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

FOURTH 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

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)

Statutes and Rules

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTRODUCTION

In the Second Brief, defendant Whirlpool Corporation raised two conditional cross-appeal issues for the Court to decide if it reinstates any claims asserted by plaintiffs Gina Glazer and Trina Allison (which it should not do). Whirlpool showed that the plaintiff class of Ohio purchasers of certain Duet clothes washers (the "Washers") should be decertified for failure to satisfy the requirements of Rule 23 and Article III of the Constitution. 2d Br. 67-72. Whirlpool also showed that, in any retrial, the jury should be instructed on Whirlpool's comparative-fault, assumption-of-risk, and mitigation-of-damages defenses. *Id.* at 72-75.

Plaintiffs devote little attention to these issues in the Third Brief. And nothing they say warrants affirming the district court's refusal to decertify the class and instruct the jury on Whirlpool's defenses.

Plaintiffs rest their defense of continued class treatment on this Court's 2013 interlocutory decision affirming the original 2010 class certification order. But plaintiffs completely ignore the many developments since then—including their concessions in the Third Brief (at 17, 22-23) that "idiosyncratic differences" among the 20 Washer models placed an "insurmountable burden of proof" on them and "cast doubt" on whether Glazer and Allison were "qualified representatives of the entire Class." The trial evidence confirms that decertification is necessary because individual questions of defect, causation, injury, and defenses predominate

over any common questions, Glazer and Allison are inadequate and atypical class representatives, and the class is filled with uninjured Washer purchasers.

Plaintiffs' attempt to keep Whirlpool's comparative-fault, assumption-of-risk, and mitigation-of-damages defenses out of any retrial is no more persuasive. Those defenses are well supported by ample trial evidence of the pre- and post-sale conduct of Glazer, Allison, and others. Under relevant Ohio law, it was improper for the district court to take those defenses away from the jury.

On both of these cross-appeal issues, plaintiffs greatly overreached to obtain the sweeping class trial they wanted and convinced the district court to go along. But the jury still recognized that plaintiffs could not prove their class claims and found for Whirlpool. As the Second Brief shows, the judgment entered on that jury verdict should be affirmed.[1] But if it is not—or if any of plaintiffs' claims are otherwise revived—Whirlpool asks the Court to rule for it on the cross-appeal issues to ensure that any remand proceedings remain fair and lawful.

ARGUMENT

I. THE TRIAL RECORD AND OTHER NEW DEVELOPMENTS DEMONSTRATE THAT CLASS CERTIFICATION IS IMPROPER.

Whirlpool established in the Second Brief (at 67-72) that the class certified in this case must be decertified if this Court vacates or reverses the judgment. In

[1] Pursuant to Fed. R. App. P. 28.1(c)(4), this brief is limited to issues presented by the cross-appeal and thus does not address the many legal errors and factual misstatements plaintiffs make throughout the Third Brief.

particular, the Second Brief demonstrated how the trial proved that common questions do not predominate, the named plaintiffs are neither typical nor adequate class representatives, and most class members are uninjured.

In the Third Brief, plaintiffs make a series of concessions that reinforce Whirlpool's arguments. Plaintiffs admit to "idiosyncratic differences" in the 20 Washer models. 3d Br. 17. They claim that the district court's "20 models" instruction requiring them to prove liability for all Washers "saddled" them with an "essentially insurmountable burden of proof." *Id.* at 17, 23. And they express "doubt" that the named plaintiffs were "qualified" to either prove that all Washers were defective or "protect the rights of individual Class members." *Id.* at 22. Those admissions confirm that there are pervasive "[d]issimilarities" within the class that "impede the generation of [the] common answers" necessary for class certification and render the class representatives atypical. *Wal-Mart Stores* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011); see *Amgen* v. *Conn. Retirement Plans*, 133 S. Ct. 1184, 1197 (2013) ("some fatal dissimilarity among class members" makes a class action "inefficient" and "unfair").

Plaintiffs nonetheless argue that the district court properly refused to decertify the class. But they offer no substantive defense of the merits of continued class certification. Instead, plaintiffs claim that this Court's interlocutory decision affirming a 2010 class certification ruling forecloses Whirlpool's decertification

arguments and that the district court correctly shifted the burden of proof under Rule 23 to Whirlpool when it denied decertification. Plaintiffs are wrong. Plaintiffs always had the burden to show that the class certification requirements remained satisfied. And developments since this Court's prior decision—including the three-week jury trial—show the need for decertification.

A. The District Court Applied The Wrong Decertification Standard.

There can be no doubt that the district court denied decertification using the wrong legal standard when it imposed *on Whirlpool* a "heavy burden" to obtain the "drastic measure" of decertification. R.482, PageID#36357. Plaintiffs concede that *they* retained the burden of "continu[ing] to demonstrate" compliance with Rule 23's requirements throughout the proceedings. 3d Br. 49.

