Nos. 23-1666

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JODI TAPPLY, JEANNETTE BUSCHMAN, MICHAEL PARTIPILO, BARBARA LESTER, and VICKI MEYERHOLZ, on behalf of themselves and all others similar situated,

Plaintiffs-Appellants

v.

WHIRLPOOL CORPORATION,

Defendant-Appellee

Appeal from the United States District Court
Western District of Michigan
Case No. 1:22-cv-00758 (JMB)

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANT-APPELLEE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Sixth Circuit Case Numbers: 23-1666

Case Name: Tapply, et al. v. Whirlpool Corporation

Name of counsel: Philip S. Goldberg

Amicus National Association of Manufacturers makes the following disclosure:

1. Is *amicus* a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal or an *amicus*, that has a financial interest in the outcome?

   None known.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Association of Manufacturers ("NAM"), submits this brief because of the adverse impact on safety, manufacturing and consumers that would persist if design-based liability could be pursued through consumer-based class actions—not product liability law—where the plaintiffs have not even pleaded sufficient facts to show they have a viable cause of action.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs 13 million men and women, contributes $2.85 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM is dedicated to the manufacture of safe, innovative and sustainable products that benefit consumers while protecting human health and the environment.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This putative class action provides a stark example of speculative litigation that, while ostensibly based on product liability concepts, seeks to avoid establishing elements of a product liability cause of action. Here, Plaintiffs allege a theoretical defect with ranges they purchased from Whirlpool. They do not allege any actual defect under any state's product liability law. They assert solely that the range's knobs do not operate in the exact way they assumed and, if Whirlpool had told them more about the nature of how this feature works, they would have made different choices. At most, the individual plaintiffs have buyer's remorse, which is not a cause of action. The district court properly dismissed this lawsuit for failure to state a claim. Plaintiffs did not plead facts showing that Whirlpool had violated a legal duty to them and, in doing so, caused them any harm.

To bring a viable lawsuit, plaintiffs must plead a viable cause of action. When a plaintiff alleges a product is defective, the cause of action sounds in product liability, which requires each plaintiff to show a personal injury, that the product was defective, and that defect caused the harm. Framing a product-defect case as a class-wide fraud or misrepresentation case does not alleviate all pleading burdens for the plaintiffs. They still must satisfy the pleading requirements for the causes of actions they allege. Here, Plaintiffs allege Whirlpool fraudulently misled them by omitting that the knobs were dangerously "defective." Therefore, to

survive a motion to dismiss, they had to include sufficient facts to show a safety defect actually existed, Whirlpool knew about both the defect and its attendant safety risk, and Whirlpool concealed that information from them. Next, Plaintiffs had to show they relied on this concealment when buying the product and the concealment was material to their purchasing decisions. Finally, they had to articulate a concrete harm. To plead a benefit-of-the-bargain loss, they had to provide facts showing that there is a quantifiable difference in value between what they assert they bargained for and what they say they actually received.

Plaintiffs failed to include any of these details in their pleadings. They did not allege any real-world wrongs or sustain any real-world injuries. Thus, they never crossed the legal threshold for seeking any type of judicial remedy. Further, invoking Rule 23's class mechanism does not allow them to substitute these facts with generalized abstractions. The plaintiffs here received the full benefit of their bargain: they paid for a range, they received a range, and they used the range without suffering any harm. Their claims were properly dismissed.

For these reason, *amicus* respectfully urges this court to affirm the ruling below that Plaintiffs failed to state a claim and further hold that Plaintiffs did not provide sufficient facts for Article III standing. Speculative class actions must not be allowed to circumvent product liability laws over allegations of product defect.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISED THE CLAIMS BECAUSE PLAINTIFFS FAILED TO MEET THE APPLICABLE PLEADING STANDARDS.

Plaintiffs are not permitted to sidestep the pleading requirements that apply to their claims by bringing the case as a putative class action. In their appeal, the Plaintiffs expressed concern the district court imposed too demanding a pleading standard. (Dkt. 37 at 46.) But class actions do not allow Plaintiffs to pull back the lens of their substantive claims from specific facts establishing an individual cause of action to abstractions that can apply to anyone. They must meet the pleading requirements under Federal Rules of Civil Procedure 8 and 9 by providing specific facts to establish elements of a cause of action. *See* James Wm. Moore, et al., Moore's Federal Practice & Procedure § 9.11(2)(b)(i), at 9–36 (2007) (Rule 9(b) "usually requires the claimant to allege at a minimum the time, place, and content of the misrepresentation, the resulting injury, and the method by which the misrepresentation was communicated"). As this Circuit has held, plaintiffs may not allege causation, injury, and damages in a conclusory manner. *See, e.g., Courser v. Mich. House of Representatives,* 831 Fed. Appx. 161, 183 (6th Cir. 2020) (rejecting conclusory allegation of damages from emotional distress).

