. P91	37343-37347
518-38	Plaintiffs' Trial Exhibit No. P94	37348-37354
518-39	Plaintiffs' Trial Exhibit No. P95	37355-37367
518-40	Plaintiffs' Trial Exhibit No. P98	37368-37376
518-41	Plaintiffs' Trial Exhibit No. P102	37377-37383
518-42	Plaintiffs' Trial Exhibit No. P103	37384-37406
518-43	Plaintiffs' Trial Exhibit No. P104	37407-37443
518-44	Plaintiffs' Trial Exhibit No. P105	37444-37454
518-45	Plaintiffs' Trial Exhibit No. P106	37455-37459
518-46	Plaintiffs' Trial Exhibit No. P107	37460-37474
518-47	Plaintiffs' Trial Exhibit No. P108	37475-37477
518-48	Plaintiffs' Trial Exhibit No. P114	37478
518-49	Plaintiffs' Trial Exhibit No. P115	37479-37480
518-50	Plaintiffs' Trial Exhibit No. P116	37481-37484
518-51	Plaintiffs' Trial Exhibit No. P118	37485-37486
518-52	Plaintiffs' Trial Exhibit No. P120	37487-37490
518-53	Plaintiffs' Trial Exhibit No. P121	37491-37493

Docket No.	Description of Relevant Document	PageID#Range
518-54	Plaintiffs' Trial Exhibit No. P124	37494-37511
518-55	Plaintiffs' Trial Exhibit No. P133	37512-37560
518-56	Plaintiffs' Trial Exhibit No. P136	37561-37568
518-57	Plaintiffs' Trial Exhibit No. P137	37569-37587
518-58	Plaintiffs' Trial Exhibit No. P138	37588-37607
518-59	Plaintiffs' Trial Exhibit No. P148	37608-37643
518-60	Plaintiffs' Trial Exhibit No. P149	37644-37668
518-61	Plaintiffs' Trial Exhibit No. P150	37669-37709
518-62	Plaintiffs' Trial Exhibit No. P151	37710-37721
518-63	Plaintiffs' Trial Exhibit No. P153	37722-37799
518-64	Plaintiffs' Trial Exhibit No. P156	37800
518-65	Plaintiffs' Trial Exhibit No. P159	37801-37837
518-66	Plaintiffs' Trial Exhibit No. P160	37838-37848
518-67	Plaintiffs' Trial Exhibit No. P166	37849-37861
518-68	Plaintiffs' Trial Exhibit No. P188	37862
518-69	Plaintiffs' Trial Exhibit No. P199	37863-37877
518-70	Plaintiffs' Trial Exhibit No. P200	37878-37893
518-71	Plaintiffs' Trial Exhibit No. P207	37894-37916
518-72	Plaintiffs' Trial Exhibit No. P226	37917-37938
518-73	Plaintiffs' Trial Exhibit No. P227	37939-37973
518-74	Plaintiffs' Trial Exhibit No. P228	37974-37998
518-75	Plaintiffs' Trial Exhibit No. P272	37999-38000
518-76	Plaintiffs' Trial Exhibit No. P273	38001-38002
518-77	Plaintiffs' Trial Exhibit No. P279	38003
518-78	Plaintiffs' Trial Exhibit No. P287	38004-38012
518-79	Plaintiffs' Trial Exhibit No. P288	38013-38027
518-80	Plaintiffs' Trial Exhibit No. P304	38028-38034
518-81	Plaintiffs' Trial Exhibit No. P324	38035-38041
518-82	Plaintiffs' Trial Exhibit No. P338	38042-38059
518-83	Plaintiffs' Trial Exhibit No. P355	38060-38083

