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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JULIE CORZINE, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

MAYTAG CORPORATION, a Delaware corporation; WHIRLPOOL CORPORATION, a Delaware corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No.: 5:15-cv-05764

DEFENDANT'S MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Defendant Whirlpool Corporation respectfully submits this memorandum in support of the parties' Joint Motion for Preliminary Approval of Class Action Settlement.

INTRODUCTION

After nearly two years of active motions practice and discovery—followed by a stay of proceedings pending the Ninth Circuit's *en banc* resolution of the appropriate standards for certifying nationwide classes for settlement purposes—the parties now present a proposed nationwide class settlement of all claims in this case. Plaintiffs allege that certain models of Whirlpool-manufactured, Amana, Jenn-Air, KitchenAid, and Whirlpool brand bottom-mount refrigerator-freezers are defective in that components of the freezer drain tubes become clogged, impeding the flow of defrosted water from the evaporator compartment to the drain pan below. When this occurs, the water can drain into the freezer compartment instead of into the drain pan, resulting in ice build-up on the freezer floor and in some rare instances water dripping underneath the refrigerator-freezer from the bottom of the freezer drawer. Plaintiff's original complaint asserted claims for strict liability, negligence, breach of express warranty, breach of implied warranty, and violations of California consumer protection statutes.

Plaintiff nearly lost this case at the pleading stage. Despite three chances to amend her complaint, the Court dismissed most of Plaintiff's claims and conditioned the remaining claims on proof that Whirlpool fraudulently concealed a safety defect (which the minor quality issue alleged in the complaints never was). Within a few months after the Court's motion to dismiss rulings, the parties reached a settlement (first as to class benefit terms and only then as to Plaintiff's counsel attorney fees and a service award to Plaintiff).

Notwithstanding the strength of Whirlpool's defenses, the costs required to continue to litigate this putative class action to a defense verdict or other favorable outcome would be immense, and the Settlement Agreement fully resolves the parties' disputes.[1] It provides cash reimbursement on a sliding scale, up to $150, for paid qualifying repairs of Class Refrigerators within five years of purchase. The Settlement Agreement further covers future repairs by providing either reimbursement

[1] A copy of the Class Action Settlement Agreement, dated May 7, 2018 ("Settlement Agreement"), is attached to the parties' Joint Motion for Preliminary Approval of Class Action Settlement.

for repairs paid for out of pocket—up to $150 for repairs within five years of purchase—or a free P-Trap part under Whirlpool's Special Project concerning freezing events that will remain in place through December 31, 2021.

Under the facts and circumstances of this case, the proposed settlement is more than fair and reasonable to the Class. It adequately compensates the Class in exchange for a classwide release of all claims related to the subject matter of this litigation. The proposed settlement reflects the strength of Whirlpool's defenses to the merits of Plaintiff's claims as well as the difficulty Plaintiff faces in achieving a contested class certification for trial purposes, and provides Class Members with benefits that Plaintiff would be unlikely to recover if she continued to litigate.

Accordingly, the proposed settlement is well within the reasonable range of what this Court can approve as fair to the Class under Federal Rule of Civil Procedure 23(e). The Court should grant preliminary approval of the Parties' proposed settlement, certify the Settlement Class, approve the proposed notice plan, and order notice to the Class.

STATEMENT OF FACTS

I. DRAIN TUBE DESIGN BACKGROUND

The history of Whirlpool's design changes to the Class Refrigerators, shown by documentary evidence and warranty claims data, proves that far from defrauding its customers, Whirlpool was instead committed to customer satisfaction through the continuous improvement of its products and its offer to cover the costs of repairs to units that experienced the issue beyond the base written warranty period.

A. Improvements to Predecessor Drain Components

Whirlpool regularly monitors the performance of its products in the field and evaluates its warranty claims data to identify opportunities to improve its products. As relevant here, Whirlpool initiated a project in 2008 to redesign the machine compartment[2] in its Amana-built bottom-mount refrigerator-freezers (the predecessors to the Class Refrigerators) to drive improvements in several quality areas, including freezer drain performance. The freezer drain (or "defrost drain") generally

[2] As the name suggests, the machine compartment contains many of the refrigerator-freezer's major components, including the compressor, condenser, fan, heat exchange tube, drain tube, and drain pan.

serves to collect the water draining off of the evaporator during its defrost cycle and channel that water into the drain pan where it evaporates in advance of the next defrost cycle. Whirlpool's initial redesign of this drain system featured an open nozzle at the outlet of the freezer compartment that drained into a "waterslide" component snapped into the drain pan below. This new design served to guard against the rare instances where the predecessor drain tube could become misaligned and direct the water to areas away from the drain pan.

Although the waterslide drain eliminated water leakage into or away from the machine compartment due to misalignment, early warranty service data showed that units with the fully-redesigned machine compartment experienced a slight increase in complaints relating to moisture in the refrigerator compartment or frost in the freezer compartment. Whirlpool's analyses of its claims data and reliability testing results indicated that these moisture issues were the result of several contributing factors, including variation in cabinet sealing, door sealing, and drain-hole restrictions.

B. First- and Second-Generation "Duckbill" Drain Nozzles

To help address the moisture and frost issues related to the waterslide configuration, Whirlpool added a "duckbill" to the freezer drain in certain models in late 2009 and in other models in early 2010. The duckbill was a rubber grommet that slid onto the freezer drain and functioned as a check valve, which allowed water to flow out but prevented air from entering the freezer drain and introducing moisture into the circulation paths in the freezer and refrigerator compartments, which is a key factor in condensation and frost forming inside those compartments.

