CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^{O}: 500-06-000794-160

(Class Action)
SUPERIOR COURT

S. GAUDETTE

Petitioner

-vs.-

WHIRLPOOL CANADA LP, legal person duly constituted, having its head office at 200-6750 Century Avenue, City of Mississauga, Province of Ontario, L5N 0B7

and

WHIRLPOOL CANADA INC., legal person duly constituted, having its head office at 1901 Minnesota Court, City of Mississauga, Province of Ontario, L5N 3A7

and

WHIRLPOOL CORPORATION, legal person duly constituted, having its head office at 2000 N. M-63, City of Benton Harbor, State of Michigan, 49022-2692, U.S.A.

and

SEARS CANADA INC., legal person duly constituted, having its head office at 290 Yonge Street, Suite 700, City of Toronto, Province of Ontario, M5B 2C3

and

SEARS CANADA HOLDINGS CORP., legal person duly constituted, having its head office at 3711 Kennett Pike, City of Greenville, State of Delaware, 19807, U.S.A.

and

SEARS ROEBUCK & CO., legal person duly constituted, having its head office at 3333 Beverly Road, City of Hoffman Estates, State of Illinois, 60179, U.S.A.

Respondents

MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO DESIGNATE THE PETITIONER AS REPRESENTATIVE
(Arts. 574 C.C.P. and following)

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) The Action

1. The Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

    - all residents in Canada who currently own or have previously owned a Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machine without a steam feature, purchased prior to January 1, 2010, but excluding models built on the Sierra platform starting in 2007 (collectively the "Washing Machines"), or any other group to be determined by the Court;

    Alternatively (or as a subclass)

    - all residents in Quebec who currently own or have previously owned a Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machine without a steam feature, purchased prior to January 1, 2010, but excluding models built on the Sierra platform starting in 2007 (collectively the "Washing Machines"), or any other group to be determined by the Court;

2. “Washing Machines” as outlined above includes:

(a) “Whirlpool Duet”, “Whirlpool Duet HT” and “Whirlpool Duet Sport” Front-Loading Washing Machines of the following model numbers and manufacture dates:

Model No.	Manufacture Dates
GHW9100	All
GHW9200	All
GHW9150	All
GHW9250	All
GHW9400	All
GHW9160	All
GHW9300	All
GHW9460	All
WFW8500	All
WFW9200 – MATADOR	All
WFW8300	All on or before 09/30/09
WFW9400	All on or before 02/28/09
WFW8410	All on or before 09/30/09
WFW8400	All on or before 09/30/09
WFW9600	All
WFW9500	All on or before 02/28/09
WFW8200	All
WFW9300	All
WFW9250	All on or before 09/30/09
WFW9150	All on or before 09/30/09

(b) Whirlpool-manufactured Kenmore Front-Loading Washing Machines of the following model numbers and manufacture dates:

Model No.	Manufacture Dates
110.42922 110.42924 110.42926	January 2001 – June 2004
110.42932 110.42934 110.42936	February 2001 – December 2003
110.42822 110.42824 110.42826	April 2001 – July 2004
110.42832 110.42836	June 2001 – May 2003

110.44832 110.44836 110.44834	March 2002 – June 2004
110.44932 110.44934 110.44936	October 2002 – September 2004
110.45091	May 2003 – September 2006
110.45081 110.45087 110.45088 110.45089	May 2003 – October 2006
110.44826	July 2003 – June 2004
110.44921	August 2003 – July 2004
110.45862	January 2004 – September 2006
110.45981 110.45986	January 2004 – July 2006
110.43902	January 2004 – May 2004
110.45991 110.45992 110.45994 110.45996	January 2004 – July 2006
110.45972 110.45976	June 2004 – October 2006
110.45872	July 2004 – May 2006
110.46472	June 2005 – June 2006
110.47561 110.47566 110.47567	August 2005 – October 2010
110.47511 110.47512	January 2006 – November 2009
110.49972	January 2006 – October 2008
110.49962	April 2006 – November 2009
110.47081 110.47086 110.47087 110.47088 110.47089	April 2006 – October 2009
110.47531 110.47532	April 2006 – April 2009
110.47571 110.47577	August 2006 – August 2009
110.47091	October 2006 – March 2009
110.47852	March 2007 – June 2007
110.47542	June 2007 – November 2008

(c) Whirlpool-manufactured Maytag Front-Loading Washing Machines of the following model numbers and manufacture dates:

Model No.	Manufacture Dates
MFW9600	March 2006 – June 2008
MFW9700	March 2006 – June 2008
MFW9800	January 2007 – June 2008
MHWZ400	January 2007 – February 2010
MHWZ600	February 2007 – April 2010

3. The Respondents (defined below) designed, manufactured, marketed, distributed, imported, advertised, warranted, sold, and/or serviced the Washing Machines which suffer from serious design flaws (the "Design Defect") which cause, *inter alia*, the following issues:

    - The failure of the Washing Machines to properly clean themselves and to remove moisture, residue, growth and/or bacteria that leads to the formation of mould, mildew, and associated foul odours in consumers' homes and onto their clothing,

    - The accumulation of residues that contribute to the formation of mould, mildew, and associated foul odours in consumers' homes and onto their clothing,

    - The failure of the stainless steel drums to fully and properly drain in connection with each and every wash cycle and/or to not sufficiently permit the rinsing away and/or prevent the accumulation of residues and growths, and

    - The failure of the door seal (the "boot") to fully or properly drain and/or remove residues and growths after each wash;

4. In addition, the Petitioner contends that the Respondents failed to disclose and/or actively concealed, despite longstanding knowledge, the fact that the Washing Machines are defective and the fact that the existence of the Design Defect would diminish the intrinsic value of the Washing Machines;

5. By reason of this unlawful conduct, the Petitioner and members of the Class:

    (a) Overpaid for the purchase price of the Washing Machines in terms of its full cost or alternatively, in terms of having paid a premium,

    (b) Were forced to purchase a replacement washing machine;

    (c) Have suffered a loss or reduced value of the Washing Machines,

(d) Have incurred costs of attempting to identify and/or repairs to their Washing Machines, whether by Whirlpool, Sears, or by a third party (including future costs of repairs),

(e) Paid for purported remedies to the problem, whether by Whirlpool (Affresh products), Sears, or by a third party,

(f) Have suffered loss of use and enjoyment of their Washing Machines,

(g) Have incurred replacement costs for clothing and/or other items ruined by the Washing Machines,

(h) Have incurred replacement costs of the Washing Machines,

(i) Have incurred increased energy costs due to having to run their Washing Machines with empty cycles and/or with cleaning products, and

(j) Have suffered pain, suffering, trouble and inconvenience;

B) <u>The Respondents</u>

6. Respondent Whirlpool Canada LP is a Canadian corporation with its head office in Mississauga, Ontario. It is involved in the "sale, marketing and distribution of home appliances" in Canada, including within the province of Quebec, the whole as appears more fully from a copy of an extract from the *Registraire des enterprises*, produced herein as **Exhibit R-1**;

7. Respondent Whirlpool Canada Inc. is a Canadian corporation with its head office in Mississauga, Ontario. It is a subsidiary of Respondent Whirlpool Corporation, that does business throughout Canada, including within the province of Quebec. It is involved in the "manufacture of major home appliances" and the "distribution, sale and servicing or major home appliances", the whole as appears more fully from a copy of an extract from the *Registraire des enterprises*, produced herein as **Exhibit R-2**;