Plaintiffs nonetheless insist that the district court understood that law and simply imposed a "heavy burden" on Whirlpool to justify "reconsideration" of the original class certification order. But the district court's own words disprove this argument: "Whirlpool has not met its heavy burden of demonstrating that continued class action treatment is improper." R.482, PageID#36357. And plaintiffs' facile recharacterization could be applied to every decertification motion, effectively shifting the burden on continued class certification in every case, contrary to the bedrock law that plaintiffs themselves acknowledge. See *White* v. *NFL*, 756 F.3d 585, 594 (8th Cir. 2014) ("the burden of showing that class

litigation is appropriate generally remains on the plaintiff at all times during litigation"); *Marlo* v. *UPS*, 639 F.3d 942, 947-48 (9th Cir. 2011) (on decertification motion, the party seeking certification bears the burden of showing that Rule 23 requirements are met); see also *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 160 (1982) ("after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation" because such an order "'is inherently tentative'" and such "flexibility enhances the usefulness of the class-action device"); *Boucher* v. *Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) "courts are 'required to reassess their class rulings as the case develops'").

Particularly where a decertification motion rests on a different record from prior Rule 23 decisions—as in this case—there is no justification for placing a "heavy burden" on the party seeking decertification. It was error for the district court to do so. As a matter of law, a district court "*must* * * * withdraw class certification" if the class no longer satisfies Rule 23. *Binta B. ex rel. S.A.* v. *Gordon*, 710 F.3d 608, 618 (6th Cir. 2013) (emphasis added).[2]

[2] Contrary to plaintiffs' suggestion, the possibility that subclassing could prevent certain *intra-class conflicts* does not mean that subclassing is a cure for *all* of the many obstacles to continued certification in this case or that a district court *must* devise subclasses even where (as here) plaintiffs never asked for subclassing. See *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 408 (1980) (there is "no *sua sponte* obligation" to subclass); *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 399 n.9 (6th Cir. 1998) (en banc) ("Subclasses are not a substitute for compliance with Rule 23").

B. The Current Record And Circumstances Differ Materially From What Was Before The Court Previously.

Burden issues aside, plaintiffs rest their entire defense of the district court's refusal to decertify on the assertion that "no facts or arguments relevant to class certification have changed since *Glazer II*," this Court's 2013 decision affirming the original 2010 class certification order. 3d Br. 50 (capitalization altered). But circumstances have changed dramatically after four years of additional discovery, new pretrial rulings, a three-week jury trial, plaintiffs' concessions, and intervening Supreme Court decisions.

In the prior appeal, plaintiffs assured this Court that "*all* Duets" were defective and differences among Duet models were irrelevant. Brief of Appellees, at 13-16, *Glazer* v. *Whirlpool Corp.*, No. 10-4188 (6th Cir. Dec. 20. 2010), ECF No. 37. The Court relied on those representations in affirming class certification. *Glazer* v. *Whirlpool Corp.*, 722 F.3d 838, 854-55 (6th Cir. 2013). But on remand plaintiffs quickly conceded that many Duet models were not defective and moved to exclude them from the class definition. R.330, PageID#22716.

In narrowing the class a month before trial, the district court remarked that for "the first time" it saw "evidence that clearly and concisely se[t] out all of" the distinguishing characteristics and features of the "different" Duet models. R.366, PageID#24341. The court explained that the prior "class definition"—which this Court reviewed—was based "on far-less-exact descriptions." *Id.* at 24342. The

court also affirmed that the redefined class "still leaves Plaintiffs with the burden at trial of proving that 20 different Duet models, with at least two different tub designs, two different bracket designs, and a variety of optional self-cleaning cycles, share a common defect." *Id.*

Ten days later, the district court ruled on the parties' summary judgment motions with the benefit of a fully developed factual record. In doing so, the court rejected plaintiffs' argument that supposedly overwhelming evidence of a common defect in *all* Washers made it impossible for a reasonable jury to find for Whirlpool. R.391, PageID#26804-06. Factual disputes on that subject meant that a jury would have to determine "whether Plaintiffs' view of the evidence is correct." *Id.* at 26805-06. The court also reiterated that plaintiffs retained "the burden at trial of proving that 20 different Duet models * * * share a common defect." *Id.* at 26785.

Shortly before trial—in what plaintiffs pretend was a surprise—the district court again 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 design defect." R.427, PageID#30800. Then, at trial, the court proposed corresponding jury instructions requiring plaintiffs 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." R.476-1, PageID#36094, 36100. After being told to "[f]ile your written objections" to any court-proposed instructions that differed even "slightly" from what the parties proposed (Tr., R.474, PageID#36048)—which the "20 models" instructions did—plaintiffs stated that they had "no [o]bjection" to the instructions (JI Obj., R.483, PageID#36361), which they described as "correct" (JI Br., R.481, PageID#36332).

Meanwhile, in full accord with this Court's directions that the "trial evidence may concern different Duet models built on two different platforms" (*Glazer*, 722 F.3d at 854) and that the "credibility" of evidence concerning whether the Washers "are nearly identical" is "ultimately an issue for the jury" (*id.* at 854 & n.1), the parties offered extensive evidence regarding what plaintiffs admit (at 17) are "idiosyncratic differences" among the Washer models. See 2d Br. 8-16. Likewise, consistent with this Court's invitation to "prove that most class members have not experienced a mold problem" (*Glazer*, 722 F.3d at 857), Whirlpool presented overwhelming evidence showing that very few individual class members were injured. See 2d Br. 8-17, 70. The jury also heard extensive evidence regarding individual variations in causation and affirmative defenses. See *id.* at 8-17, 69-71. To reach its verdict, the jury had to credit much of this evidence.

