Case No. 15-11455-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROBERT BROWN, *et al.*,

Plaintiffs-Appellees,

v.

ELECTROLUX HOME PRODUCTS, INC. d/b/a FRIGIDAIRE,

Defendant-Appellant.

BRIEF OF PUBLIC JUSTICE, P.C.; THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES; U.S. PIRG; CONSUMER ACTION AND CONSUMER FEDERATION OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT'S RULING

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CERTIFICATE OF CORPORATE DISCLOSURE AND INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Rule 26.1-2 of the Rules of the Court of Appeals for the Eleventh Circuit, *Amici Curiae*, Public Justice, P.C., National Association of Consumer Advocates, U.S. PIRG, Consumer Action and Consumer Federation of California certify that each is a non-profit corporation, has no parent corporation and has no stock. There is no person known to *Amici Curiae* to have an interest in the outcome of this appeal other than those persons and entities named in the parties' Certificates of Interested Persons and Corporate Disclosure Statement.

Dated this 22nd day of July, 2015.

/s/ Edwin J. Kilpela, Jr.
Edwin J. Kilpela, Jr.
Attorney for *Amici Curiae*

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I. STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Public Justice, P.C. is a national public interest law firm that focuses on precedent-setting and socially significant civil litigation, including by pursuing justice for the victims of intentional misconduct. To further its goals of promoting and defending access to justice for consumers, businesses, employees and others harmed by such misconduct, Public Justice has initiated projects dedicated to fighting abuses of mandatory arbitration, opposing overly broad assertions of federal preemption, and preserving the integrity of collective and class actions. The experience of Public Justice has been that the collective and class action mechanisms, properly employed, often represent the only meaningful way for American consumers, businesses, and employees to vindicate important legal rights.

The National Association of Consumer Advocates ("NACA") is a nationwide non-profit corporation whose over 1,000 members are private, public sector, legal services and non-profit lawyers, law professors, and law students, whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the effective and ethical representation of consumers. Toward this end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, which is published at 299 F.R.D. 160 (3d ed. 2014), and co-issued a report titled *Class Actions Are a Cornerstone of*

our Civil Justice System: A Review of Class Actions Filed in 2009 (Feb. 27, 2015), which is discussed herein.

NACA is dedicated to promoting justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in part by appearing as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States. For example, NACA has appeared as *amicus curiae* before this Court in support of consumer parties in *Day v. Persels & Assoc's, LLC*, 729 F.3d 1309 (11th Cir. 2013), and *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009), among other cases.

U.S. PIRG serves as the federation of state Public Interest Research Groups. Founded in 1971, PIRGs are non-profit, non-partisan research and advocacy organizations that take on a variety of issues. We stand up to powerful interests whenever they threaten our health and safety, our financial security, or our right to fully participate in our democratic society. U.S. PIRG believes that strong laws enforced by federal and state regulators are not enough to police the marketplace. Consumers also need strong private rights of action, including strong, unfettered rights to take their grievances to court and to band together in class actions to make their claims more efficiently and effectively.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A nonprofit 501(c)(3) organization, Consumer Action focuses on empowering consumers nationwide to assert their rights in the marketplace and financially prosper. In this vein, for more than 40 years, Consumer Action has been engaged in a multitude of projects focused on consumer advocacy through the preparation of educational materials, community outreach, grassroots action, and litigation.

The Consumer Federation of California ("CFC") (www.consumercal.org) is a non-profit advocacy organization. Since 1960, CFC has been a powerful voice for consumer rights. CFC campaigns for state and federal laws that place consumer protection ahead of profit. Each year, CFC testifies before the California legislature on dozens of bills that affect millions of our state's consumers. CFC also appears before state agencies in support of consumer regulations and participates in court actions, as here, involving consumer law. Recent areas of activity for CFC include protecting consumer financial privacy, reforming accounting industry practices, enabling patients to sue HMO's for denial of care, holding homebuilders accountable for construction defects, prohibiting manufacturers from keeping secret vital safety information about defective products, enacting cell phone users rights and strengthening food safety laws.

