No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LARRY BUTLER, JOSEPH LEONARD, KEVIN BARNES, VICTOR MATOS, ALFRED BLAIR, and MARTIN CHAMPION, individually and on behalf of all others similarly situated,

Plaintiffs-Petitioners,

vs.

SEARS, ROEBUCK AND CO.,

Defendants-Respondents.

Petition for Permission to Appeal from the July 20, 2012
Class Certification Decision of the United States District Court
for the Northern District of Illinois, Eastern Division
Case Nos. 1:06-CV-7023, 1:07-CV-0412, and 1:08-CV-1832

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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Appellate Court No: _____

Short Caption: Butler, et al. v. Sears, Roebuck and Co.

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Kevin Barnes, John Bettua, Larry Butler, Lauren Crane, Guiseppina Donia, Derral Howard, Alan Jarashow, Joseph Leonard, Lawrence L'Hommedieu, Victor Matos, Denise Miller, Susan Munch, Charles Napoli, Dr. Stephen Papaleo, Victor Pfefer, Christina M. Ramer, Jeffrey A. and Sandra K. Robinson, and Bryan Seratt

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☒ **No** ☐

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STATEMENT OF JURISDICTION

The District Court has jurisdiction under 28 U.S.C. § 1332(d)(2) because the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and certain of the Class members are citizens of a different state than Defendant. The named plaintiffs who seek permission to appeal the District Court's denial of class certification are Kevin Barnes (Texas), Larry Butler (Indiana), Joseph Leonard (Minnesota), Victor Matos (Kentucky), Alfred Blair (California), and Martin Champion (Illinois). (R.162 at ¶¶ 6, 8, 9, 10, 15, 17.) Defendant Sears Corporation is incorporated in New York, and its principal place of business is in Illinois. (*Id*. at ¶ 24.)

The Court of Appeals has jurisdiction to entertain this Petition under Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5(a). This Petition is timely because it is filed within 10 days after the District Court entered its order denying reconsideration of Plaintiffs' class certification motion on July 20, 2012. *See* Fed. R. Civ. P. 6.

RELIEF REQUESTED

Plaintiffs-Petitioners ("Plaintiffs") seek permission to appeal the District Court's denial of their motion for class certification and subsequent denial of their motion for reconsideration. *See* Fed. R. App. P. 5(a); Fed. R. Civ. P. 23(f).

ISSUES PRESENTED

1. Whether the District Court committed a substantial abuse of discretion by failing to weigh largely undisputed record evidence, failing to distinguish a substantively identical case, and failing to consider procedural alternatives — such as subclasses or issue certification — proposed by Plaintiffs.

2. Whether the District Court's holding creates a novel or unsettled legal question in light of a unanimous opinion from the United States Court of Appeals for the Sixth Circuit reaching precisely the opposite holding in a case based on the same evidence involving the same product sold under a different name.

I. INTRODUCTION

This litigation concerns certain front-loading Whirlpool-manufactured washing machines sold by Sears under the Kenmore brand-name (the "Kenmores"). The Kenmores have a uniform design defect: they do not adequately self-clean, and as a result microbiologic materials and debris known as "biofilm" accumulate. Ex. 1 (1/4/10 Supp. Expert Rep.) Biofilm leads to mold and "bad smells" in the washer, as well as on laundry washed in the machine. Ex. 2 (3/1/06 Biofilm Presentation) at 4. "Traditional household cleaner" does not eliminate or control the growth of biofilm and resulting odor. Ex. 3 (1/24/05 Biofilm Presentation) at 5, 6.

The Kenmores are identical to the front-loading Whirlpool-branded machines that are the subject of a related class action pending in the United States District Court for the Northern District of Ohio. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 08-65000, 2010 U.S. Dist. LEXIS 69254 (N.D. Ohio July 12, 2010) ("*Whirlpool I*").[1] The cases have substantially the same factual record (consisting almost entirely of Whirlpool's pre-

[1] Whirlpool is indemnifying Sears in this case (R. 218-4 at 107:16-107:18), and the same counsel represents both companies in the two cases.

litigation internal engineering documents), allege the same defect, and involve similar legal claims sounding in warranty.

