

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JAMES BODLEY, KYLE MATSON and	§	Case No. 1:18-CV-00594
RONALD MCCALLUM	§	
On behalf of themselves and all others	§	Hon. Paul L. Maloney
similarly situated,	§	
Plaintiffs,	§	SECOND AMENDED COMPLAINT
	§	CLASS ACTION
v.	§	
	§	
WHIRLPOOL CORPORATIONS AND	§	
DOES 1 through 10, inclusive,	§	JURY TRIAL DEMANDED
Defendants.	§	

TO THE HONORABLE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

COMES NOW, JAMES BODLEY, KYLE MATSON and RON MCCALLUM (“Plaintiffs”), on behalf of themselves and all others similarly situated, alleging as follows:

I. INTRODUCTION

1. This case was originally filed on September 19, 2017 in the United States District Court, Northern District of California Case No. 3:17-cv-05436. On November 06, 2017, Plaintiffs filed their First Amended Complaint for Damages and Class Action. Upon Motion of the Defendant, this case was subsequently transferred to United States District Court, Western District of Michigan Southern Division.

2. This case arises out of the manufacture and sale of KitchenAid brand dishwashers designed, manufactured and sold by Defendant Whirlpool Corporation (“Defendant” or “Whirlpool”) which are equipped with a defective upper rack assembly depicted in Exhibit A hereto, including but not limited to part numbers W10350375 and W10350376.

3. Defendant designed, manufactured, distributed and sold the dishwashers, including but not limited to model KUDS30FXSS5, from approximately 2011 to at least 2016, according to proof, to Plaintiffs and the Class.

4. Furthermore, Defendant designed, manufactured, distributed, marketed, sold or otherwise continues to distribute through the stream of commerce replacement upper rack assembly kits with the same or similarly defective parts for use with part numbers W10350375 and W10350376, from approximately 2011 through the date of the original filing of this Complaint, according to proof, to Plaintiffs and the Class.

5. At the time of sale, the dishwashers contained a defect in the upper rack assembly. The upper rack assemblies in the dishwashers are defective and fail as the heat generated by the dishwasher causes the plastic components to become brittle and break, which in turn causes the top rack to suddenly and unexpectedly collapse.

6. The failure of the upper rack assembly results in property damage and creates an unreasonable risk of personal injury because the upper rack assembly fails without warning causing dishware and glassware to shatter and break.

7. The dishwasher will not operate without a functional upper rack assembly. Moreover, the component part cannot be repaired and must be replaced, an expense Whirlpool refuses to pay and must be incurred by Plaintiffs and the Class as alleged herein.

8. Defendant has known that the upper rack assembly was defective and not fit for its intended purpose as alleged herein since shortly after the same were first sold, at least 2011. Nevertheless, Defendant actively concealed and failed to disclose the defect to Plaintiffs and the Class at the time of purchase continued selling the dishwashers containing the defective upper rack

assembly. On information and belief, Whirlpool continued selling the dishwashers containing the defective upper rack assembly until approximately 2016, according to proof.

9. Defendant had a duty to disclose the defect in the dishwashers to all prospective purchasers particularly because of the unreasonable risk of serious physical injury posed by the defect in the upper rack assembly. Had Plaintiffs and the Class been aware of the defect, they would not have purchased a KitchenAid dishwasher but instead would have purchased a dishwasher manufactured by others.

10. Despite having notice of the defect, Defendant has not recalled the dishwashers to repair the defect and when asked, has refused to pay for the parts and labor associated with removing and replacing the defective rack assembly.

11. Indeed, rather than disclose the defective upper rack assembly, Defendant capitalized on the continued failures of the designated parts and profited from the sale of “replacement” components possessing the same defect in materials and workmanship. Had Plaintiffs and the Class been aware that the purchase of the “replacement” components failed to remedy the defect, they would not have purchased same.