Pursuant to F.R.A.P. 29(a) and (c)(5), *amici curiae* state: (1) the parties to this appeal have consented to the filing of this brief; (ii) no party or parties' counsel has authored any part of this brief; (iii) no party or parties' counsel has contributed any money that was intended to fund preparing or submitting the brief; and (iv) no person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

II. SUMMARY OF ARGUMENT

The District Court's certification of a class of purchasers of Electrolux washing machines, all of which suffer from a common defect causing mold and biofilm to build in the machine over time, is well-supported by the record of and wholly consistent with recent affirmance of both class certification in a similar matter by the Sixth Circuit Court of Appeal, and the reversal of a denial of class certification by the Seventh Circuit Court of Appeal. Given the ample evidence supporting the District Court's ruling as well as the decisions of three sister Circuits, this Court should not create an unnecessary circuit split in this area of class action law, which would impel some class action plaintiffs to choose to litigate in other circuits and would preclude others from seeking remedies available to other federal court litigants.

The legal standards developed by the District Court and by the Circuits that have addressed similar cases are completely consistent with the purpose of Rule 23

class actions: to permit individuals who have real, but relatively small, claims for economic harm to obtain legal redress. Absent the ability to proceed collectively, consumers would have no available avenue to seek redress and, as a result, companies would be effectively insulated from liability. Indeed, the United States Consumer Financial Protection Bureau recently published a study confirming that class actions are an effective and efficient means of obtaining such redress and that alternative methods such as governmental lawsuits and small claims court actions are insufficient alternatives. Given the unanimity of persuasive authority as well as the public policy reasons for protecting the ability of consumers to take collective action to enforce consumer protection and product liability rules, this Court should either 1) affirm the ruling of the District Court or 2) remand to the District Court with instructions to apply the legal standards articulated by the Sixth and Seventh Circuits in cases with substantially similar facts.

III. ARGUMENT

A. The Court Should Avoid Creating a Significant Circuit Split in This Area of Product-Defect Class Action Law.

Appellant and the *amici* supporting reversal of the class certification order urge this Court to interpret *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) as precluding class certification in this case. While this Court has yet to expressly find that *Comcast* does not apply to cases such as this, two sister circuits have done so and found the arguments of Appellant and *amici* who preserved similar

arguments in those cases, lacking. Specifically, both before and after *Comcast*, two other Circuit Courts of Appeals (the Sixth Circuit and the Seventh Circuit) substantively considered the propriety of class certification in virtually identical factual contexts, and both courts concluded that class certification was appropriate, *Comcast* notwithstanding.[1] If this Court is inclined to remand for any reason, it should only do so with the intent of avoiding an unnecessary circuit split and, in doing so, should provide clear and unambiguous instructions to follow the Sixth and Seventh Circuit's most recent decisions in the *Glazer* and *Butler* matters.

1. The *Glazer* Matter in the Sixth Circuit

Prior to *Comcast*, the Sixth Circuit upheld certification of a statewide class of purchasers of Whirlpool front-load washing machines who alleged that the machines did not effectively clean themselves, leading to the growth of mold and mildew, ruined laundry, and foul odors. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 412–413 (6th Cir. 2012) ("*Glazer I*"), *reh'g en banc denied*, 2012 U.S. App. LEXIS 12560 (6th Cir. June 18, 2012),

[1] In a third case, a California district court certified a class of purchasers of front-load washing machines manufactured by BSH Home Appliances under the brand names Bosch and Siemens, which allegedly included a similar defect tending to promote the growth of mold, biofilm, bacteria, etc. The Ninth Circuit denied the defendant's petition for permission to appeal pursuant to Fed. R. Civ. P. 23(f), and the Supreme Court denied the defendant's petition for certiorari. *See Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), *leave to appeal denied*, *Cobb v. BSH Home Appliances Corp.*, No. 13-80000, 2013 WL 1395690, at *1 (9th Cir. Apr. 1, 2013) *cert. denied*, 134 S. Ct. 1273 (2014).

