

CANADA

(Class Action)

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

SUPERIOR COURT

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NO. 500-06-000794-160

SYLVAIN GAUDETTE

Plaintiff

v.

WHIRLPOOL CANADA LP

and

WHIRLPOOL CORPORATION

and

SEARS CANADA HOLDINGS CORP.

Defendants

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**MOTION FOR LEAVE TO DEPOSE CLASS MEMBERS**  
**(Article 587 C.C.P.)**

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TO THE HONOURABLE SUZANNE COURCHESNE, S.C.J., SITTING IN THE CLASS ACTION DIVISION, IN AND FOR THE DISTRICT OF MONTREAL, WHIRLPOOL CANADA LP, WHIRLPOOL CORPORATION AND SEARS CANADA HOLDINGS CORP. (COLLECTIVELY THE “DEFENDANTS”) RESPECTFULLY SUBMIT THE FOLLOWING:

**I. PROCEDURAL BACKGROUND**

1. On May 5, 2020, this Honourable Court authorized the bringing of a class action (the “**Class Action**”) instituted by Mr. Sylvain Gaudette against Whirlpool Canada LP, Whirlpool Corporation and Sears Canada Holdings Corp. (the “**Defendants**”), the whole as appears from the judgment rendered on that day and forming part of the Court record (the “**Authorization Judgment**”) on behalf of the following class:

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, manufactured prior to December 31, 2008, but excluding models built on the Sierra platform starting in 2007, which include the following models:

-Whirlpool GHW9100, GHW9200, GHW 9150, GHW9250, GHW9400, GHW9160, GHW9300, GHW9460, WFW8500, WFW9200, WFW8300,

WFW9400, WFW8410, WFW8400, WFW9600, WFW9500, WFW8200, WFW9300, WFW9250, WFW9150;

-Kenmore 110.42922, 110.42924, 110.42926, 110.42932, 110.42934, 110.42936, 110.42822, 110.42824, 110.42826, 110.42832, 110.42836, 110.44832, 110.44836, 110.44834, 110.44932, 110.44934, 110.44936, 110.45091, 110.45081, 110.45087, 110.45088, 110.45089, 110.44826, 110.44921, 110.45862, 110.45981, 110.45986, 110.43902, 110.45991, 110.45992, 110.45994, 110.45996, 110.45972, 110.45976, 110.45872, 110.46472, 110.47561, 110.47566, 110.47567, 110.47511, 110.47512, 110.49972, 110.49962, 110.47081, 110.47086, 110.47087, 110.47088, 110.47089, 110.47531, 110.47532, 110.47571, 110.47577, 110.47091, 110.47852, 110.47542;

-Maytag MFW9600, MFW9700, MFW9800, MHWZ400, MHWZ600; (collectively, the “**Washing Machines**”);

2. On or about December 1, 2020, the Representative Plaintiff served the present Class action, the whole as appears from the Court record;
3. On or about March 9, 2020, the parties agreed to a case protocol which was endorsed by this Honourable Court;
4. A prior mirror Authorization Motion was dismissed in the *Lambert* matter (Court file numbers: 500-06-000493-094 and 500-09-024118-135) by both the Superior Court and the Court of Appeal. The Supreme Court of Canada denied Mr. Lambert leave to appeal on October 29, 2015;
5. This Class Action, combined with its previous iteration in the *Lambert* file, has been ongoing for nearly 12 years and concerns washing machines which were sold between 12 and 20 years ago;
6. By the present Motion, the Defendants request leave to depose 35 Class Members in addition to the Class Plaintiff during discovery;

## II. CAUSES OF ACTION OF THE PRESENT PROCEEDINGS

7. The Class Action essentially alleges that the Defendants are liable for manufacturing design flaws of the front-loading Washing Machines in dispute, including their supposed failure to self-clean as outlined at paragraph 1 thereof;
8. The Class Action alleges the following faults against the Defendants at paragraphs 40 and 41, namely that:
  - (i) The Washing Machines contain design defects which does not prevent the growth and accumulation of dirt, debris, scrud and/or biofilm through their intended use and which allegedly constitute latent defects under the C.C.Q. and C.P.A.;
  - (ii) Defendants failed to remedy the situation in a timely manner;
  - (iii) Defendants breached their duty to inform Class Members of these design defects under the C.C.Q. and C.P.A.;