The initial duckbill design was a readily available, "off the shelf" component. This "short" duckbill (which contrasted with a later "long" duckbill) was the type used on Ms. Corzine's refrigerator.

Together with improvements to door- and cabinet-sealing, the short duckbill drove down complaints concerning moisture in the refrigerator compartment and frost in the freezer compartment. But the short duckbill itself was, in rare circumstances, susceptible to blockage for a variety of reasons, including (i) stray insulation blown in during the manufacturing process, (ii) misalignment of the duckbill during manufacture, (iii) debris from shipping, unpacking, and installation, (iv) bits of food or packaging from the freezer, (v) a misshapen mouth or slit on the

duckbill due to manufacturing variability that could freeze shut, and (vi) other environmental household debris (*e.g.*, dog hair). Blockage in the short duckbill could result in ice building up on the bottom of the freezer compartment, and in rare instances water dripping from the freezer drawer.

Whirlpool launched projects to address all of these potential reasons for blockage, including improving its manufacturing processes. These changes drove down complaint rates for ice build-up. Most significantly, Whirlpool's continuous improvement efforts led to the redesign and introduction of a second generation "long" duckbill in late 2010 that was more robust than its predecessor, although still susceptible to blockage for a variety of reasons.

The SIR for claims associated with the freezer drain in models in the putative class containing a duckbill nevertheless ranged from approximately 1% to 2.5%, depending on production era and model family.[3] The warranty claims underlying this SIR consisted of fewer complaints of interior moisture and frost, but introduced new complaints of duckbill blockage resulting in ice build-up.

C. P-Trap Drain

To further improve freezer drain reliability and address the new complaints of drain blockage and ice build-up, Whirlpool analyzed the viability of using a "P-Trap" component in place of the duckbill/waterslide configuration. The P-Trap was introduced into production and service in August 2013. It features a connection to the freezer drain hole and snaps directly into the drain pan. The "trap" holds water to prevent air infiltration and also to eliminate drain blockage, similar to the piping seen under household sinks.

Since the P-trap was implemented, it has virtually eliminated freezer-drain SIR, particularly for drain plugging, for models in the putative class. Initial analyses concluded that the approximately 0.2% (or 2 in 1,000) units with claims following P-Trap implementation were largely the result of manufacturing variances that have been further improved since implementation.

These very low SIR rates together with Whirlpool's continuous improvement efforts to drive those low rates down further is not a case narrative worthy of significant investment by Plaintiff's

[3] The SIR figures presented here are derived from Whirlpool's contemporaneous warranty claims analyses and represent snapshots of warranty claims rates that vary over time.

counsel. The facts show that Whirlpool cared about its customers, and they do not support the tale of uniform fraud and broken promises Plaintiff must prove to certify a class, survive summary judgment, and persuade a jury to find liability and award significant damages.

II. WHIRLPOOL'S CUSTOMER GOODWILL MEASURES

A. Whirlpool's Special Project for Freezing Events

In addition to Whirlpool's efforts to drive improvements in its products, it also invested in helping the customers in the field who experienced freezer-drain issues by initiating a "Special Project" to cover certain costs of repair. First, Whirlpool offered to cover parts and labor to remove the duckbill and waterslide and install the P-Trap for customers who experienced an issue a full year after their original written warranties expired. Whirlpool also offered to provide the P-Trap part—free of charge—to any customer who experiences a freezer drain issue, however far beyond the warranty period they might be. Ms. Corzine herself received a free P-Trap part through this Special Project. As noted in Plaintiff's memorandum in support of preliminary approval, Whirlpool's claims data show that approximately 5.5% of the Class Refrigerators have had repair costs covered through Whirlpool's base warranty period plus the extended coverage afforded under the Special Project. Finally, to the extent any freezer-drain issue caused property damage to a customer's home, Whirlpool promptly investigated and resolved the claim to ensure the customer was made whole.

B. Whirlpool's Customer-Satisfaction Efforts for Ms. Corzine

Using the model number and serial number of Plaintiff's refrigerator-freezer, Whirlpool has located customer service records that appear to relate to Ms. Corzine. Whirlpool's investigation shows that Ms. Corzine owns a Maytag-branded, two-door bottom mount refrigerator-freezer manufactured at Whirlpool's Amana, Iowa division during the week of June 28, 2010. She purchased her refrigerator-freezer in November 2010. Ms. Corzine alleges in her Second Amended Complaint that she began to experience leaks from her refrigerator-freezer only in late October or early November 2014 (ECF No. 56 ¶ 41)—that is, four years after purchase and three years after expiration of her refrigerator-freezer's one-year limited warranty.

Whirlpool's records show that Ms. Corzine contacted Whirlpool about her refrigerator-freezer only once, on June 8, 2015 (nearly five years after purchase). Ms. Corzine reported to

Whirlpool's customer service representative that she had ice built up in her freezer compartment. Whirlpool scheduled service for Ms. Corzine with A Go Home Appliance Repair, Inc. On June 16, 2015, A Go Home Appliance serviced Ms. Corzine's refrigerator-freezer. Whirlpool's warranty service records show that the servicer confirmed Ms. Corzine's complaint that there was ice built up on the bottom of the freezer compartment. Those records show that the servicer installed a drain tube (part number W10619951): the "P-Trap." Whirlpool's customer contacts and warranty service records also confirm that Whirlpool provided that part to Ms. Corzine free of charge pursuant to its November 2013 customer-satisfaction program, even though her refrigerator-freezer's written limited warranty term had expired.