vacated, 133 S. Ct. 1722 (2013). The consumer class brought claims for tortious breach of warranty, negligent design, and negligent failure to warn. *Id.* at 412. The Sixth Circuit noted that one of the primary bases for the appellant's opposition to class certification in the district court was that, according to the appellant, "the vast majority of [washing machine] owners ha[d] not had a mold problem with their washing machines and the incidence of mold [was] actually rare." *Id.* at 415. In that case, as in this one, the appellant-manufacturer argued that the "class as certified [was] overly broad because it include[d] [washing machine] owners who [had] not experienced a mold problem." *Id.* at 420. In *Glazer I*, the Sixth Circuit flatly disagreed and affirmed certification of the liability class. *Id.* at 420–421. The Court reasoned that lack of injury by some class member was simply not a barrier to certification. *Id.* at 420. Further, the Court noted, the appellees may be able to show that every class member was injured at the point of sale regardless of whether or not they experienced a mold problem. *Id.*

Following *Glazer I*, the Supreme Court issued a grant, vacate, and remand ("GVR") order and directed the Sixth Circuit Court of Appeals to reconsider its class certification decision in light of *Comcast*. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013) (*"Glazer II"*), *cert. denied sub nom. Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014). Upon reconsideration in *Glazer II*, the Court found that the *Comcast* decision did not

compel a different result and, again, affirmed class certification. *Id.* at 846, 861. In its second bite at the apple, the appellant again argued that the certified class was too broad because it included washing machine owners who "allegedly [had] not experienced a mold problem and [were] pleased with the performance of their [washing machines]." *Id.* at 855. The Sixth Circuit, however, disagreed and ***again*** flatly rejected that argument, holding that class certification by the lower court was not an abuse of discretion despite the fact that the class included owners who had never experienced a manifestation of the alleged defect. *Id.* The Court explained, in clear terms, why the inclusion of class members who had not yet complained of a mold problem was not a barrier to class certification. "If defective design is ultimately proved, all class members have experienced injury as a result of the decreased value of the product purchased. The remedy for class members who purchased [washing machines] at a premium price but have not experienced a mold problem can be resolved through the individual determination of damages as the district court determined." *Id.* The Court went on to reason that, "[b]ecause *all* [washing machine] owners were injured at the point of sale upon paying a premium price for the [washing machines] as designed, even those owners who have not experienced a mold problem are properly included within the certified class." *Id.* at 856 (emphasis added).

Significantly, on reconsideration the Sixth Circuit expressly (and correctly) noted that the impact of *Comcast* was considerably narrower than appellant urged in that matter and, in fact, noted that it could not identify any holding in *Comcast* that should alter its prior affirmance of class certification. *See id.* at 860 ("To the extent that *Comcast Corp.* reaffirms the settled rule that liability issues relating to injury must be susceptible of proof on a classwide basis to meet the predominance standard, our opinion thoroughly demonstrates why that requirement is met in this case."). Following the *Glazer II* decision, the appellant-manufacturer once again petitioned for certiorari, and that petition was denied. *See Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014).

2. The *Butler* Matter in the Seventh Circuit

Shortly after the *Glazer I* decision, the Seventh Circuit soon followed suit by reversing a lower court's denial of class certification with respect to a class of purchasers of Kenmore brand front-load washing machines which, like the machines here and in *Glazer*, allegedly were defective in their design and prone to developing mold and mildew. *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012) ("*Butler I*"), *reh'g en banc denied*, 2012 U.S. App. LEXIS 26202 (7th Cir. Dec. 19, 2012), *vacated*, 133 S. Ct. 2768 (2013), *reinstated*, 727 F.3d 796 (7th Cir. 2013) ("*Butler II*"), *cert. denied*, 134 S. Ct. 1277 (2014). In *Butler I*, the Court responded to the appellant's overbroad class argument as follows: "[Appellant]

argues that most members of the plaintiff class did not experience a mold problem. But if so that is an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate [Appellant]—a course it should welcome, as all class members who had not opted out of the class action would be bound by the judgment."[2] *Butler I*, 702 F.3d at 362.