Here, Plaintiffs did not offer any such facts. First, Plaintiffs did not provide facts demonstrating they sustained any real world harm from how the knobs turn,

which they needed to do to satisfy their pleading requirements. *See New London Tobacco Market, Inc. v. Kentucky Fuel Corp.*, 44 F.4th 393, 411 (6th Cir. 2022) (plaintiff failed to meet Rule 9(b) by not describing the injury alleged). Plaintiffs did not allege any physical injury, but economic harm under a "benefit of the bargain" theory. Therefore, they had to specify in their pleadings the value of the range they contend they bargained for versus the value of the range they received, *i.e.*, how much the ranges diminished in value to them given the knobs' "defect."

"[C]laims of injury premised on 'overpayment' for a product, or a loss of the benefit of the bargain, require an objective measure against which the plaintiff's allegations may be evaluated." *Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 12 (1st Cir. 2017). Discovery is not needed to establish these measures; these facts, to the extent they exist, are in each plaintiff's possession. Each plaintiff knows how much they would have paid for a product and must articulate it. What they cannot do is allege, as they did here, overpayment by making the threadbare assertion that the ranges were "worthless" or "worth less." Such overpayment declarations are nothing more than *ipse dixit. See* Edward Sherman, *"No Injury" Plaintiffs & Standing*, 82 Geo. Wash. L. Rev. 834, 844 (2014) (noting in many cases, there is a "question as to whether any value can realistically be placed on the benefit of the bargain that a 'no injury' consumer expected"). Accordingly, Plaintiffs did not

meet their pleading standard for asserting a concrete economic injury—either to state a claim or to meet their burden to show Article III standing to bring a claim.

Second, Plaintiffs did not meet their pleading requirements to state a claim for fraudulent omission or misrepresentation. *See* Fed. R. Civ. P. 9(b) ("Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). To meet this requirement, Plaintiffs had to show Whirlpool had actual knowledge that the way in which the knobs turn constituted a "defect" and that there was a specific, unreasonably dangerous safety risk associated with this "defect." This requirement makes sense. If Whirlpool did not know its stoves were defective and unsafe, it could not have fraudulently concealed these facts. *See Smith v. Gen. Motors LLC,* 988 F.3d 873, 882 (6th Cir. 2021) ("It is difficult to understand how GM would have known, or had reason to know, that Plaintiffs were entering into a transaction under a mistake as to the existence of a safety risk unless GM somehow knew about a safety risk."). Further, as indicated, under Rule 9(b) the facts demonstrating Whirlpool's knowledge must have been pleaded with specificity.

Here, Plaintiffs alleged Whirlpool possessed this pre-sale knowledge based solely on a handful of customer complaints posted to various internet websites and the Consumer Product Safety Commission (CPSC) database. These postings

generally put forth opinions about what features consumers and experts in the field find desirable or undesirable, how a product performs, the product's strengths and shortcomings, and other things a manufacturer or consumers should consider going forward. These postings are not generally vetted for accuracy and can be unreliable. In litigation, they do not by themselves constitute facts showing a defect existed or the safety implications of that alleged defect.[2]

Further, there is no indication, in the briefings or internet complaints, that anyone was physically harmed by the way the knobs turn. Plaintiffs merely speculate someone might get hurt by them. But, as this Court has held, a defendant cannot know of a safety risk for purposes of a fraudulent-omission claim if that risk has "never occurred." *Smith*, 988 F.3d at 885. Otherwise, any lawyer could conjure a scenario linking a product feature to an imagined safety concern and bypass the requirement to allege specific facts establishing this element of the cause of action. Here, Plaintiffs pleaded—at most—their personal displeasures

[2] The questionable usefulness of internet postings, including from the CPSC database, in litigation have been discussed in other contexts. *See, e.g.*, *McKinnon v. Skil Corp.*, 638 F.2d 270, 278–79 (1st Cir. 1981) (finding CPSC reports inadmissible); *Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029, 1040 (N.D. Ohio 2002) (expert failed to "meet the requirements under *Daubert*" where relying on CPSC reports). Similarly, adverse event reports to the Food and Drug Administration involving pharmaceuticals do not demonstrate the existence of an actionable risk. *See, e.g.*, *Gayle v. Pfizer, Inc.*, 452 F. Supp. 3d 78, 88 (S.D.N.Y. 2020) (explaining why 6,000 adverse event reports were not indicative of a defect).

with the way their burner knobs turn. They did not plead facts showing Whirlpool's actual knowledge of a real-world safety risk for a fraud-based action.