Whirlpool had no further contact from Ms. Corzine until she filed suit in November 2015. Nothing in Whirlpool's customer contacts or warranty records indicate Ms. Corzine complained that she experienced any water leakage as a result of the ice build-up in her freezer, or that the repair was somehow unsuccessful.

III. HISTORY OF THE LITIGATION

Ms. Corzine filed this lawsuit in November 2015. Her First Amended Complaint asserted a total of eleven claims for relief: (1) negligence and strict-liability, (2) breach of express warranty, (3) breach of implied warranty, (4) violations of California's Unfair Competition Law ("UCL"), and (5) violations of California's Consumer Legal Remedies Act ("CLRA"). On May 27, 2016, the Court granted in full Whirlpool's motion to dismiss the First Amended Complaint. *See* ECF No. 48.

Plaintiff filed her Second Amended Complaint ("SAC") on July 8, 2016. Ms. Corzine remained the sole named Plaintiff. The SAC included some additional allegations related to Whirlpool's purported fraudulent concealment of the alleged defect, but otherwise the factual allegations and legal claims were materially unchanged from the previous two iterations of the Complaint. The Court largely granted Whirlpool's motion to dismiss the SAC in November, 2016. In particular, the Court dismissed with prejudice all of Plaintiffs' negligence and strict-liability claims, express-warranty claims, and implied-warranty-of-fitness claims. *See* ECF No. 64. Thus, Plaintiffs' only remaining claims are for breach of the implied warranty of merchantability, and her UCL and CLRA claims.

Significantly, all three remaining claims survive only to the extent that Plaintiff can prove that Whirlpool fraudulently concealed the existence of a safety risk posed by the alleged drain-tube defect. Specifically, Plaintiff's implied-warranty claims are time-barred unless the applicable statute of limitations has been tolled by fraudulent concealment premised on "Whirlpool's alleged knowledge of safety risk." ECF No. 64 at 8. Similarly, Plaintiff's UCL and CLRA claims depend on her proof of a fraudulent omission based on "Whirlpool's duty to disclose the alleged[] defect of her refrigerator." *Id.* at 9.

While the motions practice was ongoing, the parties informally traded discovery. Most significantly, Whirlpool provided to Plaintiff hundreds of records of key product development and approval technical documents relating to the design and testing of the freezer drain at issue. Whirlpool also provided customer claims data revealing the service incident rate of freezer drain malfunctions. During this time the Parties further made initial disclosures, issued written discovery requests, and interviewed clients, client employees, and potential experts.

IV. THE SETTLEMENT NEGOTIATIONS AND THE SETTLEMENT AGREEMENT

The proposed settlement is the product of arms-length negotiations spanning several months. After the Court's ruling granting in large part Whirlpool's motion to dismiss, the parties informally discussed settlement and agreed to schedule a formal mediation. In February 2017, the parties mediated for a full day with retired California Court of Appeals Justice Howard B. Weiner. That session resulted in a mutually agreeable framework for settlement that the Parties refined over the next seven weeks and memorialized in a formal Term Sheet dated March 22, 2017.

After agreeing on the class benefits and other substantive terms of the proposed class settlement, Whirlpool and Class Counsel negotiated the issue of Class Counsel's attorney fees and costs for over four months. In August 2017, they mediated attorney fees with retired California Court of Appeals Justice Edward J. Wallin, which resulted in a resolution. The Parties ultimately agreed that Whirlpool would not oppose Class Counsel's request that the Court award Class Counsel attorney fees and costs in an amount not to exceed $1,850,000, and a service award to Ms. Corzine of $5,000.

On May 7, 2018, the Parties executed a comprehensive Settlement Agreement. The Settlement Agreement provides for a nationwide settlement. (Settlement Agreement ¶ I.KK.) Specifically, the Parties have agreed that Whirlpool will compensate each Class Member who timely submits a valid, complete Claim Form, with specified supporting documentation, all as defined and set forth in the Settlement Agreement. The Settlement Agreement provides for three types of benefits.

First, All Class Members who (a) within five years of acquiring their Class Refrigerator experienced a build-up of ice on the floor of the freezer due to a freezer drain obstruction that may have resulted in water leaking from the freezer door (a "Freezing Event"), (b) repaired that problem by replacing the freezer drain tube with a "P-Trap" replacement part within five years of acquiring the Class Refrigerator, and (c) paid money out of pocket for that repair, are eligible to receive a cash reimbursement payment, up to $150, for the amount of out-of-pocket qualifying repair expenses the Class Member can establish through documentary proof as follows: (1) one hundred percent of parts and labor in years one through three of ownership, (2) one hundred percent of parts and sixty-five percent of labor in year four of ownership, and (3) one hundred percent of parts and fifty-percent of labor in year five of ownership. (*Id.* ¶ IV.B.)

Second, members of the Settlement Class who experience a Freezing Event after the Settlement Notice Date and within five years of purchase are eligible for free or discounted repair service subject to the above-described limitations applicable to out-of-pocket expense reimbursement claims. (*Id.* ¶ IV.C.)[4]

Finally, Whirlpool has agreed to keep in place and not alter through December 31, 2021, its special service project concerning Freezing Events, which provides a free replacement P-trap drain tube part to persons who experience a Freezing Event as reported to Whirlpool by a Service Technician. (*Id.* ¶ IV.A.)

