No. 14-4184

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GINA GLAZER AND TRINA ALLISON,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

WHIRLPOOL CORPORATION,

Defendant-Appellee.

On Appeal from the United State District Court
for the Northern District of Ohio
D.C. No. 1:08-wp-65000

BRIEF OF APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, Appellants make the following disclosure:

1. Are Appellants a subsidiary or affiliate of a publicly-owned corporation?

   No.

2. Is there a publically-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

/s/ *Jason L. Lichtman*
Jason L. Lichtman

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1332, 1441, and 1453. The District Court entered final judgment on October 31, 2014. Judgment, R. 491, Page ID # 36774. This Court therefore has jurisdiction under 28 U.S.C. § 1291. Appellants appealed on November 24, 2014. Notice of Appeal, R. 499, Page ID # 36854-57.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument because it will afford the parties the opportunity to address any questions the Court may have about the voluminous record.

INTRODUCTION

The jury in the bellwether Ohio trial below wasted little time finding that certain of Defendant-Appellee Whirlpool Corporation's ("Whirlpool") front-load washers ("Duets") are not defective. Not because the Duets are *not* defective—long before this litigation commenced, Whirlpool's own engineers concluded that they *are* defective due to common design features that permit mold to accumulate in parts of the washers consumers cannot see or clean. And not because Whirlpool put on a compelling—or, really, any—defense of that design at trial; it did not, instead attacking the consumers who purchased the washers, their experts, and their counsel in ways that plainly violated court orders. Rather, a series of legal errors by the District Court, coupled with its acquiescence in Whirlpool's repeated violation of its prior orders, led to a defense verdict despite the overwhelming evidence that the Duets are defectively designed and unmerchantable.

First, the evening before trial, the District Court inexplicably—and without explanation—issued a single-sentence ruling requiring Appellants to prove that each of the twenty Duet models included in the Class is defective. That holding cannot be reconciled with this Court's holding on appeal of class certification that

Appellants did *not* need to "prove liability as to each separate model" but rather had shown that they could do so as to all Duets "in one stroke."[1]

It also sharply departed from the District Court's own holding just one month earlier in its order denying decertification and modifying the Class, based on detailed factual findings, to limit it to the twenty Duet models indisputably sharing the same alleged design flaws. Indeed, when denying Whirlpool's motion for summary judgment, the District Court explained that "a jury [would] resolve 'in one stroke' the question of whether there exists a universal design defect across all washing machine models" such that "Plaintiffs' design defect claim succeeds or fails holistically for every Duet model in the class."[2]

The District Court's eve-of-trial ruling greatly expanded Appellants' burden of proof, causing severe prejudice. Over the course of years of litigation, and in light of the District Court's and this Court's holdings, Appellants marshaled their proof to establish the defect in the Duets as a group based upon two key and interrelated design flaws—honeycombed tubs and crosspieces with cavities that gather moisture and debris that lead to mold growth—unquestionably shared across all twenty models. Appellants did not do so for each iteration of the twenty

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[1] *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 849, 855 (6th Cir. 2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)), *cert. denied*, 134 S. Ct. 1277 (2014).

[2] S.J. Order, R. 391, Page ID # 26785 (citations omitted).

models individually, precisely because they are all equipped with the same tubs and crosspieces that comprise the defect. While some models incorporate *other* variations in design elements, this Court and the District Court found based on substantial evidence that those were immaterial for purposes of a classwide trial. The District Court's sudden shift on this issue left Appellants without proof critical to proving their claims. In simplest terms, their testifying engineering expert inspected only seven of the twenty models in the Class and, because all twenty shared the identical alleged design flaws, opined that all twenty are defective. Whirlpool immediately took advantage of the District Court's ruling, making Appellants' expanded burden of proof a central focus of its trial presentation.

In a second critical error (like the first, found in a single-sentence order the evening before trial), the District Court excluded all of the substantial evidence that the mold that grows in Duets poses a risk to human health. That evidence included internal Whirlpool documents showing its own engineers' concerns that the moldy Duets would make them sick, and Whirlpool's knowledge of the health risk to consumers, as well as expert testimony from a world-renowned microbiologist regarding the same. Such evidence is plainly relevant to the question before the jury of whether the Duets are defective and fit for their ordinary purpose.

The third reversible error came during the trial itself, when the District Court permitted a trial about the design of washers to turn into a referendum on plaintiffs

and plaintiffs' lawyers and devolve into allegations of ginned-up litigation. Whirlpool made bad-faith allegations that family members of two testifying consumers would personally profit from a verdict, made repeated remarks concerning the personal wealth of one named Plaintiff (including opening the trial by stating that the jury would learn that "Porsches were her car of choice"), and made more than eighty references—each more dripping with disdain than the last—to class action or plaintiff lawyers. All this notwithstanding the District Court's express *in limine* rulings barring such prejudicial tactics.

Any of the above errors independently justify remand for a new trial.[3] Collectively, Appellants respectfully submit that they compel it. Reversal by this Court is of particular import because this was a bellwether trial, the first of many more to come.

STATEMENT OF THE ISSUES

1. Did the District Court err in holding, and instructing the jury, that it could not find for Appellants unless it determined that Appellants separately proved that each of the twenty models in the Class is defective?

[3] There is a fourth error, addressed below, relating to application of the discovery rule. While it did not come into play because the jury did not get to that issue, Appellants raise it now given that this was a bellwether trial and so that in the event of remand, it can be correctly applied.

2. Did the District Court err by: (a) excluding evidence that the Duets pose a risk to human health; and (b) dismissing Appellants' Ohio failure-to-warn claim based on a holding that the claim requires a health or safety defect and a summary finding that the defect here presented no health or safety issue as a matter of law?

3. Did the District Court err by permitting Whirlpool to appeal to prejudices against plaintiffs and plaintiffs' lawyers—and to make unfounded attacks on consumers and their experts and counsel—on grounds that plainly violated court orders?

4. Did the District Court err in reversing its own prior holding and directing a verdict for Whirlpool on the applicability of the discovery rule?

STATEMENT OF FACTS

A. Prior to Litigation, Whirlpool Concludes the Duets Have a Design Defect.

1. Whirlpool Admits the Duets Present the "Ideal Environment for Bacteria and Mold."

Long before this litigation, Whirlpool engineers and scientists concluded that the Duets suffer from a major design flaw: they present the "ideal environment for bacteria and mold to fl[o]urish." 6/24/04 New Meeting Request, R. 518-4, Page ID # 37063; *see also* 10/26/04 Meeting Minutes, R. 518-11, Page ID # 37084

("[The Duets] provide a nearly perfect condition for both fungi and bacteria growth").[4] This bacteria and mold frequently lead to what Whirlpool characterized as "malodor." Presentation, R. 518-96, Page ID # 38337; *see also* 2/5/08 E-mail, R. 518-33, Page ID # 37325 (stating that the machines "smell like shit"). Whirlpool concluded that this defect was not limited to particular models, and that it continued in all models throughout the Class period. 10/26/04 Meeting Minutes, R. 518-11, Page ID # 37084 ("In general: Biofilm is an issue we see globally on multiple washer platforms. It is **not only** an issue which we have in one region and it is not linked to one platform only!"); 9/22/04 Biofilm Presentation, R. 518-7, Page ID # 37074 ("Problem … [i]n all Whirlpool HE Washer Platforms"); 7/25/07 Presentation, R. 518-26, Page ID # 37229 (highlighting the continuing need for "smooth tub backs").

Indeed, Whirlpool's internal pre-litigation files contain a treasure trove of documents showing that Whirlpool knew its Duets were defective and failed to meet consumers' expectations. One, for example, stated:

> Most high efficiency washer owners are surprised to learn that they need to wash their washer once a month in order to prevent and remove odor-causing residue. First of all, it seems counterintuitive that a washer would need washing. Secondly, top load washers never needed to be washed. Thirdly, odor-causing residue is generally not visible and only detected by smell.

[4] "R." refers to the docket entry at which the cited document was filed in the District Court. "Tr." refers to the trial transcript.

3/08 Brand Book Presentation, R. 518-46, Page ID # 37463.

Whirlpool adopted the term "biofilm" for the bacteria, mold, and other fungi that accumulates within Duets, and found that biofilm "spreads rapidly and is difficult to stop." 1/24/05 Presentation, R. 93-16, Page ID # 2239. While Whirlpool observed that "odor-causing residue is generally not visible" (3/08 Brand Book Presentation, R. 518-46, Page ID # 37463), it is worth noting that the inside of Duets where consumers cannot see is often filthy, as reflected in this image of a tub Whirlpool showed to Procter & Gamble while enlisting its help to try to mitigate the defective design:

6/5/06 Presentation, R. 518-54, Page ID # 37507.

2. Whirlpool Convenes an Expert Task Force That Concludes the Duets Are Improperly Designed.

After concluding that a remarkable one-third of owners experienced issues with odor—"35% of current Duet owners have already called" (2/14/05 Memo, R.

518-117, Page ID # 38631)—Whirlpool assembled an expert task force of engineers from the United States and Germany. It found that the mold problems stem from basic design flaws:

- "Root causes are: limitations in the design of the machine." 4/11/05 Presentation, R. 518-62, Page ID # 37711.
- "Any low water flow or area which allows pooling of water, soils, and detergent components appears to be the initial sites for problems. The Access' webbed tub structure appears extremely prone to water and soil depositions. Aluminum basket cross-bar appears extremely susceptible to corrosion with biofilm." 10/26/04 Meeting Minutes, R. 518-11, Page ID # 37084.
- "As both a biologist and a chemist this problem is very tro[u]bling in that we are fooling ourselves if we think that we can eliminate mold and bacteria[] when our HA wash platforms are the ideal environment for molds and bacteria[] to fl[o]urish." 6/24/04 New Meeting Request, R. 518-4, Page ID # 37063.
- "Root cause prevention requires basic design changes …." 2/16/05 Presentation, R. 518-34, Page ID # 37334. For this reason, it is "necessary to make basic design changes on all existing FL platforms." 2005 Presentation, R. 518-16, Page ID # 37107.

The task force tried to do the right thing, urging senior management "to consider stopping the release" of additional Duets to give Whirlpool time to modify "the tub design" to "eliminate" areas that "ultimately serve[] as the nucleation sites for mold and bacteria growth." 10/18/04 E-mail, R. 518-9, Page ID # 37080. The task force emphasized that "the long term solution must be that our washing machines start clean and stay clean. *This will require design changes*." 3/2/05 E-mail, R. 518-36, Page ID # 37340 (emphasis added).

3. Whirlpool's Own Engineers Express Concerns About the Health Risks Posed by the Mold, and Whirlpool Learns That Consumers Are Concerned Too.

While the potential adverse health effects of mold accumulating inside hidden parts of a washing machine may be obvious, Whirlpool's documents provided ample confirmation: Whirlpool's own engineers feared for their health as a result of working with the moldy washers. As one expressed to management: "I cannot bring washers into the engineering lab that have mold, biofilm, or smell like shit. There are alot [sic] of people working in that room and they've made it clear that they do not want to get sick." 2/5/08 E-mail, R. 350-1, Page ID # 23522.

The engineers' concerns were not misplaced; indeed, "numerous consumers complain[ed] of breathable air issues related to the repair person physically scrubbing the washer in their home where mold spores can become airborne." 3/8/04 E-mail, R. 110-4, Page ID # 4220. Whirlpool identified "respiratory allergens" and "opportunistic pathogens" in Duet mold that can pose a "real & perceived" risk to "human safety." 2/21/05 Presentation, R. 379-5, Page ID # 2595.

4. Whirlpool Ignores the Task Force and Attempts to Profit from the Defect.

Rather than making the recommended design changes, which would have required costly retooling of production lines, Whirlpool decided to profit from the defect by developing and selling a product it branded "Affresh," that Whirlpool

marketed as the solution to the mold and odor problems in front-load washers (that is, if consumers paid Whirlpool an additional $235 for the product over the expected life of their machines).[5] But in pre-litigation engineering documents as late as mid-2007, Whirlpool scientists concluded that Affresh was *not* the solution: only design changes—elimination of the honeycombed tubs and crosspieces with cavities—could solve the mold problem. *See* 7/25/07 Presentation, R. 518-26, Page ID # 37229 (admitting that only "a combination of AFFRESH with machine modifications will offer the complete solution" to bacteria, mold, and fungus in Duets); 9/14/06 Presentation, R. 518-39, Page ID # 37360 ("Tub rear wall should be smooth.… Drum rear wall should be flat.… The cross piece itself should have a profile as free from ribs and cavities as possible. The closed surface facing the tub should be smooth.").