9. The Class Action further alleges that each Class Member was prejudiced by Defendants' omission to disclose the supposed design defects and required regular maintenance since, they would never have purchased their Washing Machine or not paid as high of a price had they been made aware of these shortcomings (at paragraph 60 of the Application to Institute Proceedings);

### **III. NECESSITY AND USEFULNESS OF DEPOSING CLASS MEMBERS OTHER THAN THE CLASS PLAINTIFF**

10. The proposed depositions will permit the Defendants to particularize the facts alleged against them and to better assess the evidence in order to prepare a full and complete defence;
11. The Courts have consistently opted for a liberal application of the discovery provisions of the C.C.P., in order to favor the full disclosure of all substantial facts at the preliminary stage of a dispute;
12. Furthermore, this liberal application is consistent with the requirement to cooperate at Article 20 C.C.P.;
13. These principles certainly apply to the pre-trial deposition of Class Members, especially since they are considered to be quasi-Plaintiffs and given the inherent limitations of adjudicating contested common issues in a single representative procedural context;
14. Whilst the authorization of class actions has often been qualified as an intendant process, it remains that an authorized class action invariably gives rise to full defence rights on the merits;
15. Thus, the Defendants ought to be permitted to disprove the core elements of the Class Plaintiff's defect allegations which he proposes to adjudicate on a collective basis;
16. The Defendants must also be given the subsidiary opportunity to disprove that the issues authorized for adjudication are common to all Class Members and thereby require individual mini trials, so as to ensure a semblance of fairness;
17. The depositions of the Class Members are thus necessary and will be useful to address the following issues:

#### **a) The Core Defect Claims and their Prescription**

18. In particular, the Defendants ought to be given the opportunity to test whether any other Class Members understood that the subject washers were self-cleaning or intended to prevent the growth of biofilm without any maintenance whatsoever;
19. Moreover, the trial judge will have an obvious interest in determining whether most if not all Class Members were aware of the possible accumulation of biofilm and need for regular maintenance in front load or any other type of washer, prior to their purchase of a Whirlpool product;
20. The additional washer purchase and service histories of these other Members will also permit to test the veracity of Plaintiff's loss of use allegations;

21. As indicated by this Honourable Court at paragraph 40 of the Authorization Judgment:

“The evidence on the merits will determine the legitimate expectations of the consumer of the Washing Machines, taking into consideration, *inter alia*, the nature of the property, its intended use, the information provided to the consumers and the effects and inconvenience related to the alleged defect.”;

22. These additional depositions are all the more justified when considering the multiple model years, platforms and evolving features of the Subject Washers;

23. Furthermore, Class counsel’s website already contains testimonials which patently contradict the Class Plaintiff’s defect allegations:

➤ George Babineau : “people need to be educated on how to use front load washers. the proper amount of detergent is critical . top load washers will stink also if too much detergent is used !”

➤ Harold Hemberger: “I am able to read instructions Therefore i do not need to participate is stupid lawsuits”

24. As identified by the Court at paragraph 79 in the Authorization Judgment, the Defendants have and will continue to raise the issue of prescription with respect to (a) the purchase date of the Subject Washers and (b) the first clear and material manifestation of the alleged mold/odor issue;

25. Sample depositions on these issues will also be germane and useful;

**b) The Right to Contest Class Plaintiff’s Common Prejudice Allegations**

26. The Defendants are undoubtedly entitled to establish that there is a common “absence of prejudice” amongst Class Members;

27. As the Class Plaintiff still owns and uses his Washing Machine, he could not have suffered any (or at least most) of the supposed losses alleged in the Class Action;

28. As the instant Class Action continues to invoke a litany of common prejudices, the Defendants should certainly be entitled to adduce evidence in order to disprove these loss allegations;

29. At the very least, Defendants should be permitted to depose a representative sample of Class Members in order to establish that the proposed “common” issue of consumer prejudice is at best suited for individual mini-trials;

