IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: WHIRLPOOL CORP. FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION	**CASE NO. 1:08-wp-65000** **MDL No. 2001** **Judge: Christopher A. Boyko** **Magistrate Judge: William H. Baughman, Jr.** **Special Master: David R. Cohen** **Class Action**

DEFENDANTS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

After nine years of hard-fought litigation—including a bellwether class-action trial, three trips to the Sixth Circuit, two trips to the Seventh Circuit, and two trips to the U.S. Supreme Court—the parties have settled their dispute over whether certain models of Whirlpool-manufactured high-efficiency, front-loading washers (collectively, the "Class Washers") are defective in design and breached Defendants' warranties. Plaintiffs alleged that the Class Washers are prone to develop bad odors or mold problems due to the buildup of excessive laundry residues inside the Washers, allegations which Defendants vigorously dispute. This proposed nationwide class settlement will resolve Plaintiffs' claims in the consolidated multidistrict litigation against Whirlpool ("Whirlpool MDL") and in the related actions against Sears pending in the U.S. District Court for the Northern District of Illinois ("Sears Actions").

In October 2014, Whirlpool and the Ohio Plaintiffs tried the first bellwether action—*Glazer v. Whirlpool*—to a jury. Following a three-week trial, the jury returned a defense verdict after less than two hours of deliberations, confirming that Plaintiffs' criticisms of the Class Washers are without merit. Defendants' service records, *Consumer Reports* annual reliability surveys, and surveys of Class Members conducted by both Plaintiffs and Defendants all proved that the overwhelming majority of Class Members are highly satisfied with their Washers and never experienced any mold or odor problem. Defendants also produced significant, compelling evidence that some Class Members' failure to follow the Washers' user instructions was the primary cause of any mold and odor problems experienced by the tiny fraction of Class Members who did have problems.

Notwithstanding the strength of Whirlpool and Sears' defenses, the costs required to continue to try these class actions to defense verdicts would be immense, and the Settlement

Agreement fully resolves the Parties' disputes.[1] It provides the choice of $50 cash or a 20% rebate off the purchase of a new washing machine, dryer, or washer/dryer pair to those Class Members who actually experienced mold or odor problems within the first five years of ownership of their Washer. If those Class Members who experienced problems incurred more than $50 in out-of-pocket expenses to service or replace their Washer, they may instead choose to file a claim for reimbursement of those out-of-pocket expenses, up to a maximum of $500. Further, the Settlement Agreement provides a more limited benefit—a 5% cash rebate off the purchase of a new washer or dryer or washer/dryer pair—to Class Members who did not experience mold or odor problems.

Under the facts and circumstances of the Whirlpool MDL and the Sears Actions, the proposed settlement is more than fair and reasonable to the Class. It adequately compensates Class Members in exchange for a classwide release of all claims. The *Glazer* defense verdict confirmed that Plaintiffs' criticisms of the Class Washers are without merit and that Defendants have the superior litigation position, but there is no reason for the parties to spend years of their time and millions of dollars to prove that over and over again. The proposed settlement reflects the strength of Whirlpool's and Sears' defenses to the merits of Plaintiffs' claims and provides Class Members with benefits that Plaintiffs would be unlikely to recover if they continued to litigate.

Finally, the Settlement has been well received by the Class. With the claims deadline six weeks away, it is clear the claims rate will result in significant payments to the Class. And only a small number of Class Members have objected to or excluded themselves from the Settlement, further demonstrating that the settlement should be approved. Moreover, those few objectors

[1] A copy of the Class Action Settlement Agreement, dated April 18, 2016 ("Settlement Agreement"), is attached to the Joint Motion for Preliminary Approval of Class Action Settlement. (ECF No. 545-2.)

generally claim that the Settlement should be rejected because it does not compensate them for the purchase price of their washers. But Plaintiffs never sought full replacement value in this litigation; rather, their experts calculated damages at $235 to $279 per Class Member. The $50 cash is approximately 20% of their best damages case, while the 20% rebate is worth almost half that amount. Given the overwhelming likelihood that Plaintiffs never would have achieved their best damages case at trial, this settlement provides excellent results to the Class.

For all these reasons, the Settlement is "fair, reasonable, and adequate," as required by Federal Rule of Civil Procedure 23(e)(2), and should be given final approval.

STATEMENT OF FACTS

I. PROCEDURAL HISTORY

In cases pending in this Court and in the Northern District of Illinois, Plaintiffs allege that certain Whirlpool-built high-efficiency front-loading washers contain design defects that cause the machines to accumulate mold, bacteria, and other debris ("biofilm"), which may then result in musty odors in the machine or in laundry. These were sold under the Whirlpool, Sears, and Maytag brands. (*See* Decl. of Casey Tubman ¶ 2, ECF No. 545-11).) Each were built on either the Access or Horizon engineering platform between 2001 and 2010, and each contain one of the plastic tub and aluminum crosspiece designs that Plaintiffs specifically claim are defective in permitting the accumulation of biofilm.

A. The Whirlpool MDL and *Glazer v. Whirlpool* Bellwether Trial

In 2008, Plaintiffs filed the first case against Whirlpool for Whirlpool-brand front-loading washers. Other copycat actions against Whirlpool in various courts followed. Each of the Whirlpool actions was consolidated in this Court by the United States Judicial Panel on Multi-District Litigation. On July 22, 2010, this Court certified a liability-only class of Ohio residents who purchased a Whirlpool Duet, Duet HT, or Duet Sport washer. (ECF No. 141.) Whirlpool

appealed the class certification order, but the Sixth Circuit twice affirmed. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409 (6th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 1722 (2013), *judgment reinstated*, 722 F.3d 838 (6th Cir. 2013), *cert. denied* 134 S. Ct. 1277 (2014).

On remand, Plaintiffs sought to modify the class to exclude certain later Duet models (ECF No. 330), and Whirlpool moved to decertify based on a developed factual record (ECF No. 327-1). The district court declined to decertify but trimmed the class by excluding all models lacking the tub and crosspiece designs that Plaintiffs' specifically claimed were defective. (ECF No. 366.) The parties also litigated multiple pre-trial motions, including motions to exclude experts under *Daubert*, motions in limine, and cross-motions for summary judgment. As a result, the Court dismissed Plaintiffs' failure-to-warn claim (ECF No. 391), excluded certain of the parties' expert witnesses (ECF No. 423), and granted in part and denied in part the parties' motions in limine (ECF No. 426).

The parties subsequently proceeded to the *Glazer* bellwether trial in October 2014. After hearing testimony from 22 fact and expert witnesses and receiving 339 admitted exhibits, the jury swiftly rendered a verdict for Whirlpool, finding that the Washers were not negligently designed and that Whirlpool did not breach any implied warranty. (ECF No. 490.) The Court subsequently awarded Whirlpool $292,930 in costs. (ECF No. 520.) That verdict and the accompanying costs award were appealed and cross-appealed to the Sixth Circuit, with the parties submitting seven briefs in total. The parties reached this settlement after oral argument but before receiving a ruling.

