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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSONS, CHARLES BEYER, JONATHAN COHEN, JENNIFER SCHRAMM, and ASPASIA CHRISTY on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WHIRLPOOL CORPORATION, LOWE'S HOME CENTER**S**, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT (U.S.A.), INC., FRY'S ELECTRONICS, INC. and APPLIANCE RECYCLING CENTERS OF AMERICA, INC.,

Defendants.

Case No. 2:12-cv-00089-KM-JBC
Honorable Kevin McNulty
Honorable James B. Clark, III

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs mischaracterize this case as "exceedingly simple," even suggesting that their rote recitation of four supposedly "common facts" establishes both certification and liability. It is true that Whirlpool labeled three of its Maytag Centennial washer models (the "Washers") with the Energy Star logo, and it is true that the Environmental Protection Agency ("EPA") disqualified one of those models years after it had gone out of production, but that is where any "simpl[icity]" ends. Plaintiffs fail to tell the Court that Whirlpool tested the Washers for Energy Star in a way that the Department of Energy ("DOE") had specifically authorized, but that years later—after most Plaintiffs and putative class members had bought their Washers—the DOE changed how it interpreted its own regulations, and the Washers narrowly missed satisfying the revised Energy Star criteria. In other words, the model was disqualified for a purely technical reason, not because it "consume[d] significantly more water and electricity than their labels state." (Br. of Law in Supp. of Pls.' Mot. for Class Cert. 1 ("Class Cert. Br."), ECF No. 163.) Plaintiffs also neglect to tell the Court that Whirlpool never sold a Washer that had been "disqualified" under the revised criteria to any Plaintiff or putative class member.

Plaintiffs move to certify seven state classes to "avoid choice of law issues." But there remain significant conflicts among those seven states' warranty and unjust enrichment laws—including whether proof of reliance, notice, and state-of-mind are required—which preclude the Court from applying New Jersey law to non-resident class members. Applying those states' laws raises serious manageability concerns. So do Plaintiffs' nine consumer fraud claims. The significant differences among those claims in terms of what Plaintiffs must prove and what defenses are available would make instructing the jury all but impossible.

To show commonality and predominance, Plaintiffs continually point to their four "common facts," as though their mere incantation relieves Plaintiffs of their burden to prove compliance with Rule 23. But the Court's required "close look" reveals many individual fact issues lurking inside those supposedly "common facts" that will necessarily predominate any class trial, including breach, materiality, reliance, notice, safe harbor and bona fide error.

For example, the evidence contradicts Plaintiffs' claim that materiality, injury, and damages can be determined on a classwide basis because "Whirlpool admits that Energy Star qualified clothes washers command an initial purchase price premium." (Class Cert. Br. at 2.) The evidence shows that this assertion is neither "common" nor a "fact." To the contrary, due to market conditions and other factors, Whirlpool did not recommend that retailers charge any premium for the Washers, and retailers in fact did not. They sold the Washers, on average, for less than comparable non-Energy Star models. Nor do Plaintiffs point to any common evidence that "every class member incur[red] higher utility bills over the machine's useful life." (*Id.*) Whether any owner incurred higher bills than they reasonably expected is a highly individualized inquiry not susceptible to class treatment. For several additional reasons, Plaintiffs' proffered class damages models are unworkable and divorced from their theory of liability.

In short, Plaintiffs' repeated claim of "simplicity" ignores the real-world evidence, omits key differences in the seven states' laws, and disregards individualized fact issues that will necessarily predominate any class trial. This case is not simple, and a class trial would be unfair, inefficient, and unmanageable. The Court should deny certification.

STATEMENT OF FACTS

I. THE ENERGY STAR PROGRAM

The Energy Star program is a "voluntary program to identify and promote energy-efficient products." 42 U.S.C. § 6294a(a). It is jointly administered by the EPA, which enforces Energy Star standards, and the DOE, which creates them. (*See* Decl. of J.B. Hoyt ("Hoyt Decl.") ¶ 4 & Ex. 1, Defs.' Subm. Ex. A.)[1] Products can earn the Energy Star label by meeting the energy efficiency requirements set by DOE. (*Id.* Ex. 3.)

Energy Star is and always has been intended to serve as a recognizable symbol of relative energy efficiency. (*Id.* ¶¶ 6-8.) However, the Energy Star logo does not convey how much more water- or energy-efficient a washer will be. (*Id.*) The label does not state, for example, the

[1] "Defs.' Subm." refers to the Declaration of Galen D. Bellamy Submitting Defendants' Evidence in Opposition to Class Certification, filed contemporaneously with this opposition.

number of kWh used or how that compares to a similar, non-labeled washer (consumers can look to the EnergyGuide label for that information). (*Id.*) The Energy Star label is not, and was never intended to be, a promise or warranty that any specific level of savings will be achieved. (*Id.*)

II. THE DOE INSTRUCTED WHIRLPOOL HOW TO MEASURE ITS TOP-LOADING WASHERS FOR ENERGY STAR COMPLIANCE

In 2009, Energy Star qualification for a washer hinged on two measures: the Modified Energy Factor ("MEF") and the Water Factor ("WF"). (Hoyt Decl. ¶ 15; Expert Rep. of M. Laurentius Marais ("Marais Rep.") ¶ 24, Defs.' Subm. Ex. B.) The equations underlying MEF and WF depended on the capacity of the clothes washer's "clothes container." 10 C.F.R. 430, Subpart B, Appendix J1 § 3 (2003) (the "J1 Procedure").

To determine the "clothes container" capacity, the DOE's regulations instructed manufacturers to "[m]easure the entire volume which a dry clothes load could occupy within the clothes container during washer operation" by lining the container with a plastic sheet and filling it with "the maximum amount of water" up to its "uppermost edge." *Id.* § 3.1. But different washers have different configurations and components—e.g., some top-loading washers contain a "tub cover" that extends above the wash basket to prevent lost laundry; others do not. (Decl. of Christopher Chisek ¶¶ 18-19 ("Chisek Decl."), Defs.' Subm. Ex. C.) These differences caused confusion in the appliance industry regarding where the "uppermost edge" of the "clothes container" should be. (Hoyt Decl. ¶ 19.)

On March 20, 2007, Whirlpool sought to resolve this ambiguity by writing a letter to the DOE asking for clarification of how "it should measure clothes container capacity in vertical axis washers." (*Id.* ¶¶ 23-24 & Ex. 6.) In Whirlpool's view, the "space formed by inter-related components within the clothes washer, such as the top of the tub cover" was "fully consistent with the DOE test procedures" for determining clothes container capacity. (*Id.*) On May 14, 2007, the DOE responded to Whirlpool's letter, "agree[ing]" that "measurement of the clothes container capacity to the upper edge of the tub cover in vertical axis clothes washers" is proper under the J1 Procedure. (*Id.* ¶ 26 & Ex. 7.) The DOE later designated the "top of the tub cover"

as "Fill Level 4." (*Id*. ¶ 26; Expert Rep. of John R. Fessler, Ph.D., P.E. ("Fessler Rep.") ¶ 34, Defs.' Subm. Ex. D.)

In light of the DOE's guidance, Whirlpool revised its internal testing procedures to conform to the DOE's May 14, 2007, interpretation of "clothes container." (Hoyt Decl. ¶ 27; Chisek Decl. ¶ 17.) For all top-loading washers going forward, Whirlpool would fill the "clothes container" to the "top of the tub cover" (i.e., Fill Level 4) to determine its capacity. (Hoyt Decl. ¶ 27; *see also* Fessler Rep. ¶ 24.)

III. WHIRLPOOL FOLLOWED THE DOE'S GUIDANCE IN DESIGNING THE MAYTAG CENTENNIAL WASHERS TO QUALIFY FOR ENERGY STAR

Before 2009, most if not all Energy Star top-loaders were high-efficiency models, which cost hundreds of dollars more than conventional machines. (*See* Decl. of David Whitehead ("Whitehead Decl.") ¶ 5, Defs.' Subm. Ex. E.) To provide a lower-cost option to consumers, Whirlpool decided to add an Energy Star model to its Maytag Centennial washer line. (*Id*.) Whirlpool designed models MVWC6ESWW0 ("C6-0"), MVWC6ESWW1 ("C6-1"), and MVWC7ESWW0 ("C7") with an "Auto Load Sensing" feature, which effectively measured the load size and composition and adjusted the water level accordingly, leading to significant energy and water savings. (*Id*. ¶ 10; Chisek Decl. ¶¶ 8-10; Hoyt Decl. ¶ 34; Fessler Rep. ¶ 40.)

In late 2008 and early 2009, Whirlpool tested the C6-0 and C6-1 in accordance with its internal test procedures for Energy Star qualification, as revised in light of the DOE's May 14, 2007, guidance. (Chisek Decl. ¶¶ 17, 21-24; Fessler Rep. ¶ 22.) The C6-0 and C6-1 both met the DOE's Energy Star requirements.[2] (Chisek Decl. ¶¶ 22-23 & Exs. 2-3; Fessler Rep. ¶¶ 22-23.) Accordingly, per the Energy Star program's requirements, Whirlpool labeled the Washers as Energy Star-qualified and, beginning in April 2009, started shipping them to its trade customers in the seven states at issue.[3] (Hoyt Decl. ¶ 35; Decl. of Scott A. Bursor in Supp. of Pls.' Mot. for Class Cert. Ex. 17 (attaching Whirlpool's shipments data).)

[2] The C7 was not tested separately because it had the same energy components as the C6-1. (Chisek Decl. ¶ 25; Fessler Rep. ¶ 23.)

[3] Whirlpool sold nearly 90% of the C7s to trade customers in the rental channel (such as Rent-A-

Purchasers of these Washers saved substantial water and energy as compared to similar conventional top-loading washers. (Hoyt Decl. ¶ 34; Chisek Decl. ¶ 10.) Further, purchasers were eligible for tax rebates and other incentives provided by the federal and state governments for Energy Star washers. (Hoyt Decl. ¶¶ 12-14; Whitehead Decl. ¶¶ 20-22.)

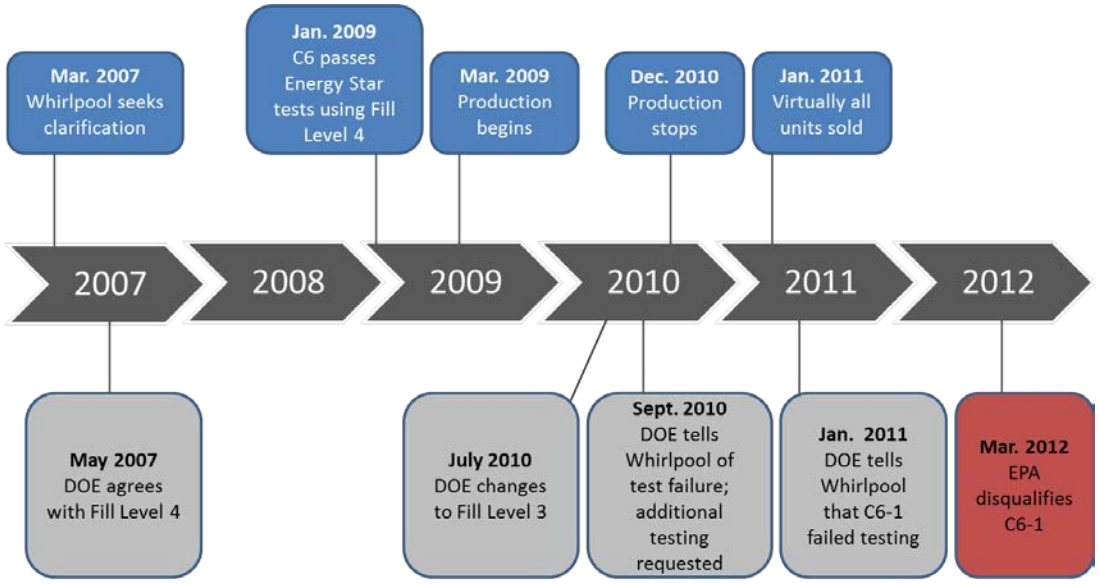
Whirlpool discontinued production of the Washers in December 2010. (Whitehead Decl. ¶ 11.) While a handful of shipments to retailers in the seven states occurred in early 2011, the vast majority of Washers were sold by the end of 2010. (Bursor Decl. Ex. 17 (Whirlpool shipped just 133 units in January 2011 and 12 units in the following months).)

IV. WHIRLPOOL NEVER SOLD A "DISQUALIFIED" CLOTHES WASHER TO ANY PLAINTIFF OR PUTATIVE CLASS MEMBER

About 15 months after Whirlpool started shipping the Washers, the DOE changed its interpretation of the term "clothes container." Specifically, on July 6, 2010, the DOE issued revised "guidance" stating that capacity measurement should be to "Fill Level 3," not "Fill Level 4."[4] (Hoyt Decl.¶ 41 & Ex. 12; Chisek Decl. ¶ 26; Marais Rep. ¶ 26-27.) Using this new interpretation, the DOE tested an exemplar C6-1 and found that the unit did not meet Energy Star criteria. (Hoyt Decl. ¶ 44 & Ex. 14; Fessler Rep. ¶ 30.) At Whirlpool's request, the DOE retested that unit and three additional C6-1 units. (Hoyt Decl. ¶ 44 & Ex. 15.) On January 19, 2011—after all Plaintiffs had bought their Washers and virtually all Washers had been shipped—the DOE notified Whirlpool that these four units narrowly missed the Energy Star criteria. (Hoyt Decl. ¶ 46 & Ex. 16.) Then, on May 7, 2012, the EPA disqualified the C6-1 from the Energy Star program. (*Id*. ¶ 50.) The following chart summarizes these key events:

Center) who in turn rented them to end-user consumers. (Whitehead Decl. ¶ 9.)

[4] In making this change, the DOE recognized that it was changing the rules and that its prior rule was ambiguous: "Between 1997 and 2010 DOE 'became aware that this general specification of the water fill level could lead to multiple capacity measurements that do not reflect the actual capacity for washing clothes.'" (Marais Rep. ¶ 26 (quoting DOE Guidance, July 6, 2010).)



Critically, nothing about the Washers had changed: the only reason that the four C6-1 units failed the DOE's verification testing is because the DOE had changed what constitutes the uppermost edge of the clothes container. (Chisek Decl. ¶¶ 27-29; Fessler Rep. ¶ 33.) While Whirlpool had tested the Washers in accordance with the DOE's May 2007 guidance (by measuring capacity to Fill Level 4) the DOE tested these units by measuring capacity to Fill Level 3. (Chisek Decl. ¶ 28.) The tested capacity was thereby diminished, which negatively affected the Washers' MEF and WF values. (*Id.*) An analysis of the test results conclusively shows, however, that "there was no appreciable difference in the actual capacity of the washers or their performance in terms of energy or water usage." (Fessler Rep. ¶ 33.) Thus, consumers got exactly what they paid for: a conventional top-loader that uses substantially less water and energy than other similar conventional top-loaders. (Hoyt Decl. ¶ 34; Marais Rep ¶ 50.)

V. THE ENERGY STAR TEST DOES NOT MIMIC HOW CONSUMERS USE THE WASHERS IN THE REAL WORLD

While Plaintiffs claim that "every class member will incur higher utility bills over the machine's useful life" (Class Cert. Br. at 2), that supposed "common fact" is based solely on the DOE's verification testing failure. In fact, individual usage varies significantly from laboratory testing standards, as is evident by Plaintiffs' own testimony. (*See* Fessler Rep. ¶¶ 69-71; Marais Rep. ¶¶ 63-64 & fig.17.) Indeed, various independent sources, including Consumer Reports,

have been critical of Energy Star for this reason. (*See* Defs.' Subm. Ex. F.) Thus, whether in fact any consumer's Washer used more water or energy than implied by the then-applicable Energy Star testing requirements is an individual question.

VI. ACTUAL MARKET DATA SHOWS THAT THE WASHERS DID NOT COMMAND A PREMIUM DUE TO THE ENERGY STAR LOGO

Contrary to Plaintiffs' theory, the facts show that the Washers did not "command" a "substantial price premium" in the "marketplace," and that proving whether any premium existed would require evidence that would vary over time and by retailer. (*Compare* Class Cert. Br. at 2, *with* Whitehead Decl. ¶¶ 12-23, Decl. of Ronald Voglewede ("Voglewede Decl.") ¶ G, Defs.' Subm. Ex. G, Expert Rep. of Peter E. Rossi ("Rossi Rep.") at 8-14, Defs.' Subm. Ex. H, *and* Expert Rep. of Carol A. Scott, Ph.D. ("Scott Rep.") ¶¶ 74-78, Defs.' Subm. Ex. I.) While Whirlpool does not set the price that any consumer will pay at retail, it does provide retailers with a Manufacturer's Suggested Retail Price ("MSRP") and a Manufacturer's Minimum Advertised Price ("MAP"). (Whitehead Decl. ¶ 12.) [redacted] (*Id*. ¶¶ 10, 13, 23.) In fact, sales data from Lowe's show that the average retail price for the C500 was $85 more than the C6-0. (Rossi Rep. at 11-12; Scott Rep. ¶ 78.) And Consumer Reports listed both washing machines at the same retail price. (Scott Rep. ¶ 76.) In other words, Whirlpool did not suggest a price premium for the Washers, and the retailers did not charge one.[5]

VII. PLAINTIFFS HAVE DIFFERENT UNDERSTANDINGS OF WHAT THE ENERGY STAR LOGO "MEANS" AND WHAT WAS "PROMISED" TO THEM

Plaintiffs' attempt to imbue the Energy Star logo with a specific uniform meaning (beyond, at most, relative efficiency), is contradicted by their own testimony. For instance, Mr.

[5] This lack of a premium is largely due to the competitive and economic environment in the 2009-2010 time period. (Whitehead Decl. ¶¶ 15-22; Voglewede Decl. ¶ 7; Rossi Rep. at 12-14; Scott Rep. ¶¶ 79-85.)

Angelone testified that he did not know what Energy Star means, other than it being "a good thing" and indicating a "decent machine":

> Q. You mentioned Energy Star earlier. Did the Energy Star label convey to you any information that's not on this EnergyGuide label?
>
> A. I believe Energy Star was supposed to be a good thing. I believe it's a reputable -- I don't know if it's a company, I really don't know what Energy Star is, other than it's supposed to be, you know, if it's telling you, it's telling me that it's a decent machine, it saves me electricity and water usage, I believed them, I believed what was here, I thought that was a good thing -- another good reason to buy the thing.
>
> Q. What does the Energy Star logo look like?
>
> A. I don't know. I couldn't tell you, I don't know.

(Dep. of Francis Angelone, June 16, 2015, at 48:22–49:12, Defs.' Subm. Ex. J.) Similarly, while Ms. Parsons believed that the Energy Star logo indicates that the washer will use less energy and water, she also testified that the logo conveys that the product will "be safer for everyone to use." (Dep. of Kari Parsons, May 19, 2015, at 141:10-25, Defs.' Subm. Ex. K.)

Plaintiffs' idiosyncratic understandings of the Energy Star label's meaning depended on their individual experiences. For instance, Mr. Beyer explained that his knowledge was informed by his "conversation with the sales guy," which is why he understood the logo to encompass water savings (which, before 2007, it did not). (Dep. of Charles Beyer, May 12, 2015, at 103:20–105:14, Defs.' Subm. Ex. L; *see also* Dep. of Brian Maxwell, June 12, 2015, at 101:17–102:5, Defs.' Subm. Ex. M.) Mr. Reid testified that he understood (inaccurately) that the Energy Star label conveyed "additional savings on utilities" beyond what was listed on the EnergyGuide label, based on his "Internet research." (Dep. of Jeffery Reid, June 30, 2015, at 98:2–99:22, Defs.' Subm. Ex. N.) And Ms. Dzielak admitted that her understanding of the label came from "numerous ads, from print ads, from advertisements in newspapers, from flyers that have come from online representations," none of which she could recall as coming from Defendants. (Dep. of Charlene Dzielak, June 10, 2015, at 7:3-18, 17:2-16, Defs.' Subm. Ex. O.)

ARGUMENT

I. LEGAL STANDARD

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (Rule 23 "imposes stringent requirements for certification that in practice exclude most claims"). The plaintiff "must affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs must prove "'that there are *in fact* . . . common questions of law or fact,' typicality of claims or defenses, and adequacy of representation" and that they meet the "far more demanding" Rule 23(b)(3). *Comcast*, 133 S. Ct. at 1432 (quoting *Dukes*, 564 U.S. at 350).

Defendants do not dispute that some common questions exist here.[6] But those few common questions do not predominate over individual issues or render class treatment superior to other methods of adjudication. Plaintiffs' rote recitation of their four "common facts"—e.g., that the clothes washers bore the Energy Star logo—are not meaningful enough to merit a class trial and are "not sufficient to obtain class certification." *Dukes*, 564 U.S. at 349.

II. PLAINTIFFS IGNORE KEY DIFFERENCES IN THE STATES' LAWS, WHICH CAUSE INDIVIDUAL ISSUES OF LAW TO OVERWHELM COMMON ISSUES AND RENDER CLASS TREATMENT UNMANAGEABLE

A. Plaintiffs Fail to Satisfy their Burden of Showing that New Jersey's Express Warranty, Implied Warranty, and Unjust Enrichment Laws Apply

Plaintiffs argue that New Jersey's warranty and unjust enrichment laws should apply to class members in all seven states. (Class Cert. Br. at 18, 20-21.) "[C]lass action movants must credibly demonstrate, through an extensive analysis of state law variances, that class certification

[6] Defendants do dispute that any of these common questions "will resolve an issue that is central to the validity of each one of the claims in one stroke," as required by *Dukes*, 564 U.S. at 350, and thus disputes that Plaintiffs have met Rule 23(a)(2). Defendants further dispute that Plaintiffs can satisfy typicality and adequacy. Given space constraints, Defendants have not challenged Plaintiffs ability to meet those requirements here but reserve the right to do so in the future.

does not present insuperable obstacles." *Powers v. Lycoming Engines*, 328 F. App'x 121, 124 (3d Cir. 2009) (internal quotation marks, citation omitted). "This comprehensive analysis is necessary because aggregate class action should not alter the applicable substantive legal rights of the plaintiffs." *Id.*; *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-23 (1985) (courts "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'").

Plaintiffs have made no attempt to meet their burden. Instead, they merely conclude that New Jersey law applies. (*See* Class Cert. Br. at 18, 20.) That is not enough to carry their burden. *See Gray v. Bayer Corp.*, No. 08-4716, 2011 WL 2975768, at *7 (D.N.J. July 21, 2011) (denying certification where the plaintiff "failed to carry his burden" of showing "through an extensive analysis of state law variances, that class certification does not present insuperable obstacles" (quoting *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 453 (D.N.J. 1998))).[7]

B. This Court Must Apply the Warranty and Unjust Enrichment Laws of All Seven States, Which Prevents Plaintiffs from Satisfying Rule 23(b)(3)

1. Actual conflicts of law exist between the states' express- and implied-warranty and unjust enrichment laws

An "extensive analysis" of state-law variances, *Powers*, 328 F. App'x at 124, shows that New Jersey's laws cannot apply to non-resident putative class members. New Jersey's choice-of-law analysis is a two-step process. First, a court must determine if an actual conflict of law exists. *See P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 460 (N.J. 2008). This is "done by examining the substance of the potentially applicable laws to determine whether there is a distinction between them." *Id.* at 460 (internal quotation marks, citation omitted). If a conflict exists, the court must then determine which state has the "most significant relationship" to the claim at issue, as analyzed under the Restatement (Second) of Conflict of Laws. *Id.* at 455.

[7] This Court's June 16, 2014, opinion does not relieve Plaintiffs of their burden. *See Speeney v. Rutgers, The State Univ.*, 369 F. App'x 357, 360 (3d Cir. 2010) ("The law of the case doctrine only precludes relitigation of issues that the parties had a full and fair opportunity to litigate."). Aside from disputing whether California, Indiana, and Michigan require privity, the parties never briefed the conflicts-of-law issue. (*See* ECF Nos. 37-2, 47, & 49-1.)

Here, as shown by the chart below and detailed in Defendants' Appendix A of State-Law Variations, the express-warranty law of the seven jurisdictions differ materially:

	Privity Required?	Reliance Required?	Notice Required to Remote Seller?	Energy Star as Express Warranty?
CA	Yes, unless buyer proves reliance	Yes – as exception to the privity rule	No	Yes
FL	Unsettled	Yes – to prove benefit of the bargain	Yes	Undecided
IN	Yes, unless buyer proves reliance	Yes – as exception to the privity rule	Likely yes	Undecided
NJ	No	No	No	Yes
OH	No	Yes – to prove benefit of the bargain	Yes	No
TX	Unsettled	Yes – to prove benefit of the bargain	Yes	Undecided
VA	No	No	No	Undecided

(*See* Defs.' App. § I.)[8]

Plaintiffs concede that Florida, Ohio, and Texas all require proof of reliance (they ignore all the other differences identified above), but they brush aside that fact. While they claim that "reliance may be inferred on a classwide basis where the claims arise from uniform misrepresentations" (Class Cert. Br. at 19 & n.13), none of their cited cases actually hold that

[8] This Court has previously observed that there is no conflict on the issue of privity. (ECF No. 78 at 14.) However, both California and Indiana have excused the privity requirement only upon proof of reliance—an element not found in New Jersey law. *Compare Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 546 (C.D. Cal. 2012) ("[I]n the absence of privity, California law requires a showing that a plaintiff relied on an alleged omission or misrepresentation."), *and Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. Ct. App. 1987) (recognizing a privity exception where a manufacturer made representations to a buyer in advertisements or on product labels and the buyer relied on those representations), *with Rapid Models & Prototypes, Inc. v. Innovated Sols.*, No. 14-277 (NLH/KMW), 2015 WL 4914477, at *3 (D.N.J. Aug. 18, 2015) (New Jersey does not "require[] privity or reliance"). Defendants also note that the law in Florida is unsettled as to privity. *See Mardegan v. Mylan, Inc.*, No. 10-14285-CIV, 2011 WL 3583743, at *6 (S.D. Fla. Aug. 12, 2011) ("Florida law with regard to express warranty claims and the requirement of privity is not as well-settled . . . . Although the Florida Supreme Court has never spoken on this issue, . . . several courts have held that absent privity there can be no claim for the breach of an express warranty.").

reliance in an express-warranty claim can be inferred.[9] The Texas Supreme Court's decision in *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002), is the only on-point authority they cite, but the court there found that proof of reliance was an individual inquiry precluding certification. *Id*. at 693-94. While the court suggested that reliance could be a common issue with the appropriate evidence—that is, "[i]f a plaintiff could prove reliance in an individual action with the same evidence offered to show class-wide reliance," *id*. at 694—later courts have recognized that the *Henry Schein* standard "make[s] such cases a near-impossibility." *Fid. & Guar. Life Ins. Co., v. Pina*, 165 S.W.3d 416, 423, 425 (Tex. App. 2005); *see Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225 (11th Cir. 2016) (that a plaintiff could prove classwide reliance is a near-impossibility under Texas law); *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 921-22 (Tex. 2010) ("Texas courts have been reluctant to certify a class when proof of reliance is required as an element of a claim.").[10]

Here, Plaintiffs fail to show that any classwide reliance evidence exists. All they submit is a 2010 EPA presentation showing that an unknown survey found that the Energy Star logo has an "influence" on 91% of "product purchase[rs]." (Class Cert. Br. at 6.) But that document says nothing about what percentage of class members relied on the logo in deciding to buy the Washers. *See Fid. & Guar. Life Ins.*, 165 S.W.3d at 423 ("Class-wide evidence requires that there be no differences in how individual members of the class relied on the misrepresentation"). The document does not prove that any Plaintiff or class member relied on the label. *See Henry*

[9] For instance, *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *abrogated by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008), addressed the propriety of certifying federal RICO claims. And there was no express-warranty claim at issue in *Baughman v. State Farm Mutual Automobile Insurance Co.*, 88 Ohio St. 3d 480 (Ohio 2000), a fraud case.

[10] *Southwestern Bell* presents one of the rare (if only) cases in which the court found that reliance could be proven on a classwide basis. There, in a suit against a phone company for overcharging consumers, the Texas Supreme Court noted that certification is improper wherever "individual class members' experiences reasonably could have varied." 308 S.W.3d at 922. The court, however, found the case before it to be distinguishable because "the plaintiffs had no choice but to rely on the misrepresentation"—the inclusion of an improper fee on the bill—in paying their bills. *Id.* at 922-23. There is no similar concern about compulsory reliance here.

Schein, 102 S.W.3d at 693 ("[E]vidence insufficient to prove reliance in a suit by an individual does not become sufficient in a class action simply because there are more plaintiffs.").[11]

Plaintiffs' implied-warranty claim is similarly fraught with differences, as shown below:

	Notice to Manufacturer Required?	Must Warranty Disclaimer Be Provided Prior to Sale?
IN	Likely yes	Yes
NJ	No	No
TX	Yes	No
VA	No	Yes

(*See* Defs.' App. § II.)

The same is true for Plaintiffs' unjust enrichment claims,[12] as shown below:

	Does Adequate Remedy at Law Bar Claim?	Proof of Reliance or Other State-of-Mind of Purchaser?	Proof of Wrongful Conduct Required?
CA	Yes	Yes	Unknown
FL	No	Yes	Unknown
IN	Yes	No	No
NJ	Yes	Unsettled, but likely yes	Unknown
OH	Yes	Unsettled, but likely no	No
TX	Yes	Yes	Yes
VA	Yes	Unknown	Yes

(*See* Defs.' App. § III.)[13]

[11] The survey by Plaintiffs' expert Dr. J. Michael Dennis (ECF No. 165) is unhelpful because it asks whether survey respondents would "prefer" a washer with the Energy Star label. It does not test whether class members actually relied on the logo when they bought their Washers.

[12] Plaintiffs "seek to certify claims for unjust enrichment on behalf of each of the seven statewide classes against each of the retailer defendants" but admit that Plaintiffs Reid and Parsons bought their Washers from retailers that "are not defendants in this action," meaning that "no claims are asserted against them" (Class Cert. Br. at 3, 20 & n.4.) Given this ambiguity, Defendants analyze all seven states' laws but submit that Florida and Ohio should not be at issue.

[13] This Court has noted that many courts have found no significant disparities in the unjust enrichment laws of the 50 states. (ECF No. 78 at 25.) In fact, other courts have come to the opposite conclusion. *See, e.g.*, *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 280-81 (E.D. Pa. 2013); *Gustafson v. BAC Home Loans Servicing, LP*, 294 F.R.D. 529, 548-49 (C.D. Cal. 2013); *Muehlbauer v. Gen. Motors Corp.*, No. 05 C 2676, 2009 WL 874511, at *6 (N.D. Ill. Mar. 31,

Given that there are discernable conflicts of law, it is necessary to determine which state has the most significant relationship to Plaintiffs' claims. In doing so, the Court must consider "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." Restatement (Second) of Conflict of Laws § 188. Here, the Washers' advertising, marketing, and sales took place throughout the states, and putative class members reside and used their Washers in their home states. In fact, given that Whirlpool is not headquartered in New Jersey and did not design or test the Washers in New Jersey, not one factor favors applying New Jersey law. Accordingly, each class members' claims should be governed by the laws of his or her home state.[14]

2. Individual questions of warranty and unjust enrichment law overwhelm common issues, making a class trial unmanageable and inferior

Individual issues of law overwhelm common issues and would make any class trial unmanageable. *See Powers*, 328 F. App'x at 127 ("Attempting to apply the law of a multiplicity of jurisdictions can present problems of manageability for class certification under Rule 23(b)(3)."); *see, e.g.*, *De Lage Landen Fin. Servs., Inc. v. Rasa Floors, LP*, 269 F.R.D. 445, 467-68 (E.D. Pa. 2010) (denying certification of 13-state class where differences in law "would present serious and legitimate case management problems," thereby defeating Rule 23(b)(3)).

Because class actions cannot alter class members' or Defendants' substantive rights, this Court would need to present the jury with seven different sets of jury instructions on the express-warranty claim alone. Those instructions would include confusing, yet crucial, differences on the claim's elements. For instance, the jury would need to be instructed that the "benefit of the bargain" element requires proof of reliance for the Ohio, Florida, and Texas classes; is proven

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2009); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 501 (S.D. Ill. 1999).

[14] *See, e.g.*, *Feldman v. Mercedes-Benz USA, LLC*, No. 2:11-cv-00984 (WJM), 2012 WL 6596830, at *8 (D.N.J. Dec. 18, 2012) ("In holding that the law of Plaintiffs' home state applies, this Court follows other cases in this Circuit holding that warranty claims should be governed by the law of each consumers' home state.").

for the Indiana class so long as the Energy Star label was an intended element of the sale; can be presumed for the New Jersey and California classes upon proof that the buyer was aware of the logo; and can be presumed for the Virginia class even if the buyer was unaware of the logo. (*See* App. § I.) Class members would then need to prove reliance for the California and Indiana classes to hold Whirlpool (but not the retailer Defendants) liable under those states' privity exceptions. (*Id*.) Differences in the pre-suit notice standards are yet another complication. (*Id*.)

Accordingly, Plaintiffs fail to satisfy Rule 23(b)(3).[15]

C. Differences among the Nine Consumer Protection Statutes Render Class Treatment Unmanageable and Inferior to Individual Actions

Plaintiffs seek certification of claims based on nine different consumer protection statutes,[16] assuring this Court that their case is "manageable as a class action because liability will be established predominantly through common classwide proof of COMMON FACTS 1 through 4." (Pls.' Mot. for Class Cert. at 30.) In reality, numerous differences exist among the nine claims that will present significant management problems at trial. (*See* App. § IV.)

For instance, Plaintiffs do not inform this Court that the IDCSA specifically requires proof of reliance. *See* Ind. Code § 24-5-0.5-4(a). The TDTPA similarly requires proof of reliance, *see* Tex. Bus. & Com. Code § 17.50(a)(1), which—contrary to Plaintiffs' assertion—cannot be inferred or proven on a classwide basis. *See* Argument, Part II.B.1, *supra*; *Brown*, 817 F.3d 1225, at *7 (district court abused its discretion in holding that TDTPA's reliance requirement could be proven on a classwide basis). Actual reliance is also required for the three California claims, although only the CLRA claim requires proof as to absent class members. *See Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014). But unlike the IDCSA

[15] Plaintiffs' proposal to proceed with "subclasses" does nothing to alleviate these concerns. *See De Lage*, 269 F.R.D. at 467.

[16] Plaintiffs assert claims for violation of California's Consumer Legal Remedies Act ("CLRA"), California's Unfair Competition Law ("UCL"), California's False Advertising Law ("FAL"), the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), the New Jersey Consumer Fraud Act ("NJCFA"), the New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act ("TCCWNA"), the Ohio Consumer Sales Practices Act ("OCSPA"), the Indiana Deceptive Consumer Sales Act ("IDCSA"), and the Texas Deceptive Trade Practices Act ("TDTPA").

and TDTPA claims, reliance may be inferred if the misrepresentation is material. *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011). And while reliance may not be required for an OCSPA claim, Plaintiffs must at least prove an awareness of the label. *See In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 870 (S.D. Ohio 2012).

But reliance is not the only difference among those nine statutes. They further differ on whether scienter[17] and materiality[18] are required, the availability and scope of safe harbor[19] and bona fide error[20] defenses, and the length of the statutes of limitations.[21] Applying those

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[17] Proof of intent to mislead is required to prove an "incurable" claim under IDCSA, an unconscionable-act claim under OCSPA, and certain of TDTPA's "laundry list" deceptive acts. *See McKinney v. State*, 693 N.E.2d 65, 68 (Ind. 1998); *Thomas v. Nat'l Coll. of Va., Inc.*, 901 F. Supp. 2d 1022, 1030 (S.D. Ohio 2012); Tex. Bus. & Com. Code § 17.46(b)(24).

[18] The CLRA, OCSPA, and TDTPA require proof of materiality. *See In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 94-95 (Cal. Ct. App. 2009); *Church & Dwight Co. v. Huey*, 961 S.W.2d 560, 567 (Tex. App. 1997); *Richards v. Beechmont Volvo*, 711 N.E.2d 1088, 1090 (Ohio Ct. App. 1998). Although less clear, the FDUTPA and IDCSA likely require materiality. *See FTC v. Wash. Data Res.*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2012); *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 332-33 (Ind. 2013). There is a split as to whether NJCFA requires materiality. *Compare Mango v. Pierce-Coombs*, 851 A.2d 62, 69 (N.J. Super. Ct. App. Div. 2004), *with Leon v. Rite Aid Corp.*, 774 A.2d 674, 678 (N.J. Super. Ct. App. Div. 2001). The UCL and FAL do not require materiality. *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009).

[19] The FDUTPA, IDCSA, and OCSPA all contain safe-harbor provisions that preclude recovery where the challenged act is "permitted" by federal law. Fla. Stat. § 501.212(1); Ind. Code § 24-5-0.5-6; Ohio Rev. Code § 1345.12(A). The CLRA, UCL, and FAL do not contain a safe harbor but courts have inferred one where a statute "actually 'bar[s]' the action or clearly permit[s] the conduct." *Cel-Tech Commc'ns., Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 542 (Cal. 1999). The NJCFA and TCCWNA do not contain a safe-harbor provision, but courts have recognized a narrow defense where "a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme." *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 696 A.2d 546, 553, 554 (N.J. 1997).

[20] The CLRA, FDUTPA, IDCSA, and OCSPA all contain bona fide error defenses, although those laws differ as to what must be proven and whether the defense prevents a finding of liability or merely limits damages. *See* Cal. Civ. Code § 1784 ("[n]o award of damages"); Fla. Stat. § 501.207(4) (limits recovery to the amount of unjust enrichment); Ind. Code § 24-5-0.5-3(d) (no liability); Ohio Rev. Code § 1345.11(A) (capping at actual damages).

[21] The OCSPA and IDCSA both have two-year statute of limitations that cannot be tolled by the discovery rule. *See Varavvas v. Mullet Cabinets, Inc.*, 923 N.E.2d 1221, 1225 (Ohio Ct. App. 2009); Ohio Rev. Code § 1345.10(C); *A.J.'s Auto. Sales, Inc. v. Freet*, 725 N.E.2d 955, 964-65 (Ind. Ct. App. 2000); Ind. Code § 24-5-0.5-5(b). While the TDTPA has a two-year statute of limitations, "[t]he discovery rule always applies." *Zimmerhanzel v. Green*, 346 S.W.3d 721, 725

differences will result in massive juror confusion. Contrary to Plaintiffs' "assertions that this is basically a simple fraud case, the challenges of explaining to a jury the substantive laws of different states" are such that the jury will be unable to "fairly adjudicate the numerous factual and legal issues in a way that would allow for a trial to be concluded in any reasonable amount of time, or for a verdict that would be fair." *De Lage*, 269 F.R.D. at 467.

III. PLAINTIFFS IGNORE THE MANY INDIVIDUALIZED FACTS THAT WILL PREDOMINATE AND OVERWHELM ANY CLASS TRIAL

Plaintiffs declare that common issues of fact predominate, focusing on four "common facts" that, in their view, support certification. (Class Cert. Br. at 1-2.) But those four "common facts" are unmoored to Plaintiffs' claims or the elements they must prove. Predominance "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011); *see Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 600 (3d Cir. 2012) ("[A] court at the certification stage must examine each element of a legal claim through the prism of Rule 23(b)(3)." (citation omitted)). Plaintiffs purport to analyze the elements at issue, but their cursory examination and conclusions about the "common evidence" ignore the many individualized facts that they must prove at trial.

A. Whether Any Warranty Was "Breached" or Any Fact "Misrepresented" or Whether Defendants' Conduct Was Authorized by Federal Law Will Necessarily Raise Individualized Questions of Fact

Plaintiffs' claims require proof of a "breach" or a "misrepresentation" (or an "unfair" or "deceptive" practice). But whether Defendants breached any warranty or misrepresented any fact depends, in turn, on the timing of each putative class member's purchase.

For Plaintiffs' warranty claims, any "breach" occurred at the time that the Washers were bought,[22] and whether any warranty was "breached" depends on whether "the machines met the efficiency standards set forth as part of the Energy Star program." (Op. 19, ECF No. 78.)[23] But a

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(Tex. App. 2011). The remaining statutes have three-, four-, or six-year statutes.

[22] Cal. Com. Code § 2725(2); Ind. Code § 26-1-2-725(2); N.J. Stat. § 12A:2-725(2); Ohio Rev. Code § 1302.98(B); Tex. Bus. & Com. Code § 2.725(b); Va. Code § 8.2-725(2).

[23] Based solely on the Court's ruling, Defendants have assumed for purposes of this Opposition

jury's determination of whether the Washers met Energy Star's criteria will differ based on how the DOE was interpreting its Energy Star test procedures at any given time. For instance, while the jury could find that Defendants did not breach any class member's warranty because the EPA did not disqualify the C6-1 until after all class members purchased their Washers, the jury could also find that the warranty was breached as to only those class members who bought their Washers after July 6, 2010—that is, when the DOE reinterpreted the term "clothes container" under the J1 Procedure. Alternatively, the jury could find that Defendants only breached the warranty as to those people who bought their machines after September 20, 2010—that is, when one C6-1 unit was found to have failed Energy Star testing. Or the critical date could be January 19, 2011, when the DOE concluded that the C6-1 did not meet the revised Energy Star criteria.

The fact that the answer to the "was the warranty breached?" question may differ by date of purchase means that the question is not truly common. *See Dukes*, 564 U.S. at 350 (a question is only "common" under Rule 23 if it "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id*. (citation omitted).

Likewise, the "misrepresentation" and "safe harbor" questions for Plaintiffs' statutory fraud claims are not common. Each claim generally requires proof of a "misrepresentation" or a "deceptive" or "unfair" act. But Defendants cannot make a "misrepresentation" of something that was true at the time it was made, nor can they commit a "deceptive" or "unfair" act for the same reason. The analysis, as above, will turn on the time of purchase and the timeline of the DOE's changing interpretation and what the jury ultimately concludes about the significance of

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that the Energy Star logo could create a warranty that any given Washer would pass certification tests. (*Id.*) Defendants dispute that any warranty was created (or breached) because the Energy Star logo is only intended to convey a message of relative efficiency, which was at all times accurate as to these Washers. Even assuming the logo constituted a warranty along the lines the Court envisions, its "terms" changed over time as the DOE's interpretation of the tests changed.

those facts. The same is true of Defendants' "safe harbor" defense: the jury's finding of whether Whirlpool's labeling was authorized by federal law may differ depending on time of purchase.[24]

B. Several of Plaintiffs' Express Warranty, Consumer Fraud, and Unjust Enrichment Claims Require Individual Proof of Reliance or State-of-Mind

A number of Plaintiffs' claims require them to prove reliance on the Energy Star logo. For instance, Plaintiffs' express-warranty claims under California, Florida, Indiana, Ohio, and Texas law all require proof of reliance. (*See* Argument, Part II.B.1, *supra*; App. § I.) So do their claims under the consumer protection statutes of Indiana and Texas. *See* Ind. Code § 24-5-0.5-4(a); Tex. Bus. & Com. Code § 17.50(a)(1). Plaintiffs' unjust enrichment claims under California, Florida, New Jersey, and Texas law further require inquiry into the reasons motivating each consumer's purchase decision—essentially a reliance requirement, although its contours differs from state to state. (*See* App. § III.)

For instance, in California, "[t]here is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected." *Peterson v. Cellco P'ship*, 80 Cal. Rptr. 3d. 316, 323 (Cal. Ct. App. 2008) (quoting *Comet Theatre Enters., Inc. v. Cartwright*, 195 F.2d 80, 83 (9th Cir. 1952)). Under Florida law, "each member would have to show evidence as to why the purchase was made to determine whether equity warrants the return of the purchase price." *Green v. McNeil Nutritionals, LLC*, No. 2004-0379-CA, 2005 WL 3388158, at *9 (Fla. Cir. Ct. Nov. 16, 2005) ("Unjust enrichment may not be appropriate . . . if the consumer purchased the product without relying on the alleged deceptive practices."). New Jersey requires Plaintiffs to "show that [they] expected remuneration from the defendant at the time [that they] performed or conferred a benefit," *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J. 1994), which necessarily requires individual analyses of each putative class member's state of mind and what, if anything, they "expected" from the Energy Star logo. And Texas has concluded that unjust enrichment claims require an "individualized inquiry into the state of mind of each plaintiff." *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 206 (Tex. 2007) (citation omitted).

[24] Defendants have a constitutional right to assert this defense. *See Dukes*, 131 S. Ct. at 2561.

Plaintiffs gloss over or ignore those requirements, presumably because, as numerous courts have held, predominance cannot be satisfied where proof of reliance is required.[25]

C. Plaintiffs' Warranty Claims Require Individual Proof of Pre-Suit Notice

Plaintiffs ignore that each of their warranty claims require proof of notice.[26] While California, New Jersey, and Virginia law do not require notice to the remote manufacturer, all states require notice to the retailer Defendants. Pre-suit notice to Whirlpool is required under Florida, Indiana, Ohio, and Texas law. (*See* App. §§ I.C, II.A.) Because Plaintiffs ignore this requirement, they likewise fail to explain how they plan to prove notice as to all class members.

Defendants anticipate that Plaintiffs will argue—as they did in their opposition to Defendants' motion to dismiss (ECF No. 47 at 12)—that pre-suit CLRA demand letters sent by the two California plaintiffs, which do not even claim that Defendants breached any warranty, are sufficient to satisfy the pre-suit notice requirement for the entire class. But courts in Ohio and Texas have specifically rejected the argument that "generalized" notice satisfies the pre-suit notice element,[27] and Defendants are unaware of any case in Florida, New Jersey, and Virginia allowing such an exception to the notice rule. While Indiana has held that notice is satisfied where the seller has "actual knowledge" that the goods are non-conforming, those cases all involved instances where the seller had actual knowledge that the plaintiff had trouble with the

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[25] *See, e.g., In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 619 (8th Cir. 2011) ("Claims requiring individual proof of reliance are generally not amenable to class certification . . . ."); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 727 (5th Cir. 2007) ("[T]he economies ordinarily associated with the class action device are defeated where plaintiffs are required to bring forth individual proof of reliance." (internal quotation marks, citation omitted)).

[26] *See* Cal. Com. Code § 2607(3)(A); Fla. Stat. § 672.607(3)(a); Ind. Code 26-1-2-607(3)(a); N.J. Stat. § 12A:2-607(3)(a); Ohio Rev. Code § 1302.65(C)(1); Tex. Bus. & Com. Code § 2.607(c)(1); Va. Code § 8.2-607(3)(a).

[27] *See St. Clair v. Kroger Co.*, 581 F. Supp. 2d 896, 902 (N.D. Ohio 2008) ("Even if Kroger had independent knowledge of its alleged breach, this does not satisfy the statute's requirement for pre-litigation notice."); *U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 202 (Tex. App. 2003) ("The manufacturer must be made aware of a problem with a particular product purchased by a particular buyer."); *Massey v. Novartis Pharm. Corp.*, 46 F. Supp. 3d 688, 692 (W.D. Tex. 2014) (the fact that defendant received several "Adverse Event" reports from other claimants did not relieve the plaintiff of the individualized notice requirement).

particular product.[28] Finally, while California may allow generalized notice to suffice, that exception may only apply "[w]here the merchandise was sold under circumstances which indicate that the seller acted in bad faith and was aware of the breach at the time of the sale." *Metowski v. Traid Corp.*, 104 Cal. Rptr. 599, 602 (Cal. Ct. App. 1972). But Plaintiffs submit no evidence showing that Defendants acted in bad faith in selling the Washers and knew that the machines did not meet Energy Star standards. In fact, the evidence shows the opposite: that Whirlpool believed, based on the DOE's guidance, that the Washers met Energy Star criteria.

Because the pre-suit notice requirement can be proven only on an individual basis, such proof will necessarily engulf any class trial.

D. Plaintiffs' Unjust Enrichment Claims Are Inappropriate For Certification

Courts regularly refuse to certify unjust enrichment claims because "common questions will rarely, if ever, predominate an unjust enrichment claim." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009). This is so because those claims require a court to "examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist." *Id.* For many states, this examination requires Plaintiffs and putative class members to prove reliance or state of mind. (*See* Argument, Part III.B, *supra*.) But even more generally, Plaintiffs and putative class members must prove that "equity warrants the return of the purchase price," *Green*, 2005 WL 3388158, at *9, which "necessarily involves examination of the individual factual circumstances of every transaction," *Chesner v. Stewart Title Guar. Co.*, No. 1:06CV00476, 2008 WL 553773, at *14 (N.D. Ohio Jan. 23, 2008). In this way, "[t]he person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it." *Monet v. Chase Home Fin., LLC*, No. C 10-0135 RS, 2010 WL 2486376, at *2-3 (N.D. Cal. June 16, 2010) (alteration in original) (citation omitted).

[28] *See, e.g., Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 781-82 (7th Cir. 2011); *Agrarian Grain Co. v. Meeker*, 526 N.E.2d 1189, 1193 (Ind. Ct. App. 1988).

Here, individual fact issues concerning each Plaintiff's and class member's transaction will necessarily predominate because each will have to prove that the "equities" favor return of the purchase price. This analysis will turn on several issues, including whether the purchaser bought the Washer on sale or received an Energy Star rebate or discount; whether the purchaser relied on the Energy Star logo; and whether the label made any difference to the purchase decision. *See Best Buy Co. v. Barrera*, 248 S.W.3d 160, 163-64 (Tex. 2007) ("individual differences between each class member's experience" will necessitate individualized inquiries to "determine in whose favor the equities weigh"). Class treatment is, therefore, inappropriate.

