

COPY

Clerk's Stamp

COURT FILE NUMBER 1603 10241

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF 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 CNADA LP

DOCUMENT **BRIEF PRELIMINARY SETTLEMENT APPROVAL**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

David A. Klein
Angela Bessflug
Klein Lawyers LLP
#400, 1385 West 8th Avenue
Vancouver, BC V6H 3V9
Tel: 604-874-7171
Fax: 604-874-7180

Clint Docken, Q.C.
Guardian Law
Ground Floor, Riverfront Pointe
342 4 Ave S.E.
Calgary, AB T2G 1C9
Tel: 403-457-7778
Fax: 1-877-517-6373

Richard J. Mallett
James H. Brown and Associates
2400 Sunlife Place
10123 99 Street
Edmonton, AB T5J 3H1
Tel: 780-428-0088
Fax: 780-428-7788

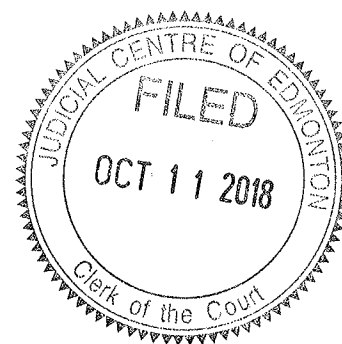


TABLE OF CONTENTS

PART I. NATURE OF THE APPLICATION	1
PART II. FACTUAL BACKGROUND.....	1
PART III. STEPS IN THE BRITISH COLUMBIA AND ALBERTA ACTION	2
PART IV. ORDER SOUGHT BY THE PARTIES	4
(A) Appointment of the Representative Plaintiff.....	4
(B) Confirmation of Class Counsel.....	6
(C) Confirmation of the Definition of Settlement Class and Sub Classes	6
(D) Certification for Settlement Purposes Only	7
(E) Preliminary Approval of the Settlement Agreement	8
(F) Benefits to be Provided to Class Members and Non-Class Members	13
(a) Whirlpool-Sponsored Rebate Program	13
(b) Enhanced Rebate Offer for TCO Repairs	13
(c) Benefits to Subclass Members	14
(d) Past Overheating Subclass Members	14
(e) Future Overheating Subclass Members.....	16
(f) Sticker Program for Replacement of Rushmore and Rush ECB Parts.....	16
(g) Non-Class Members compensation for Past Overheating Events.....	17
(h) Non-Class Members compensation for Future Overheating Events.....	17
(i) Sticker Program for Replacement of NewGen and Raptor ECB Parts	18
(G) Appointment of Rice Point as Claims Administrator	19
(H) Approval of the Various Notices and Notice Plan.....	21
(I) Approval for Opt-Out Form and Process for Opting Out.....	24
(J) Lifting of CCAA Stay of Proceedings.....	25
PART V. CONCLUSION	25

ATTACHED MATERIALS

Tab

<i>Class Proceedings Act</i> , SA 2003, c C-16.5.....	1
Settlement Agreement	2

Appendix A:	Claim Form
Appendix B:	Class Dishwashers
Appendix C:	Final Approval Order
Appendix D:	Non-Class Dishwashers
Appendix E:	Notice of Certification and Settlement

Appendix F:	Opt-Out Form	
Appendix G:	Preliminary Approval Order	
Appendix H:	Prequalified Notice	
Appendix I:	Publication Notice	
Appendix J:	TCO Repair Notice	
Appendix K:	Tailored Prequalified Notice;	
Appendix L:	Release re: Future Overheating Event	
Appendix M:	Sticker	
Appendix N:	Notice to NewGen and Raptor Owners who experienced an Overheating Event	
Appendix O:	Release – Non-Class Dishwasher (Past Overheating Event)	
Appendix P:	Tailored Notice to NewGen and Raptor Owners	
United States Settlement Agreement		3
Proposed Form of Preliminary Approval Order		4
Opt Out Form		5
Consent to lift the Stay of CCAA proceeding		6

PART I. NATURE OF THE APPLICATION

1. This is a class proceeding pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5, [TAB 1] brought by the Plaintiff Kristina Essa on her own behalf, and on behalf of the proposed class.
2. The Defendants are the designers, manufacturers, distributors and vendors of dishwashers sold under the brand names “KitchenAid®”, “Kenmore®” or “Whirlpool®.” The dishwashers sold under these brand names are hereinafter referred to as the “Dishwashers.”
3. It is alleged that the Dishwashers contained a defectively designed electronic control board that had a propensity to overheat resulting in damages.
4. A settlement has been reached in this action subject to final Court approval. A copy of the Settlement Agreement and Appendices are attached at **TAB 2**.
5. The parties are applying jointly and on a consent basis for a Preliminary Approval Order that will address a number of matters and provide for a process leading up to a second application for Final Approval (the “Final Approval Application”).