As in *Glazer*, the Supreme Court issued a GVR order and directed the Seventh Circuit Court of Appeals to reconsider its class certification in light of *Comcast*. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013) ("*Butler II*"), *cert. denied*, 134 S. Ct. 1277 (2014). Judge Posner, writing for the Seventh Circuit panel on remand, similarly rejected the notion that *Comcast* defeated a finding of predominance. *Comcast*, according to the Seventh Circuit, did not compel a different result. Judge Posner reiterated that the inclusion of class members whose washing machines did not have visible evidence of mold or mildew buildup did not create a barrier to class certification. *Id.* at 799. Rejecting the appellant's reading of *Comcast*, the Court stated as follows: "It would drive a stake through the heart of the class action device, in cases in which damages were

[2] The Sixth Circuit made the same substantive point in *Glazer II*: "If [the appellant] can prove that most class members have not experienced a mold problem and that it adequately warned consumers of any propensity for mold growth in the [washing machines], then [the appellant] should welcome class certification. By proving that the [washing machines] are not defectively designed and that no warnings were needed (or if they were, that adequate warnings were issued to consumers), [the appellant] can obtain a judgment binding all class members who do not opt out of the class." *Glazer II*, 722 F.3d at 857.

sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages … Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits."[3] *Id.* at 801. As in

[3] The danger of adopting the erroneous interpretation of *Comcast* rejected by Judge Posner and endorsed by Appellant was also noted in a recent academic article:

> "[C]lass members—and society as a whole—may suffer a very real and significant harm if a court refuses to certify a class because plaintiffs cannot show precisely which members suffered the relevant form of injury. Many of them—or all of them—may not be able to pursue their claims at all.
>
> This is particularly likely to be true in cases where damages are small enough that bringing an individual suit is simply not feasible. Many class members would be completely deprived of the benefits of litigation if defendants were allowed to claim that the inclusion of uninjured class members violates their due process rights. Due process does not support an outcome that effectively makes plaintiffs lose regardless of the merits."

Joshua P. Davis, Eric L. Cramer & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 880–881 (2014) (footnotes omitted).

As explained by Judge Wood in *Suchanek v. Sturm Foods, Inc.*, the inclusion of class members whose claims *might* ultimately fail on the merits does not preclude class certification. *Suchanek*, 764 F.3d 750 at 757 (7th Cir. 2014) ("If the [district] court thought that no class can be certified until proof exists that every member has been harmed, it was wrong."). Judge Wood further noted "there is a distinction 'between class members who *were not* harmed and those who *could not* have been harmed.'" *Id.* at 758 (quoting *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 825 (7th Cir. 2012). Class certification is not precluded unless the class includes individuals who *could not* have been injured by the Defendant's conduct,

Glazer, the Supreme Court denied the appellant-manufacturer's second petition for certiorari following the *Butler II* decision. *Butler v. Sears, Roebuck & Co.*, 134 S. Ct. 1277 (2014).

3. The Court Should Rebuff Arguments Advanced by Appellant That Have Been Soundly Rejected By the Sixth and Seventh Circuits, Thereby Avoiding a Circuit Split.

Thus, according to both the Sixth and Seventh Circuits, the inclusion of class members who have not complained of a mold problem is not a barrier to class certification under *Comcast* in the context of product-defect, front-loading washing machine cases. If this Court reverses the lower court's certification order based on the predominance arguments advanced by Appellant, it will create a circuit split regarding the application of *Comcast* in product-defect class actions. Indeed, Judge Posner noted the following in conclusion of the *Butler II* decision: "On remand the Sixth Circuit…interpreting *Comcast* as we do, concluded that the requirement of predominance had been satisfied… The concordance in reasoning and result of our decision and the Sixth Circuit's decision averts an intercircuit conflict." *Butler II*, 727 F.3d at 802. The Court should employ the same reasoning and reach the same conclusion here, thereby avoiding any such conflict.

