No. 12-1067

IN THE

Supreme Court of the United States

SEARS, ROEBUCK AND CO.,
Petitioner,

v.

LARRY BUTLER, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is certiorari appropriate in a case remanded by the court of appeals to the district court with no operative class certification order?

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The opinion of the court of appeals is found at Pet. App. at 1a-8a. Its order denying rehearing en banc is found at Pet. App. 29a-30a. The district court's opinion is found at Pet. App. at 9a-22a. The district court's opinion denying reconsideration is found at Pet. App. at 23a-28a.

INTRODUCTION

All class certification orders are interlocutory, but some are more interlocutory than others. It is for this reason that the Court has never granted a petition for certiorari where, as here, there is no operative order granting or denying class certification with respect to the core claim in the case.

The core claim is that Sears, Roebuck and Co. ("Sears") breached the warranty on certain front-loading washing machines ("Kenmores") manufactured by Whirlpool Corporation ("Whirlpool"). Plaintiffs-Respondents allege that the Kenmores are defective because they accumulate mold, mildew, and other biological debris and do not adequately self-clean ("the mold claim"). Whirlpool, indemnifying Sears here, faces this same claim in a corresponding action before the Sixth Circuit. *See In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation,* 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.*, *Whirlpool Corp. v. Glazer*, No. 12-322, 2013 U.S. LEXIS 2695 (2013) ("*Glazer*"). This Court vacated the Sixth Circuit's opinion in *Glazer* for further consideration in light of *Comcast Corp. v. Behrend,* 133 S.Ct. 1426 (2013).

The need for further class certification analysis below counsels in favor of denial of the Petition here. Unlike in *Glazer*, there is no class certification order with respect to the mold claim; rather, the Seventh Circuit reversed the District Court's denial of class certification and remanded for further analysis. That opinion requires the District Court to reconsider its denial of class certification under all intervening law, which now includes this Court's decisions this term in *Comcast* and *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). In other words, there is no class certification order for this Court to review with respect to the mold claim, only a Seventh Circuit opinion for the District Court to interpret in light of, *inter alia*, *Comcast* and *Amgen*. Until the District Court issues a new ruling on class certification with respect to that claim, subject to further review by the Seventh Circuit, there simply is no reason for this Court to wade into the fray.[1]

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[1] Even setting aside that review is inapt in this procedural posture, many of Sears' contentions are wrong even on their own terms. Much of the Petition, for example, focuses on the Seventh Circuit's purportedly controversial statement that "[p]redominance is a question of efficiency." Pet. at 14-17. Yet, this Court reiterated that very point in *Amgen* when it explained that "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" 133 S. Ct. at 1191.

Without an order on class certification on the mold claim, what remains is a secondary class certification order on a small unrelated claim that should have been severed from the core mold claim. Broadly speaking, this claim (the "CCU claim") is that Sears is obligated to repair a small number of Kenmores that stop functioning due to an alleged defect in the manufacturing process used by one particular subpart vendor for a brief period of time. Even as to this much smaller class, moreover, the Seventh Circuit ordered the District Court to perform further class certification analysis. Most importantly for present purposes, the CCU class certification order does not implicate either of the questions presented in Sears' petition.

At bottom, and as explained more fully below, this Petition arises in a procedural posture particularly unsuited for review. Respondents respectfully ask that it be denied.

STATEMENT OF THE CASE

This is one of two substantially identical cases, the other of which is pending in the Sixth Circuit following a "GVR" order. *See Whirlpool Corp. v. Glazer*, No. 12-322, 2013 U.S. LEXIS 2695 (2013). The washing machines at issue here are the same at issue there, Whirlpool is the real party in interest in both cases (it manufactured all of the washers and is indemnifying Sears here), and the factual record is substantially identical. The only difference is the brand name appearing on the washer.

