

CANADA

(Class Action)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT

NO. 500-06-000794-160

SYLVAIN GAUDETTE

Plaintiff

v.

WHIRLPOOL CANADA LP

and

WHIRLPOOL CORPORATION

and

SEARS CANADA HOLDINGS CORP.

Defendants

MOTION TO STRIKE ALLEGATIONS AND EXHIBITS
(Article 169(2), 235 and 239 C.C.P.)

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 12 to 20 years ago;

II. CAUSES OF ACTION OF THE PRESENT PROCEEDINGS

6. 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;
7. 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, scud 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.;
8. 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. THE IMMATERIAL ALLEGATIONS AND HEARSAY EVIDENCE SHOULD BE STRUCK FROM THE APPLICATION TO INSTITUTE PROCEEDINGS

9. The Class Action includes Exhibits which were illegally filed in the Court record and are thus immaterial. Failure to strike these Exhibits from the Court record will lead to an unnecessary waste of time and expense for the parties and Court;
10. The Class Action also includes allegations which are false and are contradicted by the Class Plaintiff's own Exhibits;

a) Allegations Relying on Foreign Expert Reports

11. Plaintiff makes multiple allegations based on reports that were filed in previous mirror class actions, in the United States or in Ontario, which were prepared by the following "experts": Todd B. Hilsee, Dr. R. Gary Wilson, and Chris S. Yang, referenced in Exhibits P-7, P-9 and P-12;
12. Class Counsel freely admitted during the case management conference held on March 9, 2021, that the Plaintiff did not mandate these experts to prepare or submit their expert reports in the instant file;
13. The said U.S. expert reports were not filed with the intent of adducing expert testimony pursuant to Article 231 C.C.P. and fail to conform to the imperative requirements of Articles 235 and 239 C.C.P.;
14. In accordance with Art. 231 C.C.P. and ff. and as confirmed by Class Counsel in the Case Protocol, Plaintiff intends to retain six (6) other experts in order to adduce opinion evidence in the present Quebec class action;
15. The "expert" reports, communicated as Exhibits P-7, P-9 and P-12 are thus mere unverified opinions which have been illegally introduced in the Court record and which include copious amounts of hearsay;
16. The allegations made at paragraphs 24, 29 and 39 as well as the Exhibits, P-7, P-9 and P-12 referred to therein, should thus be struck from the Court record;

b) Photos in the Application to Institute Proceedings

17. Plaintiff included multiple photographs of Washing Machines in his Class Action, at paragraphs 13 and 27, whose origin, date and source are unknown;
18. It is trite law that a party must prove the authenticity of any element of real evidence brought into the Court record as outlined in Article 2855 C.C.Q.;
19. Plaintiff has attempted to bypass this rule by including said photos in his Class Action as opposed to filing them as separate exhibits into the Court record, as is usually the case;
20. The Defendants hereby submit that this Honourable Court should strike these photos from this Class Action;

c) Allegations That are Patently False or Have No Basis in the Exhibits Referenced Therein

21. At paragraph 21, of the Class Action, Plaintiff alleges that “Whirlpool created, promoted and sold the new Affresh washing cleaner kit”, due to the ineffectiveness of the Affresh tablets. However, the Affresh tablets remained a main element of the Affresh washing cleaner kit, which is to be used in conjunction with a “Grit Grabber” cloth, the whole as appears in Exhibit P-5, such that this allegation is illogical and patently false;
22. At paragraph 23 of the Class Action, Plaintiff refers to Exhibit P-6 to allege that the Defendants knew “that even strict adherence to its extraordinary maintenance steps would not actually solve the problems created by the Design Defect.” Such a statement is false, and not found anywhere in Exhibit P-6. Thus, the allegation and the reference to Exhibit P-6 are misleading;
23. These misleading and frivolous allegations are evidently immaterial and will lead to an unnecessary waste of time and resources.
24. This Honourable Court should therefore also strike these allegations from the Class Action;
25. The housekeeping measures proposed herein by the Defendants in no way denature or distort the Class Action. They will merely ensure that the litigation is proportionate and focused on allegations and exhibits which are relevant and can be legally entered into evidence in accordance with the applicable rules of civil procedure;

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present Motion to strike allegations and exhibits;

STRIKE paragraphs 21, 23, 24, 29 and 39 of the Class Action and Exhibits P-7, P-9 and P-12 in support thereof and the photos referred to in paragraphs 13 and 27 of the Plaintiff's Class Action;

THE WHOLE with costs.

Montreal, April 1, 2021

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

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

Attorneys for the Defendants
WHIRLPOOL CANADA LP, WHIRLPOOL
CORPORATION and SEARS CANADA
HOLDINGS CORP.

Mtre Laurent Nahmiash

Mtre Anthony Franceschini

Mtre Jonathan Liber

lnahmiash@infavocats.com

afranceschini@infavocats.com

jliber@infavocats.com

255 St-Jacques Street, 3rd Floor

Montréal, Québec H2Y 1M6

Tel.: 514-312-0289 | 312-0291

Fax: 514-312-0292

Our file : 08020-0002

NOTICE OF PRESENTATION

TO: Mtre Jeff Orenstein
Mtre Andrea Grass
Consumer Law Group Inc.
1030 rue Berri, Suite 102
Montréal, Québec H2L 4C3

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

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

Attorneys for the Defendants
WHIRLPOOL CANADA LP, WHIRLPOOL
CORPORATION and SEARS CANADA
HOLDINGS CORP.

Mtre Laurent Nahmiash
Mtre Anthony Franceschini
Mtre Jonathan Liber
lnahmiash@infavocats.com
afranceschini@infavocats.com
jliber@infavocats.com
255 St-Jacques Street, 3rd Floor
Montréal, Québec H2Y 1M6
Tel.: 514-312-0289 | 312-0291
Fax: 514-312-0292
Our file: 08020-0002