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or the proposed class representative's claim is "idiosyncratic or possibly unique." *Suchanek*, 764 F.3d at 758.

This Court has previously indicated its preference to follow a prior ruling from another Circuit Court of Appeals, even if there is "some doubt about its correctness," unless this Court believes the decision to be "plainly wrong." *See Pub. Health Trust of Dade Cnty., Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 n. 4 (11th Cir. 1993) ("[W]e do listen to other courts. And, we do not create intercircuit splits lightly."). Although the holdings of the other Circuit Courts of Appeal are not binding on this Court, there are important reasons for treating those opinions as strongly persuasive authority and avoiding circuit splits when possible. Circuit splits, by their nature, undermine the uniformity of federal law (whether substantive or procedural) and encourage forum shopping among those who seek to avoid less favorable rules in particular jurisdictions. *See McCarty v. S. Farm Bureau Cas. Ins. Co.*, 758 F.3d 969, 974 (8th Cir. 2014) (noting, in a National Flood Insurance Program dispute, that "[w]e firmly decline to create a circuit split in this area of federal common law where uniformity is the goal."); *United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) ("The avoidance of unnecessary circuit splits furthers the legitimacy of the judiciary and reduces friction flowing from the application of different rules to similarly situated individuals based solely on their geographic location.") (Murphy, J., concurring in denial of rehearing en banc); *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) ("[P]rocedural rules are best applied

uniformly, and we decline to create a circuit split unless there is a compelling reason to do so."); *U.S. ex rel. Merena v. Smithkline Beecham Corp.*, 114 F. Supp. 2d 352, 372 (E.D. Pa. 2000) (noting that circuit split with respect to interpretation of False Claims Act "forces litigants and litigants' attorneys, wherever possible, to attempt to choose the most favorable jurisdiction; i.e. 'forum shop.'"). Circuit splits on standards for class certification are especially problematic, since many federal class actions, including this one, could be brought in many different venues.

If this Court adopts a more expansive application of *Comcast* than the Sixth and Seventh Circuit Courts of Appeal, plaintiffs who have a choice will avoid filing class cases in this circuit and will file in those circuits instead. Meanwhile, those plaintiffs who are constrained in their choice of forum will face a higher threshold to class certification here than in the Sixth or Seventh Circuits (or any other circuit that joins them). This is a particularly undesirable result in the product-defect class action context where consumer safety is involved. The Court, therefore, should reject the arguments advanced by Appellant that would create a highly undesirable circuit split, particularly since the well-reasoned decisions of the Sixth and Seventh Circuits are anything but "plainly wrong."

B. If This Court Chooses to Reverse the Lower Court's Ruling, it Should Remand with Instructions to Follow the Most Recent Circuit Court Decisions in the *Butler* and *Glazer* cases.

The lower court here certified two statewide classes that are strikingly similar to those certified by the district courts in the *Butler* and *Glazer* matters; the classes include all purchasers of certain Electrolux front-loading washing machines with convoluted bellows during a four-year time period. Appellant argues that "class certification should…be reversed because the district court erroneously certified a wildly overbroad class—in which the overwhelming majority of class members have not experienced any mold or odor problems—making it impossible for injury or damages to be proven on a classwide basis." (June 15, 2015 Brief of Appellant Electrolux Home Products, Inc. ("Electrolux Brief") at p. 20.) As detailed above, this precise argument was advanced, addressed, and rejected twice—both before and after the *Comcast* decision—by the Sixth and Seventh Circuit Courts of Appeal.