E. Plaintiffs Must Prove That the Energy Star Logo Was "Material" to Each Plaintiff and Putative Class Member

To succeed on their CLRA, OCSPA, and TDTPA claims, and likely their FDUTPA, IDCSA, and NJCFA claims, *see supra* note 18, each Plaintiff and class member must prove that the Energy Star logo was material to his purchase decision. This is an impossible inquiry on a classwide basis, as is shown by Plaintiffs' own testimony. (Statement of Facts § VII, *supra*.)

Despite this, Plaintiffs announce that materiality poses no obstacle to certification. They state that the label was material to "every" class member "because Energy Star appliances command a substantial price premium in the marketplace." (Class Cert. Br. at 1.) Even if that were true (and the evidence shows that it is not, *see* Whitehead Decl. ¶ 23; Voglewede Decl. ¶¶ 5-7; Rossi Rep. at 11-12), the standard for materiality under any state's laws does not turn on whether a product commands a "price premium." *See Vioxx Class Cases*, 103 Cal. Rptr. 3d at 94-95(a material fact under the CLRA is one that "induced the consumer to alter his position to his detriment"); *McCrea v. Cubilla Condo. Corp. N.V.*, 685 S.W.2d 755, 759 (Tex. App. 1985) (a material fact under the TDTPA is one that "causes a party to enter into the transaction"). The evidence Plaintiffs do cite is unhelpful. The 2010 EPA chart showing that the logo has an "influence" on 91% of "product purchase[rs]" (Class Cert. Br. at 6) is not relevant to the Washers at issue and says nothing about whether class members bought the Washers in "substantial part" on the Energy Star logo. *In re Tobacco II*, 207 P.3d at 39. Nor does Dr.

Dennis's survey, which merely asks respondents which hypothetical washer they prefer. (*See* note 11, *supra*.)

The materiality inquiry turns on several individual issues: the reasons for each consumer's purchase decision; what each consumer understood Energy Star to mean (and thus what was allegedly "promised" to them) at the time of purchase; whether any consumer considered the logo "material" only because it "promised" them a rebate or tax incentive; or whether any consumer bought the Washer despite having first read or heard of articles critical of Energy Star. Such inquiries will necessarily raise individual issues that will overwhelm any class trial. *See, e.g.*, *Sanchez v. Wal-Mart Stores, Inc.*, No. Civ. 2:06-CV-02573-JAM-KJM, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009) (no predominance where "[t]here are innumerable variations in the experiences and information possessed by consumers" and "in the factors that influence consumers' purchasing decisions").

F. There is No Common Evidence of "Energy Expense" Injury

The glaring predominance problem with Plaintiffs' "energy expense" injury is that it presumes the existence of a classwide injury, i.e., that Plaintiffs and putative class members incurred "higher utility bills over the machine's useful life." (Class Cert. Br. at 2.) Plaintiffs provide no evidence that the class paid higher energy and water bills. Instead, they rely on usage estimates and average utility rates, but such reliance is improper. (*See* Decl. of Colin B. Weir, Dec. 28, 2015 ("Weir Decl.") ¶¶ 9-23, ECF No. 167; *see also* Marais Rep. ¶ 60.)

Their energy expense damages model cannot account for the wide variations in owners' use habits (e.g., loads per week, temperature settings, and cycle settings), geographic location, and electricity and water rates that vary from state-to-state and city-to-city. (*See* Fessler Rep. ¶¶ 19, 66-71; Marais Rep. ¶¶ 51-67; *see, e.g.*, Dep. of Jennifer Schramm, May 22, 2015, at 33:2-25, 51:5–52:24, 134:4–137:15 (testifying that, "most" of the time, she overrides the auto-load sensing feature and forces her Washer to fill completely with water, despite knowing that this "might reduce water efficiency"), Defs.' Subm. Ex. P.) Those fact issues, among others, preclude certification. (*See* Argument § IV, *infra*.)

IV. PLAINTIFFS' DAMAGES MODELS ARE NOT TIED TO THEIR THEORY OF LIABILITY AND FAIL TO MEASURE DAMAGES ON A CLASSWIDE BASIS

To obtain certification, Plaintiffs must proffer a class damages model that measures "only those damages attributable" to their theory. *Comcast*, 133 S. Ct. at 1433. If the model "does not even attempt to do that," then "it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* Because Plaintiffs seek to recover damages on a classwide basis, *Comcast* further requires that they can prove damages through a "common methodology." *Id.* at 1430.

Here, Plaintiffs' liability theory is that Defendants violated the "fundamental bargain" of the Energy Star program—i.e., "consumers pay a higher up-front purchase price but save more on water and energy bills" over time—resulting in them being hit with "a costly double-whammy" of paying the "substantial price premium" that the Washers "command[ed] in the marketplace" and higher utility bills. (2d Am. Compl. ¶¶ 2, 6.) Plaintiffs' claim that their two damages models—"price premium" and "energy expense"—are tied to this theory and "are calculable based on objective classwide evidence." (Class Cert. Br. at 27.) They are wrong.[29]

A. Plaintiffs' "Price Premium" Damages Model Is Fundamentally Flawed and Not Tied to Their Theory of Liability

Plaintiffs offer three different methods that purport to calculate this "price premium" on a classwide basis: (1) a 55.7% premium supposedly calculated by Whirlpool; (2) a 48.5% premium calculated by Dr. Dennis using a contingent valuation survey; and (3) a 44.4% premium calculated by Dr. Sukumar using a conjoint survey.[30] (Class Cert. Br. at 28-29; Weir Decl. ¶¶ 50-52 & tbl.4).) All three methods should be disregarded.[31]

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[29] Plaintiffs cannot recover both measures of damages because, if they did, they would receive the benefit of an Energy Star-qualified washer and the benefit of having not paid for one in the first place. *See, e.g.*, *Captain & Co., Inc. v. Stenberg*, 505 N.E.2d 88, 98-99 (Ind. Ct. App. 1987) (plaintiffs not entitled to both benefit-of-the-bargain and out-of-pocket damages under IDCSA).

[30] A "contingent valuation" directly measures consumers' "willingness to pay" for certain product attributes. (Scott Rep. ¶ 25.) A "conjoint analysis" is a statistical technique that measures what is "often called the market's willingness to pay." *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1073 (C.D. Cal. 2015).

[31] Defendants anticipate that, once expert discovery is complete, they will challenge whether the

1. Plaintiffs' "price premium" models improperly measure only a subjective "willingness-to-pay," not actual market value

While Plaintiffs claim that their "premium price" model will calculate the portion of the Washers' "retail price attributed to the Energy Star label" (Class Cert. Br. at 27), a review of their proffered methods show that is not true. First, the 55.7% premium is based on a single, undated Whirlpool document that is likely from 2006—years before Whirlpool even produced the Washers—and seems to analyze the price difference between HE front-loading washers, HE top-loading washers, and conventional top-loading washers. (*See* Voglewede Decl. ¶¶ 5-7; Marais Rep. ¶¶ 71-74; Scott Rep. ¶¶ 19-22.) Plaintiffs fail to explain how this estimate measures "only those damages attributable" to their theory of liability when this document seems to have nothing to do with the Washers and compares categories of washing machines (HE top- and front-loaders vs. conventional top-loaders) whose prices are hundreds of dollars apart, regardless of their Energy Star status. *See Comcast*, 133 S. Ct. at 1433.

Second, Drs. Sukumar's and Dennis's surveys only measure respondents' subjective valuation of the Energy Star label and not what the Energy Star label actually "command[ed] in the marketplace." (2d Am. Compl. ¶ 6.) For instance, Dr. Dennis's survey asks how much respondents would be "willing to pay" for a washer without the Energy Star logo (Dennis Decl. ¶¶ 18-22, ECF No. 165), from which he concludes that "[p]urchasers . . . would need an average discount of 48.5% to be persuaded to purchase the unit without the Energy Star label" (*id.* ¶ 11.b). Dr. Sukumar's survey asked respondents a series of questions regarding their preferences among various washer attributes to determine the average "value difference" between a washer with the Energy Star logo and one without the logo. (Expert Rep. of Dr. R. Sukumar 5, ECF No. 166.) From these subjective questions, he estimated that $180 of any washer priced between $300 and $500 would be attributed to the Energy Star logo. (Dep. of R. Sukumar ("Sukumar Dep."), Mar. 17, 2016, at 55:2-18, 154:3–155:17, Defs.' Subm. Ex. Q.)

Court should even consider any of Plaintiffs' experts' opinions under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Critically, Plaintiffs' claims each require proof of the actual market value of the Energy Star label. *See, e.g., Chatlos Sys., Inc. v. Nat'l Cash Register Corp.*, 670 F.2d 1304, 1306 (3d Cir. 1982) ("The correct measure of damages, under [the UCC] is the difference between the fair market value of the goods accepted and the value they would have had if they had been as warranted." (emphasis added)).[32] Even if Drs. Dennis's and Sukumar's methodologies "quantify the relative value a class of consumers ascribed" to the Energy Star logo, they do not "permit the court to turn the 'relative valuation . . . into an absolute valuation to be awarded as damages.'" *NJOY*, 120 F. Supp. 3d at 1119 (alteration in original) (quoting *Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-9366-SVW (MANx), 2014 WL 7338930, at *4 (C.D. Cal. Dec. 18, 2014)). If they did, then damages would turn on the subjective whims of an average consumer, not an objective standard based on market value. *See Saavedra*, 2014 WL 7338930, at *4 (rejecting the plaintiffs' proffered conjoint analysis, in part, because they "seek to prove injury by proving that each class member received a [product] that the average consumer subjectively values less," rather than by relying on a difference in fair market value).

After all, the "ultimate price of a product is a combination of market demand and market supply." *NJOY*, 120 F. Supp. 3d at 1119 (quoting *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2014 WL 976898, at *11 (N.D. Cal. Mar. 6, 2014)). Plaintiffs' price premium model fails because it looks only to the "demand side of the market equation."[33] *Id*. (holding that

[32] While Plaintiffs' consumer fraud claims provide for different measures of damages, *see* App. § IV.F, each require objective proof. *See, e.g., Gastaldi v. Sunvest Resort Cmty., LC*, 709 F. Supp. 2d 1299, 1304 (S.D. Fla. 2010) (FDUTPA claim permits recovery of only "actual damages," based on "the difference in the market value of the product." (citation omitted)); *Brown v. The Am. Tobacco Co.*, No. JCCP 4042, 2013 WL 7154428, at *6 (Cal. Super. Ct. Sept. 23, 2013) (UCL restitution "reimburses customers only for the difference between value paid and the actual value received"); *Romano v. Galaxy Toyota*, 945 A.2d 49, 55 (N.J. Super. Ct. App. Div. 2008) (NJCFA permits recovery of an "objectively ascertainable loss").

[33] Recognizing this criticism, Dr. Sukumar, who is not an economist, repeatedly testified that his survey does account for "supply-side" factors because that information is "baked into" the retail-level sales data, which he considered in determining the Washers' average sales price and the price range to test in his survey. (Sukumar Dep. at 13:14–14:0, 76:22–80:12, 278:13-23.) But Dr. Sukumar also admitted that he did not consider competitive offerings or competitive prices because he deems those irrelevant to his survey. (*Id*. at 15:12–23:15,47:7-18, 79:10-19, 162:10-

the plaintiffs' "conjoint analysis" model "does not satisfy *Comcast*" because it transforms what should be an "objective evaluation of relative fair market values" into a "subjective inquiry of what an average consumer wants" (quoting *Saavedra*, 2014 WL 7338930, at *4); *see also Brown*, 2013 WL 7154428, at *6 (the plaintiffs' "conjoint analysis" failed to provide "a reliable measure of restitution" because it focused "only on the consumers' perceived value of one attribute," not the "market value of the entire product without the misrepresented attribute").

2. Plaintiffs' "price premium" model improperly treats the Energy Star logo as a binary concept, not as a symbol of relative efficiency

According to Plaintiffs, "class members have been injured by paying a price premium for a washing machine that did not deliver the promised utilities savings." (Class Cert. Br. at 27.) But their model fails to translate this legal theory into "the economic impact *of that event*," as required by *Comcast*, 133 S. Ct. at 1435, because it ignores the "utilities savings" that Plaintiffs did receive over similar, non-Energy Star models. It also ignores that Plaintiffs were eligible for tax rebates and other incentives provided by the federal and state governments for Energy Star washers. Both Dr. Dennis and Dr. Sukumar treat the Energy Star logo as a "binary," all-or-nothing proposition,[34] which incorrectly assumes that consumers received no value in exchange for the price premium that they allegedly paid. But the Energy Star logo is a symbol of relative efficiency, as even Plaintiffs' admit. (*See* 2d Am. Compl. ¶ 2.) They submit no evidence showing that the Washers were not, in fact, relatively more efficient than comparable non-Energy Star models. And the evidence shows that the Washers used materially less water and energy than conventional top loaders (Hoyt Decl. ¶ 34; Chisek Decl. ¶ 10), even when tested using Fill Level 3 (Marais Rep. ¶ 50), and purchasers were eligible for tax rebates and incentives in addition to those savings (Whitehead Decl. ¶¶ 20-21; Hoyt Decl. ¶¶ 12-14).

To the extent that Plaintiffs paid any "price premium," that premium would only be recoverable as damages to the extent that the efficiency benefits and rebates were not delivered.

18; Rossi Rep. at 21-23.)

[34] *See* Sukumar Dep. at 11:12-18; 217:7–218:23; Dep. of J. Michael Dennis, Mar. 8, 2016, at 45:1-14, 51:18–53:9, 254:17–254:22, Defs.' Subm. Ex. R.

See Brown, 2013 WL 7154428, at *6 (rejecting damages model that "did not even attempt to measure the value of the product received discounted for any misrepresented health benefit"). But because their "price premium" model is an all-or-nothing measure, it is untethered from their theory of liability and fails *Comcast*. *See, e.g.*, *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 698 (S.D. Fla. 2014) (the plaintiffs must show that their damages model "will isolate [the] premium received by the inclusion of the alleged misrepresentation"); *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, MDL No. 2199, 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014) (price premium model failed *Comcast* because it failed "to explain how Defendant's alleged misrepresentations caused any amount of damages" but instead "assumed that 100% of that price difference was attributable to [the defendant's] alleged misrepresentations").

Finally, proving the existence and amount of any premium would require evidence that would vary substantially over time and by retailer. (Scott Rep. ¶¶ 86-88.)

B. Plaintiffs' "Energy Expense" Model Is Fundamentally Flawed, Not Tied to Their Theory of Liability, and Cannot Measure Classwide Damages

To calculate the "energy expense" damages, Mr. Weir turns to estimates that are divorced from actual, real-world experience: (1) the EnergyGuide label's "estimated yearly electricity use," or 212 kWh; (2) what Mr. Weir (incorrectly) calculates is the electricity use of the Washers based on the DOE's verification testing, or 243 kWh; (3) a national average price of electricity of 10.65 cents per kWh; (4) a national average price of water per gallon of $0.0057; and (5) an average Washer lifespan of 11 years. (Weir Decl. ¶¶ 9-23.) Mr. Weir then calculates the difference between what putative class members were ostensibly "promised" by the Energy Star logo—a washer that would consume 212 kWh and 9,026 gallons per year—and what putative class members supposedly received—a washer that consumed 243 kWh and 9,748 gallons per year. (Weir Decl. ¶¶ 14 & tbl.1.) Plaintiffs' "energy expense" model is fundamentally flawed.

First, Mr. Weir seeks to measure the "additional expense associated with operating the [Washers] at less energy-efficient levels" (Weir Decl. ¶ 6), but he uses inputs that come from the EnergyGuide label (which, in turn, come from the DOE's test procedures), not from what

Plaintiffs or any putative class member actually experienced. The DOE's test procedures are "not indicative of what any user would experience in the real world" but are "comparative measures that one can only use to determine the relative energy use for different products." (Fessler Rep. ¶ 18). Indeed, the EnergyGuide label states as much: "Your cost will depend on your utility rates and use." (Marais Rep. at 24, fig.11.) Critically, Plaintiffs have offered no evidence establishing that Mr. Weir's assumptions accurately represent how much energy and water their Washers, or the putative class members' Washers, actually consumed per day.[35]

Second, in an attempt to obtain classwide damages, Plaintiffs eschew real-world evidence in favor of a model based solely on inaccurate estimates and averages. (*See* Weir Decl. ¶¶ 13-19 & tbl.1.) Mr. Weir's use of averages violates *Dukes*' prohibition on "Trial By Formula." 564 U.S. at 367. It is also impermissible under the Supreme Court's recent *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), decision because Plaintiffs could not rely on an estimate of "average" damages if they brought individual suits under the same theory. In *Tyson Foods*, the Court held that sample evidence could be permissible where "each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id*. at 1046-47. The Court deemed the representative sample at issue there to be permissible because it was needed to fill an "evidentiary gap" created by the "employer's failure to keep adequate time records," despite being statutorily obligated to do so. *Id.* at 1043, 1047.

Those circumstances are not present here. In an individual suit, Plaintiffs would have to prove the actual difference (if any) between the electricity and water costs that they were supposedly promised and the electricity and water costs that they actually paid. But Plaintiffs have produced no such evidence. Plaintiffs' "energy expense" model thus turns *Dukes* and

[35] What evidence does exist shows the fallacy of Mr. Weir's method. For instance, he assumes that Plaintiffs ran 392 wash cycles per year (again, because the EnergyGuide label uses that figure for test purposes), but Plaintiffs' actual usage patterns vary widely. (*See* Fessler Rep. ¶ 69.) Most Plaintiffs ran their washer far less than Weir assumed. (*Id*.; *see also* Marais Rep. ¶¶ 63-64 & fig.17.) Temperature, load size, and cycle type will also affect efficiency, but the evidence shows that Plaintiffs used their washers differently. (Fessler Rep. ¶ 69-71.)

Comcast on their head: it purports to offer a "common methodology" of calculating damages only because Plaintiffs presume the existence of a common, classwide injury.

Finally, Plaintiffs' "energy expense" damages are preempted by federal law, which expressly prohibits claims based on the EnergyGuide label's disclosures. *See* 42 U.S.C. § 6297(g); *see also Avram v. Samsung Elecs. Am., Inc.*, Nos. 2:11-6973 (KM) & 2:12-976(KM), 2013 WL 3654090, at *7 (D.N.J. July 11, 2013) (distinguishing between claims premised on "the energy consumption disclosures" on the EnergyGuide label, which would be preempted, and claims based on "the Energy Star logo itself," which would not be). Plaintiffs ostensibly avoid this prohibition by basing their claims on the Energy Star logo, not the EnergyGuide label, but it follows that they cannot then seek damages based on the EnergyGuide label's disclosures.

V. THE CLASS DEFINITION IS FATALLY OVERBROAD BECAUSE IT INCLUDES UNINJURED RENTAL COMPANIES

Plaintiffs' proposed class includes "[a]ll persons . . . who purchased" a C7, excluding those who purchased for "purpose of resale." (Class Cert. Br. at 4.) But the vast majority of C7 purchasers were rental companies (Whitehead Decl. ¶ 9), which in turn rented the C7s to end-users. These companies did not suffer any "energy expense" damages under Plaintiffs' theory because they never used the Washers. Nor is there any evidence suggesting that they would have paid the same "price premium" when buying Washers in bulk from Whirlpool as part of their business as end-user consumers who bought their individual Washers at a mark-up from retailers.

CONCLUSION

For all of these reasons, the Court should deny Plaintiffs' motion for class certification.

Dated: May 20, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2016, I caused to be served the foregoing document via ECF on all counsel of record, including all individuals listed below:

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DEFENDANTS' APPENDIX OF VARIATIONS IN THE SEVEN STATES' WARRANTY, UNJUST ENRICHMENT, AND CONSUMER FRAUD LAWS

Part I of this appendix summarizes the warranty requirements for the seven jurisdictions in Plaintiffs' putative multi-state classes. Part II of this appendix summarizes the implied-warranty requirements for the four jurisdictions. Part III focuses on differences between the states' treatment of unjust enrichment laws. Part IV focuses on differences among the nine consumer protection statutes at issue.

I. PLAINTIFFS' BREACH OF EXPRESS WARRANTY CLAIM

A. The Seven States Differ on Whether Privity Is Required and, If So, Whether There Is an Exception to the Privity Rule

New Jersey, Ohio, and Virginia do not require privity
New Jersey – *Spring Motors Distribs. v. Ford Motor Co.*, 489 A.2d 660, 663 (N.J. 1985) ("We hold also that the buyer need not establish privity with the remote supplier to maintain an action for breach of express or implied warranties."); *Francis E. Parker Mem'l Home, Inc. v. Ga.-Pacific LLC*, 945 F. Supp. 2d 543, 569 (D.N.J. 2013) ("Manufacturer-liability due to a breach of warranty has also been established when the claim is for economic losses only, even where the product was not purchased directly from the manufacturer."); *Smith v. Merial Ltd.*, No. 10-439, 2011 WL 2119100, at *7 (D.N.J. May 26, 2011) (to establish a breach of express warranty, the plaintiff need not prove privity).
Ohio – *Risner v. Regal Marine Indus., Inc.*, No. 1:11-cv-00191, 2013 WL 1758876, at *11 (S.D. Ohio Apr. 24, 2013) ("A number of Ohio courts have recognized that privity is not required to impose liability for breach of an express warranty."); *Johnson v. Monsanto Co.*, No. 11-02-02, 2002 WL 2030889, at *3 (Ohio Ct. App. Sept. 6, 2002) (denying summary judgment on breach-of-express warranty claim despite lack of privity); *C.W. Zumbiel Co. v. Reichhold Chems., Inc.*, No. C-950644, 1996 WL 400501, at *2 (Ohio Ct. App. June 5, 1996) (stating that "the requirement of privity of contract is no longer a generally recognized prerequisite to bringing a contractual action" for breach of express warranty).
Virginia – Va. Code Ann. § 8.2-318 ("Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages brought for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.").
Florida and Texas are undecided
Florida – *Compare T.W.M. v. Am. Med. Sys., Inc.*, 886 F. Supp. 842, 844 (N.D. Fla. 1995) (dismissing express warranty claim when plaintiff failed to allege contractual privity with defendant); *Weiss v. Johansen*, 898 So. 2d 1009, 1012 (Fla. Dist. Ct. App. 2005) ("[I]n order to

recover for the breach of a warranty either express or implied, the plaintiff must be in privity of contract with the defendant."), *Spolski Gen. Contractor, Inc. v. Jett-Aire Corp. Aviation Mgmt. of Cent. Fla., Inc.*, 637 So. 2d 968, 970 (Fla. Dist. Ct. App. 1994) (affirming directed verdict for defendant on express warranty claim because plaintiff was not in privity with defendant), *and Intergraph Corp. v. Stearman*, 555 So. 2d 1282, 1283 (Fla. Dist. Ct. App. 1990) ("Privity is required in order to recover damages from a seller of a product for breach of express or implied warranties."), *with Karhu v. Vital Pharm., Inc.*, No. 13-60768-CIV, 2013 WL 4047016, at *6 (S.D. Fla. Aug. 9, 2013) (holding that plaintiff adequately pled express warranty claim, despite lack of privity, when actual seller did not have relevant knowledge concerning the accuracy of scientific statements constituting warranty and the representation was made on the product's label and in advertisements directed toward the consumer), *Smith v. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1342-43 (S.D. Fla. 2009) (refusing to dismiss express warranty claim where actual seller did not have relevant knowledge concerning the accuracy of scientific statements constituting warranty, the representation was made on the product's label, and the plaintiff relied on the warranty when purchasing the product), *Am. Coach Lines of Orlando, Inc. v. N. Am. Bus Indus., Inc.*, No. 6:09-cv-1999, 2011 WL 653524, at *18 (M.D. Fla. Feb. 14, 2011) ("These cases and others stand for the proposition that a manufacturer, although not the ultimate seller of the product, may expressly warrant a product through 'direct contacts' with the buyer upon which the buyer relies in purchasing the product."), *and Rentas v. DaimlerChrysler Corp.*, 936 So.2d 747, 751 (Fla. Dist. Ct. App. 2006) (allowing express-warranty claim to proceed despite absence of privity and stating that "[t]his court and other Florida appellate courts have expressly enforced written warranties in suits brought under the [Magnuson–Moss Warranty Act] against manufacturers where privity did not exist between the manufacturer and the vehicle owner.").

Texas – *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 88 (Tex. 2004) ("[I]n *Nobility Homes of Texas, Inc. v. Shivers*, we held a downstream purchaser of a mobile home could bring implied warranty claims directly against a remote manufacturer, even though there was no privity of contract between them. While it appears we have never addressed the same issue regarding express warranties, several lower courts have applied the same rule in that context—express warranties pass with the goods."). *Compare U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 198 (Tex. App. 2003) ("We agree with the reasoning of the more recent cases and hold that privity of contract is not required in order to sustain a breach of express-warranty claim for purely economic losses."), *and Indust-Ri-Chem Lab., Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 287 (Tex. App. 1980) (applying *Nobility* in express warranty case and holding that "privity is not required where a manufacturer induces the purchase by furnishing samples to a middleman, knowing that the middleman will use the samples to induce sales of the product"); *with Tex. Processed Plastics, Inc. v. Gray Enters., Inc.*, 592 S.W.2d 412, 415 (Tex. App. 1979) ("[T]he rule [of privity] has evolved that in situations involving solely economic loss based upon breach of express warranty, privity of contract between the parties is required."); *Henderson v. Ford Motor Co.*, 547 S.W.2d 663, 667 (Tex. App. 1977) (affirming directed verdict on breach-of-express-warranty claim solely for economic loss when plaintiff lacked privity with defendant); *Scott v. Dorel Juvenile Grp., Inc.*, 773 F. Supp. 2d 664, 672 (N.D. Tex. 2011) ("Texas courts still generally require privity between the buyer and seller for recovery on breach of express warranty."), *rev'd in part on other grounds*, 456 F. App'x 450 (5th Cir. 2012).

California and Indiana require vertical privity unless the buyer relied on the warranty in purchasing the product
California – *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) ("The first [exception to the privity rule] arises when the plaintiff relies on written labels or advertisements of a manufacturer." (citing *Burr v. Sherwin Williams Co.*, 268 P.2d 1041 (Cal. 1954))); *Dei Rossi v. Whirlpool Corp.*, No. 2:12-CV-00125-TLN, 2015 WL 1932484, at *9 (E.D. Cal. Apr. 28, 2015) (in California, a plaintiff must adequately plead reliance or privity in order to succeed on a breach of express warranty claim); *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F. Supp. 3d 1306, 1335 (C.D. Cal. 2013) (noting that reliance is required where plaintiff did not purchase directly from the manufacturer); *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 546 (C.D. Cal. 2012) ("[I]n the absence of privity, California law requires a showing that a plaintiff relied on an alleged omission or misrepresentation."); *Coleman v. Bos. Sci. Corp.*, No. 1:10-cv-01968, 2011 WL 3813173, at *4 (E.D. Cal. Aug. 29, 2011) ("As a general rule, privity of contract is a required element of an express breach of warranty cause of action. However, privity is not an absolute requirement for express warranty claims under California law, because reliance on a seller's representations may provide the basis for an express warranty claim even absent privity."); *Fieldstone Co. v. Briggs Plumbing Prods., Inc.*, 62 Cal. Rptr. 2d 701, 708 n.10 (Cal. Ct. App. 1997) (privity not required if "the plaintiff's decision to purchase the product was made in reliance on the manufacturers' written representations in labels or advertising materials"). *But see McVicar v. Goodman Global, Inc.*, 1 F. Supp. 3d 1044, 1057 (C.D. Cal. 2014) (holding that plaintiffs' failure to allege that they saw manufacturer's representations was not fatal to express warranty claim asserted against remote manufacturer).
Indiana – *Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp.*, 514 N.E.2d 1299 (Ind. Ct. App. 1987) (recognizing an exception to the privity rule where a manufacturer made representations to a buyer in advertisements or on product labels and the buyer relied on those representations); *In re Elk Cross Timbers Decking Mktg.*, MDL No. 2577, 2015 WL 6467730, at *31 (D.N.J. Oct. 26, 2015) ("Even if Plaintiffs are correct that *Prairie Production* states the appropriate rule (that privity is not always required for express warranty claim under Indiana law), they have failed to plead any allegations supporting that an exception to this requirement exists here. Therefore, the Indiana Plaintiffs' express warranty cause of action will be dismissed without prejudice on this basis."); *Ryden v. Tomberlin Auto. Grp.*, No. 1:11-cv-1215, 2012 WL 4470266, at *2 (S.D. Ind. Sept. 27, 2012) (dismissing express warranty claim when plaintiff failed to plead that he relied on, or even saw, advertisements forming the basis of manufacturer's express warranty).

B. The Seven States Differ on Whether Reliance Is Required to Prove that an Affirmation Became Part of the "Benefit of the Bargain"

Indiana[1], New Jersey, and Virginia do not require reliance
Indiana – *Essex Grp., Inc. v. Nill*, 54 N.E.2d 503, 506-07 (Ind. Ct. App. 1992) ("[R]eliance is not an element of a breach of warranty claim").
New Jersey – *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 171 F.3d 818, 825 (3d Cir.

[1] Reliance is, however, required as an exception to the privity rule. *See* Part I.A, *supra*.

1999) (holding that "a promise is presumed to be a part of the basis of the bargain under New Jersey law once the buyer has become aware of the affirmation of fact or promise" (internal quotation marks, citation omitted)); *Cipollone v. Liggett Grp., Inc.*, 893 F.2d 541, 567-69 & n.34 (3d Cir. 1990) (holding that "a plaintiff effectuates the 'basis of the bargain' requirement of section 2-313 by proving that she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise," which the defendant may then rebut); *Smith*, 2011 WL 2119100, at *7 (holding that "traditional reliance" is not required; rather, to prove that the warranty formed part of the "basis of the bargain," the plaintiff need only show that the alleged warranty was "of a kind which naturally would induce the purchase").
Virginia – *Martin v. Am. Med. Sys., Inc.*, 116 F.3d 102, 105 (4th Cir. 1997) ("The express warranty inquiry focuses on what it is that the seller agreed to sell, and, absent clear proof that the parties did not intend their bargain to include the seller's description of the goods, that description is an express warranty."); *Yates v. Pitman Mfg., Inc.*, 514 S.E.2d 605, 607 (Va. 1999) ("An affirmation of fact is presumed to be a part of the bargain, and any fact that would remove such affirmation out of the agreement requires clear affirmative proof." (internal quotation marks omitted)); *Daughtrey v. Ashe*, 413 S.E.2d 336, 338 (Va. 1992) ("In our opinion, the 'part of the basis of the bargain' language of [Virginia] Code § 8.2-313(1)(b) does not establish a buyer's reliance requirement.").
Florida, Ohio, and Texas require reliance
Florida – *Hobco, Inc. v. Tallahassee Assocs.*, 807 F.2d 1529, 1533 (11th Cir. 1987) ("Under Florida law, an express warranty may arise only where justifiable reliance upon assertions or affirmations is part of the basis of the bargain."); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) ("The requirement that a statement be part of the basis of the bargain is essentially a reliance requirement . . . . The buyer's knowledge or absence of reliance will negate the existence of an express warranty." (internal quotation marks, citation omitted)); *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245, 250 (Fla. Dist. Ct. App. 1984) ("an express warranty is generally considered to arise only where the seller asserts a fact of which the buyer is ignorant prior to the beginning of the transaction, . . . and on which the buyer justifiably relies as part of the 'basis of the bargain" (internal quotation marks, citations omitted)).
Ohio – *Wagner v. Roche Labs.*, 709 N.E.2d 162, 164 (Ohio 1999) ("An express warranty is an affirmation of fact by the seller as to a product or commodity to induce the purchase thereof, on which affirmation the buyer relies in making the purchase." (quoting *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612 (Ohio 1958))).
Texas – *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 550 (5th Cir. 2003) (in rejecting certification of express-warranty claim, noting that "[t]he Texas Supreme Court has concluded that '"[b]asis of the bargain' loosely reflects the common-law express warranty requirement of reliance,' and that therefore an express warranty claim 'requires a form of reliance.'" (quoting *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997))); *Sw Bell Tel. Co. v. Mktg. on Hold, Inc.*, 308 S.W.3d 909, 921 (Tex. 2010) (to succeed on a claim for breach of express warranty under Texas law, Plaintiffs must show "some form of reliance" on the alleged warranty); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 & n.23 (Tex. 2002) ("Reliance is also not only relevant to, but an element of proof of, plaintiffs' claims of breach of express warranty (to a certain extent) . . . .").

California is split[2]
California – *Compare Weinstat v. Dentsply Int'l, Inc.*, 103 Cal. Rptr. 3d 614, 626-27 (Cal. Ct. App. 2010) (recognizing that the UCC creates a presumption that any affirmation of fact is made part of the basis of the bargain and that defendant must provide "clear affirmative proof" that the affirmation has been taken out of the agreement), *and Keith v. Buchanan*, 220 Cal. Rptr. 392, 397-98 (Cal. Ct. App. 1985) (concluding that "the concept of reliance has been purposefully abandoned" under the UCC), *with Williams v. Beechnut Nutrition Corp.*, 229 Cal. Rptr. 605, 608 (Cal. Ct. App. 1986) ("In order to plead a cause of action for breach of express warranty, one must allege the exact terms of the warranty, plaintiff's reasonable reliance thereon, and a breach of that warranty which proximately causes plaintiff injury.").

C. The Seven States Differ on Whether Notice Is Required to a Remote Manufacturer (e.g., Whirlpool)[3]

California, New Jersey, and Virginia do not require notice to a remote manufacturer
California – *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 900 (1963) (timely notice of a breach of an express warranty is not required where the action is against a manufacturer and is brought "by injured consumers against manufacturers with whom they have not dealt"); *Dorfman v. Nutramax Labs., Inc.*, No. 13CV0873 WQH (RBB); 2013 WL 5353043, at *16 (S.D. Cal. Sept. 23, 2013) ("[W]hen claims are against a defendant in its capacity as a manufacturer, not as a seller, plaintiff is not required to give notice." (quoting *Rosales v. FitFlop USA, LLC*, 882 F. Supp. 2d 1168, 1178 (S.D. Cal. 2012))); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1180 (C.D. Cal. 2010) ("[The notice] requirement is excused as to a manufacturer with which the purchaser did not deal.").
New Jersey – *Cipollone*, 683 F. Supp. at 1498 (predicting that the New Jersey Supreme Court would not require notice against a "manufacturer who was not the immediate seller of the product"), *rev'd on other grounds*, 893 F.2d 541 (3d Cir. 1990), *rev'd in part on other grounds and aff'd in part on other grounds*, 505 U.S. 504 (1992); *see also Coyle v. Hornell Brewing Co.*, No. Civ. 08-02797 (JBS), 2010 WL 2539386, at *6 (D.N.J. June 15, 2010) ("[T]his Court has predicted more than once that the New Jersey Supreme Court would not require a buyer to give notice of breach of warranty to a remote manufacturer who is not the immediate seller under Section 2–607 before commencing suit."); *Strzakowlski v. Gen. Motors Corp.*, No. Civ.A. 04-4740, 2005 WL 2001912, at *3 (D.N.J. Aug. 16, 2005) ("[U]nder *Cipollone*, no notice must be given to a manufacturer who is not the immediate seller in an express warranty case.").
Virginia – *Kerr v. Hunter Div.*, Nos. 78-L-491, 78-L-492, 1981 WL 394232, at *8 (Va. Cir. Ct. Feb. 23, 1981) ("The buyer need only give notice to his seller, not to the remote manufacturers."); *cf. Yates*, 514 S.E.2d at 607 (holding that "buyer" for purposes of UCC notice

[2] As with Indiana, reliance is required against a remote manufacturer. *See* Part I.A, *supra*.

[3] All seven states require that notice be given to the "seller." Cal. Com. Code § 2607(3)(A); Fla. Stat. Ann. § 672.607(3)(a); Ind. Code 26-12-607(3)(a); N.J. Stat. Ann. § 12A:2-607(3)(a); Ohio Rev. Code Ann. § 1302.65(C)(1); Tex. Bus. Code. Ann. § 2.607; Va. Code Ann. § 8.2-607(3)(a).

requirement refers only to "those who buy or contract to buy goods from a seller," such that injured plaintiff who did not purchase product was not required to give statutory notice).
Florida, Ohio, and Texas all require notice to remote manufacturer
Florida – *Jovine v. Abbott Labs., Inc.*, 795 F. Supp. 2d 1331, 1340 (S.D. Fla. Apr. 12, 2011) ("Here, Plaintiff does not allege that he ever notified Defendants of the alleged breach of a warranty. Plaintiff, therefore, has failed to state a claim for breach of express warranty."); *Nichols v. Wm. Wrigley Jr. Co.*, No. 10-80759-CIV, 2011 WL 181458, at *4 (S.D. Fla. Jan. 19, 2011) (holding that the plaintiff failed to state an express-warranty claim under Florida law because he did not allege that notice of breach was given to seller).
Ohio – *St. Clair v. Kroger Co.*, 581 F. Supp. 2d 896, 902 (N.D. Ohio 2008) (dismissing claim for failure to plead pre-suit notice and rejecting arguments that filing of lawsuit was sufficient notice or satisfied by the defendant's "actual knowledge" of its breach); *Jones v. Davenport*, No. 18162, 2001 WL 62513, at *8 (Ohio Ct. App. Jan. 26, 2001) (holding that "[b]ecause Jones failed to notify Snyder of the breach after he discovered, or at least should have discovered the color discrepancy, he is barred from recovery under an express warranty theory").
Texas – *U.S. Tire-Tech., Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 199 (Tex. App. 2003) ("[We] hold that, under section 2.607(c)(1), a buyer is required to give notice of an alleged breach of warranty to a remote manufacturer.").
Indiana has not directly addressed the issue, but would likely require notice to manufacturer
Ind. Code Ann. § 26-1-2-607(3)(a) (failure to provide timely notice results in a waiver of any claim for breach of warranty).

D. The Seven States Differ as to Whether the Energy Star Logo Can Be Deemed an "Affirmation of Fact"

California and New Jersey courts have expressly held that the Energy Star logo may constitute an express warranty
California – *Dei Rossi v. Whirlpool Corp.*, No. 2:12-cv-00125, 2013 WL 5781673, at *4 (E.D. Cal. Oct. 25, 2013) (Nunley, J.) (finding that the Energy Star logo "is an affirmation of fact that the product adheres to the Energy Star [program], and [that it] sufficient described the product as meeting the Energy Star requirements."). *But see Rossi v. Whirlpool Corp.*, No. 12-CV-125-JAM-JFM, 2013 WL 1312105, at *3-4 (E.D. Cal. Mar. 28, 2013) (Mendez, J.) (dismissing express-warranty claim after finding that Energy Star label does not constitute an express warranty); Tr. of Oral Arg. at 12, *Dei Rossi*, No. 12-CV-125-JAM-JFM (E.D. Cal. Sept. 5, 2012) (Mendez, J.) ("If you are relying on the Energy Star sticker itself, as a matter of law you're going to have problems with that. The sticker itself contains no affirmation of any specific fact."), *with.*
New Jersey – *Dzielak v. Whirlpool Co.*, 26 F. Supp. 3d 304, 325 (D.N.J. 2014) ("Applying New Jersey law, I find that the Amended Complaint adequately alleges that the Energy Star logo would be understood by consumers as an affirmation of fact or a promise regarding the energy efficiency of the washing machines—namely, that the machines met the efficiency standards set forth as part of the Energy Star program."); *Avram v. Samsung Elecs. Am., Inc.*, No. CIV. 2:11-6973 KM, 2013 WL 3654090, at *9 (D.N.J. July 11, 2013) ("Applying New Jersey law, I find

that the Complaints adequately allege that the Energy Star logo would be understood by consumers as an affirmation of fact or a promise regarding the energy efficiency of the refrigerators.").
Ohio has rejected the Energy Star logo as creating an express warranty
Savett v. Whirlpool Corp., No. 12 CV 310, 2012 WL 3780451, at *9 (N.D. Ohio Aug. 31, 2012) (finding that the Energy Star logo is not an "affirmation of fact or promise" sufficient to create an express warranty under Ohio law because "[u]nlike traditional express warranties where unambiguous promises or factual assertions are made, which are clearly understood on their own footing, any meaning conveyed by the logo requires independent knowledge")
Indiana may reject the Energy Star logo as an express warranty without evidence that both Whirlpool and buyers agreed on the logo's meaning
Taurus Holding Co. of Am., Inc. v. Thompson, No. 97-1590, 1997 WL 724513, at *24 (7th Cir. Nov. 17, 1997) (holding that "[t]he buyer has the burden of establishing that both parties understood and agreed to the same thing, before an express warranty can be proven" (citing *Richards v. Goerg Boat & Motors, Inc.*, 384 N.E.2d 1084, 1095 (Ind. Ct. App. 1979))).
The law is unsettled in Florida, Texas, and Virginia

II. BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

A. The Four States Differ on Whether Notice Is Required to a Remote Manufacturer (e.g., Whirlpool)

New Jersey and Virginia do not require notice to a remote manufacturer
New Jersey – *Cipollone*, 683 F. Supp. at 1498 (predicting that the New Jersey Supreme Court would not require notice against a "manufacturer who was not the immediate seller of the product"), *rev'd on other grounds*, 893 F.2d 541 (3d Cir.1990), *rev'd in part on other grounds and aff'd in part on other grounds*, 505 U.S. 504 (1992); *see also Coyle*, 2010 WL 2539386, at *6 ("We . . . find that notice of breach of either express or implied warranty is not required in an action against a remote manufacturer who is not the immediate seller of a product.").
Virginia – *Kerr*, 1981 WL 394232, at *5, 8 ("The buyer need only give notice to his seller, not to the remote manufacturers."); *cf. Yates*, 514 S.E.2d at 607 (holding that "buyer" for purposes of UCC notice requirement refers only to "those who buy or contract to buy goods from a seller," such that injured plaintiff who did not purchase product was not required to give statutory notice).
Texas requires notice to remote manufacturer
Texas – *U.S. Tire-Tech., Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 199 (Tex. App. 2003) ("We . . . hold that, under section 2.607(c)(1), a buyer is required to give notice of an alleged breach of warranty to a remote manufacturer.").
Indiana likely requires notice to remote manufacturer, although no Indiana court has addressed the issue
Ind. Code Ann. § 26-1-2-607(3)(a) (failure to provide timely notice results in a waiver of any

claim for breach of warranty); *Agrarian Grain Co. v. Meeker*, 526 N.E.2d 1189, 1193 (Ind. Ct. App. 1988) (recognizing that "notice is a substantive condition precedent to recovery" for breach of the implied warranty of merchantability).

B. The Four States Differ on Whether a Disclaimer of Implied Warranties Must Be Provided Before the Sale Is Completed

Indiana and Virginia require that the disclaimer be provided to the buyer prior to sale
Indiana – *Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 948 (Ind. Ct. App. 1982) ("A modification of warranty or limitation of remedy contained in a manufacturer's manual received by purchaser subsequent to sale has not been bargained for and thus does not limit recovery for implied or express warranties which arose prior to sale.").
Virginia – *Williams v. Gradall Co.*, 990 F. Supp. 442, 445 (E.D. Va. 1998) ("Although Va.Code § 8.2–316 affords a seller a way to disclaim warranties, they may not be disclaimed for the first time upon delivery of the goods promised without an agreed modification of the contract." (citation omitted)).
New Jersey and Texas do not require that the disclaimer be provided prior to sale
New Jersey – *Skalski v. Elliot Equip. Co.*, No. 08-2686 (JBS/AMD), 2010 WL 891582, at *5 (D.N.J. Mar. 9, 2010) (holding that a conspicuous disclaimer is effective to limit or waive the implied warranty of merchantability even when not presented to the buyer until the product was delivered, after payment was made).
Texas – *Coppock v. Nat'l Seating & Mobility, Inc.*, 121 F. Supp. 3d 661, 667 (W.D. Tex. 2015), *appeal dismissed* (Dec. 1, 2015) ("The Court sees no reason why waiver cannot apply to the circumstances of this case" where the disclaimer was provided at delivery or repair).

III. UNJUST ENRICHMENT

A. The Seven States Differ on What Type of State-of-Mind Evidence, if Any, Is Required to Prove a Claim for Unjust Enrichment

California[4] requires proof that the purchaser did not get what he/she expected

[4] The most persuasive authorities hold that California does not recognize unjust enrichment as a cause of action. *See Hendricks v. StarKist Co.*, 30 F. Supp. 3d 917, 933-34 (N.D. Cal. 2014); *Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1196 (N.D. Cal. 2014); *Vicuna v. Alexia Foods, Inc.*, 2012 WL 1497507, at *2-3 (N.D. Cal. Apr. 27, 2012); *In re Toyota Motor Corp. Unintended Acceleration Prods. Liab. Cases*, 754 F. Supp. 2d 1145, 1172, 1194 (C.D. Cal. 2010); *Melchior v. New Line Prod., Inc.*, 106 Cal. App. 4th 799, 793 (Cal. Ct. App. 2003). However, there are other courts that have concluded that a plaintiff can state a claim for unjust enrichment. *See, e.g.*, *AFCM, Inc. v. Elite Global Farming & Logistics, Inc.*, 2012 WL 1309168,

Peterson v. Cellco P'ship, 80 Cal. Rptr. 3d 316, 323 (Cal. Ct. App. 2008) ("There is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected." (quoting *Comet Theatre Enters., Inc. v. Cartwright*, 195 F.2d 80, 83 (9th Cir. 1952))); *see also Monet v. Chase Home Fin., LLC*, No. C 10-0135 RS, 2010 WL 2486376, at *2-3 (N.D. Cal. June 16, 2010) ("The fact that one person benefits another is not, by itself, sufficient to require restitution. . . . Instead, the person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it." (internal quotation marks and citations omitted)).
Florida and Texas require proof of reliance or other state-of-mind evidence
Florida – *Green v. McNeil Nutritionals, LLC*, No. 2004-0379-CA, 2005 WL 3388158, at *9 (Fla. Cir. Ct. Nov. 16, 2005) ("Unjust enrichment may not be appropriate if a consumer did not rely on the alleged deceptive acts. It would be unjust to compensate a consumer under this equitable theory if the consumer purchased the product without relying on the alleged deceptive practices."); *Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-cv-81373-DMM, 2013 WL 139913, at *10 (S.D. Fla. Jan. 10, 2013) (claim for unjust enrichment requires the court to "examine the state of mind of each borrower, including awareness, expectations, and conduct").
Texas – *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 206-07 (Tex. 2007) (denying certification on unjust enrichment claim because theory of recovery required "individualized inquiry into the state of mind of each plaintiff" despite the fact that each class member was subjected to a "uniform telemarketing effort with virtually indistinguishable telemarketing scripts" (internal quotation marks omitted)); *cf. Best Buy Co. v. Barrera*, 248 S.W.3d 160, 163-64 (Tex. 2007)) (in equitable claim for "money had and received," holding that, even in situations where the benefit received, i.e., the price paid by class members to the defendant, the defendant is "entitled to inquire into individual class members' knowledge and understanding about the disputed charge in order to demonstrate in whose favor the equities weighed").
Indiana does not require state-of-mind evidence where there is evidence of a uniform fraud
ConAgra, Inc. v. Farrington, 635 N.E.2d 1137, 1143 (Ind. Ct. App. 1994) (concluding that the predominance requirement was satisfied when plaintiffs showed that defendant made misleading and/or fraudulent statements to which all class members were exposed).
The law is unsettled in New Jersey and Ohio

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at *6 (N.D. Cal. Apr. 16, 2012). While Defendants maintain that California does not recognize unjust enrichment as an independent cause of action, the above chart analysis is based on California law as summarized by those minority of courts recognizing the claim.