8. Respondent Whirlpool Corporation (hereinafter "Whirlpool Corp.") is an American corporation with its head office in Benton Harbor, Michigan. It is a major appliance company. On March 31, 2006, Whirlpool Corp. acquired non-party Maytag Corporation thereby acquiring the Maytag brand. It is the registrant of the trade-mark (word) "WHIRLPOOL" (TMA101105), which was filed on January 3, 1955, the trade-mark (design) "WHIRLPOOL & DESIGN", which was filed on August 25, 1969, and the trade-mark (design) "WHIRLPOOL & DESIGN" (TMA345525), which was filed on August 12, 1987, the whole as appears more fully from a copy of the New York Times article entitled "Maytag Agrees to Be Acquired by Whirlpool for $1.7 Billion" dated August 23, 2005, from a copy of the Competition Bureau's publication entitled "Acquisition of

Maytag by Whirlpool" dated May 2006, and from copies of said trade-marks from the Canadian Intellectual Property Office trademark database, produced herein *en liasse* as **Exhibit R-3**;

9. Respondent Sears Canada Inc. (hereinafter "Sears Canada") is a Canadian corporation with its head office in Toronto, Ontario. It is a subsidiary of Respondent Sears Canada Holdings Corp. that does business throughout Canada, including within the province of Quebec, the whole as appears more fully from a copy of an extract from the *Registraire des enterprises* and from a copy of an extract from Industry Canada, produced herein *en liasse* as **Exhibit R-4**;

10. Respondent Sears, Roebuck and Co. (hereinafter "Sears Co.") is an American corporation with its head office in Hoffman Estates, Illinois. It markets and sells Kenmore brand products, including the Washing Machines, throughout Canada, including in Quebec, through its out retail outlets as well as other retail outlets. It is the registrant of the trade-mark (word) "KENMORE" (UCA27933), which was filed on August 5, 1947, the trade-mark (design) "KENMORE & DESIGN" (TMA490679) which was filed on January 3, 1997, and the trade-mark (design) "KENMORE ELITE & DESIGN" (TMA634375) which was filed on November 5, 1999, the whole as appears more fully from copies of said trade-marks from the Canadian Intellectual Property Office trade-mark database, produced herein *en liasse* as **Exhibit R-5**;

11. Respondent Sears Canada Holdings Corp. (hereinafter "Sears Canada Holdings") is an American corporation with its head office in Greenville, Delaware. It is a parent company of Respondent Sears Canada;

12. All Respondents have either directly or indirectly designed, manufactured, marketed, distributed, imported, advertised, warranted, sold, and/or serviced the Washing Machines throughout Canada, including the Province of Quebec;

13. Given the close ties between the Respondents and considering the preceding, all Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, the Whirlpool Respondents will be referred to as "Whirlpool" and the Sears Respondents will be referred to as "Sears" for the purposes hereof;

C) <u>The Situation</u>

14. Whirlpool holds itself out to the public as a manufacturer of safe, cutting-edge, and easy-to-use home appliances, including washing machines whereby it is self-proclaimed to be "the industry leader in laundry", while Sears holds itself

out to the public as a leading broad line retailer providing merchandise (including the Washing Machines) and related services[1];

15. Unfortunately, the Washing Machines in question were designed and manufactured such that they are susceptible to the build up of "scrud" which is a mixture of sludge, soils, mould, fungi, bacteria, and/or mildew. The Respondents use the euphemism "biofilm" to describe this scrud as well as "odor-causing residue" at times;

16. The result of the Design Defect causes the Washing Machines to:

- Accumulate mould and mildew residue or growth within the Washing Machines;
- Produce a mouldy or mildewy odour that permeates the Washing Machines and/or consumers' homes;
- Produce a mouldy or mildewy odour on clothes and other items washed in the Washing Machines;
- Fail to clean and remove moisture, residue, growth, and/or bacteria that lead to the formation of mould, mildew and associated foul odours; and
- Be unusable in the manner, to the extent of, and for the purposes for which the Washing Machines were marketed, advertised, warranted, and sold;

17. Depicted below are two examples of what the Washing Machines look like when disassembled:

[1] Sears is in the business of distributing, and/or selling washing machines through more than 2,400 Sears-branded and affiliated stores in Canada and the United States.

18. Due to the Design Defect, the Washing Machines have an inherent propensity to a build-up of scrud on the interior surfaces which they fail to prevent and/or adequately eliminate. The Washing Machines have not been designed properly to direct water to clean all the surfaces exposed to the water, soap, softener, dirt, and debris and to provide air circulation to allow these surfaces to dry once a wash cycle has ended. For example, the Washing Machines have inappropriately deep cavities and ribs on surfaces exposed to the water, softener, dirt, and debris, which increase the surface and pooling areas upon which growth of the scrud can occur and which prevent water, soap, softener, dirt, and debris from being flushed during washing or cleaning cycles and also which allows and promotes corrosion on key aluminum parts;

19. This in turn results in a musty or mouldy smell being imparted or transferred to clothes washed in the Washing Machines, in the machines themselves and in the room in which the machines are located;

20. To be clear, odour is a *sometime* symptom of the mould and "odor symptoms are secondary characteristics"; even Washing Machines with little or no odour are often riddled with mould nonetheless, the whole as appears more fully from a copy of the letter with the subject "HA-washers, biofilm" dated November 5, 2004 and from a copy of an internal Whirlpool email with the subject "ACCESS Kickoff Meeting Summary" dated April 29, 2004, produced herein *en liasse* as **Exhibit R-6**;

21. The Respondents fail to inform consumers that even when they operate the Washing Machines as instructed and use the recommended high-efficiency ("HE") detergent, mould problems will inevitably occur with virtually every machine and that the aforementioned problems will result regardless of washer maintenance, due to the Design Defect;

22. The Respondents also made express representations that their Washing Machines were "High Efficiency" and labelled the Washing Machines as "ENERGY STAR" compliant[2]. The indication being that consumers would be saving money and energy. However, due to the various problems associated with the Washing Machines, consumers are forced to run empty cycles of hot water, bleach and/or other products to combat the mould and mildew problems;

23. Instead of disclosing the mould problem and the extraordinary maintenance required to partially combat it, Whirlpool told all purchasers — but only after they bought and installed the Washing Machines — to buy another product sold by Whirlpool, Affresh, to "effectively combat" the buildup of "mold and mildew";

24. To put it simply, Whirlpool saw the Design Defect and its related issues/symptoms as an "Emerging Business Opportunity" – one where it decided to sell Affresh as a new product to increase its revenues and to "drive

[2] ENERGY STAR® is the mark of high-efficiency products in Canada.

more HE “high end” sales”, the whole as appears more fully from a copy of the Whirlpool PowerPoint presentation entitled “Removing & Preventing HE Washer Odor” dated June 2007, produced herein as **Exhibit R-7**;

25. The Respondents recommended that Washing Machine owners run successive washer cleaning cycles with an “Affresh” tablet in each cycle. Affresh is a product designed, manufactured, marketed, advertised, and sold by Whirlpool specifically to address the mould problems in the Washing Machines. Due to the ineffectiveness of the Affresh tablets, Whirlpool created, promoted, and sold the new Affresh washing cleaner kit, the whole as appears more fully from a copy of various instructions and explanations which appear on Whirlpool’s website at www.affresh.ca, produced herein *en liasse* as **Exhibit R-8**;

26. In essence, Whirlpool sold its customers a (partial) solution to a problem that Whirlpool itself created while blaming them for any odour that occurred as a result of mould – for failing to buy Affresh and to follow other unexpected, costly, and time-consuming steps, such as (a) wiping down its washers with bleach after each use, (b) leaving the door open between uses (a safety hazard for anyone with children or pets), (c) cleaning the exterior, interior, door seal, and dispenser drawer, (d) running monthly maintenance cycles, and (e) running cycles with Affresh cleaning tablets, a product developed and sold by Whirlpool;