On July 12, 2010, the district court in *Whirlpool I* granted class certification, a ruling unanimously affirmed by the Sixth Circuit. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.* ("*Whirlpool II*"), 678 F.3d 409, 418 (6th Cir. 2012), *pet'n for en banc reh'g denied*, 2012 U.S. App. LEXIS 12560 (June 18, 2012).

Despite being faced with nearly identical evidence, claims, and assertions concerning the Kenmores, on September 30, 2011, the United States District Court for the Northern District of Illinois issued an opinion denying class certification. Ex. A. On July 20, 2012, it denied Plaintiffs' motion for reconsideration. Ex. B. Neither order mentions, much less distinguishes, either *Whirlpool II* or this Court's opinion in *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010), although both have obvious relevance to the certification issues at hand.[2] The second order, in fact, cited only a single case and a solitary paragraph of evidence.

As perplexing as what the District Court ignored is what it held. For example, it found that Plaintiffs failed to establish numerosity within the proposed subclasses — a notion so far-fetched that Sears had not bothered to contest it, even when granted leave to file a brief twice the normal page limit. (R. 287; R. 296.) The District Court also cited Plaintiffs' alleged failure to submit conclusive evidence establishing that Sears' knowledge of the defect was uniform throughout the class period, even though Sears acknowledged that this is not even an element of Plaintiffs' claims. (*See* R. 317 at 2.)[3]

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[2] *Whirlpool II* was issued after the District Court's first order, which did mention *Whirlpool I*, albeit only in passing.

[3] In any event, that finding itself is manifest error. As detailed below, undisputed evidence shows that Sears knew of the defect at the start of the class period.

For the above reasons, Plaintiffs respectfully submit that the District Court's ruling cannot be reconciled with *Whirlpool II*, *Pella*, or similar decisions from other courts, lacks the rigorous analysis required by binding precedent, and warrants review under this Court's standards for interlocutory appeals regarding class certification.

II. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. Five Years of Production, One Uniform Design Flaw.

The Kenmores were manufactured between 2004 and 2008. While they share an identical design flaw, they are based on two slightly different engineering platforms known as "Access" and "Horizon." *See* Ex. 4 (8/19/08 Hardaway Decl.) at ¶¶ 5, 7.[4] Sears represented to the District Court that the differences between the two are primarily "aesthetic," and that models of washers within each platform are "nearly identical from an engineering standpoint." *Id*. at ¶¶ 6, 8.

Neither platform adequately self-cleans. As Whirlpool's engineers explained, "avoidance of deposits" simply was "not a design requirement." Ex. 2 (3/1/06 Biofilm Presentation) at 8. For this reason, the problem is the same in all of the washers:

> Biofilm is an issue we see globally on multiple washer platforms. It is *not only* an issue which we have in one region and is not linked to one platform only!

Ex. 5 (10/26/04 Minutes) at 1 (emphasis in original); *see also* Ex. 6 (10/18/04 Email Chain) at 2 ("Samples of the buildup from [Horizon] were taken and chemical analyses were identical in composition to that in Access.").

Whirlpool's post-design "attempts to manage the propensity of 100% of [the Kenmores] to grow mold were ineffective." Ex. 1 (1/4/10 Supp. Expert Rep.) at 6. Indeed, all of the washers at issue in this litigation suffer from the identical problem: "odor, due to mold in most

[4] Access machines that were manufactured in Mexico are sometimes referred to as "Sierras." *See* Ex. 4 (8/19/08 Hardaway Decl.) at ¶5 n.1.

cases, is inherent to the front load platform, all brands, all price points, new and old models." Ex. 7 (9/5/08 e-mail).