These decisions are directly on-point and explain, in clear terms, why *Comcast* in no way precludes class certification in this case. Thus, if this Court were to reverse for the reasons advanced by Appellant and its *amici*, it would thereby create a circuit split, an outcome which is disfavored, and in this case wholly unnecessary because the district court properly determined that the numerous issues common to the class predominate the individualized issues identified by Appellant. In light of the district court's correct application of the law on this point and the consistent, persuasive reasoning of the prior circuits to

address these same questions, this Court should dismiss Appellant's petition for review, affirm the district court's class certification order, or remand with instructions to follow the decisions of the Sixth and Seventh Circuits in *Glazer II and Butler II*. As such, if this Court is inclined to disturb the lower court's decision in any way, the appropriate path is to avoid a circuit split by remanding to the district court with instructions to follow the most recent decisions of the Sixth and Seventh Circuits.

C. Class Actions Serve the Public Interest.

The Court should not lose sight of the policy objectives that justify the class action as a remedy for tortious conduct that affects large numbers of people: class actions permit redress to injured parties in situations where individual claims are too small to justify the expense of litigation. *See* Fed. R. Civ. P. Rule 23, Advisory Committee Notes, 1966 Amendments, subdivision (b)(3) (class certification appropriate where "the amount at stake for individuals may be so small that separate suits would be impracticable."); *see also* Davis, Cramer, and May, *supra.* This circumstance is present here. The decrease in value of a defective washing machine is simply insufficient to bring an individual lawsuit. In the absence of a class action, private rights of action for these injuries, such as those created by the Texas and California Deceptive Trade Practice and Unfair Competition statutes

that form the basis for the claims against Electrolux, would be unavailable to the consumers they were intended to protect.

The availability of effective private actions under such statutes performs a salutary deterrent function that goes far beyond the amount recovered by any individual plaintiff: the desire to avoid litigation should impel manufacturers to establish quality assurance programs for the design and manufacture of consumer products that keep defective products off of the market. *See* Jared N. Jennings, Simi Kedia and Shivaram Rajgopal, *The Deterrent Effect of SEC Enforcement Actions and Class Action Litigation* Social Science Research Network (December 2011)[4] (empirical analysis concluding that private securities fraud class action lawsuits deter companies that have been sued from future violations of the securities laws). A calculation of the amounts awarded to consumers who purchased defective products inevitably understates the full extent of the benefit that all consumers – including those who never purchased any defective products – benefit from the availability of the class action remedy. The standard this Court adopts for certifying classes of individuals who suffer economic hardship from their purchases of defective products should reflect the benefits that Class Members receive from participation in these cases, as the standards adopted in the Sixth and Seventh circuits do.

[4] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868578 (last visited July 22, 2015).

A recent Report to Congress by the Consumer Financial Protection Bureau presents compelling evidence that the benefits are substantial. *See Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act. § 1028(a)*, published March 31, 2015 (the "CFPB Study").[5]

The CFPB Study analyzed data concerning consumer finance class action settlements entered in Federal court cases between 2008 and 2012. The study included 419 cases where sufficient data was available. The cases collectively had 350 million class members. CFPB Study, § 8 at 15. The total amount that defendants in cases alleging financial misconduct agreed to pay was $2.7 billion, of which $2 billion consisted of either cash payments or grants of debt forbearance to the Class Members, and the remainder of the value was "in-kind relief," such as free or discounted access to a credit monitoring service.[6] *Id.* § 8 at 24. In 53 cases involving 106 million class members, class members also benefited from "behavioral relief," such as an injunction requiring a defendant to refrain from

[5] http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (last visited July 22, 2015).

[6] The bulk of the in-kind relief in these cases came in one action alleging improper disclosure of personal financial information, which exposed class members to a risk of identification theft. The settlement's provision credit monitoring services in this case, which would permit Class Members to detect and respond to any such thefts, provided a close match to the correction of the wrong alleged in the Complaint. *Id.* § 8 at 24 n. 43 (*citing Lockwood v. Certegy Check Svcs., Inc.*, M.D. Fla. No. 8:09-cv-1434*)*.

deceptive or coercive debt collection tactics. Although such relief has real value, the CFPB Study could not set dollar values, so it omitted these benefits from its calculations altogether. *Id.* § 8 at 20-22. Many of the cases analyzed did not require claim forms, or divided funds among all of the claimants. In a subset of 251 cases for which more complete data was available, $1.1 billion had actually been distributed, or was guaranteed to be distributed without further completion of additional claim forms or other efforts from Class Members, to over 34 million individual Class Members. *Id.* § 8 at 28. The CFPB study thus makes clear that Class Actions do benefit the victims of tortious conduct.