On top of these developments, plaintiffs now effectively concede that this case is not susceptible to class litigation. According to plaintiffs, proving a

common defect in all 20 Washer models was an "insurmountable burden of proof." 3d Br. 23. They also say that requiring such proof "cast doubt on whether the named Plaintiffs remained qualified representatives of the entire class," "Balkanized the Class into 20 distinct subgroups," and "left the absent class members without notice of their right to opt out and file separate actions." *Id.* at 22.

None of those things could be true if the defect question was a common one. Proving a defect in all 20 Washer models would not increase plaintiffs' burden of proof at all if defect was truly a common question because in those circumstances proof of defect in one model would settle the matter for all models. Plaintiffs concede that was not the case here. 3d Br. 17, 22-23. And the possibility of disparate answers to the defect question is why the district court had to give the "20 models" instructions to ensure that the class claims would "'prevail or fail in unison'" at trial (*Glazer*, 722 F.3d at 859) without trampling Whirlpool's constitutional right to dispute defect allegations for each individual model. See 2d Br. 26-32. At trial, plaintiffs gambled on receiving the broadest possible class-wide judgment with the "20 models" instructions and therefore kept the defects inherent in the class to themselves when consenting to the instructions. They should not be permitted to now cite those defects to upset the unfavorable class verdict while ignoring them when defending the class certified below.

Finally, class certification law has changed since this case was last before the Court in 2013. After completion of briefing in April 2013, the Supreme Court decided *American Express*, which was not cited or applied in this Court's opinion. That decision holds that Rule 23 imposes "stringent" requirements that "exclude most claims," whether or not there is an "economic incentive" to pursue "claims individually." *Am. Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013). After this Court issued its opinion, the Supreme Court further ruled in *Halliburton* that plaintiffs must "*prove*," not just "plead," compliance with Rule 23 and that defendants may rebut presumptions of injury with "direct, more salient evidence." *Halliburton Co.* v. *Erica P. John Fund*, 134 S. Ct. 2398, 2414, 2416 (2014). "'[A]ny showing that severs the link'" of causation means the "suit cannot proceed as a class action." *Id.* at 2415-16. Applying *Halliburton* here requires class decertification because Whirlpool presented abundant evidence refuting plaintiffs' desired inference that the alleged Washer defect injured *all* class members at the point of sale.

The Supreme Court recently granted certiorari to consider whether it was proper to certify a class action where "the class contains hundreds of members who were not injured and have no legal right to any damages" and "liability and damages [were] determined with statistical techniques that presume all class members are identical to the average observed in a sample." Petition for Certiorari,

at i, *Tyson Foods* v. *Bouaphakeo*, No. 14-1146 (U.S. Mar. 19, 2015), 2015 WL 1285369, cert. granted, 135 S. Ct. 2806 (2015). Plaintiffs' injury theories raise similar questions here.

In short, the class certification record, Supreme Court precedent, and other circumstances facing this Court now are vastly different from the circumstances that led to the Court's previous interlocutory ruling.[3]

C. The Trial Proved That Plaintiffs Failed To Establish That The Class Satisfied Rule 23.

Plaintiffs and this Court *predicted* that plaintiffs could carry their Rule 23 burden throughout the proceedings. But the trial proved those predictions wrong. At trial, common issues did not predominate, the named plaintiffs revealed

[3] This Court's decision has been subject to criticism by commentators in the intervening years. See 1 Joseph P. McLaughlin, *McLaughlin on Class Actions* § 5:23, at 1193 (11th ed. 2014) ("The infirmity in *Butler* and *Whirlpool* is not that damages varied among class members, but that each decision overlooked myriad permutations among hundreds of thousands of purchasers of different product models"); Christine Frymire, *Class Actions A Thing of the Past ... or Are They? A Look at the Circuit Courts' Application of* Comcast v. Behrend, 48 J. Marshall L. Rev. 335, 357 (2014) (*Glazer*'s "refusal to limit class actions counteracts the Supreme Court's efforts to limit class action litigation" (capitalization altered)); Andrey Spektor, *The Death Knell of Issue Certification and Why That Matters After* Wal-Mart v. Dukes, 26 St. Thomas L. Rev. 165, 178 (2014) (criticizing *Glazer*'s "defiant" reading of *Comcast*). The Supreme Court summarily vacated this Court's original affirmance of class certification. *Whirlpool Corp.* v. *Glazer*, 133 S. Ct. 1722 (2013). It later allowed the litigation to mature through trial (*Whirlpool Corp.* v. *Glazer*, 134 S. Ct. 1277 (2014)), which has now occurred and necessitates fresh consideration under the complete record and intervening Supreme Court precedents.

themselves to be atypical and inadequate class representatives, and the evidence showed that the class is filled with uninjured Washer purchasers.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013). Accordingly, "actual, not presumed, conformance" with Rule 23 is "indispensable." *Falcon*, 457 U.S. at 160. "[A] party seeking to maintain a class action 'must affirmatively demonstrate [its] compliance' with Rule 23." *Comcast*, 133 S. Ct. at 1432. And the trial court must be "satisfied, after a rigorous analysis," that the prerequisites of Rule 23 "have been satisfied." *Falcon*, 457 U.S. at 161.