These admissions are not just isolated nuggets taken out of context. To be clear: *all* of Whirlpool's and Sears' pre-litigation internal engineering documents establish that this problem exists in *all* of the Kenmores. *See, e.g.*, Ex. 6 (10/18/04 Email Chain); Ex. 3 (1/24/05 Biofilm Presentation); Ex. 8 (7/2/05 WP Memo); Ex. 2 (3/1/06 Biofilm Presentation); Ex.7 (9/5/08 e-mail). And Dr. R. Gary Wilson, Whirlpool's own former head of Laundry Technology, opined the same: all of the Kenmores share this defect. (R. 214-3 at ¶ 4.)[5]

B. Sears' Argument Against the Presence of a Uniform Defect.

Few class certification motions were supported by an evidentiary record as lopsided as this one. To be sure, Sears *argued* that the Kenmores have certain "biofilm-related machine design differences" that render certification of a single litigation class containing all washers inappropriate. Ex. 9 (1/14/11 Hardaway Decl.) at ¶ 41. But it was unable to point to a single pre-litigation document to support this contention. Instead, and notwithstanding its earlier admission that the models within each platform are "nearly identical" from an engineering standpoint, Ex. 4 (8/19/08 Hardaway Decl.) at ¶¶ 6, 8, Sears submitted a new declaration by the same declarant contending that there were five allegedly material design variations. Ex. 9 (1/14/11 Hardaway Decl.) at ¶ 41.[6] But Sears presented no evidence to support that assertion. *Cf.* Ex. 10 (Sears' Uncited Exhibit) (containing a document of unknown origin, citing no evidence, asserting more than five material variations).

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[5] The District Court found over Sears' *Daubert* challenge that Dr. Wilson is "clearly qualified to use his knowledge . . . to offer an opinion, for purposes of a class certification motion, that all front loading high efficiency machines are similarly defective in design." Ex. B at 6-7.

[6] Sears also argued that there were 27 different models in the proposed class, although Sears did not point to anything, even a declaration, asserting that there were "biofilm-related machine design differences" between all 27 models. (*See, e.g.*, R. 297 at 6.)

III. RELEVANT PROCEDURAL HISTORY

A. Plaintiffs' Class Certification Motion.

On November 22, 2010, Plaintiffs filed a motion asking the District Court to certify their claims against Sears for trial pursuant to Federal Rule of Civil Procedure 23(b)(3), seeking a six-state class, each under its own law. (*See* R. 207 at 2.) The District Court denied that motion in relevant part on September 30, 2011. Ex. A.[7]

While ultimately denying Plaintiffs' motion, the District Court found that Plaintiffs satisfied the Rule 23(a)(1)-(4) prerequisites. *Id*. at 7-8. Of particular relevance, it concluded that: "[w]hether the subject washers were uniformly defective in design, and whether their sale violates Sears' warranties are questions that are apparently common. . . ." *Id*. at 8. It also denied Sears' *Daubert* motion, finding that Dr. Wilson was "clearly qualified . . . to offer an opinion . . . *that all front loading high efficiency machines are similarly defective in design*." *Id*. at 5-7 (emphasis supplied).

The District Court, however, held that Plaintiffs failed to establish predominance under Rule 23(b)(3). It concluded that Plaintiffs could not establish predominance because "Sears *contends* that [ ] changes from model to model reduced any mold problems that the machines had," Ex. A at 9 (emphasis added), though no pre-litigation evidence or expert testimony supports that contention.[8] While the District Court denied Plaintiffs' motion, it did implicitly suggest sub-classing: "In the court's view, the issues raised by the effect of the washer modifications and the extent of Sears' knowledge across multiple product iterations cannot be

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[7] The District Court certified a class with respect to a different claim involving a different part in a subset of the washers, and Sears seeks review of that portion of the order. *See* Ex. C (Sears' Petition). In opposition, Plaintiffs argued that the District Court arrived at the right result, *but did not defend its methodology*. *See* Ex. D (Plaintiffs' Response).

[8] The District Court's Opinion also contained critical errors with respect to the state of the factual record, as explained more fully below.

answered *on a basis as wide as the class defined by the plaintiffs' certification motion*." *Id*. at 10 (emphasis added).