B. The Sears Actions

In December 2006, Plaintiffs filed the first action against Sears for its sale of Kenmore-brand washers in the Northern District of Illinois. Two other copycat actions were later filed in

that court, and the three cases were consolidated for pretrial proceedings. *In re Sears, Roebuck & Co. Front-Loading Washers Prods. Liab. Litig.*, No. 06-CV-7023 (N.D. Ill). The district court initially denied class certification, but that decision was reversed on appeal. *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *cert. granted, judgment vacated*, 133 S. Ct. 2768 (2013), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

On remand, the district court certified a class of Illinois residents who purchased the Kenmore-branded washers at issue. Despite certification of a liability-only class, Plaintiffs' experts opined on three measures of classwide damages: (1) $279, representing the supposed difference between what consumers were willing to pay for a washer that requires biofilm-related maintenance compared to an identical one that does not; (2) $279, representing the supposed difference between the price at which Whirlpool sold its washers and the price at which Whirlpool would have been able to sell its washers had it allegedly disclosed the mold-related requirements; and (3) $235, representing the cost of mitigation throughout the life of the washer. (Rebuttal Expert Rep. of Christopher Knittel, Ph.D. ¶ 12-14, ECF No. 545-14.)

The parties agreed to the Settlement when the Sears Action was in the middle of pre-trial briefing, with *Daubert* motions and a motion to decertify the class pending, and trial preparations heavily underway.

II. DISCOVERY TAKEN IN THE WHIRLPOOL MDL AND SEARS ACTIONS

The parties conducted a substantial amount of discovery both before and after the various class certification decisions, including (1) production of approximately 1,000,000 documents and many electronic databases regarding the Class Washers' designs, testing, sale, marketing, and field performance and reliability; (2) taking and defending approximately 100 fact-witness depositions, including of the named Plaintiffs, key Whirlpool and Sears personnel, and various third-parties; (3) inspection of many named Plaintiffs' washers; (4) disclosure of more than 20

testifying experts, nearly all of whom were subject to multiple depositions; and (5) answering written discovery requests. This exhaustive discovery allowed both sides to make fully informed decisions about the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses.

III. THE SETTLEMENT NEGOTIATIONS AND SETTLEMENT AGREEMENT

The proposed settlement is the product of arms-length negotiations spanning several years. Over the course of the litigations, the parties met for face-to-face settlement negotiations at least six times and met many more times by telephone. In September 2014, just before the *Glazer* trial, the parties also mediated with the Honorable Layn R. Phillips. Following the defense verdict in *Glazer*, and as the Illinois-class trial in the Sears Actions approached, negotiations intensified.

In November 2015, the parties met in person for a full day of negotiations in Chicago, Illinois. That negotiation produced a written memorandum of understanding on the class benefit terms of the proposed nationwide settlement. After agreeing on the class benefits and other substantive terms of the proposed class settlement, Defendants and Class Counsel negotiated the issue of Class Counsel's attorney fees and costs for more than five weeks. On April 18, 2016, the Parties executed a comprehensive Settlement Agreement.

The Settlement Agreement provides for a nationwide settlement of Plaintiffs' claims. (*See* Settlement Agreement, ECF No. 545-2.) Specifically, the parties have agreed that Whirlpool will compensate each Class Member who timely completes, signs, and submits to the Settlement Administrator a valid claim. One of the following three benefits is available to those Class Members who experienced persistent mold or odor problems within the first five years of purchase of a Class Washer:

- A cash payment of $50 (Settlement Agreement ¶ IV.B);

- A 20% cash rebate off the best negotiated retail purchase price (not including sales taxes, delivery fees, or installation charges) of certain models of new Whirlpool-built washing machines or dryers or both (*id.*); or
- A cash reimbursement payment of up to $500 for documented out-of-pocket costs incurred by the Class Member to service or replace their Class Washer due to persistent mold or odor problems (*id.*).

Class Members who did not experience mold or odor problems within five years of purchase may submit a claim for a 5% cash rebate on eligible washers, dryers, or both. (*Id.* ¶ IV.C.)

Under the Settlement Agreement, Class Members who are "prequalified"—i.e., can be identified in Whirlpool's or Sears' databases as having reported a mold or odor problem within five years after purchase—can receive the $50 cash payment or the 20% rebate option by merely confirming their names and addresses. (*Id.* ¶ IV.A.2.) Non-Prequalified Class Members may receive the $50 cash or $20% rebate by providing their model and serial numbers (or providing alternate proof of purchase) and stating under oath attesting that they experienced persistent bad odors and/or mold growth problems inside their Washer within five years of purchasing a Class Washer. (*Id.* ¶¶ IV.A.3, IV.B.) Any Class Member, whether Prequalified or Non-Prequalified, can receive up to $500 in reimbursement upon submission of documentary proof of their out-of-pocket expenses. (*Id.* ¶ IV.B.2.)

To qualify for any benefit, Class Members must complete, sign, and submit a claim form online or by U.S. Mail, along with any necessary documentary proof, by October 11, 2016. Class Members who claim either rebate option will have at least one year to buy a rebate-eligible washer or dryer and redeem the completed rebate form for payment. (*Id.* ¶ IV.H.)

The settlement, if approved, will result in a release by Plaintiffs and all Class Members of all claims that were or could have been alleged with respect to the mold or odor problems with the Class Washers, excluding claims for personal injury, emotional distress, and damage to property other than the Class Washer itself. (*Id.* ¶¶ XI.A & B.) Also, upon entry of the order granting final approval to the settlement, the Whirlpool MDL and the Sears Actions shall be dismissed with prejudice as to all Released Claims (as defined in the Settlement Agreement) and thereby be conclusively settled as to Plaintiff and all Class Members. (*Id.* ¶ XI.C.)

Finally, as a condition of the settlement, Whirlpool has agreed to pay reasonable costs of providing notice to the Settlement Class and for the Settlement Administrator's services fees and costs to administer the settlement. (*Id.* ¶ VI.) Whirlpool has also agreed to pay reasonable attorneys' fees and costs to Class Counsel, without reducing the amount of money available to pay Class Members. (*Id*. ¶ X.A.) Specifically, Defendants agree not to oppose Class Counsel's request (which is subject to this Court's approval) for up to $14,750,000 in fees and costs and incentive awards to Plaintiffs. (*Id*. ¶ X.C.) However, the Court's or an appellate court's failure to approve the requested awards "shall not affect the validity or finality of the Settlement" and "the remaining provisions of this Agreement shall remain in full force and effect." (*Id*. ¶ X.G.)

IV. THE COURT'S PRELIMINARY APPROVAL ORDER

On May 11, 2016, the Court entered its Order Granting Preliminary Approval of Class Action Settlement ("Preliminary Approval Order"). (ECF No. 551.) The Preliminary Approval Order preliminarily certified for settlement purposes the Class defined in the Settlement Agreement. (Prelim. Approval Order at 3-4.) It also (1) appointed the named Plaintiffs as class representatives for settlement purposes (*id*. at 5); (2) appointed Class Counsel for settlement purposes (*id.*); (3) preliminarily approved the terms of the Settlement Agreement as falling "within the appropriate range of possible approval and "not appear[ing] in any way to be the

product of collusion" (*id.* at 7); (4) approved the parties' proposed notice and dissemination plan and approved the forms of mailed and emailed settlement notice, the publication notice, the long-form notice in FAQ form, and claim form (*id.* at 8-10); (5) appointed Angeion Group as the Claims Administrator (*id.* at 11); (7) ordered Class Member exclusions and objections to be postmarked no later than 90 days after the Preliminary Approval Order (August 8, 2016) (*id*. at 14-15); and (8) scheduled the Fairness Hearing for September 7, 2016 (*id.* at 14), which was subsequently rescheduled for September 21, 2016.