To facilitate the claims process, Whirlpool will provide to the Settlement Administrator model and serial number data from its warranty database that the Settlement Administrator will pre-

[4] Although Whirlpool ceased manufacturing units with the duckbill drain in 2013, it is possible that some of those units remained in inventory with Whirlpool and were later sold by retailers selling Whirlpool appliances

populate into the online claim form, taking care of these proof requirements for many Class Members.

To qualify for any past Freezing Event benefit, Class Members must complete, sign, and submit a claim form online or by U.S. Mail, along with any necessary documentary proof, no later than 90 days after the Preliminary Approval Order. (*Id.* ¶ IV.B.5.) Class Members who claim the future Freezing Event benefit must do so within 90 days of experiencing the Freezing Event. (*Id.* ¶ - IV.C.1.a) The settlement benefits to be provided to Class Members who submit a valid claim are in addition to any rights or remedies the Class Members may have under their written warranties or service contracts, if any.

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.* ¶ V.B.)

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 freezer drain tube problems with the Class Refrigerators, excluding claims for personal injury, emotional distress, and damage to property other than the Class Refrigerator itself. (*Id.* ¶¶ IX.A & B.) Also, upon entry of the order granting final approval to the settlement, the Lawsuit 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.* ¶ IX.C.)

ARGUMENT

V. THE STANDARDS FOR PRELIMINARY APPROVAL OF THE SETTLEMENT

Federal Rule of Civil Procedure 23(e) requires court approval of any proposed class-action settlement. Preliminary court approval is the first step before finding a settlement fair, reasonable, and adequate:

> Review of a proposed class action settlement generally involves two hearings. First, counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. In some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties.
>
> If the case is presented for both class certification and settlement approval, the

> certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b). . . . The judge must make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.
>
> . . . .
>
> At the fairness hearing, the proponents of the settlement must show that the proposed settlement is "fair, reasonable, and adequate." The parties may present witnesses, experts, and affidavits or declarations. Objectors and class members may also appear and testify.

Manual for Complex Litigation (Fourth) §§ 21.632 at 430, 21.634 at 431 (Fed. Jud. Ctr. 2015) (internal citations and footnotes omitted); *see also O'Connor v. Uber Technologies, Inc.*, 201 F. Supp. 3d 1110, 1121-22 (N.D. Cal. 2016) (approval of class action settlements is a two-step process: "the Court first determines whether class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted.")

At the preliminary approval stage, a district court need only determine that the proposed settlement does not contain obvious deficiencies and is within the "range of reasonableness," such that dissemination of notice to the class and scheduling of a fairness hearing are worthwhile and appropriate. *See High-Tech Emp. Antitrust Litig.*, No. 11-CV-2509-LHK, 2014 WL 3917126, at *3 (N.D. Cal. Aug. 8, 2014) (courts look "to whether the settlement falls within the range of possible approval or within the range of reasonableness.") (internal quotations omitted); *Miller v. CEVA Logistics USA, Inc.*, No. 2:13-cv-01321-TLN-CKD, 2015 WL 729638, at *5 (E.D. Cal. Feb. 19, 2015) ("The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the range of reasonableness."). "In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is plaintiffs' expected recovery balanced against the value of the settlement offer." *Cotter v. Lyft, Inc.*, No. 13–cv–4065–VC, 176 F. Supp. 3d 930, 935, 2016 WL 1394236, at *4 (N.D. Cal. Apr. 7, 2016); *see also* Procedural Guidance for Class Action Settlements, UNITED STATES DISTRICT COURT—NORTHERN DISTRICT OF CALIFORNIA, http://cand.uscourts.gov/ClassActionSettlementGuidance (last visited Nov. 9, 2017).

The Ninth Circuit has a strong policy of promoting and encouraging settlements between litigating parties, and this is true for class actions. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."); *Eisen v. Porsche Cars N. Am., Inc.*, No. 2:11-CV-09405-CAS-FFMx, 2014 WL 439006, at *3 (C.D. Cal. Jan. 30, 2014) ("'[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.' This general rule applies with special force to class actions." (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004))).

As the Ninth Circuit has explained, "[s]ettlement is the offspring of compromise; the question we address 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); *see also Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) ("The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982))).

Moreover, when the settlement is the product of arm's-length negotiations conducted by capable and experienced counsel, it is entitled to a presumption of fairness. *In re Toys "R" Us-Del, Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 450 (C.D. Cal. 2014) ("the settlement is a product of informed, arm's-length negotiations, and is therefore entitled to a presumption of fairness."); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair.").

VI. THE PROPOSED SETTLEMENT SATISFIES THE PREREQUISITES FOR CERTIFICATION OF A SETTLEMENT CLASS

The parties have agreed to a resolution that provides for the settlement on a nationwide basis of the claims that actually were, and could have been, brought in the litigations. 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 following Settlement Class:

> All persons in the United States and its territories who (a) purchased a new Class Refrigerator, (b) acquired a Class Refrigerator as part of the purchase or remodel of a home, or (c) received as a gift, from a donor meeting those requirements, a new Class Refrigerator not used by the donor or by anyone else after the donor purchased the Class Refrigerator and before the donor gave the Class Refrigerator to the Settlement Class Member. Excluded from the Settlement Class are (a) officers, directors, and employees of Whirlpool or its parents or subsidiaries, (b) insurers of Settlement Class Members, (c) subrogees or all entities claiming to be subrogated to the rights of a Class Refrigerator purchaser, a Class Refrigerator owner, or a Settlement Class Member, (d) issuers or providers of extended warranties or service contracts for Class Refrigerators, and (e) any judicial officer for the Action.