B. Plaintiffs' Motion for Reconsideration.

On October 14, 2011, Plaintiffs moved for reconsideration, proposing certification in the alternative of subclasses and/or particular issues, and addressing several central factual errors in the District Court's recitation of the evidence. (R. 289.)

While this motion was pending, the Sixth Circuit issued its opinion in *Whirlpool II*, affirming certification of an essentially identical class, and then denied Whirlpool's request for rehearing en banc (which garnered no votes). Despite this, the District Court denied Plaintiffs' motion for reconsideration on July 20, 2012, citing no caselaw (not even *Whirlpool II*) and only a single paragraph of evidence. Ex. B at 1-4.

The District Court denied reconsideration only by reaching the Kafkaesque conclusion that Plaintiffs still had not established that the Kenmores have a uniform design *precisely because the prelitigation evidence treats the washers as having a uniform design*:

> The subsequent evidence identified by plaintiffs as indicative of knowledge of the continued problem by Sears and Whirlpool is similarly lacking in distinction between various machine models. Each of the documents cited by plaintiffs addresses the group of high efficiency washers as a whole, or their general propensity to develop the mold problem. None addresses the specific effect of any modification in mitigating the impact of that general propensity.

Id. at 2-3 (emphasis added).

Employing similar logic, the District Court found that Dr. Wilson's testimony was insufficient to establish predominance because he had not considered the impact of any of the changes in isolation, but rather concluded that they were ineffective collectively. *See id*. at 3-4. In effect, the District Court held that although Dr. Wilson testified that "none of the changes were effective," he did not testify that "each one of the changes was not effective."

Finally, the District Court concluded that it was unpersuaded that "Sears' knowledge of the alleged mold problem and its responses to that knowledge were uniform throughout the machines' product cycles." Ex. B at 4. But Plaintiffs' claims all sound in warranty, and Sears' knowledge throughout the class period — uniform or not — is not an element of those claims, as Sears itself conceded. (R. 317 at 2.)

C. Denial of Certification of Subclasses and/or Particular Issues.

Following this Court's holding in *Pella*, 606 F.3d 391, Plaintiffs suggested that the District Court could exercise its discretion to certify liability-only subclasses consisting of owners of machines with each of the few modifications Sears contended were relevant. *See* Ex. B.[9] The District Court declined to certify subclasses or issues in summary fashion. *See* Ex. B at 4-5.

First, the Court concluded that Plaintiffs had not established numerosity for each of the proposed subclasses. *Id*. It did so even though Sears never contested numerosity (and it is indisputably present). *See, e.g.*, Ex. 4 (Hardaway Decl. 8/19/08); (R. 212-1 at 12 (breaking down the hundreds of thousands of machines manufactured per platform in any given production year).)

Second, the Court found that creation of subclasses would require a reassessment of typicality. Ex. A at 5. But the District Court previously found the current class representatives met typicality for the class as a whole, Ex. B at 8, so they axiomatically meet the typicality requirement for the proposed subclasses to which they belong. Plaintiffs acknowledged the

[9] While Sears submitted a declaration contending there were five relevant design differences, the record affirmatively forecloses any possibility that two of the asserted differences could be material. (*See* R. 290 (Plaintiffs' Memo ISO Reconsideration) at 5.) For example, one purportedly relevant change merely allowed consumers to access a maintenance cycle by pressing a single button rather than multiple buttons. *See id*.

possible need for additional class representatives for the other subclasses (R. 290 at 14) and were (and remain) prepared to put them forward; Plaintiffs' counsel have been contacted by thousands of Kenmore owners suffering from problems with biofilm (*see* R. 223-1 at ¶ 3).

IV. STANDARD OF REVIEW

This Court has unfettered discretion to entertain interlocutory review. While "the Rule 23(f) appeal is never to be routine," *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002), this Court has generally evaluated three factors to determine whether review is appropriate: (1) the presence of novel or unsettled legal questions; (2) the economic pressure of a class certification grant or denial; and (3) the presence of a substantial abuse of discretion by a district court. *See* Manual for Complex Lit. (4th) § 21.28 (2004); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 658 (7th Cir. 2004) (collecting cases). Each factor is present here.