Docket No.	Description of Relevant Document	PageID#Range
518-84	Plaintiffs' Trial Exhibit No. P357	38084-38106
518-85	Plaintiffs' Trial Exhibit No. P358	38107
518-86	Plaintiffs' Trial Exhibit No. P359	38108
518-87	Plaintiffs' Trial Exhibit No. P360	38109-38120
518-88	Plaintiffs' Trial Exhibit No. P361	38121-38129
518-89	Plaintiffs' Trial Exhibit No. P362	38130-38143
518-90	Plaintiffs' Trial Exhibit No. P374	38144-38159
518-91	Plaintiffs' Trial Exhibit No. P377	38160-38173
518-92	Plaintiffs' Trial Exhibit No. P385	38174-38189
518-93	Plaintiffs' Trial Exhibit No. P388	38190-38194
518-94	Plaintiffs' Trial Exhibit No. P449	38195-38327
518-95	Plaintiffs' Trial Exhibit No. P594	38328-38336
518-96	Plaintiffs' Trial Exhibit No. P612	38337-38339
518-97	Plaintiffs' Trial Exhibit No. P672	38340-38403
518-98	Plaintiffs' Trial Exhibit No. P683	38404
518-99	Plaintiffs' Trial Exhibit No. P717	38405-38476
518-100	Plaintiffs' Trial Exhibit No. P753	38477-38540
518-101	Plaintiffs' Trial Exhibit No. P767	38541-38592
518-102	Plaintiffs' Trial Exhibit No. P768	38593-38594
518-103	Plaintiffs' Trial Exhibit No. P769	38595-38596
518-104	Plaintiffs' Trial Exhibit No. P770	38597
518-105	Plaintiffs' Trial Exhibit No. P886	38598-38604
518-106	Plaintiffs' Trial Exhibit No. P1002A	38605-38617
518-107	Plaintiffs' Trial Exhibit No. P1008	38618-38621
518-108	Plaintiffs' Trial Exhibit No. P1047	38622
518-109	Plaintiffs' Trial Exhibit No. P1048	38623
518-110	Plaintiffs' Trial Exhibit No. P1049	38624
518-111	Plaintiffs' Trial Exhibit No. P1050	38625
518-112	Plaintiffs' Trial Exhibit No. P1051	38626
518-113	Plaintiffs' Trial Exhibit No. P1058	38627

Docket No.	Description of Relevant Document	PageID#Range
518-114	Plaintiffs' Trial Exhibit No. P1059	38628
518-115	Plaintiffs' Trial Exhibit No. P1060	38629
518-116	Plaintiffs' Trial Exhibit No. P1061	38630
518-117	Plaintiffs' Trial Exhibit No. P1063	38631-38633
518-118	Plaintiffs' Trial Exhibit No. P1064	38634-38641
518-119	Plaintiffs' Trial Exhibit No. P1065	38642-38643
518-120	Plaintiffs' Trial Exhibit No. P1066	38644-38645
518-121	Plaintiffs' Trial Exhibit No. P1067	38646-38650
518-122	Plaintiffs' Trial Exhibit No. P1068	38651-38652
518-123	Plaintiffs' Trial Exhibit No. P1069	38653-38656
518-124	Plaintiffs' Trial Exhibit No. P1071	38657-38659
518-125	Plaintiffs' Trial Exhibit No. P1072	38660-38665
518-126	Plaintiffs' Trial Exhibit No. P1073	38666-38667
518-127	Plaintiffs' Trial Exhibit No. P1076	38668-38673
518-128	Plaintiffs' Trial Exhibit No. P1077	38674-38675
518-129	Plaintiffs' Trial Exhibit No. P1081	38676-38677
518-130	Plaintiffs' Trial Exhibit No. P1084	38678-38680
518-131	Plaintiffs' Trial Exhibit No. P1087	38681-38682
518-132	Plaintiffs' Trial Exhibit No. P1088	38683-38740
518-133	Plaintiffs' Trial Exhibit No. P1095	38741-38756
518-134	Plaintiffs' Trial Exhibit No. P1100	38757-38764
518-135	Plaintiffs' Trial Exhibit No. P1102	38765-38782
518-136	Plaintiffs' Trial Exhibit No. P1122	38783
518-137	Plaintiffs' Trial Exhibit No. P1123	38784-38840
518-138	Plaintiffs' Trial Exhibit No. P1126	38841
518-139	Plaintiffs' Trial Exhibit No. P1127	38842
518-140	Plaintiffs' Trial Exhibit No. P1128	38843-38844
518-141	Plaintiffs' Trial Exhibit No. P1129A	38845-38847
518-142	Plaintiffs' Trial Exhibit No. P1129B	38848-38850
518-143	Plaintiffs' Trial Exhibit No. P1129C	38851-38853