27. The Respondents also knew, however, that even strict adherence to its extraordinary maintenance steps would not actually solve the problem created by the Design Defect. In particular, it knew that what the consumer did was “of little help since mold…[flourished] under all conditions…” and that following the steps it recommended, did not “reach the core issue…the odor may come back in av[era]g[e] 2 weeks...”, the whole as appears more fully from a copy of the Affresh product pamphlet dated September 2008, produced herein as **Exhibit R-9**;

28. The Respondents hid the defect (and extraordinary maintenance required as a result of it) because they knew that upfront disclosures might concern consumers and put them at a competitive disadvantage. The Respondents buried all of the extra maintenance required by the defect in lengthy Use and Care Guidelines provided to consumers only after they bought the washer and had it installed in their homes, the whole as appears more fully from a copy of the “Report on Communication of Mold Problems regarding Whirlpool Front Load Washers” by Todd B. Hilsee dated November 16, 2009, produced herein as **Exhibit R-10**;

29. The Respondents have failed to recall, repair, and/or replace the Washing Machines or to disclose the Design Defect to its customers and instead continued to profit from its concealment by charging premium purchase prices for the Washing Machines, charging for repair services, and selling the

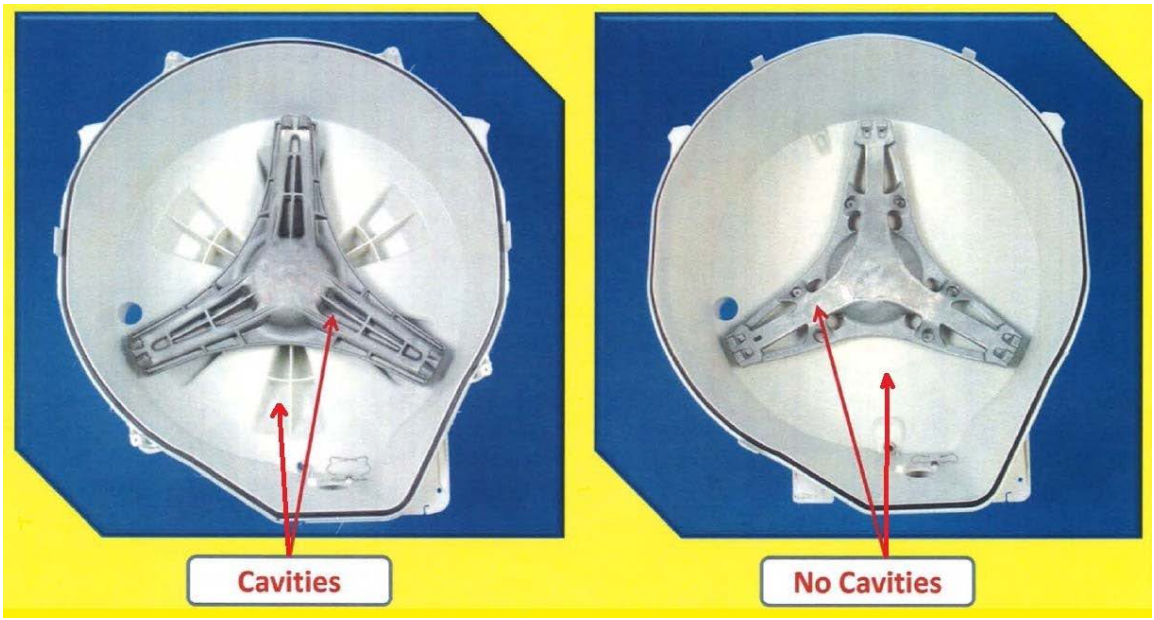
Whirlpool Affresh products to purportedly palliate the serious issues associated with the Washing Machines;

30. Whirlpool began manufacturing the Washing Machines in 2001 and for several reasons, including the fact that it began receiving numerous complaints about mould and odour, it made several design changes to the Washing Machines over time;

31. These design changes included both structural modifications to the Washing Machines and the addition of optional laundry cycles. The following is a list of some of these changes:

- Modifications to the plastic tub, which holds the sudsy wash-water and within which the metal laundry-basket revolves. Whirlpool redesigned the plastic tub several times to remove water-side structural ribs, which tended to gather mould. See example photographs on the following page. There are at least six different plastic tub designs in various models,

- Modifications to the metal bracket (also called the "crosspiece"), which sits inside the plastic tub and connects the metal laundry basket to the revolving motor spindle. Whirlpool redesigned the bracket several times to remove structural crevices, which tended to gather mould. There are at least six (6) different bracket designs in various models. Whirlpool also modified the mostly-aluminum bracket to contain less copper, which tended to corrode and cause pitting, allowing mould accumulation



Access 2001 Design Sierra 2007 Design[3]

[3] Whirlpool built the Washing Machines using different engineering "platforms" including "ACCESS", "HORIZON", "SIERRA", and "ALPHA".

Whirlpool Duet Washing Machines – Plastic Tub and Metal Bracket

(The bracket fits into the back of the metal clothes basket, which is not shown; all surfaces inside the tub - including the entire bracket - get wet during a wash cycle.)

- Addition of an internal fan that turns on after the wash cycle is over. The fan increases air flow inside the plastic tub and helps prevent mould,

- Addition of a "sanitary cycle." This is an optional cycle the user may choose to run where the wash-water is super-heated to about 160 degrees, thereby sanitizing the laundry and also reducing accumulation of bacteria and mould,

- Addition of a "maintenance cycle" or "clean washer cycle." This is an optional cycle the user may choose to run with no laundry inside the machine. The tub fills with water, the user adds bleach or other machine-cleaning additives, and the water is agitated to "scrub" the interior of the otherwise-empty tub, reducing bacteria and mould, and

- Addition of a "steam feature." This is an optional cycle (like the "extra rinse" cycle) that helps sanitize the machine's interior and prevent accumulation of bacteria and mould. A user may add steam to either a laundry cycle or a no-laundry maintenance cycle;

32. These design changes were not incorporated into all of the engineering platforms at the same time. For example, Whirlpool first incorporated plastic tubs with a rib-free inside on its SIERRA platform in 2007, but did not incorporate similar "smooth-inside" plastic tubs on its ACCESS platform until February of 2009, nor on its HORIZON platform until September of 2009. Whirlpool added the steam feature option on some ACCESS machines in January of 2006 and later on some SIERRA and ALPHA machines. Further, Whirlpool added the optional cycles to different models at different times, the whole as appears more fully from a copy of a chart of the 35 different Washing Machine models and some of the design changes, produced herein as **Exhibit R-11**;

33. Although these design changes were available when Whirlpool first began manufacturing the Washing Machines, it made the business decision not to implement them, as espoused in the January 2013 Supplemental Expert Report of Dr. R. Gary Wilson PH.D., P.E.[4]:

[4] Dr. R. Gary Wilson is an engineer who had been employed by Whirlpool for 27 years as *inter alia* Director of Laundry Technology.

