

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-000493-094

(Class Action)  
SUPERIOR COURT

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**M. KUPFERT**

*Petitioner*

-vs.-

**WHIRLPOOL CANADA LP**, legal person duly constituted, having its principal place of business at 3080, boul. Le Carrefour, City of Laval, Province of Quebec, H7T 2R5

and

**WHIRLPOOL CANADA INC.**, legal person duly constituted, having its principal place of business at 10, rue St-Jean-Baptiste Est, City of Montmagny, Province of Quebec, G5V 1J7

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, USA

*Respondents*

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**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 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. 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 own a Whirlpool Duet, Whirlpool Duet HT and/or Whirlpool Duet Sport Front-Loading Washing Machine (the “Washing Machines”), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who own a Whirlpool Duet, Whirlpool Duet HT and/or Whirlpool Duet Sport Front-Loading Washing Machine (the “Washing Machines”), 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;
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;

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 liasse* 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 liasse* as **Exhibit R-4**;

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

16. Petitioner purchased a Whirlpool Duet Front-Loading Automatic Washing Machine (Model Number GHW9150PWO) on or about the beginning of 2007 for approximately \$750;
17. Petitioner installed the washing machine in his apartment and used it to wash his clothing until around July 2009, when he ceased using it. Petitioner always used the recommended high-efficiency (“HE”) detergent;



18. At first the washing machine worked without any problems, however, over time it began to smell and progressively got worse;
19. Petitioner suspected that it was due to the growth of mould and/or mildew inside the washing machine;
20. Petitioner has had some of his clothes being ruined because of this problem and has also experienced a foul odour in his apartment caused by his washing machine;
21. Petitioner discontinued using the washing machine after researching the issue and discovering that this problem is common with Whirlpool Duet, Whirlpool Duet HT and Whirlpool Duet Sport Front-Loading Washing Machines. In fact, Petitioner is aware that numerous class actions have been instituted in the United States for the same problems as he has experienced;
22. Had petitioner known 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 owns a Whirlpool Duet, Whirlpool Duet HT and/or Whirlpool Duet Sport Front-Loading Washing Machine 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 attempted 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;
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 are 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);
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. 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?
- 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) 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;
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;

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;

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

- all residents in Canada who own a Whirlpool Duet, Whirlpool Duet HT and/or Whirlpool Duet Sport Front-Loading Washing Machine (the “Washing Machines”), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who own a Whirlpool Duet, Whirlpool Duet HT and/or Whirlpool Duet Sport Front-Loading Washing Machine (the “Washing Machines”), 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. 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?
- 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) 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 NATIONAL POST;

**ORDER** that said notice be available on the Respondent Sony's website with a link stating "Notice to Whirlpool Duet, Whirlpool Duet HT and Whirlpool Duet Sport Front-Loading Washing Machine users";

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, December 21, 2009

(s) Jeff Orenstein

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