IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 16-2653

JAMIE GONZALEZ, PATRICIA WRIGHT, KEVIN WEST, GERALD BOEHM, EDWARD MAAG, and DIANE MAAG, on behalf of themselves and all others similarly situated

Plaintiffs-Appellants,

v.

OWENS CORNING and OWENS CORNING SALES, LLC,

Defendants-Appellees.

On Appeal from an Order of the Western District of Pennsylvania
Denying Class Certification, No. 13-cv-1378-JFC

BRIEF OF *AMICI CURIAE* PROFESSORS SIMONA GROSSI AND ALLAN IDES, ALLIANCE FOR JUSTICE, CONSUMER ACTION, CONSUMERS FOR AUTO RELIABILITY AND SAFETY, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND NATIONAL CONSUMERS LEAGUE SUPPORTING APPELLANTS SEEKING REVERSAL OF DISTRICT COURT DECISION

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CORPORATE DISCLOSURE STATEMENT

Professors Simona Grossi and Allan Ides are natural persons, and they accordingly are not subject to any corporate disclosure provisions.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1.1, *Amici Curiae* Alliance for Justice, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, and National Consumers League (collectively, "*Amici*") make the following disclosures:

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Amici have no parent corporations.

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Amici know of no such party.

4) In all bankruptcy appeals, counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debt, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A.

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I. INTEREST OF *AMICUS CURIAE*[1]

Simona Grossi is a Professor of Law at Loyola Law School. She teaches Civil Procedure, Federal Courts, and Constitutional Law and has written extensively in each of these areas. **Allan Ides** is the Christopher N. May Professor of Law at Loyola Law School. He teaches Civil Procedure, Federal Courts, and Constitutional Law and has written extensively in each of these areas. Professors Grossi and Ides share an interest in promoting a just and coherent approach to the Federal Rules of Civil Procedure.

Alliance for Justice (AFJ) is a national association of more than 100 organizations, including a broad array of groups committed to progressive values and access to justice for all Americans. For over 30 years, AFJ has been a leader in the fight for a more equitable society on behalf of a broad constituency of consumer, environmental, civil and women's rights, children's, senior citizens' and other groups. AFJ believes that all Americans have the right to secure justice in the courts.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education that empowers low- and moderate-income and

[1] This brief was not authored in whole or in part by counsel for any party. No person other than *amicus curiae* and its counsel made a monetary contribution that was intended for the preparation or submission of this brief.

limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change. Consumer knows through its advocacy work that many consumers are subjected to unlawful, unfair, or deceptive business practices which damage them in small amounts, and has seen that the class action vehicle is the only way for them to recover their damages or put an end to wrongful practices by the sellers of goods and services in the marketplace.

By providing consumer education materials in multiple languages, a free national hotline, a comprehensive website (www.consumer-action.org) and annual surveys of financial and consumer services, Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices. Over 7,000 community and grassroots organizations benefit annually from its extensive outreach programs, training materials and support.

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning non-profit and auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has spearheaded enactment of many landmark laws to protect the public and successfully petitioned the National Highway Traffic Safety Administration and various state agencies for promulgation of consumer protection regulations.

The United States Congress has repeatedly invited the President of CARS to testify on behalf of American Consumers regarding auto safety practices and policies, including air bags and other automatic restraint systems, the safety hazards posed by salvage and flood vehicles, mandatory binding arbitration in auto sales contracts, and various fraudulent and predatory auto sales practices, which affect the ability of car buyers to afford advanced safety systems.

National Association of Consumer Advocates (NACA) is a nationwide non-profit corporation whose over 1,700 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 ethical and professional representation of consumers. Toward this end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 299 F.R.D. 160 (3d ed. 2014).

NACA also is dedicated to promoting justice for 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 appeared as *amicus curiae* before this Court in, among other cases, *Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. 2015), and *Khan v. Dell Inc.*, 669 F.3d 350 (3d Cir. 2012).

National Consumers League (NCL) has represented the interests of consumers since 1899. NCL believes in consumer access to the courts to redress corporate wrongdoing, and in the right of consumers to band together when many have endured small losses, including from defective products, which cumulatively can add up to millions of dollars.

II. SUMMARY OF ARGUMENT

The district court's refusal to establish a nationwide class under Rule 23(b)(1)(B) represents an abuse of discretion because it fails to take into account the complex landscape of the law of preclusion, thereby promoting litigation inefficiency, a waste of judicial resources, and unfairness. Instead of providing an elegant and final resolution of a simple and direct question, the district court opinion invites a cacophony of re-litigation.

The district court's application of Rule 23(b)(3)'s predominance standard represents an abuse of discretion in that it fails to adhere to the Supreme Court's decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013). Most egregiously, the district court required proof of a material element of the plaintiffs' claims where doing so was completely unnecessary to the predominance inquiry.

