UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

DEANNA McEACHERN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. WHIRLPOOL CORPORATION, Defendant.	Civil Action No.: (Case No. 2019-176683-CK in the Circuit Court for the County of Oakland, Michigan)

DEFENDANT'S NOTICE OF REMOVAL

Defendant Whirlpool Corporation ("Whirlpool") removes to this Court the state court action described below:

1. Shortly after this Court denied class certification in *Schechner v. Whirlpool Corp.*, No. 2:16-cv-12409-SJM-RSW (E.D. Mich.) ("*Schechner*"), Plaintiff Deanna McEachern ("Plaintiff") filed a related, follow-on action on September 18, 2019, in the Circuit Court for the County of Oakland, Michigan, captioned *Deanna McEachern v. Whirlpool Corporation*, Case No. 2019-176683-CK ("*McEachern*").

2. *McEachern* is the fourth successive class action filed by the same Plaintiffs' lawyers who already sued Whirlpool three separate times in Michigan federal court based on nearly identical allegations regarding Whirlpool's ovens with AquaLift Self-Clean Technology: first in *Schechner*, filed on June 27, 2016

(ECF No. 1, PgID 1); second in *Danielkiewicz v. Whirlpool Corp.*, No. 2:18-cv-13599-SJM-RSW (E.D. Mich.) ("*Danielkiewicz*"), filed on November 19, 2018 (ECF No. 1, PgID 1); and third in *Angerman v. Whirlpool Corp.*, No. 2:18-cv-13832-JEL-SDD (E.D. Mich.) ("*Angerman*"), filed on December 11, 2018 (ECF No. 1, PgID 1). All three earlier-filed cases are pending before the Honorable Stephen J. Murphy III.[1]

3. In *Schechner*, Plaintiffs originally brought their claims on behalf of a putative nationwide class (*Schechner,* ECF No. 5, PgID 110), but they ultimately sought certification of six statewide classes comprising "all persons who purchased a Whirlpool, Maytag, KitchenAid, or Jenn-Air oven with AquaLift in" Michigan, Florida, New Jersey, Arizona, Idaho, and New Mexico (*Schechner,* ECF No. 176, PgID 26885).[2] On August 13, 2019, the Court denied certification, finding Plaintiffs failed to establish Rule 23(a)'s commonality and typicality requirements, Rule 23(b)(3)'s predominance requirement, and Rule 23(b)(2)'s requirements for an injunctive relief class. (*Id.* at PgID 26886-26898.)

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[1] Judge Murphy accepted reassignment of *Danielkiewicz* and *Angerman*, ruling that they are "nearly identical" to *Schechner* (*Danielkiewicz*, ECF No. 7, PgID 226), and then consolidated *Danielkiewicz* and *Angerman* because they involved "substantially similar claims" (*Angerman*, ECF No. 10, PgID 233).

[2] *Danielkiewicz* alleges claims on behalf of nine individual plaintiffs, three new putative state classes (Missouri, New York, and California), and two repeat putative state classes (Michigan, Florida). *Angerman* asserts claims on behalf of three new individual plaintiffs and three new putative state classes (Minnesota, Washington, Georgia).

4. *McEachern* represents Plaintiff's lawyers' newest tactic. Instead of filing another class action in Michigan federal court, they attempted to avoid federal court altogether, presumably hoping that their duplicative Michigan claims and class certification arguments would gain more traction in state court.

5. As detailed below, Plaintiff's Complaint is removable to this Court. This Court has jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332, 28 U.S.C. § 1441(a) and (b), and 28 U.S.C. § 1453, because this is a putative class action involving more than 100 putative class members who are seeking to recover in excess of $5,000,000, and minimal diversity exists. *See* 28 U.S.C. § 1332(d).

6. On September 23, 2019, Plaintiff McEachern served Whirlpool with her Complaint and Summons by certified mail. On October 21, 2019, Whirlpool filed Defendant Whirlpool Corporation's Answer to Class Action Complaint and Jury Demand ("Answer"). This Notice of Removal is timely filed in accordance with 28 U.S.C. § 1446(b).

7. A true and correct copy of the Complaint, together with copies of all other process, pleadings, and orders served in this case, including Whirlpool's Answer, are attached as Exhibits A through I. To the best of Whirlpool's knowledge and belief, these documents comprise all process, pleadings, and orders as of this date. *See* 28 U.S.C. § 1446.

8. A true and correct copy of this Notice of Removal will be filed with the Clerk of the Circuit Court for the County of Oakland, Michigan, in accordance with 28 U.S.C. § 1446(d), along with a notice of that filing, a copy of which will be served on all parties.