12. Because of the defect in the dishwashers, Plaintiffs and members of the Class have suffered actual damages.

13. Plaintiffs seek recovery on behalf of themselves and all persons who purchased the dishwashers or properties in which the dishwashers were installed (the “Class”) for breach of express and implied warranties, fraudulent concealment, violation of the provisions of the California consumer protection and unfair business practice statutes, and for violation of the provisions of the Texas Deceptive Trade Practices Act.

II. PARTIES

14. Plaintiff James Bodley (“Bodley”) is a resident of Dublin, California, County of Alameda. On or about November 6, 2012, Bodley became the first purchaser of a newly constructed home in which a KitchenAid dishwasher bearing model number KUDS30FXSS5 was installed.

15. Plaintiff Kyle Matson (“Matson”) is a resident of Martinez, California, County of Contra Costa. On or about November 22, 2013, Matson purchased a home in which a KitchenAid dishwasher bearing model number KUDS30FXSS5 was installed.

16. Plaintiff Ronald McCallum (“McCallum”) is a resident of Dallas, Texas, County of Dallas. On or about September 8, 2011, McCallum purchased a home originally constructed in 1965. McCallum remodeled and updated the home, including the purchase of two of the subject KitchenAid dishwashers, which were installed by his general contractor.

17. Defendant Whirlpool Corporation is a Delaware corporation with its principal place of business in Benton Harbor, Michigan. Whirlpool is the number one major appliance manufacturer in the world. Whirlpool sells appliances to its trade customers under a variety of brand names for re-sale to consumers including, but not limited to, Kenmore, KitchenAid and Whirlpool. At all times relevant herein, Whirlpool distributed, advertised, marketed, manufactured, warranted, and sold KitchenAid dishwashers equipped with a defective upper rack assembly.

18. Plaintiffs are informed and believe and thereupon allege that Whirlpool has engaged in substantial business within California and Texas over the past two decades, including specifically the sale the dishwashers in question. Whirlpool has distribution centers and sales offices within California and Texas. Plaintiffs further are informed and believed that the volume

of sales by Whirlpool in these two States is the greatest compared to any other state within the United States.¹ Plaintiffs further allege that a choice of law decision at the pleading stage is premature prior to discovery and a development of the factual record.

19. Plaintiffs are unaware of the true names and capacities of the Defendants sued herein as “DOES 1 through 10,” and therefore sue these Defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when they are ascertained. Plaintiffs are informed and believe that each of the fictitiously named Defendants is responsible in some manner for the occurrences herein alleged and that the damages suffered by Plaintiffs and the class were proximately caused by their conduct.

20. Plaintiffs are informed and believe that all Defendants, including the fictitious Doe Defendants 1 through 10, were at all relevant times acting as actual or ostensible agents, conspirators, partners, joint venturers or employees of all other Defendants and that all acts alleged herein occurred within the course and scope of that agency, employment, partnership, or enterprise, and with the express or implied permission, knowledge, consent, authorization and ratification of their co-Defendants.

III. JURISDICTION AND VENUE

21. This Court has jurisdiction over this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), because this is a class action in which: (1) there are at least 100 class members in the proposed class; (2) the combined claims of the proposed class members exceed \$5,000,000 exclusive of interests and costs; and (3) there is minimal diversity as Plaintiffs and

¹ California is the most populous state in the United States by several percentage points, representing 12% of the total population; Texas is ranked second, representing 8.69% of the total population. US Census Results 2017. It is believed that discovery will support a commiserate percentages of sales.

certain members of the proposed class are citizens of California and Texas, and Defendant is a citizen of other states including Delaware and Michigan.

22. Personal jurisdiction over the Defendant is established because Defendant purposefully availed itself of the privilege of conducting business activities within the State of California and the State of Texas by advertising, selling, and warranting the dishwashers to Plaintiffs and the proposed class, and maintained systematic and continuous business contacts with the State of California and the State of Texas. As such, this matter was originally filed in California pursuant to traditional notions of fair play and substantial justice.

23. Venue was proper in the originally pleaded District pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events, misrepresentations and/or omissions giving rise to Plaintiffs' claims alleged herein occurred in the subject counties.