Third, Plaintiffs never alleged any facts showing the mechanism for turning the knobs was material to their individual purchase of their ranges, or that they, let alone the entire class of consumers, relied on the alleged fraudulent omission in buying their ranges. As courts have explained, the "basic question" in consumer fraud cases is whether the alleged fraudulent concealment improperly affected the consumer's decision with regard to a product. *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, app. 174–84 (1984). "If so, the practice is material . . . because consumers are likely to have chosen differently but for the deception." *Id.*; *Hiner v. Bridgestone/Firestone Inc.*, 959 P.2d 1158, 1163 ("Implicit in the definition of 'deceptive' is the understanding that the actor misrepresented something of material importance."). Accordingly, Plaintiffs had to plead specific facts showing that had they "known the truth" they would have actually made a different economic choice. *Dura Pharm., Inc. v. Broudo*, 125 S. Ct. 1627, 1632 (2005) (considering the common law roots of a private right of action for securities fraud). Without specific facts that establish context, a court cannot reasonably infer that an omitted fact was material to a plaintiff's purchasing decision.

It is elucidating to consider how these claims would be pled if they were brought in an individual breach-of-warranty or consumer-fraud case. An individual

plaintiff would not advance a vague "price premium" theory of damage, such as "I would have paid less for the range or bought a less expensive alternative." The plaintiff would specify the amount he or she believes they overpaid and show actual alternatives they would have bought otherwise. For example, in individual automotive warranty cases, owners will seek "benefit of the bargain" damages by calculating the actual price the plaintiff paid for the vehicle, discounted by the mileage driven once the alleged defect compromised their use of the vehicle, among other factors. *See, e.g.*, *Farrales v. Ford Motor Co.*, No. 21-cv-07624-HSG, 2022 WL 1239347, at *4 (N.D. Cal. Apr. 27, 2022) (calculating restitution for a vehicle, including an offset for the benefit of bargain received based on mileage driven before alleged defect arose). The use of the class-action mechanism does not allow Plaintiffs to skirt these pleading requirements.

Finally, requiring Plaintiffs to plead quantifiable harm, causation, and the other elements of their claims is critical in cases where—as here—they seek economic damages for an alleged safety risk that never manifested anywhere. A conclusory allegation that all consumers who bought Whirlpool ranges "would have paid less" for this item if they knew about the way the knobs turn is not facially plausible. *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009). The Court should uphold the lower court's ruling dismissing this action for failure to state a claim and further hold Plaintiffs have not pleaded a concrete injury under Article III.

II. ENFORCING THE PLEADING STANDARDS WILL PREVENT PLAINTIFFS FROM MASKING THEIR ALLEGATIONS OF PRODUCT DEFECT AS CONSUMER FRAUD CLASS ACTIONS.

Enforcing the applicable pleading standards will allow courts to distinguish between cases where plaintiffs may actually have been fraudulently deceived into buying a product from those where plaintiffs' lawyers are trying to recast risk of future product injury as misrepresentations. The U.S. Supreme Court has been clear that under product liability, negligence and other bodies of law, the risk an injury may occur in the future is not compensable. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (it is when the "risk of future harm materializes [that] the individual suffers a concrete harm, then the harm itself, and not the pre-existing risk, will constitute a basis for the person's injury and for damages"). The Court has made no exceptions for economic-loss theories. In these cases, plaintiffs bought and safely used the product, and thus received the benefit of their bargain.

Because of this jurisprudence, plaintiffs' lawyers have searched for creative ways to frame risks of physical harm that products may pose to individuals as economic harms for all consumers. As here, they contend a manufacturer "knew" its product had a "defect" but sold it without informing consumers of that "defect." *See Braverman v. BMW of N. Am., LLC*, No. 21-55427, 2023 U.S. App. LEXIS 5721, at *9 (9th Cir. Mar. 10, 2023) (Bennett, J., concurring) (observing trend of products claims recast as consumer protection actions). In doing so, class counsel

are seeking two shortcuts: (1) invoke product liability concepts without proving a product liability action, and (2) extend liability to all consumers, not just those who have sustained actual harms from the alleged defect. *See* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?,* 80 Brook. L. Rev. 599, 628 (2015) ("Rather than claim a product caused physical harm, the lawsuits often seek to recover for alleged pecuniary losses" from an unmanifested defect or alleged misrepresentation.).