PART II. FACTUAL BACKGROUND

6. On September 6, 2013, Natalie Bickert commenced British Columbia Supreme Court Action No. VLC-S-S-136688 (the “BC Action”) against the defendants Whirlpool Corporation, Whirlpool Canada Co., Whirlpool Canada LP, Sears Canada Inc., Sears, Roebuck and Co. and Sears Holdings Management Corporation alleging negligence and breaches of the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 and the *Sale of Goods Act*, RSBC 1996, c 410. A copy of the Amended Notice of Civil Claim is at Exhibit “D” to the Affidavit of the proposed Representative Plaintiff, Kristina Essa (the “Essa Affidavit”).

7. On June 8, 2016, the Plaintiff Kristina Essa commenced the within action being Alberta Court of Queen's Bench Action No. 1603-10241 (the "Alberta Action") against the Defendants alleging negligence and breaches of the *Fair Trading Act*, RSA 2000, c F-2 and the *Sale of Goods Act*, RSA 2000, c S-2. A copy of the Statement of Claim and Amended Statement of Claim are attached to the Essa Affidavit at Exhibits "B" and "C";

Essa Affidavit, **Exhibit "B" and "C"**

8. Ms. Bickert and Ms. Essa ("the Plaintiffs") allege that the Dishwashers contained defectively designed electronic control boards that had an unreasonable propensity to overheat with resulting damages.
9. The Defendants have at all times disputed, and continue to dispute, the Plaintiffs' allegations in the British Columbia Action and Alberta Action and deny any liability.

PART III. STEPS IN THE BRITISH COLUMBIA AND ALBERTA ACTIONS

10. As outlined in the Affidavit of Kristina Essa at paragraph 16, various steps have been taken including:
 - a. After the filing of the claim in British Columbia on September 6, 2013, Class Counsel closely monitored a similar proceeding in the United States. The United States litigation was ultimately concluded by way of a settlement agreement [TAB 3];
 - b. The United States settlement agreement was approved by the United States court [TAB 3];
 - c. A number of what appeared to be "serial" objectors, filed appeals in the United States with respect to the US Approval Order. The appeals are pending and will be heard in 2019.

- d. An application for certification and 19 supporting affidavits were filed in the British Columbia action by Class Counsel and communications with Defence Counsel were ongoing.
- e. An initial meeting was arranged between Class Counsel and Defence Counsel to discuss a general framework for settlement. The meeting took place in Chicago, Illinois on November 16, 2016. Discussions included the nature of the claims that might be included within a potential settlement, the requirements of documentary proof from class members, the valuation of the claims and whether to address claims for property damage and bodily injury.
- f. A second in-person meeting to discuss the settlement was held in Chicago, Illinois, on January 21, 2017. At that time, further discussions took place with respect to a potential framework for settlement, the claims that would be included and the valuation of the claims. There was no agreement reached with respect to Class Counsel's legal fees and disbursements.
- g. A third in person meeting took place in Chicago, Illinois with Class Counsel and Defence Counsel on April 25, 2017. While the general terms of the Settlement Agreement were confirmed at this meeting, an agreement could not be reached with respect to Class Counsel's legal fees and disbursements.
- h. The parties attended in Vancouver, British Columbia on August 1, 2017 for a mediation before the Honourable Mr. Kenneth Smith in relation to issues surrounding the payment of legal fees and disbursements. After a day long mediation, an agreement was reached with respect to legal fees and disbursements.
- i. The parties attended at a Case Management Conference in Edmonton, AB on July 20, 2018;

PART IV. ORDER SOUGHT BY THE PARTIES

11. The proposed form of order is attached to this brief at **TAB 4**. The relief sought may be categorized as follows:

- (a) Appointment of the Representative Plaintiff;
- (b) Confirmation of Class Counsel;
- (c) Confirmation of the definition of Settlement Class and Sub Classes;
- (d) Certification of the action for settlement purposes only;
- (e) Preliminary approval of the Settlement Agreement;
- (f) Approval of the public Notices and Notice Plan;
- (g) Approval of an Opt-Out Form and process for opting out.

(A) Appointment of the Representative Plaintiff

12. This application seeks the appointment of Kristina Essa as the Representative Plaintiff for the Settlement Class, the Past Overheating Subclass, and the Future Overheating Subclass.

13. A Representative Plaintiff does not need to be a sophisticated litigant. The proposed Plaintiff should confirm that she understands her duties and responsibilities to act in the best interests for the class as a whole.

Warner v. Smith [2016] A.J. No. 758 at paragraph 43,
Plaintiff Brief of Authorities [**TAB 1**]

14. On or about November 13, 2004, Kristina Essa purchased a new KitchenAid dishwasher, for \$1,399.00. On or about January 16, 2015, the electronic control board on the dishwasher

overheated, causing melting of the dishwasher and smoke to come out. Kristina Essa is a member of the Settlement Class.