THIS COURT HAS CAFA JURISDICTION

9. Plaintiff is a resident of Birmingham, Michigan, which is located in Oakland County, Michigan. (Ex. A, Class Action Compl. & Jury Demand ("Compl.") ¶ 17.)

10. Whirlpool is a Delaware corporation with its principal place of business in Benton Harbor, Michigan. (Ex. J, Decl. of Pamela R. Klyn in Supp. of Def.'s Notice of Removal ("Klyn Decl.") ¶ 4.)

11. Plaintiff's Complaint alleges that Whirlpool "designs, manufactures, advertises, and sells a line of gas and electric stoves, ranges, and ovens featuring its proprietary 'AquaLift® Self-Cleaning Technology,'" and that "Whirlpool's marketing and advertising . . . are false, deceptive, and misleading to reasonable consumers because AquaLift—a key product feature—does not 'self-clean' as advertised." (Ex. A, Compl. ¶ 1.) The Complaint asserts that this allegedly deceptive marketing and advertising occurred "nationwide." (*Id.* ¶ 3.)

12. Plaintiff filed this putative class action on behalf of "[a]ll persons who purchased a Whirlpool, Maytag, KitchenAid, or Jenn-Air oven equipped with

AquaLift in the state of Michigan." (*Id.* ¶ 70.) The putative class definition is *not* limited to Michigan citizens or residents. (*Id.*)

13. The Complaint alleges claims for violation of the Michigan Consumer Protection Act and for breach of contract. (*Id.* ¶¶ 9, 79-92.) Plaintiff seeks damages (*id.* ¶¶ 8, 74(n), 84-85, 92; *see also id.* at p. 30), including damages for "payment for a falsely advertised product" (*id.* ¶ 8); "overpayment" damages (*id.*); damages for "a decrease in value of their Ovens" (*id.*); "out-of-pocket money spent in connection with servicing AquaLift" (*id.*); statutory damages (*id.* at p. 30); and punitive damages (*id.* ¶ 74(o))—as well as "disgorgement of Whirlpool's revenues" (*id.* at p. 30), restitution (*id.*), injunctive and declaratory relief (*id.* ¶¶ 74(p), 85; *see also id.* at p. 30 (seeking an injunction enjoining Whirlpool from continuing its nationwide "advertising campaign")), and attorney fees (*id.* at p. 30).

14. The allegations in the Complaint are nearly identical to those in *Schechner*, *Danielkiewicz*, and *Angerman*.

15. CAFA reflects Congress's intent to have federal courts adjudicate substantial class actions. *See* S. Rep. 109-14, at 43 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 41; H. Rep. 108-144, at 36-37 (2005). To effectuate this purpose, CAFA provides that putative class actions filed in state court are removable to federal court, and it expands federal jurisdiction over such cases by amending 28 U.S.C. § 1332 to grant original jurisdiction where, as here, the putative class

contains at least 100 class members, there is minimal diversity, and the amount in controversy exceeds $5,000,000 in the aggregate for the proposed class, exclusive of interest and costs. 28 U.S.C. § 1332(d).

16. This case satisfies all of CAFA's jurisdictional requirements. Specifically, based on the allegations in the Complaint, (1) the proposed class consists of 100 or more members, (2) there is sufficient diversity of citizenship, and (3) the amount in controversy exceeds $5,000,000. *See* 28 U.S.C. § 1332(d).

A. The Putative Class Size Exceeds 100 Members

17. CAFA requires that the putative class comprise at least 100 persons. 28 U.S.C. § 1332(d)(5)(B). In the Complaint, Plaintiff represents the following putative class: "All persons who purchased a Whirlpool, Maytag, KitchenAid, or Jenn-Air oven equipped with AquaLift in the state of Michigan." (Ex. A, Compl. ¶ 70.)

18. Whirlpool first began manufacturing and selling ovens with AquaLift Self-Clean Technology ("Ovens") in 2012. (Ex. J, Klyn Decl. ¶ 8.)

19. Based on sales and shipping information maintained by Whirlpool in the ordinary course of business, Whirlpool has shipped approximately 65,233 Ovens to trade customer locations, including retailers, in Michigan since 2012. (*Id.*) Thus, the number of persons who bought Ovens in Michigan easily exceeds

100. (*See id.* ¶¶ 6-11; *see also* Ex. A, Compl. ¶ 73 (alleging that "the Class includes *thousands of members*" (emphasis added)).)