> "The significant design changes that have been reviewed (which will, in my opinion, greatly reduce the level of odor producing mold and bacteria inside the machine) were practically and technically feasible alternative designs available at the time the subject washers left the control of the manufacturer and could have been implemented without impairing the usefulness or intended purpose of the product. Indeed, most if not all of these changes were discussed between Whirlpool and P&G.
>
> …
>
> It is my opinion that these are encouraging design changes which could have been and should have been implemented in the original design. In addition, once Whirlpool received post-marketing reports of significant mold and odor problems in its washers in 2004, these design changes could have and should have been immediately implemented."[5]

The whole as appears more fully from a copy of the January 2013 Supplemental Expert Report on Whirlpool Front-Loading Washer by Dr. R. Gary Wilson, PH.D., P.E., dated January 23, 2013, produced herein as **Exhibit R-12**;

34. During the period between 2008 and 2009, various class actions were instituted against Whirlpool and against Sears in the United States alleging all of the above. These cases have all been consolidated in the United States District Court, Northern District of Ohio[6] and in the United States District Court, Northern District of Illinois, Eastern Division[7]. These Complaints have since been amended. On July 12, 2010, the case against Whirlpool was certified and upheld on appeal in 2012 and again in 2013 the whole as appears more fully from copies of various Class Action Complaints, a copy of the Ohio Third Amended Master Class Action Complaint dated November 16, 2009, a copy of the Consolidated Class Action Complaint, a copy of the Judgment granting certification in the Ohio District Court dated July 12, 2010, a copy of the Judgment affirming class certification in the U.S. Court of Appeals dated May 3, 2012, and a copy of the Judgment affirming class certification in the U.S. Court of Appeals dated July 18, 2013, produced herein *en liasse* as **Exhibit R-13**;

35. On April 18, 2016, a settlement agreement was reached in both files; as between Whirlpool, Sears and the plaintiffs and on May 11, 2016, it was preliminarily approved by the Honourable Christopher A. Boyko, United States District Judge, the whole as appears more fully from a copy of the Settlement Agreement dated April 18, 2016 and from a copy of the "Order Granting

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[5] Exhibit R-12 at pages 10 and 12.

[6] *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, case no. 08-WP-65000, MDL No. 2001 (N.D. Ohio).

[7] *In re Sears, Roebuck and Co. Front-Loading Washer Products Liability Litigation*, case no. 06-CV-07023.

Preliminary Approval of Class Action Settlement" dated May 11, 2016, produced herein *en liasse* as **Exhibit R-14**;

36. In addition, a class action was filed in Ontario and was amended three times. The motion for certification/authorization was dismissed on August 16, 2012 based on the fact that it was considered there was no contractual privity between the Plaintiffs and the Defendants, a finding which has no application in Quebec as privity is not required pursuant to arts. 53 and 54 of the *Consumer Protection Act*, CQLR c P-40.1. This decision was upheld on appeal with the following being said in obiter:

> "[31] The fact that Whirlpool did not sell the machines directly to consumers is critical to the viability of the appellants' implied warranty claim.
>
> [32] It is clear that individuals resident in Saskatchewan and New Brunswick could have a cause of action against Whirlpool for breach of the warranty of fitness for purpose implied under the sale of goods legislation in those provinces. In Saskatchewan and New Brunswick, legislation expressly provides that lack of privity does not defeat a third party's claim for damages as a result of a breach of an implied warranty: see *Consumer Protection Act*, S.S. 1996, c. C-30.1, at s. 55; *Law Reform Act*, R.S.N.B. 2011, c. 184, at s. 4(1). Accordingly, subject to certain requirements, a consumer in those provinces can claim directly against a manufacturer if a product fails to conform to the implied warranties of fitness and quality. The appellants, however, are all resident in Ontario and therefore cannot.
>
> [33] I agree with the motion judge that the appellants' claim against Whirlpool for breach of the warranty of fitness for purpose implied under the SGA has no reasonable prospect of success. Their remedy under the SGA is against the seller, and in this case Whirlpool was not the seller."

The whole as appears more fully from a copy of the "Amended Amended Amended Statement of Claim" Court File No. CV-10-404742-OOCP, dated August 26, 2011, a copy of the Judgment rendered by the Ontario Superior Court of Justice in *Arora* v. *Whirlpool Canada LP*, 2012 ONSC 4642, dated August 16, 2012, and a copy of the Judgment rendered by the Court of Appeal of Ontario in *Arora* v. *Whirlpool Canada LP*, 2013 ONCA 657, dated October 31, 2013, produced herein *en liasse* as **Exhibit R-15**;

37. The present Motion is the second motion that has been filed in the Superior Court of Quebec regarding the Design Defect associated with the Washing

Machines[8] – the first was filed on December 21, 2009 and dismissed on November 19, 2013 based on the Honourable Madam Justice Danièle Mayrand, J.S.C.'s determination that the petitioner's personal cause of action against the Respondents was prescribed and as a result, the criteria of 1003 b) C.C.P. had not been met. In addition, Justice Mayrand determined that the petitioner did not meet the criteria of 1003 d) C.C.P. The criteria of 1003 a) and c) were adjudged to have been satisfied, the whole as appears more fully from a copy of the Judgment rendered by the Honourable Madam Justice Danièle Mayrand, J.S.C. in *Lambert* c. *Whirlpool Canada, l.p.*, 2013 QCCS 5688, produced herein as **Exhibit R-16**;

38. On March 11, 2015, the Quebec Court of Appeal, in a 2-1 majority opinion, upheld the Judgment (Exhibit R-16) and dismissed the appeal, with the Honourable Mr. Justice Vézina J.A. dissenting and on October 29, 2015, the Supreme Court of Canada dismissed the Petitioner's Application for Leave, the whole as appears more fully from a copy of the Judgment of the Quebec Court of Appeal in *Lambert* c. *Whirlpool Canada, l.p.*, 2015 QCCA 433 and a copy of the Judgment of the Supreme Court of Canada in Case No. 36425, produced herein *en liasse* as **Exhibit R-17**;

The Defects

39. All the models of the Washing Machines claimed in the present action have nearly identical designs and any design differences that do exist are immaterial to the claims in this action;

40. The Washing Machines have a number of components that are exposed to water, detergent, dirt, and debris from clothes that are suspended in wash water. There is a clothes basket or tub which sits inside a water-tight structure and is held in place by an aluminum cross member, tubes inside and outside of the tub through which water enters and drains, a pump to move water, a dispenser and tubes for water softener and detergent, a motor to turn the basket and electronic controls. A door seals the basket when closed. With the exception of the motor and the electronic controls, these components are all exposed to the water, detergent, softener, dirt, and debris. The interior surfaces are not accessible by a consumer and cleaning would require a technician to disassemble the machine;

41. In a front-loading washing machine, including the Washing Machines, the tub rotates on a horizontal axis and repeatedly submerges clothe in a small amount of water. A relatively small amount of water can be used because the horizontally spinning tub tumbles the clothes through the water. They are

[8] While Sears was not named in the original Motion for Authorization, Kenmore, their proprietary brand, was manufactured by Whirlpool and therefore they were always solidarily and/or jointly and severally liable so the prescription/limitation period in case 500-06-000493-094 suspended prescription with respect to Sears as well (arts. 2897, 2900, 2908, and 2909 C.C.Q.).

sometimes referred to as High Efficiency or HE washers. In contrast, the traditional top loading machines manufactured by the Respondents and others and used by consumers for decades have a tub with a vertical axis attached to a motor. The clothes being washed are moved about by a mechanical agitator rotating around the vertical axis and are fully immersed in water;

42. Scrud develops on internal surfaces of Washing Machines, as they do not adequately self-clean by removing the mixture of water, soap, detergent, dirt, and debris by the end of a wash cycle. These substances form the medium upon which the mould, mildew, and bacteria in scrud flourish. When scrud develops in sufficient quantity it emanates a musty smell that is imparted on washed clothes and permeates the washing machine itself and the room in which it is located. Scrud also corrodes metal components in the Washing Machines;

43. Top loading washing machines self-clean well and do not typically build up significant amounts of scrud. Front-loading washing machines are particularly susceptible to the development of scrud due to the characteristics that result in energy and water savings. They have a sealed environment that does not vent humidity well, creating a moist environment conducive to the growth of mould, mildew and bacteria. They use a significantly smaller quantity of water to both rinse the clothes and the residues off interior surfaces of the washing machine. It is therefore important for frontloading washing machines to be designed to properly self-clean;