B. Whirlpool's Former Director of Laundry Technology Confirms the Duets Are Defective.

Appellants presented the jury with the expert testimony of Dr. R. Gary Wilson, a 23-year Whirlpool engineer and its former Director of Laundry Technology. He opined on the same core engineering flaw that Whirlpool itself identified: the back wall of the tub and the aluminum crosspiece (the "bracket")

[5] The District Court precluded Appellants from introducing any evidence of Whirlpool's revenues or profits from Affresh, evidence that confirmed the widespread nature of the mold problem. M.I.L. Order, R. 426, Page ID # 30798.

contain physical cavities that trap and collect water and debris, permitting mold, fungus, and other bacteria to thrive. Tr. 265-69, R. 435, Page ID # 31143-47. Dr. Wilson testified that this design—present in all twenty models—causes the mold problem. Tr. 318-21, R. 435, Page ID # 31196-99 (these models share "the common defect, those cavities"); *see also* Tr. 321-22, R. 435, Page ID # 31199-200 (explaining that aesthetic variations among the models did not address the defect). Whirlpool's corporate representative confirmed that all twenty models in the Class are equipped with one of two tub designs (Access or Horizon)[6] and one of three crosspieces, all with pronounced cavities. Tr. 2496-97, R. 459, Page ID # 34715-16.[7]

Instead of engaging the substance of Dr. Wilson's engineering conclusions, Whirlpool accused him of bias:

> Q. Now that you're spending all your time trying to help lawyers win their case rather than helping a company with an engineering problem, you get paid $500 an hour instead of $175, isn't that right?

[6] The Access and Horizon tub designs are so similar that during trial two different Whirlpool witnesses misidentified a Horizon tub as an Access. Tr. 1051, 1073, R. 442, Page ID # 31952, 31974 (Hardaway); Tr. 3129, R. 470, Page ID # 35679 (Taylor).

[7] Later models that finally incorporated a smooth tub and smooth crosspiece, including the Sierra and Alpha models, were excluded from the Class in the District Court's order modifying the Class definition precisely because they do not share the same alleged defective design as the twenty that remained. Class-Redefinition Order, R. 366, Page ID # 24324-27, 24332-43.

Tr. 354, R. 435, Page ID # 31232. In closing, Whirlpool even claimed Dr. Wilson had an ax to grind as a former Whirlpool employee: "[H]e'll go to pretty far lengths to stick it to his old employer. He was not some disinterested party here. Something's been gnawing at him since he left …." Tr. 3646, R. 488, Page ID # 36684. This claim is not only false, it violated the parties' pretrial stipulated agreement on this issue. *See* Stipulation Concerning Testimony of Dr. R. Gary Wilson, R. 405, Page ID # 28385.

* * *

Rather than curtailing Whirlpool's unfounded attacks on Dr. Wilson, the District Court joined them. After Dr. Wilson finished testifying, the District Court stated: "Yes, there is a God." Tr. 648, R. 436, Page ID # 31526. Commenting on another witness, the court stated: "Thank God she is not Dr. Wilson." Tr. 726, R. 436, Page ID # 31604. When Appellants objected, the court issued a milquetoast instruction to the jury that could not possibly undo the prejudice. *See* Tr. 801, R. 439, Page ID # 31687 ("I made a couple comments about Dr. Wilson. Please don't take that as relating to any of his credibility in this case. It is just to lighten the mood.").

The District Court treated Anthony Hardaway, the only current or former Whirlpool representative who testified at trial, in a markedly different manner. Working full-time for Whirlpool as a paid consultant on this litigation for the last

five years, Hardaway spent over a month meeting with Whirlpool's lawyers, thirty to forty hours per week, to prepare his testimony. Tr. 1009-13, R. 442, Page ID # 31910-14. During a lunch break in the midst of his testimony, he was seen laughing and joking with jurors in the courthouse cafeteria. Tr. 1399, R. 447, Page ID # 32391. Appellants brought this to the District Court's attention and moved for a mistrial, pointing out that Hardaway was a key Whirlpool witness who sat at Whirlpool counsel table during opening statements. Tr. 1399-1401, R. 447, Page ID # 32391-93. The District Court did not question or admonish the jurors or Hardaway, and denied the motion summarily. *Cf. Hobson v. Wilson*, 737 F.2d 1, 48 (D.C. Cir. 1984) (noting that "any communication link between the jury and interested parties" may "subtly create empathy" and "thus potentially contaminate[] the controlled environment irreparably"), *cert. denied*, 470 U.S. 1084 (1985); *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535 (4th Cir. 1986).

C. Consumers Testify to Their Experience of the Defect.

1. Numerous Consumers Testify That the Duets Are Defective.

At trial, both Plaintiffs and several additional consumers shared their first-hand experiences with the Duets. The first consumer to testify was Tracy Cloer, who told the jury that she and her family "started smelling a very horrible, horrible, foul smell on our clothes" washed in a Duet. Tr. 678, R. 436, Page ID # 31556.

She changed detergents, added bleach, consulted the user's manual—but nothing worked. Tr. 677-78, 690, R. 436, Page ID # 31555-56, 31568. Whirlpool's cross-examination centered on the Cloers' decision to sue: "You came across a lawyer website in Nashville? … [Y]ou are here because your lawyers asked you to come." Tr. 717, 725, R. 436, Page ID # 31595, 31603.

Other consumers testified to similar experiences. Class representative Trina Allison tried running empty bleach cycles: "It helped for … probably four or five loads, and then it would go back to normal." Tr. 815, R. 439, Page ID # 31701. Though Allison "religiously" followed Whirlpool's advice, the recommended steps proved ineffective—just "masking the problem." Tr. 823, 831-32, R. 439, Page ID # 31709, 31717-18.[8]

2. Whirlpool Makes Unfounded and Improper Attacks on the Consumers.

Whirlpool's cross-examination of testifying consumers focused on Plaintiffs' attorneys, class actions, and false claims of improper monetary motive. Cross-examining one witness, Whirlpool alleged—falsely—that a lawyer in her

[8] Despite acknowledging that Allison's machine had noticeable mold deposits at a 2012 inspection (Tr. 451, R. 435, Page ID # 31329), Whirlpool's counsel blamed Allison for the buildup on the grounds that she did not do all the scrubbing, bleaching, and other maintenance that Whirlpool advised. *E.g.*, Tr. 874-76, 891, 894-96, R. 439, Page ID # 31760-62, 31777, 31780-82. Allison explained this was not feasible because her husband was hospitalized and she was caring for her family at the time. Tr. 805, 891, R. 439, Page ID # 31691, 31777.

family would receive kickbacks if this case were successful. Tr. 1616-23, R. 448, Page ID # 32608-15. Whirlpool also falsely insinuated that the father of one Plaintiff, Glazer, was being paid by class action attorneys for her participation in this case. Tr. 1736-43, 1774, R. 448, Page ID # 32728-35, 32766; *cf.* Tr. 984, R. 439, Page ID # 31870; *see also* Tr. 3653, R. 488, Page ID # 36691 ("She and her father were already consulting with the class action lawyers."). And Whirlpool opened trial by announcing that the other Plaintiff, Allison, was an out-of-touch fat cat: "[s]he took up sports car racing as a hobby. Porsches were her car of choice." Tr. 217, R. 434, Page ID # 31095.

To the extent it defended the Duets at all, Whirlpool did so only by blaming consumers for not carrying out all the extra maintenance steps Whirlpool recommended—post-sale—to try to mitigate the problem (such as paying Whirlpool for Affresh). *E.g.*, Tr. 186, R. 434, Page ID # 31064 (arguing "it is America, you know, it is [consumers'] right, they don't have to pay attention to the Use and Care Guide."). These assertions were contradicted by consumers' testimony that they followed Whirlpool's instructions and by Whirlpool's admissions prior to litigation that consumer behavior could not solve the problem. *E.g.*, 6/24/04 New Meeting Request, R. 518-4, Page ID # 37063 ("Consumer habits are of little help since mold (always present) fl[o]urished under all conditions"); *id.* ("It occurs with both HE and regular detergents. It re-occurs with hot wash/regular

bleach cleanout cycles. It re-occurs after service call cleanouts."); 7/25/07 Presentation, R. 518-26, Page ID # 37229 (admitting that even the product Whirlpool created to profit from its own defect, Affresh, would only solve the bacteria and mold problems if combined with basic design modifications—"i.e. smooth tub backs").

STATEMENT OF THE CASE

A. The Evening Before Trial, the District Court Rejects This Court's Holding That Appellants Were Not Required to Prove Liability Separately for Each Washer Model.

1. Prior Appellate Proceedings.

This Court twice considered this case prior to trial, and, in parallel litigation, the Seventh Circuit twice considered similar issues and concurred with this Court's analysis.[9] Of particular relevance to this appeal, this Court held that Appellants would *not* have to "prove liability as to each separate model." *Glazer II*, 722 F.3d at 849. The Court explained:

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[9] *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409 (6th Cir. 2012) ("*Glazer I*"), *reh'g en banc denied*, 2012 U.S. App. LEXIS 12560 (6th Cir. June 18, 2012) (no votes for rehearing), *vacated*, 133 S. Ct. 1722 (2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

Butler v. Sears, Roebuck & Co., 702 F.3d 359 (7th Cir. 2012) (Posner, J.) ("*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).

> According to Whirlpool, the plaintiffs must prove liability as to each separate model—a task that would defeat the class action prerequisites of commonality, predominance, and superiority…. Whirlpool claims that commonality is defeated because the Duets were built over a period of years on two different platforms, resulting in the production of twenty-one different models during the relevant time frame. While the trial evidence may concern different Duet models built on two different platforms, the common question of whether design defects cause mold growth remains ....

Id. at 849, 854.

2. The District Court Reaffirms that Appellants' Claims Succeed or Fail Holistically.

Following remand, Appellants moved to narrow the Class to exclude two types of washers. *See* Plaintiffs' Renewed Motion to Modify the Class Definition, R. 330, Page ID # 22712-28. First, Appellants sought to exclude later models that did not share the key alleged design defect (both the tubs and crosspieces had, finally, been smoothed). *Id.* Second, Appellants sought to exclude washers with a "steam" feature because their expert never evaluated a washer with this feature. *Id.* Whirlpool opposed the motion and argued for total decertification. *See* Whirlpool's Opposition to Plaintiffs' Renewed Motion to Modify the Class Definition, R. 351, Page ID # 23802-20; Whirlpool's Memorandum in Support of Its Motion to Decertify the Ohio Class, R. 327-1, Page ID # 18669-710.

The District Court denied Whirlpool's motion and granted Appellants' motion in part, modifying the Class to exclude the late model washers with the smooth tubs and crosspieces, but keeping the washers with the steam feature in the

Class on the basis that there was no reason it was relevant. Class-Redefinition Order, R. 366, Page ID # 24312-57.[10] The court later (correctly) characterized the import of its holding in its opinion denying Whirlpool's motion for summary judgment:

> [B]y redefining the class to increase commonality and predominance, the Court has enabled a jury to resolve "in one stroke" the question of whether there exists a universal design defect across all washing machine models. *Whirlpool II*, 722 F.3d at 852 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).… Thus, Plaintiffs' design defect claim succeeds or fails holistically for every Duet model in the class.

S.J. Order, R. 391, Page ID # 26785 (docket citations omitted). Critically, this holding was not based on mere allegations; it was a factual finding proven by *evidence*: "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3) …. Plaintiffs have carried this burden." Class-Redefinition Order, R. 366, Page ID # 24356 (quotation marks and citation omitted).