B. There Is Sufficient Diversity of Citizenship

20. The second CAFA requirement—minimal diversity—is readily satisfied here. At least one putative class member is a citizen of a state different from Whirlpool. 28 U.S.C. § 1332(d)(2).

21. Whirlpool is a Delaware corporation with its principal place of business in Michigan. (Ex. J, Klyn Decl. ¶ 4.)

22. Plaintiff was a citizen of Michigan and a resident of Birmingham, Michigan at the time she filed her Complaint. (Ex. A, Compl. ¶ 17.)

23. Plaintiff seeks to represent a proposed class of persons who bought Ovens in Michigan, but she does not limit her putative class to Michigan citizens. Instead, citizens and residents of foreign states who bought Ovens "in the state of Michigan" are included. (*Id.* ¶ 70.) Similarly, the proposed class includes former Michigan residents who bought Ovens in Michigan but have since left the state. (*Id.*)

24. As noted above, since 2012 Whirlpool has shipped approximately 65,233 Ovens to trade customer locations in Michigan. (Ex. J, Klyn Decl. ¶ 8.) Trade customers sell the Ovens to end-user consumers. (*Id.* ¶ 7.) Consumers may provide their contact information, including their state of residence, to Whirlpool

by registering their Oven (through owner-warranty registration paths), by contacting Whirlpool customer service with a question or concern (which may manually enter consumer data and contact information), or by making requests for product service. (*Id.*) Whirlpool maintains this consumer contact information in Whirlpool's computerized databases. (*Id.*)

25. Based on the shipping information and consumer contact information maintained by Whirlpool in the ordinary course of business, there are many consumers who bought Ovens from trade customers in Michigan, but who reported to Whirlpool their state of residence as other than Michigan, including many consumers in the neighboring states of Illinois, Indiana, Ohio, and Wisconsin. (*Id.* ¶ 9.) Thus, minimal diversity is satisfied because at least one putative class member is a citizen of a state different from Whirlpool. *See* 28 U.S.C. § 1332(d)(2).

26. In addition, Whirlpool's shipping and consumer data do not (and cannot) account for all consumers who either (i) bought an Oven in Michigan and reside outside of Michigan, but who have not reported their state of residence to Whirlpool; or (ii) bought an Oven in Michigan and resided in Michigan at the time of purchase, but have since moved to another state or country during the putative seven-year class period and have not reported to Whirlpool their new state or country of residence. (Ex. J, Klyn Decl. ¶ 10.)

27. Whirlpool also sells Ovens directly to consumers through Whirlpool's Employee Purchase Program, which allows Whirlpool employees and their family members to buy appliances from Whirlpool. (*Id.* ¶ 11.) Further, Whirlpool sells Ovens directly to consumers through Whirlpool's Inside Pass program, which allows employees of Whirlpool's third-party vendors to buy appliances from Whirlpool. (*Id.*) These are Internet sales, accomplished through Whirlpool websites. (*Id.*) Whirlpool maintains its websites and direct-to-consumer sales operations in Michigan, but consumers who buy appliances through these two programs reside nationwide. (*Id.*)

28. For all these reasons, minimal diversity is satisfied because at least one putative class member is a citizen of a state different from Whirlpool. *See* 28 U.S.C. § 1332(d)(2).

C. The Minimum Amount in Controversy Requirement Is Satisfied

29. To confer subject matter jurisdiction on this Court based on diversity of citizenship, the amount in controversy must exceed the sum or value of $5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). Under CAFA, the claims of the individuals comprising a putative class are aggregated to determine if the amount in controversy exceeds $5,000,000. 28 U.S.C. § 1332(d)(2); *see also Dart Cherokee Basin Operating Co., LLC v. Owens*, 574

U.S. 81 (2014) (a "defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold").

30. Under Local Rule 81.1, in "actions removed on the basis of diversity of citizenship in which the complaint does not plead a specific amount in controversy in excess of the jurisdiction amount," a "removing defendant must . . . allege in the notice of removal that the amount in controversy exceeds the required jurisdictional amount," and "set forth the facts or other reasons that the removing defendant possesses that support that allegation or state that the removing defendant has no such facts at that time."

31. Plaintiff claims that she and the proposed class suffered "damages, including, but not limited to: (a) payment for a falsely advertised product; (b) overpayment for a product advertised to include a self-cleaning function that the product allegedly did not have; (c) a decrease in value of their Ovens due to the false advertising; and (d) out-of-pocket money spent in connection with servicing AquaLift [or] manually cleaning the Oven." (Ex. A, Compl. ¶ 8.)

