

COURT FILE NUMBER 1603 10241
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
PLAINTIFFS KRISTINA ESSA as REPRESENTATIVE PLAINTIFF
DEFENDANTS WHIRLPOOL CORPORATION, SEARS HOLDINGS MANAGEMENT CORPORATION, SEARS ROEBUCK AND CO., INC., SEARS CANADA INC., WHIRLPOOL CANADA CO. and WHIRLPOOL CANADA LP
DOCUMENT AMENDED STATEMENT OF CLAIM



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
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**A Class Proceeding pursuant to the
*Class Proceedings Act, S.A. 2003, C-16.5***

NOTICE TO DEFENDANTS

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

STATEMENT OF FACTS RELIED ON:

General Overview

1. The Plaintiff brings this action on her own behalf, and on behalf of a proposed class.
2. The Defendants are the designers, manufacturers, distributors and vendors of dishwashers sold under the brand names "Whirlpool", "KitchenAid" and "Kenmore", hereinafter the "Dishwashers".
3. The Dishwashers contain a dangerous defect. Put simply, the product is a fire hazard. Each Dishwasher is equipped with an electronic control board. This control board has an unreasonable propensity to over-heat. This may cause the dishwasher to emit smoke, fumes, sparks, and flames. The resultant smoke and fire may cause harm to life and property.
4. The Defendants have known about this product defect for years, and yet have failed to take appropriate corrective action, including warning consumers, recalling or repairing the product.
5. The Defendants' conduct in the design and marketing of the Dishwashers was negligent and in breach of the *Fair Trading Act* and the *Sale of Goods Act*.

Parties

6. The proposed Representative Plaintiff, Kristina Essa, resides in the Province of Alberta.
7. The proposed definition of the class is as follows:

"All persons in Alberta and elsewhere in Canada who purchased or otherwise acquired a Whirlpool, KitchenAid or Kenmore branded dishwasher manufactured on or after October 1, 2000 after July 1, 2003."

8. The Defendant, Whirlpool Corporation, is a body corporate incorporated pursuant to the laws of the United States with an address for service at 1209 Orange Street, Wilmington, Delaware, 19802 and at all material times carried on business in the Province of Alberta and elsewhere in Canada.
9. The Defendant, Whirlpool Canada Co., is a Nova Scotia company registered extra-provincially in Alberta with an address for service at Suite 1900, 520 - 3rd Avenue SW, Calgary, Alberta, T2P 0R3. At all material times, Whirlpool Canada Co. carried on business in the Province of Alberta and elsewhere in Canada.
10. The Defendant, Whirlpool Canada LP, is an Ontario limited partnership registered extra-provincially in Alberta with an address for service at 1900, 520 - 3rd Avenue SW, Calgary, Alberta, T2P 0R3. At all material times, Whirlpool Canada LP carried on business in the Province of Alberta and elsewhere in Canada.
11. The Defendant, Sears Holdings Management Corporation, is a body corporate incorporated pursuant to the laws of the United States with an address for service at 208 So LaSalle Street, Suite 814, Chicago, Illinois, 60604 and at all material times carried on business in the Province of Alberta and elsewhere in Canada.
12. The Defendant, Sears Roebuck and Co., Inc., is a body corporate incorporated pursuant to the laws of the United States with an address for service at 208 So LaSalle Street, Suite 814, Chicago, Illinois, 60604 and at all material times carried on business in the Province of Alberta and elsewhere in Canada.
13. The Defendant, Sears Canada Inc., is a Canadian corporation registered extra-provincially in Alberta with an address for service at 1616 - 14 Avenue NW, Calgary, Alberta, T2N 1M6. At all material times, Sears Canada Inc. carried on business in the Province of Alberta.
14. The Plaintiff has sufficient facts and grounds to serve this Statement of Claim ex juris outside of Alberta and outside of Canada since the within claims arise out of and relate to torts, breach of contract or wrongful acts and omissions committed in Alberta and are governed by the law of Alberta and have a real and substantial connection to Alberta.

15. The Defendants are joint tortfeasors. They each participated in the design, manufacture, distribution, and sale of the Dishwashers in Alberta and elsewhere in Canada. They each knew or ought to have known of dangerous defects in the Dishwashers. They each owed a duty of care to the Plaintiff and class members, and they each could have taken reasonable steps to have prevented harm to the Plaintiff and class members, including issuing a warning about the defect, recalling the product, repairing, correcting or avoiding the defect.