Several other circuits have called out and rejected any such attempt to mask product defect cases as consumer class actions. As the Eighth Circuit stated, plaintiffs cannot be allowed to "reframe the issue by saying that there is an inherent . . . defect common to all" of the products or that all consumers suffered an economic loss because they would not have paid "the sticker price if they knew" of the potential defect. *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 988 (8th Cir. 2021); *see also Penrod v. K&N Eng'g, Inc.*, 14 F.4th 671, 674 (8th Cir. 2021). Plaintiffs "cannot now recast their product liability claim into a non-existent breach of contract claim." *Penrod*, 14 F.4th at 674. If the product does not cause injury, "the purchasers of the [product] have received the benefit of their bargain," under both common law and state consumer protection acts. *Id.*

Plaintiffs must, as the Third Circuit held, "do more than simply characterize that purchasing decision as an economic injury." *In re Johnson & Johnson Talcum*

Powder Prods. Mktg., Sales Pracs. & Liab. Litig., 903 F.3d 278, 281 (3d Cir. 2018). "The plaintiff must instead allege facts that would permit a factfinder to determine, without relying on mere conjecture, that the plaintiff failed to receive the economic benefit of her bargain." *Id.* "While the evidentiary burdens placed on a plaintiff at the pleading stage are minimal, our precedent requires the plaintiff to do more than simply pair a conclusory assertion of money lost with a request that a defendant pay up." *Id.* at 287; *accord Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315, 319–20 (5th Cir. 2005) (when asserting an elevating risk of harm without physical injury, "[m]erely asking for money does not establish an injury in fact").

Thus, if Plaintiffs assert that reliance on an alleged misrepresentation distinguishes their case from a traditional risk-of-future-injury product action, they must plead the specific facts that make these claims plausible. Plaintiffs have not done so, and the Court should issue a ruling that protects the courts and parties from product claims improperly masked as economic injuries.

III. ENFORCING THE PROPER PLEADING STANDARDS EXPOSES CLASS ACTIONS THAT, AS HERE, HAVE NO FACTUAL BASIS.

Particularly in broad-based class actions like this case, "courts must be more careful to insist on the formal rules." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). The pleading requirements, along with the Supreme Court's plausibility standard in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), set the rules for accessing the courts.

Together, they help protect against prolonged class litigation, settlements that provide no benefits to the class, and outcomes inconsistent with product liability and other substantive areas of law. *See, e.g.*, *B&G Towing, LLC v. City of Detroit,* 828 Fed. Appx. 263, 266 (6th Cir. 2020) ("While the pleading standards are not onerous, they lock the doors of discovery for a plaintiff armed with nothing more than conclusions.") (cleaned up); *Changizi v. Dept. of Health & Human Servs.,* 82 F.4th 492, 498 (6th Cir. 2023) ("federal courts will not unlock the doors of discovery for a fishing expedition based on a plaintiff's speculative assertions").

One of the problems with allowing threadbare class claims such as the ones at bar to proceed past a motion to dismiss is that merely having to litigate a putative class action, regardless of the merits, "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Defendants are placed in an untenable position. Defense costs can run into tens of millions of dollars, and these actions can drag on for years, even before a court takes up class certification. Therefore, merely allowing a putative class action to survive a motion to dismiss can enable plaintiffs to leverage the inefficiencies of the judicial system "to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552

U.S. 148, 149 (2008); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail").

Further, experience has shown that it is particularly difficult to value a class action for settlement purposes where the class members were neither actually misled nor suffered measurable injury. *See generally* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & Contemporary Problems 97 (1997). As a result, even when the parties try to settle these claims, few—if any—benefits end up going to the class. Often, absent class members have little interest in claiming an award; they do not feel aggrieved and view returning the claim form as not worth the effort. *See* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014) (finding "very small percentages of class members actually file and receive compensation from settlement funds"). These class members also have little incentive to hold their counsel accountable; they "have individually too little at stake to spend time monitoring the lawyer—and their only coordination is through" such counsel. *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.*, 834 F.2d 677, 681 (7th Cir. 1987). The result is that "class counsel effectively appoint themselves as agents for the class, wielding a power to transact in class members' rights." Richard A. Nagareda, *The Preexistence Principle and the Structure of the*

Class Action, 103 Colum. L. Rev. 149, 150–51 (2003). It is not surprising that the bulk of money in these actions ends up going to class counsel.