24. Upon motion by and at the request of Defendant, this matter was transferred to the Western Division of Michigan, and thereafter reassigned pursuant to W.D. Mich. LCivR 3.3.1(d)(iii)(B).

IV. FACTUAL ALLEGATIONS

A. The Latent Defect in the Dishwashers

25. The dishwashers designed, manufactured, marketed, and sold by Defendant contain defective rack assemblies that fail and cause the dishwasher to be substantially inoperable.

26. The dishwashers utilize plastic parts in the top rack slide mechanism. These parts prematurely fail without warning because the plastic hooks that retain the wheel to the rack break. Once these hooks break, it allows the wheel to detach from the wheel hub causing the rack to fall. The loaded top rack falls onto the open door or lower rack, causing dishware and glassware to shatter and break, which in turn causes property damage and exposing consumers to an

unreasonable risk of personal injury. The design of the rack assembly cannot withstand normal or intended use. Owners of the dishwashers cannot and do not cause the rack assembly failures nor can they prevent them.

27. Because of the defect in the rack assemblies, all KitchenAid dishwashers relevant to this litigation have upper rack assemblies that have failed or will fail before the end of their expected useful life.

28. The defect in the dishwasher is latent and not discoverable until the upper rack assembly fails, at which point the dishwasher is no longer operable and remains substantially inoperable until the defective rack assembly is replaced.

29. Plaintiffs are informed and believe that the dishwashers were manufactured and sold between 2011, according to proof.

30. Plaintiffs are informed and believe that replacement upper rack assembly kits containing plastic adjusters were manufactured and sold between 2011 to the present, according to proof.

31. Notwithstanding their knowledge of the defect as alleged herein, Defendant continued the sale of the dishwashers and adjuster service kits containing plastic adjusters without disclosing the defect or safety risk to consumers. Had Defendant disclosed the known facts Plaintiffs and the proposed Class would not have purchased the dishwashers or would have requested that they be replaced in homes purchased by Plaintiffs and the Class.

32. Plaintiffs were not aware of the defect in their dishwashers until the upper rack assemblies suddenly and unexpectedly failed. Plaintiffs further were not aware that the replacement upper rack adjuster kit involved the same defect.

B. Cost and Installation of Repair Assembly

33. When the upper rack assembly fails, Plaintiffs and members of the Class are required to purchase replacement rack assemblies at a cost of \$35-\$50 plus labor costs associated with installation of the rack assemblies of approximately \$100-\$150.

34. Defendant could have avoided damaging Plaintiffs and the proposed Class by disclosing the nature of the defect and paying for the replacement of the defective rack assembly with a redesigned rack assembly. Defendant continues to refuse to do so as alleged herein. Instead, Defendant capitalizes on the defect by marketing and selling comparable defective replacement assemblies and refusing to pay owners for parts and labor costs.

35. Because of the defect, Plaintiffs and the putative class have experienced, or are substantially certain to experience, premature failure of their dishwashers and have incurred damages as alleged herein.

C. Defendant's Knowledge and Suppression of the Defect

Plaintiffs are informed and believe that:

36. As early as 2011, numerous customers reported failures of the dishwashers to Defendant through its KitchenAid Customer Service Center. Failures were also reported to Defendant's distributors and retailers, who in turn reported them to Defendant.

37. Between 2011 and 2016, the reports of failures went to Defendant's engineers who inspected, researched, analyzed, tested and prepared reports concluding that the upper rack was defective and unfit for its intended purpose.

38. Defendant's engineers opined that the design was inadequate and there was no way to repair the defect.

39. The engineers recommended that the upper rack assembly be replaced with a new design. During or about 2016, according to proof, the defective plastic upper rack assembly was abandoned and replaced with a stainless-steel design in new production dishwashers.²

40. Although Defendant knew that the latent defect in the upper rack assembly posed an unreasonable safety risk and rendered the dishwasher unmerchantable, Whirlpool did not disclose the defect to its distributors, sellers, or others in the chain of distribution, including the end user. Instead, Whirlpool actively concealed the defect and continued to sell the dishwashers.