[10] The District Court found that steam should not make a difference to liability because Duets "with the steam cycle otherwise share the alleged essential common design defect (that is, plastic tubs and/or metal brackets with crevices) …." Class-Redefinition Order, R. 366, Page ID # 24344. That is consistent with Whirlpool's marketing of steam as a way to reduce wrinkles in clothing. *E.g.*, Tr. 2498, R. 459, Page ID # 34717 (Whirlpool's corporate representative testifying that "steam itself did not eliminate biofilm …. The purpose of the steam function was for improved cleaning of the clothes").

3. On the Eve of Trial, the District Court Issues a One-Sentence Order Requiring Appellants to Prove That Duets Are Defective *Model by Model*.

Notwithstanding this Court's and its own prior rulings, the District Court summarily ruled the evening before trial 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." Order on Scope of Proof, R. 427, Page ID # 30800 (emphasis in original); *contra Glazer II*, 722 F.3d at 849 (holding that Appellants were *not* required to "prove liability as to each separate model"). The District Court later instructed the jury to the same effect over Appellants' objections. Tr. 3478, 3481, R. 488, Page ID # 36516, 36519; Trial Brief, R. 392, Page ID # 26820-24; Supp. Trial Brief, R. 400, Page ID # 27888-903; Reply on Supp. Trial Brief, R. 411, Page ID # 28848-51; Opposition to Renewed Decertification Motion, R. 477, Page ID # 36127, fn. 3.

In other words, the District Court held that Appellants must prove liability separately for each model, including the steam models Appellants argued should not be part of the Class because there was no record evidence concerning the efficacy of the steam feature.

B. The District Court Eliminates Health Risk from the Case.

1. Without Explanation, the District Court Excludes Evidence of the Health Risks Posed by the Duets.

In a single-sentence order, the District Court granted Whirlpool's motion to exclude evidence that the mold that accumulates in Duets poses a health risk. M.I.L. Order, R. 426, Page ID # 30799. Because such evidence tends to show that the Duets are defective and unmerchantable, Appellants moved for reconsideration and made an offer of proof under Federal Rule of Evidence 103. In addition to the documents showing Whirlpool's own internal concerns about health risk, Appellants' offer of proof included expert testimony and citations to secondary medical literature. *See* Plaintiffs' Motion to Reconsider *in Limine* Ruling with Respect to Health Risks and Offer of Proof, R. 450 & R. 450-1, Page ID # 33048-70.

The District Court denied Appellants' motion in another one-sentence order. Reconsideration Denial, R. 464, Page ID # 34988. Consequently, neither Appellants' experts nor their counsel could mention health risks in front of the jury, and all Whirlpool documents mentioning such risks—including those revealing its own engineers' health fears based on the specific knowledge that the Duets harbored "opportunistic pathogens" that threatened "human safety"—were redacted. *Compare, e.g.*, 2/21/05 Presentation, R. 379-5, Page ID # 25953 (unredacted Whirlpool document), *with* R. 518-58, Page ID # 37603 (same

document redacted for trial); *compare also, e.g.*, 2/5/08 E-mail, R. 350-1, Page ID # 23522 (unredacted Whirlpool document), *with* R. 518-33, Page ID # 37325 (same document redacted for trial).

2. The District Court Grants Summary Judgment on the Failure-to-Warn Claim.

Prior to trial, the District Court granted summary judgment for Whirlpool on Appellants' common-law claim for failure to warn. It held that this claim could be maintained only if Whirlpool failed to warn about a product defect that presented a safety risk, and then summarily concluded in passing that "propensity for mold growth is not a safety defect …." S.J. Order, R. 391, Page ID # 26790-96. The District Court did not explain how that could be true as a matter of law, a failure difficult to reconcile with this Court's holding on appeal that "[s]uccess on the negligent failure-to-warn claim depends on whether Whirlpool had a duty to warn consumers about the propensity for mold growth in Duets and breached that duty." *Glazer II*, 722 F.3d at 853.

C. The District Court Grants Certain of Appellants' Motions *in Limine*, Then Fails to Enforce Them.

1. The District Court Orders Whirlpool Not to Refer to One Class Representative's Wealth.

Shortly before trial, Whirlpool revealed that it had combed through the named Plaintiffs' social media postings and planned to introduce evidence that one, Trina Allison, liked expensive cars (Porsches), had a swimming pool, bought

nice dresses for her daughter, and took a vacation in Hawaii. *See* Letter, R. 401, Page ID # 28025.

Appellants asked the District Court to bar Whirlpool from referring to Allison's wealth or income because such evidence has no independent probative value, yet carried the potential for serious prejudice. The District Court granted the motion in part, and held that the issue of Allison's wealth could only be used for impeachment. M.I.L. Order, R. 426, Page ID # 30796.

Whirlpool ignored this order from the outset. At the end of his opening statement, Whirlpool's counsel played videotaped testimony regarding Allison's Porsches. Tr. 216-17, R. 434, Page ID # 31094-95. Appellants objected to no avail. Tr. 217, R. 434, Page ID # 31095. Whirlpool brought up Porsches over and over again in cross-examining Allison. *E.g.*, Tr. 908, R. 439, Page ID # 31794 ("It costs money to maintain Porsches, right?"); Tr. 923, R. 439, Page ID # 31809 ("And I want to follow up on, which is the Porsche that your husband bought that he then sold?"); Tr. 911, R. 439, Page ID # 31797 ("And did your husband also buy a 1992 968 Porsche in January of 2008?").

2. The District Court Prohibits Whirlpool from Making Inflammatory Comments About Plaintiffs' Attorneys.

Appellants also requested an order precluding "any references to trial lawyers, attorneys' fees, or gridlocked courthouses." Plaintiffs' Motions *in Limine*, R. 368, Page ID # 24388-89. The District Court agreed: Whirlpool "may

not offer any inflammatory comments regarding Plaintiffs' trial attorneys." M.I.L. Order, R. 426, Page ID # 30796-97.

Whirlpool honored this order, too, only in the breach. Following a voir dire in which numerous prospective jurors—including one who was seated over Appellants' objection and ultimately deliberated (Tr. 118-19, R. 430, Page ID # 30992-93)—condemned plaintiffs' lawyers, class actions, and lawsuits in general, the District Court failed to intercede as Whirlpool's counsel suggested *more than eighty times* (and over repeated objections) that this case was driven by plaintiffs' lawyers trying to get rich. *E.g.*, Tr. 2470, R. 459, Page ID # 34689 (objecting to Whirlpool's repeated "insinuat[ions] to the jury that they shouldn't credit this case because it's Plaintiff's lawyers that brought the case."); *see also* Tr. 2127, R. 455, Page ID # 33254 (objection to comments about plaintiffs' lawyers); Tr. 2396, R. 459, Page ID # 34615 ("I'm objecting to the repetitive mention of lawyers").

D. The District Court Holds That the Discovery Rule Tolls the Statute of Limitations, Then Precludes Consideration of It.

The District Court held on summary judgment that discovery rule tolling was available for Appellants' claims. S.J. Order, R. 391, Page ID # 26801-04. But toward the end of trial, the District Court summarily announced that "the jury may not consider discovery rule tolling." Tr. 2553, R. 463, Page ID # 34818; D.V. Order, R. 482, Page ID # 36359. Both before and after the court's oral ruling, Appellants filed trial briefs discussing why discovery rule tolling was available.

Trial Brief, R. 461, Page ID # 34779-85; Opposition to Whirlpool's Motion for Judgment as a Matter of Law, R. 478, Page ID # 36162-68. The District Court did not explain its sudden reversal on this issue.

* * *

At the close of trial, the jury quickly rendered a verdict for Whirlpool. Verdict, R. 490, Page ID # 36764-68. Appellants concluded that any motion for new trial would be futile given the District Court's rulings and filed this appeal. Notice of Appeal, R. 499, Page ID # 36854-56.

STANDARDS OF REVIEW

The legal correctness of a jury instruction is reviewed de novo. *Jones v. Federated Fin. Reserve Corp*., 144 F.3d 961, 966 (6th Cir. 1998). Evidentiary rulings are reviewed for an abuse of discretion; the application of an incorrect legal standard constitutes such an abuse. *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 997 (6th Cir. 2007). A grant of summary judgment is reviewed de novo. *CenTra, Inc. v. Estrin*, 538 F.3d 402, 412 (6th Cir. 2008). The abuse of discretion standard applies to the question of whether the improper conduct of counsel warrants a new trial. *Cleveland v. Peter Kiewit Sons' Co*., 624 F.2d 749, 756-57 (6th Cir. 1980). The de novo standard applies to issues of Ohio law. *Tolbert v. Ohio Dep't of Transp*., 172 F.3d 934, 938 (6th Cir. 1999).

SUMMARY OF THE ARGUMENT

Appellants respectfully submit that this case should be remanded as a result of three highly prejudicial errors.

First, the District Court erroneously held that Appellants had to prove a defect as to each of the twenty washer models in the Class. This ruling was contrary to law, contrary to this Court's (and the District Court's own) prior ruling, and prejudiced Appellants by vastly expanding the scope of proof on the literal eve of trial.

Second, the District Court abused its discretion when it barred evidence of the health risk posed by the mold that accumulates in Duets because of the defect, and erred in granting summary judgment on Appellants' Ohio failure-to-warn claim.

Third, Whirlpool inflamed the jury with ceaseless comments that the quest for money or an ax to grind (not justice) motivated Plaintiffs, their counsel, their experts, and testifying consumers. These comments are improper, and plainly violated pretrial orders, but the District Court refused to stop them despite repeated objections.

Appellants also seek reversal of the District Court's incorrect ruling on application of the discovery rule to toll the statutes of limitations.

ARGUMENT

I. IT WAS PREJUDICIAL ERROR TO HOLD—AND INSTRUCT THE JURY—THAT APPELLANTS MUST PROVE MODEL BY MODEL THAT EACH OF TWENTY MODELS IS DEFECTIVE.

The District Court erred in holding—and instructing the jury—that it could not find for Appellants unless they proved separately that each of the twenty Duet models in the Class is defective. This was particularly inexplicable given this Court's holding that liability could be determined "in one stroke" across these models. *Glazer II*, 722 F.3d at 853, 855 (citing *Dukes*, 131 S. Ct. at 2551). The Court explained, "According to Whirlpool, the plaintiffs must prove liability as to each separate model—a task that would defeat the class action prerequisites of commonality, predominance, and superiority." *Id*. at 849.

As discussed above, the District Court initially adhered to that ruling. In its Opinion and Order five weeks prior to trial, it denied decertification and modified the Class to increase "the precision with which trial of all class members' claims together 'will generate common answers that are likely to drive resolution of the lawsuit.'" Class-Redefinition Order, R. 366, Page ID # 24350 (citing *Glazer II*, 722 F.3d at 852).[11] The District Court's subsequent summary judgment order

[11] At the same time, the District Court *denied* Appellants' pretrial motion to exclude machines with a "steam" feature. *Cf.* Class-Redefinition Order, R. 366, Page ID # 24342 (recognizing that no previous court had ever denied a named plaintiff's request to narrow an already certified class). Appellants made that motion precisely because they lacked evidence specific to the steam feature (which

Footnote continued on next page…

explained, correctly, that as a result of this ruling "Plaintiffs' design defect claim succeeds or fails *holistically for every Duet model in the class*." S.J. Order, R. 391, Page ID # 26785 (emphasis added) (citations omitted).

But the evening before trial, with no new evidence before it, the District Court reversed course, holding in a terse order 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." Order on Scope of Proof, R. 427, Page ID # 30800 (emphasis in original). The District Court repeated that erroneous holding in its jury instructions (Tr. 3478, 3481, R. 488, Page ID # 36516, 36519), over Appellants' objections that a model-by-model analysis was in no way "holistic," by definition could not be done "in one stroke," and would upend the settled law of the case (*e.g.*, Supp. Trial Brief, R. 400, Page ID # 27888-903).