New Jersey – *Compare VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J. 1994) ("The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights."), *and Kleinman v. Merck & Co.*, 8 A.3d 851, 863 (N.J. Super. Ct. Law Div. 2009) ("Retention without payment is unjust if, had "the true facts [been] known to the plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred." (quoting *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332 (N.J. Super. Ct. App. Div. 1966))), *with In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 72-73 (D.N.J. 2009) (certifying unjust enrichment class because "whether Plaintiffs had any legally-cognizable expectation" of the particular feature at issue was a "question of contractual interpretation . . . common to all members of the putative class).
Ohio – *Compare Chesner v. Stewart Title Guar. Co.*, No. 1:06CV00476, 2008 WL 553773, at *14 (N.D. Ohio Jan. 23, 2008) (denying certification on unjust enrichment claim based on fraudulent nondisclosure because the "cause of action necessarily involves examination of the individual factual circumstances of every transaction"), *with Lucio v. Safe Auto Ins. Co.*, 919 N.E.2d 260, 267-68 (Ohio Ct. App. 2009) (holding that predominance requirement met for unjust enrichment claim when plaintiff alleged common scheme of fraudulent activity).
Virginia has not addressed whether proof of reliance or expectation is required

B. Florida Differs from the Other States on Whether the Existence of an Adequate Legal Remedy Precludes a Claim for Unjust Enrichment

Under Florida law, the availability of non-contractual legal remedies will not preclude an unjust enrichment claim
State Farm Mut. Auto. Ins. Co. v. Physicians Injury Care Ctr., Inc., 427 F. App'x 714, 722 (11th Cir. 2011) ("It is generally true that equitable remedies are not available under Florida law when adequate legal remedies exist. . . . However, that rule does not apply to unjust enrichment claims."), *rev'd in part on other grounds sub nom. State Farm Mut. Auto. Ins. Co. v. Williams*, 563 F. App'x 665 (11th Cir. 2014); *Marty v. Anheuser-Busch Cos.*, 43 F. Supp. 3d 1333, 1349 (S.D. Fla. 2014) (refusing to dismiss unjust enrichment claim even though plaintiffs had adequate legal remedy in the form of state law consumer protection claims); *Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 400 (Fla. Dist. Ct. App. 1998) ("Although Appellees argue that Appellant has adequate legal remedies and therefore no equitable relief can be granted, this notion does not apply to unjust enrichment claims . . . .").
Under California, Indiana, New Jersey, Ohio, Texas, and Virginia law, the availability of non-contractual legal remedies precludes an unjust enrichment claim
California – *In re Facebook PPC Advertising Litig.*, 709 F. Supp. 2d 762, 770 (N.D. Cal. 2010) ("[T]he remedy for unjust enrichment applies only in the absence of an adequate remedy at law.").
Indiana – *King v. Terry*, 805 N.E.2d 397, 400 (Ind. Ct. App. 2004) (recognizing that a plaintiff

may not pursue an equitable remedy, including unjust enrichment, "when there is a remedy at law"); *State ex rel. Zoeller v. Pastrick*, 696 F. Supp. 2d 970, 981 n.7 (N.D. Ind. 2010) (stating that availability of remedies under RICO, Indiana's "little RICO" statute, and the Crime Victims Act precluded plaintiff from recovering under a theory of unjust enrichment).
New Jersey – *Duffy v. Charles Schwab & Co.*, 123 F. Supp. 2d 802, 814 (D.N.J. 2000) ("Restitution for unjust enrichment is an equitable remedy, available only when there is no adequate remedy at law."); *Nat'l Amusements, Inc. v. N.J. Turnpike Auth.*, 619 A.2d 262, 267 (N.J. Super. Ct. Law Div. 1992) (granting summary judgment on unjust enrichment claim in part because plaintiff had adequate legal remedies through claim for inverse condemnation).
Ohio – *RFC Capital Corp. v. EarthLink, Inc.*, No. 03AP-735, 2004 WL 2980402, at *19 (Ohio Ct. App. Dec. 23, 2004) ("[W]here damages may be available for breach of contract or in tort, a plaintiff cannot also invoke the equitable remedy for unjust enrichment.").
Texas – *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 770 (Tex. 2005) ("[A]n adequate legal remedy may render equitable claims of unjust enrichment and equitable defenses of voluntary-payment unavailable."); *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) (holding unjust enrichment inapplicable when parties have express contract covering the subject matter of the parties' dispute); *R.M. Dudley Constr. Co. v. Dawson*, 258 S.W.3d 694, 704 (Tex. App. 2008) (affirming directed verdict on unjust enrichment claim when claimant had adequate remedy through common-law claim of conspiracy to breach fiduciary duty).
Virginia – *R.M. Harrison Mech. Corp. v. Decker Indus., Inc.*, No. CL08-193, 2008 WL 10669311, at *7 (Va. Cir. Ct. Aug. 28, 2008) ("For a claim of unjust enrichment to stand, the plaintiff must have no adequate remedy at law against the demurring defendant."); *Elegant Homes of Va., Inc. v. Boberski*, No. CL05-10,158, 2006 WL 2949005, at *1 (Va. Cir. Ct. Apr. 13, 2006) ("[T]he 'unjust' in 'unjust enrichment' refers to the lack of the plaintiff having an adequate remedy at law for any wrong *perpetrated on him by the defendant*." (internal quotation marks omitted)).

C. The States Differ on the Degree of Wrongful Conduct Required

Indiana and Ohio do not require proof of wrongful conduct
Indiana – *Dominiack Mech., Inc. v. Dunbar*, 757 N.E.2d 186, 190-91 (Ind. Ct. App. 2001) (holding that plaintiff stated claim for unjust enrichment by alleging that defendants benefited from proceeds of third-party's embezzlement, despite failure to allege defendants were complicit in embezzlement)).
Ohio – *F.D.I.C. v. Jeff Miller Stables*, 573 F.3d 289, 295 (6th Cir. 2009) ("Ohio law contains no requirement that a party have acted improperly for an action based upon quasi-contract to succeed. Passive retention of a benefit where such retention is "unconscionable" is enough to trigger liability." (citing *Reisenfeld & Co. v. Network Grp., Inc.*, 277 F.3d 856, 860 (6th Cir. 2002))); *Cosby v. Cosby*, 750 N.E.2d 1207, 1213 (Ohio Ct. App. 2001) ("There is no evidence that Bonnie Cosby acquired her right to Carel Cosby's death benefit through fraud or other

misconduct. However, the grounds for a claim of unjust enrichment are not that narrow. Unjust enrichment also results from a failure to make restitution where it is equitable to do so. That may arise when a person has passively received a benefit which it would be unconscionable for him to retain." (citation omitted)), *rev'd on other grounds*, 773 N.E.2d 516 (Ohio 2002).

Texas likely requires proof of fraud, duress, or the taking of undue advantage

Heldenfels Bros., Inc. v. City of Corpus Christi, 832 S.W.2d 39, 41-42 (Tex. 1992) (recognizing that "a party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage" and that "[u]njust enrichment is not a proper remedy merely because it might appear expedient or generally fair that some recompense be afforded for an unfortunate loss to the claimant, or because the benefits to the person sought to be charged amount to a windfall" (internal quotation marks omitted)); *Thompson v. Bayer Corp.*, No. 4:07CV00017 JMM, 2009 WL 362982, at *5 (E.D. Ark. Feb. 12, 2009) (noting that Texas law allows recovery for unjust enrichment only upon a showing of misconduct or fault on the party of the defendant). *But see Huggins v. Royalty Clearinghouse, Ltd.*, 121 F. Supp. 3d 646, 659 (W.D. Tex. 2015) (unjust enrichment occurs when "the person sought to be charged . . . has passively received [a benefit] that [] would be unconscionable to retain"); *Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 927 (Tex. App. 1994) (because unjust enrichment is an equitable remedy, it "does not depend upon the existence of a wrong").

Virginia limits unjust enrichment to claims to circumstances involving undue advantage or other wrongful conduct

Muehlbauer v. Gen. Motors Corp., No. 05 C 2676, 2009 WL 874511, at *6 (N.D. Ill. Mar. 31, 2009) (unjust enrichment under Virginia law is "limited" to claims "arising from: money paid by mistake; failed consideration; money got through imposition; extortion; oppression; or any other undue advantage taken of the claiming party's situation, where the advantage is contrary to laws made for the protection of persons under those circumstances." (quoting *Qualichem, Inc. v. Xelera, Inc.*, 2003 WL 23162331, at *3 (Va. Cir. Ct. June 19, 2003))).

California, Florida, and New Jersey courts have not addressed the type of wrongful conduct, if any, required

IV. PLAINTIFFS' NINE STATUTORY CLAIMS UNDER THE VARIOUS STATES' CONSUMER PROTECTION ACTS

For convenience, Plaintiffs' nine statutory claims are listed below, together with the abbreviations used to describe them in this section:

State	Statute	Abbreviation
California	Consumer Legal Remedies Act	CLRA
California	Unfair Competition Law	UCL

California	False Advertising Law	FAL
Florida	Florida Deceptive and Unfair Trade Practices Act	FDUTPA
Indiana	Indiana Deceptive Consumer Sales Act	IDCSA
New Jersey	Consumer Fraud Act	NJCFA
New Jersey	Truth-in-Consumer Contract, Warranty and Notice Act	TCCWNA
Ohio	Ohio Consumer Sales Practices Act	OCSPA
Texas	Texas Deceptive Trade Practice Act	TDTPA

A. The Nine Statutes Differ on Whether Proof of Reliance Is Required

The IDCSA and TDTPA require reliance
IDCSA (Indiana) – Ind. Code Ann. § 24-5-0.5-4(a) ("A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered . . . ." (emphasis added)).
TDTPA (Texas) – Tex. Bus. & Com. Code Ann. § 17.50(a)(1)(B) ("A consumer may maintain an action" based on the "use or employment by any person of a false, misleading, or deceptive act or practice that is" listed in subsection (a)(1)(A) and "relied on by a consumer to the consumer's detriment." (emphasis added)); *Henry Schein*, 102 S.W.3d at 693-94 (denying class certification as individual reliance is an element of "laundry list" TDTPA claims and plaintiffs had failed to show that individual issues of reliance did not preclude a finding of predominance); *McLaughlin, Inc. v. Northstar Drilling Techs., Inc.*, 138 S.W.3d 24, 30 (Tex. App. 2004) (upholding trial court's judgment on TDTPA counterclaim where record established defendant had relied on the recommendation of a friend rather than any of the plaintiff's promotional literature). Reliance is also an essential element of TDTPA claims based on a breach of express or implied warranties. *See Ackermann v. Wyeth Pharm.*, 471 F. Supp. 2d 739, 744 (E.D. Tex. 2006), *aff'd*, 526 F.3d 203 (5th Cir. 2008). Although reliance is not an element of a TDTPA claim that is based on an alleged unconscionable act, *see Mays v. Pierce*, 203 S.W.3d 564, 572 (Tex. App. 2006) ("A plaintiff need not prove reliance to establish a claim [under the TDTPA] based on unconscionability."), claims ostensibly based on unconscionable acts but in actuality based on alleged misrepresentations, as here, still require reliance, *see Robinson v. Match.com, L.L.C.*, Nos. 3:10-CV-2651-L, 3:11-CV-1354-L, 3:11-CV-1913-L, 3:11-CV-02319-L, 3:11-CV-02322-L, 3:11-CV-02323-L, 2012 WL 5007777, at *8-10 (N.D. Tex. Oct. 17, 2012) (noting that despite plaintiffs' claims for unconscionable conduct, all alleged claims related back to alleged false or misleading practices under the laundry list and should require proof of reliance), *aff'd sub nom. Malsom v. Match.com, L.L.C.*, 540 F. App'x 412 (5th Cir. 2013).
The CLRA, UCL, and FAL require reliance, but that element may be inferred if the representation was "material"
CLRA (California) – *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 969 & n.24 (S.D. Cal. 2012) (for fraud-based claims brought under California's three consumer protection statutes, including the CLRA, "actual reliance" must be shown; in

addition, for claims brought under the CLRA, "each class member must present actual injury"); *see also In re Steroid Hormone Prod. Cases*, 104 Cal. Rptr. 3d 329, 337 (Cal. Ct. App. 2010) ("The CLRA claim requires a different analysis than the UCL claim, because the CLRA requires a showing of actual injury as to each class member."). Actual reliance is presumed, or at least inferred, when the representation or omission is material. *In re Sony*, 903 F. Supp. 2d at 969.
UCL (California) – *In re Tobacco II Cases*, 93 Cal. Rptr. 3d 559, 565 (Cal. 2009) (concluding that a class representative "proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions"); *see also Kwikset Corp. v. Super. Ct.*, 129 Cal. Rptr. 3d 741, 754 (Cal. 2011) (same). Actual reliance is presumed, or at least inferred, when the representation or omission is material. *In re Sony*, 903 F. Supp. 2d at 969.
FAL (California) – *Kwikset Corp.*, 129 Cal. Rptr. 3d at 753 (noting that a plaintiff's economic injury come "as a result of" the unfair competition or a violation of the false advertising law, and the "phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection or reliance on the alleged misrepresentation" (citation omitted)). Actual reliance is presumed, or at least inferred, when the representation or omission is material. *In re Sony*, 903 F. Supp. 2d at 969.
The OCSPA requires a plaintiff to be at least "aware" of the representation
In re Porsche Cars N. Am., Inc., 880 F. Supp. 2d 801, 868 (S.D. Ohio 2012) (concluding that "Plaintiffs bringing OCSPA claims must allege that the defendant performed an act or omission that was unfair or deceptive, and that the alleged act 'impacted [the plaintiffs'] decision to purchase the item at issue'" (quoting *Temple v. Fleetwood Enters., Inc.*, 133 F. App'x. 254, 265 (6th Cir. 2005))). Regarding affirmative conduct, "a plaintiff must allege that he 'saw or was . . . aware of the alleged misrepresentations at any time before or during the purchase of the [allegedly defective product].'" *Id.* at 870 (alterations in original) (citation omitted).
The FDUTPA, NJCFA, and TCCWNA do not require reliance
FDUTPA (Florida) – *Rollins, Inc. v. Butland*, 951 So. 2d 860, 883 (Fla. Dist. Ct. App. 2006) ("[A] party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue." (citation omitted)); *see also Davis v. Powertel, Inc.*, 776 So. 2d 971, 973 (Fla. Dist. Ct. App. 2000) ("However, we conclude that there is a critical difference between a deceptive trade practice claim and a claim of fraud. A party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.").
NJCFA (New Jersey) – *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641, 651 (D.N.J. 2013) (noting that reliance is required under a common law claim of fraud in New Jersey, but that "consumer fraud" under the NJCFA "requires only proof of a causal nexus" (citation omitted)); *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 366 (N.J. 1997) (stating that the NJCFA "does not require proof of reliance").
TCCWNA (New Jersey) – *Mattson v. Aetna Life Ins. Co.*, 124 F. Supp. 3d 381, 392-93 (D.N.J. 2015) (listing the elements of a TCCWNA claim and noting that the TCCWNA "only bolsters rights established by other laws; it does not create any new consumer rights").

B. The Nine Statutes Differ on Whether Materiality Is Required

The CLRA, TDTPA, and OSCPA Require Materiality
CLRA (California) –*In re Vioxx Class Cases*, 103 Cal. Rptr. 3d 83, 94-95 (Cal. Ct. App. 2009) (stating that class-wide causation may be established by materiality, meaning that, "[i]f the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class"); *see also Johnson v. Harley-Davidson Motor Co. Grp., LLC*, 285 F.R.D. 573, 581 (E.D. Cal. 2012) (in a case about motorcycles giving off excessive heat, denying certification of a CLRA claim, in part, because "there are numerous individualized issues as to whether the reasonable consumer purchasing one of Defendants' motorcycles would find the excessive heat material"); *Webb v. Carter's Inc.*, 272 F.R.D 489, 502 (C.D. Cal. 2011) (noting that "Defendants have put forth persuasive evidence that materiality and reliance would vary from consumer to consumer, such that the reasonable consumer standard cannot be applied").
TDTPA (Texas) – *Church & Dwight Co. v. Huey*, 961 S.W.2d 560, 567 (Tex. App. 1997) (listing the elements of a TDTPA claim and noting that "[t]he misrepresentation must be of a material fact"); *Milt Ferguson Motor Co. v. Zeretzke*, 827 S.W.2d 349, 355 (Tex. App. 1991) (describing that the "general objective" of certain subdivisions of the TDTPA "is to ensure that descriptions of goods or services offered for sale are accurate" and that misrepresentations, "so long as they are of a material fact and not merely 'puffing' or opinion," are actionable) (quoting *Pennington v. Singleton*, 606 S.W.2d 682, 688 (Tex. 1980)); *McCrea v. Cubilla Condo. Corp. N.V.*, 685 S.W.2d 755, 759 (Tex. App. 1985) ("A misrepresentation must be such that it constitutes a producing cause of damages. To do this the representation must be material. A material fact is one which causes a party to enter into the transaction.").
OCSPA (Ohio) – *Reeves v. PharmaJet, Inc.*, 846 F. Supp. 2d 791, 798 (N.D. Ohio 2012) ("To establish a prima facie claim under the OCSPA, a plaintiff must 'show a material misrepresentation, deceptive act or omission' that impacted his decision to purchase the item at issue." (emphasis added) (citing *Temple v. Fleetwood Enters., Inc.*, 133 F. App'x. 254, 265 (6th Cir. 2005))); *see also Richards v. Beechmont Volvo*, 711 N.E.2d 1088, 1090 (Ohio Ct. App. 1998) ("In order to be deceptive, and therefore actionable, a seller's act must not only be at variance with the truth but must also concern a matter that is or is likely to be material to a consumer's decision to purchase the product or service involved." (citation omitted)).
The FDUTPA and IDCSA Likely Require Materiality
FDUTPA (Florida) – Defendants have found no case law affirmatively holding that materiality is required under the FDUTPA. However, the FDUTPA is patterned after the Federal Trade Commission Act [FTCA], and the FDUTPA states that federal precedent interpreting the FTCA, including the Federal Trade Commission's interpretations, should be given "great weight": "It is the intent of the Legislature that . . . due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to . . . the [FTCA] . . . ." Fla. Stat. Ann. § 501.204(2). The Federal Trade Commission, construing the FTCA, "will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." *In re Cliffdale Assocs., Inc.*, No. 9156, 1984 WL 565319, at *37 (F.T.C. Mar. 23, 1984); *see also F.T.C. v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2012) (noting that, under the FTCA, a representation "is

material if likely relied upon by a reasonable prospective purchaser"), *aff'd sub nom. F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323 (11th Cir. 2013). In addition, Florida courts have discussed materiality in the context of false advertising under the Lanham Act, stating that, "[i]n order to establish materiality, the plaintiff must demonstrate that the defendant's deception is likely to influence the purchasing decision." *Suntree Techs., Inc. v. EcoSense Int'l, Inc.*, 802 F. Supp. 2d 1273, 1288 (M.D. Fla. 2011) (quoting *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1319 (11th Cir. 2010), *aff'd*, 693 F.3d 1338 (11th Cir. 2012)).
IDCSA (Indiana) – *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 332-33 (Ind. 2013) (noting that the IDCSA requires a "representation of fact," which "looks to the same criterion that distinguishes an actionable warranty from non-actionable puffing" (citing *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 868 (7th Cir. 1999))).
There is a split of authority as to whether the NJCFA—and a TCCWNA claim based on a NJCFA violation—requires materiality
Compare Mango v. Pierce-Coombs, 851 A.2d 62, 69 (N.J. Super. Ct. App. Div. 2004) (stating that "an affirmative misrepresentation is one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase" (emphasis added) (citation omitted)), *and Mladenov v. Wegmans Food Mkts., Inc.*, 124 F. Supp. 3d 360, 373 (D.N.J. 2015) (citing *Mango* for the proposition that an affirmative representation must be "material to the transaction"), *and Mason v. Coca-Cola Co.*, 774 F. Supp. 2d 699, 703 (D.N.J. 2011) (same), *with Leon v. Rite Aid Corp.*, 774 A.2d 674, 678 (N.J. Super. Ct. App. Div. 2001) (concluding that, "when a plaintiff's claim is that there was an affirmative act such as fraud or deception, it is not necessary that plaintiff show either defendant's knowledge or intent or that the misrepresentation was of a material fact").
The UCL and FAL do not require materiality
In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig., 790 F. Supp. 2d 1152, 1168 (C.D. Cal. 2011) (materiality is not required but reliance is, and a "presumption of reliance" for UCL claims "arises wherever there is a showing that the misrepresentation was material" (quoting *In Re Tobacco II*, 207 P.3d at 39)).

C. The Nine Statutes Differ on Whether Scienter Is Required and the Standard for Proving It

Proof of intent to mislead is required for an IDCSA "incurable" claim, an OCSPA unconscionable-act claim, and certain of TDTPA's "laundry list" deceptive acts
IDSCA (Indiana)[5] – Ind. Code Ann. § 24-5-0.5-2(8) (defining an "incurable deceptive act" as "done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead" (emphasis added)); *see also McKinney v. State*, 693 N.E.2d 65, 68 (Ind. 1998) ("An incurable deceptive act means a deceptive act done by a supplier as part of a scheme, artifice, or device

[5] Plaintiffs allege that Defendants' acts are "incurable." (2d Am. Compl. ¶ 244.) They cannot back away from this position, as the statute requires written notice for any non-incurable act prior to bringing suit—which Plaintiff Beyer failed to do. Ind. Code Ann. § 24-5-0.5-5.

with intent to defraud or mislead. Intent to defraud or mislead is thus clearly an element of an incurable deceptive act." (internal quotation marks, citation omitted)) ; *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 790 (7th Cir. 2011) (granting summary judgment on "incurable" IDCSA claim where plaintiff failed to produce evidence of intent to deceive).
OCSPA (Ohio) – *Thomas v. Nat'l Coll. of Va., Inc.*, 901 F. Supp. 2d 1022, 1030 (S.D. Ohio 2012) ("[S]cienter is a necessary element and must be proven in order to find an act unconscionable under [Ohio Rev. Code Ann.] § 1345.03."); *Hamilton v. Ball*, 7 N.E.3d 1241, 1254 (Ohio Ct. App. 2014) (noting that "proof of knowledge" is required to prove an unconscionable act under [Ohio Rev. Code Ann. §] 1345.03).
TDTPA (Texas) – Intent is an element of some, but not all, of the "laundry list" violations found in the TDTPA. *See Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985) (noting that certain of the 23 "laundry list" claims found in the TDTPA require proof of intent, while others are objective). Here, Plaintiffs' allegation that Whirlpool failed to disclose information "with the intent to induce consumers to purchase or lease the appliances" contains a scienter element. *See* Tex. Bus. & Com. Code Ann. § 17.46(b)(24) (a false, misleading, or deceptive practice includes "failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed" (emphasis added)); *see also Sergeant Oil & Gas Co. v. Nat'l Maint. & Repair, Inc.*, 861 F. Supp. 1351, 1361-62 (S.D. Tex. 1994) (granting summary judgment on TDTPA claim where defendant did not know about the defective properties of the fuel sold).
The remaining statutes do not have a scienter requirement

D. The Nine Statutes Differ on the Availability of Safe Harbor, Bona Fide Error, and Good Faith Defenses and the Standards for Meeting Them

The FDUTPA, IDCSA, and OCSPA contain safe-harbor provisions that preclude recovery when the challenged act is "permitted" by federal law
FDUTPA (Florida) –Fla. Stat. Ann. § 501.212(1) (stating that FDUTPA does not apply to "[a]n act or practice required or specifically permitted by federal or state law"); *see also Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228, 1234 (S.D. Fla. 2007) (reasoning that Pfizer's claims made in advertisements that Lipitor reduced the risk of heart disease were "implicitly authorized by the FDA," and thus "fall within the safe harbor provisions" of FDUTPA); *Berenguer v. Warner-Lambert Co.*, No. 02-05242, 2003 WL 24299241, at *4 (Fla. Cir. Ct. July 31, 2003) (concluding that the defendant's advertisement claiming that its medication "kills lice completely" was no different than the FDA-approved label stating that the medication was effective at treating head lice; "[i]t is well established that causes of action that challenge statements in advertisements that 'repeat information contained in the label' or do not 'substantially differ' from statements contained in FDA-approved labels" fall within the statutory safe harbor).
IDCSA (Indiana) – Ind. Code Ann. § 24-5-0.5-6(1) (the IDCSA "does not apply to an act or practice that is . . . required or expressly permitted by federal law, rule, or regulation"); *see also Koehlinger v. State Lottery Comm'n of Ind.*, 933 N.E.2d 534, 541-42 (Ind. Ct. App. 2010) (upholding the trial court's order granting summary judgment in the defendant's favor on the plaintiff's IDCSA claim premised on allegedly misleading lottery advertisements because state

law "expressly permitted" such advertising; "[t]here can be little doubt that that part of the Lottery's website listing remaining prizes in scratch-off games is a promotional or advertising tool designed to encourage purchases" that is "expressly permitted" by state law).
OCSPA (Ohio) – Ohio Rev. Code Ann. § 1345.12(A) (the OCSPA does not apply if the "act or practice [is] required or specifically permitted by or under federal law"); *see also Bergmoser v. Smart Document Sols., LLC*, 268 F. App'x 392, 394-95 (6th Cir. 2008) (concluding that the defendant's practice of charging costumers more than it actually cost to mail medical records was "expressly authorized" by statute because that statute authorized "medical record companies to contract with patients," and it did "not place limitations on the terms of these agreements").
California recognizes a common law "safe harbor" defense to CLRA, UCL, and FAL claims
CLRA (California) – *Bourgi v. W. Covina Motors, Inc.*, 83 Cal. Rptr. 3d 758, 768-69 (Cal. Ct. App. 2008) (concluding that the trial court erred by refusing to consider the defendant's "safe harbor" defense to the plaintiff's CLRA claim, namely, that the defendant's actions were permitted by California's "damage disclosure law," which permitted vehicle dealers to sell vehicles as new despite having had minor repairs); *Alvarez v. Chevron Corp.*, 656 F.3d 925, 934 (9th Cir. 2011) (agreeing "with the district court that '[t]he California regulatory framework creates specific requirements [for retail gasoline dispensing] that may not be trumped by the general prohibitions of the CLRA[,]' and that Defendants therefore were entitled to safe harbor from Plaintiffs' CLRA claims" (alterations in original) (citing *Bourgi*, 83 Cal Rptr. 3d at 764-66)).
UCL (California) – *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 83 Cal. Rptr. 2d 548, 562 (Cal. 1999) ("Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded that no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor."); *Ochs v. PacifiCare of Cal.*, 9 Cal. Rptr. 3d 734, 741 (Cal. Ct. App. 2004) (holding that safe harbor defense precluded UCL claim in action challenging healthcare service plan's obligation to pay out for emergency services); *Byars v. SCME Mortg. Bankers, Inc.*, 135 Cal. Rptr. 2d 796, 805-06(Cal. Ct. App. 2003) (holding that a lender's payment to a broker did not violate the UCL because the payment of such a premium had been deemed lawful under federal law); *Chavez v. Whirlpool Corp.*, 113 Cal. Rptr. 2d 175, 183-84(Cal. Ct. App. 2001) (holding that Whirlpool's conduct of setting resale prices was permissible under the "*Colgate* doctrine"—a judicially created rule that permits a company to exercise "discretion as to parties with whom [it] will deal" without triggering an antitrust violation—was not "unfair" under the UCL).
FAL (California) – *Cel-Tech Commc'ns*, 83 Cal. Rptr. 2d at 562 ("Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair. Specific legislation may limit the judiciary's power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded that no action should lie, courts may not override that determination. When specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor."); *see also Pom Wonderful LLC v. Coca Cola Co.*, No.

CV 08-06237 SJO (FMOx), 2013 WL 543361, at *5 (C.D. Cal. Feb. 13, 2013) (because the defendant had complied with "relevant FDA regulations," California's safe harbor doctrine provides "a separate and independent basis" for granting the defendant's motion to dismiss the plaintiff's UCL and FAL claims).
The NJCFA—and a TCCWNA claim based on a NJCFA violation—contain a common law "safe harbor" defense for "direct and unavoidable" conflicts
Lemelledo v. Beneficial Mgmt. Corp. of Am., 696 A.2d 546, 554 (N.J. 1997) ("[T]o overcome the presumption that the CFA applies to a covered activity, a court must be satisfied . . . that a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes."); *Macedo v. Dello Russo*, 840 A.2d 238, 242 (N.J. 2004) (per curiam) (concluding that "learned professionals" are "beyond the reach of the [CFA] so long as they are operating in their professional capacities"); *Daaleman v. Elizabethtown Gas Co.*, 390 A.2d 566, 570 (N.J. 1978) (concluding that public utilities are not subject to the CFA and that the plaintiff's complaint "is within the exclusive jurisdiction of [the Public Utilities Commission]").
The CLRA, FDUTPA, IDSCA, and OCSPA contain "bona fide" error defenses, but the scope of those defenses differ
CLRA (California) – Cal. Civ. Code § 1784 ("No award of damages may be given in any action based on a method, act, or practice declared to be unlawful by Section 1770 if the person alleged to have employed or committed such method, act, or practice (a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services according to the provisions of subdivisions (b) and (c) of Section 1782.").
FDUTPA (Florida) – Fla. Stat. Ann. § 501.207(4) ("If a violator shows that a violation of this part resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, by which the violator was unjustly enriched by the violation."
IDSCA (Indiana) – Ind. Code Ann. § 24-5-0.5-3(d) ("If a supplier shows by a preponderance of the evidence that an act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, such act shall not be deceptive within the meaning of this chapter"); *see also McKinney v. State*, 693 N.E.2d 65, 69 (Ind. 1998) ("Section 3(d) provides a defense if the act was made in good faith without knowledge of its falsity in reliance upon certain representations made by others.").
OCSPA (Ohio) – Ohio Rev. Code Ann. § 1345.11(A) ("[I]f a supplier shows by a preponderance of the evidence that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, no civil penalties shall be imposed against the supplier under division (D) of section 1345.07 of the Revised Code, no party shall be awarded attorney's fees, and monetary recovery shall not exceed the amount of actual damages resulting from the violation."); *see also Zindle v. Hawks Appliance Serv., Inc.*, No. 13016, 1987 WL 16660, at *5 (Ohio Ct. App. Sept. 2, 1987) ("[W]here the violations are a result of a good faith error made despite the maintenance of procedures designed to avoid the errors, the supplier is only liable for the amount of actual damages resulting from the violations.").

The IDCSA contains a good-faith defense
IDSCA (Indiana) – Ind. Code Ann. § 24-5-0.5-3(e) ("It shall be a defense to any action brought under this chapter that the representation constituting an alleged deceptive act was one made in good faith by the supplier without knowledge of its falsity and in reliance upon the oral or written representations of the manufacturer, the person from whom the supplier acquired the product, any testing organization, or any other person provided that the source thereof is disclosed to the consumer.").

E. The Nine Statutes Have Different Statutes of Limitations and Accrual Dates

The OCSPA and IDCSA both have two-year statutes of limitations that cannot be tolled by the discovery rule
OCSPA (Ohio) – Ohio Rev. Code Ann. § 1345.10(C) (prohibiting actions "more than two years after the occurrence of the violation which is the subject of suit"); *Varavvas v. Mullet Cabinets, Inc.*, 923 N.E.2d 1221, 1225 (Ohio Ct. App. 2009) (noting that the OCSPA's two-year limitations period is "absolute" and begins "to run from the date of the occurrence of the violation, which is not necessarily the date of any underlying transaction").
IDCSA (Indiana) – Ind. Code Ann. § 24-5-0.5-5(b) ("No action may be brought under this chapter except as expressly authorized in section 4(a), 4(b), or 4(c) of this chapter. Any action brought under this chapter may not be brought more than two (2) years after the occurrence of the deceptive act."); *A.J.'s Auto. Sales, Inc. v. Freet*, 725 N.E.2d 955, 964-65 (Ind. Ct. App. 2000) ("[T]he [IDCSA] has an occurrence statute of limitation, rather than a discovery statute of limitation," meaning that "the statutory period commences to run at the occurrence of the deceptive act.").
The TDTPA has a two-year statute of limitations, and the discovery rule "always" applies
Tex. Bus. & Com. Code Ann. § 17.565 ("All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice."); *Zimmerhanzel v. Green*, 346 S.W.3d 721, 725 (Tex. App. 2011) ("The discovery rule always applies to [T]DTPA claims.").
The CLRA has a three-year statute of limitations
Cal. Civ. Code § 1783 ("Any action brought under the specific provisions of Section 1770 shall be commenced not more than three years from the date of the commission of such method, act, or practice."); *Asghari v. Volkswagen Grp. of Am., Inc.*, 42 F. Supp. 3d 1306, 1319 (C.D. Cal. 2013) (stating that, absent applying the "delayed discovery rule," the statute of limitations begins to run on the date of purchase). To get the benefit of the "delayed discovery rule," the plaintiff must plead facts showing (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. *Id.*, at 1320.
The FAL has either a three- or four-year statute of limitations
There is a split of authority regarding whether the FAL is subject to a three-year statute of limitations or a four-year statute of limitations. *See Aoki v. Gilbert*, No. 2:11-cv-02797-TLN-CK,

2014 WL 3689345, at *11-12 (E.D. Cal. July 23, 2014) (listing cases).
The UCL and FDUTPA have four-year statutes of limitations
UCL (California) – Cal. Bus. & Prof. Code § 17208 ("Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment."). It is unclear whether the delayed discovery rule applies to UCL claims; *compare Karl Storz Endoscopy Am., Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 857 (9th Cir. 2002) ("[C]laims under [the UCL] are subject to a four-year statute of limitations which began to run on the date the cause of action accrued, not on the date of discovery."), *with Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 878 (Cal. 2013) (stating that a UCL claim is subject to the discovery rule and "should accrue only when a reasonable person would have discovered the factual basis for a claim") (internal citation omitted).
FDUTPA (Florida) – Fla. Stat. Ann. § 95.11(3)(f) (actions premised on a statutory liability must be commenced within four years); *see also Coursen v. JP Morgan Chase & Co.*, No. 8:12-cv-690-T-26EAJ, 2013 WL 5437341, at *13 (M.D. Fla. Sept. 27, 2013) (stating that the limitations period for a FDUTPA claim begins to run "four years from the date of the allegedly wrongful act"), *aff'd sub nom. Coursen v. Shapiro & Fishman, GP*, 588 F.App'x 882 (11th Cir. 2014); *Point Blank Sols., Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1833366, at *6 (S.D. Fla. May 13, 2011) ("It is clear that in Florida the delayed discovery doctrine does not apply to causes of action under FDUTPA.").
The NJCFA and TCCWNA have six-year statute of limitations
NJCFA (New Jersey) – N.J. Stat. Ann. § 2A:14-1; *see also Belmont Condo. Ass'n v. Geibel*, 74 A.3d 10, 28-29 (N.J. Super. Ct. App. Div. 2013) (noting that a CFA claim is subject to a six-year statute of limitations and that the discovery rules applies).
TCCWNA (New Jersey) – N.J. Stat. Ann. § 2A:14-1; *see also Sexton v. Wells Fargo Bank, N.A.*, No. GLO-L-814-13, 2014 WL 8102957, at *6 (N.J. Super. Ct. Law Div. Dec. 23, 2014) ("Claims under TCCWNA must be commenced within six years after the cause of action accrues." (citing N.J. Stat. Ann. § 2A:14-1)); *Mirra v. Holland Am. Line*, 751 A.2d 138, 140 (N.J. Super. Ct. App. Div. 2000) ("[T]he statute of limitations that applies to consumer fraud claims is the same six-year general limitation contained in [N.J. Stat. Ann. § 2A:14-1].").

F. The Nine Statutes Permit Recovery of Different Measures of Damages

The CLRA permits recovery of "actual" damages of not less than $1,000 in a class action, restitution, and "other relief"
Cal. Civ. Code § 1780(a)(1), (2) & (5) (permitting recovery of "actual damages" of not less than $1,000 in a class action, restitution, attorney fees, and "other relief that the court deems proper"); *see also Mass. Mut. Life Ins. Co. v. Super. Ct.*, 119 Cal. Rptr. 2d 190, 197 (Cal. Ct. App. 2002) (noting that "relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice" unlawful under the act" (alteration in original) (quoting Cal. Civ. Code § 1780(a))).
The UCL and FAL allow only for injunctive, restitutionary, and related relief, not actual

damages
UCL (California) – Cal. Bus. & Prof. Code § 17203; *Nelson v. Pearson Ford Co.*, 112 Cal. Rptr. 3d 607, 632 (Cal. Ct. App. 2010) ("The remedies available under the UCL are limited to injunctive, restitutionary and related relief."); *see also Korea Supply Co. v. Lockheed Martin Corp.*, 131 Cal. Rptr. 2d 29, 37 (Cal. 2003) ("A UCL action is equitable in nature; damages cannot be recovered."); *Tomlinson v. Indymac Bank, F.S.B.*, 359 F. Supp. 2d 891, 893-94 (C.D. Cal. 2005) (noting that prevailing plaintiffs are limited to injunctive relief and restitution, not damages); *Kasky v. Nike, Inc.*, 119 Cal. Rptr. 2d 296, 304 (Cal. 2002) (an order for restitution is one "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken.").
FAL (California) – Cal. Bus. & Prof. Code § 17500; *Viggiano v. Hansen Nat. Corp.*, 944 F. Supp. 2d 877, 886 (C.D. Cal. 2013) ("A court may award injunctive relief and restitution for false advertising that violates § 17500."); *see also McVicar v. Goodman Global, Inc.*, No. SA CV 13-1223-DOC (RNBx), 2015 WL 4945730, at *15 (C.D. Cal. Aug. 20, 2015) (rejecting Plaintiffs' damages theory because it "does not purport to be restitutionary, so as to be a proper measure of damages under the UCL or FAL" (citing *Korea Supply Co.*, 63 P.3d at 947)).
The NJCFA permits recovery of treble damages for an "ascertainable loss," based on loss in "value" or out-of-pocket expenses, and attorney fees and costs
N.J. Stat. Ann. § 56:8-19 (under the NJCFA, a plaintiff must sustain an "ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under [the CFA]"; in any action, "the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest" and attorney fees and costs); *Mladenov v. Wegmans Food Markets, Inc.*, 124 F. Supp. 3d 360, 375 (D.N.J. 2015) ("There are two relevant theories to ascertain losses under the [NJ]CFA: (1) the out-pocket-loss theory, and (2) the loss-in-value or benefit-of-the-bargain theory. An out-of-pocket-loss theory will suffice only if the product received was essentially worthless. A benefit-of-the-bargain theory requires that the consumer be misled into buying a product that is ultimately worth less than the product that was promised.") (internal citations omitted); *Kleinman v. Merck & Co.*, 8 A.3d 851, 861 (N.J. Super. Ct. Law Div. 2009) ("An ascertainable loss occurs when the plaintiffs receive something less than, and different from, what they reasonably expected in view of defendant's presentations," and a "loss can be demonstrated by expert proof of a loss in value or out of pocket expenses" (emphasis added) (internal quotation marks, citations omitted)); *see also Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 792 (N.J. 2005) ("In cases involving breach of contract or misrepresentation, either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle and will set the stage for establishing the measure of damages."). To meet this standard, the plaintiff "must proffer evidence of loss that is not hypothetical or illusory" and the claim of ascertainable loss "must be presented with some certainty demonstrating that it is capable of calculation." *Thiedemann*, 872 A.2d at 792-93.
The TCCWNA permits recovery of "actual damages," a penalty of not less than $100, or both, plus attorney fees and costs
N.J. Stat. Ann. § 56:12-17 ("Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs.");

accord Shelton v. Restaurant.com, Inc., 70 A.3d 544, 549-50 (N.J. 2013).
The FDUTPA permits recovery of "actual damages" based on "market value," plus attorney fees and costs
Fla. Stat. Ann. § 501.211(2) (permitting recovery of "actual damages" and attorney fees and costs); *see also Gastaldi v. Sunvest Resort Cmty., LC*, 709 F. Supp. 2d 1299, 1304 (S.D. Fla. 2010) (noting that, under the FDUTPA, actual damages are calculated by "taking the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties" (emphasis added) (quoting *Rollins, Inc. v. Heller*, 454 So.2d 580, 585 (Fla. Dist. Ct. App. 1984))); *Collins v. DaimlerChrysler Corp.*, 894 So.2d 988, 990 (Fla. Dist. Ct. App. 2004) (stating that, in the context of the FDUTPA, actual damages "have long been defined" as the difference in market value).
The IDCSA permits recovery of damages "actually suffered" or $500, whichever is greater, but, for willful acts, the IDCSA permits recovery of treble damages
Ind. Code Ann. § 24-5-0.5-4(a) ("A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act or five hundred dollars ($500), whichever is greater."); *see also Captain & Co., Inc. v. Stenberg*, 505 N.E.2d 88, 98-99 (Ind. Ct. App. 1987) (permitting what amounts to "benefit-of-the-bargain" damages and rejecting the argument that the plaintiffs were also entitled to out-of-pocket damages because that "allows [them] to recover the same damages twice").
The OCSPA limits damages in class actions to "actual damages"
Ohio Rev. Code Ann. § 1345.09(B) ("[T]he consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater. . . or recover damages or other appropriate relief in a class action under Civil Rule 23." (emphasis added)); *see Felix v. Ganley Chevrolet, Inc.*, No. 2013-1746, 2015 WL 5039233, at *5-6 (Ohio 2015) (noting that treble and statutory damages are not available in class actions and that the OCSPA "limit[s] the damages available in class actions to actual damages"; "Plaintiffs in class-action suits must demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions." (emphasis added)); *see also Washington v. Spitzer Mgmt., Inc.*, No. 81612, 2003 WL 1759617, at *5 (Ohio Ct. App. Apr. 3, 2003) (noting that the OCSPA limits damages in class actions to "protect defendants from huge damage awards" (citation omitted)).
The TDTPA permits recovery of "economic damages" under either an "out-of-pocket" or a "benefit of the bargain" theory, but not both, and attorney fees and costs
Tex. Bus. & Com. Code Ann. § 17.50(b)(1) (permitting recovery of "economic damages"); *Houston v. Mike Black Auto Sales, Inc.*, 788 S.W.2d 696, 699 (Tex. App. 1990) (noting that that TDTPA permits recovery of "actual damages," "namely, 'out of pocket' damages, measured by the difference between the value of that which he has parted with and the value of that which he has received, or 'benefit of the bargain' damages, allowing recovery of the difference between the value as represented and the actual value received"); *see also Matheus v. Sasser*, 164 S.W.3d 453, 458 (Tex. App. 2005) (reasoning that there is no difference between "economic" damages and "actual" damages). Under the TDTPA, a plaintiff may recover either the out-of-pocket measure or the benefit-of-the-bargain measure, but not both. *See Matheus*, 164 S.W.3d at 459

("The [T]DTPA allows the consumer to recover either the out-of-pocket measure or the benefit-of-the-bargain measure, whichever is greater." (emphasis added)).

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSONS, CHARLES BEYER, JONATHAN COHEN, JENNIFER SCHRAMM, and ASPASIA CHRISTY on behalf of themselves and all others similarly situated, Plaintiffs, v. WHIRLPOOL CORPORATION, LOWE'S HOME CENTERS, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT (U.S.A), INC., FRY'S ELECTRONICS, INC., and APPLIANCE RECYCLING CENTERS OF AMERICA, INC., Defendants.	Civil Action No. 2:12-cv-00089 (KM)(MCA) Honorable Kevin McNulty, U.S.D.J. Honorable Madeline C. Arleo, U.S.M.J. **[REDACTED] DECLARATION OF GALEN D. BELLAMY SUBMITTING DEFENDANTS' EVIDENCE IN OPPOSITION TO CLASS CERTIFICATION**

I, Galen D. Bellamy, declare as follows:

1. I am a partner at the law firm Wheeler Trigg O'Donnell LLP, attorneys for Defendants Whirlpool Corporation, Lowe's Home Centers, LLC, Sears Holdings Corporation, and Fry's Electronics, Inc. in this action. I have personal knowledge of the facts set forth herein,

except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. Attached as Exhibit A is a true and correct copy of the Declaration of J.B. Hoyt.

3. Attached as Exhibit B is a true and correct copy of the Expert Report of M. Laurentius Marais.

4. Attached as Exhibit C is a true and correct copy of the Declaration of Christopher Chisek.

5. Attached as Exhibit D is a true and correct copy of the Expert Report of John R. Fessler, Ph.D., P.E..

6. Attached as Exhibit E is a true and correct copy of the Declaration of David Whitehead.

7. Attached as Exhibit F is a true and correct copy of the article, *Energy Star Has Lost Some Luster* in the October 2008 edition of Consumer Reports.

8. Attached as Exhibit G is a true and correct copy of the Declaration of Ronald Voglewede.

9. Attached as Exhibit H is a true and correct copy of the Expert Report of Peter E. Rossi.

10. Attached as Exhibit I is a true and correct copy of the Expert Report of Carol A. Scott, Ph.D.

11. Attached as Exhibit J is a true and correct copy of the transcript from Plaintiff Francis Angelone's June 16, 2015, deposition.

12. Attached as Exhibit K is a true and correct copy of the transcript from Plaintiff Kari Parson's May 19, 2015, deposition.

13. Attached as Exhibit L is a true and correct copy of the transcript from Plaintiff Charles Beyer's May 12, 2015, deposition.

14. Attached as Exhibit M is a true and correct copy of the transcript from Plaintiff Brian Maxwell's June 12, 2015, deposition.

15. Attached as Exhibit N is a true and correct copy of the transcript from Plaintiff Jeffery Reid's June 30, 2015, deposition.

16. Attached as Exhibit O is a true and correct copy of the transcript from Plaintiff Charlene Dzielak's June 10, 2015, deposition.

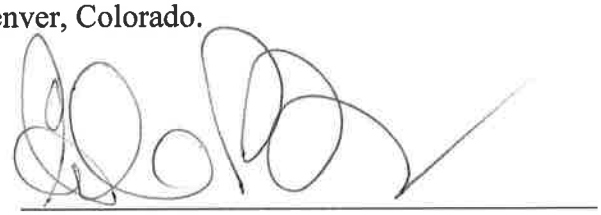
17. Attached as Exhibit P is a true and correct copy of the transcript from Plaintiff Jennifer Schramm's May 22, 2015, deposition.

18. Attached as Exhibit Q is a true and correct copy of the transcript from Plaintiffs' expert Dr. R. Sukumar's March 17, 2016, deposition.

19. Attached as Exhibit R is a true and correct copy of the transcript from Plaintiffs' expert Dr. J. Michael Dennis's March 8, 2016, deposition.

I declare under penalty of perjury under the laws of the State of New Jersey and the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 20th day of May, 2016, at Denver, Colorado.



Galen D. Bellamy

EXHIBIT A

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UNITED STATES DISTRICT COURT
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CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSONS, CHARLES BEYER, JONATHAN COHEN, JENNIFER SCHRAMM, and ASPASIA CHRISTY on behalf of themselves and all others similarly situated, Plaintiffs, v. WHIRLPOOL CORPORATION, LOWE'S HOME CENTERS, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT, INC., FRY'S ELECTRONICS, INC. and APPLIANCE RECYCLING CENTERS OF AMERICA, INC., Defendants.	Civil Action No. 2:12-cv-00089-KM-JBC Honorable Kevin McNulty Honorable James B. Clark, III **[REDACTED] DECLARATION OF J.B. HOYT**

I, J. Brian ("J.B.") Hoyt, declare as follows:

1. I was formerly employed by Whirlpool Corporation ("Whirlpool") for thirty-six years. My last position with the company was as the Director of Sustainability & Regulatory Affairs. I am currently retired. I am over 21 years of age, of sound mind, and competent to testify. Except as otherwise stated, I have personal knowledge of the facts stated in this declaration. If called as a witness, I could testify as to each of them.

2. In this declaration I state facts in support of Whirlpool's Opposition to Plaintiffs' Motion for Class Certification and related filings.

3. As Whirlpool's Director of Sustainability & Regulatory Affairs, I routinely communicated with various state and federal government agencies including the Department of Energy ("DOE") and the Environmental Protection Agency ("EPA"). My communications with the DOE and the EPA included communications related to the ENERGY STAR certification of products Whirlpool manufactured, DOE energy testing standards and regulations, and changes to those standards and regulations.

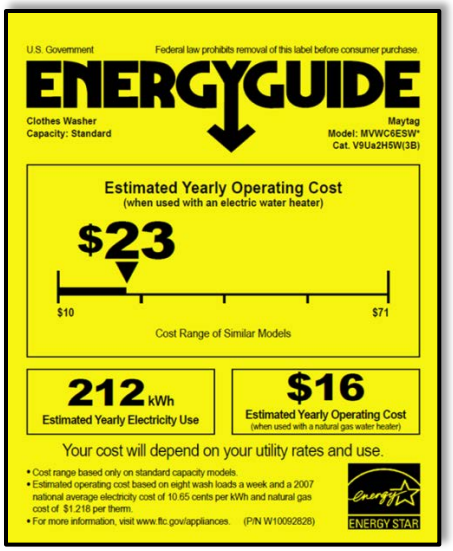
4. The Energy Star program is a voluntary program that was developed to identify and promote more highly energy-efficient products. Since 2007, Energy Star was also used to promote certain water-efficient products as well, like the clothes washers that are at issue in this case. It is jointly administered by the EPA, which enforces Energy Star qualifications, and the DOE, which creates the test procedures. (*See* Ex. 1.)[1] Participation in the Energy Star program hinges on "partnership agreements" between product manufacturers, the EPA, and the DOE. (*See* Ex. 1 at 1, Ex. 2.) A manufacturer must agree to several requirements about how Energy Star-qualified products are sold and promoted and how the Energy Star name and logo must be used.

5. While participation in the program is voluntary, once a product manufacturer elects to participate, they must label Energy Star-qualified products with the Energy Star logo. (*See* Ex. 3 ("The ENERGY STAR PARTNER must . . . Provide clear and consistent labeling of ENERGY STAR qualified clothes washers.").)

[1] In order to provide the highest resolution documents, the following exhibits are attached hereto in native format: WDZ0014603 – WDZ0014604 (Ex. 4), WDZ0018902 – WDZ0018909 (Ex. 5), WDZ0009109 – WDZ0009114 (Ex. 6), WDZ0012581 – WDZ0012595 (Ex. 8), WDZ0009251 – WDZ0009259 (Ex. 11), WDZ0008860 – WDZ0008862 (Ex. 12), WDZ0014605 – WDZ0014606 (Ex. 14), and WDZ0009099 – WDZ0009100 (Ex. 16).

6. Energy Star is and always has been intended to serve as a recognizable symbol of relative energy (and more recently, water) efficiency. However, the Energy Star logo does not convey how much more water or energy efficient the machine will be. The label itself does not contain specific information about the number of kWh or gallons of water used by a labeled machine or how that compares to a similar, non-labeled washer. A depiction of the Energy Star label is set out below:

7. For additional detail about the absolute and relative electricity consumption and cost to operate a given washer, consumers can consult the EnergyGuide label. (There is currently no analogous federal labeling requirement that includes the absolute and relative water consumption of a clothes washer.) That label contains information about how many kWh per year the washer will consume under specified laboratory conditions, and how the cost of that energy compares to other, similar models, based on an assumed number of wash loads per year (the number of assumed loads has changed over time) and using national average energy costs. In addition, a manufacturer can place the Energy Star logo on the EnergyGuide label. A depiction of the Energy Guide label that was included on one of the subject washers in this case (which included the Energy Star logo) is set out below:


U.S. Government Federal law prohibits removal of this label before consumer purchase.