V. IMMEDIATE REVIEW IS APPROPRIATE

A. The Litigation Concerns an Unsettled Legal Question.

The direct conflict between the District Court's holding and the Sixth Circuit's unanimous affirmance of certification of a class of the same washing machines establishes that the legal question here is unsettled.[10] Either the District Court or the Sixth Circuit is correct — both cannot be. *See Whirlpool II*, 678 F.3d at 419 (rejecting the exact arguments accepted by the District Court regarding uniformity of design and concluding that "the plaintiffs have produced evidence of alleged common design flaws . . . ." (emphasis added)). The District Court's holding also implicitly conflicts with this Court's holding in *Pella*, which, if anything, involved legal claims for which class certification is more difficult.

[10] The lack of evidentiary support is what distinguishes the District Court's opinion from the district court's opinion in *Whirlpool I*, which, although succinct, was supported by overwhelming evidence from the record (and lengthy oral argument). Here, the District Court's opinion is not only unsupported by the record, it is contradicted by it.

B. The Orders Would be the "Death Knell" for this Litigation.

It is well established that "when denial of class status seems likely to be fatal, and when the plaintiff has a solid argument in opposition to the district court's decision, then a favorable exercise of appellate discretion is indicated." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). This "death knell" factor supports review here.

First, it would be prohibitively expensive for individual Plaintiffs to continue this litigation through trial on the uncertain hope that this Court would eventually reverse the District Court; they would almost assuredly be forced to settle on unfavorable terms. *Carnegie*, 376 F.3d at 661 ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis in original)).

This is an expert and document-intensive case, and the cost of establishing a product defect of this nature on an individual basis would dwarf individual recoveries of a few hundred or a thousand dollars. In this regard, this case is much like *Pella*, where this Court held that:

> there is an economy to class treatment of the question whether the [product] suffer[s] from a basic design defect, the resolution of which has the potential to eliminate the need for multiple, potentially expensive expert testimony and proof that would cost considerably more to litigate than the claims would be worth to the plaintiffs.

606 F.3d at 394.[11]

Second, as explained below — and as evinced by both *Whirlpool II* and *Pella* — Plaintiffs plainly have a "solid argument" that the District Court erred.

[11] This is not a case where there are any alternative procedures for consumers to obtain relief. Sears does not fix the problem under its warranty; indeed, it has offered no remedy for injured owners at all. *Contra In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

C. The District Court Substantially Abused its Discretion.

1. Accepting Sears' Contentions Over Overwhelming and Largely Undisputed Evidence.

While district courts are not required to engage in a "lengthy explanation of the obvious," *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) (per curiam), the court may not simply take a litigant's contentions as true. Rather, "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010) (per curiam). It would be difficult to conclude that the District Court did so here.

To the contrary, the District Court explicitly credited Sears' *contentions* without requiring any (and against the overwhelming weight of) actual evidence, made serious factual errors, and denied class certification in part because Plaintiffs failed to establish uniformity of an element — Sears' knowledge over time — that is not an element of the claims, which sound in warranty. This was not the "rigorous analysis" the District Court was required to conduct. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011).

One further point bears emphasis. In each of its opinions, the District Court simply cited two or three issues that (Sears contended) *might* vary among groups of class members. At no point did the District Court *weigh* these issues against others that even Sears did not assert would vary to determine whether common issues predominated. *Contra Messner*, 669 F.3d at 815 ("Individual questions need not be absent. . . . [Rule 23(b)(3)] requires only that those questions not predominate over the common questions affecting the class as a whole."). In other words, even if the District Court could have properly credited Sears' unsupported contentions over the

actual record evidence, it still would have abused its discretion because it never weighed common issues against individual ones to determine which predominated. *See id.*

2. Failing to Distinguish *Whirlpool II* or *Pella*.

Perhaps the most striking feature of the District Court's holding is that it failed to mention or distinguish the two most directly applicable cases, the Sixth Circuit's holding in *Whirlpool II* and this Court's holding in *Pella*.