15. Kristina Essa contacted the law firm of Klein Lawyers LLP to commence litigation and seek damages with respect to allegations that the Defendants were negligent in the manufacturing, design and production of certain dishwashers.
16. Ms. Essa confirms in her Affidavit that in agreeing to seek and accept an appointment by the court as a Representative Plaintiff, it is her responsibility, among other things, to:
 - (a) become familiar with the issues to be decided by the court;
 - (b) assist in the preparation and execution of an affidavit in support of this application;
 - (c) express her opinion to her counsel with respect to the Settlement Agreement;
 - (d) throughout the litigation and enforcement of the Settlement Agreement, to continue to fairly and adequately represent the interests of class members by interacting with and instructing Class Counsel as necessary and ensuring, through counsel, that the class is kept apprised of developments;
 - (e) being available for court matters as required.
17. Due to the costs and risks involved in this complex litigation, in the absence of a class proceeding, Kristina Essa would not have pursued her claim individually.
18. Kristina Essa is not aware of having, on the common issues or issues arising out of them, any interest which is in conflict with the interests of any other class member and has an arms' length relationship with the Defendants.

(B) **Confirmation of Class Counsel**

19. Klein Lawyers LLP, Guardian Law, and James H. Brown & Associates all have experience with class proceedings and the resources to advance the case.

(C) **Confirmation of the Definition of the Settlement Class and Sub Classes**

20. The “Settlement Class” would be defined as:

Settlement Class Members: All residents in Canada who (a) purchased a new KitchenAid®, Kenmore® or Whirlpool® brand automatic dishwasher manufactured by Whirlpool between October 2000 and January 2006 that contained either a Rushmore or Rush electronic control board (“**Class Dishwasher**”), (b) acquired a new Class Dishwasher as part of the purchase or remodel of a home, or (c) received as a gift, from a donor meeting those requirements, a new Class Dishwasher not used by the donor or by anyone else after the donor purchased the Class Dishwasher and before the donor gave the Class Dishwasher to the claimant. Excluded from the Settlement Class are:

- (i) officers, directors and employees of the Defendants or their parents or subsidiaries,
- (ii) insurers of Settlement Class Members,
- (iii) subrogees or all entities claiming to be subrogated to the rights of Settlement Class Members, and
- (iv) issuers or providers of extended warranties or service contracts for Class Dishwashers;

21. The Settlement Class subclasses are defined as:

- (a) Past Overheating Subclass: All Settlement Class Members whose Class Dishwashers' electronic control boards overheated within 12 years after the Purchase of their Class Dishwasher but before the Notice Date; and
 - (b) Future Overheating Subclass: All Settlement Class Members whose Class Dishwashers' electronic control boards overheat within 10 years after the Purchase of their Class Dishwasher or within 2 years after the Notice Date, whichever is later.
22. In addition, the Settlement Agreement provides benefits to certain non-class members. These benefits are outlined below at paragraphs 54 to 58.

(D) Certification for Settlement Purposes Only

23. Section 4 of the *Class Proceedings Act* requires certification of a proceeding for settlement purposes only:

“Where a plaintiff has reached a settlement with a defendant in respect of a proceeding prior to the proceeding’s being certified but certification of the proceeding as a class proceeding is being sought as a condition of the settlement for the purposes of imposing the settlement on persons who will be class members in respect of the proceeding if the proceeding is certified as a class proceeding, those persons, on the application for certification being commenced, constitute a settlement class with respect to the proceeding for which certification is being sought.”

Class Proceedings Act [TAB 1]

24. The parties are seeking certification of the Alberta Action on a national opt-out basis.
25. Section 5(1) of the *Class Proceedings Act* requires that the Court be satisfied as follows:

“In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
 - (i) will fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.”

26. In this case, it is submitted that Section 5(1) has been satisfied.

(E) Preliminary approval of the Settlement Agreement

27. The parties are seeking only a non-binding preliminary approval at this time. The parties will seek a final approval order at the future Final Approval Hearing, after an opportunity for the public to object to the Settlement Agreement or opt out.
28. Class action settlements are subject to court approval. The settlement must be fair, reasonable and in the best interests of the settlement class.

Class Proceedings Act, SA 2003, c C-16.5 at s. 35 [Tab 1]

Adrian v Canada (Minister of Health), 2007 ABQB 376 at para 12,
Plaintiff Brief of Authorities [Tab 2]

Northwest v Canada (Attorney General), 2006 ABQB 902 at para 23,
Plaintiff Brief of Authorities [Tab 3]

29. Settlements by their nature are a product of negotiation and compromise. In *Northwest v Canada*, the court recognized that a settlement need not be perfect and it need not be the best for every class member. Rather, settlements must fall within a range of reasonableness.

Northwest v Canada (Attorney General), 2006 ABQB 902 at para 24,
Plaintiff Brief of Authorities [Tab 3]

30. In *Osmun v Cadbury Adams Canada Inc.*, the court summarized the principles guiding settlement approval as follows:
- a. To approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class.
 - b. The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy.
 - c. There is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval.
 - d. To reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness.
 - e. A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and costs associated with continued litigation.
 - f. It is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or simply rubber-stamp a proposed settlement.
 - g. The burden of satisfying the court that a settlement should be approved is on the party seeking approval.
 - h. The court cannot modify the terms of a proposed settlement. The court can approve or reject the settlement. In deciding whether to reject a settlement, the court should consider whether doing so would derail the settlement process. The parties are not obligated to resume discussions and it is possible that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy.