Docket No.	Description of Relevant Document	PageID#Range
518-144	Plaintiffs' Trial Exhibit No. P1129D	38854-38856
518-145	Plaintiffs' Trial Exhibit No. P1129E	38857-38859
518-146	Plaintiffs' Trial Exhibit No. P1129F	38860-38862
518-147	Plaintiffs' Trial Exhibit No. P1129G	38863-38865
518-148	Plaintiffs' Trial Exhibit No. P1129H	38866
518-149	Plaintiffs' Trial Exhibit No. P1129I	38867-38869
518-150	Plaintiffs' Trial Exhibit No. P1129J	38870-38872
518-151	Plaintiffs' Trial Exhibit No. P1132	38873-38938
518-152	Plaintiffs' Trial Exhibit No. P1136	38939-38945
518-153	Plaintiffs' Trial Exhibit No. P1137	38946-38949
518-154	Plaintiffs' Trial Exhibit No. P1142	38950-38952
518-155	Plaintiffs' Trial Exhibit No. P1143	38953-38954
518-156	Plaintiffs' Trial Exhibit No. P1144	38955-38957
518-157	Plaintiffs' Trial Exhibit No. P1145	38958-38959
518-158	Plaintiffs' Trial Exhibit No. P1146	38960
518-159	Plaintiffs' Trial Exhibit No. P1147	38961
518-160	Plaintiffs' Trial Exhibit No. P1148	38962-38963
518-161	Plaintiffs' Trial Exhibit No. P1149	38964-38966
518-162	Plaintiffs' Trial Exhibit No. P1150	38967-38968
518-163	Plaintiffs' Trial Exhibit No. P1151	38969-38973
518-164	Plaintiffs' Trial Exhibit No. P1152	38974-38984
518-164	Plaintiffs' Trial Exhibit No. P1153	38985-38988
518-166	Plaintiffs' Trial Exhibit No. P1154	38989-38990
518-167	Plaintiffs' Trial Exhibit No. P1155	38991
518-168	Plaintiffs' Trial Exhibit No. P1156	38992-38995
518-169	Plaintiffs' Trial Exhibit No. P1158	38996-39000
518-170	Plaintiffs' Trial Exhibit No. P1160	39001-39003
518-171	Plaintiffs' Trial Exhibit No. P1161	39004-39005
518-172	Plaintiffs' Trial Exhibit No. P1170	39006
518-173	Plaintiffs' Trial Exhibit No. P1175	39007-39008