These cases involve Whirlpool front-loading washing machines ("FLWs"), here, branded as "Kenmores." The allegation is that these washers

were designed in such a way that they trap mold and do not adequately self-clean. *Id.* at 412.[2] As a result, Respondents allege that consumers are required to undertake undisclosed, expensive, and extraordinary maintenance to try to ameliorate the development of mold and resulting noxious odors. *See id.* at 415.

Whirlpool's own engineers have conceded that the FLWs are the "ideal environment for bacteria and mold to flourish" because of their "lower water levels, high moisture, and reduced ventilation." *Id.* at 412-13. Whirlpool, moreover, concluded that odor, a common end result of mold contamination, had developed in 35% of the FLWs within just a few years, and estimated that 50% of "current front-load washer owners might be looking for a solution to an odor problem with their machines." *Id.* at 415; *see also* D. 213-13 (7/02/05 Memo) at 1 ("[H]igh # of customers (35%) complaining about bad odors . . . .").

While Sears and Whirlpool denied warranty coverage for this problem, Whirlpool developed and sells a product to *all* purchasers of the FLWs that it touts as addressing the problem. *See Glazer*, at 415. ("Whirlpool marketed Affresh™ [tablets] as 'THE solution to odor causing residue'"); *see also* D. 213-11 (9/20/07 Affresh Memo) at 1-2 (explaining that no other "cleaning product provided a complete solution to effectively combat" the buildup of "mold and mildew" within the Washers). Sears and Whirlpool,

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[2] Sears asserts that this is a case about "all Kenmore front-loading Washers made since 2001." Pet. at 6. That is false. The proposed class includes only *some* Kenmores sold prior to 2009.

moreover, eventually instructed *all* purchasers to follow elaborate procedures to forestall the mold problem, including running extra cycles with bleach, wiping and cleaning the machine after each use, and leaving the washer door open at all times. D. 214-1 at ¶35.

A. Sears Mischaracterizes The Record.

Although the procedural posture of this case makes the factual record a matter for the district court — i.e., denial of the petition will result in a remand to the District Court for plenary factual and legal review — Sears twice mischaracterizes what is in that factual record in ways worthy of brief comment.

1. The Kenmores Are Uniform.

Sears claims that it sold 27 different models of FLWs since 2001 (Pet. at 6), and implies that the number of models indicates that the underlying problem is not uniform. Not so. Even setting aside that this number includes washing machines that are not part of the proposed class, the question is not whether some Kenmores are white while others are red, but whether they share uniform design features that cause them to develop mold and inadequately self-clean. Whirlpool's own engineers concluded they do. *See Glazer*, at 414 ("[T]he mold problem was not restricted to certain models or certain markets."); D. 291-6 (10/26/04 Minutes) at 1-2 (same).

Even Sears' contention that there are many different models at issue is not quite accurate. Kenmores are built on only two slightly different

engineering platforms, known as "Access" and "Horizon," which are uniform for purposes of the claims in this litigation. *Glazer*, at 414. Indeed, Whirlpool itself admitted that every washer within each of the two platforms is "nearly identical from an engineering standpoint" and that "most of the differences" are "aesthetic." D. 290-4 (Hardaway Aff.) at ¶¶ 6, 8.

At bottom, contrary to Sears' implication that this litigation involves multiple different FLW models, all Kenmores are designed with the same relevant features that create an identical problem: none prevents mold from forming, eliminates mold during a self-cleaning cycle, or allows consumers to remove mold manually. *See Glazer*, at 413 ("[T]he mold problem was not restricted to certain models."); *see also id.* ("Chemical analysis Whirlpool conducted showed that the composition of biofilm found in the 'Horizon' and 'Access' platforms was identical."); D. 291-8 (10/18/04 Email Chain) at 3 (same).

2. 35-50% of Purchasers Experienced the Mold Problem Within A Few Years.

Sears seeks to minimize the scope of the mold problem by asserting that "0.37% of all US owners" report odor problems to Sears within the first year of service. Pet. at 9. For support, Sears refers to documents showing that a small percentage of owners submitted odor complaints through its formal warranty process during the first year after purchase. *See id.* That is a curious construct on its own terms, given that washing machines are durable goods expected to function properly for at least 10 years, and that the gravamen of the lawsuit is that

Sears and Whirlpool refused all relief under the warranty.