Osmun v Cadbury Adams Canada Inc, 2010 ONSC 2643, at para 31, aff'd 2010 ONCA 841, leave to appeal to SCC denied 2011 Carswell Ont 6019 (SCC), Plaintiff Brief of Authorities
[Tab 4]

31. A list of the factors that are useful in assessing the reasonableness of a proposed settlement includes:
- a. the likelihood of success and the risk of loss;
 - b. the costs and likely duration of the litigation;
 - c. the terms of the settlement;
 - d. the presence of arms-length bargaining and the absence of collusion;
 - e. the number and nature of objections;
 - f. the recommendation and experience of counsel;
 - g. the potential that the case could take years to reach trial and exhaust all appeals;
 - h. whether the Settlement meets the objectives of improved access to justice, deterrence of future wrongs and the promotion of judicial economy.

Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd, [2005] OJ No. 1118 (SCJ),
Plaintiff Brief of Authorities **[Tab 5]**

Adrian v Canada (Minister of Health), 2007 ABQB 376 at para 13-14,
Plaintiff Brief of Authorities **[Tab 2]**

Northwest v Canada (Attorney General), 2006 ABQB 902 at para 25-34,
Plaintiff Brief of Authorities **[Tab 3]**

32. The factors listed above are “guidelines” rather than rigid criteria. In a particular case, some criteria may be given more weight than others, some criteria may not be satisfied or other criteria may be relevant.

Ford v. F. Hoffman-LaRoche Ltd., (2005), 74 O.R. (3d) 758 (S.C.J.),
Plaintiff Brief of Authorities **[Tab 6]**

Silver v. Imax Corp., 2016 ONSC 403, para. 18,
Plaintiff Brief of Authorities **[Tab 7]**

33. The court must be assured that the class members will receive the promised benefits in a timely and efficient manner.

Silver v. Imax Corp., 2016 ONSC 403, para. 20,
Plaintiff Brief of Authorities [Tab 7]

34. The recommendation of class counsel is important. Class counsel have a duty to the entire class and a duty to the court, including a duty to identify any limitations in a settlement. Finally, class counsel are uniquely situated to assess the risks and benefits of the case and the advantages of a settlement.

Osmun v Cadbury Adams Canada Inc, 2010 ONSC 2643 at para 45, aff'd 2010
ONCA 841, leave to appeal to SCC denied 2011 CarswellOnt 6019,
Plaintiff Brief of Authorities [TAB 4]

35. The Plaintiffs and their counsel have examined and considered the benefits to be provided to the Settlement Class Members and Non-Class Members, the risks, costs and time associated with prosecuting the BC and Alberta Actions through one or more trials and appeals. Class Counsel took into account various procedural and litigation risks in terms of negotiating the Settlement Agreement including:

- a. Throughout this litigation, the Defendants have disputed liability and have revised defences with respect to liability and damages;
- b. The risk that the Defendants would oppose the plaintiff's applications for certification in British Columbia and Alberta and might appeal any judgment certifying the actions as class proceedings;
- c. The possibility of appeals by the Defendant in relation to the various liability and damage issues.
- d. The time and expense associated with prosecuting the litigation to its conclusion pursuant to the formal court processes including extensive questioning, document production and expert reports, disputed applications, the common issues trial, individual trials and potential appeal;
- e. The risk that the court would find that there was no liability.

- f. The risk that the court would find that class members would be unable to prove causation or damages.

Essa Affidavit, paragraph 26

- 36. Although no formal discovery had taken place at the time of the settlement, a significant amount of information was available to Class Counsel to evaluate the merits of the Settlement Agreement including the following:
 - a. Access to the United States' Settlement Agreement and approval materials;
 - b. Class Counsel's own investigation with respect to the actions;
 - c. Class Counsel retained an electrical engineering expert with respect to the dishwasher and circuit board design, and the expert conducted his own review and investigation; and
 - d. Class Counsel communicated with and obtained information from numerous class members and filed 19 affidavits in support of an application for certification in British Columbia. It was determined ultimately that certification and approval would be sought in Alberta in order to ensure the settlement was on a national basis and on an opt-out basis.

- 37. Information has been reviewed by Class Counsel with respect to the anticipated failure rate of Class Dishwashers (containing Rushmore and Rush control platforms) and Non-Class Dishwashers (containing New Gen and Raptor control platforms). The available information indicated that the Non-Class Dishwashers had a markedly lower predicted rate for Overheating Events as compared to the Class Dishwashers. As well, the information reviewed indicated that Overheating Events in any of the platforms are rare and should be contained.