In *Whirlpool II*, the Sixth Circuit reached exactly the opposite conclusion reached by the District Court — whether Plaintiffs established the presence of a uniform defect because of slight variations among the identical washing machines (marketed under a different brand name):

> Based on the evidentiary record, the district court properly concluded that whether design defects in the Duets proximately caused mold or mildew to grow and whether Whirlpool adequately warned consumers about the propensity for mold growth are liability issues common to the plaintiff class.

Whirlpool II, 678 F.3d at 419. In so concluding, the Sixth Circuit was supported by a wealth of authority from similar cases in which consumers alleged economic harm as a result of a defective product, most notably this Court's holding in *Pella*, 606 F.3d at 394. *See also Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 31 (Pa. 2011) (explaining that while the defendant contended that the presence of 13 different design changes defeated predominance, "these changes were minor and [ ] they did not eliminate the design defect"); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617 (8th Cir. 2011) (collecting cases)); *Wolin v. Jaguar Land Rover North Am., L.L.C.*, 617 F.3d 1168, 1173-74 (9th Cir. 2010); *Barden v. Hurd Millwork Co.*, 249 F.R.D. 316, 321 (E.D. Wis. 2008).

To be sure, *Whirlpool II* is not binding (though *Pella* is). But this did not excuse the District Court from considering it. *Cf. Ruffing v. Masterbuilt Tool & Die, L.L.C.*, No. 1:08-CV-01264, 2009 U.S. Dist. LEXIS 4754, 6 n.3 (N.D. Ohio Jan. 23, 2009) ("[T]he Court will

carefully consider well-reasoned opinions from another jurisdiction, even when that jurisdiction is in Michigan."). This is particularly true because *Whirlpool II* involved literally the same washers sold under a different name, the legal claims sounded in warranty, and much of the evidence — consisting largely of Whirlpool's pre-litigation internal engineering documents — was identical. The Sixth Circuit, moreover, was *correct*. (*See* R. 290 (Mot. to Reconsider) at 6-8 (collecting prelitigation evidence for the proposition that the Kenmores share an identical design flaw).)

The District Court's holding is also inconsistent with this Court's holding in *Pella*, a case that involved some six million windows sold over an 18 year period. This Court affirmed certification of a six-state liability class under Rule 23(b)(3), where:

> the central questions in the litigation are the same for all class members — whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty.

Pella, 606 F.3d at 394. That holding — in a case involving consumer fraud claims, no less — has direct application here, yet the District Court never mentioned, much less distinguished, *Pella*.

3. Additional Manifest Errors.

The District Court reached five other conclusions relevant to denial of class certification that are manifestly erroneous. *See generally* Exs. A and B.

First, the District Court concluded that all of the internal documents establishing the design uniformity of the Kenmores "predate[d] the model changes that, according to Sears, fixed the problem." Ex. A at 9. As explained above, that is simply not so, as even Sears implicitly acknowledges.

Second, the District Court erroneously found that Dr. Wilson failed to evaluate whether each of the design modifications was material (i.e., meaningfully impacted the development of biofilm and mold). *See* Ex. A at 9. Dr. Wilson, however, inspected machines with the vast majority of the design changes Sears contends defeat predominance; he concluded that those changes did not correct the underlying product defect. *See* Ex.1 (1/4/10 Supp. Expert Rep.) at 5 ("[Whirlpool's design] changes did not solve the underlying defect or eliminate the growth of mold and bacteria."). Curiously, the District Court found that Dr. Wilson's testimony was insufficient because he concluded that the changes were collectively ineffective, rather than examining each change in isolation. *See* Ex. B at 3-4. Yet, given that Whirlpool's changes were ineffective collectively, there was no reason to examine one particular ineffective change in isolation. *See Whirlpool II*, 678 F.3d at 419 (reaching this exact conclusion about Dr. Wilson's testimony); *see also Samuel-Bassett*, 34 A.3d at 31 ("[Plaintiff's] expert acknowledged the design changes, but testified that these changes were minor and that they did not eliminate the design defect…."). And, as detailed above, there is literally no pre-litigation document establishing that any of the changes made *any* difference.