41. At all times relevant hereto, Defendant was under a continuous duty to disclose to distributors, sellers, installers and end users: (1) the defect in the upper rack assembly, (2) the safety issues related thereto, including the risk of property damage and physical injury; and (3) the existence of numerous reports of the failures of the upper rack assembly, including reports of property damage.

42. Whirlpool had this duty because the facts it failed to disclose: (1) are contrary to representations made by Defendant that the dishwashers were manufactured with the highest quality, provided premium performance, were dependable and reliable; (2) relate to a safety issue; (3) were material facts in the exclusive knowledge of Whirlpool; (4) were material and actively concealed by Whirlpool; and (5) constituted information omitted from statements made by Whirlpool concerning the safety and reliability of the dishwashers.

43. Whirlpool continues to deny that there is a defect thereby actively concealing and denying the defect, notwithstanding the fact that it abandoned the use of the defective plastic rack assembly and replaced it with a metal assembly.

² Whirlpool continued to sell the same part known to be defective to unsuspecting members of the Class. The replacement rack assemblies were offered for sale by Whirlpool online and at retail stores.

D. Defendant's Misrepresentations and Omissions Concerning the Dishwashers

44. Defendant issued a written warranty (the "Warranty") for the KitchenAid dishwasher.

45. The Warranty provides that: "For one year from the date of purchase, when this major appliance is operated and maintained according to instructions attached to or furnished with the product, KitchenAid brand of Whirlpool Corporation or Whirlpool Canada LP (hereafter "KitchenAid") will pay for factory specified parts and repair labor to correct defects in materials and workmanship that existed when this major appliance was purchased." (Emphasis added.) A copy of the Warranty is attached hereto as Exhibit B.

46. The Warranty further provides, "In the second through fifth year from the date of purchase, when this major appliance is operated and maintained according to instructions attached to or furnished with the product, KitchenAid will pay for factory specified parts for the following components to correct defects in materials or workmanship that existed when this major appliance was purchased: nylon dish racks and electrical controls."

47. The Warranty can be found on the KitchenAid website and in the User Manual for the dishwasher. Both documents have been displayed on the KitchenAid and Sears websites from approximately 2011 to the present.

48. Plaintiffs have provided Defendant with notice of breach of the Warranty and a reasonable opportunity to cure the breach. Defendant has failed to remedy the breach or its obligations to Plaintiffs and the proposed Class under the Warranty.

49. The Warranty purports to limit the rights and remedies of purchasers of the dishwashers as follows:

- a. Defendant purports to disclaim any implied warranties, including the warranties of merchantability and fitness for a particular use;

- b. Defendant purports to disclaim responsibility for any “incidental, consequential damages” arising from the use or loss of use of or failure of the dishwasher to perform as warranted; and
- c. The Warranty purports to provide that, “YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT REPAIR AS PROVIDED HEREIN.”

50. Each of these purported limitations and exclusions (the “Warranty Exclusions”) is unenforceable against Plaintiffs and the Class. The Warranty Exclusions were not bargained for by Defendant and its customers but were imposed unilaterally by Defendant. The Warranty Exclusions are unfair in that they are outside the reasonable expectations of the parties thereto, deny consumers an effective remedy and purport to limit the rights of consumers in ways that are unenforceable under relevant state and federal law including, without limitation, the Song-Beverly Consumer Warranty Act and Magnuson-Moss Warranty Act.

51. The unfairness of these limitations in remedy are reinforced by unenforceable provisions of the Warranty stating that it is the “sole” and “exclusive remedy” for breach of warranty or for manufacturing or design defects and the purported exclusion of implied warranties. In fact, Plaintiffs and the proposed Class have substantial rights and remedies available to them both for breach of implied and express warranty and for redress arising from the defective nature of the dishwashers which Defendant cannot lawfully preclude them from asserting.

52. The provisions described in Paragraph 49 above, both individually and in combination, if enforced as Whirlpool unlawfully asserts, would deprive Plaintiffs and the Class of any effective remedy for breach of Defendant’s obligations to them.