Essa Affidavit, paragraph 26

- 38. Class Counsel are experienced in class actions. They believe that the proposed settlement is fair, reasonable and in the best interests of the Class Members, affords significant judicial efficiency and economy, promotes access to justice and fosters behavior modification.

39. The Defendants have at all times disputed, and continue to dispute, the Plaintiffs' allegations in the Actions and deny any liability for any of the claims that have or could have been raised regarding the Dishwashers by the Plaintiffs or the Settlement Class Members, but believe that the comprehensive resolution of the issues in these Actions, as provided in the Settlement Agreement, will avoid the substantial costs and disruptions of continued litigation.

(F) **Benefits to be Provided to Class Members and Non-Class Members**

40. The compensation and benefits are set out in detail at paragraphs 13 – 68 of the Settlement Agreement.
41. The Settlement Agreement does not have a pre-determined “cap” or limit. The claims process will be on a “claims made” basis with the Defendants agreeing to pay all of the valid claims that are submitted in accordance with the Settlement Agreement.

(a) **Whirlpool-Sponsored Rebate Program**

42. Class Members who do not opt out of the Alberta action will be eligible to receive a cash rebate from Whirlpool on the purchase of a new dishwasher. This benefit will be available to all Class Members including those who did not have a Dishwasher that actually experienced an Overheating Event. The rebate will be 10% off the retail purchase price of new Kenmore and Whirlpool brand dishwashers and 15% off the retail purchase price of new KitchenAid brand dishwashers. These rebates are in addition to any other sales promotion offered by Whirlpool, Sears or any retailer/seller towards the sale of any new KitchenAid®, Kenmore® or Whirlpool® brand dishwasher. Qualified Class Members do

not need to currently own the Class Dishwasher, as this offer applies to any class members that own or ever owned a Class Dishwasher.

(b) Enhanced Rebate Offer for TCO Repairs

43. An enhanced Rebate will be offered to those Class Members who have undergone Thermal Cut Off (“TCO”) device repairs to their Dishwashers. Whirlpool and Sears will search their database to identify these Sub-Class members and the Settlement Administrator will mail and e-mail out a TCO Repair Notice. Qualified members will be eligible to receive an enhanced rebate of 15% off the retail purchase price of new Kenmore or Whirlpool brand dishwashers and 20% off the retail purchase price of new KitchenAid brand dishwashers. Qualified Class Members will be entitled to receive a single rebate for each dishwasher that experienced a TCO repair. As with the Whirlpool-Sponsored Rebate Program, these enhanced rebates will be in addition to any other sales promotion offered by Whirlpool, Sears or any retailer/seller towards the sale of any new KitchenAid®, Kenmore® or Whirlpool® brand dishwasher.

(c) Benefits to Subclass Members

44. The Settlement Agreement encompasses a subclass of members who have observed or experienced smoke, flames, fumes, sparks or electrical arcing from the control consoles of their dishwashers (an “Overheating Event” as defined in the Settlement Agreement). This subclass has two groups as follows:

(d) Past Overheating Subclass Members

45. These are Class Members who experienced a past Overheating Event, within 12 years after purchase of their dishwashers (but prior to a prescribed Notice Date) and had a Qualifying Repair or Qualifying Replacement of the Dishwasher. They will be eligible to be reimbursed for out of pocket expenses for the repair of their Dishwashers. If the amount spent on the repair is not known, then the Class Member will receive \$200. If the Class Member purchased a Qualifying Replacement Dishwasher, he or she would receive \$300 for a Whirlpool brand replacement or \$200 for a non-Whirlpool brand replacement.
46. A Prequalified Notice will be sent (in the form attached to the Settlement Agreement as Appendix H) via mail and also email to Prequalified Settlement Class Members and will include a pre-printed unique claim identification number for each Prequalified Settlement Class Member that he or she will enter into the online Claim Form or print on his or her hardcopy of the Claim Form. The unique claim identification number will be used by the Settlement Administrator to identify and differentiate between those Settlement Class Members who have been identified in Whirlpool's or Sears' databases as a Prequalified Settlement Class Member and those who have not.
47. Prequalified Settlement Class Members are those who can be identified in databases maintained by Whirlpool or Sears.
48. Prequalified Settlement Class Members will not be required to submit documentation to support their claim unless they dispute the prequalified amount to be paid in satisfaction of their claim. Prequalified Settlement Class Members will be required only to enter or confirm their current name and address, check the eligibility boxes on the Claim Form and sign the Claim Form certifying that the statements are true and correct. Where an online Claim Form is used, the claimant will electronically sign the Claim Form certifying that the statements are true and correct.
49. If Whirlpool's or Sears' databases reflect that the Prequalified Settlement Class Member experienced an Overheating Event, and if the database records reflect the amount paid by the claimant for a Qualifying Repair or Qualifying Replacement, the prequalified amount

offered to the Class Member will be his or her out-of-pocket cost for the Qualifying Repair or Qualifying Replacement.

