No. 13-138

IN THE

Supreme Court of the United States

BSH HOME APPLIANCES CORPORATION,
Petitioner,

v.

SHARON COBB, 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 Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is certiorari appropriate when a circuit court exercises its discretion not to review a district court's class certification order, the district court considered only issues of law about which there is no relevant circuit split, and petitioner claims primarily that the district court erred under the law of its own circuit?

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INTRODUCTION

Petitioner BSH Home Appliances Corporation ("Bosch") asks this Court to engage in an unprecedented form of certiorari review. Fifteen years ago, the Federal Rules of Civil Procedure were amended to allow an extra layer of fully discretionary appellate review of class certification orders. *See* Fed. R. Civ. P. 23(f). In the intervening fifteen years, this Court has never interceded to overturn a court of appeals' exercise of discretion over that narrow type of interlocutory review.

Bosch fails to identify any substantive issue in the District Court's opinion that warrants certiorari review. Instead, Bosch claims that certiorari is appropriate based primarily on the District Court's refusal to credit certain factual arguments made by Bosch. Few class certification orders are more routine: the District Court held that a single trial could determine whether two essentially identical products (front-loading washing machines) were designed defectively and, if so, whether Bosch is liable to all class members for selling these washers.

Because this case is ill-suited for certiorari, Bosch seeks to tether its Petition to two cases this

Court considered last Term, brought against Whirlpool Corporation. Those cases involve certain Whirlpool-manufactured front-loading washing machines and similar claims to the ones at issue in this litigation.[1] The Sixth and Seventh Circuits approved of class certification in those cases, and Whirlpool sought certiorari. Following *Comcast*, this Court issued GVR orders. Both Circuits reinstated their opinions.

But a critical fact distinguishes this case from the Whirlpool cases: here, the Court of Appeals denied review *after* this Court's decision in *Comcast*. Indeed, the Court of Appeals denied reconsideration on the precise argument that *Comcast* somehow mandated a different outcome. Bosch, moreover, does not even attempt to claim that the District Court's opinion conflicts with *any* circuit's interpretation of *Comcast*. And it cannot: to date, every circuit to consider the issue has interpreted *Comcast* in precisely the same manner with respect to these issues.

This Petition raises no substantive issues warranting review, and arises in a procedural posture almost uniquely unsuited for it. Respondents respectfully ask that the Petition be denied.

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[1] Sears, Roebuck & Co. is the nominal defendant in one of these cases, but Whirlpool is the real party in interest in both. The procedural history of these cases is summarized in *Butler v. Sears, Roebuck & Co.*, No. 11-8029, --- F. 3d. ---, 2013 U.S. App. LEXIS 17748, at *15-16 (7th Cir. Aug. 22, 2013).

STATEMENT OF THE CASE

This is a case about Bosch's design, manufacture, marketing, and sale of identical front-loading washing machines ("Washers"). The Washers fail to self-clean and, as a result, accumulate biofilm, mold, and bacteria, which can cause them to emit a foul odor. Bosch never disclosed to consumers that its Washers suffered from a mold problem, nor that its Washers require costly and time-consuming maintenance to try to ameliorate it. Respondents thus contend Bosch is liable to every consumer who purchased a Washer in four states whose consumer protection laws recognize such claims. If so, those four states permit Respondents to recover the difference in value between the product as marketed and the product delivered, or the undisclosed costs of trying to ameliorate the problem. More importantly for present purposes, the District Court found that a single trial can determine Bosch's liability (or lack thereof) to all class members, the Petition concerns this finding.

A. Relevant Facts.

The defect at issue goes back to Bosch's introduction of Washers into the United States. The record shows that Bosch was flooded with complaints about mold and other product defects from the introduction of the Washers in 2004. *See* R. 93 at 51-53 (Peebles Dep. at 334:20-335:3); *see also* R. 92 at 9 (09/08/2005 e-mail) ("People are extremely sensitive to mold issues and I get call after call regarding this."). But Bosch never warned consumers prior to the sale; for example, the "stickers" and "labels" on the Washers, visible to any consumer who purchases a Washer, contain no information about the mold

problem or its mitigation.[2] Instead, Bosch advised complaining customers to seek to remediate on their own (and at their own cost). *See, e.g.*, R. 93 at 59-61 (Novinsky Dep. at 55:11-57:8); *cf.* R. 92 at 68 (11/19/2007 email) ("[A product designed to fight mold] seemed to work at first, but after a couple of cycles I can already start to smell the musky/moldy smell again."). Remarkably, the Senior Project Manager for Laundry prevented the sales department from warning consumers about "washer smells" at the point of purchase. Pet. App. at 17a, 31a.