A. The District Court's Requirement of Proof as to All Twenty Models Resulted in Clear Prejudice.

Based on this Court's ruling, and consistent with all of the District Court's pretrial orders, Appellants marshaled their proof—expert and otherwise—to prove the defect across the twenty models based upon the (indisputably) shared design

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Whirlpool never contended prior to litigation had anything to do with mold). Yet the District Court mandated that the Class include the steam machines and held that Appellants were required to prove those washers, too, are defective, or lose as to all.

flaws in all, rather than a defect in each of the twenty Duet models. Appellants' proof in this regard sufficed to defeat Whirlpool's motion for summary judgment with respect to the negligent design and breach of warranty claims. S.J. Order, R. 391, Page ID # 26782-90. And in denying Appellants' own summary judgment motion based on the overwhelming evidence of defect across models, the District Court observed that Appellants' overall proof of that defect was "ardent and robust." *Id.*, Page ID # 26805.

1. The Evidence at Trial Established That All Duets Share the Same Defect.

The evidence at trial came in just as it did on summary judgment, establishing that all twenty Duet models are equipped with honeycombed tubs and crosspieces with cavities that accumulate mold. Dr. Wilson's testimony was straightforward: these models share "the common defect, those cavities." Tr. 318-22, R. 435, Page ID # 31196-200. Whirlpool's corporate representative corroborated the fact that all models in the Class shared those tubs and crosspieces. Tr. 2496-97, R. 459, Page ID # 34715-16.

Whirlpool's internal documents, moreover, disclose high rates of odor complaints and heightened concern about the mold problems well into 2007 and 2008 when the last of the models were built. *E.g.*, 8/4/08 E-mail, R. 518-47, Page ID # 37475 ("Fifty percent of people that own High Efficiency Washer[s] report having an odor problem."); 3/08 Affresh Marketing Material, R. 518-46, Page ID #

37464 ("[U]sing liquid chlorine bleach once a month … does not remove the odor causing residue."); 7/25/07 Presentation, R. 518-26, Page ID # 37229 (conceding that the "complete solution" would only come from "a combination of AFFRESH with machine modifications," including "[r]educed cavities that catch/trap soil & residues i.e. smooth tub backs and non-corrugated hoses").

2. Whirlpool Repeatedly Highlighted the Sheer Number of Models in the Class.

Against the above compelling evidence, Whirlpool emphasized the sheer number of models to the jury. Whirlpool contended that Appellants had to prove not simply that "each one of these 20 models was somehow defective" (Tr. 3671, R. 488, Page ID # 36709), but also that each model was defective *in every year* it was manufactured and, ultimately, that if even a *single washer* in the Class did not have mold or odor, the jury must return a verdict for Whirlpool. Tr. 3677, R. 488, Page ID # 36715 (arguing that Anthony Hardaway's personal Duet "was pristine, no biofilm or mold, barely noticeable, no odors at all."); Tr. 3667-68, R. 488, Page ID # 36705-06 (arguing that Appellants "have to prove that somehow this caused economic harm, not to Ms. Glazer and Ms. Allison, but to 150,000 people" and that for "the overwhelming majority of them," there were "no mold problems, no odor problems").

Whirlpool's cross-examination of Dr. Wilson focused on the fact that he did not inspect every single Duet model in each year of manufacture. *E.g.*, Tr. 490, R.

436, Page ID # 31368 (asking Dr. Wilson to admit that "while there were models of these different numbers produced in these different years, you did not inspect any of those models for those years."); Tr. 491-92, R. 436, Page ID # 31369-70 ("And if it is green in my chart, that indicates that we know those machines existed because they are in the class, but you never looked at one. Okay?"); *see also* Tr. 500-01, 507-10, R. 436, Page ID # 31378-79, 31385-88.[12] Further underscoring this point, Whirlpool's primary jury demonstrative, to which its counsel referred in cross-examining Dr. Wilson, listed all twenty Duet models across *all* their individual years of manufacture. Trial Demonstrative, R. 518-338, Page ID # 43317.

Whirlpool again capitalized on the erroneous "all 20 models" instructions during closing argument. Whirlpool reminded the jury several times that Appellants had "to prove all 20 of those models were defectively designed. That's the law that the Judge has given you."[13] Tr. 3671, R. 488, Page ID # 36709; *accord* Tr. 3677, R. 488, Page ID # 36715 ("I gave serious thought to giving about

[12] Dr. Wilson's response to this line of questioning was not surprising, given the pretrial proceedings (including this Court's decisions): "I know about the plaintiffs' models." Tr. 500, R. 436, Page ID # 31378.

[13] The District Court gave these instructions over Appellants' strenuous objections both before and during trial. *E.g.*, Trial Brief, R. 392, Page ID # 26820-24; Supp. Trial Brief, R. 400, Page ID # 27888-903; Reply on Supp. Trial Brief, R. 411, Page ID # 28848-51; Opposition to Renewed Decertification Motion, R. 477, Page ID # 36127, fn. 3.

a five-minute closing argument, and it was going to be put up the Judge's instruction, they got to prove all 20 models").[14] Whirlpool then reiterated that Dr. Wilson had not personally inspected all twenty models. *E.g.*, Tr. 3674, R. 488, Page ID # 36712 ("[T]here are 13 different Access models. He looked at only seven"); Tr. 3675, R. 488, Page ID # 36713 ("But what about all the other Horizon models? They got to prove all those models are defective. He didn't even look at them"). Whirlpool finished by arguing that Anthony Hardaway's personal Duet, one of the models with the steam feature, "smelled like a spring day"—so "they lose their case." Tr. 3655-57, 3676-77, R. 488, Page ID 36693-95, 36714-15.

B. The District Court's Requirement of Proof as to All Twenty Models Contravened the Law of the Case.

As Whirlpool's trial strategy demonstrates, the District Court's eve-of-trial expansion of the scope of proof went to the heart of the case and was fundamentally unfair. It would be as if the umpire announced right before the World Series that one team's pitcher had to get twenty strikes for a strike-out instead of three. Furthermore, it plainly departed from the law of the case on Appellants' required proof. This Court could not have been more clear that Appellants did *not* have to "prove liability as to each separate model" because that

[14] *See also* Tr. 3675, R. 488, Page ID # 36713 ("But for Plaintiffs to win, they have to prove that all of these newer Access models were defective."); Tr. 3673, R. 488, Page ID # 36711 ("And remember, they have to prove all the models were defective; not some model just from 2005.").

"would defeat the class action prerequisites of commonality, predominance, and superiority." *Glazer II*, 722 F.3d at 849.

Notwithstanding its class certification and summary judgment rulings just weeks before trial, if the District Court ultimately came to believe that "there were large differences in the mold problem among the differently designed washing machines," *Butler II*, 727 F.3d at 798, it should have: (1) further modified the class definition; (2) postponed the trial for supplemental expert work; or (3) "create[d] subclasses," *id.*, to keep the jury from unfairly penalizing one group of consumers on account of circumstances pertaining to another.[15] But the model-by-model ruling was clear error in the absence of an accompanying order designating subclasses on a model-by-model basis to conform to this scope of proof and providing Appellants with notice and the opportunity to designate subclass representatives to meet this new requirement at trial. *See* Fed. R. Civ. P. 23(c); *cf. Glazer II*, 722 F.3d at 854 (indicating that if the District Court decided to create subclasses and grouped them appropriately on a verdict form, the answer to the question of liability "may [have] var[ied] with the differences in design" (citing *Butler I*, 702 F.3d at 361)).

[15] This was particularly true because the District Court mandated the inclusion of certain models of Duets in the Class *over Appellants' objection*.

The District Court implemented none of the above options—and in fact none was necessary because the District Court had defined the Class so as to follow this Court's directive that the claims should "prevail or fall" in unison, based on the substantial evidence of a common classwide defect in the Class representatives' machines. *Glazer II*, 722 F.3d at 858-59 (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013)). But what the District Court could *not* do was precisely what it did: instruct the jury that, contrary to this Court's unambiguous ruling, the jury needed to consider liability separately as to each individual model within a unitary class.

The District Court's incorrect holding and instructions infected—and almost surely predetermined—the verdict, and alone mandate a new trial.

II. THE DISTRICT COURT COMMITTED TWO ERRORS AS A RESULT OF ITS FAILURE TO APPREHEND THE RELEVANCE OF THE HEALTH AND SAFETY RISKS.

The District Court erred by excluding evidence relevant to all of Appellants' claims and dismissed their failure-to-warn claim on the faulty premise that this case does not involve a health or safety risk.

A. The District Court Abused Its Discretion in Excluding Evidence of Potential Health Hazards.

The District Court barred Appellants from presenting evidence that the mold in Duets poses a risk to human health, evidence that directly supports Appellants' claim that they did not get what they bargained for. No one buys a washing

machine expecting it to jeopardize their health. Nor did Whirlpool's engineers want to bear this risk: "I cannot bring washers into the engineering lab that have mold, biofilm, or smell like shit. *There are alot [sic] of people working in that room and they've made it clear that they do not want to get sick.*" 2/5/08 E-mail, R. 350-1, Page ID # 23522 (emphasis added). In addition to having the key italicized language in this document redacted—and thus not shown to the jury (*see* R. 518-33, Page ID # 37325)—the District Court excluded:

> (1) Numerous other statements in Whirlpool's internal records concerning health risks. *E.g.*, 4/26/05 E-mail, R. 379-14, Page ID # 26133 ("The bottom line is a range of potentially very serious fungi and bacteria as well as living parasitic nematodes"); 2/21/05 Presentation, R. 379-5, Page ID # 25953 (Whirlpool made "[s]pecific organism identification" in Duet mold affecting "real & perceived human safety," including "respiratory allergens" and "opportunistic pathogens").
>
> (2) Findings of Appellants' world-renowned microbiologist, Dr. Chin Yang, whom Whirlpool did not challenge under *Daubert*. 10/17/14 Yang Decl., R. 450-1, Page ID # 33066 (Dr. Yang's testing of a number of Duets revealed "[s]pecies of several identified fungi" and bacteria that "are known opportunistic human pathogens."); *id*., Page ID # 33067 (the World Health Organization "concludes that 'there is clinical evidence that exposure to mould and other dampness-related microbial agents increases the risks of rare conditions").

1. The District Court's Orders Are Not Entitled to Deference.

As an initial matter, the usual deference to evidentiary rulings does not apply to the District Court's orders excluding this health risk evidence, for the simple reason that they lack the reasoning necessary to show a proper exercise of

discretion. After Appellants moved to reconsider the *in limine* exclusion, making a detailed offer of proof, the court merely reissued its one-sentence ruling that "Plaintiffs have not claimed health risks and the prejudicial effect outweighs the probative value." *Compare* M.I.L. Order, R. 426, Page ID # 30799, *with* Reconsideration Denial, R. 464, Page ID # 34988.

In fact, Appellants *did* "claim[] health risks": the operative complaint alleges that "the Washing Machines carried with them greater risks of … health hazards than an ordinary consumer would expect …." Third Amended Master Class Action Complaint, R. 80, Page ID # 1641. This is unsurprising—washers that present a risk of causing allergies, asthma, and other respiratory problems are more likely to be defective than washers that do not. That this case is not about personal injuries hardly renders this probative evidence irrelevant. *Cf., e.g., United States v. Certified Envtl. Servs.*, 753 F.3d 72, 90, 96 (2d Cir. 2014) (reversing where the lower court misconstrued the "very broad" definition of relevancy when it excluded evidence going to "a contested issue in this case," leaving the jury "without vital context and corroboration").

Rule 403, moreover, requires a court to provide more explanation of its ruling than a single summary sentence. *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) (explaining that a district court must show that it "exercised [its] discretion, that is, that [it] considered the factors relevant to that

exercise."). Accordingly, this Court has reversed orders that excluded relevant evidence in cursory fashion. *See, e.g.*, *Robinson v. Runyon*, 149 F.3d 507, 511, 515 (6th Cir. 1998) (reversing based on exclusion in a "single terse line" that "did not indicate how the employment application would be unfairly prejudicial"); *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 360 (6th Cir. 1997) (reversing order that failed to "state with any specificity what it found prejudicial").

The utter lack of analysis makes it impossible for this Court to determine whether the District Court even exercised discretion. There is no discussion of why or how the health risk evidence is not relevant to the underlying defect or merchantability, or why this evidence would be unfairly prejudicial.