1. Common Questions Did Not Predominate.

Rule 23's predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.* v. *Windsor*, 521 U.S. 591, 623 (1997). The required analysis is no "gestalt judgment." *Id.* at 621. Courts must "take a '"close look"' at whether common questions predominate over individual ones." *Comcast*, 133 S. Ct. at 1432. And a question qualifies as common only if "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. "'What matters,'" in other words, is "'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of

the litigation.'" *Id.* Under these "stringent" requirements (*Am. Express*, 133 S. Ct. at 2310), the trial evidence establishes that the predominating questions in this litigation are individual ones.

Defect. Plaintiffs now admit (at 17) what the trial showed; there are many "idiosyncratic differences" among the 20 Washer models:

- The tub for Access models has a 10-degree tilt and perpendicular ribs, but the tub for Horizon models lacks tilt and has sloped ribs that discourage water pooling and biofilm accumulation. Tr., R.447, PageID#32296-98.
- As even plaintiffs' expert Dr. Gary Wilson testified (R.477, PageID#36128), the crosspiece on Horizon models is smooth, lacking the crevices that could allow biofilm growth. Tr., R.470, PageID#35530-31; R.366, PageID#24322.
- Some Washers have a maintenance or clean washer cycle that reduces biofilm by flushing the tub with water and bleach or Affresh. Tr., R.447, PageID#32376-77, 32433; Tr., R.465, PageID#35231, 35236-39. Allison admitted the cycle is "quite easy" to use. Tr., R.439, PageID#31774.
- Some Washers have a sanitary cycle that uses super-heated water to further prevent mold and odor. Tr., R.465, PageID#35225-26.
- Some Washers have a steam feature that kills biofilm with hot vapor. Tr., R.447, PageID#32377-78; Tr., R.470, PageID#35533.[4]

To be sure, Whirlpool brought these differences to this Court's attention in the prior appeal. But the Court accepted plaintiffs' assurance (based on the 2010

[4] Plaintiffs lament the inclusion of Washers with the steam feature in the class definition. But they do not ask for revision of the class definition. Nor could they, given the unimpeachable and unchallenged reasons that the district court gave for including steam models. Decertification/Modification Order, R.366, PageID#24344-45 (models "share the alleged essential common design defect" and plaintiffs *obtained class certification by* arguing that the feature was "immaterial").

record) that the differences mostly "related to aesthetics, not design." *Glazer*, 722 F.3d at 854. At trial, however, Whirlpool proved that those innovations resulted in much-improved biofilm management and greatly reduced complaint rates. See 2d Br. 9-12. And Whirlpool thoroughly impeached Dr. Wilson's opinion that all class models were defective notwithstanding the innovations. See *id.* at 12-13. Without the "20 models" instruction, the defect question would not generate "in one stroke" the necessary "common answer" for all Washers. *Wal-Mart*, 131 S. Ct. at 2551.

Proximate Cause. As the Second Brief explained (at 69), individual user habits were a major focus at trial and the trial evidence proved that there are many owner-specific causes of odor. Plaintiffs do not disagree. They respond only that this Court previously rejected Whirlpool's arguments on proximate causation. But this Court relied explicitly on the pretrial opinion of Dr. Wilson that user care was irrelevant. *Glazer*, 722 F.3d at 854-55. At trial, Wilson *admitted* that different user care was the "only thing" explaining why Glazer's machine had significant biofilm buildup while Sylvia Bicknell's was "so clean." R.435, PageID#31311; R.436, PageID#31411-13. And contrary to the claimed irrelevance of the subject, plaintiffs have acknowledged that *both sides* "asked repeated questions" about witnesses' "individual use and care habits." Decertification Opp., R.477, PageID#36129.

The jury heard extensive testimony regarding the material effect that using the sanitary or clean washer cycles, the steam feature, and bleach or Affresh could have on biofilm growth and moldy odors. Tr., R.447, PageID#32373-74, 32376-77, 32433; Tr., R.465, PageID#35225-26, 35231, 35236-39; Tr., R.470, PageID#35532; 2d Br. 9-13. Witnesses also testified about other circumstances determining biofilm accumulation, such as whether an owner used HE detergent, left the Washer door ajar, wiped down the door seal, cleaned the detergent dispenser, had hard or soft water, used fabric softener, or kept her Washer in a damp or humid place. See Tr., R.442, PageID#32136-51; Tr., R.455, PageID#33200, 33206; 2d Br. 13-16. Across the thousands of class members, the "permutations" in the possible causes of the moldy odor—that according to Dr. Wilson supposedly marks a defective Washer (see Tr., R.435, PageID#31200, 31304-06)—are "nearly endless." *Comcast*, 133 S. Ct. at 1434-35. The resulting need for owner-specific evidence to sort out those permutations makes plain that causation is not a common question. See *In re Am. Med. Sys.*, 75 F.3d 1069, 1084 (6th Cir. 1996) (reversing class certification because "because there is no common cause of injury").