The Plaintiff

16. On or about November 13, 2004, the Plaintiff purchased a new Dishwasher, with an extended four year warranty, valued at approximately \$1,000.00.
17. On or about January 16, 2015, during a normal cycle, the electronic control board in the Dishwasher overheated and parts of the Dishwasher melted and smoke erupted from the Dishwasher.
18. The resulting smoke, flames, heat and fumes caused damages and losses to the Plaintiff, including:
 - a. damage to her home and kitchen;
 - b. destruction of the Dishwasher;
 - c. out of pocket expenses;
 - d. cost for a replacement dishwasher, being approximately \$1,000.00; and
 - e. such further and other losses or damages as may be proven at trial.
19. The damages and losses suffered by the Plaintiff and the class as described herein were caused by the wrongful acts and omissions of the Defendants as set out in this Statement of Claim.

Negligence

20. The electronic control board or circuit board (hereinafter the "Electronic Control Board") performs all of the major control functions of the Dishwashers. It enables the consumer to operate the Dishwashers and select cycle preferences. The Electronic Control Board also monitors the basic functions of the Dishwashers.
21. At the time of their sale, each Dishwasher contained a dangerous defect that caused or could cause the Electronic Control Board to overheat, smoke, ignite and combust. The defect prevents the Dishwashers from being used as intended during their useful lives and creates a substantial and unreasonable risk of property damage, personal injury and death. In addition to the unreasonable risk of fire posed by these defective Dishwashers, smoke and fumes, containing harmful gases, vapors and particulate matter can quickly permeate an entire house.
22. The Defendants designed, manufactured, supplied, provided, marketed, advertised, promoted, distributed, warranted, sold or offered repair services for the Dishwashers to the Plaintiff and the class. In conjunction with each sale, the Defendants marketed, advertised and warranted that each Dishwasher was of merchantable quality, fit for the ordinary purpose for which dishwashers are used, free from defects in materials and workmanship and would not pose a danger to consumers.
23. The design defect arises at or near the terminal connection between the wiring from the heating element and the console control area including the Electronic Control Board.
24. The defective design of the Dishwashers causes degradation of the Electronic Control Board over time, which in turn causes the terminal connection to get extremely hot, causing the circuit board, wire insulation or other nearby parts of the circuit board assembly to melt or combust. Moreover, due to the defective design of the Dishwashers, there is a likelihood that the heat, flames or sparks can cause further combustion of material and exit the Dishwashers and create a serious risk of setting fire to nearby objects such as woodwork, kitchen counters, cabinetry, dishtowels, items of clothing and any other flammable material above or in the vicinity of the Dishwashers.
25. The Defendants owed a duty of care to the Plaintiff and the class as the Defendants were and are in a superior position to know the truth about the quality and nature of the

Dishwashers and possess superior knowledge of the defect based on pre-release testing, numerous consumer complaints and warranty claims relating to the Dishwashers, testing done in response to those complaints, replacement part sales data, aggregate data from Dishwasher dealers, and other sources.

26. The Defendants Whirlpool Corporation, Whirlpool Canada Co. and Whirlpool Canada LP owed a duty to the Plaintiff and the class to design, manufacture and produce, and all of the Defendants owed the Plaintiff and the class a duty to test, inspect, market, distribute, sell and service, the Dishwashers with reasonable care and in a workmanlike fashion, and had a duty to protect them from foreseeable and unreasonable risk of harm.
27. The Defendants knew or should have known that the Dishwashers they designed, manufactured, produced, tested, inspected, marketed, distributed, sold and/or serviced would, in ordinary and foreseeable use, fail to perform as intended.
28. The Defendants knew or should have known that the Dishwashers created an unreasonable risk of catastrophic property damage, personal injury and death.
29. Due to their superior knowledge of the defect in the Dishwashers, the Defendants had a duty to disclose to the public, including the Plaintiff and the class, the defective nature of the Dishwashers. Further, the Defendants had a duty not to put defective products on the market.
30. The control panels of the Dishwashers have all either experienced combustion or are at real risk of combustion originating at or near the heating element terminal connection on the Electronic Control Board.
31. The Defendants owed a duty of care to the Plaintiff and the class and breached that duty, particulars of which include:
 - a. the Defendants knew that the Dishwashers needed to be recalled due to the Electronic Control Board problem;
 - b. the Dishwashers were not safe for their ordinary and intended use;