2. The District Court Should Not Have Excluded the Health Risk Evidence.

Evidence is relevant and admissible so long as it has "any tendency" to make a fact of consequence "more or less probable than it would be without the evidence." Fed. R. Evid. 401. This standard is "extremely liberal." *Dortch v. Fowler*, 588 F.3d 396, 400 (6th Cir. 2009) (citation omitted); *see Runyon*, 149 F.3d at 512 (explaining that a court "may not exclude the evidence if it has even the slightest probative worth."). In reviewing evidentiary orders, this Court must consider the evidence in the light most favorable to its proponent, "maximizing its probative value and minimizing its prejudicial effect." *Koloda v. General Motors Parts Div.*, 716 F.2d 373, 377 (6th Cir. 1983); *see also Sutkiewicz*, 110 F.3d at 360.

A trial court abuses its discretion under Rule 403 if it precludes a party "from the full opportunity to present her case to the jury." *Runyon*, 149 F.3d at 515; *Sutkiewicz*, 110 F.3d at 360.

a. The Evidence Is Probative of These Claims.

The exclusion of health risk evidence denied Appellants a full opportunity to present their case. Just as the reports of bad smells demonstrate the presence of mold and the structural shortcomings of the Duet design, so the mold-related health risks derive from, and confirm, the defect.

First, a reasonable trier of fact could find that a washing machine that grows potentially toxic pathogens is not of "good and merchantable quality." *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 270 (Ohio 1977) (reciting elements of breach of the implied warranty of merchantability). In this regard, this case is similar to a recent breach-of-warranty case in which the court held that allegations that a diet drug could harm the liver and kidneys supported the legal claim that purchasers "did not get what they paid for" and were therefore entitled to recover their economic loss. *In re Hydroxycut Mktg. & Sales Practices Litig.*, 801 F. Supp. 2d 993, 999, 1008 (S.D. Cal. 2011); *see also, e.g., In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1117 (C.D. Cal. 2008) ("Plaintiffs' claim is straightforward—they allege that they purchased toys that were unsafe and unusable and should get their money

back."). That is the law whether or not particular plaintiffs actually suffered, or even allege, adverse health effects.

Second, the excluded evidence shows that Whirlpool foresaw a "real" risk to its customers' health from the Duet design. 2/21/05 Presentation, R. 379-5, Page ID # 25953; *see* Tr. 3477, R. 488, Page ID # 36515 (jury instructions regarding negligent design). Whirlpool—but not the jury—was aware of the "opportunistic pathogens" and "breathable air issues … where mold spores can become airborne." 2/21/05 Presentation, R. 379-5, Page ID # 25953; 3/8/04 E-mail, R. 110-4, Page ID # 4220. Whirlpool—but not the jury—was aware that "Biofilm is considered a 'pest' by the EPA" and that "[h]uman risk to get ill increases because of insufficient disinfection of laundry process." 2/12/07 Presentation, R. 379-10, Page ID # 26061; 3/22/06 Presentation, R. 379-11, Page ID # 26080.

b. The Evidence Is Not Unfairly Prejudicial to Whirlpool.

Unfair prejudice under Rule 403 "is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial"—otherwise it is not material. For Rule 403 to apply, "the prejudice must be 'unfair.'" *Koloda*, 716 F.2d at 378 (citation omitted); *see also Runyon*, 149 F.3d at 514-15. In general, "unfair prejudice" means a suggestion of decision on an improper or emotional basis. *See* Fed. R. Evid. 403 advisory committee's note (1972).

Whirlpool's only stated concern below was that the jurors might mistakenly think this was a case about physical injuries. *See* Whirlpool's Motions *in Limine*, R. 369, Page ID # 24439 (contending only that the health risk evidence "would confuse the jury as to what this case is really about."). The remedy for that possibility, however, was not exclusion but a curative jury instruction. And the magistrate judge supervising voir dire informed the jurors *on the very first day* that there was no claim for physical injury. Tr. 64, R. 430, Page ID # 30938; *see Washington v. Hofbauer*, 228 F.3d 689, 705 (6th Cir. 2000) (a properly instructed jury is "capable of considering evidence for one purpose but not another." (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987))).

3. The Court's Exclusion of Health Risk Evidence Prejudiced Appellants.

In light of the magnitude of this error and the nature of the excluded evidence, it cannot be fairly said that "the outcome of a trial was not affected by evidentiary error." *Beck v. Haik*, 377 F.3d 624, 635 (6th Cir. 2004), *overruled on other grounds by Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009). Rather, the record shows that the court's evidentiary ruling on health risks stymied Appellants' trial presentation, unfairly giving Whirlpool the upper hand. *Cf. Runyon*, 149 F.3d at 515 ("The absence of even one piece of highly relevant evidence may have made the difference in the jurors' minds").

a. Appellants Were Precluded from Rebutting Key Whirlpool Defenses.

Whirlpool maintained throughout trial that the Duets are not defective because consumers can "easily" clean them and leave their doors open. For example, its counsel argued in closing:

> Cleaning the door seal, that's pretty simple, too. You open it up, you get a little cloth with some bleach and water, and you wipe it up.
>
> * * *
>
> And really, [Appellants' expert] ought to be embarrassed by his claim that these maintenance steps were hard. Leaving a door open is hard? … [N]obody who testified said it was hard ….

Tr. 3644-46, R. 488, Page ID # 36682-36684.

The District Court's *in limine* ruling precluded Appellants from responding by showing that even just performing these "pretty simple" tasks could expose a consumer or her family to health and safety risks. That the court's one-sided ruling was unfair is shown by the fact that Whirlpool's own engineers treated this as a serious concern: "I cannot bring washers into the engineering lab that have mold, biofilm, or smell like shit. There are alot [sic] of people working in that room and they've made it clear that they do not want to get sick." 2/5/08 E-mail, R. 350-1, Page ID # 23522. The jury, however, never got to see the critical second sentence. *Compare* 2/5/08 E-mail, R. 350-1, Page ID # 23522 (unredacted Whirlpool document), *with* R. 518-33, Page ID # 37325 (redacted trial exhibit).

b. Appellants Were Unable to Rebut Whirlpool's Attacks on Dr. Wilson's Credibility.

Appellants' engineering expert testified that he disassembled and inspected contaminated machines. Tr. 249, R. 435, Page ID # 31127. On cross-examination, Whirlpool's counsel mocked photos of those inspections showing Dr. Wilson in protective clothing:

> Q. [Y]ou've got this, all this protective clothing on, and [a Whirlpool employee] is just there, you know, holding the same piece. Right?
>
> A. Yes.
>
> Q. … [I]t was pretty much the case every time … that you and your crew would *all get dressed up in these get-ups*, and [the Whirlpool employee] and his crew would just come in jeans and a sweater and take the machine apart, right?

Tr. 470, R. 436, Page ID # 31348 (emphasis added).

Whirlpool's counsel went further, suggesting Dr. Wilson wore protective gear to be photographed for litigation purposes:

> Q. And when you would go have your picture taken with the gloves on and the coat and the masks, were there also sometimes lawyers present at these inspections?
>
> A. Usually, yes.

Tr. 470, R. 436, Page ID # 31348. The implication was that Dr. Wilson, at the behest of plaintiffs' lawyers, had staged a dog-and-pony show for the cameras.

But the District Court's *in limine* ruling prevented Appellants from presenting Whirlpool's internal conclusions that the "bacterial and fungi

propagation" in contaminated Duets, like those Dr. Wilson inspected, may "increase hygiene risks" and "health risks." 11/14/06 Presentation, R. 379-3, Page ID # 25898. At trial, Dr. Wilson could only say that Whirlpool's company protocol called for the protective garb; he could not allude to the Whirlpool document which explains that "[t]here are alot [sic] of people working in that room and they've made it clear that they do not want to get sick." *Compare* Tr. 615-17, R. 436, Page ID # 31493-95, *with* 2/5/08 E-mail, R. 350-1, Page ID # 23522.

As a result of the erroneous *in limine* ruling, Appellants had to forego some of their most "vital" evidence—and were effectively forced to prosecute the case with one hand tied behind their back. *Koloda*, 716 F.2d at 378.

B. The District Court Erred in Dismissing the Failure-to-Warn Claim.

The District Court's pretrial grant of summary judgment on Appellants' failure-to-warn claim hinged on the same misconception that the health and safety risks from the Duets were irrelevant or nonexistent. *See* S.J. Order, R. 391, Page ID # 26790-96 (finding summarily, as a matter of law, that "propensity for mold growth is not a safety defect"). On the contrary, the evidence set forth above and in Appellants' offer of proof generates, at minimum, triable issues on whether the mold and bacteria that result from the defect create unsafe conditions because of the health risks Whirlpool failed to disclose. *Cf. Estrin*, 538 F.3d at 412 (evidence

at summary judgment must be viewed in the light most favorable to Appellants, with all inferences drawn in their favor).

The District Court's ruling not only overlooked the health and safety evidence related to the defect, it also cannot be reconciled with this Court's recognition that this claim is actionable even without allegations of hazard. Indeed, in stating the elements of failure of warn, this Court indicated that the claim does not require a hazard at all. *Glazer II*, 722 F.3d at 853 (employing the disjunctive "risk *or* hazard" (emphasis added) (citation omitted)). Thereafter, the Court explained that "Ohio law permits ordinary consumers … to bring claims such as … negligent failure-to-warn in order to recover damages for economic injury only," and that under "negligent failure-to-warn ... the plaintiffs need not prove that mold manifested in every Duet owned by class members because the injury to all Duet owners occurred when Whirlpool failed to disclose the Duets' propensity to develop biofilm …." *Id*. at 856-57.

Other cases, too, illustrate that an Ohio failure-to-warn claim does not require a health or safety danger. *See, e.g.*, *Lawyer's Coop. Pub. Co. v. Muething*, No. C-900582, 1991 Ohio App. LEXIS 4500, at *2-3 (Ohio Ct. App. Sept. 25, 1991), *rev'd on other grounds*, 65 Ohio St. 3d 273 (1992) (failure to warn regarding promissory notes prepared using a law book's forms); *Doe v.*

SexSearch.com, 502 F. Supp. 2d 719, 736 (N.D. Ohio 2007) (failure to warn that adult website's members may be under 18).

Thus, the dismissal of the failure-to-warn claim should be reversed on both factual and legal grounds.

III. WHIRLPOOL'S RELENTLESS ATTACKS ON PLAINTIFFS' WEALTH AND CLASS ACTION ATTORNEYS WERE IMPROPER, VIOLATED COURT ORDERS, AND SEVERELY PREJUDICED THE TRIAL.

At every turn, Whirlpool sought to distract the jury from the question of whether the Duets are defective or merchantable. Whirlpool berated individual witnesses for their personal wealth and accused them in bad faith of having family members who would profit directly from this lawsuit. Further, Whirlpool disparaged class action lawyers *more than eighty* times, insinuating that these claims were ginned up solely to enrich attorneys. Permitting this repeated prejudicial behavior was error, and it necessitates reversal.

A. Legal Standard.

It is bedrock law that "appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940). As this Court declared, "It has ever been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice …." *Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 757 (6th Cir. 1980) (citation

omitted). Consequently, "evidence as to the poverty or wealth of a party to an action is inadmissible in a negligence action." *Id.* (citation omitted).

While this Court's "power to set aside [a] verdict for misconduct of counsel should be sparingly exercised," it should be exercised if there is a "reasonable probability that the verdict of the jury has been influenced by such conduct …." *Peter Kiewit*, 624 F.2d at 756 (citations omitted). Among the factors considered by the Court are whether misconduct was "deliberate" or "pervasive," whether it violated the trial court's rulings, and whether the trial court undertook any remedial efforts to "reprimand counsel or to strike the reference from the record." *Igo v. Coachmen Indus., Inc.*, 938 F.2d 650, 653 (6th Cir. 1991).