Third, the District Court concluded that it was unpersuaded that "Sears' knowledge of the alleged mold problem and its responses to that knowledge were uniform throughout the machines' product cycles." Ex. B at 4. As explained above, this is a bit of a non-sequitur; Plaintiffs' claims sound in warranty, and Sears concedes that knowledge is not an element of such claims.[12] While the record evidence is clear (and undisputed) that Sears had knowledge of

[12] (*See* R. 317 at 2 ("[I]ssues related to Sears' knowledge of the purported defect and whether the alleged defect was a proximate cause of Plaintiffs' alleged damages have no bearing on this case. Indeed, knowledge of a latent defect is neither an element of a warranty claim, nor does it alleviate Plaintiffs' burden of proof on any element of their warranty claims.").)

the defect from the start of the class period, Ex. B at 2, for present purposes, it suffices that Plaintiffs do not need to prove Sears' knowledge at all as part of their claims.

Fourth, the District Court found that Plaintiffs failed to establish numerosity with respect to the proposed subclasses. Ex. B at 4-5. But Sears has never challenged numerosity, which is well-supported by the record. *See* Ex. 4 (Hardaway Decl. 8/19/08); Ex. 11 (2008 Training Manual); (*see also* R. 291-8 at 4 (noting that Whirlpool and Kenmore machines make up 50% of all front load washers sold in the USA); R. 212-1 at 12 (breaking down the hundreds of thousands of machines manufactured per platform in any given production year); R. 223-1 (noting that as of November 2010 Plaintiffs' counsel had been contacted by over 2,300 dissatisfied Kenmore owners, over 600 of whom were from the six states Plaintiffs' moved to certify).)

Finally, the District Court found that Plaintiffs failed to establish adequacy of the class representatives for any of the subclasses. Ex. B at 5. But the Court had already concluded that each of the class representatives was adequate to represent the class as a whole; axiomatically, they must also be adequate to represent the subclasses to which they belong. Plaintiffs also expressly acknowledged the possible need to add class representatives. (R. 290 at 14.) And there was nothing atypical about this. *See, e.g., Srail v. Vill. of Lisle*, 249 F.R.D. 544, 554 (N.D. Ill. 2008).

These findings further demonstrate that the District Court did not conduct the requisite rigorous analysis and abused its discretion. *See, e.g., Messner*, 669 F.3d at 815.

D. Sears' Additional Anticipated Arguments Should be Rejected.

1. The breadth of the mold problem.

Sears argued below that a negligible percentage of Kenmore owners have complained directly to it or Whirlpool about mold problems. (*See, e.g.*, R. 230 at 8.) Yet, these were

numbers used only in litigation; neither Sears nor Whirlpool ever trusted those numbers in the ordinary course of business, and instead relied on the very numbers upon which Plaintiffs relied. *See* Ex. 12 (2005 Quickfix Presentation) at 10 ("35% . . . complain of odors[.]"); Ex. 8 ("7/02/05 WP Memo.") at 1 ("[H]igh # of customers (35%) complaining about bad odors . . .").

That at least 35% of Kenmores already exhibited a problem back in 2005 may seem startling given that few (if any) previous defective product cases have involved such high rates of failure. But it is not particularly surprising given the washers' uniform failure to self-clean. *See* Ex.1 (1/4/10 Supp. Expert Rep.) at 6 ("[A]ttempts to manage the propensity of 100% of [the Kenmores] to grow mold were ineffective."). On the other hand, the negligible percentage that Sears advanced below simply is not credible, especially when considering the thousands of complaints received by Plaintiffs' counsel. (*See* R. 223-1.)[13]