The mold problem is straightforward: the Washers contain identical internal components that do not properly clean themselves. *See* R. 148 at 6:20-23 (Clark Reply Decl.) ("[T]he Washers all bore the same design [and] used the same parts . . . ."); *accord* Pet. App. at 13a-14a. Because of this, they all "have the same propensity for reaching [problematic] levels of micro-organism growth." R. 91 at 38 (Clark Report). This defect promotes mold growth regardless of an individual consumer's habits in using her Washer. *See* R. 92 at 74 (2005 White Paper) ("[R]esidues and smells [sic] that may build up even with proper use."); R. 93 at 28 (Peebles Dep. at 191:7-11) ("Q. … [T]he machine can grow mold and mildew both when it's used the way it's

[2] Among other things, Bosch did not disclose that owners would need to wipe-out the door gasket after each wash, leave the washer open between uses, run extra cycles, and purchase cleaning products. R. 93 at 59-62 (Novinsky Dep. at 55:11-58:3); *but cf.* R. 92 at 104-105 (revealing that Bosch's operating manuals warned consumers that leaving the door open was hazardous to children and pets).

supposed to be and if it's used the way it's not supposed to be used? A. That's correct.").

B. The District Court's Order.

On December 20, 2012, the District Court issued a lengthy opinion granting class certification in part and denying Bosch's motion to exclude Respondents' expert testimony. Pet. App. at 3a-75a.

1. The Order Granting Class Certification in Part.

The Petition turns on Bosch's claim that no class could be certified because some purchasers have not yet complained about odor (a sometime *symptom* of mold, but neither the defect nor the injury itself) in their machines. But the District Court did not purport to certify a class of individuals whose washing machines smell, it certified a class of individuals who purchased a product that required purchasers to undertake undisclosed, extraordinary, maintenance and to purchase additional products to try to ameliorate the effects of the undisclosed product characteristics. The District Court made clear that a single trial could determine Bosch's liability to *all* such class members:

> Plaintiffs need only prove that Defendant's products had a common design and the design created a propensity for the products to develop an undesirable condition; Plaintiffs need not prove that every product *actually* developed this undesirable condition. . . . the harm for which Plaintiffs sue is not the *actual*

> *manifestation* of [mold problems], but for Defendant's *failure to disclose* the Washers' propensity to develop [such problems].

Pet. App. at 27a (emphasis in original).

Put another way, the District Court held that, under the four applicable state consumer protection laws, consumers have a claim when they pay too much for a defective product, where the negative characteristics and extraordinary operating costs were not disclosed until after purchase. As detailed below, that holding is plainly a correct statement of law. *See, e.g. Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris,* 196 F.3d 818, 823 (7th Cir. 1999) (Easterbrook, J.) (explaining that injury includes "[p]aying too much, or getting an inferior product for the same money . . . causes a loss of one's money, which is 'property'"). Because of this, the District Court reasoned there were no individual issues regarding Bosch's liability—Bosch either sold defective Washers with an unreasonable propensity to develop mold and, as a result, injured all consumers who paid too much for an inferior product, or it did not and injured none.[3]

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[3] Bosch argues that issues of individual consumer misuse predominate over any common questions. Setting aside that Bosch presented no evidence to support this argument, this misapprehends the litigation. If Bosch shows that mold and odors are caused by individual consumer misuse, Bosch will not be liable to *any* class members; i.e., its Washers are not defective. But if, as Bosch concluded pre-litigation, consumer misuse does not cause the mold infestation, then Bosch sold

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2. The Order Denying Bosch's Motion to Strike Respondents' Experts.

With its opposition to Plaintiffs' motion for class certification, Bosch also moved to exclude Respondents' experts. While the District Court considered aspects of Bosch's motion, the District Court declined to analyze whether expert testimony unnecessary to its class certification decision was admissible. Pet. App. at 69a-75a.

The District Court has since ruled that Bosch may file a class decertification motion before March 31, 2014, and which time Bosch may also file additional motions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). (*See* R. 185.)