V. THE PARTIES' COMPLIANCE WITH THE COURT'S ORDERS

After the Court granted preliminary approval to this settlement, the parties prepared final versions of the mail and email settlement notice and the publication notice (collectively, the "Notice Materials"), incorporating into each of them the Fairness Hearing date and deadlines set forth in the Preliminary Approval Order. (*See* Decl. of Michael T. Williams ¶ 2, attached as Ex. 1.) Defendants ensured that, within the time limits prescribed in the Preliminary Approval Order and Settlement Agreement, the Settlement Administrator mailed, by first-class United States Mail, a copy of the notice to all Settlement Class members whose address reasonably could be identified in Whirlpool's or Sears' records. (*Id*. ¶ 3.) Defendants also ensured that, within those time limits, the Settlement Administrator emailed a copy of the notice to all Settlement Class members for whom Sears or Whirlpool had email addresses. (*Id*. ¶ 4.) The Settlement Administrator mailed the notice to 3,817,399 members or potential class members and emailed the notice to 311,213 members or potential class members. (*See* Decl. of Steven Weisbrot Esq. on Compliance With Plan of Notice ("Weisbrot Decl.") ¶¶ 7, 9 ECF No. 573-1.) The notice materials, including the long-form notice in frequently asked questions form, were also posted on the Settlement Administrator's website, www.washersettlement.com. (*Id*. ¶ 12.)

Although direct notice reached an estimated 66% of class members, direct notices could not be sent to all class members. Accordingly, the Settlement Administrator caused the publication notice to be published. A ½ page notice appeared in the June 9, 2016, national edition of *USA Today*. (Weisbrot Decl. ¶ 10.) On June 10, 2016, the Settlement Administrator also implemented a four-week desktop and mobile internet banner campaign utilizing standard IAB sized banner-style notices that were specifically targeted to reach potential Settlement Class Members. (*Id.* ¶ 11.) A total of 13,442,000 unique impressions were ordered. (*Id.*)

The Settlement Administrator has received 639 timely requests for exclusion to date. (*See* Suppl. Decl. on Requests for Exclusion ¶ 6, ECF No. 635.) Pursuant to the Preliminary Approval Order, the Settlement Administrator submitted to the Court a list of the names of all persons who submitted requests for exclusion. (*Id.* Ex 1.) Further, the Court received and docketed 68 objections to the Settlement, 19 of which were filed by individuals who are not Class Members or who opted out of the Class.

VI. THE CLAIMS RATE SHOWS THAT THE SETTLEMENT PROVIDES REAL BENEFITS TO THE CLASS

The claims deadline will expire on October 11, 2016. However, as of August 19, 2016, the Settlement Administrator had received a total of 213,945 claims—6,085 claims from Prequalified Class Members and 207,860 from Non-Prequalified Class Members. (*See* Email from Troy Walitsky, Aug. 19, 2016, attached as Ex. 2.) The breakdown of claims is as follows:

	$50 Payment	**20% Rebate**	**5% Rebate**	**Reimbursement**	**Total**
Prequalified	5,175	542	-	368	6,085
Non-Prequalified	166,447	22,477	10,778	8,158	207,860
Total	**171,622**	**23,019**	**10,778**	**8,526**	**213,945**

(*Id*.) Although the Settlement Administrator must still review the claims to determine their validity, it is clear from the claims rate data that the Class will receive significant compensation.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 23(e), the parties moved the Court to (1) certify the nationwide Settlement Class of all Class Washer owners to resolve the class claims, (2) finally approve the terms of the Settlement Agreement reached by the parties, (3) enter an order granting final approval of the Settlement, and (4) enter final judgment in this matter. (ECF No. 640.) The proposed Settlement satisfies all requirements of federal law and due process, is fair and adequate, and provides reasonable relief to Class Members. Accordingly, this Court should grant the parties' joint motion for final settlement approval.

I. THE STANDARD FOR FINAL APPROVAL OF THE SETTLEMENT

Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). To certify a class for settlement purposes, the Court must first consider whether the proposed class meets the requirements of Rule 23(a) and (b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997). If these requirements are met, then the court must ensure the proposed class action settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Finally, the Court must ensure that adequate notice of the settlement has been directed to members of the settlement class. Fed. R. Civ. P. 23(e)(1).

II. THE PROPOSED NATIONWIDE SETTLEMENT CLASS SATISFIES THE PREREQUISITES FOR CERTIFICATION OF A SETTLEMENT CLASS

For the purpose of implementing the proposed settlement, and for no other purpose, Defendants have conditionally withdrawn their objections to the certification of a nationwide class and stipulate to the conditional certification of the Settlement Class. As detailed in

Defendants' Memorandum in Support of Motion for Preliminary Approval of Class Settlement (ECF No. 546 at 13-17), the proposed nationwide class satisfies each of Rule 23's prerequisites for settlement purposes. That analysis is fully applicable to the Court's consideration of final approval, and Defendants incorporate that memorandum herein by reference.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

In determining whether a proposed class settlement is "fair, reasonable, and adequate," courts consider the following factors:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Gen Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007). These factors each weigh in favor of granting final approval.

A. There Is No Risk of Fraud or Collusion Between the Parties

In evaluating a proposed class settlement, the district court must "examine the terms of the settlement and the process by which the settlement was arrived at, to make sure that the terms are reasonable and that the settlement is not the product of fraud, overreaching, or collusion." *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989). However, when a "settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair." *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 351 (N.D. Ohio 2001) (citing *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983)). A settlement negotiated "at arm's-length by adversarial parties and experienced counsel . . . itself is indicative of fairness, reasonableness, and adequacy." *Dallas v. Alcatel-Lucent USA, Inc.*, No. 09-14596, 2013 WL 2197624, at *9 (E.D. Mich. May 20, 2013).

Here, there can be no doubt that the settlement reached was the result of arm's-length negotiations by adversarial parties. As this Court well knows, the Settlement Agreement is the result of nearly a decade of "knock-down, drag-out fights over (for example) class certification, admissibility of expert testimony, and the propriety of summary judgment." *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2016 WL 320182, at *5 (N.D. Ohio Jan. 27, 2016). This included a bellwether jury trial, three trips to the Sixth Circuit, two trips to the Seventh Circuit, and two trips to the U.S. Supreme Court. The settlement was then reached only after numerous rounds of negotiations—some with the assistance of a third-party mediator—over the course of several years. And the provision for attorneys' fees took an additional five weeks of negotiations after the parties had already reached agreement on the essential settlement terms and executed a memorandum of understanding regarding the class remedy.

