

CANADA

(Class Action)  
SUPERIOR COURTPROVINCE OF QUEBEC  
DISTRICT OF MONTREAL**S. LAMBERT**

NO: 500-06-000493-094

*Petitioner*

-vs.-

**WHIRLPOOL CANADA LP**  
and  
**WHIRLPOOL CANADA INC.**  
and  
**WHIRLPOOL CORPORATION***Respondents*


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**RE-AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION**  
**&**  
**TO ASCRIBE THE STATUS OF REPRESENTATIVE**  
**(Art. 1002 C.C.P. and following)**

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TO THE HONOURABLE MADAM JUSTICE DANIÈLE MAYRAND 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. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

(...)

- all residents in Quebec who currently own or have previously owned a Whirlpool Duet, Whirlpool Duet HT and/or Whirlpool Duet Sport Front-Loading Washing Machine, as well as, the Whirlpool manufactured Kenmore HE2, HE2t, HE3t, HE4t, HE5t and other Kenmore Front-Loading Automatic Washers in the same family and Whirlpool manufactured Maytag Front-Loading Automatic Washers, purchased

between 2002 and 2008 (collectively the “Washing Machines” or “Whirlpool Front-Loader”), or any other group to be determined by the Court;

B) The Respondents

2. Respondent Whirlpool Corporation is an American major appliance company;
3. Respondent Whirlpool Canada LP is involved in the “sale, marketing and distribution of home appliances”, the whole as appears more fully from a copy of the Quebec Inspector General of Financial Institutions report, produced herein as **Exhibit R-1**;
4. Respondent Whirlpool Canada Inc. is involved in the “manufacture of major home appliances” and the “distribution, sale and servicing of major home appliances”, the whole as appears more fully from a copy of the Quebec Inspector General of Financial Institutions report, produced herein as **Exhibit R-2**;
5. Respondents Whirlpool Canada LP and Whirlpool Canada Inc. are affiliates of the Respondent Whirlpool Corporation and carry on business throughout Canada, including the Province of Quebec;
6. All Respondents have either directly or indirectly designed, manufactured, marketed, distributed, imported and/or sold the Washing Machines throughout Canada, including the Province of Quebec;
7. 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, all Respondents will be referred to as “Whirlpool” for the purposes hereof;

C) The Situation

8. Whirlpool holds itself out to the public as a manufacturer of safe, cutting-edge, and easy-to-use home appliance, including washing machines;
9. However, the Washing Machines in question they suffer from serious design flaws including, among other things:
  - a) the failure of the Washing Machines to properly drain water and to avoid lingering moisture;

- b) the failure of the Washing Machines to sufficiently rinse away high-efficiency ("HE") detergent and liquid fabric softener to prevent the accumulation of residues that contribute to the formation of mould, mildew and associated foul odours;
- c) 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;
- d) the failure of the door seal ("boot") to fully or properly drain and/or remove residues and growths after each wash;

9.1 The Whirlpool Front-Loaders were designed and manufactured by the Respondents such that they are susceptible to the build up of "scud" which is a mixture of sludge, soils, mould or fungi and mildew. The Respondents use the euphemism "biofilm" to describe this scud;

10. The result of these design defects cause the Washing Machines to:

- a) accumulate mould and mildew residue or growth within the Washing Machines;
- b) produce a mouldy or mildewy odour that permeates the Washing Machines and/or consumers' homes;
- c) produce a mouldy or mildewy odour on clothes and other items washed in the Washing Machines;
- d) fail to clean the Washing Machines and remove moisture, residue, growth, and/or bacteria that lead to the formation of mould, mildew and associated foul odours; and
- e) be unusable in the manner, to the extent of, and for the purpose for which the Washing Machines were advertised, marketed, and sold;

10.1 Due to common design defects, the Whirlpool Front-loaders fail to prevent or adequately eliminate a build up of scud;