53. In addition to the representations contained in the Warranty, Defendant engaged in a marketing campaign for their “premium” dishwashers which are manufactured using “the highest quality standards.” During the relevant time period, the KitchenAid website asserted that: (1) “All

large KitchenAid® appliances come with outstanding warranties that back up the premium quality of our appliances;” and (2) “You chose quality and dependability when you chose a KitchenAid brand appliance.” Whirlpool markets its KitchenAid products as high-performance appliances. Defendant knew by at least 2011 that there was a defect in the upper rack assembly that would cause the dishwashers to fail prematurely.

54. The representations and warranties made by Defendant concerning the dishwashers were false because the upper rack assemblies are defective and prematurely fail due to a defect in the plastic components. The defect causes the upper rack assembly to collapse, creating a serious risk of physical injury and property damage. The defect also renders the dishwashers substantially inoperable until the defective rack assembly is replaced with the redesigned metal assembly. Further, members of the Class have stated that Defendant has represented that the defective rack assembly is not covered under the terms of the Warranty.

55. Complaints submitted online to www.consumeraffairs.com by members of the Class demonstrates that Defendant is refusing to warranty the defective upper rack assembly

- On August 4, 2014, John H. of Cincinnati, OH wrote:

We have owned a KitchenAid Dishwasher, Model KUDS35FXSS8 for 16 months. The wheels on the upper dish rack have already come off, rendering it unusable. This happened because the plastic tabs that hold the wheels in place have become brittle and cracked off in this short time. Kitchen Aid’s warranty states that the dish rack is warranted for 5 years. However, Kitchen Aid customer service tells us that the wheel assembly on the dish rack is not covered by this warranty. Wheel assembly W10350376 is poorly designed and quickly fails. Do not buy a Kitchen Aid or Whirlpool dishwasher that uses this wheel assembly.

- On June 11, 2013, Jerri of Valley Park, MO wrote:

The Plastic wheels on my \$800 KitchenAid dishwasher Model KUDS30IX failed after a little over a year. My manual states that the rack is under warranty for 5 years... KitchenAid says the warranty only applies to the nylon coating on

the rack, not the wheels. They gave me a one-time replacement part that failed again after 6 months.

Additional complaints submitted to the third-party website as well as the KitchenAid website are attached hereto as Exhibit C.

56. Defendant was obligated to disclose that: (1) the upper rack assemblies in the dishwasher have failed; (2) the only effective remedy for the defect is to replace the upper rack assembly with a non-defective replacement part or replace the dishwasher, which Whirlpool now concedes; and (3) the rack assembly is purportedly not covered under the five-year warranty.

57. Defendant was obligated to disclose these facts to Plaintiffs and the Class because: (1) the defect in the dishwashers poses an unreasonable safety risk due to its sudden collapse which results in broken dishware and glassware; (2) disclosure was necessary to qualify affirmative representations made concerning the dishwashers in order to make such representations non misleading; and (3) Defendant was uniquely in possession of the facts it did not disclose, knew that such facts were not available to Plaintiffs and the Class and knew that such facts would be highly material to any prospective purchaser or owner of a dishwasher.

58. Instead of disclosing these facts, since at least 2011 Whirlpool has engaged in a practice of deceptive material misrepresentations and omissions in connection with the marketing, advertising, and sale of the dishwashers. Had Whirlpool disclosed the known history of upper rack failures and the risks and consequences of such failures, including the risk of serious laceration injuries due to broken glassware and dishware upon failure, Plaintiffs and the Class would not have purchased any dishwashers containing the defective upper rack assembly and would have purchased an alternative dishwasher from another manufacturer.

59. Defendant knew or should have known with testing that the upper rack assembly was defective and would fail prematurely.

60. Further, Defendant had actual knowledge of the defect in the upper rack assembly based upon calls to their warranty department, consumer complaints concerning the defect that were posted on the KitchenAid website and consumer complaints posted on third party websites. The large volume of orders for a replacement upper rack assembly through Whirlpool and its distributors also reflects Defendant's knowledge of the defect.