Of particular relevance here, when an attorney makes "transparently veiled" attempts to suggest that a non-party "fabricated" a meritless claim, the trial court commits reversible error if it fails to stop those attempts. *Pingatore v. Montgomery Ward & Co.*, 419 F.2d 1138, 1142-43 (6th Cir. 1969) (citing *Brown v. Walter*, 62 F.2d 798 (2d Cir. 1933) (Hand, J.)). It is "reprehensible" to suggest that a case has been "trumped up" by a lawyer, as this constitutes an attack on the core right to file suit. *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1130 (10th Cir. 2009) (Gorsuch, J.) (citations omitted).

B. The District Court Condoned Whirlpool's Improper Attacks on Testifying Consumers.

1. The Court Permitted Whirlpool to Falsely Imply That Sylvia Bicknell's Family Received Kickbacks.

Whirlpool's improper behavior was extreme. For example, Whirlpool's counsel suggested, without any good-faith basis, that one witness' son-in-law received an unethical kickback when she joined the litigation:

> Q. Do you know, ma'am, whether as the referring lawyer, the person who referred you to [counsel], do you know whether [your son-in-law] has any arrangement where he would share in legal fees that [counsel] gets for representing the Florida class?
>
> A. I'm shocked. I don't know that.
>
> * * *
>
> MR. CHALOS [at sidebar]: Judge, we've got an issue here. She said she doesn't know anything about her son-in-law getting any kind of fee arrangement. There is absolutely no basis for that.… And he keeps injecting it in the questions.
>
> MR. LICHTMAN: Most importantly, it is not true.

Tr. 1623, 1636-37, R. 448, Page ID # 32615, 32628-32629.

The District Court neither admonished defense counsel nor instructed the jury to disregard this line of questioning. Tr. 1637, R. 448, Page ID # 32629.

2. The Court Permitted Whirlpool to Deride Trina Allison's Wealth.

The District Court ordered Whirlpool not to offer evidence of Plaintiff Allison's wealth because it has nothing to do with whether her Duet was defective. The court allowed for a narrow exception: if she opened the door at trial by

testifying about her delay in buying a new washer and the severity of her washer problems, Whirlpool could then use "non-photographic evidence of wealth to *rebut* Plaintiff Allison's testimony." M.I.L. Order, R. 426, Page ID # 30796 (emphasis added).[16]

Whirlpool ignored this ruling from the start, concluding its opening statement by playing videotaped deposition testimony about Allison's Porsches. Tr. 907-08, R. 439, Page ID # 31793-94. Whirlpool stated:

> [S]he took up sports car racing as a hobby. Porsches were her car of choice. We asked her about that.
>
> (Video playing as follows:)
>
> How many Porsches did you own between June of 2009 and January of 2012?
>
> I can't answer that we've had so many.

Tr. 217, R. 434, Page ID # 31095.

Counsel for Appellants objected the instant it became clear that defense counsel intended to play this video clip. Tr. 216, R. 434, Page ID # 31094. Summoned to sidebar, defense counsel justified his violation of the *in limine* ruling by distorting it: "What you said was that the photographs of the Porsches could not come in …." Tr. 217, R. 434, Page ID # 31095. That was good enough for the

[16] In deposition, Allison testified that she put off buying a new washer because her family chose to prioritize other financial matters. 5/30/13 Allison Dep., R. 402-4, Page ID # 28196-97; *see also* Tr. 904, R. 439, Page ID # 31790.

District Court. *Id.* But Whirlpool did not stop there. The District Court thereafter permitted Whirlpool to cross-examine Allison again and again about Porsches. *E.g.*, Tr. 907-08, R. 439, Page ID # 31793-94; Tr. 911, R. 439, Page ID # 31797; Tr. 923, R. 439, Page ID # 31809.

3. The Court Permitted Whirlpool to Suggest Gina Glazer Was Involved in this Case Because Her Father Profited from Class Action Litigation.

Whirlpool also implied that Plaintiff Glazer joined this litigation because her father worked as an expert witness and received payments from attorneys in the past. Tr. 1735-38, R. 448, Page ID # 32727-30. Appellants objected to this baseless implication: "All we've heard throughout this whole case is plaintiffs' lawyer, plaintiffs' lawyer, plaintiffs' lawyer …." Tr. 1739, R. 448, Page ID # 32731. The District Court again neither admonished defense counsel nor instructed the jury to disregard this inappropriate commentary. Tr. 1740, R. 448, Page ID # 32732 ("All right. How many more questions on this area?").

C. The District Court Condoned Whirlpool's Incessant References to Plaintiffs' Lawyers and Lawsuits.

The court ruled *in limine* that Whirlpool "may not offer any inflammatory comments regarding Plaintiffs' trial attorneys." M.I.L. Order, R. 426, Page ID # 30796-97. But time and again—after a voir dire that revealed widespread animosity toward lawyers and lawsuits—Whirlpool insinuated that this case amounts to a get-rich-quick scheme hatched by unscrupulous lawyers who pulled

the allegations out of thin air. Whirlpool made disdainful, prejudicial references to plaintiffs' lawyers or class action lawyers no fewer than eighty-two times.

1. Many Venire Persons Expressed Antipathy Toward Lawyers and Lawsuits.

Whirlpool's many appeals to prejudice are particularly troubling in the context of the sentiments that prospective (and actual) jurors expressed during voir dire. Juror 9 stated, "I want to say about the lawsuits also … to me, you get all these thousands of people … and then what do you get, 50 bucks and the lawyers get the rest…." Tr. 51, R. 430, Page ID # 30925. Juror 48 agreed:

> I've had stuff sent to me for class action lawsuits. I sent my information back. Sometimes you hear back, sometimes you get $1.80 back. Now, *who is winning? Me that gets $1.80, or the lawyers that get -- look how many lawyers we have here today. You are all getting paid, I'm sure, big bucks to be here.*

Tr. 61, R. 430, Page ID # 30935 (emphasis added).

Jurors 5, 46, and 47 expressed similar sentiments. *See* Tr. 50, R. 430, Page ID # 30924; Tr. 53, R. 430, Page ID # 30927; Tr. 59, R. 430, Page ID # 30933 (suggesting the case was "frivolous…. I don't think it is worthy of being in court, in this court."); Tr. 60, R. 430, Page ID # 30934 (declaring that most class actions are "completely frivolous and a waste of the Court, the system"). And Juror 50, who actually deliberated, said that while he hadn't made up his mind, he thought the case was "a little frivolous" and that he could have a "really hard time" being impartial "based off some of the things that have been said." Tr. 61-62, R. 430,

Page ID # 30935-36.[17]

These individuals are certainly entitled to these views. But their expression demonstrates that Whirlpool's repeated and purposeful violation of the District Court's ruling barring appeals to such prejudices was planted in fertile ground.

2. Whirlpool's Counsel Made Scores of Disparaging References to Plaintiffs' Class Action Lawyers.

Whirlpool wasted no time in building its improper theme: it mentioned class action lawyers three times in opening statement. Whirlpool informed the jury, for instance, that Allison "learned that class action lawyers were advertising for people who were willing to be plaintiffs in a class action …. She never went to [the retailer] and asked them to fix the problems. Instead, she joined the lawsuit." Tr. 211, R. 434, Page ID # 31089.

Whirlpool made *eighteen* such references just cross-examining Dr. Wilson. It piled on with several more cross-examining the Cloers (consumers who testified against Whirlpool): "[Y]ou went to a *lawyer* website before you first e-mailed Whirlpool…. And on that *lawyer* website, *plaintiffs' lawyer* website, you read about the claims that they were making against Whirlpool. Right? … You went to the *plaintiffs' lawyers'* website and you read about their *lawsuits* against Whirlpool." Tr. 775, R. 439, Page ID # 31661 (emphasis added).

[17] The District Court denied Appellants' motion to strike this juror for cause. Tr. 118-19, R. 430, Page ID # 30992-93.

> Of another consumer, Pramila Gardner, Whirlpool asked:
>
> Q. Do you have an understanding that while there is no written promise or guarantee, if there is a big class-wide award or settlement in the Texas case, that you have the possibility of getting a special bonus amount for agreeing to be a class plaintiff?
>
> A. I have never been told that, no.

Tr. 953, R. 439, Page ID # 31839.[18]

Whirlpool drove home the "plaintiffs' lawyers" theme five more times in closing. *E.g.*, Tr. 3587, R. 488, Page ID # 36625 ("They found a lawyer's ad asking for class action Plaintiffs, and they signed up.").

3. The District Court Refused to Stop Whirlpool's Violation of Its Order.

> Repeated objections from counsel for Appellants fell on deaf ears.
>
> MR. HEIMANN. This is deliberate misconduct on his part. [Whirlpool's lead counsel has] repeated it day in and day out, deliberately baiting us and insinuating to the jury that they shouldn't credit this case because it's Plaintiffs' lawyers that brought this case. It's a class action. This is outrageous behavior and it's got to stop.

Tr. 2470, R. 459, Page ID # 34689; *cf.*, *e.g.*, Tr. 504, R. 436, Page ID # 31382 ("MR. GLICKMAN: You are the first person that ever called me a plaintiffs' lawyer. MR. BECK: Stick around."); Tr. 2394-96, R. 459, Page ID # 34613-15 (objecting to serial comments about plaintiffs' lawyers); Tr. 2127, R. 455, Page ID

[18] Ms. Gardner is an executive at Chevron. Whirlpool cannot have believed in good faith that she subjected herself to years of litigation for the hypothetical possibility of a service award.

33254 (same).

But instead of applying the usual remedies—admonishing or reprimanding the offending attorney, instructing the jury to disregard remarks, warning of or imposing sanctions—the District Court merely stated: "Stay away from all this stuff. I'm going to try to clean up this mess at the end of the trial because a lot has been said, insinuated, done, commented upon, even me …. So let's be civil here." Tr. 2472-73, R. 459, Page ID # 34691-92.

The court never did "try to clean up this mess."

* * *

Settled law should lead this Court to condemn Whirlpool's continuous effort to sow prejudice. In *Igo v. Coachmen Industries*, this Court articulated five factors mandating reversal, each present here: (1) Whirlpool pervasively referred to the irrelevant and prejudicial topics of wealth and plaintiffs' class action lawyers; (2) the references violated *in limine* orders; (3) Whirlpool cannot claim that its improper conduct, which started during opening statement and ran through trial through closing, innocently "slipped out"; (4) Whirlpool's attacks on the consumers and their families and attorneys were "unsubstantiated"; and (5) the District Court "erred in not controlling" the misconduct. 938 F.2d at 653-64.

This case also resembles *Peter Kiewit*, where counsel—in comments that were "obviously designed to prejudice the jurors"—"almost continuously sought to

plant the seed in the[ir] minds" that the other party was a wealthy, large, well-insured corporation. 624 F.2d at 756-58 (citation omitted).[19] As in *Peter Kiewit*, this was "not a case of a single, isolated, or inadvertent comment. Rather, the improprieties permeated the entire trial, from opening statement through closing argument, in a continuing pattern of misconduct." *Id*. at 758 (citations omitted). In *Peter Kiewit*, moreover, the trial court admonished the jury multiple times and ultimately reprimanded the offending attorney. *Id*. at 751-55. The District Court here simply ignored Appellants' objections—despite acknowledging that the collective weight of Whirlpool's comments was a "mess" that needed to be "clean[ed] up" (but never was). Tr. 2472-73, R. 459, Page ID # 34691-92. The verdict should be reversed.

IV. THE DISTRICT COURT ERRED IN SUMMARILY REJECTING APPLICATION OF THE DISCOVERY RULE.

While the jury did not reach the statute-of-limitations issues, Appellants respectfully ask this Court to correct an erroneous ruling regarding the statute of limitations for purposes of a retrial and/or future trials.

[19] *See also Prescott v. Swanson*, 267 N.W. 251, 257 (Minn. 1936) ("The existence of insurance is wholly irrelevant to the determination of [negligence]. If it be proper to argue upon such basis … it would seem equally clear that many a defendant might argue that … the attorney obtained his employment as an ambulance chaser…. Clearly such argument would be improper, and no court would permit counsel so to proceed. But one argument is as bad as the other because each would be likely to lead the triers of fact away from the real issue and into the quagmire of passion and prejudice.").