These facts confirm that the settlement is not the result of fraud or collusion. *See Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351 (6th Cir. 2009) ("The duration and complexity of the litigation, to start, undermines the objectors' suspicions [of collusion]. The parties litigated for almost four years before reaching a settlement agreement. The court fielded numerous contested pretrial motions. Class Counsel pursued multiple avenues to gather evidence . . . . And the agreement itself was a product of months of supervised negotiations, two facilitated mediations and a settlement conference with the court."); *Polyurethane Foam*, No. 2016 WL 320182, at *5 (finding that there was no evidence of collusion where the five years of litigation included "knock-down, drag-out fights" that "ultimately led experienced counsel and sophisticated clients to reasonably choose negotiated settlements rather than continued litigation"); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 244 (S.D. Ohio 1991) (approving settlement reached "[a]fter almost six months of concerted negotiations").

Moreover, there is no evidence that the Settlement Agreement suffers from "obvious deficiencies, such as unduly preferential treatment to class representatives or of segments of the class, or excessive compensation for attorneys." *Inter-Op Hip Prosthesis*, 204 F.R.D. at 352 (citation omitted). Rather, the Settlement provides for incentive awards ranging from $1,000 to $4,000, depending on each Plaintiff's level of participation in the litigation process—awards well within the range of awards approved in this District. *See Liberte Capital Grp. v. Capwill*, No. 5:99 CV 818, 2007 WL 2492461, at *1 (N.D. Ohio Aug. 29, 2007) ("Incentive awards, where appropriate, generally range from a few thousand dollars to $85,000"). And Class Counsel's request for $6,723,432 in attorneys' fees represents a fraction of the fees that Class Counsel accumulated over the past nine years.

B. The Settlement Is Objectively Fair, Reasonable, and Adequate in Light of the Likelihood of Success on the Merits

As the Sixth Circuit has explained, "[t]he fairness of each settlement turns in large part on the bona fides of the parties' legal dispute." *Int'l Union*, 497 F.3d at 631. Courts "cannot judge the fairness of a proposed compromise without weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Id*. at 631 (internal quotation marks, citation omitted). This factor weighs heavily in favor of approval, as the Settlement benefits are generous in comparison to what Class Members likely would have received had the litigation continued—nothing.

As the Court knows, Whirlpool prevailed convincingly in the *Glazer* trial. That victory—coming after just two hours of deliberations following a three-and-a-half week trial—confirmed that Plaintiffs' defect allegations lack merit and exposed substantial weaknesses in Plaintiffs' evidence and expert witnesses. These deficiencies would have continued to plague Plaintiffs in future class-action trials, resulting in Class Members likely receiving no recovery while costing

millions of dollars in litigation expenses. For instance, Plaintiffs were unlikely to succeed on the merits in future trials for at least the following reasons:

- Both Defendants and Plaintiffs' survey evidence shows that most Class Members are highly satisfied with their Class Washers and that the overwhelming majority of Class Members have not experienced any mold or odor problem.
- Defendants' service records show that repair and complaint rates for mold and odor problems, however measured, are in the low single digits.
- Defendants' service data also show that Whirlpool's Sierra-platform models, which do not share the allegedly defective tub and crosspiece designs, have approximately the same rate of mold and odor problems as the Access and Horizon models that did contain during the allegedly defective part designs. These data point to variations in consumer use and care habits and practices as the primary cause of any mold or odor problems, not specific parts designs.
- Other evidence, such as the testimony of named Plaintiffs themselves and the testimony of former Whirlpool employee Anthony Hardaway and Defendants' expert Dr. Paul Taylor, proves that consumers' individual use and care habits are the primary cause of any mold or odor problems. As the *Glazer* trial proved, jurors do not believe that Class Washers' designs are defective, much less that those designs will cause all Class Members to experience mold problems.
- Whirlpool's continuous changes to and improvements of the Class Washers and owners' manuals show that not all Class Members are similarly situated and that it is extremely difficult to prove that the later model-year machines are defective in design or that Defendants failed to warn of mold and odor problems.

- The Class Washers unquestionably provide consumers with substantial benefits, including energy and water savings, better cleaning performance compared to traditional clothes washers, and better fabric care. Since the Washers' initial launch, all Class Washer models have been Energy Star certified. Further, year after year *Consumer Reports* has ranked one or more Access and Horizon models among the best front-loading washer models.
- Plaintiffs' express and implied warranty claims are exceedingly difficult to prove on a classwide basis because Plaintiffs must show that Whirlpool or Sears did not honor the terms of the applicable warranty after being provided notice of breach. This element is not susceptible to classwide proof at trial.
- Whirlpool and Sears voluntarily provided customer-satisfaction benefits and free repairs to thousands of Class Washer owners who experienced problems no longer covered by a warranty or service contract.

(*See* Defs.' Mem. in Supp. of Prelim. Approval of Class Settlement at 3-8.)

By contrast, the proposed settlement provides immediate compensation to the small minority of Class Members who experienced mold or odor problems within five years of purchase and who have not already received voluntary compensation or benefits from Sears or Whirlpool. Given Plaintiffs' trial loss in *Glazer* and the substantial risk of future verdicts adverse to Plaintiffs and the Class, the proposed settlement is objectively fair, reasonable, and adequate.

C. Continued Litigation Would Be Risky, Lengthy, and Expensive

Absent this settlement, the Whirlpool MDL and the Sears Actions—already in their ninth year of litigation—would likely continue for many more years. Because a nationwide class trial would pose impose intractable management concerns and be improper under Rule 23, Class Counsel would need to proceed on a state-by-state basis in both this Court and the Northern

District of Illinois. Continuing piecemeal would necessitate additional class certification proceedings (only the *Glazer*-Ohio class and Sears Illinois class have been certified), discovery into substitute class representatives and any new expert opinions, summary judgment proceedings, *Daubert* motions, motions in limine, dozens of class trials, and multiple post-trial appeals. All of that would require significant time and resources from the parties and the Court, while providing no guarantee that Class Members would see any recovery.

The Settlement will relieve the parties and the Court of the costs of continuing to litigate these complex cases. Accordingly, the risk, expense, and duration of continued litigation strongly supports final settlement approval. *See Olden v. Gardner*, 294 F. App'x 210, 217 (6th Cir. 2008) ("the complexity, expense, and likely duration of the litigation weigh in favor of the settlement because, if this case had gone to trial, it most likely would have been a lengthy proceeding involving complex scientific proof" and "would most likely have been an appeal"); *Brent v. Midland Funding, LLC*, No. 3:11 CV 1332, 2011 WL 3862363, at *16 (N.D. Ohio Sept. 1, 2011) ("Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them."); *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001) ("[A]bsent a settlement, there would no doubt be substantial time and expense devoted to motion practice, likely appeals from those motions, multiple trial preparations, trials, and appeals from trials.").

D. Extensive Discovery Has Been Sufficient to Allow Class Counsel to Exercise Sound Judgment in Evaluating the Settlement

Additional factors to be considered by the Court are "the amount of discovery engaged in by the parties" and the opinion of Class Counsel that the settlement is fair and reasonable. *Int'l Union*, 497 F.3d at 631. Here, the parties reached agreement after nine years of litigation, which included multiple years of discovery. Specifically, Defendants produced and Class Counsel

reviewed more than 1,000,000 pages of documents. The parties responded to numerous written discovery requests, conducted dozens of in-home washing machine inspections, and took and defended approximately 100 fact-witness depositions. The parties also employed more than 20 testifying experts, nearly all of whom were subject to multiple depositions and authored multiple expert reports.