10.2 The Whirlpool Front-Loaders have an inherent propensity to build up of scud on the interior surfaces because they have not been designed properly to direct water to clean all the surfaces exposed to the water, soap, softener and dirt and debris and to provide air circulation to allow these surfaces to dry once a wash has ended. For example, the Whirlpool Front-Loaders 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 scud can occur and which prevent water, soap, softener and dirt and debris from being flushed during washing or cleaning cycles and also which allows and promotes corrosion on key aluminum parts (the "Design Deficiencies");
- 10.3 This in turn results in a musty or mouldy smell being imparted on clothes washed in the Whirlpool Front-Loaders, in the machines themselves and in the room in which the machines are placed. The corrosion and the scud create a real and substantial risk to the health and safety of consumers because parts spinning at high speed may break and/or consumers will be exposed to toxins and allergens;
  11. Whirlpool fails 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 these problems will result regardless of washer maintenance, due to the defects in design of the Washing Machines;
  12. Whirlpool also made express representations that its Washing Machines were "High Efficiency" and labelled the Washing Machines as "Energy Star" compliant. The intention being that consumers would be saving money and energy. However, due to the mould 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 problems;
  13. As the mould problems became undeniable, Whirlpool began recommending that Washing Machine owners run successive washer cleaning cycles with an Affresh tablet in each cycle. Affresh is a product designed, manufactured, marketed, and sold by Whirlpool specifically to address the mould problems in the Washing Machines. Due to the ineffectiveness of Affresh tablets, Whirlpool created, promoted, and sold the new Affresh washing cleaner kit; a copy of various instructions and explanations which appear on Whirlpool's website at [www.affresh.ca](http://www.affresh.ca) is being produced herein *en l'asse* as **Exhibit R-3**;
  14. Whirlpool has failed to recall, repair, and/or replace the Washing Machines nor to disclose the mould problem to its customers and instead continues to profit from the concealment of the design defects by charging premium prices for the purchase of the Washing Machines, charging for repair services, and selling its Affresh products to palliate the Washing Machines' defects;
  15. During the period of 2008 and 2009, various class actions were instituted against Whirlpool 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, the whole as appears fully from a copy of various Class Action Complaints, produced herein *en l'asse* as **Exhibit R-4A**. A copy of the Ohio Third Amended Master Class Action Complaint, Judgment granting

certification in the Ohio District Court, and Judgment affirming class certification in the U.S. Court of Appeals are being produced herein as Exhibit R-4B:

### The Defects

- 15.1 All the models of the Whirlpool Front-Loaders claimed in the present action have nearly identical designs and any design differences that do exist are immaterial to the claims in this action;
- 15.2 The Whirlpool Front-Loaders have a number of components that are exposed to water, detergent and the 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;
- 15.3 In a front loading washing machine including the Whirlpool Front Loaders, 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 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;
- 15.4 Scrud develops on internal surfaces of Whirlpool Front-Loaders, 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 mold, 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 Whirlpool Front-Loaders;
- 15.5 Top loading washing machines self clean well and do not 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 mold, 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;

- 15.6 Due to the Defects, the Whirlpool Front-Loaders 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 mold, mildew and bacteria and a musty or moldy smell that is imparted on clothes washed in the Whirlpool Front-Loaders and in the room in which the machines are placed. As mentioned above, the scrud also corrodes metal components;
- 15.7 As a result of the Defects and resultant scrud problems in the Whirlpool Front-Loaders the Respondents have manufactured, Defects and resultant formulated and marketed a front-loading washing machine cleaning product in tablet form, to be used in a cleaning cycle (i.e., a wash run at high temperature with maximum water quantity and without clothes), called "Affresh". The Respondents have marketed it as a solution for front-loading washer odour;
- 15.8 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 and use of bleach in periodic clean out cycles;
- 15.9 Two (2) reports are being produced herein to explain: (1) what the problem is with the Washing Machines and the cause of the Defects as alleged herein [Exhibit R-5], and (2) why the solution put forward by the Respondents on certain models still fails to fully address these Defects as alleged herein [Exhibit R-6];

#### Respondents' Negligence

- 15.10 In view of the preceding paragraphs, the Respondents were negligent in following manner:



- (a) the Whirlpool Front-Loaders were designed in a manner which, under normal conditions, usage and applications causes it to degrade by developing scud and corrosion;
- (b) the Whirlpool Front-Loaders were not properly or adequately tested to avoid the Design Deficiencies;
- (c) the Whirlpool Front-Loaders were marketed in such a manner as not to reveal the Design Deficiencies and the consequences;
- (d) the Whirlpool Front-Loaders failed to perform at their optimal level because of premature degradation and the defendants' failure to rectify the Design Deficiencies;
- (e) the Whirlpool Front-Loaders' design was not changed promptly once the Respondents knew the machines were subject to premature degradation and would develop scud and corrosion;
- (f) inadequate testing was carried out to ensure a proper design and to ensure proper and prompt modifications to the Whirlpool Front-Loaders to eliminate the foreseeable risks;
- (g) the Respondents failed to attach an adequate warning or warning label to the Whirlpool Front-Loaders 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 Whirlpool Front-Loaders were discovered and users' complaints were transmitted from them to the customers, sales representatives or distributors;
- (j) the Respondents failed to establish any adequate procedure for evaluating customers' complaints with respect to the Whirlpool Front-Loaders;
- (k) the respondents failed to recall and repair or to ensure the repair of Whirlpool Front-Loaders 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 Whirlpool Front-Loaders;