In Ohio, the causes of action at issue here do not accrue until the plaintiff knows or reasonably should have known of (1) her injury, and (2) that it was caused by the defendant. *Dunn v. Ethicon, Inc.*, 167 F. App'x 539, 541 (6th Cir. 2006) (unpublished); *see also, e.g.*, *Williams v. Boston Sci. Corp.*, No. 3:12-cv-1080, 2013 U.S. Dist. LEXIS 43427, at *5-7 (N.D. Ohio Mar. 27, 2013). This is known as discovery rule tolling.

The District Court initially issued a well-reasoned opinion articulating this principle of law. S.J. Order, R. 391, Page ID # 26801-02. But late in the trial, the District Court announced from the bench that "the jury may not consider discovery rule tolling." Tr. 2553, R. 463, Page ID # 34818. The District Court provided no explanation at that time or in its subsequent written order. D.V. Order, R. 482, Page ID # 36359 (stating simply: "Despite Plaintiffs' arguments to the contrary, this Court has already ruled that the discovery rule does not toll the statute of limitations period.").

A. The Statutes of Limitations Were Tolled.

The evidence shows that Appellants' claims should have been tolled. For example, when Class representative Gina Glazer called Whirlpool after she began experiencing odor problems, she was told not told about the design flaw that Whirlpool's engineers had acknowledged. Instead, she was told that "[i]t is difficult to determine the exact cause of the issue." Ex. 770; Tr. 1684-86, R. 448,

Page ID # 32676-78. Similarly, when Class representative Trina Alison called Whirlpool, she was told to use bleach (which she was already doing) and to leave open her machine's door—but never that her product had crevices that collect mold. Tr. 809-10, 815-24, 860, R. 439, Page ID # 31695-96, 31701-10, 31746.

Whirlpool's documents provided corroboration, showing that the mold grows in "unseen" places within the machine and that Whirlpool, despite anticipating this litigation, purposely decided *not* to disclose the mold problems to consumers so that it would not lose market share. 4/16/07 Presentation, R. 518-44, Page ID # 37453; 9/22/04 Presentation, R. 518-7, Page ID # 37075; 11/16/04 E-mail, R. 518-14, Page ID # 37093. Indeed, Whirlpool internally acknowledged the connection between the defect, its discovery, and legal exposure, discussing the need to "[m]inimize legal exposure by preventing potential law suits resulting from component breakdown & *discovery of biofilm* in washer." 11/16/06 Presentation, R. 518-79, Page ID # 38014 (emphasis added).

In the face of this evidence, and having made no specific findings, the District Court summarily reversed its prior holding on the discovery rule. The original holding should be reinstated.

B. The District Court's Ruling on Discovery Rule Tolling Contradicts Its Ruling on Fraudulent Concealment Tolling.

Even as the District Court ruled that Appellants could not avail themselves of the discovery rule, the court allowed the jury to consider a closely related tolling

doctrine: fraudulent concealment. Tr. 3482-84, R. 488, Page ID # 36520-22 (jury instructions); D.V. Order, R. 482, Page ID # 36359. The finding of triable issues on fraudulent concealment necessarily means there were triable issues on the discovery rule because *both* doctrines depend on the plaintiff's "fail[ure] to discover the facts giving rise to the claim despite the exercise of due diligence." *Sharp v. Ohio Civil Rights Comm'n*, No. 04 MA 116, 2005 Ohio App. LEXIS 1122, at **6 (Ohio Ct. App. Mar. 10, 2005) (fraudulent concealment); *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, 273 (Ohio 2006) (same for discovery rule).

As with a lesser-included offense in criminal law, the elements of the discovery rule are entirely subsumed within the elements of fraudulent concealment.[20] It was thus wrong, even under the District Court's own reasoning in this case, not to present the jury with discovery rule tolling.

V. THE CUMULATIVE EFFECT OF THE DISTRICT COURT'S ERRORS NECESSITATES REVERSAL.

Whirlpool may argue that one or more of the District Court's errors were harmless. The record refutes that, but in any event, if this Court were to find one or more errors could have been harmless individually, their combined effect was

[20] This overlap does not render fraudulent concealment superfluous because the discovery rule applies in a narrower range of cases. *See Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 473-74 (6th Cir. 2013); *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 612 (7th Cir. 1975).

plainly prejudicial. *Michigan First Credit Union v. CUMIS Ins. Soc'y, Inc.*, 641 F.3d 240, 251 (6th Cir. 2011) (holding that even errors that alone do not dictate reversal may compel it when considered together); *accord United States v. Williams*, 81 F.3d 1434, 1443-44 (7th Cir. 1996) ("It is the total impact of all the irregularities at trial, rather than the impact of each one examined in isolation, that determines whether a [party] is entitled to a new trial.").

CONCLUSION

The first bellwether trial in this multidistrict litigation, involving the claims of the Ohio Class, demonstrated clearly the propriety of the District Court's decision—and this Court's decision—that Whirlpool's liability for the alleged defect in the Duet washers can and should be tried "holistically," with the answer "in one stroke" resolving the claims of all Class members. But for the District Court's erroneous rulings, Rule 23 would have been vindicated. The trial was short (a mere three weeks), and neither overly complex nor difficult to comprehend. Regrettably, however, the result reached by the jury was largely predetermined, not by the actual evidence at trial, but by crucial legal errors by the District Court, the purposeful violation of court orders by Whirlpool that infected the entire proceedings, and the District Court's refusal to "clean up [the] mess" Whirlpool created. Appellants respectfully submit that, in view of these manifest errors, this Court must reverse the judgment and remand for a new trial.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,833 words, excluding certain parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Word 2003 in 14-point Times New Roman.

/s/ *Jason L. Lichtman*
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ADDENDUM

The following publicly filed docket entries, all of which were filed in N.D. Ohio Case No. 1:08-wp-65000, are relevant to this appeal.

For the convenience of the Court and parties, bold text denotes orders of the District Court.

Docket No.	Description of Relevant Document
77	**Order and Opinion on Motion to Dismiss**
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93	Plaintiffs' Motion to Certify an Ohio Class
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93-26	Exhibit 23 - Glazer 6/17/09 Deposition
93-27	Exhibit 24 - Allison 6/10/09 Deposition
93-28	Exhibit 25 - 1/27/10 Glazer Declaration
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93-31	Exhibit 28 - Whirlpool Phone Survey
93-32	Exhibit 29 - Oliver 11/16/09 Expert Report
93-33	Exhibit 30 - Def.'s First Supp. Resp. to Consolidated Pls. First Set of Interrogs.
105-1	Whirlpool's Corrected Opposition to Plaintiffs' Motion to Certify an Ohio Class
110	Reply Memorandum in Support of Plaintiffs' Motion to Certify an Ohio Class
110-1	Supplemental Appendix
110-2	Exhibit 1 - Hardaway 9/15/09 Deposition
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110-6	Exhibit 5 - "Biofilm in Automatic Washers"
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130	Plaintiffs' Filing of Exhibits Pursuant to the 5/27/10 Class Certification Hearing
130-1	Exhibit 1 - 2/14/05 Procter & Gamble Memorandum
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Docket No.	Description of Relevant Document
130-5	Exhibit 5 - 9/22/04 "Biofilm in HE Washers" Presentation
130-6	Exhibit 6 - Allison 6/10/09 Deposition
134	Transcript of 5/27/10 Oral Argument
141	**Opinion and Order on Class Certification**
263	Plaintiffs' Motion to Lift the Partial Discovery Stay and to Modify Class Definition
263-1	Exhibit - Harper v. LG
263-2	Exhibit - Amicus Letter
263-3	Exhibit - Hardaway 1/14/11 Declaration
266	Whirlpool Opposition to Motion to Lift the Partial Stay and Motion to Modify the Class Definition
266-1	Exhibit A - Plaintiffs' Court Approved Class-Certification Notice
276	Motion for Leave to File a Supplemental Brief in Opposition to Plaintiffs' Motion to Modify the Class Definition
276-1	Exhibit A - Supplemental Brief
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308-20	Exhibit 19 - Allison's Resp. to Interrog.
308-21	Exhibit 20 - Glazer's Resp. to Interrog.
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518-76	Plaintiffs' Trial Exhibit No. P273
518-77	Plaintiffs' Trial Exhibit No. P279
518-78	Plaintiffs' Trial Exhibit No. P287
518-79	Plaintiffs' Trial Exhibit No. P288
518-80	Plaintiffs' Trial Exhibit No. P304
518-81	Plaintiffs' Trial Exhibit No. P324
518-82	Plaintiffs' Trial Exhibit No. P338
518-83	Plaintiffs' Trial Exhibit No. P355
518-84	Plaintiffs' Trial Exhibit No. P357
518-85	Plaintiffs' Trial Exhibit No. P358
518-86	Plaintiffs' Trial Exhibit No. P359
518-87	Plaintiffs' Trial Exhibit No. P360
518-88	Plaintiffs' Trial Exhibit No. P361
518-89	Plaintiffs' Trial Exhibit No. P362
518-90	Plaintiffs' Trial Exhibit No. P374
518-91	Plaintiffs' Trial Exhibit No. P377

Docket No.	Description of Relevant Document
518-92	Plaintiffs' Trial Exhibit No. P385
518-93	Plaintiffs' Trial Exhibit No. P388
518-94	Plaintiffs' Trial Exhibit No. P449
518-95	Plaintiffs' Trial Exhibit No. P594
518-96	Plaintiffs' Trial Exhibit No. P612
518-97	Plaintiffs' Trial Exhibit No. P672
518-98	Plaintiffs' Trial Exhibit No. P683
518-99	Plaintiffs' Trial Exhibit No. P717
518-100	Plaintiffs' Trial Exhibit No. P753
518-101	Plaintiffs' Trial Exhibit No. P767
518-102	Plaintiffs' Trial Exhibit No. P768
518-103	Plaintiffs' Trial Exhibit No. P769
518-104	Plaintiffs' Trial Exhibit No. P770
518-105	Plaintiffs' Trial Exhibit No. P886
518-106	Plaintiffs' Trial Exhibit No. P1002A
518-107	Plaintiffs' Trial Exhibit No. P1008
518-108	Plaintiffs' Trial Exhibit No. P1047
518-109	Plaintiffs' Trial Exhibit No. P1048
518-110	Plaintiffs' Trial Exhibit No. P1049
518-111	Plaintiffs' Trial Exhibit No. P1050
518-112	Plaintiffs' Trial Exhibit No. P1051
518-113	Plaintiffs' Trial Exhibit No. P1058
518-114	Plaintiffs' Trial Exhibit No. P1059
518-115	Plaintiffs' Trial Exhibit No. P1060
518-116	Plaintiffs' Trial Exhibit No. P1061
518-117	Plaintiffs' Trial Exhibit No. P1063
518-118	Plaintiffs' Trial Exhibit No. P1064
518-119	Plaintiffs' Trial Exhibit No. P1065
518-120	Plaintiffs' Trial Exhibit No. P1066
518-121	Plaintiffs' Trial Exhibit No. P1067
518-122	Plaintiffs' Trial Exhibit No. P1068
518-123	Plaintiffs' Trial Exhibit No. P1069
518-124	Plaintiffs' Trial Exhibit No. P1071
518-125	Plaintiffs' Trial Exhibit No. P1072
518-126	Plaintiffs' Trial Exhibit No. P1073
518-127	Plaintiffs' Trial Exhibit No. P1076
518-128	Plaintiffs' Trial Exhibit No. P1077