32. As noted above, since 2012, Whirlpool has shipped approximately 65,233 Ovens to trade customer locations in Michigan (omitting the Ovens Whirlpool sold directly to consumers through the Employee Purchase and Inside Pass programs). (Ex. J, Klyn Decl. ¶ 12; *see also id.* ¶ 11.) During that time, for the vast majority of retail sales, the range of reported retail prices for new, unused

Ovens was approximately $400 to $3,500, depending on the brand, model, and feature set of the Oven, the identity of the reseller, and any sale or promotional offer. (*Id.* ¶ 12.) Simply taking Plaintiff's first sub-category of damages—"payment for a falsely advertised product"—and in light of the approximate purchase-price reimbursement cost of such Ovens, the potential classwide damages award for that sub-category alone easily would exceed approximately $26,000,000, even using the low end of the range of retail prices to perform this damages calculation. (*Id.*)

33. The Complaint also seeks an order "[a]warding disgorgement of Whirlpool's revenues" from the sale of the Ovens. (Ex. A, Compl. at 30.). During the time Whirlpool sold the 65,233 Ovens to trade customers in Michigan, the average amount of revenue that Whirlpool received per Oven substantially exceeded $76.65. (Ex. J, Klyn Decl. ¶ 13.) Thus, Whirlpool's revenue from the sale of Ovens in Michigan necessarily exceeded $5,000,000 (65,233 × $76.65 = $5,000,109.45), meaning the Complaint's demand seeking "disgorgement of Whirlpool's revenues" likewise meets the amount in controversy. (*See id.*)

34. The Complaint also seeks other categories of monetary relief, including "overpayment" damages (Ex. A, Compl. ¶ 8), damages for "a decrease in value of their Ovens" (*id.*), "out-of-pocket money spent in connection with servicing AquaLift" (*id.*), statutory damages (*id.* at p. 30), punitive damages (*id.*

¶ 74(o)), and attorney fees (*id.* at p. 30), increasing the amount in controversy even further beyond the $5,000,000 jurisdictional threshold.

35. Finally, the Complaint seeks declaratory and injunctive relief, including relief "enjoining Whirlpool from continuing its false, deceptive, and misleading advertising campaign for AquaLift," and an order requiring "Whirlpool to engage in a corrective advertising campaign." (*Id.* at p. 30.) Plaintiff's request for injunctive relief, if granted, would further inflate the amount in controversy because Whirlpool potentially could be ordered to pay for a "corrective" nationwide ad campaign and change its business practices.

36. If Plaintiff were to prevail on her request for class certification and recover a classwide judgment on behalf of persons who bought Ovens in Michigan, then an award of damages, disgorgement, restitution, injunctive relief, and attorney fees would substantially exceed—likely by several tens of millions of dollars—the sum of $5,000,000. Thus, CAFA's $5,000,000 amount-in-controversy requirement is satisfied here. *See Dart Cherokee Basin Operating Co.*, 574 U.S. 81.

CONCLUSION

For these reasons, Whirlpool requests that the Court assume jurisdiction over this action.

Dated: October 21, 2019

Respectfully submitted,

s/ Michael T. Williams

Michael T. Williams
(CO Bar #33172,
Admitted in E.D. Michigan)
Jessica G. Scott
(CO Bar #37287,
Admitted in E.D. Michigan)
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Phone: 303.244.1800
Fax: 303.244.1879
Email: williams@wtotrial.com
scott@wtotrial.com

Howard B. Iwrey
James P. Feeney
Dykema Gossett PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304
Phone: 248.203.0526
Email: hiwrey@dykema.com
jfeeney@dykema.com

Attorneys for Defendant,
Whirlpool Corporation

CERTIFICATE OF SERVICE (CM/ECF)

I certify that, on October 21, 2019, I electronically filed the foregoing **Defendant's Notice of Removal** with the Clerk of Court using the ECF system, and by email and U.S. Mail, postage prepaid, on Stuart A. Davidson, Christopher C. Gold, and Bradley Beall at Robbins Geller Rudman & Dowd, 120 East Palmetto Park Road, Suite 500, Boca Raton, Florida 33432, and on Samuel H. Rudman and Mark S. Reich at Robbins Geller Rudman & Dowd, 58 South Service Road, Suite 200, Melville, NY 11747.

s/Michael T. Williams

Michael T. Williams
(CO Bar #33172,
Admitted in E.D. Michigan)
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202-5647
Phone: 303.244.1800
Fax: 303.244.1879
Email: williams@wtotrial.com