C. The Court of Appeals' Post-*Comcast* Orders.

On April 1, 2013, the Court of Appeals declined to take interlocutory review of the District Court's order at that time. Although not referenced in the Court of Appeals' order, it is noteworthy that the Ninth Circuit has held that absent class members must have a "concrete and particularized"

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defective Washers to *all* class members, and Bosch injured even a class member who "misuses" the Washer because Bosch promised that person one thing (a merchantable Washer) and sold them another (a defective one that requires extraordinary and costly maintenance).

injury. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011).

On April 12, 2013, Bosch moved for reconsideration in light of this Court's GVR order in *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) ("[C]ase remanded . . . for further consideration in light of *Comcast Corp. v. Behrend* 133 S. Ct. 1426 (2013)."). The Court of Appeals denied that motion on May 23, 2013.

REASONS TO DENY THE WRIT

I. The Petition Is Procedurally Infirm.

A. This Court Should Decline to Review the Court of Appeals' Exercise of Discretion.

This Court has never granted certiorari review to a court of appeals' order denying interlocutory review of a class certification order. This is not a matter of happenstance: it reflects the structure of Rule 23(f), which was expressly designed to provide a layer of fully discretionary review by the courts of appeals of class certification decisions. Bosch here seeks certiorari not from a decision or opinion affirming or denying class certification, but from a discretionary (non-precedential) ruling that no interlocutory appeal may be had at this time.

Even a cursory examination of the text of Rule 23(f) reveals why the decision to grant or deny such review has never been subject to a grant of certiorari. Under the Federal Rules, the circuit courts are given freedom to decide which class certification orders they review on an interlocutory

basis. *See* Fed. R. Civ. P. 23(f) ("A court of appeals *may permit* an appeal . . . ." (emphasis added)). The object was in part to give courts of appeals an opportunity to shape law without fear that cases would disappear because a grant or denial of class certification would end the litigation. *See Blair v. Equifax Check Servs.*, 181 F.3d 832, 834-35 (7th Cir. 1999) (Easterbrook, J.).

No court of appeals has treated the exercise of Rule 23(f) review as anything other than discretionary. This is entirely consistent not only with the language of the Rule, but with the drafting observations of the Advisory Committee Notes, which twice refer to this discretion as "unfettered." *See* 2003 & 1998 Advisory Committee Notes. Indeed, Respondents are unaware of any circuit having granted en banc review of a panel decision denying interlocutory appeal under this Rule.

B. Bosch's Analogies to Emergency Interlocutory Appeals Fail.

Even Petitioner's own amici concede "the absence of an appellate ruling on class certification on *BSH* under Rule 23(f) makes the case a less than ideal candidate for plenary review." *Brief of Whirlpool, et al.* at 3. Bosch, indeed, does not attempt to locate its claimed right of certiorari review within Rule 23(f) or any of the extensive cases generated under that Rule. Instead, in an extraordinary leap of imagination, Bosch argues that a right of review must lie because: (1) the President of the United States may obtain interlocutory review in cases involving the claim that the discharge of his duties are impaired by judicial order; (2) prisoners denied their liberty may seek relief under habeas

corpus. While these arguments do not want for hubris, they nonetheless lack legal merit.

Bosch invokes *Nixon v. Fitzgerald* for the proposition that this Court will reverse a circuit court's refusal to review a civil damages action brought against the President for an employment decision made in his official capacity. 457 U.S. 731 (1982). This Court, however, has long recognized that civil actions against sitting governmental officials impose a special cost on the government itself, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Indeed, in *Nixon,* the Court found that the President:

> is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.

457 U.S. at 749. Nothing in the sale of defective Washers commands this level of judicial solicitude.

No more germane is Bosch's attempted analogy to petitions for a writ of habeas corpus. The claim that its interest in being protected from a determination as to whether it sold defective household appliances is equivalent to the interest in avoiding wrongful execution or imprisonment is simply mindboggling. And this Court has previously

rejected attempts to stretch the fundamental liberty interest at stake in habeas corpus proceedings to other interests far more central to a just conception of our society's basic values than the sale of defective Washers. *See, e.g., Lehman v. Lycoming County Children's Servs. Agency,* 458 U.S. 502, 510 (1982) (denying habeas standing to a mother facing termination of parental rights and describing prior cases as turning on whether the petitioner was truly "in custody").

In sum, there is no order properly presented for review. Rule 23(f) granted parties in class actions an additional layer of discretionary review at the court of appeals level. It did not turn a class action defendant into either the President or a prisoner. The Court of Appeals was not required to review this case.