50. If Whirlpool's or Sears' databases reflect that the Prequalified Settlement Class Member experienced an Overheating Event, and if the database records reflect that the Prequalified Settlement Class Member received a repair or replacement that was not paid for in its entirety by Whirlpool or Sears but the amount paid for a Qualifying Repair or Qualifying Replacement is not reflected, the prequalified amount offered to the Class Member will be \$200.
51. If Whirlpool's or Sears' databases reflect that the Prequalified Class Member experienced an Overheating Event, and if the database records reflect a likelihood that a free repair or replacement occurred, the Prequalified Settlement Class Member will be mailed or emailed (or both), the Tailored Prequalified Notice in the form attached to the Settlement Agreement as Appendix K, along with the Notice, advising the Prequalified Class Member that he or she received a free repair or replacement and will not be offered any additional compensation under the Settlement. The Tailored Prequalified Notice will also advise the Prequalified Class Member of his or her right to file a claim and dispute the assertion.
52. If a Prequalified Settlement Class Member wishes to dispute the prequalified amount of his or her claim, the Prequalified Settlement Class Member must submit supporting documentation showing the amount that he or she paid for the Qualifying Repair or Qualifying Replacement for a determination by the Settlement Administrator.

(e) **Future Overheating Subclass Members**

53. This subclass includes persons who experienced an Overheating Event within 10 years after the purchase date of their Class Dishwashers or within 2 years after the Notice Date, whichever is later. The Settlement Agreement entitles them, subject to certain documentary and qualifying requirements, to receive either a \$100 cash payment or a 30% rebate off the retail purchase price of a new Whirlpool or KitchenAid brand dishwasher.

(f) **Sticker Program for Replacement of Rushmore and Rush ECB Parts**

54. Whirlpool Corporation will affix a sticker to the individual parts boxes containing replacement service parts for Rushmore and Rush Electronic Control Boards (ECB) excluding replacement parts in the inventories of service technicians. The sticker will advise any Whirlpool-authorized and Sears-authorized service technicians that the corresponding claimant may be entitled to a cash payment or rebate upon verification with the Defendant Whirlpool Corporation.

(g) **Non-Class Members Compensation for Past Overheating Events**

55. Persons whose dishwashers contain NewGen or Raptor electronic control boards (i.e. not Rushmore or Rush Electronic Control Boards) and whose dishwashers experienced an Overheating Event as defined in the Settlement Agreement are eligible to receive benefits under the Settlement Agreement despite the fact that these persons are not Class Members.
56. NewGen and Raptor owners who experienced a past Overheating Event as set out in the Settlement Agreement will be eligible to be reimbursed for out of pocket expenses for the repair of their dishwashers. If the amount of the repair is not known, then the claimant would receive \$200. If the claimant purchased a qualifying replacement dishwasher, they would receive \$300 for a Whirlpool brand replacement or \$200 for a non-Whirlpool brand replacement.
57. The Settlement does not release any claims that might be advanced by NewGen or Raptor Owners.

(h) **Non-Class Members Compensation for Future Overheating Events**

58. Subject to certain documentary and qualifying requirements, NewGen and Raptor owners who experience a future Overheating Event as set out in the Settlement Agreement will be eligible to receive either a \$100 cash payment or a 30% rebate off the retail purchase price of a new Whirlpool or KitchenAid brand dishwasher, at their option. As well, Whirlpool would have the option to buy back or replace the Dishwashers for an appropriate price so that Whirlpool can obtain the Dishwasher as part of its ongoing field safety monitoring process. This Settlement Agreement does not release any claims.

(i) **Sticker Program for Replacement of NewGen and Raptor ECB Parts**

59. The Defendant Whirlpool Corporation will affix a sticker to the individual parts boxes containing replacement service parts for NewGen and Raptor Electronic Control Boards (ECB), excluding replacement parts in the inventories of service technicians. The sticker will advise any Whirlpool-authorized and Sears-authorized service technicians that the corresponding claimant may be entitled to a cash payment or rebate upon verification with the Defendant Whirlpool Corporation.
60. In exchange for entry into the Settlement Agreement and paying valid claims, the Defendants will receive a release with respect to certain claims as defined in the Settlement Agreement.
61. The Settlement Agreement releases the Defendants from all manner of actions, causes of action, administrative claims, demands, debts, damages, costs, lawyers' fees, obligations, judgments, expenses or liabilities for economic loss, in law or in equity, whether known or unknown, contingent or absolute, and which the Plaintiff and all Settlement Class Members may have against them, by reason of any act, omission, harm, matter, cause or event whatsoever which relates to any of the defects, malfunctions or inadequacies of the Class Dishwashers.

62. This release will not extinguish, and the Released Claims do not include, claims for personal injury or for damage to property other than to the Class Dishwasher itself. For example, if a Settlement Class Member were to experience a flood or fire related to his or her Class Dishwasher, the Settlement Class Member would retain his or her right to pursue claims against the Releasees for damage to his or her property other than to the Class Dishwasher itself. And, for greater certainty, Ms. Bickert retains her right to litigate the BC Action so far as that action relates to claims for personal injury and for damage to property other than to the Class Dishwasher itself.