Injury. Plaintiffs mechanically invoke this Court's prior decision in response to Whirlpool's showing that injury is an individual, not common, question. See 2d Br. 70. But that decision found injury to be a common question

based on an assumption that plaintiffs would be able to prove that even class members who never had any mold problems still experienced injury "as a result of the decreased value of the product purchased." *Glazer*, 722 F.3d at 856-57. Plaintiffs failed to prove that at trial.

In an effort to do so, plaintiffs presented a sociologist who opined that a survey of 148 non-class-members supposedly revealed that consumers, if told of the Washers' use and care steps before purchase, would request a $419 discount to buy one. Tr., R.449, PageID#32813-14, 32819-20, 32829-32, 32869-70. But she pointed to no market transactions establishing that such discounts were ever sought or obtained or to any seller who ever offered such a discount. And she admitted that under her methodology a purchaser's injury would "remain the same" for *non-defective* washers, would exist "regardless of whether the actual owner's machine after several years of use is clean as a whistle," and would endure even if maintenance steps "actually work" and are easy to perform. Tr., R.449, PageID#32885-87, 32893-94, 32906-07. Plaintiffs likewise admitted that this "damages-only" model "*assumes*" injury and "will always produce damages." Decertification Opp., R.477, PageID#36131. Thus, plaintiffs' only "evidence" of common injury *assumed* common injury. That is not proof. Accepting "arbitrary" and "speculative" expert methodologies as a basis for class certification "would

reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast*, 133 S. Ct. at 1433.

Put simply, the trial showed that plaintiffs cannot "prove, through common evidence, that all members were in fact injured." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). In fact, the trial affirmatively established that most class members were not injured at all. Most Washer purchasers were satisfied with their Washers and had no odor issues. Tr., R.463, PageID#34844-46. And those satisfied purchasers were not injured because, even if their machines had some hypothetical defect, they had the same experience that they would have had with a defect-free machine and thus received the full benefit of their bargain. See *O'Neil* v. *Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009); *Rivera* v. *Wyeth-Ayerst Labs.*, 283 F.3d 315, 319-21 (5th Cir. 2002). As a result, only individual inquiries into the experiences of individual Washer purchasers could reveal which class members actually suffered a concrete injury, at the point of sale or otherwise. See *Amchem*, 521 U.S. at 624-25 (rejecting class certification because of individual variation in injury).

Defenses. Plaintiffs also offer no credible answer to Whirlpool's showing that individual defenses favor decertification. See 2d Br. 70-71. They claim that defenses do not necessarily preclude class certification. But many decisions have denied class certification because of individualized defenses. *E.g.*, *Myers* v. *Hertz*

Corp., 624 F.3d 537, 550-51 (2d Cir. 2010); *Sacred Heart Health Sys.* v. *Humana Military Healthcare Servs.*, 601 F.3d 1159, 1176-83 (11th Cir. 2010); *Gene & Gene LLC* v. *BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008). And others have held that the presence of individualized defenses "counsels in favor of vacating [a] class certification order." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008). Indeed, due process requires a full "opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972).

Whirlpool's statute-of-limitations defense is a perfect example. The defense is unquestionably individualized. The verdict form asked separate questions about the defense for each named plaintiff because their circumstances differed. R.490, PageID#36766-67. "[R]esolution of the statute of limitations defense" could not "be accomplished on a class-wide basis." *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006). And "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its * * * defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561.

Other Issues. Additional individual issues could arise in any remand proceedings. Plaintiffs seek to resurrect their failure-to-warn claim (see 1st Br. 44-46), which would raise a host of individual notice questions. See, *e.g.*, *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 461 (E.D. La. 2006) (individual issues prevented certification of failure-to-warn claim). They also want to introduce

extensive evidence of supposed health effects of Washer biofilm (see 1st Br. 35-44), which would generate individual questions about health issues for particular class members. See, *e.g.*, *Amchem*, 521 U.S. at 623-24 (individual issues regarding health effects barred class certification). And Whirlpool is entitled to present its comparative-fault, assumption-of-risk, and mitigation-of-damages defenses (see 2d Br. 72-75), all of which turn on the unique knowledge and conduct of individual class members. See, *e.g.*, *Gunnells* v. *Healthplan Servs.*, 348 F.3d 417, 438 (4th Cir. 2003) ("affirmative defenses of comparative negligence, assumption of risk, and setoff * * * pose significant obstacles to class certification").

2. The Named Plaintiffs Lacked Typicality And Adequacy.

In response to Whirlpool's showing that the named plaintiffs lack typicality and adequacy (see 2d Br. 71-72), plaintiffs simply invoke this Court's interlocutory decision. But they overlook the class trial and the admissions in their own brief.