III. ARGUMENT

A. The District Court Abused its Discretion by Declining to Certify a Nationwide Class under Rule 23(b)(1)(B)

In *Wright v. Owens Corning*, 679 F.3d 101 (3d Cir. 2012), this Circuit held that the claims of named plaintiffs Wright and West were not subject to discharge in bankruptcy. Wright and West then sought certification of a nationwide class pursuant to Rule 23(b)(1)(B) or (b)(2) to assure that non-parties whose purchase of OC shingles fell within the relevant temporal period would receive the full benefit of that ruling. Specifically, Wright and West sought to establish that similarly situated non-party purchasers would have the benefit of the "accrual test" as opposed to the "prepetition relationship test," as articulated by this Court. *Id*. at 107-109. The District Court declined to certify the class, reasoning that since Owens Corning ("OC") would be subject to collateral estoppel with respect to discharge in bankruptcy there was no need to certify a class, the controversy over such discharge having been rendered "moot." Joint Appendix ("JA") at 000138-000141.

The District Court was correct that OC *should* be bound under the law of preclusion, but as Appellants point out in their opening brief, "should" will not necessarily translate into "would." *Id*. And in any event, the issue will have to be raised and there is nothing that would prevent OC from challenging assertions of

the doctrine, despite its non-binding concession to the contrary.

The type of preclusion involved here is properly and precisely identified as "offensive non-mutual issue preclusion." Under that doctrine, a non-party to a previous litigation may prevent a defendant from re-litigating an issue that was decided against that defendant in the previous litigation. Of course, the non-party must be aware of the previous litigation, must raise the estoppel issue, and must establish each of the elements of the underlying doctrine. In addition, whether to grant non-mutual offensive preclusion is left to the "broad discretion" of the trial court, taking into consideration whether the non-party could have readily intervened in the prior litigation and whether under the particular circumstances presented, application of the doctrine would be unfair to the defendant. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331 (1979). *See also* ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CIVIL PROCEDURE: CASES AND PROBLEMS 1217-1219 (5th ed. 2016). In other words, application of the doctrine is neither mechanical nor automatic. Hence, while OC should be bound by issue preclusion, there is no guarantee that it will be so bound.

In fact, the District Court's observation that OC will be bound by issue preclusion supports the conclusion that a class ought to be certified to establish that precise point. As noted above, being subject to assertions of the doctrine does not

lead inexorably to enforcement of the doctrine. As matters now stand, issue preclusion on the question of discharge will potentially arise in numerous suits filed throughout the fifty states, and in front of a multitude of state-court judges. And there is nothing to prevent OC from challenging specific assertions of the doctrine, despite the company's non-binding assertion to the contrary. Indeed, if OC does intend to concede the point in all future litigations by members of the putative class, it would benefit OC to put the question to rest in relatively simple and simply resolved class action.

In an analogous class-action context, the Second Circuit held that a concession of liability by a party should not serve as a basis for denying class certification. *In re Nassau County Strip Search Cases*, 461 F.3d 219, 228-229 (2d Cir. 2006). To do otherwise would undermine the efficiency and uniformity rationales of Rule 23:

> Eliminating conceded issues from Rule 23(b)(3)'s predominance calculus would undermine the goal of efficiency by requiring plaintiffs who share a "commonality of the violation and the harm," nonetheless to pursue separate and potentially numerous actions because, ironically, liability is so clear. Such a result also undermines the goal of uniformity by creating the risk of

> inconsistent decisions through the repeated litigation of the same question. Although defendants have conceded liability to these plaintiffs, there is no guarantee that they would concede liability in a case or series of cases involving significantly higher damages.

Id. at 228 (internal citations omitted). So too under the present facts. OC's non-binding assertion coupled with the clear applicability (and yet potential contestability) of issue preclusion strongly supports the conclusion that the most efficient approach, and the one most likely to lead to uniform treatment of like-situated parties, would be to certify the class.

Rule 23(b)(1)(B) seems ideally suited to the task. Rather than adopting the District Court's hyper-technical approach to that provision, which the Appellants correctly describe and critique, this Court should adopt an interpretation and approach that promotes the ideals of class-action practice—efficiency, uniformity, and fairness.

B. The District Court Abused its Discretion by Declining to Certify a Four-State Class under Rule 23(b)(3)

Class actions were conceived to assure access to justice, to generate litigation efficiency, and to promote judicial economy. Rule 23 is designed to do the same. It operates to achieve the above ends when the usual range of joinder

options is unlikely or less likely to do so. As this Court has recognized in applying the Rule's superiority requirement in cases like this one, "individual consumer class members have little interest in 'individually controlling the prosecution or defense of separate actions' because each consumer has a very small claim in relation to the cost of prosecuting a lawsuit. Thus, from the consumers' standpoint, a class action facilitates the spreading of the litigation costs among the numerous injured parties and encourages private enforcement" of consumer protection laws. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004) (quoting Fed. R. Civ. P. 23(b)(3)(A)); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

The presumption underlying Rule 23 is that under appropriate circumstances, class actions are a valuable and positive procedural invention. Yet all too often the standards for certifying a class action in federal court are treated as a minefield of complexities design to thwart certification, as if the class action is a highly disfavored joinder device. Courts need to step back from that precipice and consider that Rule 23 is part of system of rules designed "to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

Rule 23, therefore, should be interpreted purposively to advance the justice mission of the federal rules.