- c. the Defendants failed to provide the Plaintiff and the class, either directly or indirectly, with adequate and sufficient warning regarding the known or foreseeable risks and dangers inherent in the Dishwashers;
- d. the Dishwashers contained a material design defect and were not reasonably safe due to such defect;
- e. the design, methods of manufacture, and testing of the Dishwashers did not conform to generally recognized and prevailing standards or the state of the art in existence at the time the design was made and the Dishwashers were manufactured;
- f. at the time the Dishwashers left the Defendants' control, the foreseeable risks associated with the Dishwashers' design exceeded the benefits associated with that design;
- g. the Defendants knew, or should have known, that the Dishwashers were defective in design, not fit for their ordinary and intended use, would become useless or significantly diminish in value before the end of their reasonably expected useful lives, did not perform in accordance with the advertisements, marketing materials, and warranties disseminated by the Defendants nor in accordance with the reasonable expectations of ordinary customers, and that the advertisements and marketing materials for the Dishwashers were likely to mislead and deceive a reasonable consumer;
- h. the Defendants failed to exercise reasonable care concerning the design, development, manufacture, production, testing, inspecting, marketing, sale and/or servicing of the Dishwashers by, among other things, as to the Defendants Whirlpool Corporation, Whirlpool Canada Co. and Whirlpool Canada LP, failing to design and manufacture the Dishwashers in a manner to ensure that under normal intended usage, electrical failure would not occur; and as to all of the Defendants, failing to warn or to warn adequately and sufficiently, either directly or indirectly, the foreseeable users of the defective nature of the Dishwashers; and failing to represent accurately to the Plaintiff and the class, whether directly or indirectly, that the Dishwashers posed an unreasonable safety risk;

- i. the Defendants did not implement a plan to address the defect and instead manufactured, distributed and/or sold subsequent models of the Dishwashers containing the same defect;
- j. despite the Dishwashers' inherent and dangerous defect described herein, compounded by numerous customer complaints that the Defendants received about the Dishwashers, by the Defendants' testing done in response to those complaints, replacement part sales data, data from Dishwasher dealers, and other sources, the Defendants continuously failed to disclose the existence of this design defect to public consumers;
- k. the Defendants never informed any purchaser of the existence of this design defect at the time of sale or thereafter, nor did the Defendants disclose that the warranty or the recommended post-warranty repairs would not cure or rectify the defect and would, at best, only delay its impact and postpone failure in the Dishwashers. The Defendants have never issued a recall of the Dishwashers despite the serious fire hazard, or offered to replace the defective Dishwashers with defect-free components or a defect-free replacement;
- l. the Defendants knew that reasonable consumers were unaware of the latent dangerous defect, and that they reasonably expected the Dishwashers to clean effectively without putting users' property and lives at risk, expected the Defendants to disclose any defects that would prevent the Dishwashers from performing their expected function throughout their useful lives or that would seriously threaten consumers' personal welfare, and the Defendants knew that such disclosure would affect consumers' decisions whether to purchase the Dishwashers;
- m. as a result of the Defendants' misrepresentations and omissions in their marketing and advertising, consumers believed that the Dishwashers would operate without defects and consumers purchased Whirlpool, KitchenAid and Kenmore Dishwashers;
- n. the Defendants placed a dangerous and hazardous product into the stream of commerce, thereby causing an unreasonable danger and creating an unreasonable threat to the lives and property of consumers, and the Defendants had exclusive possession of this knowledge;