Respondents submit that the District Court will also be unlikely to credit Sears' argument that the mold problem in the FLWs did not affect many purchasers, given that *all* of Whirlpool's pre-litigation engineering documents indicate that mold was a major problem throughout the class period. *See Glazer* at 415; *see also* D. 213-12 (2005 Quickfix Presentation) at 10 ("35% of Duet customers complain of odors. . . . Complaints are increasing from all other markets."); D. 213-13 (7/02/05 Memo) at 2 ("[H]igh # of customers (35%) complaining about bad odors."). Whirlpool created a special "biofilm team" to try to deal with the mold problem, D. 212-2 (Hardaway Dep.) at 186-187, and, as indicated above, even developed and markets an entirely new product (Affresh) to capitalize on the widespread nature of the problem it created. *See Glazer*, at 415; *see also* D. 213-11 (9/20/07 Affresh Memo) at 1-2 (explaining that no other "cleaning product provided a complete solution to effectively combat" the buildup of "mold and mildew" within the Washers).

B. The Courts Below Correctly Certified the Small Manufacturing Defect Class (Which Does Not Implicate Sears' "Questions Presented").

One aspect of this case differs from *Glazer* and does involve a certified class, albeit one unrelated to the mold defect or either of Sears' questions presented for certiorari. Respondents allege that a small subgroup of readily identifiable Kenmores were manufactured using a uniformly defective

process that damaged the central control unit ("CCU"), which ultimately caused the Kenmores to stop functioning. *See* Pet. App. at 20a-21a ("[L]imited to an identified production period during which control units from a single supplier were installed by a unique process. . . . readily identifiable by serial number."). Respondents contend that Sears is obligated, under the warranty, to fix Kenmores that stop functioning for this reason because the machines shipped from the factory with the defect. The CCU claim is distinct from the mold claim both factually and legally, which is why Respondents moved to sever them from each other, which the District Court denied but the Seventh Circuit thought appropriate. *See* Pet. App. at 22a (denying this motion without prejudice); Pet. App. at 2a ("The suit is really two class actions because the classes have different members and different claims, and therefore they should have been severed.").[3]

The issues raised in connection with the CCU class are straightforward: either the CCU manufacturing process at the particular subpart vendor was or was not defective for a short period of time and, if it was, Sears' warranty either does or does not obligate it to fix Kenmores that fail as a result. Perhaps most importantly for present purposes, the CCU class will provide relief, if at all, only to individuals whose machines have manifested the defect. It thus raises no issues related to Sears'

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[3] Respondents *agree* with Sears that "most [Kenmores] do not even contain potentially defective CCUs." Pet. at 13. And this is exactly why "most Kenmores" are not part of the CCU class.

"questions presented", which concern members of a class "who did not experience the alleged product defect." *See* Pet. at i. The District Court was aware of Sears' argument on this issue with respect to the CCU claim, and expressly noted that Sears failed to present any evidence on it. Pet. App. at 21a. ("At this stage, it is not clear that the proposed class includes many members where were not injured by [the] alleged control unit defect, so Sears' assertions of overbreadth are not a basis for denial of certification."). That is one issue Sears can revisit on remand in the District Court should it wish. Another is the Seventh Circuit's instruction that the District Court consider whether any variations in state law might impact the propriety of its initial certification order. Pet. App. at 8a.

C. The Opinions Below.

1. The District Court Opinions.

In an opinion largely devoid of any analysis of the factual record before it, the District Court denied class certification of the mold claim, and granted certification of the more limited control unit claim. Pet. App. at 22a. Respondents moved for reconsideration on the mold claim, *see* Pet. App. at 23a, and Sears sought interlocutory review of the CCU claim, *see* Pet. App. at 7a. Approximately one year after Respondents filed their motion for reconsideration, the District Court denied that motion in a four-page opinion that cited no caselaw and referenced only a single paragraph of evidence. Respondents timely sought interlocutory review of that denial under Federal Rule of Civil Procedure 23(f), which put both orders before the Seventh Circuit.