(G) Appointment of Rice Point as Claims Administrator

63. Class Counsel recommends the appointment of RicePoint Administration Inc. (“RicePoint”) as claims administrator. RicePoint has consented to act as the Claims Administrator and to attorn to the jurisdiction of the court.
64. An active and mobile-friendly Settlement Website will be established by RicePoint, which will contain relevant information for Settlement Class Members and NewGen and Raptor Owners, including the Claims filing process, deadlines and other such information which the parties jointly agree to post (such as relevant pleadings, materials filed for the Approval Hearing and papers in support of the preliminary and final approval of the Settlement). The website will also permit the claimants to submit their respective Claim Forms online as well other necessary supporting documentation.
65. All Expenses for the Settlement Administration, including the provisions for Notice, as discussed below, are to be paid by the Defendant Whirlpool.
66. The Settlement Administrator will perform the following functions in accordance with the terms of the Settlement Agreement, the Preliminary Approval Order and the Final Approval Order:
- a. Receive Opt Out Forms and any objections to the Settlement, evaluate, and either approve completed Claim Forms sent before the Claims Deadline by Persons seeking

to receive compensation or rebates as meeting the requirements of the Agreement or disapprove them as failing to meet those requirements;

- b. Establish the Settlement Website that will post information that the Parties jointly agree to post concerning the nature of the case and the status of the Settlement, including the Preliminary Approval Order, the Final Approval Order and the Notice;
- c. Provide to Whirlpool and Class Counsel, thirty days before mailing Notices of Claim Denial, (1) a list of the names and addresses of all Settlement Class Members who have submitted Claim Forms and whose Claim Forms the Settlement Administrator has determined to be Valid Claims, by category of benefit, and (2) a separate list of the names and addresses of all Persons who have submitted Claim Forms and whose Claim Forms the Settlement Administrator has determined not to be Valid Claims, by category of benefit. Class Counsel will have an opportunity to review the Notices of Claim Denial and request a meeting and confer with counsel for Whirlpool should they decide to challenge any of the Notices of Claim Denial. In the event Class Counsel challenges a Notice of Claim Denial, that Notice will not be sent to the Person until Class Counsel and counsel for Whirlpool meet and confer and arrive at a resolution as to whether the claim was properly denied;
- d. Send, by Canada Post Xpresspost mail, to each Person who has submitted a Claim Form that the Settlement Administrator has determined not to be a Valid Claim, and which has not been challenged by Class Counsel, a Notice of Claim Denial; and
- e. Within 30 days after the payment of all Valid Claims for monetary compensation by the Settlement Administrator, provide to Whirlpool and Class Counsel a statement of the total number of claims submitted (in total and by category of benefit), the total number of claims adjudicated as Valid Claims (in total and by category of benefit) and the total dollar amount paid to Class Members (in total and by category of benefit).

H. Approval of the Various Notices and Notice Plan

67. The *Class Proceedings Act*, Section 20 provides for notice to be provided to the public of the proposed settlement.
68. The subject matter of the notices will affect the substantive rights of the Class Members, namely, their ability to object to the proposed settlement. The Supreme Court has emphasized the importance of the adequacy of notice of a final settlement approval hearing:

[A]dequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs members about how the judgment authorizing the class action or certifying the class proceeding affects them, about the rights — in particular the possibility of opting out of the class action — they have under the judgment, and sometimes, as here, about a settlement in the case.

Lepine v. Canada Post Corporation, 2009 SCC 16 at para 42,
Plaintiff Brief of Authorities [TAB 8]

69. Quite apart from the contents of a notice, where a notice is not adequately disseminated, it offends the rules of natural justice and does not bind the putative class members. Accordingly, it is imperative that the proposed Plan of Dissemination be reasonable in scope.

Parsons v. McDonald's Restaurants of Canada Ltd., 2004 CanLII 28275 (ON SC) at para
45,
Plaintiff Brief of Authorities [TAB 9]

70. A notice of settlement approval hearing must provide reasonable and effective notice to members of the class.

Osmun v. Cadbury Adams Canada Inc., [2009] OJ No 5566 at para 50,
Plaintiff Brief of Authorities [TAB 4]

71. The Notice Plan is set out in the Settlement Agreement at paragraphs 80 – 94. Whirlpool and Sears have customer databases that will be useful in identifying Class Members and Non-Class Members. The Defendants Whirlpool and Sears will search their respective registration, call centre and other relevant databases for qualified claimants. These identified claimants will be then submitted to the Settlement Administrator.
72. Pursuant to the Notice Plan:
- (a) The Publication Notice (at Appendix I of the Settlement Agreement) will be published once in each of the following newspapers in either English or French as appropriate in half page notices:
- ii. *The Globe and Mail*;
 - iii. *The National Post*;
 - iv. *the Calgary Herald*;
 - v. *the Edmonton Journal*;
 - vi. *the Vancouver Sun*;
 - vii. *the Winnipeg Free Press*;
 - viii. *the Halifax Chronicle-Herald*;
 - ix. *the Saint John Telegraph Journal*;
 - x. *the Charlottetown Guardian*;
 - xi. *St. John's Telegram*;
 - xii. *Le Journal de Montreal*;
 - xiii. *Montreal La Presse*;
 - xiv. *the Saskatoon Star Phoenix* and
 - xv. *the Regina Leader Post*.
- b. English and French internet banners will be purchased over a one-month period on a variety of websites and on the social media site Facebook.