Sears' argument that the class may include some consumers who have not experienced unacceptable levels of biofilm accumulation is not tenable in this Circuit. Ignoring for the moment that this argument conflates the concept of injury (which occurs upon purchase of a defective machine) with damages (the smelly result of using a defective machine), *Whirlpool II* at 420, it is also incorrect. *See Pella*, 606 F.3d at 394 ("While it is almost inevitable that a class will include some people who have not been injured by the defendant's conduct because at the outset of the case many members may be unknown, or the facts bearing on their claims may be

[13] There is a big difference between the percentage of consumers who jump the hurdles to make a formal warranty claim (the numbers upon which Sears relied), and the number who have actually experienced a problem. Oliver, Richard L. (1997), *Satisfaction: A Behavioral Perspective on the Consumer*, New York: Irwin/McGraw-Hill, at pp. 386-387.

unknown, this possibility does not preclude class certification."). Any consumer who has not been damaged simply will not recover.[14]

2. Plaintiffs seek trial of manageable state-wide classes.

Sears previously devoted a substantial amount of argument to various choice-of-law issues. *See, e.g.*, Ex. C (Sears' Petition) at 13-17. To be clear: Plaintiffs agree with Sears that their claims are best resolved by way of state-wide classes under the law of those states, as was done in *Pella*, 606 F.3d at 394. This is also precisely what is being done in *Whirlpool*, where the Court certified an Ohio class under Ohio law, and will turn to other states next. To the extent Plaintiffs and Sears disagree about the manageability of "grouping" small numbers of these states for trial, that issue can be briefed below and is fundamentally irrelevant to the resolution of any issue presently before the Court. *Cf. Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 301 (3d Cir. 2011) (en banc) ("differences in state law…[can] be overcome at trial by grouping similar state laws together and applying them as a unit."); *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 98-99 (D. Mass. 2008) (analyzing state consumer fraud statutes and grouping for trial).

VI. CONCLUSION

Plaintiffs respectfully ask this Court to grant their petition for discretionary review.

Dated: August 3, 2012

Respectfully submitted,

/s/ Jason L. Lichtman
Jason L. Lichtman

[14] The alternative implicitly advanced by Sears is to insist that classes be defined as "those who have been injured." Setting aside the conceptual problems inherent in such a rule (the law in the Eighth Circuit, but not this one), it leads to exactly the same result in the end in a defective products case: those who have been injured by a defendant recover, others do not. *See In re Zurn Pex*, 644 F.3d at 617.

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CERTIFICATE OF RULE 32 COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5267 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), except where modified by 7th Cir. R. 32, because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LARRY BUTLER, JOSEPH LEONARD, KEVIN BARNES, VICTOR MATOS, ALFRED BLAIR, and MARTIN CHAMPION,
individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

v.

SEARS, ROEBUCK AND CO.,

Defendants-Petitioners.

APPENDIX

Exhibit Letter	**Description**	**Record Citation**
A	9/30/11 Order (denying certification)	285
B	7/20/12 Order (denying reconsideration)	328
C	Sears' 23(f) Petition	N/A
D	Plaintiffs' Response	N/A

Exhibit Number	**Description**	**Record Citation**
1	1/4/10 Supp. Expert Rep.	290-3
2	3/1/06 Biofilm Presentation	290-7
3	1/24/05 Biofilm Presentation	291, ex 4
4	8/19/08 Hardaway Declaration	290-4; 212-1
5	10/26/04 Minutes	291, ex 12
6	10/18/04 Email Chain	291, ex 14
7	9/5/08 Email	291, ex 1
8	7/2/05 WP Memo	213-13
9	1/14/11 Hardaway Declaration	290-6
10	Sears' Uncited Exhibit	297-1
11	2008 Training Manual	291, ex 8; 217-2
12	2005 Biofilm Quickfix Presentation	213-12

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed via electronic mail (USCA7_Clerk@ca7.uscourts.gov) on August 3, 2012. I further certify that I will serve the foregoing document by electronic transmission to the following email addresses:

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