2. The Seventh Circuit's Opinion.

In a brief opinion, the Seventh Circuit found that the District Court erred by failing to conduct a rigorous class certification analysis of the mold claim. It reversed the District Court's opinion regarding the mold class and remanded the case for further class certification analysis in the District Court. The Seventh Circuit also affirmed certification of the secondary CCU claim, explaining that "[t]he only individual issues — issues found in virtually every class action in which damages are sought — concern the amount of harm to particular class members." Pet. App. at 7a.

D. The Relationship of This Case to *Glazer*.

The central legal issues in this case are identical to those presented in *Glazer*. *See* Pet. App. at 7a (refusing to create a "gratuitous" intercircuit conflict because the Seventh Circuit "agree[d] with [*Glazer*]"). This Court has now remanded *Glazer* so that the Sixth Circuit may consider any implications from *Comcast*. The present case is in the same procedural posture as *Glazer*: no action from this Court is necessary to align them.[4]

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[4] More precisely, they are in the same *legal* posture: *Glazer* is pending before the Sixth Circuit for consideration only of intervening law, whereas this case, if the petition is denied, will be pending before the District Court for further analysis of both law and fact.

REASON TO DENY THE WRIT

There Is No Judgment Or Order To Review.

There is no operative order or judgment on the question of class certification of the mold claim, the only part of the case that presents either of Sears' questions presented. *See* Pet. at i. (identifying an "efficiency" issue in Question 1 and a "most members did not experience the alleged product defect" issue in Question 2). Instead, the Seventh Circuit issued an order requiring further examination of the mold claim before the District Court, where the parties will address the full factual record under new legal authority.

Under Rule 23(f) of the Federal Rules of Civil Procedure, interlocutory review extends only to "an order granting or denying class-action certification . . . ." An order to remand for further consideration neither grants nor denies class-action certification and would not qualify as reviewable. For example, were a district court to vacate and remand to a magistrate judge an order that had granted or denied class certification, that would not be appealable to the Court of Appeals by the terms of Rule 23(f). Although there are no cases directly on point, the plain language of Rule 23(f) interlocutory appellate procedure mandates the existence of *an order granting or denying class certification.* In other words, this Court should not grant certiorari under circumstances in which a circuit court could not even exercise review in the first instance.

Since the adoption of Rule 23(f), this Court has never accepted review of any class certification

appeal in the absence an operative order granting or denying such certification.[5] Without a specific order to review based on a concrete factual record, the Court would be left in the improper role of issuing advisory opinions disconnected from direct judicial action. Review would thus contravene the well-established rule that "this Court reviews judgments, not opinions . . . ." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842 (1984); *see also Herb v. Pitcairn,* 324 U.S. 117, 126 (1945) (this Court's "power is to correct wrong judgments, not to revise opinions.").

Accordingly, the petition should be denied for the simple reason that there is no order for this

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[5] Rule 23(f) was adopted in 2005. Since that time, this Court has considered substantive issues of class certification in several cases. In none of these cases did the Court face the situation where, as here, there is no operative class certification order. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (appeal from grant of class certification); *RBS Citizens, N.A., v. Ross*, No. 12-163, 2013 U.S. LEXIS 2640 (Apr. 1, 2013) (GVR) (appeal from grant of certification); *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184 (2013) (appeal from grant of class certification); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (appeal from partial grant and partial denial of class certification); *Chinese Daily News, Inc. v. Wang*, 132 S. Ct. 74 (2011) (GVR) (appeal from grant of certification as a collective action); *Erica P. John Fund v. Halliburton Co.,* 131 S. Ct. 2179 (2011) (appeal from denial of class certification).

Court to review until the District Court issues an order granting or denying class certification and until the Seventh Circuit, in turn, reviews that ruling.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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