- c. The internet banners will be targeted to adults age 25 and older and will include an embedded link to the Settlement Website. The Facebook banners will be further targeted to adults who own a dishwasher, home appliance and/or a home.
 - d. A press release will be released in English and French on Canada Newswire.
73. A "Prequalified Notice" in the form attached to the Settlement Agreement as Appendix "H" will be sent to all Class Members whom either Whirlpool or Sears records indicate had a Dishwasher which experienced an Overheating Event. This notice indicates that most of these Class Members are prequalified to receive a cash payment of at least of \$100.00 and up to the full cost of repairs or a \$300.00 cash reimbursement if they purchased a replacement Dishwasher. Prequalified claimants may also qualify for 10 – 20% rebate off the purchase of a new Whirlpool Dishwasher.
74. A TCO Repair Notice (in the form attached to the Settlement Agreement as Appendix "J") will be sent to those class members whom Sears or Whirlpool records indicate had experienced a TCO repair. These claimants would be entitled to a cash rebate of up to 20% on a purchase of a new dishwasher and if an Overheating Event occurred, may also be eligible for reimbursement of up to the full cost incurred for repairs or \$300.00 if a new dishwasher was purchased.
75. A Tailored Prequalified Notice will be sent to those Class Members whom Whirlpool or Sears records indicate had a Dishwasher which experienced an Overheating Event and that the Dishwasher had been repaired or already replaced. These Class Members would be entitled to receive a 10 – 20% rebate off the purchase price of a new Whirlpool dishwasher and the actual repair costs incurred or where Whirlpool or Sears cannot determine the actual costs, the Prequalified Payment of \$200.00.
76. In terms of Non-Class Members (NewGen and Raptor owners), where Whirlpool or Sears records indicate their dishwasher experience an Overheating Event a Prequalified Notice in the form attached to the Settlement Agreement as Appendix "N" will be provided. The

Prequalified Notice will indicate that such NewGen and Raptor owners may be eligible for up to the full cost incurred for repairs or \$300.00 if a new dishwasher was purchased.

77. A Tailored Notice to NewGen and Raptor owners (in the form attached as Appendix "P" of the Settlement Agreement) will be provided to those owners whom Whirlpool or Sears records show had a dishwasher which experienced an Overheating Event and that the dishwasher had been repaired or replaced. Such owners would be eligible for a prequalified payment of \$200.00 unless the records indicated a free repair or replacement dishwasher had already been provided.

I. Approval of Opt-Out Form and Process for Opting Out

78. A Final Approval Order approving the Settlement Agreement, if granted, will be binding upon each member of the Settlement Class who had not properly opted-out before the Final Approval Hearing.
79. The Opt-Out Form is attached at Appendix "F" to the Settlement Agreement.
80. The period to opt-out of the within proceeding will expire 105 days after the date of the granting of the Preliminary Approval Order (being the Notice Date as defined in the Settlement Agreement and which is 45 days after the granting of the Preliminary Approval Order plus the Opt-out period of 60 days following the Notice Date). Any Settlement Class Member who has validly opted-out is not bound by the Settlement Agreement, and will not be entitled to receive any portion of the benefits available in connection with the Settlement Agreement.
81. To validly opt-out, Settlement Class Members must complete, sign and deliver the Opt-Out Form to the Settlement Administrator during the Opt-Out Period.

J. Lifting of CCAA Stay of Proceedings

82. The Defendant Sears Canada Inc., and a number of affiliates (“Sears Canada”), obtained creditor protection under the *Companies Creditors Agreement Act*. A Consent Agreement has been entered into to allow for the lifting of the stay for the limited purpose of implementing the Settlement Agreement. A copy of the Consent Agreement executed by the Court appointed Monitor of the Sears Canada entities is attached as **Exhibit “H”** to the Essa Affidavit

PART V. CONCLUSION

83. The Parties respectfully request the granting of the Preliminary Approval Order.

All of which is respectfully submitted this 11th day of October, 2018.

KLEIN LAWYERS LLP

Per:

for

David A. Klein
Counsel for the Plaintiff

GUARDIAN LAW

Per:

for

Clint G. Docken, Q.C.
Counsel for the Plaintiff

JAMES H. BROWN & ASSOCIATES

Per:

Richard J. Mallett
Counsel for the Plaintiff