- o. despite this knowledge, the Defendants at all material times failed to disclose or concealed material information from the Plaintiff and the class in the course of the Defendants' marketing, advertising and sale of the Dishwashers; and
 - p. the Defendants have failed to remove the Dishwashers from the marketplace or take adequate remedial action. To the contrary, the Defendants sold and serviced the Dishwashers even though the Defendants knew, or should have known, that the Dishwashers were defectively designed and at risk of failing prematurely in a catastrophic and dangerous manner, depriving the Plaintiff and the class of the ability to use the Dishwashers for their intended purpose during their useful lives, and causing property damage, personal injury and risk of death.
32. The defect described herein manifests itself during the expected useful life of the Dishwashers and is substantially likely to prevent the Dishwashers from being used as intended during their expected useful lives, and poses significant risks to individuals' lives and property.
 33. This design defect necessitated and will necessitate replacement of or costly repairs to the Dishwashers.
 34. In purchasing a Dishwasher, a reasonable consumer would expect it to operate in accordance with, and be useable for, its intended purpose and to not pose a serious safety risk. No consumer would expect their Dishwasher to be a threat to their safety or the safety of their family or property.
 35. Due to the Dishwashers' defective design, leading to combustion of their Electronic Control Boards, the Dishwashers failed or are substantially certain to fail during their expected useful lives, within or outside applicable warranty periods.
 36. The Defendants had actual knowledge, before they placed the Dishwashers in the stream of commerce, that the Dishwashers contained a defect that would cause the electrical system to fail and the Electronic Control Board to overheat, resulting in heat or smoke or fire damage to the Dishwashers and surrounding area, and creating an unreasonable risk of property damage, personal injury and death.
 37. The existence of the design defect incorporated into the manufacture of the Dishwashers is a material fact reasonable purchasers would have considered in deciding whether to

purchase a Dishwasher, and had the consumers been aware of the design defect, the consumers would not have purchased the Dishwasher.

38. Many Dishwashers across Canada – including in Alberta – have overheated and combusted, and those still in service are at risk of and likely to do so as well due to their dangerously defective design as referred to herein.
39. The Plaintiff, class members and reasonable consumers would not have purchased these Dishwashers had they known of the defect.
40. The design defect renders the Dishwashers unfit for their intended purpose and not of merchantable quality, and breached the Defendants' duty to the Plaintiff and the class.
41. As a result of the Defendants' negligence, the Plaintiff and class members have suffered damages and are entitled to damages at common law including, without limiting the generality of the foregoing:
 - a. general damages;
 - b. special damages;
 - c. out of pocket expenses;
 - d. repair costs;
 - e. dishwasher replacement costs;
 - f. damages for bodily injuries;
 - g. damages for psychological or emotional harm;
 - h. kitchen and home damages;
 - i. such further and other damage as may be proven at trial.

Fair Trading Act

42. The Plaintiff repeats the material facts in regards to the negligence claim with respect to this statutory claim.

43. The Plaintiff and class members who purchased the Dishwashers, or who received or had the right to receive the Dishwashers from a supplier as a result of a purchase, lease, gift, contest or other arrangement, are “consumers” within the meaning of the *Fair Trading Act*.
44. The Dishwashers are personal property and are used or ordinarily used for personal, family or household purposes. The Dishwashers are “goods” within the meaning of the *Fair Trading Act*.
45. Sears Canada Inc., Sears Holdings Management Corporation and Sears Roebuck and Co., Inc. (collectively the “Sears Defendants”) supplied, manufactured, provided, offered, advertised or promoted the sale of the Dishwashers. The Sears Defendants are “suppliers” within the meaning of the *Fair Trading Act*.
46. The Dishwashers were supplied by one or more of the Sears Defendants to the Plaintiff and class members as a result of a purchase, lease, gift, contest or other arrangement and constituted “consumer transactions” within the meaning of the *Fair Trading Act*. Privity of contract existed between the Sears Defendants, or one or more of them, and the Plaintiff, and between the Sears Defendants, or one or more of them, and each class member.
47. The Sears Defendants breached the *Fair Trading Act* by engaging in unfair practices within the meaning of and contrary to the *Fair Trading Act*.
48. With respect to the Sears Defendants’ unfair practices:
 - a. the unfair practices involved suppliers or consumers who were residents of Alberta; or
 - b. the unfair practices involved consumer transactions in which the offer or acceptance was made in or was sent from Alberta; or
 - c. the unfair practices were made or received in Alberta involving a supplier’s representative.
49. At all material times, Sears Canada Inc. was a “supplier” within the meaning of the *Fair Trading Act*, was registered extra-provincially in Alberta, had retail outlets in Alberta that sold the Dishwashers to consumers, and carried on business in Alberta. Sears Canada Inc. was a resident of Alberta.