Docket No.	Description of Relevant Document	PageID#Range
518-174	Plaintiffs' Trial Exhibit No. P1176	39009
518-175	Defendant's Trial Exhibit No. D159	39010-39073
518-176	Defendant's Trial Exhibit No. D188	39074-39097
518-177	Defendant's Trial Exhibit No. D397	39098-39101
518-178	Defendant's Trial Exhibit No. D740-23	39102-39177
518-179	Defendant's Trial Exhibit No. D740-69	39178-39217
518-180	Defendant's Trial Exhibit No. D740-164	39218-39293
518-181	Ex. 9 to Klyn 10/13/14 Deposition	39294-39295
518-182	Ex. 17 to Klyn 10/13/14 Deposition	39296-39297
518-183	Ex. 21 to Klyn 10/13/14 Deposition	39298
518-184	Defendant's Trial Exhibit No. D10	39299-39314
518-185	Defendant's Trial Exhibit No. D27	39315-39362
518-186	Defendant's Trial Exhibit No. D31	39363-39366
518-187	Defendant's Trial Exhibit No. D33	39367-39371
518-188	Defendant's Trial Exhibit No. D34	39372-39377
518-189	Defendant's Trial Exhibit No. D35	39378
518-190	Defendant's Trial Exhibit No. D39	39379-39402
518-191	Defendant's Trial Exhibit No. D41-2	39403-39408
518-192	Defendant's Trial Exhibit No. D61	39409-39456
518-193	Defendant's Trial Exhibit No. D78	39457-39477
518-194	Defendant's Trial Exhibit No. D84	39478-39781
518-195	Defendant's Trial Exhibit No. D88	39782-39802
518-196	Defendant's Trial Exhibit No. D91	39803-39841
518-197	Defendant's Trial Exhibit No. D92	39842-39861
518-198	Defendant's Trial Exhibit No. D94	39862-39906
518-199	Defendant's Trial Exhibit No. D97	39907-39914
518-200	Defendant's Trial Exhibit No. D100	39915-39956
518-201	Defendant's Trial Exhibit No. D101	39957-39963
518-202	Defendant's Trial Exhibit No. D102	39964-40003
518-203	Defendant's Trial Exhibit No. D109	40004-40013

Docket No.	Description of Relevant Document	PageID#Range
518-204	Defendant's Trial Exhibit No. D112	40014-40151
518-205	Defendant's Trial Exhibit No. D114	40152-40175
518-206	Defendant's Trial Exhibit No. D117	40176-40231
518-207	Defendant's Trial Exhibit No. D121	40232-40271
518-208	Defendant's Trial Exhibit No. D130	40272-40450
518-209	Defendant's Trial Exhibit No. D132	40451-40476
518-210	Defendant's Trial Exhibit No. D134	40477-40496
518-211	Defendant's Trial Exhibit No. D136	40497-40498
518-212	Defendant's Trial Exhibit No. D140	40499
518-213	Defendant's Trial Exhibit No. D150	40500-40501
518-214	Defendant's Trial Exhibit No. D157	40502-40523
518-215	Defendant's Trial Exhibit No. D161	40524-40745
518-216	Defendant's Trial Exhibit No. D169	40746
518-217	Defendant's Trial Exhibit No. D170	40747-40750
518-218	Defendant's Trial Exhibit No. D173	40751-40757
518-219	Defendant's Trial Exhibit No. D175	40758-40760
518-220	Defendant's Trial Exhibit No. D176	40761-40813
518-221	Defendant's Trial Exhibit No. D184	40814-40821
518-222	Defendant's Trial Exhibit No. D187	40822-40844
518-223	Defendant's Trial Exhibit No. D188	40845-40868
518-224	Defendant's Trial Exhibit No. D190	40869-40872
518-225	Defendant's Trial Exhibit No. D199	40873-40903
518-226	Defendant's Trial Exhibit No. D230	40904
518-227	Defendant's Trial Exhibit No. D231	40905-40906
518-228	Defendant's Trial Exhibit No. D232	40907-40908
518-229	Defendant's Trial Exhibit No. D233	40909-40910
518-230	Defendant's Trial Exhibit No. D234	40911-40913
518-231	Defendant's Trial Exhibit No. D235	40914-40915
518-232	Defendant's Trial Exhibit No. D236	40916-40922
518-233	Defendant's Trial Exhibit No. D240	40923-40940