ENERGYGUIDE

Clothes Washer
Capacity: Standard

Maytag
Model: MVWC6ESW*
Cat. V9Ua2H5W(3B)

Estimated Yearly Operating Cost
(when used with an electric water heater)

$23

$10 $71

Cost Range of Similar Models

212 kWh
Estimated Yearly Electricity Use

$16
Estimated Yearly Operating Cost
(when used with a natural gas water heater)

Your cost will depend on your utility rates and use.

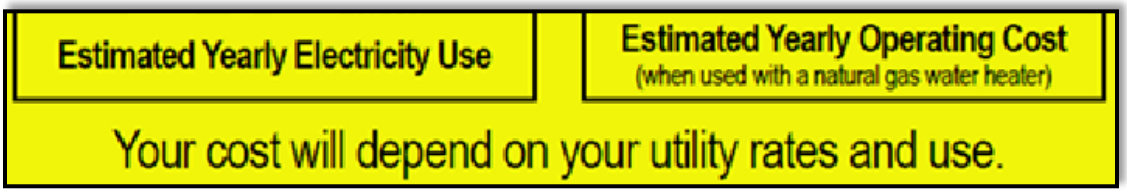
- Cost range based only on standard capacity models.
- Estimated operating cost based on eight wash loads a week and a 2007 national average electricity cost of 10.65 cents per kWh and natural gas cost of $1.216 per therm.
- For more information, visit www.ftc.gov/appliances. (P/N W10092828)

ENERGY STAR

8. The DOE tests used to calculate compliance with Energy Star and to populate the data on the EnergyGuide label are designed to be repeatable from laboratory to laboratory, but are not reflective of real world use. For a number of reasons, those lab tests cannot replicate, and therefore cannot predict, how much water or energy any individual consumer's washer will actually use in the real-world. In fact, the results generated by DOE tests under laboratory conditions that are included on the EnergyGuide label and that determine if a washer qualifies for Energy Star vary substantially from real-world operating conditions. The values shown on EnergyGuide labels do provide a basis for consumers to compare the relative energy use from washer to washer.

9. For example, the DOE tests specify the precise type of cloth to be used in the washer when it is operated in the lab, as well as how much test cloth to use on various washer settings. The absorption properties of the test cloth varies significantly as compared to clothes washed in the real world, like denim or polyester. The amount of water that the test cloth (or laundry in the real-world) absorbs and retains has a material impact on how water and energy efficient the machine performs. In addition, how a consumer operates their washer in the real-

world significantly differs from the specified test conditions. The DOE test procedures call for clothes washers to be tested on a "normal" cycle, but many clothes washers, including the washers in this case, have dozens of settings permutations. A consumer could choose to run an extra rinse cycle, could choose a warmer (or colder) wash temperature, and could use their washer significantly more or less than is assumed by the EnergyGuide's estimated annual cost of operation. Other factors that will influence how much it costs a consumer to operate their washer include the cost of energy and water where they live. For that reason, the EnergyGuide label states that a consumer's actual cost will depend on the cost of electricity where they live and how they operate their machine:



10. For all of these reasons, the EnergyGuide label is not, was never was intended to be, and indeed could not be, a promise or warranty that any specific level of energy or water savings would be achieved. The same rationale applies to the Energy Star logo, which communicates even less information to the consumer. Like the EnergyGuide label, Energy Star is not, was never was intended to be, and indeed could not be, a promise or warranty that any specific level of energy or water savings would be achieved.

11. Whirlpool has won more than 25 Energy Star awards, more than any other appliance manufacturer. It has won the Energy Star "sustained excellence" award six times. And Whirlpool has been awarded the Energy Star "partner of the year" an industry-leading 10 times. This award is EPA's highest honor, meant to recognize companies that have made "outstanding contributions to protecting the environment through superior energy efficiency."

12. Consumers receive a number of benefits from purchasing an Energy Star appliance. Depending on how a consumer chooses to operate their washer, they may receive a product that is less expensive to operate because it uses less energy and, in the case of Energy Star washing machines built since 2007, less water. Further, federal, state, and local governments and utilities have provided at different times and locations, various tax incentives and rebates to buy Energy Star products, thereby lowering the effective purchase price of those products.

13. At the state and local level, government agencies, utilities and others have long offered a variety of tax credits, rebates and other incentives to consumers who purchase Energy Star appliances in order to support energy efficiency, encourage the use of renewable energy sources, and support efforts to conserve energy and lessen pollution. To my knowledge, it is not possible to determine the types or amounts of rebates and tax incentives that were available in any given location during the relevant period, or that were taken advantage of by people who purchased one of the Centennial models at issue.

14. Beginning in 2009, a federal "cash for appliances" program was implemented offering rebates on purchases of a wide array of Energy Star qualified home appliances. The federal government made almost $300 million in funding available to the states through the American Recovery and Reinvestment Act (ARRA). With the funding provided by ARRA, the DOE developed the State Energy-Efficient Appliance Rebate Program (SEEARP) to spur economic activity and invest in long-term energy savings by helping consumers replace older, inefficient appliances with new, efficient models. Through SEEARP, the federal government provided almost $300 million to the 56 U.S. states and territories to support state-level consumer rebate programs for efficient appliances. Each state was empowered to administer its own cash for appliances program, and was free to select which residential Energy Star qualified appliances

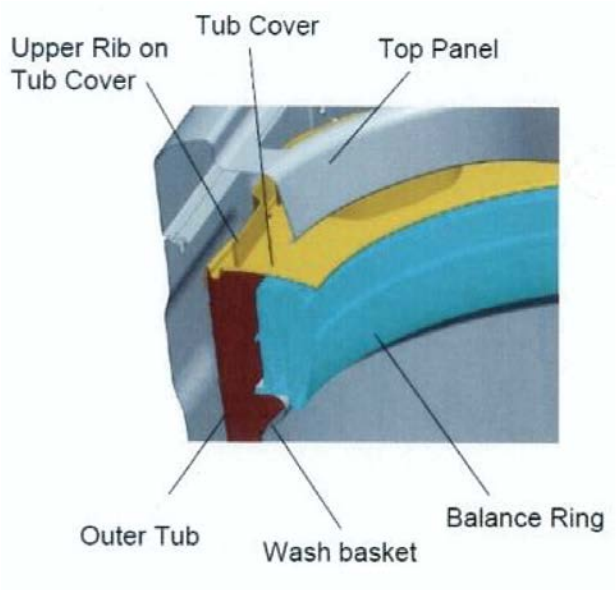
to include in their programs and the individual rebate amount offered for each appliance. Further, any rebates that were already offered by state and local utility districts for purchases of energy-efficient appliances were added to the federal cash for appliances rebate.

15. Under Energy Star, a clothes washer's overall efficiency is measured by the Modified Energy Factor (MEF) and Water Factor (WF). MEF is a measure of energy consumption that considers the energy used by the washer, the energy used to heat the water, and the energy used to run the dryer. WF measures the washer's water consumption and is measured in gallons of water used per cycle per cubic foot of capacity. Before 2007, water consumption was not a part of Energy Star, but has since been added to Energy Star criteria for clothes washers.

16. To measure the capacity of a clothes washer's "clothes container," the DOE instructed manufacturers to "[m]easure the entire volume which a dry clothes load could occupy within the clothes container during washer operation" by lining the "clothes container" with a plastic sheet, weighing the washer, filling it with "the maximum amount of water" up to its "uppermost edge," and then weighing it again *See* 10 C.F.R. 430, Subpart B, Appendix J1 (the "J1 Procedure") § 1.4. The capacity was then calculated by dividing the mass of the water in pounds by the density of the water. *Id.*

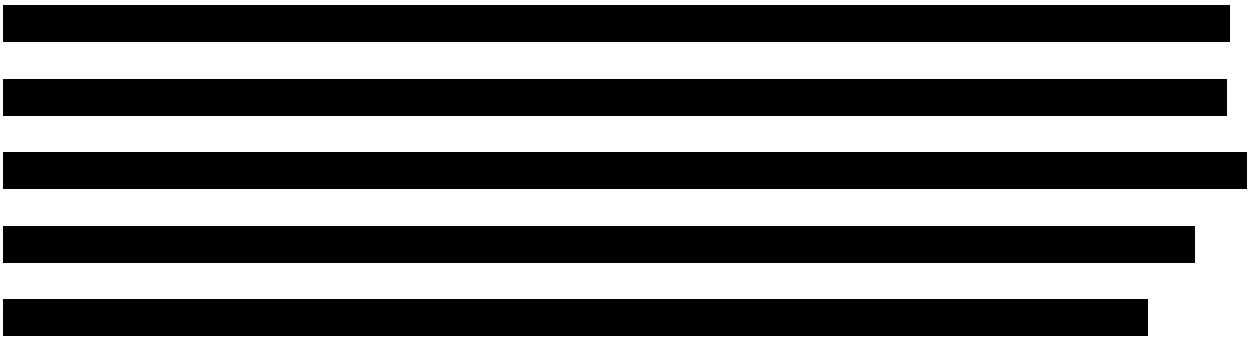
17. But clothes washers have different configurations and components that could constitute the "uppermost edge" of the clothes container. For example, some top-loading washers contain a "tub cover" that extends above the wash basket and wash tub to prevent smaller items of laundry from falling between the wash basket and the tub. The shape of these tub covers can vary significantly from one model to the next and vary even more significantly from one manufacturer to another. Together, these interrelated components, depicted below in the cross-

section of a generic top-loading washer, all comprise the upper portion of the clothes container, although which point should be deemed the "uppermost edge" was unclear. For example, it is reasonable to interpret the "uppermost edge" of the clothes container as corresponding to the top of the wash basket, the top of the balance ring, or one of several possible points on the tub cover.



18. In this way, the configuration and components of the clothes washer could affect how to measure capacity, depending on what the DOE considered the "uppermost edge" of the "clothes container" under the J1 Procedure. Because capacity measurement affects the MEF and WF calculations for Energy Star purposes, understanding the proper method to calculate "clothes container" capacity was critical.

19. [redacted]



[IMAGE REDACTED]

20. In considering Maytag's approach, Whirlpool's engineers were aware of the regulations' instruction that to determine capacity, a manufacturer should "measure the entire volume which a dry clothes load could occupy," and that to measure the entire volume, a manufacturer should fill the clothes container with the "maximum amount of water" to the container's "uppermost edge." J1 Procedure § 1.4. Whirlpool's engineers had observed on a number of occasions that actual top-loading washer owners in the field loaded their washing machines even above the top of the tub cover, so they were well aware of "the entire volume which a dry clothes load could occupy," even if that is not the level to which Whirlpool would advise its consumers to load their machines for optimal cleaning performance.

21. While consumers in fact sometimes used their washers in this way, Whirlpool's engineers were not basing their interpretation of J1 on recommended or actual consumer use. The point of the capacity measurement under J1 was not to replicate consumer use conditions. Indeed, a Maytag Centennial washer could not actually be filled with water up to the various "Fill Levels" that are discussed below under real-world operating conditions. Instead, the point of the test procedure was to identify a way to consistently measure one input into the MEF and WF formulas—a washer's capacity—that can be applied by different manufacturers of different types of washers in different labs, thereby enabling the government and consumers to engage in

an apples-to-apples comparison. Using the top of the tub cover makes sense for this purpose because it is the highest point before water begins to overflow the container. Any point that is lower will require some subjective judgment, depending on the configuration of the tub cover.

22. It was eventually determined that Maytag's approach of measuring to the top of the tub cover captured the spirit of the regulations and was more consistent with how other appliance manufacturers were believed to interpret the standard. But Whirlpool did not simply adopt Maytag's interpretation. Although it had no obligation to do so, before it adopted a revised approach to measuring the capacity of its top-loading washers, Whirlpool sought additional guidance directly from the DOE.

23. On March 20, 2007, Whirlpool sought clarification on whether its proposed interpretation of the J1 protocol was correct. With the assistance of others at Whirlpool, I prepared a letter titled "petition for waiver" that sought clarification about what the DOE intended the term "clothes container" to mean. (*See* Ex. 6.) The law allows manufacturers to submit such waivers when it determines that a test procedure is unclear and the manufacturer requires further guidance.

24. The petition for waiver specifically asked the DOE to clarify "the manner by which [Whirlpool] should measure clothes container capacity in vertical axis washers," given that any number of configurations could comprise the "clothes container." In Whirlpool's view (which had been Maytag's practice before the merger), the "space formed by inter-related components within the clothes washer, such as the top of the tub cover"—what the DOE later designated as "Fill Level 4"—was "fully consistent with the DOE test procedures" for determining clothes container capacity. Thus, Whirlpool specifically requested approval "to

measure the clothes container capacity to the upper edge of the tub cover" in top-loading washers.

25. I also sent a copy of the letter to each of Whirlpool's competitors, including sending it to the Association of Home Appliance Manufacturers ("AHAM"), which is the appliance industry's trade group, as well as to Bosch Home Appliances Corporation, Electrolux Home Products, and General Electric Company, among others. Following receipt of the petition, at least one competitor, Alliance Laundry Systems, the world's largest commercial laundry equipment manufacturer, wrote to the DOE to state its agreement with Whirlpool's proposal. (*See* Ex. 6.)

26. Mr. Bryan Berringer of the DOE, who was the highest-ranking member of the DOE staff that I would have dealt with at the time concerning energy testing procedures, reached out to me by telephone after the date of submission, and explained that Whirlpool did not need to seek a waiver because its proposed interpretation of the J1 test procedure was correct. On May 14, 2007, Mr. Berringer followed up that telephone call with an email, stating that the DOE "agree[d]" with Whirlpool that "measurement of the clothes container capacity to the upper edge of the tub cover in vertical axis clothes washer containing such a component" was proper under the J1 Procedure. (*See* Ex. 7.) This point of demarcation—the top of the tub cover—was later referred to by DOE as Fill Level 4.

27. In light of the DOE's guidance, Whirlpool revised its internal testing procedures to conform to the DOE's interpretation of "clothes container" under the J1 Procedure: Whirlpool would measure to Fill Level 4 (the "top of the tub cover") to determine the capacity of the "clothes container" for all top-loading clothes washers going forward. (*See* Ex. 8.)

28. The 2007 petition for waiver and subsequent communications with DOE were unrelated to the Energy Star Maytag Centennial washers at issue in this case, which were not manufactured and sold until approximately two years later. Instead, the petition for waiver concerned how Whirlpool would test all of its top-loading washers.

29. Whirlpool initially launched the Maytag Centennial line of top-loading washing machines without an Energy Star option. The Maytag Centennial line was built on the LEAP engineering platform on which many of Whirlpool's conventional top-loading washers were built at that time. The model line included the MVWC300VW, MVWC400VW, MVWC500VW, and MVWC700VW.

30. In an effort to provide a relatively low-cost Energy Star washer to consumers, in early 2009, Whirlpool added the MVWC6ESWW ("C6ES") and MVWC7ESWW ("C7ES") to the Maytag Centennial lineup as Energy Star options. Before 2009, most if not all Energy Star-qualified top-loading washers were built on different, more energy efficient platforms, which have larger capacities, typically employed different mechanical drives, and were priced hundreds of dollars more than conventional top-loading washers.

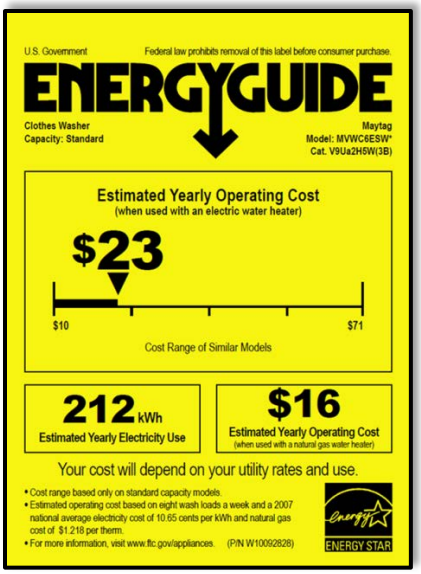
31. The LEAP engineering platform was already scheduled to be phased out and replaced by the VMW engineering platform, so these Energy Star top-loading models were scheduled to have a limited production run of approximately two years.

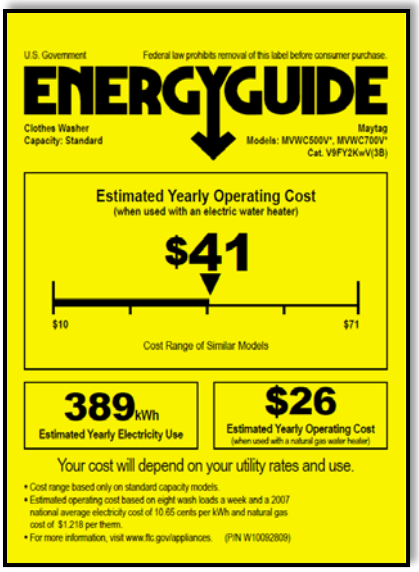
32. The C6ES and C7ES models were able to achieve Energy Star status because they were designed with an "Auto Load Sensing" feature that only fills the tub with enough water to clean the wash load. The Auto Load Sensing feature was referred to as "adaptive fill" technology that "measured" the load size and composition and adjusted the water level accordingly by sensing how much water had been absorbed by the wash load and stopping the washer from

filling with more water when it was no longer being absorbed. That technology made it possible for the clothes washers to achieve Energy Star-qualification under the revised guidelines that were implemented in 2007, which for the first time took into account water efficiency in clothes washers as well as energy efficiency.

33. In late 2008 and early 2009, Whirlpool tested the C6ES in accordance with its internal test procedures for Energy Star qualification, as revised in light of the DOE's May 14, 2007 guidance. Consequently, Whirlpool measured the capacity of the "clothes container" in light of the DOE's instruction to measure to Fill Level 4, which resulted in a capacity of 3.43 cubic feet. At that capacity, the C6ES and C7ES met the DOE's Energy Star requirements for MEF and WF. (*See* Ex. 9.) Later, Whirlpool tested model number MVWC6ESWW1 using the same test procedure, and it qualified too.

34. The Energy Star versions of the Centennial washers that employed the Auto Load Sensing feature used approximately 50% less water than their non-Energy Star counterparts. They also used far less energy, in part because there was less water requiring less energy to heat. Below is a side-by-side comparison of the EnergyGuide labels for a C6ES and the comparable, non-Energy Star MVWC500VW and MVWC700VW, which demonstrates how much more energy efficient the new Energy Star Centennial models were pursuant to DOE tests and how that translated into estimated annual operating cost savings:



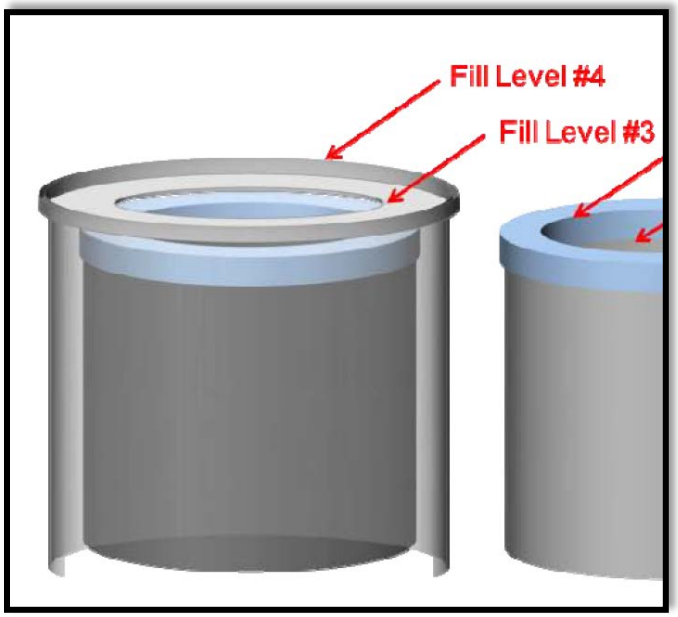


35. It was part of my job responsibilities to communicate the internal energy and water testing certification information to the DOE for purposes of both the Energy Star program and for the information displayed on the EnergyGuide label. That testing information confirmed that the C6ES and C7ES were compliant with Energy Star testing standards. Accordingly, per the Energy Star program's requirements, Whirlpool labeled the clothes washers as Energy Star-qualified and shipped them to retailers to sell to consumers. Whirlpool sold the vast majority of the clothes washers in 2009 and 2010.

36. In September 2009, AHAM, on behalf of the appliance industry, sent a letter to the DOE asking it to confirm that the Fill Level guidance that it had provided to Whirlpool in 2007 was to be followed by all manufacturers going forward. (*See* Ex. 10.)

37. In May 13, 2010, the DOE issued draft guidance in the form of frequently asked questions ("FAQs") that contained proposed guidance on the issue, and requested that industry members submit comments on the DOE's proposal. This draft guidance suggested that the DOE was considering recommending measuring capacity by filling the clothes container to "Fill Level

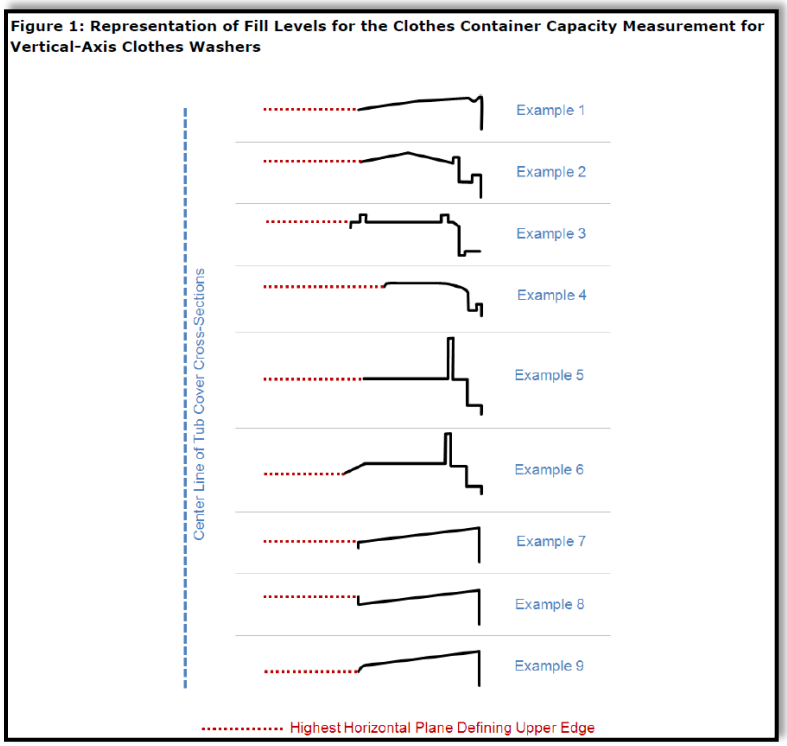
3," which corresponded to a slightly lower point on the tub cover than the DOE had previously communicated to Whirlpool, as the illustration provided by DOE reflects:



38. Thus, as of May 2010, the DOE had signaled that it was considering implementing revised guidance instructing manufacturers to measure capacity by filling the clothes container to a point that corresponded to an unspecified inside diameter of the tub cover, rather than to the top of the tub cover. However, this proposed revised guidance did not state official DOE policy; rather it was in draft form, and the DOE asked industry members to submit comments on its proposed draft guidance.

39. On June 9, 2010, with the assistance of others at Whirlpool, I prepared Whirlpool's "Response to DOE's draft interpretation of the test procedure for measuring the capacity of clothes washers." (*See* Ex. 11.) In that letter, I explained Whirlpool's position that proposed "Fill Level 3" was inconsistent with the text of the DOE regulation, was inconsistent with actual consumer use habits, and, most importantly, would undermine the certainty and reliability of the test procedures. As to the latter point, the reliability of the J1 test turns on

whether it is repeatable; meaning that different technicians in different labs can apply the exact same test procedures every time. Fill Level 4 was repeatable because the top of the tub cover, no matter how the tub cover was configured, would always be a readily identifiable point. The DOE's proposed Fill Level 3, on the other hand, requires subjective judgment, and could therefore vary from lab to lab and technician to technician. This point was later recognized by DOE (*see* 77 Fed. Reg. 13920 (recognizing that for top-loading washers, "determining the maximum fill level can require the subjective judgment of the test laboratory")), and is emphasized by a chart created by DOE in connection with later issued guidance, which identifies the location of Fill Level 3 for a number of different tub cover configurations:



40. During the period while DOE was contemplating a revision to its guidance, appliance manufacturers were not required to take any action. Specifically, the time, money and resources required to change the manner in which a large manufacturer, like Whirlpool, designs and tests all of its washing machines are enormous. Whirlpool was thus entitled to and did

continue to rely on the guidance it had been provided by the DOE pending the issuance of final guidance from the government.

41. On July 6, 2010, the DOE issued its final guidance in FAQ format, which stated—contrary to the position that it had taken four years earlier in response to Whirlpool's request for guidance—that "the upper-most edge of the clothes container shall be considered the highest point of the inner-most diameter of the tub cover"—what the DOE now called Fill Level 3. (*See* Ex. 12.) This definition of Fill Level 3 ("the highest point of the inner-most diameter of the tub cover") was similar to, but not the same as, the version that was contained in the May 2010 draft guidance, which described Fill Level 3 as corresponding to "the highest horizontal plane that a clothes load could occupy."

42. In making this change, the DOE recognized that it was effectively changing the rule and also recognized that its previous rule was ambiguous: "Between 1997 and 2010 DOE 'became aware that this general specification of the water fill level could lead to multiple capacity measurements that do not reflect the actual capacity for washing clothes.'" *See* 77 Fed. Reg. 13888, 13917. Indeed, almost immediately after issuing this revised guidance, the DOE engaged in a notice of proposed rulemaking to once again revisit the fill level issue because the revised guidance still was not clear. *Id.* at 13890, 138917.

43. In order to bring its internal testing procedures into compliance with new Fill Level 3 guidance, including the re-testing and re-rating of all of its then-existing top-loading washers, Whirlpool had to retest and rerate the capacity of more than 70 models of washing machines in 24 different energy categories and then re-characterize their WF and MEF. Whirlpool also had to change its testing procedures for all new models of washers. Whirlpool only had a certain number of energy and water testing labs that it could use to accomplish this

effort. This required an all hands-on-deck, multi-month effort, and took more than 2,000 hours of lab time to complete. The DOE was kept apprised of Whirlpool's progress during this period. (*See* Ex. 13 (Mar. 23, 2011, letter from the DOE, described below).) The Maytag Centennial Energy Star washers were not a priority during this process because they were already scheduled to be phased out of production in less than 6 months.

44. On September 20, 2010, Whirlpool received from the DOE a letter indicating that a single Maytag Centennial washing machine model C6ES was tested as part of the Energy Star Verification Testing Pilot Program and did not meet the ENERGY STAR program's efficiency standards. (*See* Ex. 14.) In this "Stage I" testing, the MEF was 1.78 (1.1% below the minimum requirement of 1.8) and the WF was 8.3 (10.7% above the maximum requirement of 7.5). The DOE stated that Whirlpool could request additional "Stage II" testing of additional units, which Whirlpool did in a letter dated September 30, 2010. (*See* Ex. 15.)

45. In December 2010, Whirlpool discontinued production of the C6ES and C7ES models in accordance with its long-term plan to replace the LEAP engineering platform with the new VMW platform.

46. On January 19, 2011, after conducting a second round of testing on three additional C6ES units plus the same unit they previously tested, the DOE informed Whirlpool that those units also did not comply with Energy Star requirements. (*See* Ex. 16.) Notably, the lab that DOE contracted with to conduct these tests misapplied the new Fill Level guidance, further reinforcing that even as revised, they remained unclear. Whirlpool was given twenty days to respond to the letter. During that period, the DOE instructed Whirlpool that "[t]he product will remain designated as ENERGY STAR qualified during this twenty day period."

47. On February 8, 2011, Whirlpool responded to the DOE's January 19, 2011 letter. Whirlpool explained that the DOE had tested the units using Fill Level 3 (the innermost diameter of the tub cover), but that they had been certified in accordance with the DOE's previous direction to use Fill Level 4 (the top of the tub cover). This difference in testing procedures resulted in a measured capacity that was 0.37 cu. ft. less than when the washers were originally certified. Thus, the only reason that the washers were found to not comply with Energy Star standards was because the DOE applied its revised Fill Level guidance when it tested the units for compliance. The letter went on to explain that Whirlpool no longer had any units remaining in inventory but was ready to assist the DOE as needed.

48. On March 16, 2011, the DOE formally referred the matter to the EPA for "appropriate action." (*See* Ex. 17.)

49. On March 23, 2011, the DOE authored a letter to Whirlpool noting, among other things, that Whirlpool was in the process of "retesting and recertifying its pre-existing clothes washer models to conform" to the revised Fill Level guidance, and expected to complete that process by the end of April 2011. (*See* Ex. 13.)

50. On approximately May 7, 2012, the EPA added model MVWC6ESWW1 to its list of "Non-Lighting Products Disqualified from the ENERGY STAR® Program". (*See* Ex. 18.) Between March 16, 2011, the date on which the matter was referred to the EPA, and May 7, 2012, the date on which I understand the EPA disqualified model MVWC6ESWW1, I received no communication from the EPA concerning this matter. Whirlpool was provided no advance notice that the EPA intended to add model MVWC6ESWW1 to its list of Non-Lighting Products Disqualified from the ENERGY STAR® Program. According to the EPA's own published Disqualification Procedures, when the EPA believes a product may warrant disqualification from

the ENERGY STAR program, the EPA is supposed to notify the manufacturer in advance and provide 20 days to submit a written response to that proposed action. The first time I learned that the EPA had added model MVWC6ESWW1 to its list of Non-Lighting Products Disqualified from the ENERGY STAR® Program Washers was June 26, 2012.

I declare under penalty of perjury under the laws of the State of New Jersey and the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 19th day of May, 2016, at Benton Harbor, Michigan.

J.B. Hoyt

EXHIBIT 1

ENERGY STAR® Program Integrity Update: Verification Testing & Product Disqualifications

Background

In 1992, under the authority of the Clean Air Act Section 103(g), the U.S. Environmental Protection Agency (EPA) introduced ENERGY STAR as a voluntary labeling program designed to identify and promote energy-efficient products to reduce greenhouse gas emissions. Section 103(g) of the Clean Air Act directs the Administrator to "conduct a basic engineering research and technology program to develop, evaluate, and demonstrate non-regulatory strategies and technologies for reducing air pollution." In 2005, Congress enacted the Energy Policy Act. Section 131 of the Act amends Section 324 (42 USC 6294) of the Energy Policy and Conservation Act, and "established at the Department of Energy and the Environmental Protection Agency a voluntary program to identify and promote energy-efficient products and buildings in order to reduce energy consumption, improve energy security, and reduce pollution through voluntary labeling of or other forms of communication about products and buildings that meet the highest energy efficiency standards."

For 20 years, ENERGY STAR and its trademark have served as a voluntary national program to reduce greenhouse gas emissions and make it easy for consumers to identify and purchase energy-efficient products without sacrificing performance, features, and comfort. Products can earn the ENERGY STAR label by meeting the energy efficiency requirements established by EPA and set forth in ENERGY STAR product specifications. Such specifications establish energy performance standards that exceed average market performance. More than 40,000 product models are currently certified to meet those standards. The program has been greatly successful: over the past 20 years individuals and organizations across the country have tapped the value of ENERGY STAR to achieve dramatic energy savings, while preventing a total of more than 1.8 billion metric tons of greenhouse gas emissions and saving over $230 billion on utility bills. More than 4.5 billion ENERGY STAR products were sold over the past 20 years, and currently, more than 1.4 million new homes and more than 20,000 facilities carry ENERGY STAR certification.

Partnerships have been key to the program's success. Businesses and organizations - more than 18,000 of them, from small school districts to large Fortune 500 companies - have embraced the value of ENERGY STAR and made it their own. The interplay of government, business, and market forces brought together through ENERGY STAR has changed the energy efficiency landscape.

Third-Party Certification & Verification Requirements

To maintain consumer trust and improve program oversight, EPA has implemented third–party certification and verification requirements. For a product to earn the ENERGY STAR label, its performance must be third-party certified based on testing conducted in an EPA-recognized laboratory

that meets international standards for quality and competency and reviewed by an EPA-recognized certification body (CB) that also meets international standards for quality. In addition to up-front testing, a percentage of all ENERGY STAR products are subject to "off–the–shelf" verification testing each year. The goal of this testing is to ensure that changes or variations in the manufacturing process do not undermine a product's qualification with ENERGY STAR requirements. In addition, the U.S. Department of Energy (DOE) conducts ENERGY STAR verification testing on certain ENERGY STAR product categories also covered by federal energy standards. Testing for ENERGY STAR program purposes is performed similar to other efficiency testing programs, such as the appliance testing for DOE federal standards, and the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) heating, ventilation, and air conditioning and the Home Ventilating Institute (HVI) vent fan certification programs, among others.

ENERGY STAR Product Disqualifications

In 2011, EPA documented and began implementing standardized product disqualification procedures to address those products that are reported to EPA by CBs as having failed verification testing (EPA's Disqualification Procedures can be found at www.energystar.gov/3rdpartycert). Under the Disqualification Procedures, EPA first reviews the testing failure information to determine if the product should be removed from the ENERGY STAR program. If EPA does not identify any abnormalities with the testing referral, EPA proceeds with notifying the tested manufacturing partner and any other product labelers affected by the failure, that EPA intends to disqualify the product from the ENERGY STAR program. Affected parties are provided a 20-day period to dispute the pending disqualification, in which case EPA conducts a technical review of all information the manufacturing partner submits before making a final determination on the product's status.

EPA has found that testing failures for products that previously passed certification testing can occur for a number of reasons, including changes in the supply chain, production malfunction, inconsistent quality with raw materials and components, and product performance designed too close to performance requirements. Failures can also be a result of laboratory testing or operator error. EPA considers all of these things, among others, in determining whether the testing accurately reflects performance of some units of the product. If upon technical review, EPA determines that the testing failure warrants a product's removal from the program, EPA will proceed with a formal product "disqualification". All disqualified products are posted on the ENERGY STAR website at www.energystar.gov/integrity. In addition, EPA issues bi-weekly disqualification updates to energy utilities that opt to receive that information.

For products that are disqualified, EPA requires that the manufacturing partner submit a corporate certification detailing product control measures undertaken to manage the sale, distribution, and marketing of the disqualified model, such that ENERGY STAR is no longer associated with the product. In approving control measures for failed products, EPA may consider the scope of the failure as it relates to consumer expectation and investment. EPA generally requires that product control measures include

notice or posting of failure, and may require, where market feasible, that manufacturing partners remain available to compensate consumers in a commensurate and appropriate manner. EPA approves product control measures in a manner that is responsive to market- and product-specific issues, provides national consistency for partners and consumers, and upholds integrity of the trademark.

Product disqualification does not necessarily indicate that all of the units in the marketplace are deemed to fail ENERGY STAR performance requirements; rather, because the product was initially certified as performing, a subsequent testing failure may indicate that some subset of units are not performing fully. Through examination of the root cause of the failure, EPA and the manufacturing partner are in some instances able to identify how many and/or which batch of units were compromised. EPA acts to protect the trademark's integrity and as a result disqualifies products that may perform fully and consistently in many or even most settings. In 2012, 1169 ENERGY STAR products were subject to verification testing. Of those tested, 87 base models warranted disqualification from the program, reflecting a 7.4 percent disqualification rate. Disqualification rates vary slightly among product types, with, e.g., appliances at 2 percent in 2012. See table listing disqualification rates by product type below.

Product Category	***Number of Unique Disqualifications***
Boilers	1
CAC ASHP	6
CFLs	54
Clothes Washers	1
Dehumidifiers	1
Geothermal Heat Pumps	1
Refrigerators and Freezers	3
Residential Light Fixtures	3
Roof Products	3
Room Air Cleaners	2
Room Air Conditioners	1
Solid-state Lighting Luminaires	4
Televisions	1
Ventilating Fans	5
Water Heaters	1
Total	***87***

Conclusion

The goal of verification testing of ENERGY STAR products followed by disqualification, as appropriate, is to enhance program integrity and protect the consumer experience with labeled products. To that end, EPA's disqualification procedures provide needed predictability and flexibility for the Agency to address

product- and manufacturer-specific issues. Flexibility allows EPA to consider the product's overall impact in the market, the potential scope of a product's deficiency, including the number of units that may have been affected, and to recognize that testing errors do occur.

Having a standardized approach to disqualification, in particular to product control measures, has ensured national consistency among manufacturers and relevant markets. ENERGY STAR product control measures are designed to minimize inequities among manufacturers, support a national approach to managing the federal trademark, and provide consistency among the many geographical markets that products enter. This approach allows EPA to adapt program responses to reflect market or product changes in the future, where fair and warranted. In addition, it allows EPA to protect the integrity of the program while keeping compliance costs low enough to encourage participation by consumers and manufacturers alike.

After two years of implementation, EPA believes that this approach to verification testing and disqualification has bolstered manufacturer and consumer confidence in the integrity of the program, and directly affected the success of energy-efficient products in the market. Confidence in the program sets up a market incentive towards innovation, which advances technology and increases the market penetration of energy-efficient products, thereby raising the floor for product design and performance. It facilitates consumer demand for and further manufacturer investment in technical research and advancement in those product areas. Consistent with the design of the ENERGY STAR program, it sets up a market dynamic that enables more stringent requirements and greater energy and environmental benefit as time goes on.

Similarly, protecting the integrity of the ENERGY STAR mark bolsters public trust in the brand, thereby increasing energy savings for consumers. Today, 85 percent of the American public recognizes the ENERGY STAR label, and global support for the program remains strong, as exemplified by international agreements. In 2012, 1.3 million Americans visited the ENERGY STAR website to find product information about home efficiency improvements and use the program's home energy tips, tools and recommendations to help reduce utility bills and improve comfort. Over 18,000 organizations partnered with EPA improved efficiency and realized significant environmental and financial benefits by associating with the ENERGY STAR brand and program. Utility programs rely upon the ENERGY STAR brand in offering efficiency-related promotions. By partnering with ENERGY STAR, consumers and businesses reduced their utility bills by $24 billion, due to investments in energy-efficient technologies and practices that will continue to provide bill savings for years to come. Public confidence is integral those successes.

EXHIBIT 2

Partnership Agreement between
ENERGY STAR®
and
{Organization Name},
an ENERGY STAR® Partner

Through this agreement, {Organization Name} ("ENERGY STAR Partner") joins in partnership with the US Environmental Protection Agency (EPA) and the Department of Energy (DOE) in one or more areas. ENERGY STAR Partner recognizes ENERGY STAR as a broad partnership designed to promote buildings, products, homes, and industrial facilities that use less energy while providing the same or better performance than conventional designs. ENERGY STAR Partner wishes to use the ENERGY STAR name and/or mark in association with qualified products or homes. ENERGY STAR Partner agrees to use the partnership and the ENERGY STAR mark to promote energy efficiency as an easy and desirable option for organizations and consumers to prevent pollution, protect the global environment, and save on energy bills. ENERGY STAR Partner agrees that it is important to build and maintain the meaning of the ENERGY STAR mark as a trustworthy symbol that makes it easy to make a change for the better.

Partner Commitments

ENERGY STAR Partner is committed to taking action in the area(s) indicated on the ENERGY STAR Commitment Form. For the designated program area(s), ENERGY STAR Partner agrees to fulfill all requirements as outlined in the following supporting documents:

- ENERGY STAR Program Requirements, defining requirements for being recognized as a partner in each program area, such as manufacturing, selling, or promoting ENERGY STAR qualified products to consumers or organizations. Specific requirements include identifying a responsible party for each area of participation and updating EPA/DOE on the efforts undertaken through the partnership. Where applicable, these include ENERGY STAR eligibility criteria defining the energy and other performance specifications that must be met for use of the ENERGY STAR mark on and/or in association with buildings, homes, and products; and

- ENERGY STAR Identity Guidelines, describing how the ENERGY STAR name and mark may be used. Partner will adhere to these guidelines and ensure that its authorized representatives, such as advertising agencies, dealers, and distributors, are also in compliance.

EPA/DOE will undertake a variety of efforts to build awareness of the ENERGY STAR name and mark, maintain the credibility of the ENERGY STAR name and mark, and promote the benefits of energy-efficient homes, buildings, products, services, and industrial facilities. EPA/DOE will strive to:

- increase awareness of the ENERGY STAR name and mark across the residential, commercial, and industrial sectors by distributing key messages on the benefits of ENERGY STAR qualified buildings, homes, and products;

- make current versions of the ENERGY STAR Identity Guidelines and ENERGY STAR Program Requirements easily accessible through the Internet and other means;

- maintain a Web site where ENERGY STAR Partner can furnish information on its program efforts and responsible key contacts as outlined in the ENERGY STAR Program Requirements; and

- provide ENERGY STAR Partner with public recognition through the Internet and other mechanisms for its efforts in the ENERGY STAR Partnership and its role in protecting the environment.

Disclaimers

Partner will not construe, claim, or imply that its participation in the ENERGY STAR program constitutes federal government approval, acceptance, or endorsement of anything other than Partner's commitment to the program. Partner understands its participation in the ENERGY STAR program does not constitute federal government endorsement of Partner or its buildings, homes, products, services, or industrial facilities. Partner understands that the activities it undertakes in connection with the ENERGY STAR program are voluntary and not intended to provide services to the federal government. As such, Partner will not submit a claim for compensation to any federal agency.

Dispute Resolution

Partner and EPA/DOE will assume good faith as a general principle for resolving conflicts under the ENERGY STAR program. Both parties will endeavor to resolve all matters informally, so as to preserve maximum public confidence in ENERGY STAR.

In the event informal channels do not produce a mutually agreeable resolution to a matter in dispute, either party to this agreement shall notify the other in writing as to the nature of the dispute, the specific corrective action sought, and their intent to terminate the Partnership Agreement, either as a whole or in part, unless specific corrective actions sought are undertaken:

- within 20 days of receiving formal notification from EPA/DOE indicating intent to terminate the Partnership Agreement, either as a whole or in part, Partner will reply, agreeing to either (1) undertake in a timely and effective manner the corrective actions sought by EPA/DOE, or (2) terminate the Partnership Agreement, either as a whole or in part;

- within 20 days of receiving formal notification from Partner indicating its intent to terminate the Partnership Agreement, either as a whole or in part, EPA/DOE will reply, either (1) agreeing to undertake in a timely and effective manner the corrective actions sought by Partner, or (2) explaining why such corrective actions cannot be undertaken;

- if Partner fails to respond within 20 days of receiving formal notification of EPA/DOE's intent to terminate the Partnership Agreement, either as a whole or in part, or if Partner responds but does not agree to undertake corrective actions sought by EPA/DOE, or if Partner agrees but does not initiate the corrective actions in a timely manner, then this agreement is terminated, either as a whole or in part.

Entry into Force and Duration of Agreement

Both parties concur that this agreement and the terms outlined in the supporting documents will become effective when signed by both parties. This agreement may be updated at any time to add new areas for which ENERGY STAR Partner wants to be recognized as a partner. Both parties concur that this agreement is wholly voluntary and may be terminated by *either party* at any time, and for any reason, with no penalty. Failure to comply with this Partnership Agreement, applicable Program Requirements, and Identity Guidelines can result in termination of this agreement and authorization to use the ENERGY STAR mark. EPA/DOE will actively pursue actions for resolving issues of noncompliance.

The undersigned hereby execute this Partnership Agreement on behalf of their party. The signatories of this agreement affirm that they have the authority to execute this agreement on behalf of ENERGY STAR Partner and EPA/DOE.

Partnership Agreement Signatory for ENERGY STAR:

Signature(s):			Date(s)	
Name(s):	Kathleen Hogan			
Title(s):	Director, Climate Protection Partnerships Division, US EPA			

Partnership Agreement Signatory for {Organization Name}:

Signature:		Date:	
Name:			
Title:			
Address:			
City:			
State:		Zip:	
Country:			
Phone:			
Fax:			
E-mail:			
Web site:			

EXHIBIT 3

FINAL VERSION 3/7/2008

ENERGY STAR® Program Requirements for Clothes Washers

Partner Commitments

Commitment

The following are the terms of the ENERGY STAR Partnership Agreement as it pertains to the manufacturing of ENERGY STAR qualified clothes washers. The ENERGY STAR PARTNER must adhere to the following program requirements:

- Comply with current ENERGY STAR Eligibility Criteria, defining the performance criteria that must be met for use of the ENERGY STAR certification mark on clothes washers and specifying the testing criteria for clothes washers. At its discretion, DOE may conduct tests on products that are referred to as ENERGY STAR qualified. These products may be obtained on the open market, or voluntarily supplied by PARTNER at DOE's request;

- Comply with current ENERGY STAR Identity Guidelines, describing how the ENERGY STAR marks and name must be used. PARTNER is responsible for adhering to these guidelines and for ensuring that its authorized representatives, such as advertising agencies, dealers, and distributors, are also in compliance;

- Qualify at least one ENERGY STAR qualified clothes washer model within one year of activating the clothes washers portion of the agreement. When PARTNER qualifies the product, it must meet the criteria in effect at that time;

- Provide clear and consistent labeling of ENERGY STAR qualified clothes washers. The ENERGY STAR certification mark must be clearly displayed on the top/front of the product (by placement of the ENERGY STAR logo on the FTC's EnergyGuide label, on product labels, and/or as a permanent mark), on the manufacturer's Internet site where information about ENERGY STAR qualified models is displayed, and in product literature (i.e., user manuals, spec sheets, etc.). It is also recommended that the label appear on product packaging;

- Provide to DOE, on an annual basis, an updated list of ENERGY STAR qualified clothes washer models. Once the PARTNER submits its first list of ENERGY STAR labeled clothes washer models, the PARTNER's company name will be listed as an ENERGY STAR PARTNER. PARTNER must provide annual updates in order to remain on the list of participating product manufacturers;

- Notify DOE of a change in the designated responsible party or contacts for clothes washers within thirty days.

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Performance for Special Distinction

In order to receive additional recognition and/or support from DOE for its efforts within the Partnership, the ENERGY STAR PARTNER may consider the following voluntary measures and should keep DOE informed on the progress of these efforts:

- Consider energy efficiency improvements in company facilities and pursue to benchmark their buildings through the ENERGY STAR Buildings program;
- Purchase ENERGY STAR qualified products. Revise the company purchasing or procurement specifications to include ENERGY STAR. Provide procurement officials' contact information to DOE for periodic updates and coordination. Circulate general ENERGY STAR qualified product information to employees for use when purchasing products for their homes;
- Ensure the power management feature is enabled on all ENERGY STAR qualified monitors in use in company facilities, particularly upon installation and after service is performed;
- Provide general information about the ENERGY STAR program to employees whose jobs are relevant to the development, marketing, sales, and service of current ENERGY STAR qualified product models;
- Feature the ENERGY STAR mark(s) on PARTNER web site and in other promotional materials. If information concerning ENERGY STAR is provided on the PARTNER web site, DOE may provide links where appropriate to the PARTNER web site;
- Provide a simple plan to DOE outlining specific measures PARTNER plans to undertake beyond the program requirements listed above. By doing so, DOE may be able to coordinate, communicate, and/or promote PARTNER's activities, provide a DOE representative, or include news about the event in the ENERGY STAR newsletter, on the ENERGY STAR web pages, etc. The plan may be as simple as providing a list of planned activities or planned milestones for which the PARTNER would like DOE to be aware. For example, activities may include:

    (1) Increase the availability of ENERGY STAR qualified products by converting the entire product line within two years to meet ENERGY STAR guidelines;

    (2) Demonstrate the economic and environmental benefits of energy efficiency through special in-store displays twice a year;

    (3) Provide information to users (via the web site and user's manual) about energy-saving features and operating characteristics of ENERGY STAR qualified products, and

    (4) Build awareness of the ENERGY STAR Partnership and brand identity by collaborating with DOE on one print advertorial and one live press event;

- Provide quarterly, written updates to DOE as to the efforts undertaken by PARTNER to increase availability of ENERGY STAR qualified products, and to promote awareness of ENERGY STAR and its message.

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ENERGY STAR® Program Eligibility Criteria for Clothes Washers

as of February 12, 2008

Below are the product criteria for ENERGY STAR qualified clothes washers. A product must meet all of the identified criteria to be labeled as ENERGY STAR qualified by its manufacturer.

1) **Definitions**:

   a) **Modified Energy Factor (MEF):** The present energy efficiency measure for all clothes washers. MEF is the quotient of the cubic foot capacity of the clothes container divided by the total clothes washer energy consumption per cycle, with such energy consumption expressed as the sum of the machine electrical energy consumption, the hot water energy consumption, and the energy required for removal of the remaining moisture in the wash load. The units are cubic feet per kWh per cycle (ft^3/kWh/cycle). The higher the value, the more efficient the clothes washer. MEF must be determined by the J1 test procedure (see below).

   b) **Water Factor (WF):** The present water efficiency calculation that allows the comparison of clothes washer water consumption independent of clothes washer capacity. The term is expressed as gallons per cycle per cubic feet. WF is the quotient of the total weighted per-cycle water consumption divided by the capacity of the clothes washer. The lower the value, the more efficient the clothes washer. WF has not been incorporated into the Federal standard but is included in the 2007 ENERGY STAR criteria.