50. Particulars of the Sears Defendants' breaches of the *Fair Trading Act* include but are not limited to:
- a. the Sears Defendants knew or ought to have known that the Plaintiff and class members were unable to receive any reasonable benefit from the Dishwashers;
 - b. the Sears Defendants used exaggeration or ambiguity as to a material fact and/or failed to state a material fact where that omission was misleading and would have reasonably affected the decision of the consumer to have entered into a consumer transaction with respect to the Dishwashers;
 - c. the Sears Defendants failed to disclose to the Plaintiff and class members that the Dishwashers were unsafe, not fit for their intended purpose, and had an unreasonable propensity to overheat;
 - d. the Sears Defendants represented that the Dishwashers were of a particular standard or quality when they were not;
 - e. the Sears Defendants represented that the Dishwashers had benefits, qualities, characteristics, performance capabilities, and length of life that the Dishwashers did not have;
 - f. the Sears Defendants represented that the Dishwashers were of a particular standard, quality or grade when they were not; and
 - g. the Sears Defendants made representations about the Dishwashers' performance, capability or length of life when:
 - a) the representations were not based on adequate and proper independent testing that was done before the representations were made;
 - b) the testing did not substantiate the claims; and
 - c) the representations did not accurately and fairly reflect the results of the testing.
51. As of a result of the Sears Defendants' unfair practices and statutory breaches, the Plaintiff and class members are entitled to statutory remedies under the *Fair Trading Act*.

Sale of Goods Act

52. The Plaintiff repeats the material facts in regards to the negligence claim with respect to this statutory claim.
53. The Plaintiff and class members who bought the Dishwashers in Alberta are “buyers” within the meaning of the *Sale of Goods Act*.
54. The Sears Defendants, having agreed to sell the Dishwashers to the Plaintiff and class members, are “sellers” within the meaning of the *Sale of Goods Act*.
55. The Dishwashers are chattels personal and are “goods” within the meaning of the *Sale of Goods Act*.
56. The Dishwashers were supplied by one or more of the Sears Defendants to the Plaintiff and class members, under contracts of sale. Privity of contract existed between the Sears Defendants, or one or more of them, and the Plaintiff, and between the Sears Defendants, or one or more of them, and each class member.
57. In each contract of sale, there was:
 - a. an implied condition that the Dishwashers were reasonably fit for their ordinary purpose, where the Plaintiff and class members expressly or by implication made known to the Sears Defendants the particular purpose for which the Dishwashers were required;
 - b. an implied condition that the Dishwashers were of merchantable quality; and
 - c. an implied warranty or condition as to the quality and fitness of the Dishwashers for their ordinary purpose.
58. The Sears Defendants breached these implied warranties and conditions. The Plaintiff and class members reasonably expected that the Dishwashers were safe, of merchantable quality, and reasonably fit for their ordinary purpose. The Dishwashers were not safe, of merchantable quality, or reasonably fit for their ordinary purpose.

59. As a result of the Sears Defendants' breaches of the implied warranties and conditions, the Plaintiff and class members who purchased the Dishwashers in Alberta are entitled to statutory remedies pursuant to the *Sale of Goods Act*.

Punitive Damages

60. The Defendants' failure to recall or repair the Dishwashers was reckless, arrogant, callous, and showed a marked disregard for public safety such that an award of punitive damages is required.
61. A punitive damage award in this case is necessary to express society's condemnation of the conduct engaged in by the Defendants and to achieve the goals of both specific and general deterrence.
62. The Defendants intentionally engaged in unlawful and unethical conduct for their personal financial gain. The conduct of the Defendants was planned and deliberate. It has continued for several years.
63. The Defendants have profited from their misconduct. Their conduct was high-handed and represented a marked departure from ordinary standards of decent behaviour.
64. Compensatory damages are insufficient in this case. The conduct of the Defendants merits punishment and warrants a claim for punitive damages.

RELIEF SOUGHT

1. The Plaintiff claims, on her own behalf and on behalf of the class, as follows:
- a. an order certifying this action as a class proceeding and appointing her as Representative Plaintiff under the *Class Proceedings Act*;
 - b. general damages in the sum of \$100,000,000.00;
 - c. special damages;
 - d. damages for out of pocket expenses;
 - e. damages for repair costs;
 - f. damages for dishwasher replacement costs;

- g. damages for bodily injuries;
- h. damages for psychological or emotional harm;
- i. damages for kitchen and home damages;
- j. statutory remedies pursuant to the *Fair Trading Act*;
- k. statutory remedies pursuant to the *Sale of Goods Act*;
- l. punitive damages;
- m. an order that the Defendants be required to publish warnings of the risks of the Dishwashers to consumers;
- n. costs;
- o. pre-judgment interest; and
- p. such further and other relief as this Honourable Court may deem just.

NOTICE TO THE DEFENDANTS

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Edmonton, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's(s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.