E. Reasonable Interpretation of Warranty Language

61. Whirlpool devised a warranty that employed language that would lead a normal consumer to believe that all defects in materials and workmanship are covered for one year; and the upper rack assembly, which is integrated into the upper rack, is covered for up to five years.

62. The Magnuson-Moss Act requires that when a written warranty is provided, the warrant shall "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." 15 U.S.C. § 2302(a). Such full and conspicuous disclosure "may require inclusion in the written warranty of (5) [e]xceptions and exclusions from the terms of the warranty."

63. Federal regulations enacted pursuant to the provisions of the Magnuson-Moss Act require that a Defendant "shall clearly and conspicuously disclose in a single document in simple and readily understood language, the following items of information: *** (2) A clear description and identification of products, or parts, or characteristics, or components or properties covered by and where necessary for clarification, excluded from the warranty." 16 CFR § 701.3.

64. The Song-Beverly Act require that express warranties be set forth "in simple and readily understood language" and "shall conform to the federal standards for disclosure of warranty terms and conditions" set forth in the Magnuson-Moss Act and federal regulations. Civil Code § 1793.1(a).

65. The written warranty at issue in this case is on a standard pre-printed form drafted by Defendant. The written warranty was provided on a take it or leave it basis. Neither Plaintiffs nor class members participated in the drafting of the written warranty or had an opportunity to negotiate the specific terms of the written warranty. The written warranty is a contract of adhesion that should be construed against Defendant.

66. The express written warranty in this case provides, inter alia, that “defects in materials” are covered by the warranty.

67. It is not readily understood by the average consumer that a written warranty that expressly asserts that it covers “defects in materials” would purportedly not provide coverage for defects that occurred because the materials selected were not suitable for their intended purpose in the dishwasher. If Defendant intended to exclude from the warranty coverage for materials selected that were not suitable for their intended purpose, Defendant was under an affirmative obligation to state this exclusion in readily understood language in its written warranty - a simple task. It did not do so because it intended to deceive the purchasers of its product, according to proof.

68. The written warranty also expressly provides that “nylon dish racks” are covered by the warranty through the fifth year after the date of purchase. The average consumer would quite appropriately be led to believe that coverage of the nylon dish racks would include all components integrated into the dish racks and necessary for the dish racks to function properly. The written warranty does not define “nylon dish racks” and does not state that the warranty allegedly does not cover the wheels that are integrated into the rack and which are required to allow the rack to function. Unknown to the purchaser, the rack assembly can only be deconstructed from the upper rack with professional assistance or by someone who happens to possess a professional level of maintenance proficiency. If Defendant intended to exclude discreet

components integrated into the dish racks, from the warranty coverage, it could have easily done so. Defendant was under an affirmative obligation to state this exclusion in readily understood language in its written warranty. It did not do so.

69. Under “Items Excluded from Warranty”, the written warranty specifically sets forth several exclusions. It does not state that “design defects” are excluded. It does not state that the wheel assembly integrated into the dish racks are excluded. It does not state that the suitability of the materials for their intended use is excluded. If Defendant intended to exclude any of the foregoing from the warranty coverage, Defendant was under an affirmative obligation to state this exclusion in readily understood language in its written warranty. Again, Whirlpool chose not to do so.

70. The written warranty does not state in readily understood language that “materials and workmanship” allegedly only provides coverage for “manufacturing defects,” and cannot now belatedly be unfairly and unlawfully enforced against its purchasers.

F. Reliance by Consumers on Representations and Omissions Made by Defendant to the Distribution Chain and End Users

71. Almost all purchasers of dishwashers rely on builders, contractors, major appliance dealers and others (collectively, “Advisors”) to advise them concerning the advantages and disadvantages of purchasing a particular type and brand of dishwasher.