C. There is No Basis for a GVR Order.

Although this Court issued GVR orders in two similar cases last Term, there is no basis for further reconsideration in the present case. *See Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013). Unlike the appellate rulings in those cases, the Ninth Circuit's two orders declining review were both issued post-*Comcast*; ordering the Court of Appeals to consider that case for a third time would serve no end. This is particularly so because there is no circuit split regarding *Comcast* that could serve as the basis for other reconsideration. *Cf. Nunez v. United States*, 554 U.S. 911, 913 (2008) (Scalia, J., dissenting) ("I had thought that the main purpose of our certiorari jurisdiction was to eliminate circuit splits, not to create them."). Under these

circumstances, a GVR order would be baffling: it would be unclear what new law the Ninth Circuit should reexamine.

II. There Is No Substantive Issue To Be Resolved By This Court.

A. There is No Circuit Split Regarding *Comcast*.

Bosch's Petition is perhaps most notable for what it does not contain: any assertion that there is a circuit split regarding the primary question presented. Seven circuits have issued opinions considering *Comcast* in at least some detail, and Petitioners do not purport to find any conflict in the application of *Comcast* among any of them.

The Ninth Circuit applied Comcast in *Leyva v. Medline Industries*, which predates the denial of rehearing in this case and sets forth the Court of Appeals' understanding of Comcast. 716 F.3d 510 (9th Cir. 2013). In addressing a class action for wage and hour claims, the Ninth Circuit explained:

> [T]he plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability. *Comcast,* 133 S. Ct. at 1435 ("The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*.") (internal quotation marks omitted). In the *Comcast* decision, the Supreme Court reversed an order granting class certification because the

> plaintiffs relied on a regression model that "did not isolate damages resulting from any one theory of antitrust impact." *Id.* at 1431. The Court concluded that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." *Id.* at 1433.

Leyva, 716 F.3d at 515 (emphasis in original). The Ninth Circuit affirmed class certification in that case because "unlike in *Comcast,* if putative class members prove [Defendant's] liability, damages will be calculated based on the wages each employee lost due to [Defendant's] unlawful practices." *Id.*

There is no conflict between the Ninth Circuit's application of *Comcast* and that of the six other circuits that have applied this Court's ruling to date. *See In re US FoodServ. Pricing Litig.*, No. 12-1311, --- F.3d ---, 2013 U.S. App. LEXIS 18141, at *36-37 n.8 (2d Cir. Aug. 30, 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 859-61 (6th Cir. 2013); *Butler*, 2013 U.S. App. LEXIS 17748 at *7-11; *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778-79 (8th Cir. 2013); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, No. 12-3176, --- F.3d ---, 2013 U.S. App. LEXIS 13842, at *17-18 (10th Cir. July 9, 2013); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869, --- F.3d ---, 2013 U.S. App. LEXIS 16500, at *19-20 (D.C. Cir. Aug. 9, 2013). As indicated above, moreover, the District Court reached the identical conclusion here that the Sixth and Seventh Circuits reached when evaluating the

application of *Comcast* to nearly identical cases against Whirlpool. *See generally Butler*, 2013 U.S. App. LEXIS 17748; *In re Whirlpool*, 722 F.3d 838.

Bosch appears to argue that all of these Circuits have erred because they do not insist on a finding that the defendant is probably *liable* prior to ruling on class certification, a proposition this Court rejected last term because it "would have us put the cart before the horse." *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds,* 133 S. Ct. 1184, 1191 (2013). The burden at class certification is not to establish that the class members "will win the fray…; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" *Id*.

B. The Petition Raises Only Questions of State Substantive Law.

Notwithstanding Bosch's repeated invocation of Rule 23 and *Comcast*, its core arguments against class certification do not actually raise any issue of federal procedural law. According to Bosch, individual issues predominate over common ones because whether each class member has been damaged depends on whether the owner of each Washer already sees or smells mold. This misstates the substantive factual and legal claims under controlling state law.

Respondents assert claims that *all* class members paid too much for their Washers (i.e., a "premium price") because all of the Washers share a uniform design defect and require extraordinary and costly maintenance. This is a well-known claim; for example, the Uniform Commercial Code provides

that "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted . . . .". U.C.C. § 2-714(2) (2002); *see also* U.C.C. § 2-714(1) (2002) "[A buyer] may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.").[4]

Bosch tries to brush aside Respondents' actual claims by contending it is "common sense" that purchasers should not be able to assert that they would have paid less for a product if they had known it was defective. Pet. at 12. But that (erroneous) contention about, and objection to, state substantive law does not somehow create an issue warranting this Court's review.