- (m) the Respondents failed to identify, implement and verify that procedures were in place to address design problems, complaint handling or timely notification of Whirlpool Front-Loaders' failures or complaints;
- (n) the Respondents failed to conduct in-process and finished device testing to ensure performance specifications for the Whirlpool Front-Loaders were met;
- (o) the Respondents failed to adequately define or control written manufacturing specifications, processes, procedures and controls for the Whirlpool Front-Loaders;
- (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 Deficiencies;
- (r) the Respondents failed to change their design, manufacturing and assembly process with respect to the Whirlpool Front-Loaders 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 Whirlpool Front-Loaders were defective and needed to be repaired or taken out of service;
- (u) the Respondents knew or ought to have known of the abnormal wear and tear and risk of damage to Whirlpool Front-Loaders and the substantial danger to the health and safety of the Petitioner and the Class;
- (v) the Respondents failed to conduct adequate testing and research regarding the risk of using the Whirlpool Front-Loaders;
- (w) the Respondents failed to engage in adequate pre-market and production testing of the Whirlpool Front-Loaders; and
- (x) the Respondents continue to fail to fulfill their ongoing obligation to fully disclose the results of their testing and research regarding the damage to Whirlpool Front-Loaders;



### Failure to Disclose and Recall

15.11 The Respondents have known about the Design Deficiencies for years but have failed to take any adequate remedial steps as can be seen from the following documents:

- (a) In a Whirlpool Document dated 07.02.2005, it was stated that 35% of "Duet" model customers were "complaining about bad odors" and "[c]omplaints are increasing from all other markets" (**Exhibit R-7**);
- (b) In September 2008, 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-8**);
- (c) In 2007, the Respondents launched the sale of Affresh tablets as the "solution to odor causing residue in HE washers". Affresh formed a "new washer cleaning category" with estimated \$50 million to \$195 million in revenue (Exhibit R-8);
- (d) 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" (**Exhibit R-9**);
- (e) 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-8);
- (f) In a Whirlpool Document dated March 1<sup>st</sup> 2006, the Respondents stated that "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." (**Exhibit R-10**)
- (g) The March 1<sup>st</sup> 2006 Whirlpool Document states "[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" (Exhibit R-10);

- (h) The March 1<sup>st</sup> 2006 Whirlpool Document states "[e]xamination of Access machines from the field shows signs of corrosion of the cross piece after 2 years of use" (Exhibit R-10);
- (i) The March 1<sup>st</sup> 2006 Whirlpool Document states "[b]oth phenomena, odors and corrosion, can be observed independently from one another." (Exhibit R-10);
- (j) The March 1<sup>st</sup> 2006 Whirlpool Document described Bio Film 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-10)

- (k) The March 1<sup>st</sup> 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-10)

- (l) The March 1<sup>st</sup> 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 Whirlpool Front-Loaders 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-10)

- (m) The March 1<sup>st</sup> 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-10)

- (n) A January 24<sup>th</sup> 2005 Whirlpool document notes that "legal states nearly 100% assurance that ACCESS case will follow" (**Exhibit R-11**)
- (o) In an October 1<sup>st</sup> 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 mold 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. (**Exhibit R-12**)

- (p) A 26.10.2004 Whirlpool Document entitled "Minutes Access / Matador / Horizon - Bio-film issue" states:

Whirlpool and Sears get an increasing number of calls complaining about "odor". A detailed analysis has confirmed that the odor is caused by mold/mildew and bacteria inside of the wash unit including hoses.

It was decided to use the term "biofilm" to communicate a less alarming verbiage that (sic) the words "mold-mildew-fungi and bacteria. Biofilm literally is intended to mean detergent residues, all types of consumer soils, water mineral serve as a substrate that support the growth of both bacteria

and fungi with warm humid low airflow environmental conditions." (AH)

AH summarize the OBSERVATIONS in one of the previous emails as following.. .

- ALL homes and offices contain mold (fungi) which can start to grow anywhere the environmental conditions are favorable. The "HE" watcher can provide a nearly perfect condition for both fungi and bacteria growth.