The CFPB Study also examined whether the benefits of class actions inure disproportionately to plaintiffs' lawyers rather than to injured class members. It concluded that this is not the case in successful actions. In the full set of 419 cases, attorneys' fee awards constituted 21% of the value of the cash relief, or 16% of the value of cash and in-kind relief combined. *Id*. § 8 at 33. Because this study did not put any value on "behavioral relief," it significantly understated the total benefit to consumers from these cases, and overstated the cost of attorneys' fees relative to benefits.

Importantly, the CFPB had been directed to examine the benefits to consumers of several forms of dispute resolution to Class Actions. *Id.* Introduction at 1. Most critically for this case, the CFPB investigated whether injured

consumers of financial products were able to bring their disputes to small claims courts. In a survey of 13 states and the District of Columbia, as well as the 30 most populous counties in the United States, the CFPB found only 870 small claims cases brought against the 10 largest credit card issuers, each of which involved a single plaintiff – a trivial number. Small claims court proceedings simply are not used to protect consumers in this area. *Id.* § 7 at 9. The CFPB also found that governmental lawsuits do not substitute for consumer class actions: although both federal and state regulators have equivalent or greater authority to bring lawsuits against providers of financial services as private lawsuits, only 32% of private class actions analyzed overlapped with any government actions, and of those, 61% had been filed first by a private individual, and only later by a government entity. *Id.* § 9 at 4.

In brief, class action litigation provides a uniquely effective remedy to consumers who suffer economic injury.

D. <u>The Mayer Brown Memo Cannot Be Relied On</u>.

Amici Chamber of Commerce of the United States, National Association of Manufacturers, and Association of Home Appliance Manufacturers rely heavily on a study of employee and consumer Class Actions that were filed in the year 2009 and resolved before September 30, 2013. Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (December,

2013)[7] ("Mayer Brown Memo"); see brief of amici at 18-19. This study's empirical shortcomings and its implausible data analysis render it unreliable.

The headline conclusion of the report, that few if any of the consumer and employee class actions filed in 2009 yielded a significant benefit to consumers, is simply untrue. *See* National Association of Consumer Advocates and American Association for Justice, *Class Actions Are a Cornerstone for our Civil Justice System: A Review of Class Actions Filed in 2009* (February 27, 2015)[8] (cataloguing numerous cases that meet the criteria for inclusion in the Meyer Brown Memo that provided significant benefits to Class Members) (the "NACA and AAJ Study"). One of the cases, described in the Memo as not providing "real benefits to anything more than a small percentage of the class," actually distributed $100 million to consumers of financial services. Mayer Brown Memo at 9, *citing in re Chase Bank USA, N.A. "Check Loan" Contract Litigation*, No. 09-md-2032 (N.D. Cal.); *See* Dkt. No. 349 (motion for approval of settlement, documenting terms).The Memo described another case as providing "no direct payout to the retired [class members] and $7.7 million for attorneys', while the article the Memo footnoted described the settlement as creating a $47 million "common good" fund to provide

[7] www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClass Members.PDF (last visited July 22, 2015).
[8] http://www.consumeradvocates.org/sites/default/files/Class%20Action%20Report%202-27-15.pdf (last visited July 22, 2015).

services to the class members. Alison Frankel, *Retired NFL Stars Reject Settlement of Their Own Licensing Class Action*, Reuters, (March 25, 2013).[9]

The Memo's methodology appears to have been designed to exclude consideration of cases where Class Members received real benefits. Initially, the study excluded 12 collective or class action cases brought in federal court outside of Rule 23. Then they excluded nine cases that did involve Rule 23 classes, but also involved claims under federal securities laws. This reduced the number of cases under examination from 169 to 148. Memo at 18.