In short, the parties engaged in a comprehensive discovery process that allowed Plaintiffs, Class Counsel, and Defendants to frankly evaluate the merits of and risks inherent in their respective cases and to determine an appropriate settlement value. The amount of discovery conducted and the opinions of Class Counsel, thus, weigh heavily in favor of final settlement approval. *See Williams*, 720 F.2d at 922-23 (noting that the court "should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs" with the deference afforded "correspond[ing] to the amount of discovery completed and the character of the evidence uncovered"); *Polyurethane Foam*, 2016 WL 320182, at *6 ("the lengthy and thorough discovery undertaken . . . supplied [the plaintiffs] with a clear picture of what their class claims were worth," thus weighing in favor of settlement).

E. The Reaction of Absent Class Members Weighs in Favor of Settlement

The reaction of absent class members also weighs in favor of final settlement approval. Out of approximately 5,500,000 absent class members, 3.9% have (to date) submitted claims for benefits. The number of Class Members who have requested to be excluded from the Settlement is very low: only 639 individuals, or 0.01% of the Class. (*See* Statement of Facts, Part VI, *supra*.) So is the number of Class Members who have filed objections—just 0.001% of the Class. Specifically, the Court received and docketed only 68 unique objections on behalf of 70 households, but 19 of those objections appear to be submitted by individuals who are not Class Members and, thus, lack standing to object.

These statistics support final approval. *See Polyurethane Foam*, 2016 WL 320182, at * 7 ("That the overwhelming majority of class members have elected to remain in the Settlement Class, without objection, constitutes the 'reaction of the class,' as a whole, and demonstrates that the Settlement is 'fair, reasonable, and adequate.'" (quoting *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 527 (E.D. Mich. 2003))); *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, at *14 (E.D. Mich. Dec. 13, 2011) (positive response rate suggests favorable reaction of class members to settlement). As the Sixth Circuit has explained, a low objection rate "permit[s] the inference that most of the class members had no qualms with" the settlement and "tends to support a finding that the settlement is fair." *Olden*, 294 F. App'x at 217 (the fact that "only 79" out of nearly 11,000 absent class members objected "cuts in favor of the settlement").

IV. THE OBJECTIONS ARE WITHOUT MERIT AND SHOULD BE OVERRULED

As indicated above, the vast majority of Class Members have raised no objections to the settlement. Those few individuals who did file objections make one or more of the following arguments against settlement approval: that (1) the settlement provides inadequate relief to Class Members; (2) the Settlement Agreement's documentation requirement is unfair; (3) Class Counsel's attorneys' fees request is unreasonable; (4) the claims administration process is problematic; (5) the settlement should cover additional washers; (6) the litigation is frivolous; and (7) the Class Washers caused health hazards. The Court should overrule each objection.

A. The Court Should Overrule Any Objections Filed By Non-Class Members

Out of the 68 filed objections, 19 appear to come from non-Class Members. Specifically, nine are filed by individuals who do not own a Class Washer (ECF Nos. 588, 595, 598, 599, 615, 617, 625, 631, 632); four are filed by individuals who requested to be excluded from the Settlement (ECF Nos. 559, 565, 607, 616); and six were filed by individuals who fail to show

that they purchased a Class Washer (e.g., by providing a model and serial number) (ECF Nos. 566, 572, 593, 596, 613, 627). The Court should overrule each of these objections as the individuals lack standing to object.

A court does not have jurisdiction to hear objections from non-class members. *See Fidel v. Farley*, 534 F.3d 508, 515 n.5 (6th Cir. 2008) (finding that the court has "no jurisdiction" over individual's objections to class settlement because the objector "does not claim to be a member of the . . . class"); *see also Perkins v. Linkedin Corp.*, No. 13-CV-04303-LHK, 2016 WL 613255, at *3 (N.D. Cal. Feb. 16, 2016) (court should "not consider the objections of non-Class members"); *Moore v. Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2013 WL 4610764, at *9 (N.D. Cal. Aug. 28, 2013) ("It is well-settled that only class members may object to a class action settlement."); *In re Regions Morgan Keegan Sec., Derivative & Erisa Litig.*, No. 2:07-CV-02830-SHM, 2013 WL 1500471, at *4 (W.D. Tenn. Apr. 10, 2013) (refusing to hearing non-class member's objection as "[t]he basis of a class member's right to object to or appeal from a settlement is the fact that he will be bound by it"); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., on Apr. 20, 2010*, 910 F. Supp. 2d 891, 941 (E.D. La. 2012), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) ("In the context of class settlements, non-settling parties generally have no standing to challenge the proposed settlement.").

Nor can the Court hear the objections of those individuals who chose to opt-out of the Class. *See Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922, 930-31 (E.D. Mich. 2007) ("[O]pting out of a settlement and choosing to object logically are mutually exclusive options: if one actually opts out, she has no standing to object to the settlement as she will not be bound by it." (citing *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 426 (6th Cir.

1999)); *see also* Newberg on Class Actions § 13:23 (5th ed.) (explaining that the "black letter rule is that opt-outs have no standing to object because they are not impacted" by the settlement).

Accordingly, the Court should disregard those 19 objections. *See Fidel*, 534 F.3d at 512, 515 n.5.

B. The Settlement Benefits Are Reasonable and Adequate in Light of the Weaknesses of Plaintiffs' Case

The majority of objectors claim that the Settlement provides too little recovery, arguing that those Class Members who experienced mold or odor problems should receive their money back or receive more than the $50 cash payment or 20% rebate offered in the Settlement. (*See, e.g.*, ECF Nos. 562, 564, 567-70, 575, 578-82, 586-89, 591, 594, 596-98, 600, 606, 609-14, 616-21, 623-24.) These objections fail.

Although the objectors—each of whom describe his or her experiences with odors and mold growth[2]—may want more relief, they were not directly involved in the extensive litigation of the case, did not go through Class Counsel's experience in the *Glazer* trial where a complete defense verdict was returned, and fail to fully appreciate the risks and expenses of continued litigation. Additional trials—in which Defendants would continue to prove, among other things, that (1) the overwhelming majority of Class Members have not experienced any mold or odor problems, and (2) that Class Members' failure to follow the Washers' user instructions was the primary cause of the small number of Class Members who experienced problems—would likely have resulted in no recovery for the class. In other words, the benefits provided by the Settlement are more than commensurate with the merits of Plaintiffs' cases and appropriately reflect that Plaintiffs faced huge risks in continuing to try these cases.

[2] No objector who has not experienced odor problems objected to the 5% rebate benefit. To the contrary, those objectors charged that the lawsuit is "ridiculous, frivolous, and unfair to Whirlpool." (ECF No. 557; *see also* ECF Nos. 559, 572.)

As Judge Gwin explained in the class certification order, "something is better than nothing" in a class settlement. (Op. & Order 6 n.3, ECF No. 141.) Indeed, "[i]t is well-settled that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair," as "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Polyurethane Foam*, 2016 WL 320182, at *11 (quoting *In re Bear Stearns Cos., Inc. Sec. Litig.*, 909 F. Supp. 2d 259, 270 (S.D.N.Y. 2012)); *see also Williams*, 720 F.2d at 922 ("A court may not withhold approval simply because the benefits accrued from the decree are not what a successful plaintiff would have received in a fully litigated case."). Rather, the propriety of a settlement must be assessed as "a function of both (1) the size of the amount relative to the best possible recovery; and (2) the likelihood of non-recovery (or reduced recovery)." *Polyurethane Foam*, 2016 WL 320182, at *11.