44. Due to the Design Defect, the Washing Machines fail to prevent the build-up of scrud because they have not been designed to allow the surfaces exposed to the water, soap, detergent, dirt and debris to be cleaned by the end of the wash cycle. They have cavities, ridges and ribs on surfaces which prevent water access and draining. Water from rinse cycles cannot adequately reach all internal surfaces to flush out the residue of water, soap, detergent, dirt and debris. This in turn results in growth of mould, mildew and bacteria and a musty or mouldy smell that is imparted on clothes washed in the Washing Machines and in the room in which the machines are placed. As mentioned above, the scrud also corrodes metal components;

45. Scrud build up and resulting odours and corrosion occur despite users having followed all instructions for use of the machine, including leaving the door open after use to allow venting of moisture, use of detergents specially designed for use in high efficiency washers, use of bleach in periodic clean-out cycles, and the use of Affresh products;

46. Six (6) additional expert reports from two (2) experts are being produced herein to explain: (1) what the problem is with the Washing Machines and the cause of the Design Defect as alleged herein and (2) why the solutions put forward by the Respondents on certain models failed to fully address the Design Defect as

alleged herein the whole as appears more fully from a copy of the Supplemental Report to “Expert Report” on Whirlpool Front-Loading Washer” by Dr. R. Gary Wilson, PH.D., P.E., dated January 4, 2009, from a copy of the Expert Report on Whirlpool Front-Loading Washer by Dr. R. Gary Wilson, PH.D., P.E., dated November 16, 2009, from a copy of the Expert Report of Dr. R. Gary Wilson, PH.D., P.E., dated January 23, 2010, from a copy of the Multi-State Expert Report on Whirlpool Front-Loading Washer by Dr. R. Gary Wilson, PH.D., P.E., dated September 15, 2010, copy of the Rebuttal Report of Dr. Chin S. Yang, Ph.D. dated January 4, 2010, and from a copy of the Expert Report of Dr. Chin S. Yang, Ph.D. dated December 20, 2010, produced herein *en liasse* as **Exhibit R-18**;

The Respondents’ Negligence

47. In view of the preceding paragraphs, the Respondents were negligent in *inter alia* the following manner:

    (a) The Washing Machines were designed in a manner which, under normal conditions, usage and applications causes it to degrade by developing scrud and corrosion;

    (b) The Washing Machines were not properly or adequately tested to avoid the Design Defect;

    (c) The Washing Machines were marketed in such a manner as not to reveal the Design Defect and its consequences;

    (d) The Washing Machines failed to perform at their optimal level because of premature degradation and the defendants' failure to rectify the Design Defect;

    (e) The Washing Machines’ design was not changed promptly once the Respondents knew the machines were subject to premature degradation and would develop scrud and corrosion;

    (f) Inadequate testing was carried out to ensure a proper design and to ensure proper and prompt modifications to the Washing Machines to eliminate the foreseeable risks;

    (g) The Respondents failed to attach an adequate warning or warning label to the Washing Machines or the owners' manuals alerting users to the risk of the inevitable build-up;

    (h) The Respondents failed to establish any adequate procedures to educate their distributors, sales and service representatives or the ultimate users;

(i) The Respondents failed to establish any adequate procedure to ensure that possible design defects in the Washing Machines were discovered and users' complaints were transmitted from them to the customers, sales representatives and/or distributors;

(j) The Respondents failed to establish any adequate procedure for evaluating customers' complaints with respect to the Washing Machines;

(k) The Respondents failed to recall and repair or to ensure the repair of Washing Machines that Class Members gave to the Respondents or the Respondents' agents for servicing;

(l) The Respondents failed to accurately, candidly, promptly, and truthfully disclose the defective nature of the Washing Machines;

(m) The Respondents failed to identify, implement and verify that procedures were in place to address design problems, complaint handling or timely notification of Washing Machines' failures or complaints;

(n) The Respondents failed to conduct in-process and finished device testing to ensure performance specifications for the Washing Machines were met;

(o) The Respondents failed to adequately define or control written manufacturing specifications, processes, procedures, and controls for the Washing Machines;

(p) The Respondents failed to conform with good manufacturing and distribution practices;

(q) The Respondents failed to introduce proper quality assurance programs to identify, recommend or provide adequate solutions for the Design Defect;

(r) The Respondents failed to change their design, manufacturing, and assembly process with respect to the Washing Machines in a reasonable and timely manner;

(s) The Respondents failed to properly supervise their employees, their subsidiaries and associated and affiliated corporations;

(t) The Respondents failed to advise the Petitioner and the Class that the Washing Machines were defective and needed to be repaired or taken out of service;

(u) The Respondents failed to conduct adequate testing and research regarding the risk of using the Washing Machines;

(v) The Respondents failed to engage in adequate pre-market and production testing of the Washing Machines; and

(w) The Respondents continue to fail to fulfill their ongoing obligation to fully disclose the results of their testing and research regarding the damage to Washing Machines;

Failure to Disclose and Recall Despite Long-Standing Knowledge

48. The Respondents have known about the Design Defect for years, but have failed to take any timely and adequate preventative and/or remedial steps as can be gleamed from the following documents (in addition to the documents produced elsewhere in this Motion):

(a) Prior to 2001, Whirlpool was aware that their Washing Machines had a propensity to develop mould and foul odours, the whole as appears more fully from a copy of the Respondents' Frequently Asked Questions portion of their website and from a copy of the Project/Task Report dated 03/01/99, produced herein *en liasse* as **Exhibit R-19**;

(b) A July 25, 2002 Whirlpool Document indicated that the biofilm/mold issue should be reduced at that it should go up to "product level as High risk", the whole as appears more fully from a copy of Whirlpool's Technology Letter of Findings dated October 26, 2004, produced herein as **Exhibit R-20**;

(c) A June 24, 2004 internal Whirlpool email of a meeting request indicates that "we are fooling ourselves if we think that we can eliminate mold and bacterial when our [HE] wash platforms are the ideal environment for molds and bacteria[] to fl[o]urish. Perhaps we should shift our focus to 'handling/controlling' mold & bacterial levels in our products" and "[i] we can not eliminate the mold and bacteria (A GIVEN), then how can we better handle the mold in our washer?" the whole as appears more fully from a copy of the internal Whirlpool email meeting request dated June 24, 2004, produced herein as **Exhibit R-21**;

(d) A September 22, 2004 Whirlpool email forward indicates that following a "tear down" of certain Washing Machines, "we found significant build-ups all over the machine. Simlar to Maytag, but still lacking the greasy wet texture….You will not that the build-up is already sheeting off for

redeposition back onto the clothes load", the whole as appears more fully from a copy of the July 22, 2004 forward of the July 21, 2004 email with the subject "Access Odor", produced herein as **Exhibit R-22**;

(e) A September 22, 2004 Whirlpool presentation acknowledges the problem and indicates that its first manifestation could be as soon as thirty (30) days and as late as two (2) to three (3) years and that the problem appears to be "industry wide" in "all Whirlpool HE Washer Platforms", the whole as appears more fully from a copy of the Whirlpool presentation entitled "Biofilm in HE Washers" dated September 22, 2004, produced herein as **Exhibit R-23**;

(f) A September 23, 2004 email from Anthony H. Hardaway indicates that "[b]iofilm has been observed" and that "there appears to be 3 separate problems; 1) Slimy to flake like soil-detergent-water mineral depositions on multiple surfaces, 2) Difficult to remove soil-detergent-water mineral coating on exterior basket surfaces, and 3) secondary microorganism growth supported by the buildup food source medium", the whole as appears more fully from a copy of the Whirlpool Document entitled "Current Status of BIOFILM (Mold, Mildew, and Odor) Issues in Washer Platforms" dated September 23, 2004, produced herein as **Exhibit R-24**;