They further excluded from analysis the 21 cases which had not been resolved as of September 30, 2013 – an exclusion likely to remove the cases with the highest potential value, as larger cases are more likely to take longer to litigate This exclusion is a clear source of bias in reporting. The Memo acknowledges this shortcoming and suggests some reasons that the pending cases may not differ from those that are included. Memo at 4-5. However it ignores the most obvious difference between cases that remain pending for four years and those that do not: the longest-pending cases tend to involve more complexity, usually more money, and greater potential liability and potential defenses. Thus, excluding from the analysis the 14% of cases that did not settle has the likely effect of excluding the cases most likely to ultimately benefit class members.

[9] blogs.reuters.com/Alison-frankel/2013/03/25/retired-nfl-stars-reject-settlement-of-their-own-licensing-class-action (last visited July 22, 2015).

Amicis are also aware of one case that appears to meet the requirements for inclusion and settled in 2015 for $36 million with all funds distributed without a claim form thus eliminating any reversion to Defendants or *cy pres* distribution. *Diebold v. Northern Trust Inv. Co.*, N.D. Ill. No. 09-cv-01934 (ERISA class action filed April 1, 2009. Final settlement hearing date August 5, 2015). Also of note, the *Electrolux* action currently before this Court was filed in 2008, a year *before* the Mayer Brown study period, and remains pending and may ultimately provide substantial benefits to consumers.

Beyond the exclusion of the open cases, the study omitted consideration of several cases that may have provided significant benefits to Class Members. Thus, ten of the cases in the study involved "automatic distribution" of proceeds to Class Members who were participants in retirement plans governed by ERISA. These settlements have none of the drawbacks the Mayer Brown Memo associated with "claims made" settlements: the Class Members do not have to complete a claim form and there are no "leftover" funds to be distributed through a *cy pres* process or returned to the Defendant. The Mayer Brown Memo makes no attempt to measure whether the benefits to class members were significant or insignificant – it simply leaves them out of the analysis altogether. *Id*. at 8.[10]

[10] The Memo also discusses at length a few cases where court-ordered attorneys' fees appear to be disproportionate to the benefits received by Class Members. *Id.*

Additionally, some cases where consumers or employees received substantial benefits are not discussed and appear to have been omitted from the study altogether. For example, *Ryals v. Hiveright Solutions*, E.D. Va. No. 3:09-cv-06225, a Fair Credit Act class action filed in 2009 and settled in 2011, appears to meet the criteria for inclusion in the study. In that case, a $28.375 million settlement fund was distributed without claim forms by mailing checks in amounts between $11.85 and $158.00 to 681,548 individuals. In addition, 3,148 Class Members who were able to prove actual damages through a claim form received checks averaging $4,122.00 each. *See, Ryals, supra*, Dkt. No. 132-2, filed Oct. 25, 2013. Contrary to the assertions in the Memo, this case clearly demonstrates that successful class actions can bring significant benefits to Class Members. *See also NACA and AAJ Study, supra*. In sum, the Mayer Brown Memo contains both methodological limitations and analytical flaws that render it untrustworthy and it should be discounted by this Court.

IV. CONCLUSION.

Neither Supreme Court precedent nor public policy considerations should impel this Court to create a circuit split by overturning the District Court's grant of class certification in this case. The District Court recognized that this is precisely the kind of case, where widespread distribution of a defective product, purportedly

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at 10. As noted above, the CFPB Study found that on average, counsel fees account for 21%. CFPB Study § 8 at 33.

depriving purchasers of the full value of their purchase, should be resolved on a classwide basis. If the Court determines that remand to the District Court is appropriate, it should adopt the standards for determination that have been employed by the Sixth and Seventh Circuits.

Dated: July 22, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,158 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2015, I electronically filed the foregoing document with the Clerk of Court using CM/ECF, which will provide service on all counsel of record via transmission of electronic notices of filing generated by CM/ECF. Pursuant to 11th Circuit Rule 31-3, seven paper copies of the foregoing have also been transmitted to the Court via U.S. mail.

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