Docket No.	Description of Relevant Document	PageID#Range
518-234	Defendant's Trial Exhibit No. D250	40941-40951
518-235	Defendant's Trial Exhibit No. D251	40952-40971
518-236	Defendant's Trial Exhibit No. D253	40972-40973
518-237	Defendant's Trial Exhibit No. D263	40974-40997
518-238	Defendant's Trial Exhibit No. D264	40998-41021
518-239	Defendant's Trial Exhibit No. D272	41022-41137
518-240	Defendant's Trial Exhibit No. D273	41138-41165
518-241	Defendant's Trial Exhibit No. D283	41166-41186
518-242	Defendant's Trial Exhibit No. D289	41187-41220
518-243	Defendant's Trial Exhibit No. D295	41221-41260
518-244	Defendant's Trial Exhibit No. D296	41261
518-245	Defendant's Trial Exhibit No. D298	41262
518-246	Defendant's Trial Exhibit No. D299	41263
518-247	Defendant's Trial Exhibit No. D300	41264
518-248	Defendant's Trial Exhibit No. D301	41265
518-249	Defendant's Trial Exhibit No. D302	41266
518-250	Defendant's Trial Exhibit No. D304	41267
518-251	Defendant's Trial Exhibit No. D322	41268-41274
518-252	Defendant's Trial Exhibit No. D327	41275-41281
518-253	Defendant's Trial Exhibit No. D334	41282
518-254	Defendant's Trial Exhibit No. D335	41283-41284
518-255	Defendant's Trial Exhibit No. D341	41285-41286
518-256	Defendant's Trial Exhibit No. D351	41287-41290
518-257	Defendant's Trial Exhibit No. D369	41291-41293
518-258	Defendant's Trial Exhibit No. D392	41294-41302
518-259	Defendant's Trial Exhibit No. D412	41303-41335
518-260	Defendant's Trial Exhibit No. D424	41336-41388
518-261	Defendant's Trial Exhibit No. D506	41389-41517
518-262	Defendant's Trial Exhibit No. D513	41518-41593
518-263	Defendant's Trial Exhibit No. D519	41594-41596

Docket No.	Description of Relevant Document	PageID#Range
518-264	Defendant's Trial Exhibit No. D523	41597-41697
518-265	Defendant's Trial Exhibit No. D527	41698-41707
518-266	Defendant's Trial Exhibit No. D528	41708-41723
518-267	Defendant's Trial Exhibit No. D529	41724-41736
518-268	Defendant's Trial Exhibit No. D530	41737-41749
518-269	Defendant's Trial Exhibit No. D531	41750-41777
518-270	Defendant's Trial Exhibit No. D532	41778-41787
518-271	Defendant's Trial Exhibit No. D533	41788-41816
518-272	Defendant's Trial Exhibit No. D625	41817-41839
518-273	Defendant's Trial Exhibit No. D628	41840-41841
518-274	Defendant's Trial Exhibit No. D630	41842-41868
518-275	Defendant's Trial Exhibit No. D637	41869-41871
518-276	Defendant's Trial Exhibit No. D645	41872-41923
518-277	Defendant's Trial Exhibit No. D665	41924-41925
518-278	Defendant's Trial Exhibit No. D674	41926-42062
518-279	Defendant's Trial Exhibit No. D700	42063-42138
518-280	Defendant's Trial Exhibit No. D713	42139-42194
518-281	Defendant's Trial Exhibit No. DD715	42195-42274
518-282	Defendant's Trial Exhibit No. D717	42275-42319
518-283	Defendant's Trial Exhibit No. D720	42320-42322
518-284	Defendant's Trial Exhibit No. D727	42323
518-285	Defendant's Trial Exhibit No. D733	42324-42355
518-286	Defendant's Trial Exhibit No. D746	42356-42357
518-287	Defendant's Trial Exhibit No. D747	42358-42366
518-288	Defendant's Trial Exhibit No. D748	42367-42372
518-289	Defendant's Trial Exhibit No. D750	42373-42375
518-290	Defendant's Trial Exhibit No. D757	42376-42379
518-291	Defendant's Trial Exhibit No. D764	42380-42472
518-292	Defendant's Trial Exhibit No. D767	42473
518-293	Defendant's Trial Exhibit No. D768	42474-42521