Plaintiffs concede that typicality was lacking by acknowledging their own "doubt" that Glazer and Allison were "qualified representatives of the entire Class." 3d Br. 22. That doubt is well founded. The "idiosyncratic differences" among Washer models (*id.* at 17) and other individual circumstances established at trial mean that proof of the named plaintiffs' claims "would not necessarily have proved anybody else's claim." *Sprague*, 133 F.3d at 399. For instance, the trial evidence showed that most class members did not experience odor problems and

were satisfied with their Washers (see 2d Br. 71) and that Glazer and Allison therefore did not "'possess the same interest and suffer the same injury' as the class members." *Falcon*, 457 U.S. at 156. Likewise, "unique defenses" against the named plaintiffs were "a major focus" at trial, including Allison's failure to comply with the statute of limitations and Glazer's failure to follow her Washer's use-and-care instructions. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009); accord *Romberio* v. *UnumProvident Corp.*, 385 F. App'x 423, 431 (6th Cir. 2009). In short, the class claims were not "'fairly encompassed by the named plaintiff's claims.'" *Falcon*, 457 U.S. at 156.

Plaintiffs also confirm their lack of adequacy by suggesting that subclasses were necessary "to protect the rights of individual Class members." 3d Br. 22. Plaintiffs never asked for subclasses in the district court and still maintain that subclasses are "not necessary." *Id.* at 21 n.8. In reaching for a massive recovery, plaintiffs "sought to act on behalf of a single giant class rather than on behalf of discrete subclasses," even though "[i]n significant respects, the interests of those within the single class are not aligned." *Amchem*, 521 U.S. at 626. For example, because the clean washer cycle can manage biofilm effectively (Tr., R.447, PageID#32376-77; R.465, PageID#35236-39), purchasers whose Washers lacked that feature had an interest in excluding from the class purchasers whose Washers had the feature. By selling out the interest of *some* class members in order to

represent a larger class, plaintiffs proved that they could not "adequately protect the interests of the class" (Fed. R. Civ. P. 23(a)(4)), which is "the cornerstone to a properly certified class." McLaughlin, *supra*, § 4:27, at 775; see also *Stout* v. *J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000) ("antagonistic" interests preclude class certification).

3. The Class Was Filled With Uninjured Purchasers.

Because the trial evidence established that most class members never experienced any injury from the alleged Washer defects (*supra*, pp. 15-17; 2d Br. 8-17), the class could not be maintained on remand for reasons beyond its failure to satisfy Rule 23. The many uninjured class members lacked Article III standing to bring individual claims. See *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013); *O'Neil*, 574 F.3d at 504; *Rivera*, 283 F.3d at 319-21. Under the Rules Enabling Act, Plaintiffs cannot use Rule 23 to manufacture claims for uninjured purchasers. See *Amchem*, 521 U.S. at 613 (in case involving unmanifested injuries, holding that "Rule 23's requirements must be interpreted in keeping with Article III constraints"); *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1449 (2011) ("[i]n an era" of "class actions," courts "must be more careful to insist on the formal rules of standing, not less so").

* * *

On all of these grounds, plaintiffs did not satisfy the "stringent requirements for [class] certification that in practice exclude most claims." *Am. Express*, 133 S. Ct. at 2310. If this Court were to vacate or reverse the judgment, it should decertify the class as well.

II. THE DISTRICT COURT ERRONEOUSLY REMOVED THREE WHIRLPOOL DEFENSES FROM JURY CONSIDERATION.

Whirlpool also conditionally cross-appeals the district court ruling that effectively granted judgment as a matter of law on Whirlpool's comparative-fault, assumption-of-risk, and mitigation-of-damages defenses by excluding them from the jury instructions and verdict form. As Whirlpool demonstrated in the Second Brief (at 72-75), these are well-recognized defenses supported by substantial evidence.[5] The jury therefore should have been allowed to consider them. Indeed, plaintiffs' opposition reflects a transparent desire to eliminate the defenses because they know that this fragmentary case could never be litigated as a class action without stripping away Whirlpool's defenses and associated due process rights. See *Wal-Mart*, 131 S. Ct. at 2561 (class cannot be certified on premise that defenses to individual claims will not arise).

[5] Plaintiffs accuse Whirlpool of improperly incorporating by reference its trial briefing on this issue in the Second Brief. Whirlpool did no such thing. Whirlpool cited the trial briefing simply to show that—unlike plaintiffs (see 2d Br. 22-25)—it preserved its instructional challenge. Contrary to plaintiffs' insinuation, this case is nothing like *Barr* v. *Lafon*, 538 F.3d 554 (6th Cir. 2008). The Second Brief cited specific evidence and gave this Court a clear "basis upon which to conclude that the district court" erred. *Id.* at 565; see 2d Br. 73-75.

A. The District Court's Ruling Is Subject To *De Novo* Review.

Relying on decisions from this court and other courts of appeals, the Second Brief (at 72-73) showed that *de novo* review applies to the district court's refusal to instruct the jury on Whirlpool's defenses because that ruling effectively granted plaintiffs judgment as a matter of law. Plaintiffs disagree, asserting that review should be for abuse of discretion. But plaintiffs misunderstand the relevant precedents.