(g) In an October 1, 2004 e-mail, Anthony H. Hardaway of the Whirlpool Corp. stated:

> "Hi All,
> One immediate issue that I need your input on is Horizon and its' scheduled release on the tub design next week according to Michael Laue. We really need to consider stopping the release and modifying the tub design to eliminate pooling positions. This is were (sic) we have seen both soils and water pooling on both Horizon and Access, which ultimately serves as the nucleation sites for mould and bacteria growth. Everything we know to date suggests that is a major area for future problems. It appears to be the first area on Access and Horizon to show the buildup initiation. Logic suggests that if (sic) collect water and soils in these areas of the tub, it is only a time before the buildups increase is (sic) scope and biofilm growth with all of its "negative" consumer identifiable symptoms begins. Please advise",
>
> The whole as appears more fully from a copy of the email correspondence dated October 1, 2004 to October 18, 2004, produced herein as **Exhibit R-25**;

(h) An October 26, 2004 Whirlpool Document of the Minutes of a meeting regarding the "Access / Matador / Horizon – Bio-film issue" confirms that

there is an "increasing number of calls complaining about ,,odor", that a "detailed analysis has confirmed that the odor is caused by mold / mildew and bacteria inside the wash unit including hoses" and that "[i]t was decided to use the term "Biofilm" to communicated a less alarming verbiage that the words "Mold-Mildew-Fungi and Bacteria". In addition, it indicates that:

- "Biofilm has been observed in Calypso, Access, and Horizon washer platforms",

- "there appears to be 3 separate problems; 1) Slimy to flake like soil-detergent-water mineral depositions on multiple surfaces, 2) Difficult to remove soil-detergent-water mineral coating on exterior basket surfaces, and 3) secondary microorganism growth supported by the buildup food source medium",

- The Washing Machines "can provide a nearly perfect condition for both fungi and bacteria growth",

- The "Access' webbed tub structure appears extremely prone to water and soil depositions", and

- The "aluminum basket cross-bar appears extremely susceptible to corrison *[sic]* with biofilm."

The whole as appears more fully from a copy of the Respondents' Minutes regarding Access / Matador / Horizon – Bio-film issue dated October 26, 2004, produced herein as **Exhibit R-26**;

(i) A November 16, 2004 internal Whirlpool email indicates that Whirlpool was concerned that if it disclosed the mould issue, or the steps required to try to combat it, prior to purchase, consumers would select a competitor's washer instead, the whole as appears more fully from a copy of the email correspondence dated November 16, 2004, produced herein as **Exhibit R-27**;

(j) An undated Whirlpool Document indicates that there is a:

> "[b]uild up of debris – in one case the tightly packed paper like debris completely fills the gap between the cross piece and the basket. All three cross pieces show corrosion is heavily biased toward the inside – the side facing the basket and in areas of stagnation at the base of ribs and in comers particularly. Perhaps the mechanism could be described as <u>microbiologically induced crevice corrosion</u>."

And that:

"Some complain of bad odor, some complain about black stains on bellows, and in severe cases redeposition of bio film on clothes, or odor on clothes",

The whole as appears more fully from a copy of the Whirlpool Document entitled "Bio-Film – 3/15-3/17 Review – Questions, Notes, and Action Plan, produced herein as **Exhibit R-28**;

(k) A January 24, 2005 Whirlpool Document notes that "legal states nearly 100% assurance that ACCESS case will follow", the whole as appears more fully from a copy of the presentation entitled "BIOFILM in Washers" dated January 24, 2005, produced herein as **Exhibit R-29**;

(l) A 2005 Whirlpool Document indicated that a "Quick Fix" being planned would not reduce the complaints so it was necessary "to make basic design changes to all FL platforms", the whole as appears more fully from a copy of the presentation entitled "Bio Film Quick Fix" dated 2005, produced herein as **Exhibit R-30**;

(m) In a Whirlpool Document dated February 7, 2005, it was stated that 35% of "Duet" model customers were "complaining about bad odors" and "[c]omplaints are increasing from all other markets", the whole as appears more fully from a copy of Whirlpool's Technology Letter of Findings dated February 7, 2005, produced herein as **Exhibit R-31**;

(n) In a Whirlpool Document dated March 1, 2006, the Respondents stated the following:

- "the [Bio Films] lead to so called crevice corrosion of vital parts such as the aluminum cross piece which holds the drum. This corrosion is usually only noticed by the customer when the component fails",

- "[t]he consumer sees and smells Bio Film ... Potentially even more serious is the corrosion risk associated with Bio Film ... Use of hypochloride bleach accelerates this corrosion",

- "[e]xamination of Access machines from the field shows signs of corrosion of the cross piece after 2 years of use", and

- "[b]oth phenomena, odors and corrosion, can be observed independently from one another",

The whole as appears more fully from a copy of the presentation entitled "Bio Film & Corrosion" dated March 1, 2006, produced herein as **Exhibit R-32**;

(o) In addition, the March 1, 2006 Whirlpool Document described Biofilm and its effects as follows:

> For this project, Bio Film describes all kinds of deposits which occur in the wet area of the washing machine, whether organic or inorganic. Strictly speaking we have two separate phenomena:
>
> > * Odours: biofilm, which forms when bacteria adhere to surfaces in aqueous environments and begins to excrete a slimy, glue-like substance that can anchor them to all kinds of materials such as metals, plastics, soil particles. A Bio Film can be formed by a single bacterial species, but more often biofilms consist of many species of bacteria, as well as fungi, algae, debris and corrosion products. When this organic matter decays it will start to smell. This leads to customer complaints.
> >
> > * Corrosion: closely associated with primarily organic Bio Film are inorganic deposit. They consist of the detergent residues, minerals which are deposited during the wash process and fibers and soil coming from the laundry. They can serve as substrate for Bio Film. The deposits lead to so called crevice corrosion of vital parts such as the aluminum cross piece which holds the drum.
> >
> > This corrosion is usually only noticed by the customer when the component fails (Exhibit R-32);

(p) The March 1, 2006 Whirlpool Document dealt with requirements for reducing corrosion:

> * Requirements to discourage deposits and growth of Bio Film inside the tub, especially on the cross piece:
>
> > * Machine must keep itself clean.
> >
> > * Robust design of the tub, drama and cross piece to avoid deposit growth and facilitate self-cleaning;
> >
> > * Water system must make internal rinsing of tub possible
> >
> > * Wash programs must include internal cleaning steps

* Use corrosion proof aluminum alloys

* Limit the amount of bleach the consumer can use

* Design a cleaning cycle which does not use hypochloride bleach

* Give clear instructions to the consumer how to keep the machine clean (Exhibit R-32);

(q) The March 1, 2006 Whirlpool Document discusses why biofilm and corrosion were becoming an issue at that time. The document attributes it to changes in washing habits (fewer high temperature programs, increased use of liquid detergent with reduced corrosion inhibitors, short cycle time has priority leading to full load being washed on express cycle with insufficient rinse, market requiring big load capacity), wash programs using less water at lower temperatures leading to poor cleaning of the inside of machine and the fact that the Washing Machines are basically a European design, not necessarily suited to US washing habits (low water temperatures, HE detergent not always used and widespread use of bleach in quite high quantities). The discussion also identified "lack of specifications and poorly understood design concepts":

* Avoidance of deposits not a design requirement. This would require contributions from mechanical design hydraulic design and wash technology.