Docket No.	Description of Relevant Document
518-129	Plaintiffs' Trial Exhibit No. P1081
518-130	Plaintiffs' Trial Exhibit No. P1084
518-131	Plaintiffs' Trial Exhibit No. P1087
518-132	Plaintiffs' Trial Exhibit No. P1088
518-133	Plaintiffs' Trial Exhibit No. P1095
518-134	Plaintiffs' Trial Exhibit No. P1100
518-135	Plaintiffs' Trial Exhibit No. P1102
518-136	Plaintiffs' Trial Exhibit No. P1122
518-137	Plaintiffs' Trial Exhibit No. P1123
518-138	Plaintiffs' Trial Exhibit No. P1126
518-139	Plaintiffs' Trial Exhibit No. P1127
518-140	Plaintiffs' Trial Exhibit No. P1128
518-141	Plaintiffs' Trial Exhibit No. P1129A
518-142	Plaintiffs' Trial Exhibit No. P1129B
518-143	Plaintiffs' Trial Exhibit No. P1129C
518-144	Plaintiffs' Trial Exhibit No. P1129D
518-145	Plaintiffs' Trial Exhibit No. P1129E
518-146	Plaintiffs' Trial Exhibit No. P1129F
518-147	Plaintiffs' Trial Exhibit No. P1129G
518-148	Plaintiffs' Trial Exhibit No. P1129H
518-149	Plaintiffs' Trial Exhibit No. P1129I
518-150	Plaintiffs' Trial Exhibit No. P1129J
518-151	Plaintiffs' Trial Exhibit No. P1132
518-152	Plaintiffs' Trial Exhibit No. P1136
518-153	Plaintiffs' Trial Exhibit No. P1137
518-154	Plaintiffs' Trial Exhibit No. P1142
518-155	Plaintiffs' Trial Exhibit No. P1143
518-156	Plaintiffs' Trial Exhibit No. P1144
518-157	Plaintiffs' Trial Exhibit No. P1145
518-158	Plaintiffs' Trial Exhibit No. P1146
518-159	Plaintiffs' Trial Exhibit No. P1147
518-160	Plaintiffs' Trial Exhibit No. P1148
518-161	Plaintiffs' Trial Exhibit No. P1149
518-162	Plaintiffs' Trial Exhibit No. P1150
518-163	Plaintiffs' Trial Exhibit No. P1151
518-164	Plaintiffs' Trial Exhibit No. P1152
518-164	Plaintiffs' Trial Exhibit No. P1153

Docket No.	Description of Relevant Document
518-166	Plaintiffs' Trial Exhibit No. P1154
518-167	Plaintiffs' Trial Exhibit No. P1155
518-168	Plaintiffs' Trial Exhibit No. P1156
518-169	Plaintiffs' Trial Exhibit No. P1158
518-170	Plaintiffs' Trial Exhibit No. P1160
518-171	Plaintiffs' Trial Exhibit No. P1161
518-172	Plaintiffs' Trial Exhibit No. P1170
518-173	Plaintiffs' Trial Exhibit No. P1175
518-174	Plaintiffs' Trial Exhibit No. P1176
518-175	Defendant's Trial Exhibit No. D159
518-176	Defendant's Trial Exhibit No. D188
518-177	Defendant's Trial Exhibit No. D397
518-178	Defendant's Trial Exhibit No. D740-23
518-179	Defendant's Trial Exhibit No. D740-69
518-180	Defendant's Trial Exhibit No. D740-164
518-181	Ex. 9 to Klyn 10/13/14 Deposition
518-182	Ex. 17 to Klyn 10/13/14 Deposition
518-183	Ex. 21 to Klyn 10/13/14 Deposition
518-184	Defendant's Trial Exhibit No. D10
518-185	Defendant's Trial Exhibit No. D27
518-186	Defendant's Trial Exhibit No. D31
518-187	Defendant's Trial Exhibit No. D33
518-188	Defendant's Trial Exhibit No. D34
518-189	Defendant's Trial Exhibit No. D35
518-190	Defendant's Trial Exhibit No. D39
518-191	Defendant's Trial Exhibit No. D41-2
518-192	Defendant's Trial Exhibit No. D61
518-193	Defendant's Trial Exhibit No. D78
518-194	Defendant's Trial Exhibit No. D84
518-195	Defendant's Trial Exhibit No. D88
518-196	Defendant's Trial Exhibit No. D91
518-197	Defendant's Trial Exhibit No. D92
518-198	Defendant's Trial Exhibit No. D94
518-199	Defendant's Trial Exhibit No. D97
518-200	Defendant's Trial Exhibit No. D100
518-201	Defendant's Trial Exhibit No. D101
518-202	Defendant's Trial Exhibit No. D102

Docket No.	Description of Relevant Document
518-203	Defendant's Trial Exhibit No. D109
518-204	Defendant's Trial Exhibit No. D112
518-205	Defendant's Trial Exhibit No. D114
518-206	Defendant's Trial Exhibit No. D117
518-207	Defendant's Trial Exhibit No. D121
518-208	Defendant's Trial Exhibit No. D130
518-209	Defendant's Trial Exhibit No. D132
518-210	Defendant's Trial Exhibit No. D134
518-211	Defendant's Trial Exhibit No. D136
518-212	Defendant's Trial Exhibit No. D140
518-213	Defendant's Trial Exhibit No. D150
518-214	Defendant's Trial Exhibit No. D157
518-215	Defendant's Trial Exhibit No. D161
518-216	Defendant's Trial Exhibit No. D169
518-217	Defendant's Trial Exhibit No. D170
518-218	Defendant's Trial Exhibit No. D173
518-219	Defendant's Trial Exhibit No. D175
518-220	Defendant's Trial Exhibit No. D176
518-221	Defendant's Trial Exhibit No. D184
518-222	Defendant's Trial Exhibit No. D187
518-223	Defendant's Trial Exhibit No. D188
518-224	Defendant's Trial Exhibit No. D190
518-225	Defendant's Trial Exhibit No. D199
518-226	Defendant's Trial Exhibit No. D230
518-227	Defendant's Trial Exhibit No. D231
518-228	Defendant's Trial Exhibit No. D232
518-229	Defendant's Trial Exhibit No. D233
518-230	Defendant's Trial Exhibit No. D234
518-231	Defendant's Trial Exhibit No. D235
518-232	Defendant's Trial Exhibit No. D236
518-233	Defendant's Trial Exhibit No. D240
518-234	Defendant's Trial Exhibit No. D250
518-235	Defendant's Trial Exhibit No. D251
518-236	Defendant's Trial Exhibit No. D253
518-237	Defendant's Trial Exhibit No. D263
518-238	Defendant's Trial Exhibit No. D264
518-239	Defendant's Trial Exhibit No. D272

Docket No.	Description of Relevant Document
518-240	Defendant's Trial Exhibit No. D273
518-241	Defendant's Trial Exhibit No. D283
518-242	Defendant's Trial Exhibit No. D289
518-243	Defendant's Trial Exhibit No. D295
518-244	Defendant's Trial Exhibit No. D296
518-245	Defendant's Trial Exhibit No. D298
518-246	Defendant's Trial Exhibit No. D299
518-247	Defendant's Trial Exhibit No. D300
518-248	Defendant's Trial Exhibit No. D301
518-249	Defendant's Trial Exhibit No. D302
518-250	Defendant's Trial Exhibit No. D304
518-251	Defendant's Trial Exhibit No. D322
518-252	Defendant's Trial Exhibit No. D327
518-253	Defendant's Trial Exhibit No. D334
518-254	Defendant's Trial Exhibit No. D335
518-255	Defendant's Trial Exhibit No. D341
518-256	Defendant's Trial Exhibit No. D351
518-257	Defendant's Trial Exhibit No. D369
518-258	Defendant's Trial Exhibit No. D392
518-259	Defendant's Trial Exhibit No. D412
518-260	Defendant's Trial Exhibit No. D424
518-261	Defendant's Trial Exhibit No. D506
518-262	Defendant's Trial Exhibit No. D513
518-263	Defendant's Trial Exhibit No. D519
518-264	Defendant's Trial Exhibit No. D523
518-265	Defendant's Trial Exhibit No. D527
518-266	Defendant's Trial Exhibit No. D528
518-267	Defendant's Trial Exhibit No. D529
518-268	Defendant's Trial Exhibit No. D530
518-269	Defendant's Trial Exhibit No. D531
518-270	Defendant's Trial Exhibit No. D532
518-271	Defendant's Trial Exhibit No. D533
518-272	Defendant's Trial Exhibit No. D625
518-273	Defendant's Trial Exhibit No. D628
518-274	Defendant's Trial Exhibit No. D630
518-275	Defendant's Trial Exhibit No. D637
518-276	Defendant's Trial Exhibit No. D645

Docket No.	Description of Relevant Document
518-277	Defendant's Trial Exhibit No. D665
518-278	Defendant's Trial Exhibit No. D674
518-279	Defendant's Trial Exhibit No. D700
518-280	Defendant's Trial Exhibit No. D713
518-281	Defendant's Trial Exhibit No. DD715
518-282	Defendant's Trial Exhibit No. D717
518-283	Defendant's Trial Exhibit No. D720
518-284	Defendant's Trial Exhibit No. D727
518-285	Defendant's Trial Exhibit No. D733
518-286	Defendant's Trial Exhibit No. D746
518-287	Defendant's Trial Exhibit No. D747
518-288	Defendant's Trial Exhibit No. D748
518-289	Defendant's Trial Exhibit No. D750
518-290	Defendant's Trial Exhibit No. D757
518-291	Defendant's Trial Exhibit No. D764
518-292	Defendant's Trial Exhibit No. D767
518-293	Defendant's Trial Exhibit No. D768
518-294	Defendant's Trial Exhibit No. D769
518-295	Defendant's Trial Exhibit No. D771
518-296	Defendant's Trial Exhibit No. D772
518-297	Defendant's Trial Exhibit No. D776
518-298	Defendant's Trial Exhibit No. D777
518-299	Defendant's Trial Exhibit No. D778
518-300	Defendant's Trial Exhibit No. D779
518-301	Defendant's Trial Exhibit No. D787
518-302	Defendant's Trial Exhibit No. D788
518-303	Defendant's Trial Exhibit No. D789
518-304	Defendant's Trial Exhibit No. D791
518-305	Defendant's Trial Exhibit No. D796
518-306	Defendant's Trial Exhibit No. D799
518-307	Plaintiffs' Trial Exhibit No. P7
518-308	Plaintiffs' Trial Exhibit No. P12
518-309	Plaintiffs' Trial Exhibit No. P15
518-310	Plaintiffs' Trial Exhibit No. P104
518-311	Plaintiffs' Trial Exhibit No. P116
518-312	Plaintiffs' Trial Exhibit No. P150
518-313	Plaintiffs' Trial Exhibit No. P151

Docket No.	Description of Relevant Document
518-314	Plaintiffs' Trial Exhibit No. P164
518-315	Plaintiffs' Trial Exhibit No. P166
518-316	Plaintiffs' Trial Exhibit No. P279
518-317	Plaintiffs' Trial Exhibit No. P374
518-318	Plaintiffs' Trial Exhibit No. P385
518-319	Plaintiffs' Trial Exhibit No. P683
518-320	Plaintiffs' Trial Exhibit No. P717
518-321	Plaintiffs' Trial Exhibit No. P753
518-322	Plaintiffs' Trial Exhibit No. P763
518-323	Plaintiffs' Trial Exhibit No. P767
518-324	Plaintiffs' Trial Exhibit No. P768
518-325	Plaintiffs' Trial Exhibit No. P770
518-326	Plaintiffs' Trial Exhibit No. P1008
518-327	Plaintiffs' Trial Exhibit No. P1100
518-328	Plaintiffs' Trial Exhibit No. P1102
518-329	Plaintiffs' Trial Exhibit No. P1123
518-330	Plaintiffs' Trial Exhibit No. P1129B
518-331	Plaintiffs' Trial Exhibit No. P1129F
518-332	Plaintiffs' Trial Exhibit No. P1132
518-333	Plaintiffs' Trial Exhibit No. P1146
518-334	Plaintiffs' Trial Exhibit No. P1147
518-335	Plaintiffs' Trial Exhibit No. P1156
518-336	Plaintiffs' Trial Exhibit No. P1175
518-337	Plaintiffs' Trial Exhibit No. P1176
518-338	Defendant's Trial Exhibit No. DD11A
518-339	Defendant's Trial Exhibit No. DD11B
519	**Order Accepting Filing of Admitted Trial Exhibits**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellants was filed via the Court's electronic filing system on February 12, 2015, which will serve electronic notice to all parties of record.

/s/ *Jason L. Lichtman*
Jason L. Lichtman