(Settlement Agreement ¶ KK.)[5] The Settlement Agreement defines the Class Refrigerators as all Whirlpool-manufactured refrigerators with bottom freezers manufactured between 2009 and 2013 with a model number identified on Exhibit 2 to the Settlement Agreement. (*Id.* ¶ I.)

The Parties stipulate that named Plaintiff Julie Corzine shall be the named representative of the Settlement Class. (*Id.* ¶ III.A.3.) The Parties also stipulate that Plaintiffs' counsel Jaclyn Anderson and Graham B. LippSmith of Kasdan LippSmith Weber Turner LLP, shall serve as Class Counsel. (*Id.* ¶ I.H.)

The Federal Rules of Civil Procedure allow a case to be certified as a class action only if the action satisfies all four requirements of Rule 23(a) and at least one of the three categories in Rule 23(b). As described below, a nationwide class could not properly be certified as a class action for trial purposes because, among other things, varying state laws would make instructing the jury unmanageable. Because the parties are requesting certification of a settlement class, rather than a trial class, the proposed settlement means that there would not be a nationwide class trial and that the many case-management problems that would plague a nationwide class trial would not arise in this action. Thus, it is appropriate for this Court to find that the Rule 23 requirements have been met for settlement purposes.

[5] The parties have agreed that if for any reason the Settlement Agreement should fail to become effective, Defendant's stipulation to certification of the nationwide Settlement Class shall be null and void, and the parties shall return to their respective positions in the Lawsuit as those positions existed immediately before the execution of the Settlement Agreement. (*Id.* ¶ II.)

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997), the Supreme Court ruled that a district court may consider the settlement in determining whether Rule 23 requirements are satisfied: "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial." *Id.* at 620. Here, the proposed settlement eliminates the problems of manageability and individualized issues that would have existed if a nationwide class had been certified for trial, and the proposed Settlement Class satisfies the Rule 23(a) and 23(b) requirements for settlement purposes.

A. The Settlement Class is so Numerous that Joinder of All Members is Impracticable

The first prerequisite to certification is that the class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Here, the Settlement Class consists of hundreds of thousands of Class Refrigerator purchasers, which easily satisfies the "numerosity" required by Rule 23(a)(1). *See, e.g., Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 473 (C.D. Cal. 2012) ("A proposed class of at least forty members presumptively satisfies the numerosity requirement.").

B. There are Common Questions of Law and Fact for Settlement Purposes

The second certification prerequisite is that there are questions of law or fact common to the Class. Fed. R. Civ. P. 23(a)(2). For purposes of effecting the Settlement, Defendant stipulates to the existence of questions of law and fact common to all Class Members based on Whirlpool's manufacture of the Class Refrigerators, including (1) whether the Class Refrigerators contain one or more defects that have caused Freezing Events; and (2) whether Plaintiff and Class Members can recover damages based on those alleged defects.

C. The Typicality Requirement is Satisfied for Settlement Purposes

The third certification prerequisite is that the plaintiff's claims be typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). For purposes of the Settlement, Defendant stipulates that Plaintiffs' claims are typical of the claims of the Class. As a Class Refrigerator owner, Plaintiff is a member of the Class and alleges that she has been damaged by the same conduct that she claims has damaged other Class Members. Moreover, the claims of the named Plaintiff and other Class Members are

based on the same theories: breach of implied warranty of merchantability and violations of the UCL and CLRA. For settlement purposes, Plaintiff's claims are not in conflict with the Class claims.

D. Plaintiff Will Fairly and Adequately Protect the Settlement Class's Interests

The fourth certification prerequisite is that Plaintiff and her attorneys be able to fairly and adequately represent the interests of the Class. Fed. R. Civ. P. 23(a)(4). For purposes of Settlement, Defendant stipulates that Plaintiff will fairly, fully, and adequately protect the interests of the Class and that Plaintiff and Class Counsel have no interests that conflict with, or are adverse to, those of the Settlement Class. Further, Defendant agrees that Class Counsel are experienced in prosecuting class actions.

E. Questions of Law or Fact Common to the Class Predominate Over Individual Questions for Settlement Purposes

Plaintiff also must prove that questions common to members of the Settlement Class predominate over individual questions and that a class settlement is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). For purposes of the Settlement, Defendant stipulates that common questions predominate based on Defendant's manufacture and sale of the Class Refrigerators and that a class settlement is superior to continued litigation.

Even though the warranty laws may vary from state to state, this does not defeat a finding of predominance among a nationwide settlement class. *See Amchem Prods.*, 521 U.S. at 622-23. When a court is evaluating a proposed class settlement, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. Here, the Class is sufficiently cohesive based on purchase of the Class Refrigerators.

Although the result would be different in a contested trial class certification motion, Rule 23(b)(3)'s requirements are met for purposes of settling this class action.