Here, the Settlement benefits are generous in comparison to the very real risk of complete non-recovery for all Class Members had this litigation continued. Through the Settlement, those Class Members who experienced mold and odor problems may receive $50—or approximately 20% of the $235 to $279 per machine that Plaintiffs sought in classwide damages.[3] (*See* Knittel Rep. ¶ 85 ("I find that damages to each class member is $279 per machine under the WTP and market price overcharge methods and $235 per machine under the cost mitigation approach.").) And the 20% rebate available to Class Members represents, on average, a $170 reduction in price for eligible front-loading washers or coordinating dryers (or $340 if a washer/dryer pair is bought) or $127 for eligible top-loading washers or coordinating dryers (or $254 for the set).

[3] While many objectors request a check for the purchase price of their Class Washer or a replacement washer (*see* ECF Nos. 567, 579-82, 586, 591, 604, 609, 614, 623), such a remedy was never a possibility as Plaintiffs did not seek such classwide damages.

(*See* Supp. Decl. of Casey Tubman ¶ 2, ECF No. 640-11) The 5% rebate offered to those Class Members who never experienced any mold or odor problems (i.e., suffered no injury) will provide an average discount of $32 to $85. And those Class Members who have documentation of out-of-pocket repair or replacement costs can recover up to $500—more than Plaintiffs' best-case-scenario.

When measured against the actual range of Plaintiffs' "best possible recovery" following the class trials, the Settlement is an exceptional result. *See, e.g.*, *Polyurethane Foam*, 2015 WL 1639269, at *5 (N.D. Ohio Feb. 26, 2015) ("A settlement figure that equates to roughly 18 percent of the best-case-scenario classwide overcharges is an impressive result in view of these possible trial outcomes."). The possibility "that the settlement could have been better . . . does not mean the settlement presented was not fair, reasonable or adequate" because "[s]ettlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). As explained above, this settlement was more than fair, adequate and free from collusion.

Accordingly, the objections to the adequacy of the Settlement benefits should be rejected. *See, e.g., Rougvie v. Ascena Retail Grp., Inc.*, No. CV 15-724, 2016 WL 4111320, at *22 (E.D. Pa. July 29, 2016) ("The settlement represents a compromise between the maximum possible recovery and the inherent risk of litigation, including a difficult burden to show liability and certify a trial class. The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." (citation omitted)); *Polyurethane Foam*, 2016 WL 320182, at *11 ("The objectors' armchair-quarterbacking and wishing-for-more does not provide valid grounds to disapprove the settlements.").

C. The Documentation Requirement Is Fair and Reasonable

A few objectors argue that they should not be required to submit the documentary proof to receive up to $500 in reimbursement for any money spent out-of-pocket to address mold and odor problems because few people keep their receipts for so long. (*E.g.*, ECF Nos. 570, 585-86, 594, 600, 619.) As an initial matter, to receive the $50 or 20% rebate benefits, non-Prequalified Class Members do not need to submit any documentation to show that they in fact experienced a problem. They simply have to state so under oath. (*See* Settlement Agreement ¶ IV.B.)

The proof requirement is necessary, however, to prevent fraudulent claims by ensuring that Class Members actually expended money to replace or service a Class Washer. As courts have recognized, "[f]raud in the claims process is a legitimate concern." *Rougvie*, 2016 WL 4111320, at *15 ("Given a significant potential for fraud in submitting cash claims by affidavit, we find Class Counsel addressed the subclass of cash purchasers in a fair manner."). Accordingly, the Settlement's documentation requirement is fair, and the objection should be overruled. *See Martin v. Reid*, 818 F.3d 302, 309 (7th Cir. 2016) (overruling objection to documentation requirement where "[a]nyone can get $10 just by signing an affidavit to the effect that she or he purchased the kit and providing any 'available' documentation they might have" as "[t]he fact that better documentation is needed for those with significant injuries is hardly a surprise"); *In re NV IDIA GPU Litig.*, 539 F. App'x 822, 824 (9th Cir. 2013) ("One objector argues that the settlement was unfair because consumers must be able to prove purchase of one of the affected computers. This is a reasonable requirement to prevent fraud . . . .").

D. This Court's Decision on the Appropriate Amount of Attorneys' Fees and Costs Has No Impact on the Validity or Finality of the Settlement

A handful of objectors claim that the Settlement should be rejected because the attorneys' fees and costs sought by Class Counsel—$6,723,432.66 in fees and $8,026,567.34 in costs—are

unreasonable when compared to the $50 payment or rebate available to Class Members. (*See* ECF Nos. 566, 587, 599, 607-09, 624, 632.) The decision as to the reasonable amount of attorneys' fees and costs is committed to the sound discretion of this Court. Here, the Settlement Agreement merely includes a cap on the amount of fees and costs that Whirlpool has agreed to pay. The award will not subtract any amount from the Class, as Class Counsel's recovery is separate and apart from the benefits payable directly to Class Members. To the extent that the Court determines that a lower amount of fees or costs is appropriate, any such order "shall not affect the validity or finality of the Settlement" and the "remaining provisions of this Agreement shall remain in full force and effect." (Settlement Agreement ¶ X.G.)

Thus, the Settlement Agreement appropriately balances the interests of Class Counsel, the Class, and Defendants and commits the final fee award to this Court's discretion.

E. The Claim Rate Is Not Indicative of a Problem with the Settlement Claims Administration Process

Based solely on the fact that "only 150,000 claims have been submitted" out of 5,500,000 Class Members, attorney Edward Siegel[4]—on behalf of Class Members Roger Gilmore, James

[4] Mr. Siegel is a well-known "professional objector"—that is, a lawyer "who file[s] stock objections to class action settlements—objections that are most often nonmeritorious" in the hopes of being "rewarded with a fee by class counsel to settle [his] objections." *In re Elec. Books Antitrust Litig.*, 639 F. App'x 724 (2d Cir. 2016); *see In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210, 214 (S.D.N.Y. 2010) (describing Siegel as a "serial objector[]"). Indeed, his serial objections have been rejected by a number of courts, some using particularly harsh language in doing so. *See In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009) ("These objectors [represented by Mr. Siegel] have contributed nothing. . . . Their goal was, and is, to hijack as many dollars for themselves as they can wrest from a negotiated settlement. Objectors' eight-page-long, two-week-late pleading presented no facts, offered no law, and raised no argument upon which the Court relied in its deliberation or ruling concerning class counsel's motion for fees. . . . Objectors' request and their motion ill-befit attorneys admitted to the bar."); *see, e.g.*, *Rodriguez v. Schneider*, 480 F. App'x 876 (9th Cir. 2012) (unpublished); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009); *Carlson v. Xerox Corp.*, 355 F. App'x 523 (2d Cir. 2009); *In re Bristol-Myers Squibb Sec. Litig.*, No. 06-2964, 2007 WL 2153284 (3d Cir. June 27, 2007); *In re Wal-Mart Wage & Hour Emp. Prac. Litig.*, No. 06- Civ. 225, 2010 WL 786513, at *1-2 (D. Nev. Mar. 8, 2010).