**c) Notice Requirements**

30. The Defendants will demonstrate that less than one percent of the purchasers of the Subject Washers actually raised a mold/odor complaint with Whirlpool and that the alleged defect issue is anything but common in any event;

31. In the context of such a non-uniform issue, the Class Plaintiff’s failure to provide the Defendants with any notice of the alleged latent defects was fatal;

32. Failure to meet this notice requirement was prejudicial to the Defendants as they were deprived of the right to inspect the Washing Machine when it was still opportune to do so;
33. It is imperative that the Defendants examine Class Members to demonstrate that the failure to fulfill this pre-litigation requirement is common to the quasi totality of the Class;
34. Defendants should thus be permitted to depose a representative sample of Class Members, in order to demonstrate that the failure to meet the notice requirement provided for in the C.C.Q. is widespread and thus fatal to the Class Action or at the very least to identify, if there are any, washers which could still be reasonably inspected;
35. Indeed, a review of Class Counsel's website confirms that they have invited participation in the instant Class Proceedings based, at least in part, on the express disclosure of a U.S. settlement, which was entered into for reasons which have nothing to do with merits of these claims;
36. The Defendants ought to be permitted to demonstrate that the number of registered Class Members in the present case is predicated at least in part on the mistaken belief that the settlement was intended to be available in Canada. The failure of any such members to provide notice will thus be all the more relevant in this context;

#### **IV. CONCLUSION**

37. The Defendants therefore request leave from this Honourable Court to depose 35 Class Members on the following themes:
  - Their washer histories and knowledge of biofilm and regular washer maintenance issues;
  - The first manifestation of their alleged prejudice resulting from the supposed design defects;
  - Notice and disclosure of the supposed defects and damages to the Defendants;
  - The damages purportedly suffered and the efforts taken to mitigate them;
38. Examining a random selection of Class Members will thus not only be useful, but also necessary to determine whether the *sine qua non* requirements of the recourse have been met and if many of the Class Members' claims are prescribed or otherwise barred in any event;
39. The Defendants propose that this Honourable Court selects, at random, a sample of 35 registered Class Members from the updated list of registered Class Members that was requested by the Defendants on March 15, 2021;
40. On March 30, 2021, Class Counsel refused to provide their updated original list of Class Members and the originals of the registration forms filled out and submitted by Class Members. This objection is unfounded;
41. The Defendants would undertake not to communicate with Class Members without further leave of the Court;

42. Plaintiffs have waived any right to argue that the content of this list is confidential. They communicated a list of Class Members to the Defendants prior to the Authorization Hearing on November 19, 2019, as well as the original list from their website in 2013, the whole as appears from **Exhibit R-1**;

**WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:**

**GRANT** the present Motion for leave to depose Class Members;

**GRANT** leave to the Defendants Whirlpool Canada LP, Whirlpool Corporation and Sears Canada Holdings Corp., to depose a sample of 35 registered Class Members of the present Class Action to be selected at random by this Honourable Court or by any other means deemed reasonable;

**ORDER** the Class Plaintiff or his Counsel to communicate to Defendants the original registration forms submitted by Class Members to the Consumer Law Group and an unredacted list of registered Class Members;

**THE WHOLE** without costs, except in case of contestation.

Montreal, April 1, 2021

**INF S.E.N.C.R.L./LLP**

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**INF S.E.N.C.R.L. / LLP**

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**NOTICE OF PRESENTATION**

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**TO: Mtre Jeff Orenstein**  
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Attorneys for the Class Plaintiff

**TAKE NOTICE** that the present motion will be presented before the Honourable Suzanne Courchesne, Judge of the Superior Court of Quebec, District of Montreal, at a date and time, and in a room to be determined by her, at the Montreal Courthouse, located at 1 Notre-Dame Street East, Montreal, Quebec, H2Y 1B6.

**DO GOVERN YOURSELVES ACCORDINGLY.**

Montreal, April 1, 2021

**INF S.E.N.C.R.L./LLP**

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**INF S.E.N.C.R.L. / LLP**

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