2) **Qualifying Products**: The current DOE federal standard (NAECA) for clothes washers includes five product classes:

   i) Top-loading < 1.6 ft^3 (compact)
   ii) Top-loading ≥ 1.6 ft^3 (standard)
   iii) Top-loading/semi automatic
   iv) Front-loading
   v) Suds-saving

   Only standard sized (> 1.6ft^3), front- or top-loading clothes washers are eligible for the ENERGY STAR clothes washer program.

3) **ENERGY STAR Criteria**: Only those products listed in Section 2 that meet the criteria below may qualify as ENERGY STAR.

	Current ENERGY STAR Criteria *as of January 1, 2007*	ENERGY STAR Criteria *as of July 1, 2009*	ENERGY STAR Criteria *as of January 1, 2011*
ENERGY STAR Criteria	MEF ≥ 1.72 WF ≤ 8.0	MEF ≥ 1.8 WF ≤ 7.5	MEF ≥ 2.0 WF ≤ 6.0

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4) **Test Criteria**: Clothes washer manufacturers must self-test their equipment according to the DOE test procedure defined in 10 CFR 430, Subpart B, Appendix J1. The J1 includes test provisions for machines with Adaptive Water Fill Control Systems (AWFCS). This control scheme determines automatically the amount of water used to wash a load based on the size and weight of the particular clothing load. MEF must be determined by the J1 test procedure.

5) **Effective Date**: The effective dates of these criteria are July 1, 2009 and January 1, 2011. A manufacturer has one year after signing the Partnership Agreement or after each criteria change to ensure that the ENERGY STAR label appears directly on at least one ENERGY STAR qualified clothes washer model.

6) **Future Criteria Revisions**: ENERGY STAR reserves the right to change the criterion should technological and/or market changes affect its usefulness to consumers, industry, or the environment. Keeping with current policy, industry/stakeholder discussions determine revisions to the criteria.

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EXHIBIT 4

FILED UNDER SEAL

EXHIBIT 5

FILED UNDER SEAL

EXHIBIT 6

March 20, 2007

U.S. Department of Energy
Attn: Alexander Karsner, Assistant Secretary of
Energy Efficiency & Renewable Energy
1000 Independence Ave., SW
Washington DC, 20585-J1

Re: Petition for Waiver & Application for Interim Waiver regarding Measurement of Clothes Container Capacity in Vertical Axis Clothes Washers

Dear Assistant Secretary:

Whirlpool Corporation ("Whirlpool") is submitting this Petition for Waiver, and Application for Interim Waiver, pursuant to 10 CFR 430.27, regarding the Department of Energy ("DOE") Test Procedures for energy and water consumption of clothes washers.

The Waiver and Interim Waiver are requested to approve measurement of clothes container capacity in vertical axis washers to the top of the tub cover, in washers that contain such a component. The J1 test procedure is silent as to the level to which the clothes container capacity should be measured in vertical axis washers. Without further DOE clarification, Whirlpool will lack certainty as to the manner by which it should measure clothes container capacity in vertical axis washers.

Whirlpool submits that the proposed measurement method is fully consistent with the DOE test procedures, and that this request is consistent with DOE's authority to grant a Waiver. Whirlpool further submits that it is within the DOE's authority to grant an Interim Waiver to provide clarity on the test procedure for energy and water consumption of clothes washers, and to avoid economic hardship and competitive disadvantage.

1. Whirlpool Corporation

Whirlpool is a leading manufacturer of home appliances. Whirlpool sells clothes washers and other home appliances in major countries around the world, including in the United States. In the US, Whirlpool's appliances are marketed under the following brands: "Whirlpool", "Maytag", "KitchenAid", "Jenn Air", "Amana", "Roper", "Estate", "Magic Chef" and others. Whirlpool is a leading supplier of home appliances, including clothes washers, to Sears, Roebuck & Co., which Sears sells under the "Kenmore" brand. Whirlpool's worldwide headquarters are located at 2000 North M-63, Benton Harbor, Michigan, USA.

2. Basic Models Subject To The Waiver Request

This Petition For Waiver and Application For Interim Waiver is for all basic models of vertical axis clothes washers manufactured by Whirlpool Corporation that contain a tub cover as described herein.

3. Requested Waiver

Whirlpool requests approval to measure the clothes container capacity to the upper edge of the tub cover in vertical axis clothes washers containing such a component. The tub cover is an annular device located in the upper portion of the interior space of the clothes washer. The tub cover closes a gap that would otherwise exist between the upper edge of the balance ring (which is affixed to the top edge of the

basket), and the upper rim of the stationary washer tub. The tub cover prevents articles of clothing from becoming lodged or lost in the space between the washer tub and basket. The tub cover represents the top of the clothes container in Whirlpool vertical axis clothes washers that contain a tub cover.

An engineering drawing is attached at Exhibit A illustrating a cut-away section of a vertical axis clothes washer and showing the location of a tub cover. The drawing is provided as an illustrative example, and is not intended to limit this waiver to the exact dimensions or configuration of the drawing.

4. Regulatory Framework

The DOE regulations provide in 10 CFR 430.27 that a manufacturer may seek a waiver *"... upon the grounds that the basic model contains one or more design characteristics which ... prevent testing of the basic model according to the prescribed test procedures... ."*

The test procedure for measuring energy and water consumption of clothes washers is contained in 10 CFR 430, Subpart B, Appendix J1 ("J1"), and requires manufacturers to measure the capacity of the washer's clothes container. Clothes container capacity is a factor in the calculation of Water Consumption Factor (J1, Sec. 4.2.3), Modified Energy Factor (J1, Sec. 4.4), and Energy Factor (J1, Sec. 4.5) for clothes washers.

Section 1.4 of J1 defines *"clothes container"* as *"... the compartment within the clothes washer that holds the clothes during the operation of the machine."*

Sections 3.1 through 3.1.5 of J1 specify the steps to measure the capacity of the clothes container. Section 3.1 instructs manufacturers to *"Measure the entire volume which a dry clothes load could occupy within the clothes container during washer operation... ."* Sections 3.1.1 through 3.1.5 prescribe a series of steps in which the clothes washer is weighed (empty), lined with a plastic sheet, and then filled with water to the "*upper edge*" of the clothes container. Section 3.1.1 specifies that the test should be performed *"... so that the container will hold the maximum amount of water."* Section 3.1.5 provides a calculation for the clothes container capacity, in cubic feet, based on the change in mass of the washer with the clothes container filled with water.

5. Measurement To Tub Cover Is Consistent With J1

The J1 procedure does not identify or limit specific components of the clothes washer that form the clothes container. In the absence of more specific language, it is permissible and fully consistent with J1 to construe the clothes container to mean the space formed by inter-related components within the clothes washer, such as the top of the tub cover.

In Whirlpool vertical axis clothes washers containing a tub cover, measuring the clothes container capacity to the top edge of the tub cover is fully consistent with the J1 procedure. Section 3.1 of J1 instructs manufacturers to *"Measure the entire volume which a dry clothes load could occupy within the clothes container during washer operation... ."* In a Whirlpool vertical axis clothes washer, a dry clothes load could occupy the space up to, or even above, the tub cover during washer operation.

The J1 procedure suggests that manufacturers should attempt to conduct measurements in a manner that maximizes the clothes container capacity. For example, section 3.1 says that the measurement should be performed *"... so that the container will hold the maximum amount of water."* Measuring capacity to the top of the tub cover is consistent with this directive.

6. Other Manufacturers With Similar Design Characteristics

Whirlpool has not performed a comprehensive tear down of vertical axis clothes washers from other manufacturers to determine which, if any, contain a tub cover as described herein. Whirlpool has no reason to believe that the tub cover is unique to Whirlpool vertical axis clothes washers. There is a reasonable likelihood that vertical axis clothes washers from other manufacturers may contain a tub cover

or similar component. Names and addresses of other manufacturers of vertical axis clothes washers made or sold in the U.S. are listed on the attached Exhibit B.

7. Possible Alternate Test Procedures

As noted above, the J1 procedure does not identify or limit specific components of the clothes washer that form the clothes container. It is conceivable that a manufacturer could interpret the J1 procedure to permit measurement of clothes container capacity to other points within the clothes washer.

The J1 procedure could be interpreted to permit measurement of the clothes container capacity to coincide with the upper rim of the basket or balancing ring within the clothes washer. However, there is no specific text within J1 that limits measurement to the basket rim or balancing ring. As noted above, such a limitation may be inconsistent with portions of J1 that suggest a manufacturer should maximize the volume of the clothes container for capacity measurement.

Taken to an extreme, it may be possible to construe the J1 procedure to permit measurement of the clothes container capacity to the interior of the washer lid, since (using the terminology of J1) a dry clothes load could occupy that space during washer operation. Such an approach would provide some consistency with the method for measuring clothes container capacity in horizontal axis clothes washers (which essentially involves measuring the full volume of the basket out to the door interior.) Although Whirlpool is not advocating measurement to the lid in this petition, Whirlpool would welcome any clarifying comments from DOE on whether such an interpretation would be permissible under J1.

Whirlpool submits that measuring the clothes container capacity to the top edge of the tub cover is a valid interpretation of J1, and represents a reasonable compromise between the extremes of the basket edge and lid as described above.

8. Additional Justification For Interim Waiver Application

Granting of an Interim Waiver is justified in this case because: (i) Whirlpool has provided strong evidence that demonstrates the likelihood of the granting of the Petition for Waiver; and (ii) Whirlpool will suffer significant economic hardship and competitive disadvantage if this Interim Waiver Application is not granted; and (iii) there are strong public policy justifications to issue an Interim Waiver to help promote uniform interpretation and application of the J1 procedure.

a. Strong Likelihood That Waiver Will Be Granted

Whirlpool has provided strong evidence that the Waiver should be granted. A Petition for Waiver is appropriate because the tub cover represents a design characteristic (pursuant to 10 CFR 430.27) of Whirlpool vertical axis clothes washers that prevents clarity as to the prescribed method for measuring clothes container capacity in vertical axis clothes washers. Whirlpool has provided ample information in this Petition for Waiver and Application for Interim Waiver explaining its rationale for measuring clothes container capacity to the top of the tub cover. Whirlpool has demonstrated that such measurement is consistent with the J1 procedure.

b. Economic Hardship & Competitive Disadvantage

In the absence of an Interim Waiver, Whirlpool will lack certainty as to the manner by which it should measure clothes container capacity in vertical axis washers containing a tub cover, since the J1 procedure is silent as to the exact point to which the capacity should be measured.

Denial of an Interim Waiver will cause economic hardship and competitive disadvantage for Whirlpool. There are long lead times and significant expenses associated with the design and manufacture of vertical axis clothes washers. Compliance with federally mandated energy and water consumption standards is a critical design factor for vertical axis clothes washers. Any delay in obtaining clarity on this issue will require Whirlpool to postpone key decisions regarding its investments to design and build

vertical axis washers, and/or require Whirlpool to implement costly contingency plans in the event these Waiver requests are not approved.

c. Public Policy Favors Consistent Application Of J1

Granting an Interim Waiver will help promote consistent interpretation and application of the J1 test procedure by clothes washer manufacturers. In the absence of such consistency, manufacturers may interpret and apply J1 in different ways that will skew the resulting energy data reflected on products, leading to possible consumer confusion.

9. CERTIFICATION OF NOTICE TO OTHER MANUFACTURERS

Whirlpool Corporation is providing concurrent notice of this Petition for Waiver & Application for Interim Waiver to the other known manufacturers of vertical axis clothes washers made or sold in the U.S., and to the home appliance industry association. The cover letters, including names and addresses of other known manufacturers and the industry association, is included in Exhibit B.

10. CONCLUSION

Whirlpool respectfully submits that the proposed measurement method is fully consistent with the J1 test procedures, and that this request is consistent with DOE's authority to grant Waivers. Whirlpool further submits that it is within the DOE's authority to grant an Interim Waiver in this case to provide clarity on the test procedure and to avoid economic hardship and competitive disadvantage for Whirlpool.

Whirlpool respectfully requests the Assistant Secretary's favorable response to this Petition for Waiver and Application for Interim Waiver.

Sincerely,

J. B. Hoyt
Director, Government Relations
Whirlpool Corporation

Whirlpool Corporation Petition for Waiver & Application for Interim Waiver regarding Measurement of Clothes Container Capacity in Vertical Axis Clothes Washers

Exhibit A

This drawing is a cut-away section of a vertical axis clothes washer, showing the location of a tub cover. This drawing is provided as an illustrative example, and is not intended to limit this waiver to the exact dimensions or configuration of the drawing.

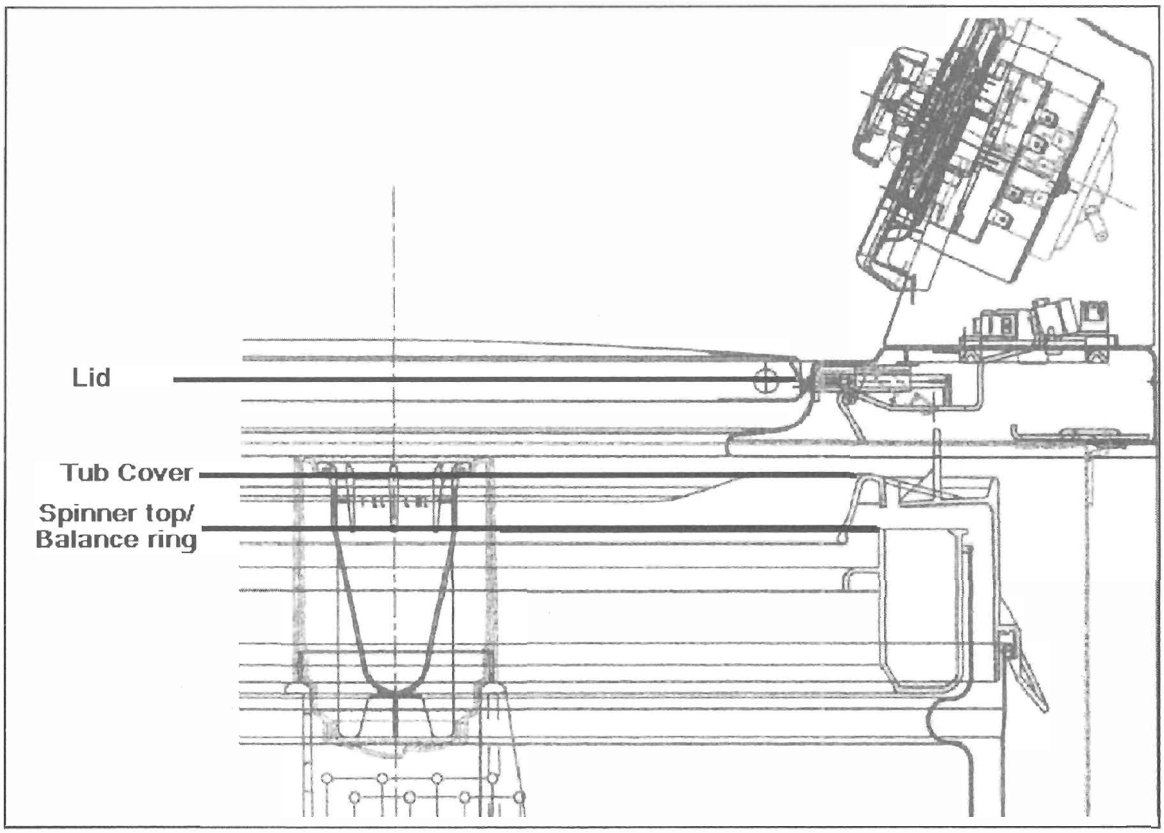

Exhibit B: Notice to Manufacturers

March 20, 2007

Alliance Laundry Systems, LLC
Attn: Philip J. Mantei
PO Box 990
Shepard Street
Ripon, WI 54971

Association of Home Appliance Mfr's
Attn: Wayne E. Morris
1111 19th Street NW, Suite 402
Washington, DC 20036

Avanti Products
10880 NW 30th Street
Miami, FL 33172

Bosch Home Appliances Corporation
Attn: Brian Chatot
5551 McFadden Avenue
Huntington Beach, CA 92649

Danby Products, Inc.
PO Box 669
Findlay, OH 45839-0669

Electrolux Home Products
Attn: Ed Buckles
PO Box 212378
Martinez, GA 30917

Fisher & Paykel Appliances Inc.
Attn: Richard Bollard
5900 Skylab Road
Huntington Beach, CA 92647

General Electric Company
Attn: Earl F. Jones
3135 Easton Turnpike
Fairfield, CT 06828-0001

Haier America
Attn: Ilya Mosionzhnik
45 W. 36th Street
New York, NY 10018-7904

Re: Notice of Whirlpool Corporation's Petition for Waiver & Application for Interim Waiver regarding Measurement of Clothes Container Capacity in Vertical Axis Clothes Washers

Dear Madam or Sir:

Whirlpool Corporation ("Whirlpool") is submitting the enclosed Petition for Waiver and Application for Interim Waiver (pursuant to 10 CFR 430.27) to the US Department of Energy ("DOE"), relating to the Test Procedures for energy and water consumption of clothes washers. This letter provides notice to other known manufacturers of similar products. The DOE Assistant Secretary for Conservation and Renewable Energy will receive and consider timely written comments on the Petition for Waiver and Application for Interim Waiver. Any manufacturer submitting written comments should provide a copy to Whirlpool Corporation at the address shown below.

Whirlpool Corporation
Attn: Thomas A. Schwyn, Senior Counsel
2000 M-63 North
Benton Harbor, MI 49022
Fax: 269/923-6221
Email: thomas_a_schwyn@whirlpool.com

EXHIBIT 7

May 14, 2007

J. B. Hoyt (Whirlpool),

This is in response to your letter dated March 20, 2007, and e-mails dated April 19, 2007, May 4, 2007 and May 10, 2007; requesting a petition for waiver and application for interim waiver regarding the measurement of clothes container capacity in vertical axis clothes washers. Upon review of these documents and Alliance Laundry Systems letter dated April 20, 2007, I do not feel that a waiver is necessary. I agree with your assessment in your waiver request that the measurement of the clothes container capacity to the upper edge of the tub cover in vertical axis clothes washer containing such a component.

No further action is necessary at this time. If you need any further clarification, please contact me.

Thank you,
Bryan Berringer
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585
(202) 586-0371
FAX (202) 586-4617
E-mail: bryan.berringer@ee.doe.gov

J B Hoyt@whirlpool.com

04/19/2007 01:38 PM

To: bryan.berringer@ee.doe.gov, bryan.berringer@ee.doe.gov

cc:

Subject: Whirlpool Washer Basket Measurement Clarification Request

|---|
| ( ) Federal Record |
| (*) Not a Federal Record |

User Filed as: Not Categorized in ERMS

| If this external e-mail is a record and you are the first EERE recipient, click the 'File to ERMS' button in the toolbar to categorize this e-mail |

Bryan:

Thanx for the call this morning. Attached is the waiver request we discussed. If we can treat this as a clarification, that would be preferable.

We look forward to hearing from you. thanx again!

(See attached file: DOE Waiver Request--Capacity 0307.pdf)

~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

J.B. Hoyt
Director, Regulatory Affairs & State Government Relations
Whirlpool Corporation
269/923-4647
j.b.hoyt@whirlpool.com

<File(s) removed: DOE Waiver Request--Capacity 0307.pdf>
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EXHIBIT 8

FILED UNDER SEAL

EXHIBIT 9

FILED UNDER SEAL

EXHIBIT 10

To:
Cc:
Bcc:
Subject: AHAM Ballot Results: Approval to Send DOE Letter Regarding CW Drum Volume
From: "Messner, Kevin" <KMessner@AHAM.org> - Monday 09/21/2009 10:03 PM

To: DOE Laundry Task Force

Re: Ballot Results Approve Sending Attached Letter to the Department of Energy Regarding CW Drum Volume

---

The ballot results approve sending the attached letter to the Department of Energy regarding their 2007 response to Whirlpool's request for waiver on residential clothes washer drum volume measurement. Thank you for your time on this matter.

If you have any questions, please contact me.

Kevin Messner
Vice President, Government Relations
1111 19th Street NW, Suite 402, Washington, DC 20036
t 202.872.5955 ext310 f 202.872.9354 e kmessner@aham.org
Visit www.aham.org or AHAM's Blog aham.typepad.com

AHAM
ASSOCIATION OF HOME APPLIANCE MANUFACTURERS

Leadership • Knowledge • Innovation

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Final letter to DOE with attachments.pdf

AHAM
ASSOCIATION OF HOME APPLIANCE MANUFACTURERS

1111 19th Street NW • Suite 402 • Washington, DC 20036
t 202.872.5955 f 202.872.9354 www.aham.org

September 14, 2009

U.S. Department of Energy
Attn: Mr. Ronald Lewis, Program Manager, Office of Building Research and Standards
1000 Independence Avenue, SW
Washington D.C., 20585

Re: Vertical Axis Clothes Washer Clothes Container or Drum Volume Calculation

Dear Ron,

As you know AHAM represents virtually all manufacturers of clothes washers sold in the United States and Canada.

We are requesting on behalf of this industry, and to facilitate general understanding of the Department's views, a statement from the Department whether the May 14, 2007 response (attachment A) from the Department to Whirlpool Corporation represents the Department's interpretation of how to measure the capacity of a vertical axis clothes washer's clothes container or its drum volume under 10 CFR 430, subpart B, appendix J1 ("J1').

Whirlpool Corporation filed on March 20, 2007 a "Petition for Waiver and Application for Interim Waiver Regarding Measurement of Clothes Container Capacity in Vertical Axis Clothes Washers." (attachment B) Whirlpool requested approval to measure clothes container capacity in vertical axis washers "to the top of the tub cover, in washers that contain such a component." The petition described such covers and provided an illustrative drawing. Whirlpool explained why its interpretation of how to conduct the measurement in this regard is consistent with J1. Alliance Laundry Systems submitted a letter to the Department supporting Whirlpool's petition (attachment C).

In response, Department staff stated that a waiver was not necessary. The staff agreed with Whirlpool's assessment of how to measure the clothes container capacity. We request clarification whether this is the Department's position and is an interpretation generally applicable to all vertical axis clothes washers containing a tub cover. For your convenience, we attach a proposed clarification to the J1 test procedure that follows a Question and Answer (Q&A) format (attachment D).

A timely response to this request will be of significant public benefit in ensuring a common industry approach to measure capacity of machines with this feature.

Sincerely,

Debra K. Brunk

Debra K. Brunk, Ph.D.
Vice President, Technical Services

ATTACHMENT A

May 14, 2007

J. B. Hoyt (Whirlpool),

This is in response to your letter dated March 20, 2007, and e-mails dated April 19, 2007, May 4, 2007 and May 10, 2007; requesting a petition for waiver and application for interim waiver regarding the measurement of clothes container capacity in vertical axis clothes washers. Upon review of these documents and Alliance Laundry Systems letter dated April 20, 2007, I do not feel that a waiver is necessary. I agree with your assessment in your waiver request that the measurement of the clothes container capacity to the upper edge of the tub cover in vertical axis clothes washer containing such a component.

No further action is necessary at this time. If you need any further clarification, please contact me.

Thank you,
Bryan Berringer
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585
(202) 586-0371
FAX (202) 586-4617
E-mail: bryan.berringer@ee.doe.gov

J B Hoyt@whirlpool.com

To: bryan.berringer@ee.doe.gov, bryan.berringer@ee.doe.gov

cc:

04/19/2007 01:38 PM

Subject: Whirlpool Washer Basket Measurement Clarification Request

|---|
| ( ) Federal Record |
| (*) Not a Federal Record |

User Filed as: Not Categorized in ERMS

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Bryan:

Thanx for the call this morning. Attached is the waiver request we discussed. If we can treat this as a clarification, that would be preferable.

We look forward to hearing from you. thanx again!

(See attached file: DOE Waiver Request--Capacity 0307.pdf)

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J.B. Hoyt
Director, Regulatory Affairs & State Government Relations
Whirlpool Corporation
269/923-4647
j.b.hoyt@whirlpool.com

<File(s) removed: DOE Waiver Request--Capacity 0307.pdf>
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ATTACHMENT B

March 20, 2007

U.S. Department of Energy
Attn: Alexander Karsner, Assistant Secretary of
Energy Efficiency & Renewable Energy
1000 Independence Ave., SW
Washington DC, 20585-J1

Re: Petition for Waiver & Application for Interim Waiver regarding Measurement of Clothes Container Capacity in Vertical Axis Clothes Washers

Dear Assistant Secretary:

Whirlpool Corporation ("Whirlpool") is submitting this Petition for Waiver, and Application for Interim Waiver, pursuant to 10 CFR 430.27, regarding the Department of Energy ("DOE") Test Procedures for energy and water consumption of clothes washers.

The Waiver and Interim Waiver are requested to approve measurement of clothes container capacity in vertical axis washers to the top of the tub cover, in washers that contain such a component. The J1 test procedure is silent as to the level to which the clothes container capacity should be measured in vertical axis washers. Without further DOE clarification, Whirlpool will lack certainty as to the manner by which it should measure clothes container capacity in vertical axis washers.

Whirlpool submits that the proposed measurement method is fully consistent with the DOE test procedures, and that this request is consistent with DOE's authority to grant a Waiver. Whirlpool further submits that it is within the DOE's authority to grant an Interim Waiver to provide clarity on the test procedure for energy and water consumption of clothes washers, and to avoid economic hardship and competitive disadvantage.

1. Whirlpool Corporation

Whirlpool is a leading manufacturer of home appliances. Whirlpool sells clothes washers and other home appliances in major countries around the world, including in the United States. In the US, Whirlpool's appliances are marketed under the following brands: "Whirlpool", "Maytag", "KitchenAid", "Jenn Air", "Amana", "Roper", "Estate", "Magic Chef" and others. Whirlpool is a leading supplier of home appliances, including clothes washers, to Sears, Roebuck & Co., which Sears sells under the "Kenmore" brand. Whirlpool's worldwide headquarters are located at 2000 North M-63, Benton Harbor, Michigan, USA.

2. Basic Models Subject To The Waiver Request

This Petition For Waiver and Application For Interim Waiver is for all basic models of vertical axis clothes washers manufactured by Whirlpool Corporation that contain a tub cover as described herein.

3. Requested Waiver

Whirlpool requests approval to measure the clothes container capacity to the upper edge of the tub cover in vertical axis clothes washers containing such a component. The tub cover is an annular device located in the upper portion of the interior space of the clothes washer. The tub cover closes a gap that would otherwise exist between the upper edge of the balance ring (which is affixed to the top edge of the

basket), and the upper rim of the stationary washer tub. The tub cover prevents articles of clothing from becoming lodged or lost in the space between the washer tub and basket. The tub cover represents the top of the clothes container in Whirlpool vertical axis clothes washers that contain a tub cover.

An engineering drawing is attached at Exhibit A illustrating a cut-away section of a vertical axis clothes washer and showing the location of a tub cover. The drawing is provided as an illustrative example, and is not intended to limit this waiver to the exact dimensions or configuration of the drawing.

4. Regulatory Framework

The DOE regulations provide in 10 CFR 430.27 that a manufacturer may seek a waiver *"... upon the grounds that the basic model contains one or more design characteristics which ... prevent testing of the basic model according to the prescribed test procedures... ."*

The test procedure for measuring energy and water consumption of clothes washers is contained in 10 CFR 430, Subpart B, Appendix J1 ("J1"), and requires manufacturers to measure the capacity of the washer's clothes container. Clothes container capacity is a factor in the calculation of Water Consumption Factor (J1, Sec. 4.2.3), Modified Energy Factor (J1, Sec. 4.4), and Energy Factor (J1, Sec. 4.5) for clothes washers.

Section 1.4 of J1 defines "*clothes container*" as *"... the compartment within the clothes washer that holds the clothes during the operation of the machine."*

Sections 3.1 through 3.1.5 of J1 specify the steps to measure the capacity of the clothes container. Section 3.1 instructs manufacturers to *"Measure the entire volume which a dry clothes load could occupy within the clothes container during washer operation... ."* Sections 3 1.1 through 3.1.5 prescribe a series of steps in which the clothes washer is weighed (empty), lined with a plastic sheet, and then filled with water to the "*upper edge*" of the clothes container. Section 3.1.1 specifies that the test should be performed *"... so that the container will hold the maximum amount of water."* Section 3.1.5 provides a calculation for the clothes container capacity, in cubic feet, based on the change in mass of the washer with the clothes container filled with water.

5. Measurement To Tub Cover Is Consistent With J1

The J1 procedure does not identify or limit specific components of the clothes washer that form the clothes container. In the absence of more specific language, it is permissible and fully consistent with J1 to construe the clothes container to mean the space formed by inter-related components within the clothes washer, such as the top of the tub cover.

In Whirlpool vertical axis clothes washers containing a tub cover, measuring the clothes container capacity to the top edge of the tub cover is fully consistent with the J1 procedure. Section 3.1 of J1 instructs manufacturers to *"Measure the entire volume which a dry clothes load could occupy within the clothes container during washer operation... ."* In a Whirlpool vertical axis clothes washer, a dry clothes load could occupy the space up to, or even above, the tub cover during washer operation.

The J1 procedure suggests that manufacturers should attempt to conduct measurements in a manner that maximizes the clothes container capacity. For example, section 3.1 says that the measurement should be performed *"... so that the container will hold the maximum amount of water."* Measuring capacity to the top of the tub cover is consistent with this directive.

6. Other Manufacturers With Similar Design Characteristics

Whirlpool has not performed a comprehensive tear down of vertical axis clothes washers from other manufacturers to determine which, if any, contain a tub cover as described herein. Whirlpool has no reason to believe that the tub cover is unique to Whirlpool vertical axis clothes washers. There is a reasonable likelihood that vertical axis clothes washers from other manufacturers may contain a tub cover

or similar component. Names and addresses of other manufacturers of vertical axis clothes washers made or sold in the U.S. are listed on the attached Exhibit B.

7. Possible Alternate Test Procedures

As noted above, the J1 procedure does not identify or limit specific components of the clothes washer that form the clothes container. It is conceivable that a manufacturer could interpret the J1 procedure to permit measurement of clothes container capacity to other points within the clothes washer.

The J1 procedure could be interpreted to permit measurement of the clothes container capacity to coincide with the upper rim of the basket or balancing ring within the clothes washer. However, there is no specific text within J1 that limits measurement to the basket rim or balancing ring. As noted above, such a limitation may be inconsistent with portions of J1 that suggest a manufacturer should maximize the volume of the clothes container for capacity measurement.

Taken to an extreme, it may be possible to construe the J1 procedure to permit measurement of the clothes container capacity to the interior of the washer lid, since (using the terminology of J1) a dry clothes load could occupy that space during washer operation. Such an approach would provide some consistency with the method for measuring clothes container capacity in horizontal axis clothes washers (which essentially involves measuring the full volume of the basket out to the door interior.) Although Whirlpool is not advocating measurement to the lid in this petition, Whirlpool would welcome any clarifying comments from DOE on whether such an interpretation would be permissible under J1.

Whirlpool submits that measuring the clothes container capacity to the top edge of the tub cover is a valid interpretation of J1, and represents a reasonable compromise between the extremes of the basket edge and lid as described above.

8. Additional Justification For Interim Waiver Application

Granting of an Interim Waiver is justified in this case because: (i) Whirlpool has provided strong evidence that demonstrates the likelihood of the granting of the Petition for Waiver; and (ii) Whirlpool will suffer significant economic hardship and competitive disadvantage if this Interim Waiver Application is not granted; and (iii) there are strong public policy justifications to issue an Interim Waiver to help promote uniform interpretation and application of the J1 procedure.

a. Strong Likelihood That Waiver Will Be Granted

Whirlpool has provided strong evidence that the Waiver should be granted. A Petition for Waiver is appropriate because the tub cover represents a design characteristic (pursuant to 10 CFR 430.27) of Whirlpool vertical axis clothes washers that prevents clarity as to the prescribed method for measuring clothes container capacity in vertical axis clothes washers. Whirlpool has provided ample information in this Petition for Waiver and Application for Interim Waiver explaining its rationale for measuring clothes container capacity to the top of the tub cover. Whirlpool has demonstrated that such measurement is consistent with the J1 procedure.

b. Economic Hardship & Competitive Disadvantage

In the absence of an Interim Waiver, Whirlpool will lack certainty as to the manner by which it should measure clothes container capacity in vertical axis washers containing a tub cover, since the J1 procedure is silent as to the exact point to which the capacity should be measured.

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c. Public Policy Favors Consistent Application Of J1

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10. CONCLUSION

Whirlpool respectfully submits that the proposed measurement method is fully consistent with the J1 test procedures, and that this request is consistent with DOE's authority to grant Waivers. Whirlpool further submits that it is within the DOE's authority to grant an Interim Waiver in this case to provide clarity on the test procedure and to avoid economic hardship and competitive disadvantage for Whirlpool.

Whirlpool respectfully requests the Assistant Secretary's favorable response to this Petition for Waiver and Application for Interim Waiver.

Sincerely,

J. B. Hoyt
Director, Government Relations
Whirlpool Corporation

Whirlpool Corporation Petition for Waiver & Application for Interim Waiver regarding Measurement of Clothes Container Capacity in Vertical Axis Clothes Washers

Exhibit A

This drawing is a cut-away section of a vertical axis clothes washer, showing the location of a tub cover. This drawing is provided as an illustrative example, and is not intended to limit this waiver to the exact dimensions or configuration of the drawing.

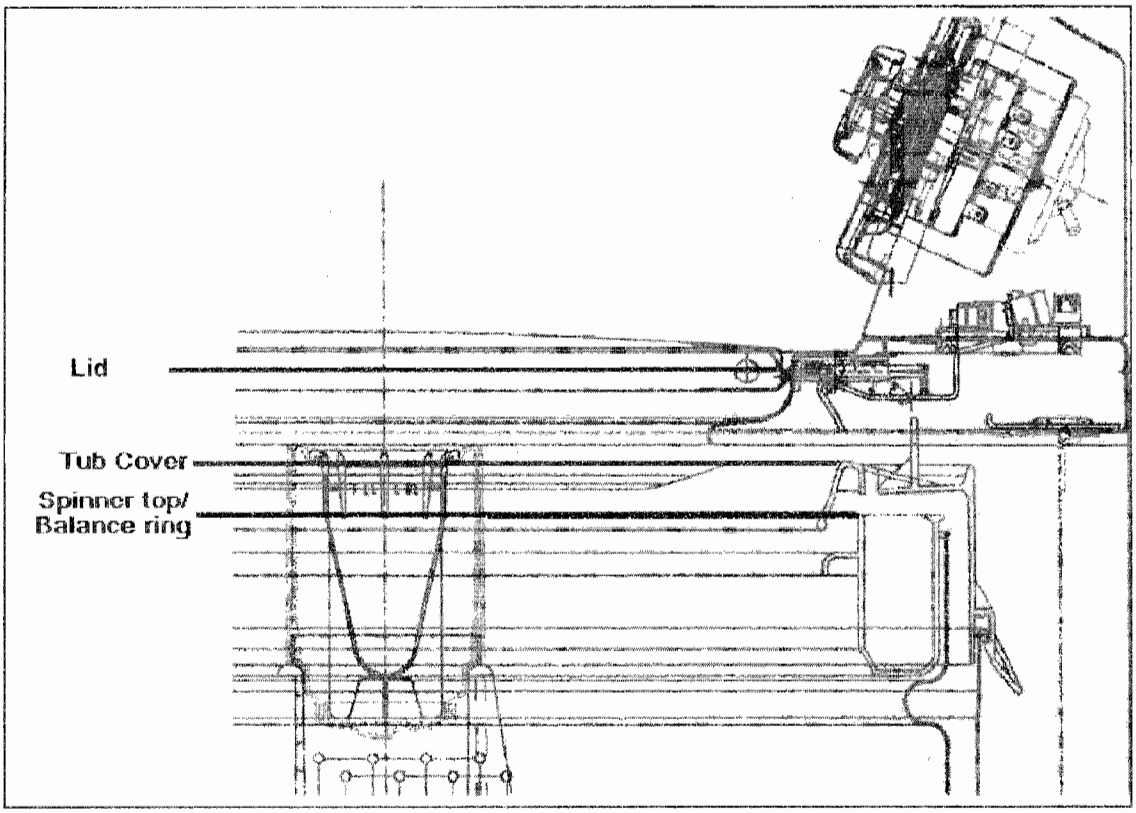

Exhibit B: Notice to Manufacturers

March 20, 2007

Alliance Laundry Systems, LLC
Attn: Philip J. Mantei
PO Box 990
Shepard Street
Ripon, WI 54971

Association of Home Appliance Mfr's
Attn: Wayne E. Morris
1111 19th Street NW, Suite 402
Washington, DC 20036

Avanti Products
10880 NW 30th Street
Miami, FL 33172

Bosch Home Appliances Corporation
Attn: Brian Chatot
5551 McFadden Avenue
Huntington Beach, CA 92649

Danby Products, Inc.
PO Box 669
Findlay, OH 45839-0669

Electrolux Home Products
Attn: Ed Buckles
PO Box 212378
Martinez, GA 30917

Fisher & Paykel Appliances Inc.
Attn: Richard Bollard
5900 Skylab Road
Huntington Beach, CA 92647

General Electric Company
Attn: Earl F. Jones
3135 Easton Turnpike
Fairfield, CT 06828-0001

Haier America
Attn: Ilya Mosionzhnik
45 W. 36th Street
New York, NY 10018-7904

Re: Notice of Whirlpool Corporation's Petition for Waiver & Application for Interim Waiver regarding Measurement of Clothes Container Capacity in Vertical Axis Clothes Washers

Dear Madam or Sir:

Whirlpool Corporation ("Whirlpool") is submitting the enclosed Petition for Waiver and Application for Interim Waiver (pursuant to 10 CFR 430.27) to the US Department of Energy ("DOE"), relating to the Test Procedures for energy and water consumption of clothes washers. This letter provides notice to other known manufacturers of similar products. The DOE Assistant Secretary for Conservation and Renewable Energy will receive and consider timely written comments on the Petition for Waiver and Application for Interim Waiver. Any manufacturer submitting written comments should provide a copy to Whirlpool Corporation at the address shown below.

Whirlpool Corporation
Attn: Thomas A. Schwyn, Senior Counsel
2000 M-63 North
Benton Harbor, MI 49022
Fax: 269/923-6221
Email: thomas_a_schwyn@whirlpool.com

ATTACHMENT C

Comments for DOE's Consideration Regarding "Capacity Measurement of Vertical-Axis Clothes Washers"

Alliance Laundry Systems is the world's largest commercial laundry equipment manufacturer. We manufacture commercial clothes washers under the Speed Queen™, Huebsch™, Unimac™, and IPSO™ trademarks in Ripon, Wisconsin. We also manufacture consumer residential laundry equipment under the Speed Queen™ trademark. We employ approximately 1,300 people in the USA. Thank you for the opportunity to comment.

The following comments are in response to Whirlpool Corporation's, March 20, 2007 Petition for Waiver and Application for Interim Waiver regarding measurement of clothes container capacity in vertical-axis clothes washers.

- We concur with Whirlpool's petition and application. We agree because we have interpreted the methodology of determining where to stop the filling of water for the measurement clothes container capacity, to be the top of the outer-tub-cover. It is obvious that dry clothes can be loaded into a vertical-axis clothes washer to the top of the outer-tub-cover and possibly all the way to the lid. We have drawn the line for capacity measurement to be at the outer-tub-cover top because it is where we believe most people would stop loading. A large load of dry clothes of sufficient size to occupy the volume all the way to the outer-tub-cover top, will absorb the incoming fill water, relax somewhat and be pulled farther down into the clothes container during agitation. Although initially the air in the clothes load causes buoyancy, and the load will actually rise, thus filling the upper most space. Therefore it is appropriate to count the volume that the dry clothes load actually uses in application.

- I (Phil Manthei) was a member of the industry group that gathered in 1994 / 1995 to work on developing a proposal for what became the revised Test Procedure for Clothes Washer commonly referred to as Appendix J1. We struggled with how to better define the physical measurement of clothes container capacity. In the end, no significant changes were made from the Appendix J, which was the existing test procedure at the time The reason for making little change dealt with the varying designs in the industry at the top portion of the clothes container tub, balance ring, outer-tub-cover and agitator. What might seem easy to define as the upper most measurement location in one design, could not be applied to other

ATTACHMENT C

designs. Today's designs of vertical-axis clothes washers appear to all have an outer-tub-cover and thus it would makes sense to set that as the "upper-most edge of the clothes container".

- Alliance Laundry Systems has measured competitive products for clothes container capacity in the past and found that the vertical-axis clothes washers produced by Maytag (now a Whirlpool Division) could only achieve their advertised DOE capacity if the measurement (filling of water into the plastic lined container) terminated at the outer-tub-cover. Alliance Laundry Systems did not always measure and advertise its product's DOE capacity by measuring all the way to the tub cover, but began doing so with the effective date of the 2007 Minimum Standard, after realizing that Maytag appeared to rate their vertical-axis clothes washers in that manner. We did not see a need to file a petition for waiver and application for interim waiver with DOE in making our determination of where to terminate the measurement. We understand Whirlpool's need for certainty in their future design plans, and support their proposal to terminate the capacity measurement at the top of the outer-tub-cover, as we have already made such a determination unilaterally for rating of our vertical-axis clothes washers.

- Alliance Laundry Systems would be greatly harmed if DOE ruled that the clothes container capacity measurement should be terminated below the top of the outer-tub-cover. As explained above, we currently require utilizing the top of the outer-tub-cover termination point for capacity measurement to achieve the existing Minimum Standard for our vertical-axis clothes washers.

In summary, we fully support Whirlpool's proposal for measurement of clothes container capacity for vertical-axis clothes washers.

Respectfully submitted,

Phil Manthei
Sr. Staff Engineer, Agency/Codes Approval
Alliance Laundry Systems LLC

Proposed Clarification to 10 CFR 430, Subpart B, Appendix J1 in Q & A Format

To aid the Department, we have developed a clarification to the J1 test procedure that follows a Question and Answer (Q & A) format, consistent with FAQ documents currently published on the DOE website for other covered products.

Q: 10 CFR 430, Subpart B, Appendix J1 Section 3.1 states that the clothes container capacity should be determined by "Measure[ing] the entire volume which a dry clothes load could occupy within the clothes container during washer operation according to sections 3.1.1 through 3.1.5". Some vertical axis washers include a tub cover which is an annular device located in the upper portion of the interior space of the clothes washer. The tub cover closes a gap that would otherwise exist between the upper edge of the balance ring (which is affixed to the top edge of the basket), and the upper rim of the stationary washer tub. The tub cover prevents articles of clothing from becoming lodged or lost in the space between the washer tub and basket. The tub cover may represent the top of the clothes container in vertical axis clothes washers that contain a tub cover. If a tub cover is present on a vertical axis washer, can the clothes container capacity be determined by measuring to the top of the tub cover?

A: As noted in the question, Appendix J1, Section 3.1 states the following for determining clothes container capacity: "Measure the entire volume which a dry clothes load could occupy within the clothes container during washer operation according to sections 3.1.1 through 3.1.5". Appendix J1, Section 3.1.1 also states "Place the clothes washer in such a position that the uppermost edge of the clothes container opening is leveled horizontally, so that the container will hold the maximum amount of water". In addition, the J1 procedure does not identify or limit specific components of the clothes washer that form the clothes container. Since dry clothes may occupy the space created by the tub cover and the J1 test procedure state that the container should hold the maximum amount of water when determining drum volume, clothes container capacity may be measured to the upper edge of the tub cover in vertical axis clothes washers containing such a component.

EXHIBIT 11

2000 M 63 · Mail Drop 3005 · Benton Harbor, Michigan 49022 · Phone: 269/923-4647 · j.b.hoyt@whirlpool.com

J.B. HOYT
DIRECTOR, GOVERNMENT RELATIONS

Via email Clothes_Container_FAQ@HQ.DOE.gov

June 9, 2010

Stephen Witkowski
U.S. Department of Energy, Building Technologies Program
1000 Independence Avenue, SW
Washington, DC 20585-0121

Re: Response to DOE's draft interpretation of the test procedure for measuring the capacity of clothes washers

Dear Mr. Witkowski,

On May 13, 2010, the Department of Energy ("DOE" or "Department") posted a request on its website[1] soliciting comments regarding a draft interpretation of its test procedures applicable to clothes washers as set forth in 10 C.F.R. Part 430, Subpart B, Appendix J1 ("J1 Test Procedure").[2] Specifically, DOE posed the following question: "For purposes of measuring the clothes container capacity under 10 CFR 430, Subpart B, Appendix J1 test procedures, what is considered the clothes container?"

In the May 13 posting, DOE provided its draft interpretation with respect to both top loading and front loading clothes washers. The May 13 Draft Interpretation proposes to interpret Section 3.1 of the J1 Test Procedure so that for top loading (vertical-axis) clothes washers, the maximum capacity is "Fill Level 3," and for front loading (horizontal-axis) clothes washers, maximum capacity is "Fill Volume B," as illustrated in the figures attached to the May 13 Draft Interpretation.

Whirlpool submits these comments regarding the proper interpretation of the J1 Test Procedure for measuring the clothes container capacity. As demonstrated below, measuring the clothes container capacity at Fill Level 4 in top loading machines is most consistent with the terms of the J1 Test Procedure.

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[1] http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/frequently_asked_questions_cw_final_05-13-2010.pdf (hereinafter, "May 13 Draft Interpretation").

[2] 10 C.F.R. Part 430, Subpart B, Appendix J1 (hereinafter, "J1 Test Procedure").

I. Measuring capacity of top loading washers at Fill Level 4 is consistent with the language of the J1 Test Procedure.

A. Key provisions of the J1 Test Procedure

Analysis of the test procedure requirements starts with the words of the test procedure itself. Section 3.1 of the J1 Test Procedure explains how a manufacturer must calculate the capacity of the clothes container. In relevant part, Section 3.1 provides:

> 3.1 Clothes container capacity. Measure the entire volume which a dry clothes load could occupy within the clothes container during washer operation according to the following procedures:
>
> 3.1.1 Place the clothes washer in such a position that the uppermost edge of the clothes container opening is leveled horizontally, so that the container will hold the maximum amount of water.
>
> 3.1.2 Line the inside of the clothes container with 2 mil (0.051 mm) plastic sheet. All clothes washer components which occupy space within the clothes container and which are recommended for use with the energy test cycle shall be in place and shall be lined with 2 mil (0.051 mm) plastic sheet to prevent water from entering any void space.
>
> . . .
>
> 3.1.4 Fill the clothes container manually with either 60° F +/- 5° F [15.6° C +/- 2.8° C] or 100° F +/- 10° F [37.8° C +/- 5.5° C] water to its uppermost edge. Measure and record the weight of water, W, in pounds.[3]
>
> . . .

The test procedure calls for measuring "the **entire volume** which a dry clothes load **could** occupy"[4] by orienting the washer such that the "**uppermost edge** of the clothes container opening is leveled horizontally, so that the container will hold **the maximum amount of water**,"[5] and then filling the container with "water to its **uppermost edge**."[6]

B. May 13 Draft Interpretation

Figure 1 in the May 13 Draft Interpretation sets forth various fill levels within a top loading washer. In that draft interpretation, DOE acknowledged that the clothes container of a top loading washer includes "an additional lip, edge, or shroud (commonly referred to as a tub cover)

---

[3] J1 Test Procedure, § 3.1.
[4] J1 Test Procedure, § 3.1 (emphasis added).
[5] J1 Test Procedure, § 3.1.1 (emphasis added).
[6] J1 Test Procedure, § 3.1.4 (emphasis added).

enclosing a volume within the clothes container that a dry clothing load could occupy."[7] However, the draft interpretation states that the maximum fill level that is consistent with the test procedure corresponds to Fill Level 3 because it represents "the highest horizontal plane that a clothes load could occupy." DOE's Figure 1 is reproduced below:

FIGURE 1
Specification of Fill Levels for Top Loading Washers from May 13 Draft Interpretation

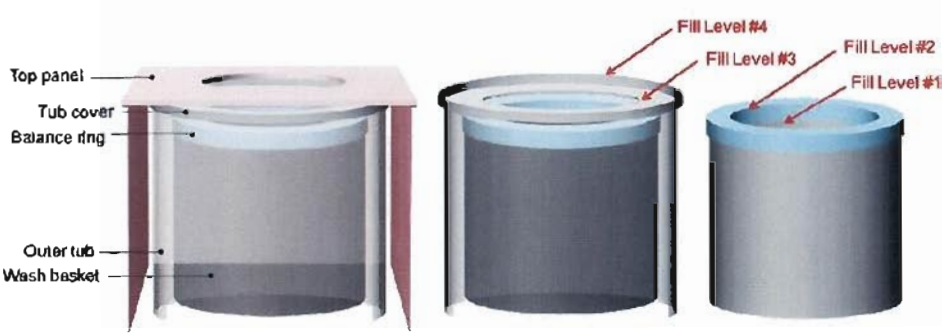


Figure 1: Representation of Fill Levels for the Clothes Container Capacity Measurement for Vertical-Axis Clothes Washers

The draft interpretation further states that Fill Level 4, which represents the uppermost edge of the of the tub cover in Figure 1, is "not consistent with the capacity measurement method" of the J1 Test Procedure because it includes "volume enclosed by an additional lip, edge, or shroud that a clothing load could not occupy during washer operation."[8] However, as explained below, measuring capacity at Fill Level 4 is proper under the J1 Test Procedure because:

1. Fill Level 4 is most consistent with the terms of the J1 Test Procedure;
2. Dry clothes loads could occupy the volume corresponding to Fill Level 4 during washer operation;
3. Measuring capacity at Fill Level 4 provides greater certainty and repeatability in testing; and
4. Fill Level 4 is consistent with the fill level used for front loading washers.