And what Bosch apparently thinks counts as "common sense" is not consistent with well-settled state substantive law. As Judge Edith Brown Clement explained in a remarkably similar context:

> [Defendant] emphasizes that the [Plaintiffs] have not shown *any* class members were actually injured. These arguments misapprehend the nature of the implied warranty of merchantability cause of action. . . . Here, the damages sought by the [Plaintiffs] are not rooted in the alleged

[4] The certified claims in this case sound in both statutory fraud and warranty. *See* Pet. App. at 5a-9a, 75a.

> defect of the product as such, but in the fact that they did not receive the benefit of their bargain.

McManus v. Fleetwood Enters., 320 F.3d 545, 552 (5th Cir. 2003) (Texas Law) (citations and internal quotation marks omitted); *see also Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.4 (5th Cir. 2001) (Jones, J.) (Texas Law) ("The key distinction between this case and a 'no-injury' product liability suit is that the [plaintiffs] claims are rooted in basic contract law rather than the law of product liability: the [plaintiffs] assert they were promised one thing but were given a different, less valuable thing.").

In *McManus,* the defendant sold a motor home represented to be capable of towing a family's passenger car. What the defendant did not disclose (until after the sale) was that to tow a car and also be able to stop safely, an additional purchase of supplemental brakes was necessary. Class certification was challenged because some purchasers had not been injured while attempting to tow a vehicle, and others had not even tried to tow a vehicle. The Fifth Circuit rejected both arguments:

> whether or not any member of the class actually suffered any *physical* injury is immaterial. Likewise, it is immaterial whether or not the class members even intended to use their motor homes for towing because all a jury need determine is that the motor homes were defective with respect to a motor home's *ordinary* purpose.

McManus, 320 F.3d at 552. (emphasis in original) (citation omitted).

Judge Easterbrook, too, has well-captured this unremarkable concept of injury, rejecting as "silly" an argument quite like Bosch's "common sense" proposition here: "[p]aying too much, or getting an inferior product for the same money . . . causes a loss of one's money, which is 'property.'" *Int'l Bhd. of Teamsters,* 196 F.3d at 823.

Bosch may take issue with the notion that it could be held liable for promising one thing (non-defective washing machines) and selling another (defective ones). But Bosch's complaint is with state substantive law, not Rule 23.

C. This Case is a Uniquely Poor Vehicle for Resolution of the Claimed Conflict Between the Seventh and Eighth Circuits Regarding Expert Testimony.

Through its Petition, Bosch seeks to use review of a district court opinion in the Ninth Circuit to resolve a conflict between other Circuits. According to Bosch, review is needed to resolve the applicability at class certification of *Daubert*, due to an asserted conflict between the Seventh and Eighth Circuits. *See In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 612 (8th Cir. 2011), *cert. dismissed*, 133 S. Ct. 1752 (2013); *American Honda*

Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010) (per curiam).[5]

But a grant of certiorari would not even address the claimed conflict between the Seventh and Eighth Circuits. Those Circuits differed on the depth of the analysis a district court must conduct when one party moves to exclude the other's experts prior to class certification. *See In re Zurn Pex*, 644 F.3d at 612. The *Daubert* challenge in the present case, however, relates only to expert opinions that were not relevant to the District Court's class certification order. *See* Pet. App. at 69a-75a.

Nor is there any merit to the final argument advanced for certiorari review. According to Bosch, the Court should intercede because "there is widespread uncertainty among district courts in the Ninth Circuit . . . and well beyond." Pet. at 21. Whatever uncertainty there may be in the handful of (mostly unpublished) opinions cited, the task of clarifying procedural standards falls in the first instance to the circuits. It is not this Court's responsibility to correct errors in particular cases. *See, e.g.,* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007) (error correction "outside the mainstream of the Court's functions"). This is particularly so because this issue will assuredly present itself in a more appropriate vehicle in the future, when and if there is a circuit

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[5] *American Honda* predates *Wal-Mart Stores, Inc. v. Dukes,* in which this Court found the *Daubert* issue secondary to whether the expert evidence established the class-wide bases of liability. 131 S. Ct. 2541 (2011).

conflict and a case that presents the issue as necessary to its disposition. *See id.* at 504 (explaining that the Court may await "other cases in the pipeline [that] present better vehicles to resolve [an] issue").

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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SEPTEMBER 27, 2013