VII. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

As noted above, the district court's fairness inquiry is a two-step process: (1) a preliminary evaluation of the fairness of the settlement; and (2) a formal fairness hearing where arguments for and against settlement are made. In determining whether a proposed class settlement is fair,

reasonable, and adequate, courts consider the following factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1026). Not all of these factors apply to every settlement. "Under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval." *Nat'l Rural Telecomms.*, 221 F.R.D. at 525-26. The "relative degree of importance to be attached to any particular factor will depend on the unique circumstances of each case." *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, No. EDCV 08-482-VAP(OPx), 2010 WL 2486346, at *5 (C.D. Cal. June 15, 2010) (quoting *Officers for Justice*, 688 F.2d at 625).

A. The Settlement is Fair, Reasonable, and Adequate in Light of the Merits, Risks, Complexity, and Expense of Continued Litigation

Judging the reasonableness of a settlement requires a district court to balance "'the strength of the plaintiffs' case on the merits . . . against the amount offered in the settlement.'" *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 526 (quoting 5 Moore Federal Practice, § 23.85[2][b] (Matthew Bender 3d. ed.). This assessment, however, "is not to be turned into a trial or rehearsal for trial on the merits." *Officers for Justice*, 688 F.2d at 625. To the contrary, the court's consideration of the likelihood of success on the merits is "nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Id.* (citation and internal quotation marks omitted).

Here, Plaintiff and the putative class face substantial risks and costs of continued litigation. Plaintiff all but lost this case on the pleadings. Despite three chances to amend the complaint, the Court dismissed most of Plaintiff's claims and conditioned the surviving claims (breach of implied warranty of merchantability and violations of California's UCL and CLRA) on proof that Whirlpool fraudulently concealed the minor quality issue alleged in the complaint. Plaintiff's case was thus reduced to the contention that Whirlpool engaged in a widespread scheme to fraudulently conceal the fact that some of its refrigerator-freezers might someday experience ice build-up on the floor of

their freezer compartments, and that a very small number of that subset might also experience minor leaks. Moreover, under California law on concealment claims like hers—as opposed to affirmative misrepresentation claims—Ms. Corzine must prove that the alleged drain tube defect created an "unreasonable safety hazard." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1143 (9th Cir. 2012).[6] In other words, to proceed past summary judgment and to prevail at trial, Ms. Corzine is faced with submitting credible evidence that (1) Whirlpool acted with fraudulent intent, and (2) the alleged defect posed an unreasonable safety hazard. That she cannot do.

First, if litigation continues, Plaintiff and the putative class will be unable to identify a common defect in the Class Refrigerators that poses an unreasonable safety hazard. Only a small percentage of Class Refrigerators ever experienced a Freezing Event. Only a small fraction of Freezing Events ever resulted in any water dripping onto the floor. Freezing Events have numerous potential causes and contributors, including one-off manufacturing issues like a dropped screw or misplaced bits of packing material. Consumers also sometimes contribute to Freezing Events by allowing large quantities of spilled loose or goopy food or loose bits of food packaging to remain in the freezer where it can be swept into the freezer drain. In the rare case of a Freezer Event leading to water dripping onto the floor, resulting accidents or physical injury is very rare, in part because the water drips underneath the refrigerator-freezer, consumers can see the water and avoid it, and consumers know that water on a kitchen floor is always a possibility (e.g., dropped ice cube, spilled drink, water sloshed from sink, floor recently mopped). Plaintiff herself claims that water leaked from her Class Refrigerator to the floor five times but no one in her family ever slipped, and Plaintiff was not concerned enough to contact Whirlpool or any servicer the first four times the leak occurred.

Further, in the Second Amended Complaint, Plaintiff alleges that Class Refrigerators may alternatively present a safety hazard because of the risk of electrical shock. The discovery the parties exchanged shows that, before starting production, Whirlpool extensively tested the Class Refrigerators for electrical risks and found all were appropriately mitigated. Still further, Plaintiff

[6] Although more recent California Courts of Appeal decisions suggest a duty to disclose may also arise where the alleged omission concerns a "central functional defect," that is not the case here, where there is no allegation that the central functionality of the Class Refrigerators (i.e., their ability to keep food cold) is impacted by the alleged drain issues giving rise to Plaintiff's claims. *See Hodson v. Mars, Inc.*, 891 F.3d 857, 864-65 (9th Cir. 2018).

faces a substantial uphill battle in achieving certification of a single-state subclass, much less a nationwide class, for trial. Absent the settlement claims process procedures, a wide range of thorny individualized issues, including the materiality of the alleged omissions to putative class members' purchase decisions, the timing of the manifestation of alleged defects relative to warranty coverage, and the amount of any resulting damages, would predominate. Any class trial would inevitably devolve into a series of thousands of individual mini-trials, defeating the superiority of a class approach.

The complexities and uncertainty of this type of litigation in general, and of this case in particular, dictate that Plaintiff compromises in a way that will provide her and the Class with some concrete benefits. In addition, there is substantial benefit to obtaining some relief now. Extensive future litigation, including pretrial, trial, and appellate proceedings would require additional years and massive resources of both the Parties and the Court. The proposed settlement provides immediate compensation to the small minority of Class Members who experienced a Freezing Event who have not already received full compensation from Whirlpool.