The cases that plaintiffs cite in support of their argument involve routine instructional choices that did not eliminate an entire claim or defense. See *Tannenbaum* v. *Fed. Ins. Co.*, 2015 WL 1543080, at *3-4 (6th Cir. Apr. 7, 2015) (failure to instruct on contract provision); *Fisher* v. *Ford Motor Co.*, 224 F.3d 570, 576 (6th Cir. 2000) (failure to instruct on aspects of claim); *Hurt* v. *Coyne Cylinder Co.*, 956 F.2d 1319, 1327 (6th Cir. 1992) (same). Plaintiffs completely ignore the cases cited by Whirlpool that address instructional rulings that 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) (by "refus[ing] to instruct the jury as to punitive damages" the trial court "effectively granted judgment as a matter of law as to punitive damages"); *Broderick* v. *Evans*, 570 F.3d 68, 74 (1st Cir. 2009) (same); *EEOC* v. *Stocks, Inc.*, 228 F. App'x 429, 431 (5th Cir. 2007) (same). Those cases make clear that "where the decision as to a

[jury] charge is effectively a judgment as a matter of law on an issue," review is "*de novo*." *Stocks*, 228 F. App'x at 430-31; *Broderick*, 570 F.3d at 74 (same); see also *Burley* v. *Gagacki*, 729 F.3d 610, 621 (6th Cir. 2013) (judgment as a matter of law reviewed *de novo*).

Here, there is no dispute that the district court's refusal to instruct on Whirlpool's comparative-fault, assumption-of-risk, and mitigation-of-damages defenses effectively granted judgment as a matter of law on those defenses. Review, therefore, is *de novo*.

B. The Evidence At Trial Justified Giving Whirlpool's Defenses To The Jury.

The Second Brief demonstrated (at 72-75) that the district court committed reversible error by refusing to instruct the jury on Whirlpool's comparative-fault, assumption-of-risk, and mitigation-of-damages defenses because substantial evidence of both pre- and post-sale conduct supported those defenses. See *Webster* v. *Edward D. Jones & Co.*, 197 F.3d 815, 821 (6th Cir. 1999) (where defendant "presented sufficient evidence to warrant a mitigation of damages instruction," failure to give that instruction was reversible error); *Wellman* v. *Norfolk & W. Ry.*, 711 N.E.2d 1077, 1080 (Ohio Ct. App. 1998) (because the evidence "could have supported a jury's conclusion" that a party's actions "played at least the slightest part in causing * * * injury, the trial court erred in directing a verdict").

Plaintiffs attempt to justify the district court's ruling by arguing that there was no pre-sale evidence to support the defenses and that post-sale evidence could not support the defenses. But their arguments rely on mischaracterizations of both the trial evidence and the jury's ability to consider that evidence.

Pre-Sale Evidence. Contrary to what plaintiffs say (at 57), there was plenty of evidence at trial regarding *pre-sale* conduct that supported Whirlpool's defenses. That evidence confirmed that Whirlpool "publicized information about potential mold and odor issues and proper care on Whirlpool's website." 2d Br. 74. Plaintiff Allison testified about information on Whirlpool's website regarding Affresh. Tr., R.439, PageID#31718-19. And Pramila Gardner, another Duet owner, testified about how she found a notification that "mold/mildew was common in all front-loading washers," a special cleaning cycle code, and a link to Affresh.com on Whirlpool's website. Tr., R.439, PageID#31828-29, 31843-54. The need to clean washers, drains, and sinks also is a matter of common knowledge.

Plaintiffs try to brush aside this evidence by claiming that there is no proof that the named plaintiffs and other testifying Duet owners consulted the Whirlpool website pre-sale. 3d Br. 57. But even if that were true, it would only strengthen Whirlpool's argument. As testifying expert Dr. Itamar Simonson found, the overwhelming majority of washer buyers conduct information searches before making a purchase decision. Tr., R.463, PageID#34914. Whirlpool should have

been permitted to argue that an "ordinary" consumer would have investigated the need for maintenance, including biofilm-related maintenance, before purchase through readily available sources (including Whirlpool's website), but that the named plaintiffs did not and thus caused—in whole or in part—their own injuries. See *Brinkmoeller* v. *Wilson*, 325 N.E.2d 233, 235 (Ohio 1975) (contributory fault is "any want of ordinary care on the part of the person injured, which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred").

The trial also established that numerous third-party websites and publications relayed mold-related information to consumers. See 2d Br. 74. Allison and Tracy Cloer (another Duet owner) testified about mold-related information on third-party websites they visited. Tr., R.436, PageID#31563-65, 31602-03 (Ms. Cloer); Tr., R.439, PageID#31700-01 (Allison). And the jury learned of similar articles in Consumer Reports. See Tr., R.447, PageID#32324-34; DX190, R.518-224, PageID#40870. Plaintiffs completely ignore this additional evidence of pre-sale information about mold issues.