- Flotation of soils and the detergent components by high sudsing appears to be a major contributor to the problems.
- Use of "HE" detergents helps to reduce the problem, but is not sufficient by itself.
- Some "HE" detergents are in reality standard detergents with the "HE" or "HE compatible" icon added.
- Any low flow or area which allows pooling of water, soils, and detergent components appears to be the initial sites for problems.
- The Access' webbed tub structure appears extremely prone to water and soil depositions.
- Aluminum basket cross-bar appears extremely susceptible to corrosion with biofilm. (**Exhibit R-13**)

(q) A September 24<sup>th</sup> 2004 email from Anthony H. Hardaway (**Exhibit R-14**);

15.12 The Respondents had a duty to recall the Whirlpool Front-Loaders and rectify the Design Deficiencies or give the Class back their purchase monies. As pleaded above, the Respondents became aware following the manufacture of the Whirlpool Front-Loaders of the existence of the Design Deficiencies and in breach of said duty failed to recall the Whirlpool Front-Loaders to correct the Design Deficiencies or, if they could not be corrected, to compensate the Class;

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

16. Petitioner purchased a Whirlpool Duet Front-Loading Automatic Washing Machine (Model Number GHW9100LW2) and a dryer in the year 2003/2004 for approximately \$2,000 from Sear at Champlain Mall in Brossard;
17. Petitioner installed the washing machine in his house and used it to wash his clothing, where it still remains today. Petitioner always used the recommended high-efficiency (“HE”) detergent;
18. For the first 2-3 years, the washing machine worked without any problems, however, (...) it began to smell and progressively got worse. After 2-3 years from the purchase of the washing machine, the Petitioner called Whirlpool to complain, but was referred back to Sears, with whom he had a service contract with (4 years plus an additional 4 years, for a total of 8 years). Sears did not come for a service call at that time, but told the Petitioner that he should wash frequently, leave the door open when not in use, use Affresh tablets once a week, always use HE detergent, and to do an empty cycle every so after while using bleach;
19. (...) These suggestions were tried, but they failed to solve the problem and the Petitioner experienced the following issues:
  - Mildew, mould, foul smell, and visible residue left in the drum
  - Having to throw out smelly towels
  - Asthma irritation when he goes into the laundry room;
20. (...) On May 18<sup>th</sup> 2010, Sears came to replace a joint on the washing machine door, the whole as appears from the service order, produced herein as **Exhibit R-15**. This has not resolved the above problems. The service contract is no longer in effect with Sears;
21. (...) Petitioner, by researching his problems online, is aware that numerous class actions have been instituted in the United States for the same problems as he has experienced;
22. Had Petitioner knew about the problems associated with the Washing Machines, he would never have purchased his washing machine;
23. Petitioner’s damages are a direct and proximate result of the Respondents’ conduct and the defect associated with the Washing Machines;
24. 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**

28. Every member of the class own one of the Washing Machines which are defective;
29. 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 or otherwise the premium of the purchase price paid over other washing machines;
  - b. Loss (or reduced) value of the Washing Machines;
  - c. Costs of attempting to identify and/or repairs to their Washing Machines, whether by Whirlpool or a third party;
  - d. Purchase price of purported remedies to the problem, whether by Whirlpool (Affresh products) or a third party;
  - e. Loss of use and enjoyment of their Washing Machines;
  - f. Trouble and inconvenience, due to the problems associated with their Washing Machines and/or the odours in their homes;
  - 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. Punitive and/or exemplary damages;
  - j. Overpayment for Whirlpool Washing Machines, which contain a latent defect;
  - k. Future costs of repair of the Design Deficiencies;
  - l. The fair replacement value of the Whirlpool Washing Machines;
  - m. Personal injury damages;
30. All of these damages to the class members are a direct and proximate result of the Respondents' conduct and the defect associated with the Washing Machines;



#### **IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
31. 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 that 3,219,000 Whirlpool Front Loaders were sold by the Respondents under their own brand names between the years 2001 and 2009. During that same 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 Whirlpool Front Loaders in the class period. Quebec will make up approximately 25% of the Canadian population, which means 160,000 Quebec class members;
32. Class members are numerous and are scattered across the entire province and country;
33. 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 Respondents would increase delay and expense to all parties and to the court system;
34. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
35. 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;
36. 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) The questions 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





37. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
38. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
39. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a.1 Does the design of the Washing Machines facilitate the growth or accumulation of dirt, debris, scrud and/or biofilm through their intended use?
  - a. Are the Washing Machines defective and what are the defects?
  - b. Are the Washing Machines fit to be used as intended?
  - c. Did Whirlpool know or should they have known that the Washing Machines are defective?
  - d. Did Whirlpool fail to perform adequate testing of the Washing Machines prior to releasing them?
  - e. Did Whirlpool fail to adequately disclose to users that the Washing Machines are defective or did Whirlpool do so in a timely manner?
    - e.1 Did Whirlpool not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm?
    - e.2 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?
    - e.3 Did Whirlpool 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?
    - e.4 Did Whirlpool 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?
  - f. Did Whirlpool unjustly enrich itself through the sale of its Affresh products?



- g. Is Whirlpool 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?
  - h. Should an injunctive remedy be ordered to force Whirlpool to recall, repair and/or replace class members' Washing Machines free of charge?
  - i. Is Whirlpool responsible to pay compensatory, moral, punitive and/or exemplary damages to class members and in what amount?
40. The interests of justice favour that this motion be granted in accordance with its conclusions;

#### **V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

41. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages and an injunctive remedy;
42. 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;

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) The Petitioner requests that he be attributed the status of representative of the Class

43. Petitioner is a member of the class;
44. 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 recours collectifs*, as the case may be, and to collaborate with his attorneys;
45. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;
46. 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;
47. Petitioner, with the assistance of his attorneys, are 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;
48. 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 protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;



49. Petitioner understands the nature of the action;
50. Petitioner's interests are not antagonistic to those of other members of the class;
- 50.1 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;
- 50.2 Petitioner is one of those individuals that entered their contact information at [www.clg.org](http://www.clg.org) and disclosed his problems with his washing machine. Petitioner is interested in taking an active role as the class representative in this file;
- 50.3 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;
- 50.4 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;
- B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal
51. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
52. The Petitioner's attorneys practice their profession in the judicial district of Montreal;
53. 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 and an injunctive remedy;

**ASCRIBE** the Petitioner the status of representative of the persons included in the class herein described as:

(...)



- all residents in Quebec who currently own or have previously owned a Whirlpool Duet, Whirlpool Duet HT and/or Whirlpool Duet Sport Front-Loading Washing Machine, as well as, the Whirlpool manufactured Kenmore HE2, HE2t, HE3t, HE4t, HE5t and other Kenmore Front-Loading Automatic Washers in the same family and Whirlpool manufactured Maytag Front-Loading Automatic Washers, purchased between 2002 and 2008 (collectively the “Washing Machines” or “Whirlpool Front-Loader”), or any other group to be determined by the Court;

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

- a.1 Does the design of the Washing Machines facilitate the growth or accumulation of dirt, debris, scrud and/or biofilm through their intended use?
  - a. Are the Washing Machines defective and what are the defects?
  - b. Are the Washing Machines fit to be used as intended?
  - c. Did Whirlpool know or should they have known that the Washing Machines are defective?
  - d. Did Whirlpool fail to perform adequate testing of the Washing Machines prior to releasing them?
  - e. Did Whirlpool fail to adequately disclose to users that the Washing Machines are defective or did Whirlpool do so in a timely manner?
    - e.1 Did Whirlpool not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm?
    - e.2 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?
    - e.3 Did Whirlpool 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?
    - e.4 Did Whirlpool 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?



- f. Did Whirlpool unjustly enrich itself through the sale of its Affresh products?
- g. Is Whirlpool 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?
- h. Should an injunctive remedy be ordered to force Whirlpool to recall, repair and/or replace class members' Washing Machines free of charge?
- i. Is Whirlpool responsible to pay compensatory, moral, 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;

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 judgement 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 judgement to be rendered herein;

**ORDER** the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the MONTREAL GAZETTE;

**ORDER** that said notice be available on the Respondents' (...) website with a link stating "Notice to users of Whirlpool Duet, Whirlpool Duet HT and/or Whirlpool Duet Sport Front-Loading Washing Machine, as well as, the Whirlpool manufactured Kenmore HE2, HE2t, HE3t, HE4t, HE5t and other Kenmore Front-Loading Automatic Washers in the same family and Whirlpool manufactured Maytag Front-Loading Automatic Washers, the whole for the 2001 to 2008 model years";

**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 publications fees.

Montreal, February 14, 2013

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CONSUMER LAW GROUP INC.  
Per: Me Jeff Orenstein  
Attorneys for the Petitioner