72. Whirlpool knows Advisors will recommend the KitchenAid dishwashers only if they are convinced it is reliable and safe. Whirlpool’s advertising campaign convinced Advisors that the dishwashers were manufactured using the highest quality standards, were dependable, and come with outstanding warranties as alleged in paragraph 49 herein. As alleged herein, Whirlpool was aware that the dishwashers were not of the highest quality, safe or reliable.

73. Whirlpool intended that all statements it made concerning the premium quality and reliability of the product as well as the terms of the product warranty, would be communicated down the distribution chain from Advisors to consumers. The Advisors are professionals who, as a matter of ordinary professional practice, rely on representations made to them by Whirlpool regarding the products they recommend and the terms of the warranties for such products. The Advisors convey those representations to members of the Class.

74. In or about May 2010, Whirlpool entered into an agreement to supply appliances to a large number of home builders, including Toll Brothers, the builder of Plaintiff Bodley's home.³ Whirlpool provides marketing materials and training to these "Trade Partners" in order to convey information regarding the quality, dependability, and reliability of the product to end users like Plaintiff Bodley, Plaintiff McCallum, and members of the Class.

75. Whirlpool's material omissions persuaded Advisors to promote their sale to end-users like Plaintiffs and the Class. This reliance pervaded all transactions throughout the period relating to the KitchenAid dishwashers containing the defective upper racks.

76. If the Advisors had been aware of either (1) the falsity of Whirlpool's representations concerning the quality and reliability of the dishwashers or (2) that the dishwashers had failed causing property damage and creating an unreasonable safety risk, the Advisors would have recommended that Plaintiff Bodley, Plaintiff McCallum, and the Class not purchase the KitchenAid dishwashers.⁴

³ See <http://www.builderonline.com/products/appliances/whirlpool-gains-big-builder-business>.

⁴ Plaintiffs are not required to plead that the advisors who were exposed to the misrepresentations or omissions repeated them to Plaintiffs. *E.g.*, *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal.App.4th 1559 (1996); *see also City of Industry v. City of Fillmore*, 198 Cal.App.4th 191 (2011).

77. If the Advisors had recommended against purchasing the dishwashers, Plaintiff Bodley and the Class would not have purchased them. The reliance by Plaintiff Bodley, Plaintiff McCallum and the Class on the Advisors was reasonable because the Advisors are in the business of advising consumers concerning the purchase of major appliances.

G. Defendant’s Breach of the Implied Warranty of Merchantability

78. “[E]very sale of consumer goods that are sold at retail in [California] shall be accompanied by the manufacturer’s and the retail seller’s implied warranty that the goods are merchantable.” CA. CIV. CODE § 1792. This statutory warranty does not require vertical privity between the plaintiff and the manufacturer or seller.⁵ The California Legislature intended that the Plaintiffs and the Class could enforce Whirlpool’s implied warranty of merchantability whether they were in privity with Whirlpool.

79. The Texas Business and Commerce Code similarly codified the implied warranty of merchantability also recognized under common law. TEX. BUS. COM. CODE § 2.314. The Code recognizes that “a warranty that the goods shall be merchantable is implied in a contract for sale if the seller is a merchant with respect to goods of that kind.” *Id.* Whether express or implied, warranting the merchantability means Defendant necessarily warranted its goods possessed capabilities of the kind and quality permitted and expected for each and all purchased units. The Texas Legislature intended that the Plaintiffs and the Class could enforce Whirlpool’s implied warranty of merchantability whether they were in privity with Whirlpool.

80. Defendant does not sell directly to end users. However, Defendant knew and intended that the dishwashers would be purchased by builders, developers, general contractors,

⁵ *E.g., Keegan v. American Honda Motor Co., Inc.*, 838 F.Supp.2d 929, 946-47 (C.D. Cal. 2012).

and individual owners from distributors and/or retailers for installation in properties throughout California, Texas, and nationwide.

81. The dishwashers are sold to end users through distributors and retailers like Sears Roebuck & Co. (“Sears”), The Home Depot, and Lowes. In certain instances, the dishwashers were sold to initial purchasers who were builders and developers for installation in newly built homes (“Initial Buyers”). The dishwashers purchased by Initial Buyers were ultimately installed in properties owned by Plaintiffs and other members of the Class.