Finally, plaintiffs concede as "true" the proven fact that "Glazer knew prior to purchase that she should leave her Washer door open and use HE detergent." 3d

Br. 57.[6] But they deny its relevance to the injury they claim from the alleged design defect. Plaintiffs seem to have forgotten that they based their claimed injury on the "discount" consumers would "want" "if they had to undertake all of the maintenance steps associated with addressing a mold-related issue * * * compared to a machine that does not have that issue or defect." Tr., R.449, PageID#32839-40; see also JMOL Opp., R.478, PageID#36170-73. Evidence that Glazer "knew of" the need for biofilm-related maintenance and "voluntarily exposed * * * herself" by proceeding with the purchase at full price anyway provides a clear basis for an assumption-of-risk defense. See *Carrel* v. *Allied Prods. Corp.*, 677 N.E.2d 795, 800-01 (Ohio 1997).

Post-Sale Evidence. Significant evidence of *post-sale* conduct also supports Whirlpool's defenses. Despite plaintiffs' claims to the contrary, that evidence is relevant even though plaintiffs maintained that Washer purchasers were injured exclusively at the point of sale.

The evidence at trial would have allowed a reasonable juror to find comparative fault or failure to mitigate based on departures from the use-and-care instructions for a Washer. A reasonable juror could have concluded that there was no point-of-sale injury if a plaintiff received a Washer that controlled mold and

[6] That concession belies plaintiffs' incorrect claim that Whirlpool provided no record citation for the fact that "plaintiffs knew about the need for biofilm-related maintenance before buying their washers." See 2d Br. 75 (citing Tr., R.448, PageID#32661).

odors when used in accord with those instructions. For such a juror, any odors experienced by a plaintiff who did not use common sense and follow simple use-and-care instructions could easily be deemed the result of the plaintiff's own "want of ordinary care" and resulting comparative fault. See *Brinkmoeller*, 325 N.E.2d at 235. Such a juror also could have found that a plaintiff incurred no damages at the point of sale because any damages could have been mitigated through "reasonable effort or expenditure after the commission of the tort" by following the standard use-and-care instructions that came with the Washers. *Dunn* v. *Maxey*, 693 N.E.2d 1138, 1140 (Ohio Ct. App. 1997).

The trial evidence here would certainly support those juror conclusions. There was ample evidence that most Washer purchasers—including several who testified at trial—experienced no odor coming from their Washers. See 2d Br. 9-16 (detailing evidence). And the only named plaintiff who experienced Washer odor, Glazer, admitted that she did not use HE detergent (Tr., R.448, PageID#32699-700), never ran the Clean Washer cycle with bleach or Affresh (*id.* at 32701, 32725), and did not clean her door seal (*id.* at 32704). As Dr. Wilson conceded, the "only thing" that can explain why Glazer's machine had significant biofilm build-up, while another inspected washer did not, is differences in user care. Tr., R.436, PageID#31411, 31413.

C. Comparative Fault Applies To A Claim For Tortious Breach Of Implied Warranty.

Plaintiffs further argue that comparative fault is not a defense to their tortious-breach-of-implied-warranty claim under Ohio law. They are mistaken.

Plaintiffs rest their argument on case law pre-dating 2003 and 2005 amendments to Ohio's comparative-fault statute that extended comparative-fault principles to products liability and other tort cases. See Ohio Rev. Code Ann. §§ 2315.42-46 (2003); *id.* §§ 2307.711(A), 2315.32-36 (2005). The current statute makes comparative fault a defense to *all* "tort claim[s]" except "intentional tort claim[s]." Ohio Rev. Code Ann. § 2315.32(B) (2010); accord *Niskanen* v. *Giant Eagle*, 912 N.E.2d 595, 600 (Ohio 2009) ("comparative negligence may be asserted as an affirmative defense to all torts except intentional torts"). And Ohio's pattern jury instructions expressly recognize that comparative fault is a defense to tortious-breach-of-implied-warranty claims. See 1 OJI-CV 451.17 (incorporating "Affirmative Defenses" in 1 OJI-CV 451.19 for tortious-breach-of-implied-warranty claims); 1 OJI-CV 451.19 (providing for "Contributory Negligence" defense). Accordingly, comparative fault is a valid defense to a claim for tortious breach of implied warranty.

* * *

In sum, Whirlpool introduced more than enough evidence to justify presenting its defenses to the jury. See *Hurt*, 956 F.2d at 1326 ("to support a jury

instruction there only needs to be *some* evidence in the record which would support a verdict on that instruction") (emphasis added). The fact that the jury rendered a verdict in favor of Whirlpool and decisively rejected plaintiffs' theory of liability underscores the importance of instructing any future jury on Whirlpool's defenses. Regardless of which standard of review applies, this Court should require that Whirlpool's comparative-negligence, assumption-of-risk, and mitigation-of-damages defenses be given to the jury to consider in the event of a retrial.

CONCLUSION

The judgment below should be affirmed. If the Court revives any of plaintiffs' claims, the class should be decertified and Whirlpool should be allowed to present its comparative-negligence, assumption-of-risk, and mitigation-of-damages defenses at any retrial.

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)(C) because it contains 7000 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

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2015, I caused the foregoing Fourth 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