Docket No.	Description of Relevant Document	PageID#Range
518-294	Defendant's Trial Exhibit No. D769	42522
518-295	Defendant's Trial Exhibit No. D771	42523-42527
518-296	Defendant's Trial Exhibit No. D772	42528-42532
518-297	Defendant's Trial Exhibit No. D776	42533-42608
518-298	Defendant's Trial Exhibit No. D777	42609-42688
518-299	Defendant's Trial Exhibit No. D778	42689-42702
518-300	Defendant's Trial Exhibit No. D779	42703-42834
518-301	Defendant's Trial Exhibit No. D787	42835-42845
518-302	Defendant's Trial Exhibit No. D788	42846-42853
518-303	Defendant's Trial Exhibit No. D789	42854-42856
518-304	Defendant's Trial Exhibit No. D791	42857
518-305	Defendant's Trial Exhibit No. D796	42858
518-306	Defendant's Trial Exhibit No. D799	42859
518-307	Plaintiffs' Trial Exhibit No. P7	42860-42861
518-308	Plaintiffs' Trial Exhibit No. P12	42862
518-309	Plaintiffs' Trial Exhibit No. P15	42863-42865
518-310	Plaintiffs' Trial Exhibit No. P104	42866-42902
518-311	Plaintiffs' Trial Exhibit No. P116	42903-42906
518-312	Plaintiffs' Trial Exhibit No. P150	42907-42947
518-313	Plaintiffs' Trial Exhibit No. P151	42948-42959
518-314	Plaintiffs' Trial Exhibit No. P164	42960-42966
518-315	Plaintiffs' Trial Exhibit No. P166	42967-42979
518-316	Plaintiffs' Trial Exhibit No. P279	42980
518-317	Plaintiffs' Trial Exhibit No. P374	42981-42982
518-318	Plaintiffs' Trial Exhibit No. P385	42983-42998
518-319	Plaintiffs' Trial Exhibit No. P683	42999
518-320	Plaintiffs' Trial Exhibit No. P717	43000-43071
518-321	Plaintiffs' Trial Exhibit No. P753	43072-43135
518-322	Plaintiffs' Trial Exhibit No. P763	43136-43150
518-323	Plaintiffs' Trial Exhibit No. P767	43151-43202

Docket No.	Description of Relevant Document	PageID#Range
518-324	Plaintiffs' Trial Exhibit No. P768	43203-43204
518-325	Plaintiffs' Trial Exhibit No. P770	43205
518-326	Plaintiffs' Trial Exhibit No. P1008	43206-43208
518-327	Plaintiffs' Trial Exhibit No. P1100	43209-43216
518-328	Plaintiffs' Trial Exhibit No. P1102	43217-43234
518-329	Plaintiffs' Trial Exhibit No. P1123	43235
518-330	Plaintiffs' Trial Exhibit No. P1129B	43236-43238
518-331	Plaintiffs' Trial Exhibit No. P1129F	43239-43241
518-332	Plaintiffs' Trial Exhibit No. P1132	43242-43307
518-333	Plaintiffs' Trial Exhibit No. P1146	43308
518-334	Plaintiffs' Trial Exhibit No. P1147	43309
518-335	Plaintiffs' Trial Exhibit No. P1156	43310-43313
518-336	Plaintiffs' Trial Exhibit No. P1175	43314-43315
518-337	Plaintiffs' Trial Exhibit No. P1176	43316
518-338	Defendant's Trial Exhibit No. DD11A	43317
518-339	Defendant's Trial Exhibit No. DD11B	43318
519	**Order on filing of admitted trial exhibits**	**43319**

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2015, I caused the foregoing Second Brief for Defendant-Appellee/Cross-Appellant Whirlpool Corporation to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Stephen M. Shapiro
Stephen M. Shapiro