The benefits of the proposed settlement go well beyond those currently available to class members, providing reimbursement for 100% parts and labor for qualifying repairs performed in the first three years of ownership, 100% parts and 65% labor in year four, and 100% parts and 50% labor in year five. In comparison, the written warranty provided free labor and parts for one year and the Special Project Whirlpool voluntarily announced in November 2013 provided free parts and labor for two years (but did not reach backward, as the proposed settlement does, to offer reimbursement for out-of-warranty repairs performed prior to November 2013). Analysis of claims submitted under Whirlpool's special project suggest the sliding scale of relief in the proposed settlement will provide reimbursement for repair labor costs to 94% of consumers who experience an out-of-warranty Freezing Event.[7] In addition, the proposed settlement ensures that Whirlpool's Special Project (which offers a free p-trap drain part to consumers who experience a Freezing Event,

[7] Consumers who do not qualify to receive any reimbursement for repair labor under the proposed settlement may still receive a free drain replacement part. In addition to the obstacles faced by all class members, a consumer whose refrigerator-freezer did not experience a Freezing Event in the first five years would almost certainly be unable to show the product was "unfit for its ordinary purpose" as required to establish breach of implied warranty of merchantability.

regardless of product age) stays in effect until at least December 31, 2021, at which time all Class Refrigerators will be at least eight years old.

Further, the settlement will relieve the parties and the Court of the costs of continuing to litigate this complex case. This factor supports final settlement approval. *See, e.g.*, *Eisen*, 2014 WL 439006, at *4 ("Settlement avoids all possible risks of continued litigation, including the possibility that plaintiffs would not succeed at trial."); *Ritchie v. Van Ru Credit Corp.*, No. CV-12-1714-PHX-SMM, 2014 WL 956131, at *4 (D. Ariz. Mar. 12, 2014) ("Further litigation would not only be contentious, but would likely result in appeals. Settlement curtails further expense, as well as shortens and simplifies the proceedings."); *Gripenstraw v. Blazin' Wings, Inc.*, No. 1:12-CV-00233-AWE-SMS, 2013 WL 6798926, at *12 (E.D. Cal. Dec. 20, 2013) (same).

Given the narrow claims left to Plaintiff and the necessity she prove fraud, given the substantial risk of a verdict adverse to Plaintiff and the Class, and given the inability of Plaintiff to achieve certification of a single-state or nationwide class for trial, the proposed settlement is objectively fair, reasonable, and adequate. The Court should approve it.

B. The Parties Reached the Settlement Through Good-Faith Bargaining

An important factor relevant to the determination whether the parties have proved the presumptive fairness of a proposed class settlement is whether the settlement was reached through good-faith bargaining among the parties. *See Eisen*, 2014 WL 439006, at *5 ("The Court places a great deal of reliance on the decision by sophisticated parties to agree to settle their dispute."); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *9 (C.D. Cal. Jun. 10, 2005) ("A presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery.")(internal quotations omitted) This settlement was reached after substantial good-faith bargaining.

On March 22, 2017, the Parties agreed on the essential terms of the class settlement, other than the reasonable amount of Class Counsel fees and costs to be requested, and executed a memorandum of understanding regarding the class remedy. Over the next four months, the parties negotiated the reasonable amount of attorney fees and costs to be paid by Whirlpool to Class Counsel, and the incentive awards to Plaintiff, to be requested by Class Counsel.

On August 1, 2017, the Parties reached an agreement on the reasonable amount of attorney fees and costs to be requested by Class Counsel, and the parties executed a second memorandum of understanding containing those terms. The parties agreed that Class Counsel would seek, and Defendant would not oppose, an award of attorney fees and costs not to exceed $1,850,000. The Parties also agreed that any order relating to such awards shall not operate to terminate or cancel the Settlement Agreement or affect the validity or finality of any order and judgment entered by this Court that grants final approval to the settlement.

Neither the substantive terms of the proposed settlement nor its provisions regarding attorney fees and costs to be paid to Class Counsel indicate that the Settlement Agreement is the product of fraud, collusion, or Plaintiff's or Class Counsel's abandonment of the Class Members' interests.

The fact that the proposed settlement is the product of many months of good-faith bargaining, including two formal mediations in front of retired California Justices, favors preliminary approval of the proposed settlement.

C. Investigation and Discovery Have Been Sufficient to Allow the Parties to Exercise Sound Judgment in Evaluating the Settlement

Although discovery was not complete at the time of the settlement, the Parties had ample information to make an informed decision regarding settlement. The extensive motion to dismiss briefing clarified and narrowed the legal issues. Further, Class Counsel received and analyzed key Whirlpool design documents and service incident rate data. And Whirlpool knows the purchase, repair, and service history of the Plaintiff's Class Refrigerator. The judgment of the Parties and their respective counsel that the proposed settlement is fair, reasonable, and adequate is entitled to deference by the Court, particularly at the preliminary approval stage. *See Larsen v. Trader Joe's Co.*, No. 11-cv-05188-WHO, 2014 WL 3404531, at *5 (N.D. Cal. July 11, 2014) (opinion of counsel should be given considerable weight due to familiarity with the case and prior experience); *see also Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) ("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.").

D. The Settlement Agreement Provides for a Formal Fairness Hearing

The Settlement Agreement provides for a formal Fairness Hearing. (Settlement Agreement ¶ VI.C.) In addition, the Settlement Agreement provides for mailed notice, emailed notice, print publication, and Internet notice of the hearing to the Settlement Class. (*Id.* ¶ V.) At the Fairness Hearing, the Court will consider, among other things, whether to grant final approval of the certification of the Settlement Class and the terms of the Settlement Agreement, whether to grant Class Counsel's request for attorney fees and costs and for service awards to the Class Representatives, as well as any objections to the settlement or Class Counsel's fee request. (*See id.* ¶¶ VI.C.) These provisions of the proposed settlement and Preliminary Approval Order satisfy "[t]he essence of procedural due process . . . that the parties be given notice and opportunity for a hearing." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984).