* Consequences of bleach usage not fully understood. (Exhibit R-32);

(r) The March 1, 2006 Whirlpool Document notes that a cleaning cycle was introduced in the mid-2005 with the objective to enable the customer to eliminate odors. This document states:

This cycle does not address the root cause: odors caused by a combination of humidity and decaying organic material in the tub of the washing machine (Exhibit R-32);

(s) A July 25, 2007 Whirlpool PowerPoint presentation confirms that Affresh is not “effective on some washer components”, that only a combination of Affresh and further “machine modifications will offer the completed solution” to mould, and that it is not a “complete solution for odor & residue prevention & remediation…”, the whole as appears more fully from a copy of the presentation entitled “Final Confirmation Testing – affresh Washer Cleaner” dated July 25, 2007, produced herein as **Exhibit R-33**;

(t) On September 20, 2007, "[i]n an effort to combat odor-causing residue in high-efficiency (HE) washing machines" the Respondents launched the sale of Affresh tablets as the "solution to odor causing residue in…HE washer[s]". Affresh formed a "new washer cleaning category" with estimated $50 million to $195 million in revenue. Whirlpool assumed, for the purpose of discussing the marketing of Affresh Tablets, that 50% of owners of High Efficiency clothes washers "may have odor problems", (Exhibit R-7), the whole as appears more fully from a copy of the Whirlpool Document entitled "Whirlpool Corporation Develops Break-Through High-Efficiency Washer Cleaner, Giving Owners a Powerful Solution" dated September 20, 2007, produced herein as **Exhibit R-34**;

(u) In a September 2008 discussion of the market for Affresh tablets the Respondents stated that "[a]ll manufacturers of HE washing machines tell their customers that HE washers need special care to prevent residue and odor- 'Use bleach and leave the door open'- Bleach is a topical solution that does not reach the core issue. Thus, the odor may come back in avg. 2 weeks and dissatisfaction from customers may be high" (Exhibit R-9);

49. The Respondents had a duty to recall the Washing Machines and to rectify the Design Defect or to give the Class Members back their purchase monies. As pleaded above, the Respondents were aware of the existence of the Design Defect and in breach of said duty failed to recall the Washing Machines to correct the Design Defect or, if they could not be corrected, to compensate the Class;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

50. The Petitioner purchased a Whirlpool Duet Compact Front-Loading Washing Machine (Model # WFW9400SW) on April 13, 2008 from Germain Larivière at 4370 boul. Laurier East, in Saint-Hyacinthe, Quebec for $1,101.20 with no additional taxes, the whole as appears more fully from a copy of the Petitioner's Bill of Sale dated April 13, 2008, produced herein as **Exhibit R-35**;

51. The Washing Machine was delivered to the Petitioner's residence on April 24, 2008 where he had it installed (where it still remains today) and himself and his wife used it to wash their belongings;

52. The Petitioner and his wife always used the recommended high-efficiency ("HE") detergent;

53. To date, the Petitioner has purchased three (3) Comerco Protection Plans for his Washing Machine, to wit:

- On May 12, 2008, the Petitioner purchased a Comerco Protection Plan for his Washing Machine, which was to apply from April 13, 2009 until April 13, 2013 for $137.91 plus taxes[9];

- On March 21, 2013, the Petitioner purchased an additional Comerco Protection Plan for his Washing Machine, which was to apply from April 24, 2013 until April 23, 2015, for $186.99 plus taxes; and

- On June 10, 2015, the Petitioner purchased a third Comerco Protection Plan for his Washing Machine, which was to apply from June 10, 2015 until June 9, 2018, for a purchase price of $250.78 plus taxes[10];

The whole as appears more fully from a copy of the Comerco Protection Plan Bills of Sale dated May 12, 2008, March 21, 2013, and June 10, 2015, produced herein *en liasse* as **Exhibit R-36**;

54. A few months after the installation of the Washing Machine on April 24, 2008, the Petitioner and his wife noticed that there were dark moisture stains on the plastic joint of the Washing Machine door and these stains were getting increasingly worse;

55. In addition, there were repeated accumulations that needed to be regularly removed from the drum, they had to throw some of their belongings out, and there was a foul smell emanating from the Whirlpool Washing Machine;

56. As result of these issues, they re-read the instruction manual and visited the Respondents' website and learned that they should regularly run empty bleach cycles, use Affresh tablets once a week, and leave the door open when not in use, the whole as appears more fully from a copy of the "Whirlpool duet Front-Loading Automatic Washer Use & Care Guide", attached hereto as **Exhibit R-37**;

57. Despite their stringent adherence to these recommended practices, including cleaning the black substance that would accumulate on the plastic joint, nothing seemed to remedy the problems that they were experiencing with any lasting effect and the problems would reoccur;

58. The Petitioner had a technician from Comerco Services Inc. come for an unrelated electrical issue and his wife mentioned the issues that we were

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[9] The Comerco Protection Plan applied to both his Washing Machine and dryer and amounted to $259.95 plus taxes for both – absent information to the contrary, the portion relating to his Washing Machine will be deemed to have been in the same proportion as his second protection plan, namely, the amount allotted to the Washing Machine was 1.13 times more than the dryer in May of 2013. Applying the same proportion to this first protection plan yields $137.91 for the Washing Machine and $122.04 to the dryer.

[10] Again, the Comerco Protection Plan applied to both his Washing Machine and dryer and amounted to $443.69 plus taxes for both – the same calculation was applied as in footnote 1.

experiencing with the Washing Machine to him and she was told that this was the way the Washing Machines were and that there was nothing to do about it;

59. The Petitioner, by researching his problems online in the summer/autumn of 2015, discovered that the problems with the Washing Machine were the result of design defects affecting all the Whirlpool Washing Machines;

60. On September 28, 2015, the Petitioner came across Consumer Law Group Inc.'s website at www.clg.org where he read about the class action and he inputted his name into the database to be kept abreast of all happenings as he realized that he was a Class Member, the whole as appears more fully from a copy of the Information Submission and Request of the Petitioner dated September 28, 2015, produced herein as **Exhibit R-38**;

61. When the Petitioner learned that the class action had been dismissed, he expressed his desire that the class action be re-filed and to be the lead Plaintiff in this new action;

62. Had Petitioner knew about the problems associated with the Washing Machines, he would never have purchased his Washing Machine;

63. The Petitioner's damages are a direct and proximate result of the Respondents' conduct and the defect associated with the Washing Machines;

64. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

65. Every member of the Class owns/owned one of the Washing Machines which are defective;

66. Each member of the Class is justified in claiming at least one or more of the following as damages:

    a) Purchase price of the Washing Machines, fair replacement value of the Washing Machines, or otherwise the premium of the purchase price paid over other washing machines (overpayment) which do not suffer from the Design Defect i.e. injury at the point-of-sale;

    b) Purchase price of a replacement washing machine purchased;

    c) Loss or reduced value of the Washing Machines;

d) Costs of attempting to identify and/or repairs to their Washing Machines, whether by Whirlpool, Sears, or by a third party (including future costs of repairs);

e) Purchase price of purported remedies to the problem, whether by Whirlpool (Affresh products), Sears, or by a third party;

f) Loss of use and enjoyment of their Washing Machines;

g) Replacement costs for clothing and/or other items ruined by the Washing Machines;

h) Energy costs due to having to run their Washing Machines with empty cycles and/or with cleaning products;

i) Pain, suffering, trouble, and inconvenience;

j) Punitive and/or exemplary damages;

67. All of these damages to the Class Members are a direct and proximate result of the Respondents' conduct and the Design Defect associated with the Washing Machines;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

A) The composition of the Class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings

68. The Petitioner is unaware of the specific number of persons who purchased the Washing Machines; however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands). It is estimated that in the United States, 3,219,000 Washing Machines were sold by the Respondents under their own brand names between the years 2001 and 2009. During that same time period, approximately the same number were sold under Sears' Kenmore brand. Assuming that sales in Canada would be proportionate to Canada's population, there would be over 640,000 purchasers in Canada of Washing Machines in the class period. Quebec will make up approximately 23.6% of the Canadian population, which means approximately 152,000 Quebec Class Members[11];

69. Therefore, Class Members are numerous and are scattered across the entire province and country;

[11] These estimates are consistent with evidence that was submitted by Whirlpool in file number SCM 500-06-000493-094 (see *Lambert* c. *Whirlpool Canada, l.p.*, 2013 QCCS 5688 at para. 64, Exhibit R-16).

70. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the Class Members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondents would increase delay and expense to all parties and to the court system;

71. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgments on issues of fact and law that are similar or related to all members of the Class;

72. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the Class to obtain mandates and to join them in one action;

73. In these circumstances, a class action is the only appropriate procedure for all of the members of the Class to effectively pursue their respective rights and have access to justice;

B) <u>The issues of fact and law which are identical, similar, or related with respect to each of the Class Members with regard to the Respondents and that which the Petitioner wishes to have adjudicated upon by this class action</u>

74. Individual issues, if any, pale by comparison to the numerous common issues that predominate;

75. The damages sustained by the Class Members flow, in each instance, from a common nucleus of operative facts, namely, the Respondents' misconduct;

76. The recourses of the members raise identical, similar or related issues of fact or law, namely:

    a) Does the design of the Washing Machines facilitate the growth or accumulation of dirt, debris, scrud, and/or biofilm through their intended use?

    b) Are the Washing Machines defective and if so, what are the defects?

    c) Are the Washing Machines fit to be used as intended?

    d) Did the Respondents know or should they have known that the Washing Machines are defective?

e) Did the Respondents fail to adequately disclose to users that the Washing Machines are defective or did they do so in a timely manner?

f) Did the Respondents not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm?

g) Was the non-disclosure of the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm a false or misleading representation?

h) Did the Respondents knowingly or recklessly not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm?

i) Did the Respondents not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm in order to promote its business interest?

j) Did Whirlpool unjustly enrich itself through the sale of its Affresh products?

k) Are the Respondents responsible for all related costs (including, but not limited to, the purchase price or otherwise the premium on the purchase price paid, the loss or reduction in value, the costs of attempted repairs, the purchase price of purported remedies and products, the loss of use and enjoyment, trouble and inconvenience, the replacement costs of clothes and other items, extra energy costs, overpayment for Whirlpool Washing Machines, future costs of repair, the fair replacement value, personal injury damages) to Class Members as a result of the problems associated with the Washing Machines?

l) Should an injunctive remedy be ordered to force the Respondents to recall, repair, and/or replace Class Members' Washing Machines free of charge?

m) Are the Respondents responsible to pay punitive and/or exemplary damages to Class Members and in what amount?

77. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

78. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages, injunctive relief and declaratory judgment;

79. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the Class;

DECLARE the Defendants have committed unfair, false, misleading, and/or deceptive conduct, particularly so with respect to their designing, manufacturing, marketing, distributing, importing, advertising, warranty, selling, and/or servicing the Washing Machines with a Design Defect;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

ORDER the Defendants to recall, repair, and/or replace the Washing Machines free of charge;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the Class;

CONDEMN the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the Class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the members of the Class;

A) <u>The Petitioner requests that he be attributed the status of representative of the Class</u>

80. The Petitioner is a member of the Class;

81. The Petitioner is ready and available to manage and direct the present action in the interest of the members of the Class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the Class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux actions collectives*, as the case may be, and to collaborate with his attorneys;

82. The Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the Class;

83. The Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

84. The Petitioner, with the assistance of his attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the Class and to keep them informed;

85. The Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other Class Members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;

86. The Petitioner understands the nature of the action;

87. The Petitioner's interests are not antagonistic to those of other members of the Class;

88. The Petitioner has given instructions to his attorneys to put information about this class action on its website and to collect the coordinates of those Class Members that wish to be kept informed and participate in any resolution of the present matter, the whole as will be shown at the hearing[12];

89. The Petitioner is prepared to be examined out of court on his allegations (as may be authorized by the Court) and to be present for Court hearings, as may be required and necessary;

90. The Petitioner has spent time researching this issue on the internet and meeting with his attorneys to prepare his file. In so doing, he is convinced that the problem is widespread;

[12] Petitioner is aware that already over 1,000 potential class members have "joined" the previous class action and that more will likely come forward.

B) <u>The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal</u>

91. A great number of the members of the Class reside in the judicial district of Montreal and in the appeal district of Montreal;

92. The Petitioner's attorneys practice their profession in the judicial district of Montreal;

93. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages, injunctive relief, and declaratory judgment;

APPOINT the Petitioner as representative of the persons included in the Class herein described as:

- all residents in Canada who currently own or have previously owned a Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machine without a steam feature, purchased prior to January 1, 2010, but excluding models built on the Sierra platform starting in 2007 (collectively the "Washing Machines"), or any other group to be determined by the Court;

Alternatively (or as a subclass)

- all residents in Quebec who currently own or have previously owned a Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machine without a steam feature, purchased prior to January 1, 2010, but excluding models built on the Sierra platform starting in 2007 (collectively the "Washing Machines"), or any other group to be determined by the Court;

IDENTIFY the principle issues of fact and law to be treated collectively as the following:

a) Does the design of the Washing Machines facilitate the growth or accumulation of dirt, debris, scrud, and/or biofilm through their intended use?

b) Are the Washing Machines defective and if so, what are the defects?

c) Are the Washing Machines fit to be used as intended?

d) Did the Respondents know or should they have known that the Washing Machines are defective?

e) Did the Respondents fail to adequately disclose to users that the Washing Machines are defective or did they do so in a timely manner?

f) Did the Respondents not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm?

g) Was the non-disclosure of the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm a false or misleading representation?

h) Did the Respondents knowingly or recklessly not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm?

i) Did the Respondents not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm in order to promote its business interest?

j) Did Whirlpool unjustly enrich itself through the sale of its Affresh products?

k) Are the Respondents responsible for all related costs (including, but not limited to, the purchase price or otherwise the premium on the purchase price paid, the loss or reduction in value, the costs of attempted repairs, the purchase price of purported remedies and products, the loss of use and enjoyment, trouble and inconvenience, the replacement costs of clothes and other items, extra energy costs, overpayment for Whirlpool Washing Machines, future costs of repair, the fair replacement value, personal injury damages) to Class Members as a result of the problems associated with the Washing Machines?

l) Should an injunctive remedy be ordered to force the Respondents to recall, repair, and/or replace Class Members' Washing Machines free of charge?

m) Are the Respondents responsible to pay punitive and/or exemplary damages to Class Members and in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the Class;

DECLARE the Defendants have committed unfair, false, misleading, and/or deceptive conduct, particularly so with respect to their designing, manufacturing, marketing, distributing, importing, advertising, warranty, selling, and/or servicing the Washing Machines with a Design Defect;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

ORDER the Defendants to recall, repair, and/or replace the Washing Machines free of charge;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the Class;

CONDEMN the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the Class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the members of the Class;

DECLARE that all members of the Class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 579 C.C.P. within sixty (60) days from the judgment to be rendered herein in LA PRESSE+, the MONTREAL GAZETTE, the NATIONAL POST, and THE GLOBE AND MAIL;

ORDER that said notice be available on the Respondents' website with a link stating "Notice to current and/or former owners of Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machines, without a steam feature, purchased prior to January 1, 2010";

RENDER any other order that this Honourable Court shall determine and that is in the interest of the members of the Class;

THE WHOLE with costs including publication fees.

Montreal, June 6, 2016

(S) Jeff Orenstein

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Per: Me Jeff Orenstein
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