C. Fill Level 4 is "the uppermost edge of the clothes container."

The clothes container for both top loading and front loading clothes washers consists of the washer basket and tub structure.[9] As described above, the J1 Test Procedure measures capacity by filling the clothes container with water up to "the uppermost edge."[10] Selecting a measurement level that is below the "uppermost edge" of the clothes contain would be in direct conflict with the precise language of the J1 Test Procedure.

---

[7] May 13 Draft Interpretation.
[8] May 13 Draft Interpretation (clothes container "includes an additional lip, edge or shroud (commonly referred to as a tub cover) enclosing a volume within the clothes container that a dry clothing load could occupy").
[9] *See* May 13 Draft Interpretation.
[10] J1 Test Procedure, § 3.1.4.

As demonstrated in the figures below, the upper rib of the tub cover is the uppermost edge of the clothes container that includes space that dry clothes load "could occupy" during washer operation.

FIGURE 2

Three-dimensional cross sectional view of top loading clothes washer showing tub, wash basket, tub cover and top panel structure

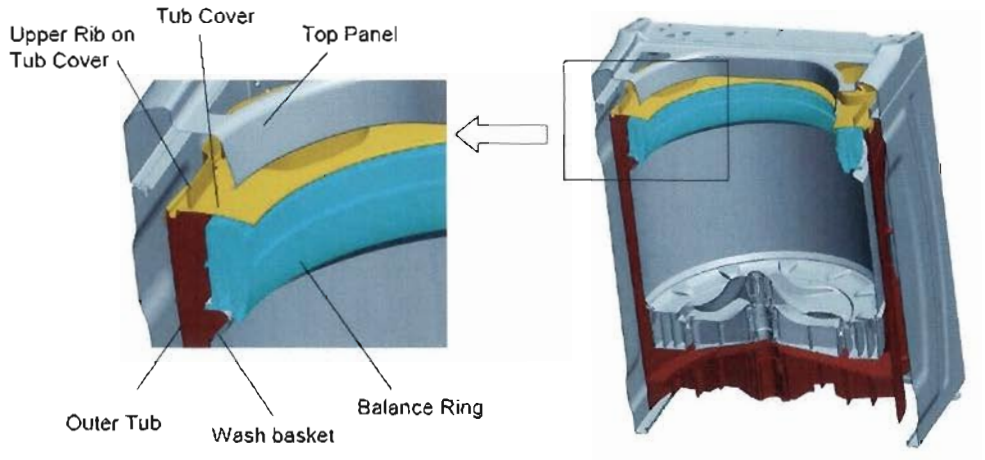
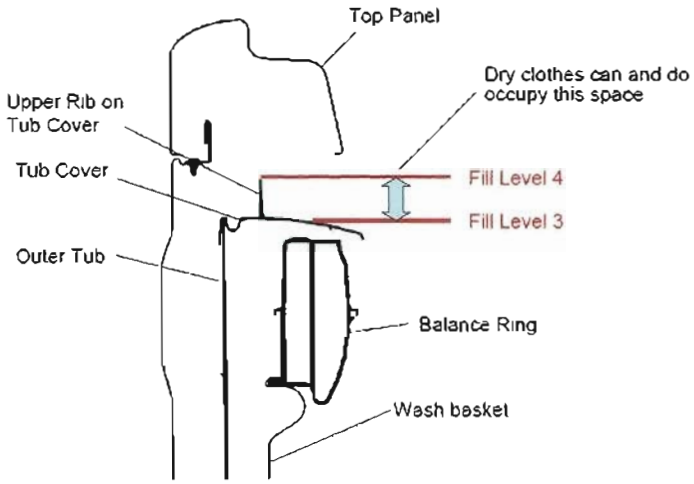


FIGURE 3

Two-dimensional cross sectional view of top loading clothes washer showing tub, wash basket, tub cover and top panel structure



As set forth in the May 13 Draft Interpretation, the difference between Fill Level 3 and Fill Level 4 appears to be the height of an upper rib located on the top of the tub cover. The rib is located around the outer rim of the clothes container to ensure that water does not splash out of the tub

and clothes do not fall between the outer tub and the cabinet—preventing the stereotypical "lost sock." As such, the upper rib is an essential part of the tub cover because it performs an integral role in the washer operation; i.e. helps to prevent loss of clothing items and avoids splash-out. Because the tub cover is part of the clothes container, and the upper rib is a part of the tub cover, the upper rib also is properly considered part of the clothes container. The rib is literally designed to contain clothes (and prevent water splash-out). Thus, the upper rib of the tub cover, which corresponds to DOE's Fill Level 4, establishes the upper edge of the clothes container,[11] and is properly used for capacity measurements.

D. Dry clothes load "could occupy" the volume within the clothes container up to Fill Level 4.

Section 3.1 of the J1 Test Procedure requires manufacturers to measure the "entire volume" of the clothes container that dry clothes load "could occupy." Dry clothes can and do occupy the space that is between Fill Level 3 and Fill Level 4.[12] In fact, a consumer can fill a top loading washer with dry clothes up to a level approaching the underside of the lid that covers the clothes container. This level is even higher than Fill Level 4 – a possible Fill Level 5.

Filling top loading clothes washers above Fill Level 3, and even above Fill Level 4, is not just a theoretical possibility, it is a loading practice used by some consumers that has been observed by Whirlpool. Figure 4 shows real-world dry clothes loads. These pictures are of actual consumer loads taken during field tests of Whirlpool clothes washers. As these pictures show, some consumers do load washers at or above Fill Level 4.

FIGURE 4
Actual customer dry clothes loads from field testing

[11] DOE may be concerned about the possibility of gaming this interpretation by using a tub cover rib that extends above the overhang of the cabinet during operation, and thus is larger than is necessary to contain clothes. Whirlpool does not make or sell such a design. In machines with such a design, however, where a tub cover rib extends above the lower edge of the top panel (the cabinet of the machine), it would be reasonable to interpret the test procedure such that Fill Level 4 would not extend above the bottom edge of the cabinet opening.

[12] *See* Figure 3 above for a depiction of the space between Fill Level 3 and Fill Level 4.

Figure 5 shows a dry clothes load that occupies a volume that exceeds Fill Levels 3 and 4, and approaches the underside of the washer lid, and the same load after washing. These pictures demonstrate that while dry clothes may approach the underside of the lid cover during the initial period of washer operation, the load collapses to a lower level when fully wet.[13]

FIGURE 5
Dry clothes load at or above Fill Level 4 at start and finish of washer operation

DRY Same Load WET

The May 13 Draft Interpretation states that the Fill Level 4 is not consistent with the J1 Test Procedure, because this level "includes volume enclosed by an additional lip, edge, or shroud that a clothing load could not occupy during washer operation."[14] As described above, customers do fill top loading clothes washers up to, and sometime beyond, Fill Level 4. The space between Fill Level 3 and Fill Level 4 is space that dry clothes loads could occupy during washer operations. As Figure 5 reflects, the dry clothes in this space will, as they are wetted and washed during washer operation, settle lower into the wash basket and be cleaned.

E. Measuring capacity at Fill Level 4 will provide greater certainty to manufacturers, resulting in greater consistency in capacity measurements and repeatable test results.

There are also practical considerations that support selecting Fill Level 4. If DOE interprets the J1 Test Procedure as requiring an intermediate fill level position, such as Fill Level 3, which is lower than the uppermost edge of the clothes container, it may cause uncertainty and inconsistency as to capacity measurements.

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[13] Section 1.4 of the J1 Test Procedure defines "clothes container" as "the compartment within the clothes washer that holds the clothes during operation of the machine." When the lid is closed and the wash cycle selected, the machine begins operation. After a water fill and an initial period of water recirculation, dry clothes that rise up to Fill Level 4 or above collapse to a lower level when wet, and all of the clothes are washed. Thus, the washer holds all of the clothes at Fill Level 4 "during operation of the washer."

[14] May 13 Draft Interpretation.

The May 13 Draft Interpretation and Figure 1 do not provide guidance as to the exact location of Fill Level 3. That level is just shown as a point on the tub cover that is not the rib. On Whirlpool washers, for instance, the tub cover is not horizontal, but rather slightly angled. Thus, due to variations in washer design, there may be many points that could qualify as that intermediate point. Every manufacturer would be required to compare their unique tub cover design to the illustrations of Figure 1 and determine which intermediate position on the tub cover best matches the depicted Fill Level 3. The point chosen by one manufacturer may be different that the point chosen by another manufacturer, and may be different than the point chosen by testing laboratories. This could result in variations in capacity measurements. Measuring capacity at Fill Level 4, the uppermost edge of the clothes container, as provided for by the J1 Test Procedure, will lead to greater clarity and repeatability in capacity and energy consumption measurements.

F. Measuring the capacity of top loading washers at Fill Level 4 is the most comparable with the level used for measuring the clothes container capacity for front loading (horizontal axis) washers.

The May 13 Draft Interpretation provides that the capacity of front loading (horizontal axis) washers must be measured by placing the washer on its back such that the front opening of the washer is horizontally level.[15] The capacity of front loading washers is measured to the highest point of contact between the door and the door gasket. If any portion of the door or gasket occupies space within the volume being measured when the door is closed, that space must be excluded from the measurement. Thus, for front loading washers, the capacity measurement uses a fill level up to the underside of the washer door and measures the maximum volume clothes could occupy when the door is closed.

Fill Level 4 on a top loading washer is the level that is most comparable to the level used for measuring the clothes container capacity in front loading washers. Measuring at Fill Level 4 would also measure the volume clothes could occupy when the lid is closed and the washer is being used. Whirlpool believes that top loading and front loading washers should be measured and tested in a comparable manner, and in a manner that achieves consistent and fair results. DOE's interpretation should be guided by that concept. The selection of any level lower than Fill Level 4 would lead to discrepancies in treatment of top loading and front loading washers, giving one washer design an advantage over the other.

For the reasons stated above, measuring capacity at Fill Level 4 for top loading washers is the proper interpretation of Section 3.1 of the J1 Test Procedure.

II. Front Loading (horizontal-axis) clothes washers

The J1 Test Procedure was developed prior to widespread use of front loading washers in the United States. Thus, it is appropriate for DOE to provide guidance to the industry with respect to the testing of such washers. For front loading washers, Whirlpool believes the key test procedure areas requiring DOE guidance are:

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[15] *See* J1 Test Procedure, § 3.1.1.

(i) the manner of securing the wash basket during testing to ensure that the wash basket does not sag or move out of normal operating range; and

(ii) the manner in which the door volume is excluded from the overall volume.

Whirlpool proposes the following guidance to address these issues.

Since a front loading washer is placed in an orientation during capacity measurement that is different than its operating position, it is essential that the clothes container be secured in position prior to placing the washer on its back. This will prevent the clothes container from sagging downwardly and stretching the bellows structure which is typically provided to connect the washer tub with the exterior cabinet. For front loading washers, a capacity measurement position for the clothes container must be determined by initially placing clothes washer in its operating position, leveled as recommended by the manufacturer and determining the at-rest position of the clothes container relative to clothes container door, in its unloaded position, leaving any shipping fixtures provided with the washer in position. This position is the clothes container capacity measurement position.

With the clothes container secured in its capacity measurement position, the clothes washer must be placed in such a position that the uppermost edge of the clothes container opening is leveled horizontally, so that the clothes container will hold the maximum amount of water. Once the inside of the clothes container is properly lined with plastic sheeting, the clothes container must be filled with water to its uppermost edge with the door in the open position, where the uppermost edge is the highest point of contact between the door and door gasket/bellows. If necessary, additional restraints or supports should be used to ensure that the clothes container is retained in its capacity measurement position when filled with water. Upon filling the clothes container to its uppermost edge, the clothes washer door should be closed and all excess water that is displaced by any portion of the door which protrudes into the clothes container must be removed from the washer. The weight of this remaining water is then used to determine the volume of the clothes container.

IV. Proposed Interpretation

In order to implement the concepts discussed above, Whirlpool proposes certain changes to DOE's May 13 Draft Interpretation. The proposed changes are shown, in redline, in Attachment 1. These changes are intended to address:

(i) the correct Fill Level selection for top loading washers;

(ii) the manner of securing the front loading washer during capacity measurement; and

(iii) the manner of excluding volume that clothes cannot occupy during washer operation from top loading and front loading washers.

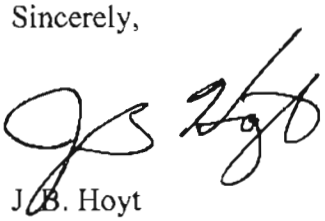
V. Conclusion

As demonstrated above, measuring capacity at Fill Level 4 is the proper interpretation of Section 3.1 of the J1 Test Procedure because measuring capacity at Fill Level 4 is consistent with the terms of the J1 Test Procedure; dry clothes loads could occupy the volume corresponding to Fill Level 4; measuring capacity at Fill Level 4 provides greater certainty and repeatability in testing; and using Fill Level 4 is consistent with the fill level used for front loading washers. Additional guidance on measuring the capacity of front loading clothes washers, focusing on the manner of securing the wash basket during testing and the way in which the door volume is excluded from the overall volume, would be helpful.

As noted in the comments of the Association of Home Appliance Manufacturers ("AHAM"), DOE's interpretation of the J1 Test Procedure can have important product design implications and consequences. Clothes washer manufacturers base their business decisions on good faith interpretations of the applicable test procedures. Therefore, it is critical that DOE provide ample advance notice to manufacturers of any restrictive interpretation that it might adopt so that manufacturers have a fair opportunity to adjust to the new interpretation.

Thank you for your time and attention to this matter. If you have any questions, or if further discussion of this matter would be helpful, please contact me at the number listed above or Joel Van Winkle at (269) 923-8284.

Sincerely,



J. B. Hoyt

Attachment

EXHIBIT 12

Frequently Asked Questions

For purposes of measuring the clothes container capacity under 10 CFR 430, Subpart B, Appendix J1 test procedure, what is considered the clothes container?

The following answer is intended to clarify the Department's views on measuring the clothes container capacity under 10 CFR 430, Subpart B, Appendix J1 test procedure. This interpretative rule represents the Department's interpretation of its existing regulations and is exempt from the notice and comment requirements of the Administrative Procedure Act. *See 5 U.S.C. §553(b)(A).* Nevertheless, the Department sought comment on a draft issued May 13, 2010, and considered all comments received in the development of the answer provided below.

The general requirements for measuring the clothes container capacity of a clothes washer are found in 10 CFR Part 430, Subpart B, Appendix J1. The following statement provides manufacturers with additional guidance on this issue.

Clothes container means the compartment within the clothes washer that holds the clothes during the operation of the machine.

For top-loading (vertical-axis) clothes washers:

For top-loading (vertical-axis) clothes washers, the upper-most edge of the clothes container shall be considered the highest point of the inner-most diameter of the tub cover. The maximum fill level that is consistent with the test procedure corresponds to "Fill Level 3" in Figure 1. Figure 2 shows the location of "Fill Level 3" for a variety of potential tub cover designs. (DOE notes that the diagrams in Figure 2 were originally submitted by commenters; on consideration of the diagrams, DOE made modifications to the interpretation of "Fill Level 3" in examples 1, 2, 4 and 6.)

"Fill Level 3" represents the highest horizontal plane that a clothes load could occupy. "Fill Level 4" is not consistent with the capacity measurement method of the test procedure because, as defined in Section 3.1 of the test procedure, "Fill Level 4" includes volume above the surface of the tub cover that a dry clothes load could not occupy during washer operation.

For the volume measurement of the machine capacity for top loading (vertical-axis) machines, the filling of the water must stop at the highest horizontal plane that a clothes load could occupy (not to exceed "Fill Level 3"). The volume is measured with the door or lid open. If any portion of the door, when closed, would occupy the measured volume space, the volume that the door portion would occupy must be excluded from the measurement.

For front-loading (horizontal-axis) clothes washers:

During the capacity measurement for front-loading (horizontal-axis) clothes washers, the shipping bolts are to remain in place. This will prevent the clothes container from sagging downward when filled with water and stretching the bellows structure, as well as prevent possible damage to the clothes container structure.

For the volume measurement of the machine capacity for front-loading (horizontal-axis) machines, the filling of the water must not exceed the highest point of contact between the door and the door gasket. If any portion of the door or gasket would occupy the measured volume space when the door is closed, the volume that the door or gasket portion would occupy must be excluded from the measurement. "Fill Volume B" in Figure 3 below represents the maximum fill volume for front-loading (horizontal-axis) clothes washers. Figure 4 shows "Fill Volume B" for a front-loading washer with a concave door, and Figure 5 shows "Fill Volume B" for a top-loading horizontal-axis clothes washer.

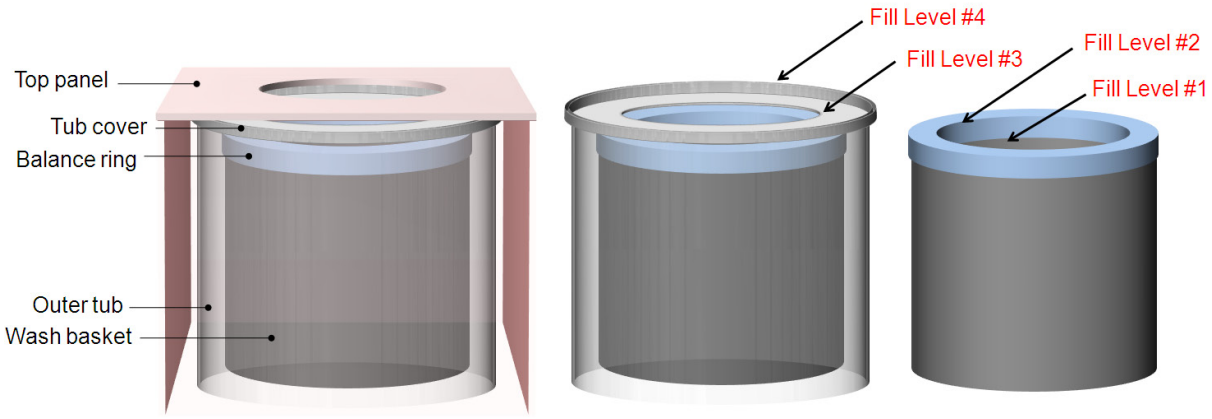


Figure 1: Representation of Fill Levels for the Clothes Container Capacity Measurement for Vertical-Axis Clothes Washers

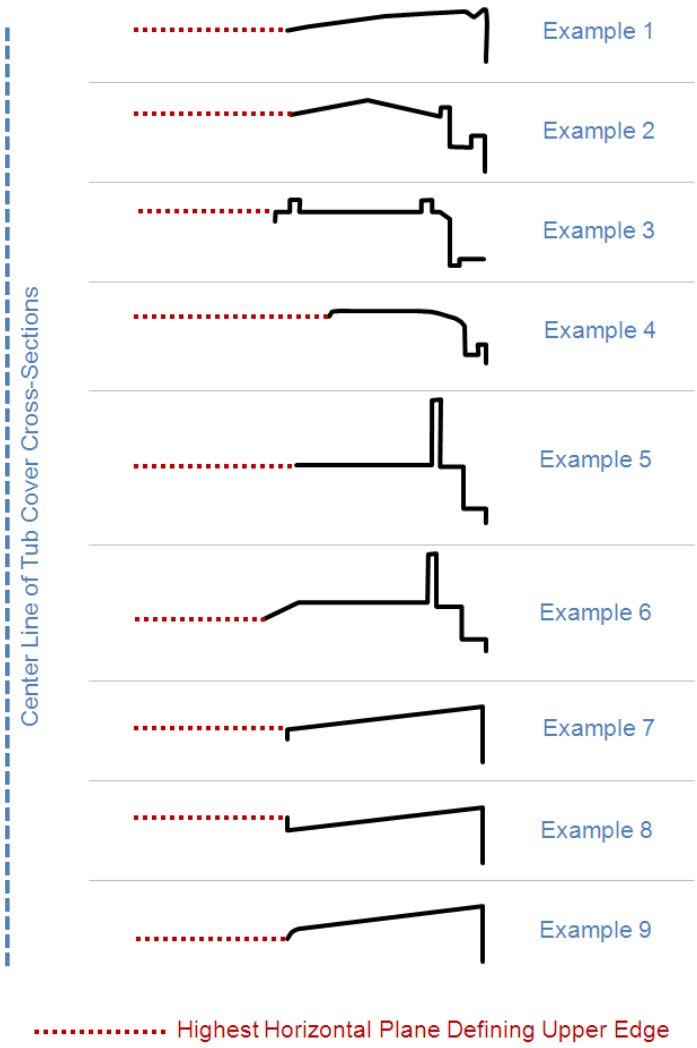


Figure 2: Example Cross-Sections of Tub Covers Showing the Highest Horizontal Plane Defining the Uppermost Edge of the Clothes Container.

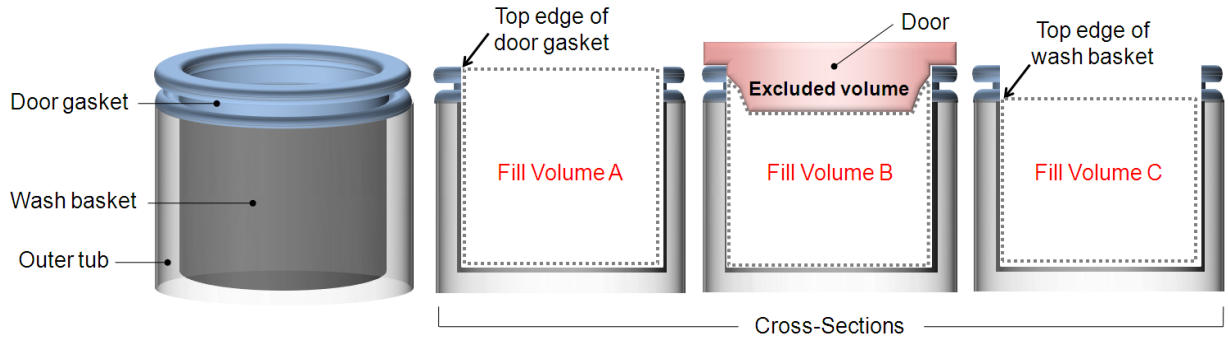


Figure 3: Representation of Fill Volumes for the Clothes Container Capacity Measurement for Front-Loading Horizontal-Axis Clothes Washers

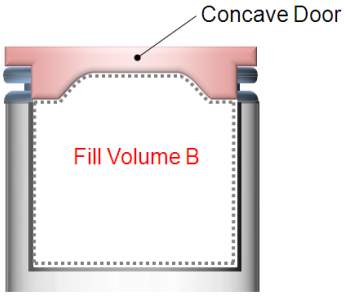


Figure 4: Representation of Correct Fill Volume for Front-Loading Washer with Concave Door

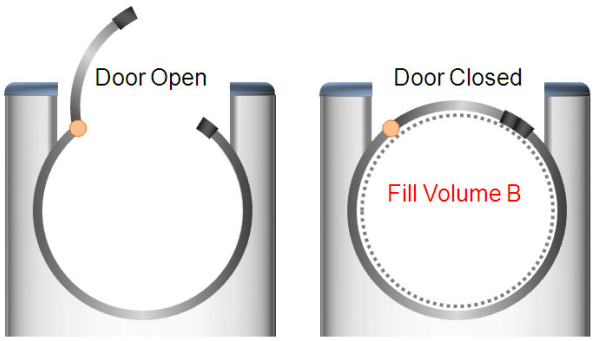


Figure 5: Representation of Correct Fill Volume for Top-Loading Horizontal-Axis Clothes Washers

EXHIBIT 13

Department of Energy
Washington, DC 20585

March 23, 2011

Via email to Joel_Van_Winkle@whirlpool.com

Joel Van Winkle, Esq.
Group Counsel
Whirlpool Corporation
2000 N. M-63
Benton Harbor, MI 49022-2692

RE: DOE Case 2010-SCE-0303

Dear Mr. Van Winkle,

Thank you for the information you provided to the Department of Energy (DOE or the Department) related to Whirlpool manufactured residential clothes washers. As you know, the Department has an open investigation related to the capacity measurement of certain top loading clothes washers manufactured by Whirlpool.

We understand that, since DOE issued guidance on capacity measurement in July 2010, Whirlpool has used the guidance to test, rate, and certify the energy performance of all new washers. We also understand that Whirlpool has been retesting and recertifying its pre-existing clothes washer models to conform to the guidance and expects to have all washers re-rated by the end of April.

In light of these developments, the Department is interested in bringing this investigation to a close. Before we can do so, however, we require that all Whirlpool clothes washers have been rerated and recertified in accordance with the guidance. Therefore, please notify the Department once you have completed the rerating process and can confirm that all pre-existing and new clothes washers have been certified in accordance with the guidance.

Please feel free to contact Stephanie Weiner (202-586-9648) should you have any questions.

Sincerely,

Timothy G. Lynch
Deputy General Counsel for
Litigation and Enforcement

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EXHIBIT 14

Department of Energy
Washington, DC 20585

September 20, 2010

Mr. J.B. Hoyt
Whirlpool Corporation
Director, Government Relations
2000 North M63, Mail Drop 3005
Benton Harbor, MI 49022

Dear Mr. Hoyt:

The Maytag clothes washer model MVWC6ESWW1 was selected for testing as part of the ENERGY STAR® Verification Testing Pilot Program. Under this program, the U.S. Department of Energy (DOE) is testing samples of the most popular types of products in the State Energy Efficient Appliance Rebate Program (SEEARP) to 1) ensure that ENERGY STAR products meet the ENERGY STAR program requirements and 2) ensure that ENERGY STAR products meet the manufacturer's stated ratings.

This letter notifies you that test results from the ENERGY STAR Verification Testing Pilot Program show that the clothes washer model identified below does not satisfy the ENERGY STAR Program's energy-efficiency specifications. The test results are summarized below.

Brand name and model number	Requirements		Serial #	Test Results	
	Federal Minimum Standard (cu.ft./kWh/yr)	ENERGY STAR (cu.ft./KWh/yr) (gallons/cycle/cu.ft.)		Measured Energy Use (cu.ft./kWh/yr) (gallons/cycle/cu.ft.)	Difference from ENERGY STAR Requirement
Maytag Model MVWC6ESWW1	1.26 MEF	1.8 MEF 7.5 WF	C00549330	1.78 MEF	1.1 %
				8.3 WF	10.7 %

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You may request additional testing no later than September 30, 2010. If you request additional testing, DOE will test at least three but not more than seven additional units selected from the retail market.

If you do not request additional testing by September 30, 2010, DOE will find that Maytag model MVWC6ESWW1 failed testing, and refer the matter to Environmental Protection Agency to begin the process of disqualifying the model and its derivatives from the ENERGY STAR Program.

If you have any additional questions, please contact Bryan Berringer at (202) 586-0371 or email bryan.berringer@ee.doe.gov.

Sincerely,

Roland J. Risser
Program Manager
Building Technologies Program
Energy Efficiency and Renewable Energy

cc: Scott Blake Harris, General Counsel, U.S. Department of Energy
Ann Bailey, Chief, EPA Energy Star Labeling Branch

EXHIBIT 15

2000 NORTH M-63 • ADMINISTRATIVE CENTER • BENTON HARBOR, MICHIGAN 49022

JOEL VAN WINKLE
Senior Counsel
Phone: 269-923-8284
Fax: 269-923-6221
Email: joel_van_winkle@whirlpool.com

September 30, 2010

Via email (BRYAN.BERRINGER@HQ.DOE.GOV) and First Class Mail

Mr. Bryan Berringer
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

Re: Verification Testing of Maytag clothes washer model MVWC6ESWW1

Dear Mr. Berringer,

We are responding to the letter (Letter) dated September 20, 2010 from Roland Risser to J. B. Hoyt regarding the ENERGY STAR verification testing of Maytag brand clothes washer model MVWC6ESWW1.

We are hereby requesting that DOE perform additional testing of this model washer. For the most accurate results, we urge the Department to considering testing seven additional units, but in any case at least four additional units.

We note that we received the Letter via email on September 23. We understand that manufacturers have ten (10) days to request additional testing and yet in this case, the response due date of September 30 provided us with only seven (7) days to respond. We believe the full ten (10) days should be provided to ensure full opportunity for manufacturers to investigate the matter fully. Moreover, consistent application of the ten (10) day response period ensures fair treatment for all manufacturers.

We are in the process of completing our analysis of the test results provided with the Letter and may be supplementing this request with additional comments on the testing of the Maytag washer.

Sincerely,

Joel Van Winkle

EXHIBIT 16

Department of Energy
Washington, DC 20585

January 19, 2011

Mr. J.B. Hoyt
Whirlpool Corporation
Director, Government Relations
2000 North M63, Mail Drop 3005
Benton Harbor, MI 49022

Dear Mr. Hoyt:

As you know, the Maytag clothes washer model MVWC6ESWW1 was selected for testing as part of the U.S. Department of Energy's (DOE) ENERGY STAR® Verification Testing Pilot Program. This letter notifies you that results from additional testing, performed at your request by letter dated September 30, 2010, confirm that the clothes washer model MVWC6ESWW1 does not satisfy the ENERGY STAR Program's energy-efficiency specifications. The test results are summarized below showing that all four units fell below the minimum modified energy factor (MEF) and exceeded the maximum water factor (WF).

MAYTAG MVWC6ESWW1

Serial number	ENERGY STAR MEF Min (ft3/kWh-cycle)	ENERGY STAR WF Max (gallons/ cycle/ft3)	Test Results				
			Tested Capacity (ft3)	Tested MEF (ft3/kWh-cycle)	Difference from ENERGY STAR Requirement	Tested WF (gallons/ cycle/ft3)	Difference from ENERGY STAR Requirement
C00549330	1.8	7.5	3.06	1.73	-3.8%	8.32	10.9%
C03640554	1.8	7.5	3.07	1.72	-4.6%	8.03	7.1%
C03640569	1.8	7.5	3.07	1.70	-5.5%	8.05	7.3%
C03640574	1.8	7.5	3.07	1.74	-3.5%	7.99	6.6%

You may respond to this notification no later than February 9, 2011. In your response, you may present to DOE conclusive manufacturing or design evidence or quality assurance information on why this product did not meet the ENERGY STAR Program's energy-efficiency specifications. The product will remain designated as ENERGY STAR qualified during this twenty day period.

If you do not respond within twenty days or your response does not conclusively demonstrate to DOE's satisfaction that the model complies with ENERGY STAR program requirements, DOE will find that the Maytag clothes washer model MVWC6ESWW1 failed testing, and refer the matter to the U.S. Environmental Protection Agency (EPA) to begin the process of disqualifying the model and its

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derivatives from the ENERGY STAR Program. Once the matter has been referred to EPA, DOE will notify the states and the public of DOE's determination that this model has failed testing and that DOE has referred it to EPA for enforcement.

If you have any additional questions, please contact Bryan Berringer at (202) 586-0371 or at bryan.berringer@ee.doe.gov.

Sincerely,

Roland J. Risser
Program Manager,
Building Technologies Program
Energy Efficiency and Renewable Energy

cc: Scott Blake Harris, General Counsel, U.S. Department of Energy
Ann Bailey, Chief, EPA Energy Star Labeling Branch
Leslie Jones, Energy Star Compliance Lead

EXHIBIT 17

Department of Energy
Washington, DC 20585

March 16, 2011

Ms. Leslie Jones
ENERGY STAR Program
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Room 62023
Washington, DC 20460

Dear Ms. Jones:

On September 20, 2010, the United States Department of Energy (DOE) notified Whirlpool Corporation (Whirlpool) that DOE testing of one unit of Maytag clothes washer model MVWC6ESWW1 as part of the ENERGY STAR Testing Pilot Program indicated that this model exceeded allowable ENERGY STAR energy-efficiency requirements. After consulting with Whirlpool, DOE proceeded with testing of additional units.

Stage II testing also indicated that model MVWC6ESWW1 does not meet the ENERGY STAR requirements. The Department notified Whirlpool of these results on January 19, 2011. In response, Whirlpool explained that the discrepancy between DOE's test results and Whirlpool's own testing stemmed from the measurement of the clothes container capacity. Whirlpool further explained that it measured capacity for this model based on its interpretation of the DOE test procedure. In July 2010, the Department issued guidance clarifying how to measure capacity in a way that differed from Whirlpool's interpretation.[1] Whirlpool also notified DOE that it discontinued production of this model in December 2010 and that Whirlpool no longer has any units of this model in inventory.

Accordingly, DOE is referring this matter to EPA, the brand manager for ENERGY STAR, for appropriate action. Please feel free to contact Laura Barhydt of my staff at 202-287-5772 should you require any further information.

Sincerely,

Timothy G. Lynch
Deputy General Counsel
for Litigation and Enforcement

cc: Mr. Joel Van Winkle
Joel_Van_Winkle@whirlpool.com

[1] *See http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/cw_guidance_faq.pdf.*

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EXHIBIT 18

Non-Lighting Products Disqualified from the ENERGY STAR® Program

1/1/2010 to 5/2/2016

If you would like to be notified by e-mail when this document is updated, please e-mail your request to enforcement@energystar.gov.

The following products have been disqualified because they failed to meet the ENERGY STAR Program Requirements during testing.

Product Type	Organization Name	Brand Name	Product Model Number	Date Disqualified
Audio/Video	Nigel B. Design Inc.	Nigel B. Design	NB-50050	7/21/2011
Audio/Video	Nigel B. Design Inc.	Nigel B. Design	NB-50050PL	7/21/2011
Audio/Video	Nigel B. Design Inc.	Nigel B. Design	NB-50090	7/21/2011
Audio/Video	Nigel B. Design Inc.	Nigel B. Design	NB-50090PL	7/21/2011
Audio/Video	Nigel B. Design Inc.	Nigel B. Design	NB-70050	7/21/2011
Audio/Video	Nigel B. Design Inc.	Nigel B. Design	NB-70050PL	7/21/2011
Audio/Video	Nigel B. Design Inc.	Nigel B. Design	NB-70090	7/21/2011
Audio/Video	Nigel B. Design Inc.	Nigel B. Design	NB-70090PL	7/21/2011
Boilers	LAARS Heating Systems Company	LAARS Heating Systems Company	MT2H0200	10/4/2012
Boilers	LAARS Heating Systems Company	LAARS Heating Systems Company	MT2H0300	10/4/2012
Ceiling Fans	Hunter Fan Company	Hunter	28418	2/3/2014
Ceiling Fans	Hunter Fan Company	Hunter	28415	2/3/2014
Ceiling Fans	Hunter Fan Company	Hunter	28416	2/3/2014
Ceiling Fans	Hunter Fan Company	Hunter	28803	2/3/2014
Ceiling Fans	Hunter Fan Company	Hunter	21585	2/3/2014
Central Air Conditioner Equipment and Air Source Heat Pumps	GD Midea Heating & Ventilating Equipment Co., Ltd.	Midea	MRB-36CWN1-M14	6/19/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	GD Midea Heating & Ventilating Equipment Co., Ltd.	Midea	MRB-36CWN1-X14	6/19/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	Rheem-Ruud Manufacturing	Rheem	RPNL-031JAZ	11/16/2015
Central Air Conditioner Equipment and Air Source Heat Pumps	Rheem-Ruud Manufacturing	Rheem	UPNL-031JAZ	11/16/2015
Central Air Conditioner Equipment and Air Source Heat Pumps	Thermo Products, LLC.	Thermo	OPB24-80	8/19/2011
Central Air Conditioner Equipment and Air Source Heat Pumps	Trane and American Standard Heating and Air Conditioning	Trane	4TYK8518A1*	12/26/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	Trane and American Standard Heating and Air Conditioning	Trane	4TXK8518A1*	4/2/2013
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity 3S	CZB01811	1/24/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	B1HX048A46*	4/20/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	B1HX048A25*	4/20/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	B1HX060A06*	4/20/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	B1HX060A25*	4/20/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	B1HX060A46*	4/20/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	B1HX048A06*	4/20/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	D1NQ042N06506B	12/26/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	D1NQ042***25**	12/26/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	D1NQ042***46**	12/26/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	DAYQ-F042****	12/26/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	DAYQ-T042****	12/26/2012
Central Air Conditioner Equipment and Air Source Heat Pumps	York International Corp. UPG	Affinity	DAYQ-W042****	12/26/2012
Clothes Washers	Equator Appliances	Equator	EZ 3720 CEE	10/22/2010
Clothes Washers	Fisher & Paykel	Fisher & Paykel	WA42T26GW*	9/30/2013
Clothes Washers	Whirlpool Corporation	Maytag	MVWC6ESWW1	5/7/2012
Commercial Griddles	Vulcan (A division of ITW Food Equipment Group)	Vulcan-Hart	36RRG	2/6/2014
Commercial Griddles	Vulcan (A division of ITW Food Equipment Group)	Vulcan-Hart	48RRG	2/6/2014
Commercial Griddles	Vulcan (A division of ITW Food Equipment Group)	Vulcan-Hart	60RRG	2/6/2014
Commercial Griddles	Lang Manufacturing	Lang	124ZTC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	136ZTC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	148ZTC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	160ZTC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	172ZTC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	124ZTDC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	136ZTDC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	148ZTDC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	160ZTDC	1/20/2015
Commercial Griddles	Lang Manufacturing	Lang	172ZTDC	1/20/2015
Commercial Refrigerators and Freezers	Admiral Craft Equipment Corp.	Adcraft	FZS-2D/W	3/22/2014
Commercial Refrigerators and Freezers	Admiral Craft Equipment Corp.	Adcraft	RF-3D	3/21/2014
Commercial Refrigerators and Freezers	Beverage-Air Corp.	Beverage-Air	WTR 48A	11/12/2013
Commercial Refrigerators and Freezers	Perlick	Perlick	HP48RO-S	7/13/2011

Product Type	Organization Name	Brand Name	Product Model Number	Date Disqualified
Commercial Refrigerators and Freezers	BuSung America Corp (DBA Everest Refrigeration)	Everest	EBB59	4/2/2014
Commercial Refrigerators and Freezers	Yindu Kitchen Equipment Co., LTD	ATOSA	MBF8501	5/21/2015
Computers	AAEON Technology Inc.	AAEON Technology Inc.	TF-GCS-2500-IF-A10	7/18/2013
Computers	AAEON Technology Inc.	AAEON Technology Inc.	TF-AEC-6872-A2-1010	7/19/2013
Computers	Advantech Co., Ltd.	Advantech	UNO-3072LA	5/22/2014
Computers	Advantech Co., Ltd.	Advantech	UNO-1172A	5/22/2014
Computers	ASUSTeK Computer Inc.	ASUS	1015E	6/9/2014
Computers	ASUSTeK Computer Inc.	ASUS	X202E	6/12/2014
Computers	ASUSTeK Computer Inc.	ASUS	X301A	6/12/2014
Computers	ASUSTeK Computer Inc.	ASUS	BU400A	8/7/2014
Computers	ASUSTeK Computer Inc.	ASUS	TAICHI21	10/14/2014
Computers	ASUSTeK Computer Inc.	ASUS	TAICHI31	10/14/2014
Computers	Posiflex Technologies, Inc.	Posiflex	XT3215	1/21/2016
Computers	TECO Electric & Machinery Co., Ltd.	TECO	TR3760	1/5/2016
Dehumidifiers	Danby Products Inc.	Danby	DDR70A1GP	8/21/2015
Dehumidifiers	Danby Products Inc.	Danby	DDR7009REE	8/21/2015
Dehumidifiers	Friedrich Air Conditioning Company	Friedrich	D70D	1/10/2012
Dehumidifiers	Haier America	Haier	DE45EK	8/6/2013
Dehumidifiers	Living Direct, Inc.	Edgestar	DEP400EW	7/16/2015
Dehumidifiers	WINIX Inc.	Kenmore Elite	90701	5/30/2013
Dishwashers	ASKO Appliances, Inc.	ASKO	D5122XXLB	6/1/2010
Dishwashers	ASKO Appliances, Inc.	ASKO	D5122XXLADA	6/30/2010
Dishwashers	ASKO Appliances, Inc.	ASKO	D5122ADA	6/30/2010
Dishwashers	ASKO Appliances, Inc.	ASKO	D5122XXLS	6/30/2010
Dishwashers	ASKO Appliances, Inc.	ASKO	D5122XXLW	6/30/2010
Displays	Sharp Electronics Corporation	Sharp	LL-S201A	12/23/2013
Furnaces	Allied Air Enterprises	Allied Air Enterprises	L85BR1V104/118F20***	8/6/2014
Furnaces	Allied Air Enterprises	Allied Air Enterprises	L85BR1V104/118F20*-**	8/6/2014
Furnaces	Granby Furnaces Inc.	Granby-Conforto	KLC-V1-*073-03*	1/10/2014
Furnaces	York International Corp. UPG	York	TP9C120D20MP12	2/12/2015
Furnaces	York International Corp. UPG	EVCON	TP9C120D20MP12	2/12/2015
Furnaces	York International Corp. UPG	Fraser-Johnson	TP9C120D20MP12	2/12/2015
Furnaces	York International Corp. UPG	Coleman	TP9C120D20MP12	2/12/2015
Furnaces	York International Corp. UPG	Luxaire	TP9C120D20MP12	2/12/2015
Furnaces	York International Corp. UPG	York	YP9C120D20MP12	2/12/2015
Furnaces	York International Corp. UPG	Luxaire	LP9C120D20MP12	2/12/2015
Furnaces	York International Corp. UPG	Coleman	CP9C120D20MP12	2/12/2015
Geothermal Heat Pumps	GeoSmart Energy Inc.	ECO Y	YS048	3/3/2015
Geothermal Heat Pumps	GeoSystems, LLC	HydroHeat	MG069	12/20/2011
Geothermal Heat Pumps	Modine Manufacturing Company	Elemental	GHR036x102xxxxxxxx,GHR036x302xxxxxxxx,GHR036x103xxxxxxx,GHR036x303xxxxxxxx (Closed Loop)	3/11/2014
Geothermal Heat Pumps	Modine Manufacturing Company	Elemental	GHR036x202xxxxxExx,GHR036x402xxxxxExx (Closed Loop)	3/11/2014
Geothermal Heat Pumps	Modine Manufacturing Company	Elemental	TG036WBXX-XXXX (Closed Loop)	3/11/2014
Geothermal Heat Pumps	WaterFurnace International, Inc.	WATERFURNACE	LSH048*1*4 (Closed loop)	1/19/2015
Refrigerators and Freezers	Avanti Products	Avanti	BCA4560W-3	6/14/2012
Refrigerators and Freezers	Danby Products Inc.	Danby	DUFM304*	5/20/2013
Refrigerators and Freezers	Electrolux Home Products	Frigidaire	FFTR1817L*	6/25/2010
Refrigerators and Freezers	Electrolux Home Products	Frigidaire	FFN09M5HW	12/16/2010
Refrigerators and Freezers	Electrolux Home Products	Electrolux	EW26SS70I*	8/26/2011
Refrigerators and Freezers	GE Appliances	GE Profile	PFSF5NFZ****	6/12/2013
Refrigerators and Freezers	Grainger Industrial Supply	Dayton	5NTX1	3/30/2012
Refrigerators and Freezers	INTIRION	MicroFridge Garage Fridge	MFRA-4GF	9/15/2012
Refrigerators and Freezers	INTIRION	MicroFridge Garage Fridge	MFRA-4GF-BUD	9/15/2012
Refrigerators and Freezers	INTIRION	MicroFridge	MFRA-4	9/15/2012
Refrigerators and Freezers	LG Electronics	LG	LFX21975ST	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LFX25975SB	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LFX25975ST	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LFX25975SW	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LFX28977SB	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LFX28977ST	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LFX28977SW	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LMX25985SB	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LMX25985ST	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	LMX25985SW	1/20/2010
Refrigerators and Freezers	LG Electronics	LG	FFTR1817L*	6/25/2010
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	FF-1112BL	8/16/2013
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	FF-1152SS	8/16/2013
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	ARD1031FW11R/L	8/16/2013
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	ARD1031FB11R/L	8/16/2013
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	ARD1031FS11R/L	8/16/2013
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	10.3RMFR	8/16/2013
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	10.3LMFR	8/16/2013

Product Type	Organization Name	Brand Name	Product Model Number	Date Disqualified
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	10.3RMFRW	8/16/2013
Refrigerators and Freezers	Panasonic Appliances Refrigeration Systems Corporation of America	Summit	10.3LMFRW	8/16/2013
Refrigerators and Freezers	Perlick	Perlick	HP72R00-S	7/14/2011
Refrigerators and Freezers	Samsung	Samsung	RF26VAB	3/22/2010
Refrigerators and Freezers	Sanyo E&E Corporation	Sanyo	SR-4460*	8/31/2012
Refrigerators and Freezers	Sears	Kenmore	79732	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79733	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79737	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79752	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79753	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79754	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79757	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79759	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79782	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79783	1/20/2010
Refrigerators and Freezers	Sears	Kenmore	79789	1/20/2010
Refrigerators and Freezers	Summit Appliances	Summit	CF11ES	11/8/2011
Refrigerators and Freezers	Sunpentown International Inc.	SPT	RF-330SS	5/23/2013
Refrigerators and Freezers	Whirlpool Corporation	KitchenAid	KSRG25FVMS*	9/27/2011
Refrigerators and Freezers	Whirlpool Corporation	KitchenAid	KSRS25RV*	9/27/2011
Roofing Products	AkzoNobel	TRINAR CC	KB3Y42114 Black	8/30/2013
Roofing Products	American Construction Metals (ACM)	Fluropon SR	435B411 Patina Green	8/17/2015
Roofing Products	Cooley Incorporated	C3 (with and without fleece back)	PVC - Grey	2/2/2016
Roofing Products	Fabral	Architectural Profiles	435B411	8/17/2015
Roofing Products	Architectural Sheetmetal Products, Inc.	SpectraLume	Everglade Moss	8/26/2014
Roofing Products	Buckeye Metal Sales, LLC	Buckeye	Burgundy	3/29/2012
Roofing Products	Consolidated Systems Inc.	Versa-Steel 4029	Black	8/30/2013
Roofing Products	Consolidated Systems, Inc.	Versa-Steel 4029	Burgundy	3/27/2012
Roofing Products	Eagle Roofing Products	Kona Red Range	2698, 3698, 4698, 598	4/9/2013
Roofing Products	Higgins	Performance Panel R Panel Series 2000	Black	8/30/2013
Roofing Products	Metal Building Supply	Metal Panels	Regal Blue	3/29/2012
Roofing Products	Millennium Metals, Inc.	Millennium Metals M-Seam	Patina Green	8/12/2015
Roofing Products	Northstar Metals Mfg. Co.	En-Dura Star, Loc Star, Snap Star	435B411	8/17/2015
Roofing Products	Santa Fe Tile Co.	Santafe	Galeras	8/19/2013
Roofing Products	Santa Fe Tile Co.	Santafe	Bay Blue	12/4/2014
Roofing Products	Southeastern Metals	SemCoatSP	Burnished Slate	2/4/2015
Roofing Products	Steelscape, Inc.	Spectrascape	Moss Green SPG0800X	2/18/2015
Roofing Products	TAMKO Building Products, Inc.	MetalWorks	Sequoia Red	12/23/2013
Roofing Products	Valspar Corporation	Fluropon	435B411	8/17/2015
Roofing Products	Valspar Corporation	WeatherX	EVERGREEN SPG0367X	8/26/2015
Roofing Products	WV Metal Wholesalers Inc.	CERAM-A-STAR 1050 CC	Burgundy	8/30/2013
Room Air Cleaners	Airgle Corporation	Airgle	AG950	2/27/2016
Room Air Cleaners	Kaz Incorporated	Honeywell	HPA-051C	6/14/2012
Room Air Cleaners	Kaz Incorporated	Honeywell	HHT-057C	7/3/2012
Room Air Conditioners	Electrolux Home Products	Frigidaire	FRA256ST2	7/13/2011
Room Air Conditioners	Haier America	Haier	EST12XCM	2/6/2015
Room Air Conditioners	Friedrich Air Conditioning Company	Friedrich	US10C30	10/3/2011
Room Air Conditioners	Friedrich Air Conditioning Company	Friedrich	CP15F10	10/3/2011
Room Air Conditioners	Friedrich Air Conditioning Company	Friedrich	US12C10	10/3/2011
Room Air Conditioners	Friedrich Air Conditioning Company	Friedrich	SM24M30	1/3/2012
Room Air Conditioners	Friedrich Air Conditioning Company	Friedrich	US10D30	2/27/2013
Room Air Conditioners	Midea USA Inc.	Westpointe	MWF08CR	3/9/2011
Televisions	Naxa Electronics, Inc.	NAXA	NT-2207	11/23/2015
Televisions	Naxa Electronics, Inc.	NAXA	NT-2202	11/23/2015
Televisions	Sharp Electronics Corporation	SHARP	LC-32SV29U	5/8/2012
Televisions	Shenyang Tongfang Multimedia Co., Limited	ELEMENT	ELEFT466	6/16/2015
Televisions	TMAX Digital	APEX	LE4643T	12/3/2014
Televisions	Tongfang Global	SEIKI	SE55GY19	10/22/2015
Televisions	Tongfang Global	SEIKI	SE55GY19A	10/22/2015
Televisions	Tongfang Global	SEIKI	LE-55GCL-Y	10/22/2015
Televisions	Tongfang Global	SEIKI	LE-55GCL-A	10/22/2015
Televisions	Tongfang Global	SEIKI	LE-55GCL*********	10/22/2015
Televisions	Tongfang Global	SEIKI	LE-55GC*********	10/22/2015
Televisions	Tongfang Global	SEIKI	LE-55GCA	10/22/2015
Televisions	Tongfang Global	SEIKI	LE-55GBP-B	10/22/2015
Televisions	Tongfang Global	SEIKI	LE-55GBP-A	10/22/2015
Televisions	Tongfang Global	SEIKI	LE-55GBP*********	10/22/2015
Televisions	Tongfang Global	SEIKI	DWM55F1Y1	10/22/2015
Televisions	Tongfang Global	SEIKI	DWM55F1A1	10/22/2015
Televisions	Westinghouse Electronics	Westinghouse	DW46F1Y1	1/28/2015
Televisions	Westinghouse Electronics	Westinghouse	DW46F1Y2	1/28/2015
Televisions	Westinghouse Electronics	Westinghouse	DWM55F1Y1	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	DWM55F2Y1	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	DWM55F1A1	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	LE-55GCL-Q	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	LE-55GCL-P	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	LE-55GCL-A	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	LE-55GCA	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	LE-55GBP-A	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	LE-55GBP-B	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	LE-55GCL*********	1/21/2016