Migliaccio, and Becky Costello (the "Siegel Objectors")—assert that "[m]ore [o]versight" of the claims administration process is "[n]ecessary," specifically requesting that the Court conduct an "independent review into the Settlement Administration process." (ECF No. 603 at 5-6.) In fact, the Siegel Objectors infer—without any factual basis for doing so—that the reason for this low claims rate is that "most of the people who received the Notice are so upset or unhappy about the washers . . . that they don't even want to expend the effort to file a claim [o]r they feel that $50 is not worth their time or effort and just want to forget they ever bought a Whirlpool washer." (*Id.* at 5.) This speculation is more properly directed at the adequacy of the Settlement benefits, which—as demonstrated above—is more than fair, reasonable, and adequate in light of the significant risks of continued litigation. (*See* Argument, Part III, *supra*.)

Critically, the Siegel Objectors present no evidence whatsoever of any "problem" in the claims or notification process. (*Id.*) The fact that approximately 3.9% of the class submitted claims is not indicative of any problem. Rather, it confirms Defendants' evidence showing that the vast majority of Class Members never reported or experienced any mold or odor problems. (*See* Defs.' Mem. in Supp. Prelim. Approval of Class Settlement at 6-8 (describing the undisputed service data).) It also represents the reality of class action settlements. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (claims rates in consumer class action settlements "rarely" exceed 7%, "even with the most extensive notice campaigns"); *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *6 (C.D. Cal. Apr. 9, 2014) ("The reality is the number of class members who actually file claims is relatively low": "3-5 percent" (citation omitted)). Critically, "class settlements featuring low claims rates are routinely approved." *Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV, 2016 WL 1529902, at *22 (S.D. Fla. Apr. 13, 2016); *see, e.g., Poertner v. Gillette Co.*, 618 F. App'x 624, 628 (11th Cir.

2015) (approving 7.26 million-member settlement class when only 55,346—less than 1%—filed claims); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944-45 (9th Cir. 2015) (approving settlement with a less than 4% claim rate).

Contrary to the Siegel Objectors' implication, the claims process could not have been easier here. Class Members could submit a claim online or by mail. Prequalified Class Members—i.e., those Class Members identified in Whirlpool's or Sears' databases as having reported a biofilm or odor problem within five years of purchase—need only confirm their names, addresses, and email addresses, check several eligibility boxes on the Claim Form, and sign or e-sign the Claim Form. (Settlement Agreement ¶ IV.A.2.) Indeed, more than 8% of Prequalified Class Members have already submitted a claim—a relatively high take rate. *See Sullivan*, 667 F.3d at 329 n.60.

The process for Non-Prequalified Class Members' claim does not require much more: to prove membership in the Class, they need only submit their Washers' model and serial number or some other proof-of-purchase. (Settlement Agreement at IV.A.2.) Then, to receive the $50 payment or 20% rebate, Non-Prequalified merely need to state under oath (but not under penalty of perjury) that they have experienced persistent bad odors and/or mold growth problems within five years of purchase; no evidence that they actually experienced such problems is necessary. (*Id*. at IV.B.) There is nothing unreasonable about requiring Class Members to provide their current address or prove class membership when such information is not readily assessable to Defendants. *See Poertner*, 618 F. App'x at 628 ("[W]hile monetary relief was available to only those class members who submitted claims, the use of a claims process is not inherently suspect. Nor was the claiming process—completing a one-page form and submitting it either online or by mail—particularly difficult or burdensome.").

Accordingly, this Court should overrule the Siegel Objectors' objection to the claims process.

F. The Remaining Objections Should Be Rejected

The remaining objections concern (1) certain objectors' beliefs that the Washers pose health risks; (2) the Settlements' exclusion of other Maytag-brand and Whirlpool-brand front-loading washers; and (3) the frivolity of this litigation. All should be overruled.

First, a handful of objectors note their concern with allergies and other health effects from alleged mold growth in the Class Washers. (*See* ECF Nos. 571, 579-58, 606, 617, 621, 626, 631, 634.) Not only is this concern completely unfounded, but the Settlement's release specifically excludes claims for personal injury. (Settlement Agreement XI.B.) Any Class Member who believes he or she has suffered physical harm may still bring such an action against Defendants, subject to the applicable statutes of limitations.

Second, non-Class Members Tena Woods, Brian Myers, and Bryce Nesbitt claim that the Settlement should include their non-Class Washers because those machines "exhibit[] the same persistent mold stain and smell condition that is identified as part of the lawsuit." (ECF No 595; *see also* ECF Nos. 615, 632.) Even assuming the Court considers these objections (it should not), the Court should overrule them. Objectors Woods, Myers, and Nesbit are essentially asking this Court to modify the class definition to include additional models manufactured by Whirlpool. But the Court has no authority to change the Settlement Agreement. *See Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness. Neither the district court nor this court have the ability to delete, modify, or substitute certain provisions.") (internal quotation marks, citation omitted).

Nor would expanding the class definition be appropriate. *See Alexander v. Fedex Ground Package Sys., Inc.*, No. 05-cv-00038-EMC, 2016 WL 1427358, at *5 (N.D. Cal. Apr. 12, 2016)

("Plaintiffs had no obligation to bring suit on anyone's behalf but their own and/or the behalf of others similarly situated . . . ."). The Class Washers were all built on one of two engineering platforms—Access and Horizon—and each contain the plastic tub and aluminum crosspiece designs that Plaintiffs' experts claim are defective. (Op. & Order, ECF No. 366; Decl. of Casey Tubman ¶ 3, ECF No. 545-11.) The washers owned by objectors Woods, Myers, and Nesbit do not share these same components, and they provide no evidence showing that including them in the class would be proper under Rule 23.[5] *See Amchem Prod., Inc.*, 521 U.S. at 624 (holding that "sprawling" settlement-only class failed to satisfy Rule 23's requirements where "Class members were exposed to different asbestos-containing products"). The objections should, therefore, be rejected.

Third, while Defendants agree with those objectors who claim that this lawsuit is "frivolous" and "without merit," that is not a reason to reject the settlement. *See Perkins*, 2016 WL 613255, at *4 (overruling objections that "do not comment on any aspect of the Settlement but, rather, oppose the claims alleged as being frivolous" because "these objectors' interests are adverse to the Class"); *Ko v. Natura Pet Prods., Inc.*, No. C 09-02619 SBA, 2012 WL 3945541, at *6 (N.D. Cal. Sept. 10, 2012) ("[A]n objection based on a concern for the Defendants and an apparent non-substantive assessment of the frivolity of the action are not germane to the issue of whether the settlement is fair.").

[5] While Objector Nesbitt does own a Horizon model (WFW9151), his washer was one of those models that this Court specifically excluded from the class in its September 2, 2014, order because it has a "Wave Structure tub" that is different from the original Access or Horizon tub design. (Op. & Order 10-11, 36-38, ECF No. 366.)