As just one example, in *Chapman v. Tristar Prods., Inc.*, plaintiffs filed a class action alleging pressure cookers had defective lids "which exposed the user to possible injury." 940 F.3d 299, 302 (6th Cir. 2019). The case resulted in coupons and warranty extensions worth $1.02 million to the class, and $1.98 million in attorneys' fees. *Id.* The settlement was so lopsided it drew an objection from the Arizona Attorney General. *See id.* at 302. Consistent with this example, a study of 44 class settlements found class counsel recovered almost as much as the class members. *See* Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010–2018)*, at 12 (Apr. 2020).[3] "Such disproportionate attorneys' fee awards mostly arise in settlements . . . where the harm to consumers is very small or even arguably nonexistent." Jason S. Johnson, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes*, 2017 Colum. Bus. L. Rev. 1, 5 (2017).

Overall, class-litigation costs in the United States have exploded in large part due to these tactics. The costs totaled a staggering $3.37 billion in 2021, continuing a rising trend that started in 2015. *See* Carlton Fields, *Class Action*

[3] https://www.jonesday.com/en/insights/2020/04/empirical-analysis-consumer-fraud-class-action

Survey 7 (2022).[4] About 57.9% of major companies are engaged in class actions, with the average number of class matters per company rising from 4.4 in 2013 to 8.9 in 2021. *See id.* These class actions do not provide "access to justice;" they open the courthouse to speculative, unprincipled litigation. They should be weeded out at the motion-to-dismiss stage if they cannot satisfy the pleading requirements.

IV. THE COURT SHOULD AFFIRM DISMISSAL TO ENSURE THAT PRODUCTS LIABILITY REMAINS THE BODY OF LAW GOVERNING ALLEGATIONS OF PRODUCT DEFECT.

Finally, the Court should affirm the ruling below to ensure products liability remains the body of tort law governing risks associated with the design and manufacture of products. Product-defect causes of action have their own purposes, elements, and remedies. They do not subject companies to consumer-wide liability for selling products with risks of harm. *See* Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. Ky. L. Rev. 423, 424 (1997) ("[C]ategory liability" and has been widely rejected in products liability law."). These laws—not fraud, misrepresentation, and consumer protection acts—should remain the basis of liability for claims related to product designs. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1267 (1991).

[4] https://classactionsurvey.com

From ranges to automobiles, it is imperative that assessments about whether products pose unreasonable risks of harm to consumers are made through the elements of product liability. Here, if Plaintiffs are going to allege the way in which the burner knobs work makes the ranges defective, there should be a determination as to whether the knobs are actually defective. This assessment requires a thorough review of the knob's design and whether the current knobs make the ranges unreasonably dangerous. The parties would have to present reliable scientific evidence on the knob's design, which would be measured against reasonable alternatives, its risk-utility, and other factors that courts can consider under the substantive law of the states where these claims are brought. These measures are intended to assure liability remains objective and principled—not a subjective assertion that a product works differently than some may have assumed.

Further, if these claims are allowed, they are not going to benefit consumers, but *cost* consumers money by making products more expensive. "[L]itigation expenses, attorney's fees, and settlement costs" are often passed "to consumers through increased prices, fewer innovations, and lower product quality." Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* 23 (Emory Univ. Sch. of Law, Legal Studies Research Paper Series No. 16–402 (2016)). Requiring counsel to include specific allegations of concrete injury in their pleadings helps filter out these worthless outcomes from ones that can offer meaningful relief.

At the end of the day, putative class actions like this one undermine respect for the judicial system, as the public comes to view class-action litigation as driven by the financial interests of lawyers, not justice for those they purport to represent. This Court should affirm the ruling below, thereby assuring judicial resources can be spent on claims involving actual product defects, fraud and injuries.

CONCLUSION

For these reasons, the Court should affirm the judgment of the district court and consider modifying the ruling to reflect a dismissal for Article III standing.

Respectfully submitted,

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Dated: April 16, 2024

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 4,666 words. 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 it has been prepared in Times New Roman 14-point proportional type.

/s/ Philip S. Goldberg
PHILIP S. GOLDBERG

April 16, 2024

CERTIFICATE OF SERVICE

I hereby certify that the on this 16th day of April 2024, I electronically filed the foregoing Brief with the Clerk of the Court using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users.

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April 16, 2024