The focus of this particular certification battleground is on the familiar prerequisites of Rule 23(a)(1)-(4) (numerosity, commonality, typicality, and adequacy of representation) and equally familiar type-based standards of Rule 23 (b)(3) (predominance and superiority), as they both operate in the context of bifurcated and limited discovery. The critical inquiry is whether there is a common question of law or fact shared among the named plaintiffs and the members of the proposed class (commonality and typicality) and whether any such common question predominates over those of a more individualized nature.

There are two common questions in this case: whether the shingles manufactured by OC and sold by it during the relevant time frame suffered from a design defect that made them prone to failure, and whether OC misrepresented the durability of those shingles. These two questions are also central to the case, as every claim by every party or proposed class member rises and falls on the resolution of these questions.

The Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), instructs that commonality is established when there is a "common contention" that is "capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims

in one stroke." *Id*. at 2551. In other words, the determination of commonality turns not simply on whether all of the class members present the same question, but on whether the common question they do present will yield a common answer for each of them. *See also Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486-87 (3d Cir. 2015). The two common questions described above (design defect and misrepresentation) easily satisfy this standard, as the answer to each is either a universal yes or a universal no. Either the shingles suffer from a design defect or they don't. Either OC misrepresented the durability of the shingles or didn't.

In accord with the decision in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), the two common questions described above, predominate "over any questions affecting only individual members." As the Court in *Amgen* explained, when the resolution of a common question against the plaintiff would render all other issues in the case superfluous, that common question predominates as a matter of Rule 23(b)(3). "[T]he failure of proof on the [common question] would end the case for one and for all; no claim would remain in which individual…issues could potentially predominate." *Id*. at 1196. In the immediate case, a resolution of common questions against the plaintiffs or the proposed class would "end the case for one and all." Those questions, therefore, predominate over all other derivative questions, i.e., those questions that would arise only if the common questions were resolved in the plaintiffs' favor.

The district court, relying on its interpretation of the evidence gathered during limited discovery, attempted to circumvent the logic of *Amgen* by making negative findings of fact on the merits of the two common questions described above. JA at 000153-000157. While it is sometimes necessary for a court to delve into the merits of a claim in the process of certification—for example, to determine if the claims of class members satisfy the commonality standard—"Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S. Ct. at 1194-1195. As shown above, the question of predominance in this case can be and ought to be established under the authority of *Amgen*. The *Amgen* Court was unequivocal: "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* at 1191. The district court's approach to the contrary was an abuse of discretion.

IV. CONCLUSION

The district court's application of Rule 23 is fundamentally at odds with the philosophy of the Federal Rules and their intended mission to promote "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. It frontloads the merits and discards the case before it can be fully

developed. In essence, the district court opinion transforms a motion for certification into a motion for summary judgment. This treats the Federal Rules as independent obstacle to litigation process. But the Federal Rules must be read as outlining a system of procedure that is holistic and design to give each case its rightful and thorough consideration.

It is true that this more aggressive approach to access of justice might promote efficiency, help clear the docket, and provide solace to a wide array of institutional defendants. But judicial efficiency is only a legitimate value to the extent that it advances the project of justice; and a clear docket is not necessarily a just one.

The district court's reading and application of Rule 23 provides a crude method through which to dispose of a case, for it exalts case management considerations and the formality of procedure over substantive rights, and it does so without consideration of countervailing costs and consequences. The standard imposed by the district court is also in deep tension with the judicial obligation to provide a forum for the vindication of individual claims of right and with our constitutional commitment to the rule of law. Thus, the district court's ruling demands reversal.

Dated: October 5, 2016

Respectfully submitted,

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COMBINED CERTIFICATIONS

BAR MEMBERSHIP

Pursuant to Third Circuit L.A.R. 28.3(d), I, Michael J. Quirk, certify that I am a member of the Bar of this Court, having been admitted on January 30, 2003.

WORD COUNT AND TYPEFACE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) because it contains **2,875** words, excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

2. This Brief complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionately-spaced typeface using Microsoft Word in 14-point Times New Roman font.

IDENTICAL COMPLIANCE OF BRIEF AND VIRUS CHECK

Pursuant to Third Circuit L.A.R. 31.1(c), I certify that the foregoing E-Brief and the hard copies of the Brief have identical text. I also certify that a virus detection program—Symantec Norton Anti-Virus (2008 version)—was run on the file and that no virus was detected.

Dated: October 5, 2016

By: /s/ *Michael J. Quirk*
Counsel for Amici Curiae

CERTIFICATION OF SERVICE

I hereby certify that on October 5, 2016, I electronically filed the foregoing Brief of *Amici Curiae* Professor Simona Grossi, *et al.* with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that seven (7) paper copies of the foregoing Brief of *Amici Curiae* shall be filed by hand delivery to the Office of the Clerk, United States Court of Appeals for the Third Circuit, within five days of the date of electronic filing of the Brief.

Dated: October 5, 2016

By: /s/ *Michael J. Quirk*
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