V. THE PARTIES' FORMS OF NOTICE AND METHODS OF NOTICE DISSEMINATION SATISFY RULE 23

Rule 23(c)(2)(B) requires that, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also* Fed. R. Civ. P. 23(e)(1). The parties jointly proposed a notice plan that provides for the "best notice practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). This Court found that the parties' proposed notice plan satisfied Rule 23:

> The proposed plan for distributing and publishing the Summary Notices, FAQ, Publication Notice, Claim Form, and Settlement Website appears reasonably likely to notify members of the Settlement Class of the Settlement, and there appears to be no additional mode of distribution that would be reasonably likely to notify members of the Settlement Class who will not receive notice pursuant to the proposed distribution plans. The proposed plan also satisfies the notice requirements of Federal Rule of Civil Procedure 23(e) and all applicable federal law.

(Prelim. Approval Order at III.B.)

As described above, the parties and the Settlement Administrator have complied with the Preliminary Approval Order's notice requirement (*See* Statement of Facts, Part V, *supra*.) Thus, the parties have satisfied Rule 23's notice requirements. *See Vassalle v. Midland Funding, LLC*, No. 3:11-cv-00096, 2014 WL 5162380, at *11 (N.D. Ohio Oct. 14, 2014), *aff'd sub nom. Pelzer v. Midland Funding LLC*, No. 14-4156, 2016 WL 3626825 (6th Cir. July 7, 2016) (finding that notice "disseminated via individual mailing to all Class Members identified in the customer data files of Midland, and also by publication . . . constitutes the best notice practicable under the circumstances, and fully complies with and satisfies the notice requirements of Rule 23").

CONCLUSION

For all these reasons, Sears and Whirlpool respectfully request that the Court grant final approval to the proposed class settlement.

Dated: August 25, 2016

Respectfully submitted,

s/ Michael T. Williams
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Attorneys for Whirlpool Corporation and Sears, Roebuck and Co.

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2016, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

s/ Michael T. Williams
Michael T. Williams

Exhibit 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: WHIRLPOOL CORP. FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION	**1:08-wp-65000** **MDL No. 2001** **Class Action** **Judge: The Hon. Christopher Boyko**

DECLARATION OF MICHAEL T. WILLIAMS IN SUPPORT OF FINAL APPROVAL OF CLASS SETTLEMENT

I, Michael T. Williams, declare and state as follows:

1. I am an attorney with the law firm Wheeler Trigg O'Donnell, LLP. Along with other attorneys, I represent Defendants Whirlpool Corporation ("Whirlpool") and Sears, Roebuck and Co. ("Sears") in this litigation and the related litigation against Sears in the U.S. District Court for the Northern of Illinois. I am over the age of 18 and am otherwise competent to testify. Unless otherwise stated below, I have personal knowledge of the facts stated in this Declaration.

2. After the Court granted preliminary approval to the proposed class action settlement, Class Counsel, Defendants' counsel, and the Settlement Administrator (i.e., Angeion Group, LLC) prepared final versions of the mailed and emailed settlement notices, the Publication Notice, and the Claim Form incorporating into each of them the deadlines set forth in the Preliminary Approval Order.

3. Defendants helped to ensure that, within the periods of time required by the Settlement Agreement and the Court's Preliminary Approval Order, the Settlement Administrator sent, by first-class United States Mail, to all members of the Settlement Class

whose addresses reasonably could be identified in Whirlpool's or Sears' records, a copy of the appropriate version of the mailed settlement notice incorporating the deadlines set forth in the Preliminary Approval Order.

4. Defendants also helped to ensure that, within the periods of time required by the Settlement Agreement and the Court's Preliminary Approval Order, the Settlement Administrator sent by email a copy of the appropriate version of the emailed settlement notice to all members of the Settlement Class whose email addresses reasonably could be identified in Whirlpool's or Sears' records, incorporating the deadlines set forth in the Preliminary Approval Order.

5. Defendants helped to ensure that the Settlement Administrator caused the Publication Notice to be published, in the forms and manners described in the Declaration of Steven Weisbrot, Esq. on Compliance with Plan of Notice. (ECF 573-1.)

6. The Settlement Administrator timely posted on the settlement website, www.WasherSettlement.com, a copy of the notice materials, including the long-form settlement notice in the form of "frequently asked questions," that incorporated the deadlines set forth in the Preliminary Approval Order.

7. Following this Court's order rescheduling the Fairness Hearing to September 21, 2016, Defendants instructed the Settlement Administrator to update the settlement website and the "frequently asked questions" form to include the new date for the Fairness Hearing so as to inform any Class Member who may wish to appear of the new date.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 25th day of August, 2016.

s/Michael T. Williams
Michael T. Williams

Exhibit 2

From: Troy Walitsky <twalitsky@angeiongroup.com>
Sent: Friday, August 19, 2016 8:59 AM
To: Spragens, John T.; Kaufman, Andrew R.; Dodd, Rebecca; Lichtman, Jason L.; Williams, Michael; Myers, Andrew W.; Selbin, Jonathan D.; david@specialmaster.biz
Cc: Steve Weisbrot
Subject: Whirlpool Update - 8/19/16

Good Morning,

Below are the updated Whirlpool stats.

TOTAL ONLINE SUBMISSIONS

We have received **202,975** online claim submissions. The breakdown of those submissions by designation (Prequalified, Non-Prequalified/Identified, and Generic) is listed below, as are the benefit selections for each category.

Description	$50 Payment	20% Rebate	5% Rebate	Reimbursement	Total
Prequalified	4,902	502	-	326	5,730
Identified	112,774	12,465	9,116	4,388	138,743
Generic	44,687	9,004	1,484	3,327	58,502
Subtotal	**162,363**	**21,971**	**10,600**	**8,041**	**202,975**

ONLINE SUBMISSIONS THIS WEEK

Below is the breakdown of the online submissions received this week:

Date	# of Submissions
8/15/2016	940
8/16/2016	912
8/17/2016	793
8/18/2016	686
8/19/2016	85
Total	**3,416**

PAPER CLAIM SUBMISSIONS

Below is the breakdown of hard copy claim forms received. Please note these totals are based on data entry information conducted thus far. The claims still need to be vetted for potential duplicate submissions, verification of completion, etc. We also identified an error in last week's stat for generic 5% rebate. The total number of those claims is much lower. We are further evaluating approximately 100-150 claim forms where it appears no benefit was selected.

Description	$50 Payment	20% Rebate	5% Rebate	Reimbursement	Total
Prequalified	273	40	-	42	355
Identified	7,880	865	160	343	9,248
Generic	1,106	143	18	100	1,367
Subtotal	**9,259**	**1,048**	**178**	**485**	**10,970**

COMBINED CLAIM SUBMISSIONS (PAPER + ONLINE)

Description	$50 Payment	20% Rebate	5% Rebate	Reimbursement	Total
Prequalified	5,175	542	-	368	6,085
Identified	120,654	13,330	9,276	4,731	147,991
Generic	45,793	9,147	1,502	3,427	59,869
Subtotal	**171,622**	**23,019**	**10,778**	**8,526**	**213,945**

EXCLUSION REQUESTS

After removing duplicate requests for exclusion, there are currently 646 exclusion requests, of which 6 were received and postmarked after the exclusion deadline. Thus, there are 640 timely-submitted requests for exclusion.

Please let us know if you need any additional information.
Best,

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