Product Type	Organization Name	Brand Name	Product Model Number	Date Disqualified
Televisions	Westinghouse Electronics	Westinghouse	LE-55GBP*********	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	LE-55GC*********	1/21/2016
Televisions	Westinghouse Electronics	Westinghouse	SE55GY19	1/21/2016
Ventilating Fans	Acme Engineering & Manufacturing Corp.	ACME	VQ080ES	4/14/2014
Ventilating Fans	Acme Engineering & Manufacturing Corp.	ACME	VQ090ES	4/14/2014
Ventilating Fans	Acme Engineering & Manufacturing Corp.	ACME	VQ090ESM	4/14/2014
Ventilating Fans	Acme Engineering & Manufacturing Corp.	ACME	VQ080ESBV	11/24/2015
Ventilating Fans	Aero Pure LLC	AERO PURE	AP80RVL	8/26/2015
Ventilating Fans	Air King, Ltd.	Air King	AK1101	3/15/2012
Ventilating Fans	Air King, Ltd.	Air King	ESVAL30W	4/20/2012
Ventilating Fans	Air King, Ltd.	Air King	ESVAL30B	4/20/2012
Ventilating Fans	Air King, Ltd.	Air King	ESVAL30S	4/20/2012
Ventilating Fans	Air King, Ltd.	Air King	ESVAL36S	4/20/2012
Ventilating Fans	Air King, Ltd.	Air King	ESVAL36W	4/20/2012
Ventilating Fans	Air King, Ltd.	Air King	ESVAL36B	4/20/2012
Ventilating Fans	Air King, Ltd.	Air King	AK300LS	4/18/2013
Ventilating Fans	Air King, Ltd.	Air King	AKF100D	5/3/2013
Ventilating Fans	Air King, Ltd.	Air King	AKF100LS	5/3/2013
Ventilating Fans	Air King, Ltd.	Air King	AKF50LS	5/3/2013
Ventilating Fans	Air King, Ltd.	Air King	FRAK50	4/8/2015
Ventilating Fans	Air King, Ltd.	Air King	AK50	4/8/2015
Ventilating Fans	Aero Pure LLC	Aero Pure	AP110G1	11/3/2015
Ventilating Fans	Aero Pure LLC	Aero Pure	AP110G2	11/3/2015
Ventilating Fans	Aero Pure LLC	Aero Pure	AP110G3	11/3/2015
Ventilating Fans	Aero Pure LLC	Aero Pure	AP110G4	11/3/2015
Ventilating Fans	Aero Pure LLC	Aero Pure	AP110G5	11/3/2015
Ventilating Fans	Aero Pure LLC	Aero Pure	AP110G6	11/3/2015
Ventilating Fans	Broan-NuTone LLC	NuTone	QTN130LE	1/24/2014
Ventilating Fans	Broan-NuTone LLC	NuTone	50NT	4/7/2015
Ventilating Fans	Broan-NuTone LLC	NuTone	770	4/7/2015
Ventilating Fans	Continental Fan Manufacturing Inc.	Continental	AXC200BES	4/10/2012
Ventilating Fans	Continental Fan Manufacturing Inc.	CFM	TBF120	4/21/2015
Ventilating Fans	Guangdong Genuin Electric Co.	GNN	BPT1524A1	3/2/2014
Ventilating Fans	Hangzhou AUPU Bathroom & Kitchen Technology Co. Ltd.	AUPU	AF912G1	10/7/2015
Ventilating Fans	Hangzhou AUPU Bathroom & Kitchen Technology Co. Ltd.	AUPU	AF912G2	10/7/2015
Ventilating Fans	Hangzhou AUPU Bathroom & Kitchen Technology Co. Ltd.	AUPU	AF912G3	10/7/2015
Ventilating Fans	Hangzhou AUPU Bathroom & Kitchen Technology Co. Ltd.	AUPU	AF912G4	10/7/2015
Ventilating Fans	Hangzhou AUPU Bathroom & Kitchen Technology Co. Ltd.	AUPU	AF912G5	10/7/2015
Ventilating Fans	Hangzhou AUPU Bathroom & Kitchen Technology Co. Ltd.	AUPU	AF912G6	10/7/2015
Ventilating Fans	Maico Italia S.p.A	Elicent	AXC200BES	4/10/2012
Ventilating Fans	Marley Engineered Products	Marley	8140ES	8/13/2013
Ventilating Fans	Marley Engineered Products	Marley	8140FL	8/13/2013
Ventilating Fans	National HVAC Products	Zonex	GM-80	4/27/2011
Ventilating Fans	Orbit Industries, Inc.	Orbit Industries	OEP110L	4/20/2012
Ventilating Fans	Orbit Industries, Inc.	Orbit	OEP110	11/22/2014
Ventilating Fans	Ortech Industries, Inc.	Ortech	OD8003	4/14/2014
Ventilating Fans	Ortech Industries, Inc.	Ortech	OD9003	4/14/2014
Ventilating Fans	Ortech Industries, Inc.	Ortech	ODS8003	4/14/2014
Ventilating Fans	Ortech Industries, Inc.	Ortech	ODS9003	4/14/2014
Ventilating Fans	Ortech Industries, Inc.	Ortech	OD8011	11/24/2015
Ventilating Fans	Panasonic	Panasonic	FV40VQ3	5/29/2012
Ventilating Fans	Panasonic	Panasonic	FV05VF2	8/23/2013
Ventilating Fans	Prime Industrial Products	PRIME	PME50	2/18/2014
Ventilating Fans	Qingdao Xingbang	Sterling	SE80Q	4/14/2014
Ventilating Fans	Qingdao Xingbang	Sterling	SE80QS	4/14/2014
Ventilating Fans	Qingdao Xingbang	Sterling	SE90Q	4/14/2014
Ventilating Fans	Qingdao Xingbang	Sterling	SE90QH	4/14/2014
Ventilating Fans	Qingdao Xingbang	Sterling	SE90QS	4/14/2014
Ventilating Fans	Qingdao Xingbang	Sterling	SE90QSC	4/14/2014
Ventilating Fans	Qingdao Xingbang	Sterling	SE80RVL	8/20/2015
Ventilating Fans	Qingdao Xingbang	Sterling	SE80RVLH	8/20/2015
Ventilating Fans	Qingdao Xingbang	Sterling	SN80	11/24/2015
Ventilating Fans	Reversomatic Manufacturing Ltd.	Softaire	SA50E	4/19/2013
Ventilating Fans	Reversomatic Manufacturing Ltd.	Reversomatic	TL340	8/12/2014
Ventilating Fans	Reversomatic Manufacturing Ltd.	Reversomatic	4000250ES2	4/21/2015
Ventilating Fans	S&P USA Ventilation Systems, LLC	S&P	PC80	4/14/2014
Ventilating Fans	Ventamatic Ltd.	NuVent	NXSH80	3/3/2014
Ventilating Fans	Windridge Fans Corporation	Windridge	EP110L	4/20/2012
Ventilating Fans	Windridge Fans Corporation	Windridge	EP110	11/22/2014
Water Coolers	Electrotemp Technologies, Inc.	Black and Decker	8LIECK-W	1/14/2014
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	7LIECH-SC-SSF	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	7LIECH-*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	7LIECH-SSF-WL	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	7LIECH-SC*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	7LIECH-BP-WL	3/6/2015

Product Type	Organization Name	Brand Name	Product Model Number	Date Disqualified
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	SWD-T600-W	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	SWD-T610-SL	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	SWD-T620-SS	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	8LDIECH-SC-WFC-SSF	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	8LDIECH-*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	8LDIECHK-*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	8LDIECHK-SC-*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	8HDIECH-*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	8HDIECHK-*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	8HDIECH-SC-*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	8HDIECHK-SC-*	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	SWD-75EHL-BD	3/6/2015
Water Coolers	Electrotemp Technologies, Inc.	Electrotemp	SWD-70EHL-SL	3/6/2015
Water Heaters	AirGenerate, LLC	AirGenerate	ATI50	4/23/2012
Water Heaters	Vaughn Thermal Corp.	Vaughn	S120HPT	1/8/2016
Windows, Doors, and Skylights	Firestone Building Products Company	Harvey Industries, Inc.	HII-M-1-00222-00001	12/24/2014
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00064-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00064-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00064-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00060-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00060-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00060-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00062-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00062-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00062-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00090-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00090-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00090-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00094-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00094-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00094-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00100-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00100-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00100-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00102-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00102-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00102-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00081-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00081-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00121-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00121-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00082-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00122-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00104-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00104-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00104-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00063-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00063-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00063-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00093-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00093-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00093-00003	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00079-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00079-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00119-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00119-00002	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00072-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00080-00001	9/1/2015
Windows, Doors, and Skylights	Comfort View Products	Comfort View Products	CVP-M-18-00120-00001	9/1/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00106-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00104-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00104-00002	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00104-00003	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00105-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00103-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00103-00002	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00103-00003	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00067-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00065-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00065-00002	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00065-00003	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00066-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00064-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00064-00002	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00064-00003	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00014-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00012-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00012-00002	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00012-00003	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00013-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00011-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00011-00002	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00011-00003	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00032-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00030-00001	9/10/2015

Product Type	Organization Name	Brand Name	Product Model Number	Date Disqualified
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00030-00002	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00030-00003	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00031-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00029-00001	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00029-00002	9/10/2015
Windows, Doors, and Skylights	Paradigm Window Solutions	Paradigm Window Solutions	PWS-A-25-00029-00003	9/10/2015

EXHIBIT B

FILED UNDER SEAL

EXHIBIT C

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSONS, CHARLES BEYER, JONATHAN COHEN, JENNIFER SCHRAMM, and ASPASIA CHRISTY on behalf of themselves and all others similarly situated, Plaintiffs, v. WHIRLPOOL CORPORATION, LOWE'S HOME CENTERS, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT, INC., FRY'S ELECTRONICS, INC. and APPLIANCE RECYCLING CENTERS OF AMERICA, INC., Defendants.	Civil Action No. 2:12-cv-00089-KM-JBC Honorable Kevin McNulty Honorable James B. Clark, III **[REDACTED] DECLARATION OF CHRISTOPHER CHISEK**

I, Christopher Chisek, declare as follows:

1. I am currently employed by Whirlpool Corporation ("Whirlpool") as a Senior Engineering Manager. I am over 21 years of age, of sound mind, and competent to testify. Except as otherwise stated, I have personal knowledge of the facts stated in this declaration. If called as a witness, I could testify as to each of them.

2. In this declaration I state facts in support of Whirlpool's Opposition to Plaintiffs' Motion for Class Certification and related filings.

3. In about 2009, I became Senior Engineering Manager of the Washer Group. In that role, I managed a team of mechanical engineers and electrical engineers tasked with designing and engineering the various electrical components and mechanical components of clothes washers, including control boards, temperature switches, load sense switches, motors, and drive systems. I stayed in that role until about 2012 when I became Senior Engineering Manager of another project.

4. Whirlpool initially launched the Maytag Centennial line of top-loading washing machines without an Energy Star option. The model line included the MVWC300VW ("C300"), MVWC400VW ("C400"), MVWC500VW ("C500"), and MVWC700VW ("C700").

5. In 2009, around the time that I became Senior Engineering Manager of the Washer Group, Whirlpool added the MVWC6ESWW0 ("6-0"), the MVWC6ESWW1 ("6-1") and MVWC7ESWW ("7-0") to the Maytag Centennial lineup as Energy Star options. These additions were part of an effort to provide a relatively low-cost Energy Star washer to consumers. Before 2009, most if not all Energy Star-qualified top-loading clothes washers were High Efficiency models, which have larger capacities, typically employed different mechanical drives, and were priced hundreds of dollars more than conventional top-loading clothes washers.

6. From an engineering standpoint, the 6-0 and 6-1 are similar to the C500. They are traditional top-loading washers with vertical agitators. They have the same size stainless steel wash baskets, the same transmission, and a higher number of cycles compared to the lower-priced C300 and C400 models. Many of the mechanical and electrical components are similar. In addition, they were all built on the LEAP engineering platform, which is a design platform for

top-loading, or "vertical axis," clothes washers. A clothes washer built on the LEAP engineering platform has a square base with four legs attached to it. The motor, or drive system, is built above the square base. The wash basket sits above the drive system and is attached by suspension springs attached to the four legs.

7. The 7-0 is similar to the C700. Both are traditional top-loading washers with vertical agitators. They have the same size stainless steel wash baskets, the same transmission, and a higher number of cycles compared to the C300 and C400. Many of the mechanical and electrical components are similar. Both are also built on the LEAP engineering platform. And, unlike the C500 and 6-0 and 6-1, both the C700 and 7-0 have glass lids.

8. The 6-0, 6-1, and 7-0 represented an improvement in energy and water efficiency technology over the C500 and C700. The 6-0, 6-1, and 7-0 had an "Auto Load Sensing" feature, also known as adaptive fill technology, which enabled them to use substantially less water and energy than other traditional top-loaders, including the C500 and C700.

9. The "Auto Load Sensing" feature works by measuring the absorption rate of the wash load during the fill cycle. Spray nozzles located near the top of the clothes washers soak the wash load from above with water. [redacted] The load sense switch then causes the clothes washer to stop filling the wash tub with water once the water level reaches the next highest discrete fill level. [redacted]

[redacted]

10. The Auto Load-Sensing feature enabled the 6-0, 6-1, and 7-1 to use substantially less water and energy than other traditional top-loaders, including the C500 and C700, by using an amount of water more closely tailored to the size of each particular wash load. This resulted in substantial water savings, and it also resulted in substantial energy savings because less energy was required to heat a lower amount of water. The 6-0, 6-1, and 7-1 also achieved additional energy savings by having additional spin time over the C500 and C700, which enabled them to remove more moisture from the laundry load, thus reducing drying time.

11. The Auto Load Sensing feature represented an improvement in energy and water efficiency, but it was a low-cost improvement to the Maytag Centennial clothes washer product line. [redacted]

12. In addition, design improvements from the 6-0 to the 6-1 resulted in additional cost savings. Whirlpool uses “energy categories” to describe components and features of clothes washers that pertain to energy and water consumption. The 6-0 was assigned energy category V9Ua2H5T(3B), and the 6-1 and 7-0 models were assigned energy category V9Ua2H5W(3B). The different energy categories reflect differences in components. [redacted]

13. The 6-0, 6-1, and 7-0 were able to meet Energy Star standards in large part due to the Auto Load Sensing feature, and they were designed and engineered to meet the Energy Star standards as promulgated by the Department of Energy ("DOE") as they existed in 2008 and 2009.

14. Under the Energy Star standards as they existed in 2008 and 2009, a clothes washer's overall efficiency was measured by the Modified Energy Factor (MEF) and the Water Factor (WF). MEF is a measure of energy consumption that considers the energy used by the clothes washer, the energy used to heat the water, and the energy used to run the dryer. WF measures the clothes washer's water consumption and is measured in gallons of water used per cycle per cubic foot of capacity.

15. To measure the capacity of a clothes washer's "clothes container," the DOE instructed manufacturers to "[m]easure the entire volume which a dry clothes load could occupy within the clothes container during washer operation" by lining the "clothes container" with a plastic sheet, weighing the washer, filling it with "the maximum amount of water" up to its "uppermost edge," and then weighing it again. *See* 10 C.F.R. 430, Subpart B, Appendix J1 (the "J1 Procedure") § 1.4. The capacity was then calculated by dividing the mass of the water in pounds by the density of the water. *Id.*

16. I understand that, in 2007, well before Energy Star testing was conducted on the 6-0, the 6-1, and the 7-0, Whirlpool specifically requested approval from the DOE "to measure the clothes container capacity to the upper edge of the tub cover" in top-loading clothes washers, which later became known as "Fill Level 4." I also understand that that the DOE "agree[d]" with Whirlpool that "measurement of the clothes container capacity to the upper edge of the tub cover in vertical axis clothes washer containing such a component" was proper under the J1 Procedure.

17. In light of the DOE's guidance, Whirlpool revised its internal test procedure, T-396, to conform to the DOE's interpretation of "clothes container" under the J1 Procedure. (*See* Ex. 1.)[1]

18. To measure the capacity of the clothes washer's clothes container, the T-396 test procedure's instructions were to "[m]easure the entire volume, which a dry clothes load could occupy within the clothes container while the machine is in operation." (Ex. 1, at 5.) The T-396 test procedure then referred to a series of figures showing several clothes washers and their various clothes container configurations. In accordance with what I understand was the DOE's guidance on this issue, the figures made clear that the clothes container should be measured to the "top of the tub cover," which is the "point at which water overflows." (*Id.* at 6-7.)

19. In addition, these figures show the wide variability of clothes washers and clothes container designs. These differences are functions of engineering, design, and aesthetic choices made during the design and production process.

20. From a design and engineering perspective, measuring to the "top of the tub cover" is proper and reasonable because it furthers the main goals of the J1 Procedure, which are repeatability and consistency. Instead, the point of the J1 Procedure was to identify a way to consistently measure one input into the MEF and WF formulas—a clothes washer's capacity—that could be applied by different manufacturers of different types of washers in different labs, thus enabling the government and consumers to engage in an apples-to-apples comparison. Using the top of the tub cover makes sense for this purpose because it is the highest point before water begins to overflow the container. Any point that is lower will require some subjective judgment, depending on the configuration of the tub cover. Indeed, the reason why repeatability

[1] In order to provide the highest resolution documents, WDZ0012581 – WDZ0012595 (Ex. 1) is attached hereto in native format.

and consistency are important is illustrated by the various configurations of clothes containers contained in the T-396 test procedure itself. (*Id.* at 6-7.)

21. Consequently, and in accordance with the J1 Procedure and the T-396 test procedure, Whirlpool measured the capacity of the "clothes container" of the 6-0, the 6-1, and 7-0 to the "top of the tub cover," or Fill Level 4, which resulted in a capacity measurement of 3.43 cubic feet.

22. [redacted] (*See* Ex. 2.)

23. [redacted] (*See* Ex. 3.)

24. These tests were performed in accordance with the J1 Procedure and the T-396 test procedure. In addition, these test results were well within accepted engineering tolerances for clothes washers.

25. The 7-0 was not separately tested by Whirlpool because it has the same energy category as the 6-1 and thus should have the same results.

26. On July 6, 2010, the DOE issued interpretative guidance on the meaning of "clothes container," which stated—contrary to the position that it had taken four years earlier—that "the upper-most edge of the clothes container shall be considered the highest point of the inner-most diameter of the tub cover." The DOE referred to this definition as "Fill Level 3."

27. In January 2011, the DOE informed Whirlpool that the 6-1 had failed Energy Star Stage II verification testing. My understanding is that the DOE had tested the 6-1 in light of its

new interpretation of what constitutes the "clothes container" for purposes of the J1 Procedure—that is, "the upper-most edge of the clothes container shall be considered the highest point of the inner-most diameter of the tub cover"—and, consequently, the capacity of the clothes container was measured to Fill Level 3, not Fill Level 4.

28. But the 6-0 and 6-1 had been tested in accordance with the DOE's previous direction to use Fill Level 4 (the top of the tub cover), not Fill Level 3 (the innermost diameter of the tub cover). This difference in testing procedures resulted in a measured capacity that was 0.37 cubic feet less than when the clothes washers were originally certified. The only reason that the clothes washers were found to not comply with Energy Star standards was because the DOE applied its revised Fill Level guidance when it tested the units in 2010.

29. The 6-0, the 6-1, and the 7-0 were designed and engineered to meet Energy Star standards as they existed in 2008 and 2009, including the DOE's interpretation that "clothes container" required a capacity measurement to Fill Level 4, not Fill Level 3. In this way, the 6-0, 6-1, and 7-0—including the variables built into the load sense switch, such as the height of the discrete water levels—were, in a sense, reverse-engineered to meet Energy Star standards as they existed at the time.

30. From an engineering perspective, Whirlpool did not need to measure the capacity of the 6-0, the 6-1, or the 7-0 to Fill Level 4 to satisfy Energy Star requirements. In fact, had the DOE simply told Whirlpool that its interpretation of "clothes container" required measurement to Fill Level 3, rather than Fill Level 4, when Whirlpool first asked for interpretive guidance in 2007, it would have been simple and inexpensive to ensure that the clothes washers met those Energy Star standards. For example, the "Auto Load Sensing" feature could have been designed in such a way that the discrete water levels corresponded to a lower capacity measurement, thus

using less water and less energy and meeting Energy Star standards. Put another way, the load sense switch could have been designed, adjusted, or "programmed" to alter the discrete fill level variable to meet Energy Star. In addition, spin times could have been lengthened slightly to remove more residual moisture from the wash load, thus reducing drying energy. Other slight, inexpensive adjustments would have been possible. These changes would have been minor, inexpensive, and easy to accomplish.

I declare under penalty of perjury under the laws of the State of New Jersey and the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 19th day of May, 2016, at Benton Harbor, Michigan.

Christopher Chisek

EXHIBIT 1

FILED UNDER SEAL

EXHIBIT 2

FILED UNDER SEAL

EXHIBIT 3

FILED UNDER SEAL

EXHIBIT D

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EXHIBIT E

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSONS, CHARLES BEYER, JONATHAN COHEN, JENNIFER SCHRAMM, and ASPASIA CHRISTY on behalf of themselves and all others similarly situated, Plaintiffs, v. WHIRLPOOL CORPORATION, LOWE'S HOME CENTERS, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT, INC., FRY'S ELECTRONICS, INC. and APPLIANCE RECYCLING CENTERS OF AMERICA, INC., Defendants.	Civil Action No. 2:12-cv-00089-KM-JBC Honorable Kevin McNulty Honorable James B. Clark, III **[REDACTED] DECLARATION OF DAVID M. WHITEHEAD IN SUPPORT OF WHIRLPOOL'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, David M. Whitehead, declare as follows:

1. I am currently employed by Whirlpool Corporation ("Whirlpool") as Merchandising Director, Cleaning & Suites. I am over 21 years of age, of sound mind, and competent to testify. Except as otherwise stated, I have personal knowledge of the facts stated in this declaration. If called as a witness, I could testify as to each of them.

2. In this declaration I state facts in support of Whirlpool's Opposition to Plaintiffs' Motion for Class Certification and related filings.

3. From 2007 to 2008, I served as the Merchandising Manager for top-load laundry. From 2008 to 2011, I served as the Senior Merchandising Manager. During this period, I developed and implemented go-to-market strategies for new top-loading laundry models. This included pricing strategies to be used by Whirlpool's trade customers to communicate Whirlpool's value proposition to end-user consumers. These strategies were built around the quality, feature set, and innovation represented by Whirlpool's various product offerings, and also took into account the state of competitive product offerings.

4. Whirlpool initially launched the Maytag Centennial line of top-loading washing machines without an Energy Star option. The model line included the MVWC300VW ("C300"), MVWC400VW ("C400"), MVWC500VW ("C500"), and MVWC700VW ("C700").

5. In recognition of the fact that at least one of Whirlpool's competitors, GE, introduced a top-loading Energy Star washing machine, and in an effort to provide a relatively low-cost Energy Star washer to consumers, in 2009 Whirlpool added the MVWC6ESWW ("C6ES") and MVWC7ESWW ("C7ES") to the Maytag Centennial lineup as Energy Star options. Prior to 2009, most if not all Energy Star-qualified top-loading washers were High Efficiency ("HE") models, which have larger capacities, typically employed different mechanical drives, and were priced hundreds of dollars more than conventional top-loading washers.

6. While the C6ES and C7ES models have slightly higher reported capacities than the C500 and C700 models, the actual capacity available to consumers for washing a load of laundry was in fact the same, or nearly the same, for all four models. That is due to the fact that, at the time these machines were manufactured, the capacities for Energy Star-rated washing

machines were measured according to standards established by the International Electrotechnical Commission, or "IEC". The standards differed from those used to measure non-Energy Star washers, which were established by the Department of Energy ("DOE"). Thus, a 4.0 cu. ft. (IEC) capacity washer (like the C6ES and C7ES) has essentially the same useable capacity as a 3.5 cu. ft. washer (like the C500 and C700) measured using DOE standards.

7. In my experience, one of the features of a top-loading washer that tends to have the largest impact on retail price is a washing machine's capacity. Specifically, the larger the capacity, the higher the retail price, all else being equal. Based on that experience, if a consumer was choosing between the C6ES and the C500 (or the C7ES and the C700), and they understood that the 4.0 cu. ft. (IEC) rated capacity meant that the available wash capacity was larger than the 3.5 cu. ft. rated capacity, I would have expected that the consumer would be willing to pay more for the larger capacity washer. However, for a number of reasons, that typically was not the case with the C6ES, which sold on average for the same or less than the otherwise comparable C500.

8. The C6ES is similar to and eventually replaced the C500. Both are traditional top-loading washers with vertical agitators, have the same size stainless steel wash baskets, the same transmission, and a higher number of cycles compared to the lower-priced C300 and C400 models.

9. The C7ES is similar to and eventually replaced the C700. Both are traditional top-loading washers with vertical agitators, the same size stainless steel wash baskets, the same transmission, and a higher number of cycles compared to the C300 and C400. In addition, unlike the C500 and C6ES, both the C700 and C7ES have glass lids. Both the C700 and C7ES were sold by Whirlpool primarily to trade customers in the rental channel, such as Rent-A-Center and Aaron's. In other words, rather than selling these models to retailers who in turn sold them to

end-user consumers, the majority of these washers were sold to rental companies who in turn rented them to end-user consumers. Only a small percentage of either of these two models was ever sold new to consumers, as reflected in the following chart:

Model MVWC7ESWW shipped to US:	
Approximate Percent Rental* Shipments	**Delivery State:**
81%	CA
85%	FL
95%	IN
0%	NJ
95%	OH
89%	TX
0%	VA
87%	Other States
88%	**Total US**

*Rental units identified using delivery names containing "lease" or "rent

10. While the models are similar, the C6ES and C7ES represent an improvement in energy and water efficiency technology over the C500 and C700. The C6ES and C7ES have an "Auto Load Sensing" feature, the "Quiet Series" or "Quiet Pak" feature, an additional spin speed, and an additional water level, all of which relate to the fact that they are more energy and water efficient. The Auto Load-Sensing feature, for example, enables the C6ES and C7ES to use substantially less water and energy than other traditional top-loaders, including the C500 and C700, by measuring the absorption of the wash load and using an amount of water more closely tailored to the size of each particular wash load. This saves water and the energy required to heat the water. The additional spin speed enables the C6ES and C7ES to remove more moisture from

the laundry load, which reduces drying time. The Quiet Series feature reduces the noise level that would otherwise result from the higher spin speed by adding insulation to the machine. (Attached as Exhibit 1 to this declaration is a Q4 2009 Laundry Toolkit, which lists at page 20 some of the available features for the C300, C400, C500, C6ES, and C7ES models of Centennial washers.)

11. Whirlpool discontinued production of the C500 in the fourth quarter of 2009 and replaced it with the C6ES. The C500 and C6ES overlapped in the marketplace for most of 2009, however. Whirlpool discontinued production of the C6ES in December 2010.

12. Whirlpool does not (and did not during the relevant time period) set the price that any consumer will pay for its appliances at retail, including the Centennial washers. The retail price paid by any individual consumer is set by each individual retailer, such as Lowe's and Home Depot, who are free to set whatever retail price they choose. Whirlpool does provide a Manufacturer's Suggested Retail Price ("MSRP") and a Manufacturer's Minimum Advertised Price ("MAP"). The MSRP is just that; the price that Whirlpool suggests the product in question should be sold for. The MAP is different from the MSRP in that Whirlpool asks its trade customers to not advertise a price below the MAP, although they remain free to do so.

13. Although the C6ES was an Energy Star model and the comparable C500 was not, Whirlpool's suggested pricing for the two models was essentially the same. [redacted]

14. Because the C7ES and C700 each had a glass lid, they were priced higher than the C6ES and C500.

15. There are a number of reasons why the MSRP and MAP for the Energy Star and comparable non-Energy Star Maytag Centennial models were the same or nearly the same. The biggest limiter on the price Whirlpool could recommend its trade customers charge at retail was the price already being charged in the market for a comparable Energy Star top-loading washer manufactured by GE. The 2009 and 2010 time period saw uniquely intense price competition in the market for Energy Star top-loading clothes washers. This competition radically altered the marketplace, functionally eliminating any premium that could be charged for Energy Star top-loading clothes during this time. Specifically, GE was first to the market with a low-cost Energy Star-qualified conventional top-loading washer, the GE WHRE5500K. GE priced that model low at $499, thereby effectively setting the market price for conventional top-loading Energy Star washers. Whirlpool's pricing decisions for the C6ES and C7ES were therefore somewhat constrained by GE's prior actions. (Page 44 of the Q4 2009 Laundry Toolkit shows a side-by-side feature comparison between the C500 and C6ES against the GE WHRE5500K and the GE WPHRE6150K, another comparable Energy Star top-loader.)

16. In addition to the downward pricing pressure that GE's market strategy exerted, [redacted] Whirlpool had the flexibility to match GE's pricing strategy.

17. Finally, in 2009, the U.S. and global economies were in crisis. Regardless of whether Whirlpool believed that the Energy Star status of an appliance could command a higher price in the market than a comparable non-Energy Star model, it was unable to command such higher prices in that strained economic environment.

18. While Whirlpool can encourage compliance with the MAP by offering trade promotion incentives, retailers frequently price below the MAP during promotional periods. For example, for Black Friday in 2009, both Home Depot and Lowe's (at least) dramatically reduced the price of the C6ES washer; substantially below the MSRP and MAP. I understand that both retailers (at least) sold a large number of units of the C6ES at that price, which represented a significant percentage of the total number of C6ES units sold by those retailers.

19. In addition to that particular Black Friday sale, Whirlpool's trade customers often promote large ticket items, such as washing machines and dryers, using large price discounts. The availability of these discounts can vary from time to time, retailer to retailer, and even geographically by the same retailer. Again, Whirlpool does not control the prices its trade customers ultimately charge at retail to end-user consumers.

20. Another larger factor impacting the effective retail price paid for the Energy Star versions of the Maytag Centennial washers was the availability of federal- and state-sponsored rebates and tax incentives for purchasing Energy Star-qualified appliances. For example, in 2010 and 2011, as part of the American Recovery and Reinvestment Act stimulus package, the Obama administration created the "Cash for Appliances" program. The program made nearly $300 million in federal funds available for state-administered rebate programs that were designed to encourage consumers to purchase new Energy Star-qualified home appliances. Each participating state was free to administer its program as it saw fit. This resulted in states offering consumers up to $250 in rebates per Energy Star machine.

21. Prior to the federal Cash for Appliances program, states and local municipalities and utilities offered their own versions of plans designed to encourage consumers to buy more

water- and energy-efficient Energy Star appliances through some combination of rebates and tax incentives. The amounts available to consumers varied over time and from place-to- place.

22. Manufacturers also received tax incentives to build more Energy Star appliances during the same time as the federal Cash for Appliances program. As a result, Whirlpool was incentivized to build and sell a large volume of the C6ES at a low price point to capture the benefits of those tax incentives.

23. I understand that Plaintiffs are claiming that the inclusion of the Energy Star logo on the C6ES and C7ES enabled Whirlpool to charge a substantial price premium for those models in the marketplace, and that between 44.3% and 55.7% of the C6ES's and C7ES's retail price can be attributed to the presence of the Energy Star logo. This is incorrect. As I explain above, [redacted] that difference is attributable to the C6ES's additional features and technology, including the extra cycles, "Quiet Series" feature, "Auto Load Sensing" feature, and an additional spin speed. Further, my understanding is that in fact there was no price premium charged at retail in connection with either the C6ES or C7ES models.

I declare under penalty of perjury under the laws of the State of New Jersey and the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 16th day of May, 2016, at Benton Harbor, Michigan.

David M. Whitehead

EXHIBIT 1

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EXHIBIT F

OCT 08

VACUUMS TO AVOID
PAGE 34

WINDEX VS. GLASS PLUS
PAGE 9

ROAD TEST: 9 SPORTY CARS
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BEST & WORST CREDIT CARDS
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DEPARTMENTS

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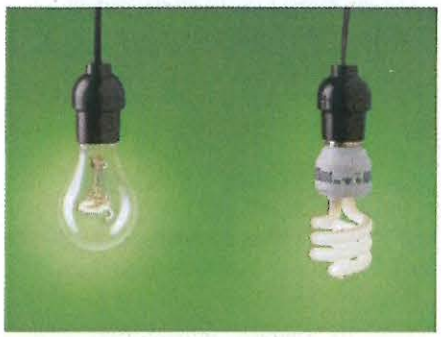

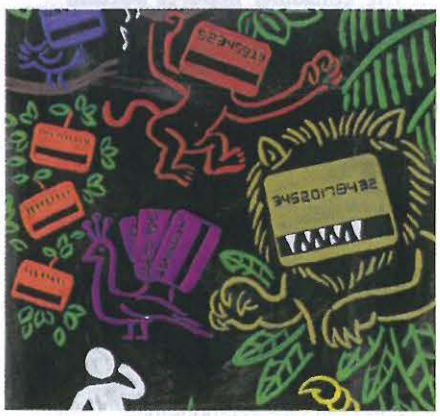

FEATURE

LAB TESTS

CARS

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Energy Star has lost some luster

The program saves energy but hasn't kept up with the times

IF YOU NEED a new refrigerator, you might be drawn to the Samsung RF267ABRS. This sharp-looking bottom-freezer, which we're testing for a future report, is equipped with French doors, through-the-door ice and water dispensers, and many other inviting features.

This refrigerator might also appeal because it carries the Energy Star badge of honor, thanks to its claimed 540-kilowatt-hour annual consumption. "By being Energy Star compliant you are assured that your Samsung model is helping the environment by using less energy while saving you money," a blurb on the company's Web site says.

But in our comparative energy tests, which are tougher than the Department of Energy's and better resemble how you use a refrigerator, it used 890 kWh per year.

WIDE DISCREPANCY Senior program leader Emilio Gonzalez tests the LG LMX25981ST refrigerator. That French-door model and others we tested used significantly more energy than other manufacturers' comparable refrigerators.

There's an even larger difference between company claims and our measurements for the LG LMX25981ST French-door fridge. LG says it uses 547 kWh per year. We found through our tests that real-life energy use would be more than double.

Why the energy-use gap? DOE procedures call for a refrigerator's icemaker to be off during testing. On the LG, turning off the icemaker also shuts off cooling to the ice-making compartment, located on the refrigerator door.

In our preliminary tests with the icemaker off, the energy use we measured was much closer to LG's figure. But that's not how you'd use the feature at home since doing so melts all the ice. When we gauged energy use with the LG's icemaker on, we got a consumption of 1,110 kWh per year.

Such a loophole lets manufacturers label products more energy efficient than we've found them to be, and they get the Energy Star and its cachet when you won't see those savings.

The issue highlights a fundamental drawback to Energy Star, a 16-year-old federal program administered by the DOE and the Environmental Protection Agency that covers more than 50 product categories and is voluntary for manufacturers.

Qualifying Energy Star appliances and consumer electronics should use less energy—about 10 to 25 percent less than the DOE's maximum allowed amount for that category. Last year alone, according to Energy Star, the program slashed greenhouse-gas emissions equivalent to those of 27 million vehicles and saved Americans $16 billion in energy costs. But our investigation has revealed some flaws:

Qualifying standards are lax. About 25 percent of products in a category should qualify, according to the EPA. But until recently, for example, 92 percent of all dishwashers qualified. Under a tighter standard, it's now about 50 percent. A high number of residential-use oil-fired

boilers (67 percent) and dehumidifiers (60 percent) also qualify for the program.

Tests are out of date. Federal test procedures haven't kept pace with technology, a point Energy Star leadership conceded in a meeting with Consumers Union, nonprofit publisher of CONSUMER REPORTS.

"A number of test procedures are out of date or problematic," says David B. Goldstein, codirector of the energy program at the nonprofit Natural Resources Defense Council (NRDC). "Part of the reason is that the DOE doesn't have the staff they need to do very much on test procedures. There's also willpower. They don't want to do it."

What's more, it usually takes the DOE three years to publish new rules—a period that includes comments from manufacturers, organizations such as Consumers Union, and others—and another three years for the updated minimum efficiency requirements to take effect. Comment cycles at other federal agencies are much shorter.

Input into the rule-making process by those who have a vested interest in easy-to-meet standards, such as manufacturers, can also help dilute those standards. "Because of all the parties involved, you may get a level that isn't as aggressive as it could be," says Jennifer Thorne Amann, director of the buildings program for the nonprofit American Council for an Energy-Efficient Economy.

Until recently, 92 percent of dishwashers qualified for Energy Star.

Companies test their own products. The DOE does not test products for compliance with its standards; manufacturers do it. And there's no independent verification of what they report. Rather, the government relies on manufacturers to test their competitors' appliances and notify it of suspicious energy-use claims.

A standard intended to be gold

Energy Star grew out of efforts by the federal government to forge a set of nationwide guidelines and create a logo that clearly indicates energy-efficient products. "Prior to Energy Star," Amann says, "different states and utilities had their own symbols. It was confusing for anyone trying to promote energy efficiency."

Today, more than 70 percent of U.S. consumers are aware of the logo, the EPA says. "You know you're getting some level of energy efficiency beyond the average when you see the logo," Amann says.

Energy Star often raises standards, as it did in 2007 for washers. Recent revisions include the Modified Energy Factor, which accounts for how much water a washer leaves in a washed load and is the best measure of the energy it takes to wash and dry a load.

Even as Energy Star has modernized, it is not nimble enough, critics say. The Consumer Federation of America, the NRDC, and many states say federal officials must do a better job creating and enforcing tougher standards to prevent appliances and electronic devices from getting the Energy Star when they shouldn't.

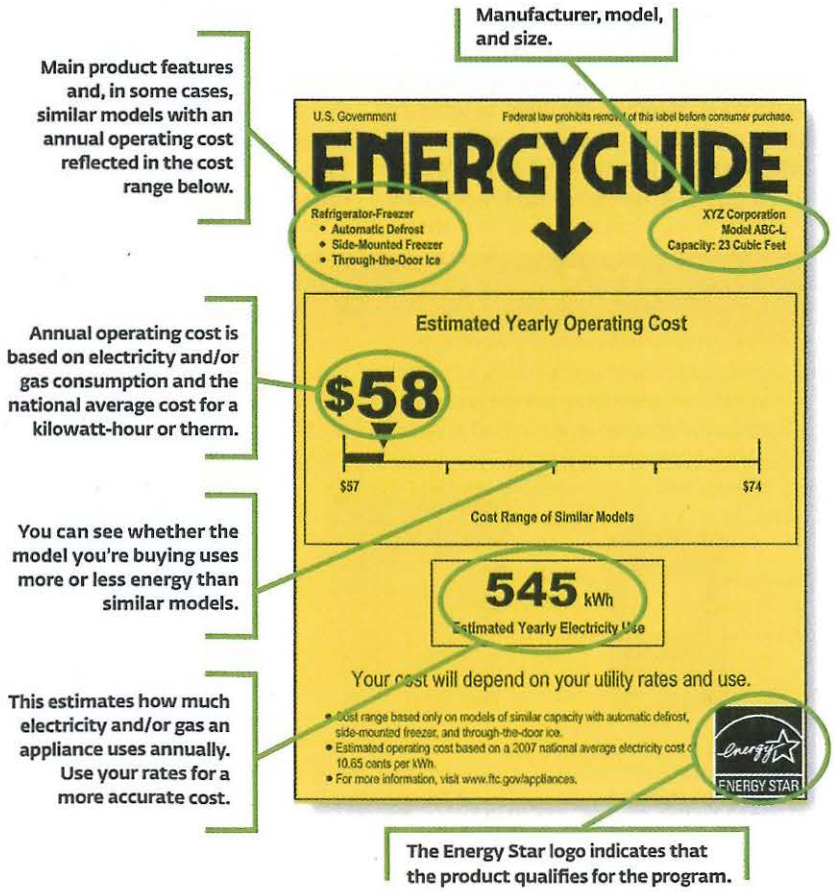
"If a manufacturer wants to claim it has a refrigerator that meets Energy Star, should it be allowed to use a test procedure that lets it say things it ought to know aren't going to be true for how consumers will use the product?" Goldstein asks. "Companies shouldn't get to hide behind test procedures."

In our own tests, we've seen large differences between the energy use we found for three LG and two Samsung Energy Star French-door models with through-the-door ice and water dispensers and the use claimed on their EnergyGuide labels.

A reason for such discrepancies is that DOE testing procedures didn't anticipate French-door models with ice-making com-

How to interpret the EnergyGuide label

Energy Star appliances should use at least 10 to 25 percent less energy than nonqualified models. Many appliances are required to carry the Federal Trade Commission's EnergyGuide label. It lets you compare the energy consumption of appliances and determine approximately how much it will cost you to run them.



partments in the refrigerated section. Manufacturers of that type of French-door refrigerator needed a waiver to be able to sell their models in this country.

We've also found through our tests that although the EnergyGuide labels on French-door models from three manufacturers state comparable energy-use figures, there are greater differences among the products.

In a June 2008 meeting with Consumers Union representatives, David E. Rodgers, the DOE's deputy assistant secretary for Energy Efficiency in the Office of Technology Development, Energy Efficiency and Renewable Energy, acknowledged that federal test procedures are outdated.

Our tests have revealed problems with other DOE protocols. The DOE test for dishwasher energy used to involve washing clean dishes. In our tests, we've always used a full load of heavily soiled dishes. That demanding workout provides a better gauge of how much energy dishwashers consume when you don't prerinse dishes. Today manufacturers must test a mix of moderately, lightly, and barely soiled dishes.

Self-testing and self-reporting by manufacturers can create other problems. The Energy Star Haier ESAD4066 air conditioner lists a 12.0 Energy Efficiency Rating (EER). That model lacks certification from the Association of Home Appliance Manufacturers, a third-party organization, so we had a recognized outside lab test one according to DOE tests. The lab measured a significantly lower 10.9 EER, borderline for Energy Star.

And when our tests showed that Haier's HD656E dehumidifier removed less water per day than the claimed 65 pints, we had the same lab test it under DOE protocols. The analysis showed that it produced 51.9 pints a day, squeaking by for Energy Star.

The future of Energy Star

In a recent report, the EPA inspector general was critical of efforts to deal with the misuse of the Energy Star. "The Energy Star staff believe that Energy Star products not meeting qualification standards for the program will be reported to EPA by rivals," the report says. But "Energy Star program officials did not produce any evidence the asserted self-policing is occurring."

A lawsuit spurred moves to change standards.

The DOE is also addressing issues that arose out of a 2006 settlement it reached after being sued by the NRDC, several states, and others to force it to create new energy standards and revise others.

Consumers Union recommends the following changes to fine-tune Energy Star:

- The DOE and EPA should bring test procedures and standards in line with the technology available in consumer products. They must also more frequently review procedures and standards as new technology and products, such as French-door refrigerators, hit the market. The DOE has said it will convene a public meeting to discuss updating test procedures for refrigerators.
- The DOE should require independent verification of test results. That need is underscored by the fact that our tests found wide energy-use discrepancies among comparable refrigerators from different manufacturers even though those models had a similar claimed energy use.
- The program should consider a graded qualifying system like the European Union's Energy Label, which uses letters from A++ to G. That way, you could easily find the best or choose a model that just misses top honors, since the most efficient products often cost more.
- Federal officials need to better police companies and enforce standards, including increasing spot checks of Energy Star-qualified products. That is important since companies have put the Energy Star on products before getting formal acknowledgement. And retailers sometimes alter or improperly display the EnergyGuide label.

Efforts like those could go a long way toward keeping nonqualified products from getting the Energy Star since pulling qualification from a product would be a big blow to a major manufacturer.

Until the federal government revamps its energy-use procedures and standards, you could be left wondering whether you're getting what you pay for when you reach for the Energy Star.

Watts on TV: Energy consumption over the decades

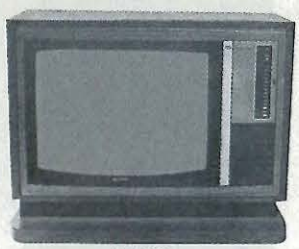
The earliest TV sets consumed as much electricity as today's energy-hungry plasma models. But newer designs in circuitry dropped wattage to less than half by about 1980 even as screen sizes grew.

Today there's a wide variation in how much power the different types of television sets consume. And there's no federally imposed limit on how much electricity TVs can use.

But Energy Star has updated its TV criteria, which go into effect Nov. 1. The new guidelines will cover energy consumption while a set is on and how much energy it uses in standby mode.

1938
DuMont Model 180
250 watts
The first electronic TV, the DuMont had an 8x10-inch black-and-white picture.

1954
RCA CT-100
475 watts
The early color TV had a screen with a 12½-inch viewable area.



1980
Sony KV2601
102 watts
This 26-inch CRT, reviewed in our January 1980 issue, came in a 3-foot-wide cabinet.

2000
Sharp LC-10A2U
28 watts
One of the first flat-panel TVs sold in the U.S., this 10-inch set was 2½ inches deep.

2008
Samsung FP-T5084
250 watts
This 50-inch plasma, at medium brightness, uses the same energy the DuMont did.

EXHIBIT G

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
P.O. Box 652
Newark, New Jersey 07101-0652
(973) 622-4444
Attorneys for Defendants
Whirlpool Corporation, Lowe's Home Centers, LLC,
Sears Holdings Corporation, and Fry's Electronics, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSONS, CHARLES BEYER, JONATHAN COHEN, JENNIFER SCHRAMM, and ASPASIA CHRISTY on behalf of themselves and all others similarly situated, Plaintiffs, v. WHIRLPOOL CORPORATION, LOWE'S HOME CENTERS, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT, INC., FRY'S ELECTRONICS, INC. and APPLIANCE RECYCLING CENTERS OF AMERICA, INC., Defendants.	Civil Action No. 2:12-cv-00089-KM-JBC Honorable Kevin McNulty Honorable James B. Clark, III **DECLARATION OF RONALD L. VOGLEWEDE**

I, Ronald L. Voglewede, declare as follows:

1. I am currently employed by Whirlpool Corporation ("Whirlpool") as Global Sustainability Director. I am over 21 years of age, of sound mind, and competent to testify. Except as otherwise stated, I have personal knowledge of the facts stated in this declaration. If called as a witness, I could testify as to each of them.

2. In this declaration I state facts in support of Whirlpool's Opposition to Plaintiffs' Motion for Class Certification and related filings.

3. I am the Global Sustainability Director for Whirlpool, which is a positon I have held since November 2013. Prior to that, I was the North American Sustainability Lead, which is a position I held starting in 2010. I obtained my B.S. in Mechanical Engineering from the University of Notre Dame in 1996, and my masters degree in Mechanical Engineering from the University of Michigan in 1998. My responsibilities include managing Whirlpool's product sustainability actions, including total life cycle product sustainability. As part of my role at Whirlpool, I am aware of the Energy Star program's financial impact on Whirlpool.

4. In their Motion for Class Certification and attached expert reports, Plaintiffs and their experts misconstrue certain Whirlpool documents in order support various arguments made by Plaintiffs and their experts.

5. In order to support an argument for a supposed price premium that the market charged for Energy Star top-loading washers like the Maytag washers at issue in this case, Plaintiffs and their experts cite a document purporting to be a Whirlpool Government Relations analysis that supposedly found a 55.7% price premium attributable to the Energy Star logo. *See* Bursor Decl., Ex. 1. This chart, however, does *not* show the existence of a 55.7% price premium attributable to the Energy Star logo for the Maytag Centennial washers at issue here or any other washers. Rather, the charts on page WDZ0000209 appear to show a comparison of the prices of Whirlpool washers *that happen to be Energy Star* versus prices for washers that happen to be non-Energy Star. Moreover, according to the label on the top graph on WDZ0000209, this data appears to be from 2006, three years before Whirlpool sold the Maytag Centennial washers at issue.

6. These are critical reasons why WDZ0000209 does not support Plaintiffs' argument. First, it is no surprise that in 2006, Whirlpool washers that happened to be Energy Star

certified sold at higher prices than Whirlpool washers that happened to be non-Energy Star washers, but that does not mean that the Energy Star logo was responsible for the price difference. In the 2006-2007 timeframe, Whirlpool's Energy Star-certified washers were far more likely to have *several* premium features that contributed to higher prices, including stainless steel construction, higher capacities, longer warranties, more sophisticated electronic controls, and greater cycle options than Whirlpool's non-Energy Star washer lineup. Importantly, Whirlpool's Energy Star-certified washers in 2006-2007 were more likely to be High-Efficiency top- or front-loading washers (as opposed to), which generally cost several hundreds of dollars more than top-loaders, like the washers at issue in this case. In sum, the figures cited by Plaintiffs and their experts on page WDZ0000209 are not comparing Energy Star washers with *comparable* non-Energy Star washers. Plaintiffs' and Plaintiffs' experts attempts to attribute any heightened price in this document *solely to the Energy Star logo* is unsupportable and not in accordance with the facts.