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

Federal Rule of Civil Procedure 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 practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(e)(1)(B). The parties jointly propose a notice plan that provides for the "best notice practicable under the circumstances." *See* Fed. R. Civ. P. 23(c)(2)(B).

A. Mailed and Emailed Settlement Notice

The parties have submitted a proposed Mailed Settlement Notice and Emailed Settlement Notice and a plan for their dissemination by direct mail and by email to the members of the Settlement Class whose physical and email addresses are currently known to Whirlpool. (*See* Settlement Agreement ¶ VI.B.) Whirlpool possesses mailing addresses for approximately 28.4% (484,327) of the approximately 1,700,000 Class Members, and has delivered those records to the Settlement Administrator. Whirlpool also maintains in their databases email addresses for approximately 29.1% (494,709) of the Settlement Class. The parties will use Whirlpool's customer databases to send, by first-class United States Mail, to every member of the Settlement Class whose address is known to Whirlpool, a copy of the Mailed Settlement Notice. (*Id.* ¶ VI.B.1.) The parties

will send by email, to every Class Member whose email address is known to Whirlpool, a copy of the Emailed Settlement Notice. (*Id.* ¶ VI.B.2.) Between the mailed and emailed notices, the direct notice campaign will reach approximately 60% of the units included in the Settlement.

Rule 23(c)(2)(B) enumerates six mandatory components of any initial class notice:

- the nature of the action;
- the definition of the class certified;
- the class claims, issues, or defenses;
- that a class member may enter an appearance through counsel if the member so desires;
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

Due process also requires a mailed settlement notice to contain a description of class members' rights in the litigation, and notice that class members have an opportunity to be heard and to participate in the litigation, whether in person or through counsel, and an opportunity to present objections to the settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The parties' proposed Mailed Settlement Notice meets each of the requirements enumerated in Rule 23(c)(2)(B), as well as the additional due process requirements. (*See* Settlement Agreement Ex. 7.)

The Mailed Settlement Notice fairly, accurately, and reasonably informs members of the Settlement Class of the nature of the litigation and Class Members' rights in it, how to obtain additional information regarding this lawsuit and the Settlement Agreement, how to challenge or exclude themselves from the Settlement, if they wish to do so, how to obtain and complete the Claim Form, and the time and place of the Fairness Hearing. (*Compare* Settlement Agreement Ex. 7 *with* Manual for Complex Litigation (Fourth) §§ 21.633 at 321-22, 21.722 at 338 (describing requirements of settlement notices).) Specifically, the Mailed Settlement Notice provides Class Members with the website of the Settlement Administrator and informs them that they can obtain additional information about the Settlement Agreement in the Frequently Asked Questions Form ("FAQ") and read a copy of the Settlement Agreement itself, posted on the website. The notice also

informs Class Members that they can complete an online Claim Form for compensation at the Settlement Administrator's website. As an alternate option, the Mailed Settlement Notice provides Class Members with a toll-free telephone number that they can call, and an address that they can write to, to request that hard copies of the same documents be mailed directly to them.

B. Print Publication, Social Media, and Internet Notice Campaign

The parties have agreed to publish the Publication Notice in a nationally circulated magazine, *People*. The Publication Notice fairly and reasonably provides to members of the Settlement Class: (1) appropriate information about the nature of the lawsuits and the essential terms of the Settlement Agreement; (2) appropriate information about how to obtain additional information regarding the settlement; (3) appropriate information about, and means for obtaining, the Claim Forms; (4) appropriate information about submitting a claim; and (5) appropriate information about how to challenge or exclude themselves from the settlement and how to appear in the lawsuits, if they wish to do so.

Further, the parties have agreed to conduct a social media campaign to promote the Settlement, including targeted banner advertisements on the Internet. The campaign is designed to achieve 84,816,000 unique internet impressions. The banner advertisements will direct potential Class Members to the Settlement Administrator's website, where they can read the FAQ, Settlement Agreement, Claim Form, and other documents.

Taken together, the Mailed Settlement Notice, the Emailed Settlement Notice, the Publication Notice, the FAQ, the Claim Forms, the plan for dissemination and publication of them, and the social media campaign satisfy the requirement of Rule 23 and the Due Process Clause that the Court provide to the Settlement Class the best notice practicable under the circumstances. *See, e.g.*, *Zimmer Paper Prods. Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985) ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause."). In fact, the Settlement Administrator has designed the notice campaign to reach approximately 70.1% of the Class Members an average of 2.96 times. (Decl. of Steven Weisbrot, Esq. ¶ 7, ECF No. 113-3.)

CONCLUSION

For all the foregoing reasons, the Court should grant the Parties' Joint Motion for Preliminary Approval of Class Settlement and enter the parties' proposed Order Granting Preliminary Approval to Class Action Settlement.

Dated: July 25, 2019

WHEELER TRIGG O'DONNELL LLP

By: *s/ Andrew M. Unthank*
Andrew M. Unthank (*pro hac vice)*

Attorneys for Defendant, Whirlpool Corporation

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on July 25, 2019, I electronically filed the foregoing DEFENDANT'S MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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