7. Second, Plaintiffs and Plaintiffs' experts improperly assume that the price difference for Whirlpool Energy Star-certified washers in 2006 or 2007 is the same or similar as it would be in 2009-2010, when the Maytag washers at issue in this case were sold. That assumption is wrong, and it ignores the reality of the competitive market for Energy Star top-loading washers in 2009 and 2010. The 2009-2010 timeframe saw particularly intense competition and downward pressure on the prices of Energy Star top-loading washers. During this time, GE introduced the first low-cost conventional (i.e., non-HE) top-loading Energy Star washer, and Whirlpool's pricing was constrained by that competition. The global recession also made many consumers and retailers especially price sensitive. Moreover, the load-sensing technology that boosted efficiency in some Energy Star top-loading washers, such as the Maytag

washers at issue in this case, was inexpensive to manufacture. Due to these factors and others, there was no price premium for mass market Energy Star top-loading washers, as compared to comparable non-Energy Star top-loading washers, during the 2009-2010 timeframe. In fact, non-Energy Star washers were often *more* expensive than non-Energy Star washers in this time frame. The price impact, if any, of the Energy Star logo varied substantially over time; so any attempt to assume a constant price difference between Energy Star and non-Energy Star washers from 2006 to 2010 is incorrect.

8. The other documents cited by Plaintiffs and their experts suffer from similar problems. Exhibit 6 to the Scott Bursor Declaration ("Bursor Declaration") is a 2008 presentation given at an equity conference. On page 13, a graph shows a supposed $200 initial price premium for an Energy Star washer, but is unclear from the graph what "price premium" should mean in this context, whether the price analysis involved comparable washers, and what year or years this data is supposed to cover (although presumably it covered a time period prior to 2008, when this presentation was given). As I note above, any supposed "price premium" that might have been calculated prior to 2009 is not at all relevant for understanding the market pricing of Energy Star top-loading washers in 2009 and 2010. Moreover, without knowing what comparison products were analyzed in order to calculate a "price premium," it is impossible to know whether any price difference was due to the Energy Star logo or other features. Exhibit 7 to the Bursor Declaration appears to be a transcript of a discussion about the presentation that is Exhibit 6 to the Bursor Declaration. There is nothing in the transcript that sheds further light on the data in the presentation, and nothing in the transcript indicates that there is a "price premium" for Energy Star washers in 2009 and 2010.

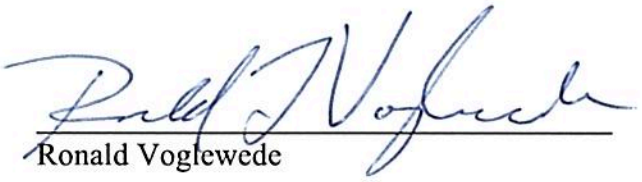
9. The presentation attached as Exhibit 8 to the Bursor Declaration has identical problems. Page 13 of Exhibit 8 purports to show a difference in initial purchase price between Energy Star and "conventional" appliances (not just washers), but it is unclear what models were considered in this analysis and whether those models were comparable. Further, this data would have been gathered prior to 2009, so it is of no value for determining a price difference for Energy Star washers in the vastly different competitive environment of 2009-2010. Exhibit 9 to the Bursor Declaration appears to be a transcript related to this presentation, but does not shed any additional light on the data contained in the presentation.

10. Plaintiffs' expert, Colin Weir, cites several old Whirlpool documents that contain unsupported statements regarding supposed higher prices for Energy Star appliances, but all of these documents suffer from the same deficiencies I describe above; none of these documents demonstrate that the market charged a "price premium" solely attributable to the Energy Star logo for top-loading washers like the washers at issue in 2009-2010. For example, Mr. Weir cites a "Leadership Brief" from February 2008, labeled WDZ0000476, claiming that Energy Star products sell at higher prices, but again, data from prior to 2009 cannot be used to suggest that a price premium existed in 2009-2010, and there is no reason to think that this analysis involved comparable washers to the ones at issue. Mr. Weir cites an undated "internal Whirlpool presentation" labeled WDZ0018993 which appears to be from 2007. This undated document contains an identical version of the chart as Exhibit 1 to the Bursor Declaration, and therefore suffers from the same deficiencies I describe above in paragraphs 5, 6, and 7. Mr. Weir also cites a "meta-analysis," labeled WDZ0000204, but all of the data cited in that analysis is from 1999 to 2003, which is far too old to be relevant to the washers at issue in this case. Finally, Mr. Weir cites a page from a presentation, WDZ0000009, purporting to show that Energy Star is an

"influential label," but that document does not discuss pricing, nor is that document relevant to a determination of whether there was a "price premium" for Energy Star top-loading washers in 2009-2010.

I declare under penalty of perjury under the laws of the State of New Jersey and the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 20th day of May, 2016, at Benton Harbor, Michigan.



Ronald Voglewede

EXHIBIT H

FILED UNDER SEAL

EXHIBIT I

FILED UNDER SEAL

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, et al., Plaintiffs, vs. WHIRLPOOL CORPORATION, et al., Defendants.	Civil Action No. 2:12-cv-00089-KM-SCM
	VIDEOTAPED DEPOSITION OF FRANCIS ANGELONE

TRANSCRIPT of the stenographic notes of the proceedings in the above-entitled matter, as taken by and before ELLEN J. GODINO, a Certified Shorthand Reporter of the State of New Jersey, held at the offices of McCARTER & ENGLISH, Four Gateway Center, 100 Mulberry Street, 15th Floor, Newark, New Jersey, on Tuesday, June 16, 2015, commencing at 10:04 a.m.

can lower the water. I don't recall what it is. I can -- I'm thinking. I know I turn the one dial. I'm not a hundred percent sure. I can't tell you without looking at the thing.

Q. Do you have any understanding of how large of an impact your use could have on the kilowatt-hour rating or the cost on the EnergyGuide label?

A. Not now. I don't know -- I don't know what it costs now.

Q. Have you ever looked at your utility bills to try and find out?

A. I never tried to figure it out, no.

Q. Did you save your utility bills?

A. I have -- I have all my utility bills, yes.

Q. From how long?

A. Just within the last year.

Q. And have you looked at them to try to determine how much energy your washing machine --

A. No, sir.

Q. You mentioned Energy Star earlier. Did the Energy Star label convey to you any information that's not on this EnergyGuide label?

A. I believe Energy Star was supposed to be

a good thing. I believe it's a reputable -- I don't know if it's a company, I really don't know what Energy Star is, other than it's supposed to be, you know, if it's telling you, it's telling me that it's a decent machine, it saves me electricity and water usage, I believed them, I believed what was here, I thought that was a good thing -- another good reason to buy the thing.

Q. What does the Energy Star logo look like?

A. I don't know. I couldn't tell you, I don't know.

Q. Do you have any recollection of what it looks like?

A. I don't recall.

Q. How do you know that you saw an Energy Star label on your washing machine if you don't know what it looks like?

A. I don't know now. I don't know why -- I don't know, I don't have that. I didn't save this.

Q. And I'm representing to you, Mr. Angelone, that they're actually two different things.

A. I understand that there's -- it's missing here. The Energy Star is usually down here on the right.

EXHIBIT K

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

~~~~~~~~~~~~~~~~~~~~

CHARLENE DZIELAK, et al.,

Plaintiffs,

vs. Civil Action No.
2:12-cv-0089-KM-SCM

WHIRLPOOL CORPORATION, et al.,

Defendants.

~~~~~~~~~~~~~~~~~~~~

Videotape deposition of

KARI PARSONS

May 19, 2015
11:35 a.m.

Taken at:
Hilton Garden Inn
500 Metro Place
North Dublin, Ohio

Wendy L. Klauss, RPR

Job No. CS2065619

time. There is the automatic water level sensor, which to me means save water.

Q. Is there anything else that indicates to you the relative water efficiency of these washing machines?

A. Well, again, I go back to the Energy Star logo, which means energy savings, and if this happens to be a washer, the energy in this case too would be the water used.

Q. So it is your understanding that Energy Star also guarantees use on level of water efficiency?

A. Yes, along with other utilities.

Q. And how did you come to that understanding?

A. Well, the Energy Star program, as long as I've known it, has been a representation of these have been tested, these are known to use less energy, electric, gas, water, what have you, and be safer for everyone to use, and I take that into consideration each time, and that's what it means to me.

So seeing that meant they are putting their stamp on it saying it's efficient in all the utilities it uses, including water.

EXHIBIT L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CAUSE NO. 2:12-cv-00089-KM-SCM

CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSONS, CHARLES BEYER, JONATHAN COHEN, JENNIFER SCHRAMM, and ASPASIA CHRISTY on behalf of themselves and all others similarly situated,

Plaintiffs,

-vs-

WHIRLPOOL CORPORATION, LOWE'S HOME CENTER, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT, INC., FRY'S ELECTRONICS, INC., and APPLIANCE RECYCLING CENTERS OF AMERICA, INC.,

Defendants.

VIDEO DEPOSITION OF CHARLES BEYER

The deposition upon oral examination of CHARLES BEYER, a witness produced and sworn before me, Tamara J. Brown, CSR, RMR, CRR, Notary Public in and for the County of Marion, State of Indiana, taken on behalf of the Defendants, at the offices of the Courtyard Marriott, 2602 Fortune Circle East, Indianapolis, Marion County, Indiana, on the 12th day of May, 2015, pursuant to the Federal Rules of Civil Procedure with written notice as to time and place thereof.

Job No. CS2060712

A That I was going to use a lot less water.
Q And how did you determine that? What information did you rely on to know that the Energy Star logo meant that this model would use less water than a standard model?
A My experience with Energy Star products in general. You know, of course, the PC monitors don't use water --
Q Let's hope not.
A -- but they use energy, right? I know the concept. I know how it's managed. And for a major appliance like a washer, that was a significant draw to say, you know, what am I buying here? I'm buying something to clean my clothes, I'm also buying something that uses two utilities, one of which is a very expensive one.
Q And this doesn't say "Water Star," it says "Energy Star."
A That's right.
Q How did you know that Energy Star encompassed water, at the time you bought it?
A That came from the conversation with the sales guy, how much it's going to save in water. He didn't say you're going to save 50 percent, he says, you know, it's only going to use the

amount of water you need.
Q Did he say something -- did the salesman say something to the effect of this is Energy Star certified because it will save you water?
A I don't remember those exact words.
Q Generally?
A Generally.
Q Did the salesman say that this model earned the Energy Star logo due to its efficient use of water?
A Well, again, five years ago, I don't remember our conversation very well. I remember I was attracted to the Energy Star, and he sort of followed up on that, said yes, it will save.
Q Do you remember any specific representations -- let me see if I can walk that back.

Do you specifically remember any specific representations that were made to you at the time that you purchased this machine that Energy Star -- that an Energy Star certified washer would save you water?
A Yes.
Q And who or what was the source of that information?
A Sales guy said, you know, it's only going to put

the water in that you need. Obviously it's going to save.

Q I realize that, but I feel like that has to do with the sensor issue, that the sensor -- if the salesperson was selling you this washer, he would say that the sensor makes it so that the clothes washer only consumes the water you need. Did the salesperson say something like that?

A Like I said, I can't remember the conversation in details. I do remember the significant, I believe was the word, something like that, something that meant the same thing, savings of water because of the -- it only uses water it needs rather than an arbitrary fill.

Q Right. And I completely understand that. But the words that were lacking in that response were Energy Star.

Let me ask -- let me ask it a different, a better way. Had you spoke with the salesman, and the salesman told you that this clothes washer had a sensor that made it so that the clothes washer would only use the water that is needed and no more, would you have bought the clothes washer?

MR. DECKANT: Objection. Lack of

EXHIBIT M

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSONS, CHARLES BEYER, JONATHAN COHEN, and JENNIFER SCHRAMM,and ASPASIA CHRISTY on behalf of themselves and all others similarly situated,

Plaintiffs,

Vs. Case No. 2:12-cv-00089-KM-SCM

WHIRLPOOL CORPORATION, LOWE'S HOME CENTER, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT, INC., FRY'S ELECTRONICS, INC., and APPLIANCE RECYCLING CENTERS OF AMERICA, INC.,

Defendants.

VIDEOTAPED DEPOSITION OF BRIAN MAXWELL

Sacramento, California

Friday, June 12, 2015

Volume 1

Reported By:
SHARON CABELLO
CSR No. 3080 RPR
Job No. 2083672

PAGES 1 - 159

Star?

A. No.

Q. And you weren't at the time of purchase, I assume?

A. No.

Q. Some of the documents that were produced to us look like a registration card. Rather than introduce them I will just ask you do you recall receiving a registration card when you bought your machine?

A. Yes.

Q. Did you fill it out?

A. No.

Q. Is there any reason you didn't fill it out?

A. I don't remember.

Q. That saved us a bunch of time.

Do you still have the Energy Star logo in front of you?

When you purchased the washer did you understand that to be a warranty?

A. Yes.

Q. What was the warranty?

A. It was based on the representation of the salesperson.

Q. Which was what?

A. Which was that this machine is Energy Star and would save on utility bills, water and energy.

Q. So you understood that the retail salesperson made a warranty to you?

A. Yes.

Q. Did the logo itself, do you think that's a warranty?

A. Yes.

Q. And what's the warranty?

A. The warranty is that the machine will perform at the Energy Star standards.

Q. Did you know what those standards were at the time of purchase?

A. Not in real specifics, but I had a basic understanding.

Q. What was the basic understanding of that?

A. That it would save water and energy.

Q. Compared to what?

A. Compared to other machines.

Q. Other non Energy Star machines?

A. Yes.

Q. Did you have an understanding of how much more it would save?

A. Not at that time, no.

Q. You have since learned?

EXHIBIT N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No.: 2:12-cv-00089-KM-SCM

CHARLENE DZIELAK, SHELLEY BAKER, FRANCIS ANGELONE, BRIAN MAXWELL, JEFFERY REID, KARI PARSON, CHARLES BEYER, JONATHAN COHEN, and JENNIFER SCHRAMM, and ASPASIA CHRISTY, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

WHIRLPOOL CORPORATION, LOWE'S HOME CENTER, LLC, SEARS HOLDINGS CORPORATION, THE HOME DEPOT, INC., FRY'S ELECTRONICS, INC., and APPLIANCE RECYCLING CENTERS OF AMERICA, INC.,

Defendants.

V I D E O T A P E D D E P O S I T I O N

o f

JEFFERY EDWARD REID

taken on behalf of Defendants

DATE: June 30, 2015

TIME: 9:05 a.m. to 1:07 p.m.

PLACE: 3805 West Cypress
Tampa, Florida 33607

BEFORE: Dawn A. Hillier, RMR, CRR, CLR
Notary Public - State of
Florida, at Large

Job No. CS2066466

A Um-hum.
Q -- what did you understand the Energy Star logo to convey to you that was not already conveyed by the EnergyGuides label?
A Additional savings on utilities.
Q And additional as compared to what?
A As to non-Energy Star.
Q And do you think the Energy Star logo implied a lower estimated yearly operating cost than is on the EnergyGuide label?
A I see what you're saying. Yes. Yes. Yes.
Q You thought it did?
A Yeah.
Q So you thought the 23-dollar number wasn't the real number, there was some lower number?
A Yeah. You'd have the additional savings from the Energy Star.
Q And you understand that those additional savings were not represented on the EnergyGuide label?
A Correct.
Q And what is the basis of that understanding?
A As -- you know, reading about it. So like I said, I didn't design this document. But my understanding is if it has the Energy Star logo, it's above and beyond what should be on there.

Q So you --
A Well --
Q Sorry.
A Go ahead. I'm sorry.
Q So you see under the "Estimated Yearly Operating Cost," you have this range of ten to $71; right?
A Um-hum.
Q So is it fair to say that the EnergyGuide label is already conveying to you that your machine is efficient, relevant to similar models?
A (No verbal response.)
Q You think the EnergyGuide -- Energy Star label suggests it's even more efficient than the EnergyGuide label?
A Yes, um-hum.
Q And as you sit here today, you don't recall the basis of that understanding?
A I don't have the specifics, but, you know, reading.
Q Reading what?
A Internet research. Things I may have read.
Q And did you have an understanding in terms of either absolute numbers or percentages of how much more efficient you understood the Energy Star label to

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, et al,	
Plaintiffs,	Civil Action No.
vs.	2:12-cv-00089-
WHIRLPOOL CORPORATION, et al,	KM-SCM
Defendants.	VIDEOTAPED DEPOSITION OF
	CHARLENE DZIELAK

TRANSCRIPT of the stenographic notes of the proceedings in the above-entitled matter, as taken by and before ELLEN J. GODINO, a Certified Shorthand Reporter of the State of New Jersey, held at the offices of McCARTER & ENGLISH, Four Gateway Center, 100 Mulberry Street, 15th Floor, Newark, New Jersey, on Wednesday, June 10, 2015, commencing at 10:12 a.m.

Job No. CS2083667

STAR®-compliant and therefore I was misled. I bought a machine that did not conform to what was promised.

Q. Could you describe for me the ENERGY STAR® logo?

A. You mean what it looks like?

Q. Yes.

A. Yeah. It's got a star. It's got energy. I believe it's blue, and it is generally prominently displayed on appliances that do indeed fit the ENERGY STAR® criteria.

Q. Okay. So your previous testimony about the -- the warranty that this appliance would lower utility bills, where did you get that understanding?

A. From numerous ads, from print ads, from advertisements in newspapers, from flyers that have come from online representations of bulletins that were put out claiming that's that what the ENERGY STAR® means.

Q. So at the time that you purchased the clothes washer, did you have an understanding that it was a government program?

A. No, I do not believe it's a government program. From what I understand, it is a voluntary program, but when an appliance manufacturer claims that it is ENERGY STAR®-compliant, they are saying

THE WITNESS: Will do.

Q. Now, you also testified that you were educated about the ENERGY STAR® program from advertisements and things like that over the years. Is that right?

A. Yes.

Q. Okay. Do you recall who put out those advertisements?

A. No, I do not.

Q. Do you recall seeing any information from Whirlpool regarding the ENERGY STAR® program?

A. Not specifically.

Q. Okay. Do you recall seeing any information from any of the retailer defendants in this case about the ENERGY STAR® program?

A. Not specifically.

Q. Okay. Do you have any social media accounts?

A. I have a LinkedIn account. I don't know if that is considered social media. And I have a Facebook account. Neither of which I ever look at.

Q. Okay. Twitter account?

A. No.

Q. Okay. Are you currently married?

A. I'm widowed.

EXHIBIT P

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, et al, Plaintiffs, vs. WHIRLPOOL CORPORATION, et al, Defendants.	Civil Action No. 2:12-cv-00089-KM-SCM

Videotaped Deposition of Jennifer Schramm

Alexandria, Virginia

Friday, May 22, 2015

9:45 a.m.

Job No. CS2073452

Reported by: Laurie Bangart, RPR, CRR, CLR

loads.

Q And so the other item that you mentioned that you do in order to help deal with this problem is lifting the lid of the washer after you've started it; is that right?

A Mm-hmm.

Q Okay, and when did you first realize that that was a solution to this problem?

A I don't recall the exact time.

Q Do you recall the year?

A It's probably about 2011. Oh, no, no, no. I'm sorry. I bought it in January 2010, so it's probably somewhere in 2010.

Q And did you come up with that solution by reading some of the documentation that came with the clothes washer?

A Well, common sense says if you lift the lid and your clothes are dry, and if, and if you lift it, it's going to fill it with more water, of course you're going to do that.

Q How did you learn that if you lifted the lid after you started the clothes washer that it would fill with water?

A It's in the, it's in the eco-awareness sheet.

when the laundry is in there, my laundry is bone dry. Whether or not that's the main reason, I don't know, but my laundry is dry.

BY MR. LOGAN:

Q So when you said -- when you open the lid when the laundry is in there, are you talking about after the cycle is done or in the middle of the cycle?

A I put my laundry in. I listen for the water. It stops. There might be some agitation. Then it stops. Some agitation. I'm not sure, but after that point I open it, or maybe it's even when it's agitating, I'm not sure, and my laundry is not completely wet.

Q How many minutes typically would you wait to check on, on your laundry by lifting the lid? How many minutes after the cycle started?

A I don't count in minutes. I listen. When the water is stopped and it's agitating, I open the lid.

Q And you -- after you open the lid, is more water added by the clothes washer?

A Yes.

Q And then at that point are your clothes getting clean because there's more water being

added?

A I had told you I pretreat my laundry, too, so . . .

Q I guess let me take a step back. How often are you -- let me go even further than that.

You are intentionally lifting the lid mid cycle so that the clothes washer will add more water to the, the, the basin; is that right?

A Yes. Otherwise, my clothes are dry. You can't wash clothes that are dry.

Q Okay. How often are you intervening to lift the lid during the cycle? Is it every time you do a load of laundry?

A No.

Q Is it most?

A Most.

Q Can you start the cycle and then just wait five, ten seconds into the cycle, and then lift the lid and it will fill all the way up, or do you have to wait for a longer period before you lift the lid to cause the clothes washer to fill up with water?

A I've never counted. It doesn't take that long.

Q For example, do you leave the room and

this document influenced your decision to purchase the clothes washer; is that correct?

A Correct.

Q Okay. Do you see the all caps bullet point where it says "FOR BEST WATER EFFICIENCY, DO NOT RE-OPEN THE LID AFTER THE INITIAL CYCLE HAS STARTED"?

A I see that, yes.

Q But it's fair to say from your previous testimony you do indeed open the lid after the initial cycle has started, specifically to increase how much water is being used in the clothes washer; is that right?

A Because otherwise my clothes are dry.

Q Right. So the answer is yes, because otherwise your clothes would be dry; is that right?

A I open the lid after the cycle has started, because otherwise my clothes would be dry.

Q Okay. So it seems like for you -- well, let me take a step back here.

You, you realize, based on this document and your previous testimony, that for -- that by reopening the lid after the initial cycle has

started, you are reducing the water efficiency of the clothes washer; is that your understanding?

A My understanding for my particular opening the lid, yes, that might reduce water efficiency. However, I represent a class of people who -- that's where you have to separate these two issues, because the issue is not my particular problem with the washer machine. The issue is the fact that Maytag had labeled these as Energy Star, and then they were determined later not to be. And when I represent the class, I don't represent the class as everybody opening the lid. They are two separate issues.

Q Okay. Well, I guess let's leave the class out of it for now. I'll ask you some other questions about the class later, but -- so just, just for you, you believe that you're reducing the water efficiency of the clothes washer by opening the lid after the initial cycle has started; is that right?

A If I didn't open the lid, my clothes would be dry.

Q Mm-hmm, yeah, I realize that, and so if I'm reading your testimony correctly, it seems like there's a bit of a tradeoff between the water

efficiency of the clothes washer and the performance of the clothes washer in terms of cleaning clothes; is that right?

A Can you reword that.

Q Sure. If I'm reading your testimony correctly, it seems like there's a tradeoff between water efficiency of the clothes washer on the one hand and the performance of the clothes washer on the other hand; is that right?

A Again, I feel that my issue with the washer is a separate issue from the class.

Q Right. Let's just leave the class out of it for this question.

If I'm reading your testimony correctly, it seems like there's a tradeoff in your experience between the water efficiency of the clothes washer on the one hand and the performance of the clothes washer on the other hand in terms of cleaning clothes; isn't that right?

A I have to add water; else my clothes would be dry and they wouldn't be clean. There would be a pile of detergent on them.

Q Right, so --

A So yes.

Q So yes, so the answer is yes, and then

you just are explaining that the reason you're opening the lid is in order to ensure that your clothes get clean?

A Yes.

Q Okay. So you would say you're in a sense sacrificing water efficiency in order to ensure that your clothes get clean; is that right?

A But that's irrelevant of this, of the class.

Q I'm not asking you to comment on the relevance. I'm just saying that isn't it the case that you personally are sacrificing water efficiency in order to ensure that your clothes get clean?

A Yes.

Q Okay.

Do you have any understanding of -- now I'll ask about the class. Do you have any understanding of what percentage of the class would be willing to sacrifice water efficiency in order to ensure that their clothes get clean?

MR. DECKANT: Objection. Lack of foundation.

THE WITNESS: I don't know the answer to that.

EXHIBIT Q

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, et al.,	:	
	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO.
	:	2:12-cv-00089-KM-SCM
vs.	:	
	:	
	:	
WHIRLPOOL CORPORATION,	:	
	:	
Defendants.	:	

Videotaped deposition of DR. RAMAMIRTHAM SUKUMAR, taken by and before Lisa Forlano, CCR, CRR, RMR, at the offices of Bursor & Fisher, P.A., 888 Seventh Avenue, New York, New York, on March 17, 2016, commencing at 9:14 a.m.

Job No. CS2236904

specifications around it and the standards around it, I wouldn't want to answer about that.

Q So you don't know how much -- by how much the Maytag Centennial washers supposedly failed to meet the ENERGY STAR requirements?

MR. MARCHESE: Objection, lacks foundation.

THE WITNESS: It really would be outside my expertise to provide answers to that question.

BY MS. McLAUGHLIN:

Q So you don't know in they possibly failed by 1 percent or 50 percent of what the Government requires to meet ENERGY STAR standards?

A It does not change any of my opinions in my report, and it is not necessary as an input for me to consider, because again, you know, my assignment was very specific.

Q But you do not know?

MR. MARCHESE: Objection to form.

THE WITNESS: I don't want to really answer that question. It's not in my expertise to answer that.

BY MS. McLAUGHLIN:

Q But do you understand I'm not asking

not something that impacts my assignment or my understanding of my assignment.

Q Is it important for your assignment to know what washers are comparable to the Maytag Centennial washers sold in 2009-2010?

A It is not -- for my assignment effectively, when you look at conjoint analysis, or the entire area of multi-attribute preference measurement, we do control for other attributes like whether it's top loaded or front loaded. The focus here is largely on the price premium, if any, for the presence of the ENERGY STAR logo as compared to not having the ENERGY STAR logo on it.

Q Would you agree that it's not important to your survey what other comparable washers were available in the marketplace in 2009-2010?

MR. MARCHESE: Objection to form.

THE WITNESS: So my survey does take into account the other brands that would have been considered by the class when they were looking to make a purchase. I also looked at retail sales data from Lowe's and Fry's and other places. But these are all baked in, in terms of what the competition is and what the competitive prices are of the entire

demand-side consideration, supply-side considerations, are baked into the price premium calculation. It's not necessary that I need to understand exactly the number of models that are present or not present.

BY MS. McLAUGHLIN:

Q I'm sorry if I didn't understand. Did you say "baked in"?

A These are all taken into consideration.

Q Okay. Thank you.

So is it important for your consideration what a washer that is comparable to the Maytag Centennial washers are, what would be the comparable features to the washers at issue?

A Could you repeat that question?

Q Sure. Is it important to your survey to understand what other -- what comparable washers were available in 2009 and 2010 in terms of features in those washers and whether there is a comparable washer to the Maytag Centennial machines?

A So when you look at -- I'm going to focus on the part where you asked about a number of different features and what they are and what needs to be taken into account and when. I did some focus groups with consumers to understand what features

they would consider, what models they had. I've looked at retail sales data and I've looked at Consumer Reports in terms of what features exist, and all of those have been taken into account in a conjoint survey, and at the end of the day the conjoint survey is done and price premium is calculated for the presence of the ENERGY STAR logo as compared to not being present is to control for some of those other features. And so the answer to your question is yes, I mean, these things were taken into account.

Q Well, what did you do to learn about what washers were available in the marketplace in 2009 and 2010?

A As I mentioned, the retail sales data is one example. And --

Q Did that retail sales data --

MR. MARCHESE: Hold on, were you finished with your answer? Were you finished with your answer?

THE WITNESS: No, I was just going to explain.

MR. MARCHESE: Can you just let the witness finish with his answer before you ask another question, please?

THE WITNESS: So, you know, what I did is I looked at retail sales data. I also looked at Consumer Reports to understand what are the attributes that I need to consider in the multi-attribute preference conjoint survey approach that was used.

BY MS. McLAUGHLIN:

Q Okay. Let's take the sales data that you looked at. Tell me what the sales data was specifically that you looked at. What did it encompass?

A I don't have a copy of my report in front of me, but the details are in there. It's retail sales data from 2009 to 2012, if I recall correctly. For retail sales data at Fry's, Home Depot, Lowe's, those are all part of the -- part of my report I've kind of stated some of those in details.

Q Please help me understand. Was the retail sales data for the Maytag Centennial washers or did it encompass all the different washing machines available in the market from 2009 to 2012 at these three retailers?

A I don't recall exactly. I don't have the data right now in front of me but it's in there.

It was all taken into consideration when the entire survey was built, along with looking at Consumer Reports, along with, you know, the store visits that I did, as well as online surveys. Took into account a whole area of attributes that are necessary for me to incorporate into my conjoint survey.

Q So you can't recall, sitting here today, if that retail sales data included washers by Whirlpool's competitors?

A I can't recall that right now. I'm just trying to think. It's there in the details of my -- in the report.

Q And you said, you looked at Consumer Reports. Was that for 2015 or was that historical Consumer Reports from 2009-2010 time period?

A I looked at 2015. Again, as part of the conjoint survey that I was doing in 2015, I took into account a wide area of attributes, a large number of these attributes into the multi-attribute preference model, the survey approach itself, in order to understand, you know, what are the things that consumers would consider when they look to make a purchase of a clothes washing machine.

And, again, as the way the conjoint survey works is, in trying to understand the price

premium for the ENERGY STAR logo versus not having the ENERGY STAR logo they're essentially ensuring that all the other attributes that might go into the purchase decision are held as a constant in the process.

Q So would you agree that you do not look at Consumer Reports from 2009, 2010, is that essentially what you're saying?

A Yeah, my expert opinion, I did not need to go back to 2008 or 2009 to look at the Consumer Reports then. It was enough for me to do the focus groups that I did with consumers in 2015 as well as a look at the Consumer Reports that I used in my evaluation.

Q You did not think it was important to look at what washing machine attributes and features were available in 2009 versus available in 2015?

MR. MARCHESE: Objection to form.

THE WITNESS: Again, in my expert opinion, and having done many of these studies, 2015 is when I did the survey, so it was important for me to make sure that I have a clear understanding of a wide number of attributes that consumers would consider, and 2009 attributes would probably be very similar

to what you have in 2015, but not something that I really needed to consider.

BY MS. McLAUGHLIN:

Q So the answer is no, you did not think it was important to look at what features were available in 2009, 2010?

MR. MARCHESE: Objection to form.

BY MS. McLAUGHLIN:

Q Just a simple yes or no. No, you did not think it was important; yes, you thought it was important?

MR. MARCHESE: Objection to form.

THE WITNESS: No, I didn't think it was important, and I didn't need it for my consumer survey.

BY MS. McLAUGHLIN:

Q Did you consider the market prices of any Maytag brand top-loading machine available in 2009 and 2010 that wasn't ENERGY STAR?

A Well, if you look at all the retail sales data, there's a clear understanding for what the market forces are and what the prices are and so on, and if you look at what I did in the conjoint survey there's a wide range of prices that were especially in the conjoint survey that include

washing machines that would perhaps not have the ENERGY STAR logo.

Q But I thought you said that your -- you didn't know what the retail sales data was that you looked at so you don't know if it included non-ENERGY STAR washers.

A Sitting here at this time, I don't remember. But clearly there's a wide range of information that I considered. You know, the retail sales data. I considered shopping at, you know -- I took a trip down to Home Depot and Lowe's. I looked at some of their promotion materials that are put in the newspapers in terms of various models of clothes washing machines. All of that became a complete input into designing the conjoint survey and testing a wide array of prices that would include machines of different kind.

Q I don't think you quite answered my question. Did you consider the market price of non-ENERGY STAR Maytag washers that were available in the 2009 to 2010 time period?

A The answer is yes. And the way I considered it is, as I described, you now, a wide array. So the conjoint survey itself tests price points that are as low as $200 for ENERGY STAR --

for clothes washing machines that don't have the ENERGY STAR logo on it.

Q But I'm not asking about what your survey found, I'm asking about what the market price was. What did these -- what did non-ENERGY STAR washers sell for back in 2009? Did you look at that data?

A Again, I don't have all the data right now, I can't recall and tell you exactly what was done, but I can tell you this, that in designing the inputs, which is really what I needed to do in my assignment, I took a whole wide range of inputs that went into it, ranging from looking at the sales data, the Complaint, and then looking at the 2015 Consumer Reports, looking at retailer websites, making a trip, doing a, you know, a set of focus groups. All of those provided me with a guidance for what price points I needed to test, and that's really what inputs I needed.

Q Do you know if there were any similar non-ENERGY STAR top-loading washers available during the class period?

MR. MARCHESE: Objection to form.

BY MS. McLAUGHLIN:

Q During the 2009 to 2010 time period.

MR. MARCHESE: Objection to form.

THE WITNESS: Can you repeat that question for me?

BY MS. McLAUGHLIN:

Q Yeah. Do you know if there are any similar non-ENERGY STAR top-loading washers that were available during the 2009 to 2010 time period?

MR. MARCHESE: Objection to form, vague as to the word "similar."

THE WITNESS: I don't remember it, and it doesn't really -- it's not important for my conjoint survey, which essentially takes into account, as I said, a whole wide range of price points and controls.

BY MS. McLAUGHLIN:

Q Right. I understand you don't think it's relevant. I'm asking if you know of any similar non-ENERGY STAR top-loading washers. And I think you said you don't know. Is that correct?

A I don't remember the exact, you know, details. I don't know would be the answer. But as I said, again, it's not relevant to the designing of the survey, because I would have taken into account all of the other information, like retail sales data and so on, in designing the conjoint survey.

Q Do you know if there were any other ENERGY STAR top-loading washing machines available in the marketplace in 2009 and 2010?

A I'm sure there were. And again, you know, I don't know if I'm repeating myself here, but it's not relevant to --

Q You don't have to keep telling me it's not relevant. I understand that. I'm asking if you know. It's a more yes, no, I don't know, as opposed to -- I understand you don't think it's relevant. I think we've established that. I just want to know if you know of any other ENERGY STAR top-loading washing machines available in the marketplace in 2009 - 2010?

A I don't remember the exact details now.

Q Thank you. Was it important to your survey to learn about the competitive models available in this time period, other than to the values -- the attributes in your survey, is it important for you to understand what else is on the marketplace -- in the marketplace in 2009?

MR. MARCHESE: Objection to form.

THE WITNESS: Well, in designing the survey and looking at, you know, what the competitive brands I wanted to consider in the

BY MS. McLAUGHLIN:

Q And what does the word "premium" mean in the phrase "price premium"?

A It's the amount of the price that they paid that would be attributable to the ENERGY STAR logo; its presence or its absence.

Q Does calculating a price premium require knowledge of economics?

A Well, the calculation of price premium does not require knowledge of economics, but having said that, in doing my Ph.D., I have -- while my Ph.D. is in marketing and statistics, I have knowledge of economics and econometrics as well. And most importantly, here in the survey research that is being done, the conjoint survey that is being done, that's important to understand what the value is to estimate the value off the ENERGY STAR logo, as well as the value of the dollar.

Q Would you agree that one definition of a price premium is that it's the difference between the market price of the product, here a washing machine, with the feature, the ENERGY STAR logo, and the market price of the same machine without the logo?

A Can you repeat that question?

here is in the report.

Q So do you believe that your survey identified the price premium that consumers actually paid back in 2009 - 2010 for the ENERGY STAR logo?

A So the price premium that is calculated here is really looking at the entire class as an aggregate and estimating for these Maytag machines, these models, given the price that we know, what portion of that price would be attributable to the ENERGY STAR logo? And to the extent that my answer explains what you're asking, that's really what this is doing.

Q So if I bought a washing machine in 2010 for -- your average is, I think, around $400, a little above. So if I bought a washing machine in 2010 for $400, $180 of that washing machine was attributed to the ENERGY STAR logo; is that your opinion?

A Yes, that's correct. That's my opinion.

Q If you look back at your report, on page 4, right under -- the first sentence under Approach. Do you see what I'm pointing to?

A Yes.

Q That first sentence you say, There are

to include brand as an attribute. You don't have to take into account demand or supply-side considerations in designing some of the elements that go into the conjoint survey. That's -- a willingness to pay again is that maximum price that consumers would be willing to pay for an attribute improvement.

BY MS. McLAUGHLIN:

Q So a willingness to pay is not the same as a price premium?

A That's correct.

Q And why not?

A For, you know, some of the same reasons that I mentioned, it's just in terms of its the maximum price that consumers would be willing to pay. It is -- it does not take into account brand considerations. It does not take into account supply or demand-side considerations. It's really looking at the maximum price that consumers would be willing to pay for improving something, improving some aspect of a product.

Q So if I understand your testimony, the difference between a willingness to pay and what you did here is that you took into account the supply-side and demand-side factors; is that right?

A That's correct.

Q Now, what do you mean when you say "supply side"?

A So for the supply-side factors we looked at the retail sales data, and clearly when you're looking at Maytag Centennial machines we are looking at the actual retail sales for these in which aspects of how individual retailers might have reached what products they offer, how much is available of those products, all of those are taken -- are baked into, you know, supply-side factors that are baked into that retail sales and the prices that are there at the retail which then become the input for the conjoint survey.

Q What is "supply"?

A So you're asking me the question what is "supply" in a very generic sense. I'm probably going to give you an answer that in a little more in the context of availability of a product in the store. Right. So it really relates to wholesalers making the product supplied to a retailer. So supply would be that aspect. That's my assumptions within which I'm trying to answer. I don't know exactly where you're coming from in terms of asking that question.

Q You mentioned the word "supply-side" several times, so I want to kind of break that down and say: What does supply mean?

A So for me the supply-side considerations would look into, you know, based on the retail sales, it's all baked into it, whether the product is available or the level of inventory; so distribution, those are factors in that.

Q What else -- what other things affect supply in a market? You said retail sales, distribution. Is there anything else?

A When you look at retail sales data for Maytag Centennial machines, you're really looking at across the store. So we had Fry's, Sears, Home Depot, Lowe's. The availability of the product across the different retailer is automatically reflected in the retail sales data. So, you know, whether they have an inventory, whether that's available, whether the manufacturers are making the product available through the wholesalers, all of that would be supply-side considerations that are reflected in that sales data.

Q But as you sit here today, you don't recall exactly what you were looking at in the retail sales data; is that correct?

A If -- you know, again, there's a little bit of flashback memory coming in, you know, as to what -- there's clearly 2009 to 2012 data that was in there. And the retail sales data for Maytag Centennial machines, the three models, depending -- I don't have the data exactly in front of me for me to reflect on, you know, which retailer had what kinds of models for Maytag Centennial, available ones.

Q Sure. But do you recall now if the retail sales data that you looked at included competitors' machines, or is it solely focused on the Maytag Centennial washers?

A I think I want to say probably they did not have competitor information, but when looking at Maytag's sales data for the different models, the competitor data is in some sense the competitor actions and some are reflected in the retail sales for the Maytag models.

Q How is that?

A Well, the number of units they would sell at the retailer is reflective of what competition has done, whether they have raised the prices or lowered the prices, and as a result it's in there. So if I -- again, I'm trying to, in the

absence of the data in front of me, I think take the retail sales data there was only reflecting the Maytag Centennial models.

Q But from that data you could make assumptions as to what was happening in the rest of the retailer space, what else they were doing with competitor machines or other Maytag machines?

A Yeah, because this sales data is really a reflection of the actions taken by other competitors. Right. So it's already included or baked into it, as you consider that and the price in looking at the price premium.

Q And how exactly did you incorporate that -- those sales data into your survey?

A So one is a reflection of how we capture price and taking into account the average price, which is really the key component of what I need, looking at the average price, but also setting out the ranges of prices for us to look at and test based on some of that retail sales data.

Q So you used it in two ways, if I understand, one was to figure out that average price of I think about $407, and the second way was to figure out the ranges, the 200 to $700 range in your survey; is that correct?

there.

BY MS. McLAUGHLIN:

Q Sure. Is it your opinion that anyone who bought a Maytag Centennial washing machine, that $180 of the purchase price can be -- was allocated to buying the logo itself?

A The price premium, which is defined as the portion of the price, you know, a portion to the ENERGY STAR logo, is $180.39. So the answer to your question would be yes.

Q And does that $180 matter, regardless of how much the total washing machine sold for?

A Could you explain the question a little bit better for me?

Q Sure. You give the example -- I think it's on page 8, the top of page 8 of your report. It says, supposed washing machines with the ENERGY STAR logo were currently priced at $500. Holding all else the same, supposed Maytag dropped the ENERGY STAR logo, thereby making the product less appealing to the market, the clothes machine price would need to be reduced to $319.

Now, does that $180 apply if the washer was priced at $500 or if it's priced at your average of $400?

A So I think I mentioned this as well that when you look at the value of a dollar, so remember to calculate the price premium we had to apply formula 14. We had to look at the value of the ENERGY STAR logo being present versus not being present, and then we also had to look at the value of a dollar. We focused of the value of a dollar in the 300 to $500 range. So this price premium would be applicable in that range. If you went to a higher price point, then, you know, the value of the dollar might be very different, and accordingly, the price premium may change a little bit. But I would expect it will still be in within that same range.

Q So if I bought a washing machine for $300, the price premium would be that $180 amount, correct?

A That's correct.

Q So is it your opinion that if Whirlpool had continued selling the Maytag Centennial washers, but took off the logo they needed to have reduced their price by $180?

A So if they wanted to keep the same amount of unit sales as I pointed out, so they would have to do -- reduce the value price premium they would that have to produce their price at the retail

became the input. Conjoint is a very accepted technique to understand price premium, to understand what value, you know, a product is a combination of all of these attributes, and to understand the price premium in terms of how much would you allocate of that price to the presence or absence of the ENERGY STAR logo. This method doesn't change. The results of this method doesn't change, based on the question you just asked.

Q Would you be interested in knowing what a comparable non-ENERGY STAR washing machine sold for, on average, in 2009 and 2010? Would that be interesting to you?

MR. MARCHESE: Objection to form.

THE WITNESS: It wouldn't change the conclusions of my survey. It wouldn't have changed the conclusions or my opinions in my report.

MR. MARCHESE: Allison, we've been going for about an hour, can we take a quick break?

MS. McLAUGHLIN: Yeah, that would be great.

VIDEO OPERATOR: Going off the record, 2:28.

BY MS. McLAUGHLIN:

Q I didn't ask if you needed to. I just asked if you did. It's a simple yes-or-no question.

A Well, I did not include it. I do not believe that it is necessary.

Q That's all I needed. Very simple.

If you turn to page 9 of your report, in the Section B under Survey Design. In that first paragraph, second sentence, The ability to reduce the consumption of electricity and water to clean clothes is an important defining factor.

Did your survey attempt to determine the price premium associated with the relatively more energy-efficient washer?

MR. MARCHESE: Objection to form.

THE WITNESS: My survey, it was used to determine whether -- what the price premium was that you would allocate, if any, to the ENERGY STAR logo, which, you know, in turn, has these efficiently measures of electricity and water. So in that sense, yes, it did take into account the understanding of the price premium and the value associated with the ENERGY STAR logo.

BY MS. McLAUGHLIN:

Q But you did not directly test a more energy-efficient washer versus a less energy-efficient washer and the premium people place on that?

A The ENERGY STAR logo is a reflection of -- the presence of the ENERGY STAR logo is a reflection of a washer -- a clothes washing machine that is more energy efficient, and so the comparison of the presence of the logo versus the absence of the logo gets the answer to the question you're asking.

Q But you did not test how efficient a machine is, it was just, yes, they have the logo or doesn't have the logo, not actually looking at the efficiency of a washing machine and the different levels of efficiency; is that correct?

MR. MARCHESE: Object to form.

THE WITNESS: Consumers don't understand the exact technical details of the amount of energy efficiency. So to test the logo is adequate, and it takes into account the holistic issue associated with the energy efficiency.

(Energy guide logo was marked RS-6 for identification.

Ph.D.-level courses that pertain to conducting, you know, that pertain to surveys in sampling that I use. So part of our Ph.D. courses -- again, this is 30 years ago when I finished my Ph.D., approximately, where those courses are a requirement that teach you specifically, again, I don't remember the exact name of the course, but courses that will teach you about the appropriateness of sampling, courses that teach you about the appropriateness of using experimental designs in conducting surveys like what we are talking about. So quite a bit of courses had been taken in that area.

Q Are you an economist?

A I think we talked about this this morning. I do not have a degree in economics or a Ph.D. in economics. However, I've taken courses in microeconomics and macroeconomics, econometric for the Ph.D. levels. You know, there's typically three courses, econometrics 1, 2 and 3, that are offered in the economic department. I've taken game theory from the very person who received a Nobel Prize. He was on the faculty of the University of Pittsburgh, Alvin Roth. I've taken courses in economics, but I wouldn't go around labeling myself as an economist.

Q Have you published in any of the major

EXHIBIT R

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CHARLENE DZIELAK, et al.,	:	
	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO.
	:	2:12-cv-00089-KM-SCM
vs.	:	
	:	
	:	
WHIRLPOOL CORPORATION,	:	
	:	
Defendants.	:	

Videotaped deposition of DR. J. MICHAEL DENNIS, taken by and before Lisa Forlano, CCR, CRR, RMR, at the offices of Bursor & Fisher, P.A., 888 Seventh Avenue, New York, New York, on Tuesday, March 8, 2016, commencing at 9:20 a.m.

Job No. CS 2236907

Q Is there any reason why you didn't consider a conjoint analysis for your purposes?

A I had the opinion that contingent valuation methodology is a reliable tool, particularly in this situation where the attribute in question, the Energy Star label, has a binary character, a pass/fail-type character with respect to whether it should or should not be on the product. I think in those circumstances, contingent valuation is a particularly strong approach.

Having said that, very similar logic and justification could be made for conducting a conjoint survey with a binary attribute such as the Energy Star label.

Q You used the word "reliable" in describing the contingent valuation method.

What do you mean by "reliable"?

A I mean "reliable" in two senses of the word. The first is what I understand to be the legal definition of "reliable"; that the survey results and the estimates are trustworthy, that they're accurate, that they can be relied upon for drawing conclusions of facts.

The other definition that I used for "reliable" is the one that is more common to my

VIDEO OPERATOR: We're now going off the record at approximately 10:23 a.m.

End of Video 1.

(Brief recess.)

VIDEO OPERATOR: This is the beginning of File 3.

We are going back on the record at approximately 10:37 a.m.

BY MR. BELLAMY:

Q Just a couple of quick follow-up points.

We discussed when you visited Homedepot.com.

Can you remember any other websites you visited when doing the research into competitive machines?

A No, I can't remember any other ones.

Q You referred to Energy Star as a "binary choice."

What is your basis for that statement?

A I think I said "binary attribute," if I'm not mistaken.

Q Well, why don't we start with what do you mean by "binary attribute"?

A By "binary attribute," I'm referring to

the dichotomous nature of the Energy Star label. It is either on the products and affixed to the products, or it's not affixed to the products.

Q You mentioned before that your understanding was that an Energy Star washer in 2009 had to be something like 37 percent more efficient, energy efficient, than the federal minimum standards would allow?

A That's what I recall, yes.

Q Okay. So if a washer was 36 percent more efficient than Energy Star would allow, would you agree that a consumer got most of the energy efficiency implied by Energy Star compliance?

MR. MARCHESE: Objection to form, lacks foundation.

THE WITNESS: I don't have an opinion on that. I think that's outside the scope of my assignment in this project.

BY MR. BELLAMY:

Q It doesn't matter whether you think it's outside the scope.

Would you agree that a consumer who purchased a washing machine that was 36 percent more efficient than the federal minimum standards got most of the benefits of energy efficiency implied by

Energy Star compliance?

MR. MARCHESE: Objection to form, lacks foundation.

THE WITNESS: Again, I don't have an opinion on that. If they bought the product as a result of the Energy Star label on there and it did not deserve to be on there, then, in my opinion, they paid a price premium for having that Energy Star label there.

BY MR. BELLAMY:

Q And I'm not asking you about price premium. I'm asking you about the energy efficiency implied by Energy Star.

But let's back up.

Do you agree that the Energy Star label impliedly represents that a labeled washer will use less energy than a nonlabeled washer?

A That is my understanding.

Q And your understanding is that in order to properly bear the label, the washing machine had to use 37 percent less energy than federal minimum standards?

A And also the water part, too. There's energy in water.

Q We're focused on energy right now. So

the effectiveness of different energy guides, then I would design a study like that. But I was asked to actually study the Energy Star labels and the value that purchasers placed on those labels.

BY MR. BELLAMY:

Q So is it at least possible that you could design a contingent valuation survey to measure the price premium associated on relative energy efficiency?

MR. MARCHESE: Objection, lacks foundation.

THE WITNESS: I would have to think about it. In theory, you could do a contingent valuation survey if the goal were to test the relative effectiveness or value that purchasers place on different types of energy guide statements or different formats of energy guide statements. It's possible to do that.

That was not my mission. That's not what I was asked to do.

BY MR. BELLAMY:

Q And beyond just the exact statements on the energy guide label, could you compare the price