82. Defendant represented to Initial Buyers and members of the Class that the KitchenAid dishwashers were top of the line appliances that came with outstanding warranties for the premium quality appliance as alleged above. Plaintiff Bodley, Plaintiff McCallum, and members of the Class paid a premium price for the KitchenAid dishwasher based upon the representations and warranty as alleged herein.

83. Defendant and Initial Buyers intended that all express and implied warranties were for the benefit of Plaintiffs and the Class, the owners of the properties in which the dishwashers were installed. Defendant contracted with Initial Buyers to supply dishwashers to be installed in Plaintiffs’ and Class Members’ properties and knew that the Initial Buyers would not generally own or occupy such properties. The express and implied warranties would be of no economic value to Buyers unless the ultimate owner of the properties containing the dishwashers, Plaintiffs and Class Members, received the benefit of such warranties.

84. At all times relevant herein, purchasers of the dishwashers relied on building contractors, real estate developers, retailers, distributors, and installers of the dishwashers to advise them concerning the advantages of purchasing a dishwasher. Accordingly, Defendant knew that if they wanted to sell the dishwashers to end users it had first to convince building contractors, real

estate developers, retailers, and distributors that they should recommend the purchase of dishwashers manufactured by Defendant rather than dishwashers manufactured by others.

85. Plaintiff Bodley, Plaintiff McCallum, and other members of the Class were exposed to Defendant's representations and warranties as alleged herein by builders, developers, distributors, retailers and installers in precisely the manner that Defendant intended. No statement made by Defendant to promote the sale of the dishwashers could fairly omit Defendant's knowledge that its product was dangerous, would fail prematurely and had failed many times already.

86. Plaintiff Bodley's exposure to Defendant's representations to Initial Buyers is detailed in Paragraphs 91-94 below.

87. Plaintiff McCallum's exposure to Defendant's representations to Initial Buyers is detailed in Paragraph 102-104 below.

H. Defendant's Failure to Disclose Material Facts to Plaintiffs and the Class

88. Defendant has been aware of the defect in the dishwashers since at least 2011. Plaintiffs are informed and believe and thereon allege that Defendant has received hundreds if not thousands of reports by distributors, sellers, and owners of the failed rack assemblies in the dishwashers. Despite its knowledge of these claims and the defect in the rack assemblies, Defendant has not disclosed the defect or the risk of personal injury and property damage to its customers. Had Plaintiffs and the Class been aware of the defect, they would not have been damaged as alleged herein.

89. Plaintiffs and members of the Class do not know the dishwasher is defective until the upper rack assembly collapses and breaks. This fact combined with Defendant's refusal to provide reasonable and adequate notice to members of the Class regarding the safety-related

defects in the dishwashers severely compromises the rights of class members to be apprised of the latent defect and related safety risk in order to make legitimate claims against Defendant.

90. Indeed, for Plaintiffs and class members that previously experienced the failure of the product because of the latent defect, Defendant continued to disguise the inherent nature of the defect by selling replacement upper rack assemblies with the same defective shortcoming. This unfair, unlawful and fraudulent practice by Defendant has required members of the Class to incur out of pocket costs for the materials and labor to replace the defective rack assembly or placed class members at risk to do so.

V. PLAINTIFF'S INDIVIDUAL ALLEGATIONS

A. Plaintiff James Bodley

91. Plaintiff James Bodley purchased a brand-new luxury home in November 2012 built by Toll Brothers. Toll Brothers has an established reputation as a luxury home builder who installs high-quality brand name products. Whirlpool Corporation is a “vendor partner” of Toll Brothers.

92. As part of their home purchase, Mr. Bodley and his wife went to the Toll Brothers Design Center to meet with a design specialist to select additional amenities and finishes for installation in their new home including, but not limited to, kitchen appliances, flooring, and bathroom fixtures. The Bodleys spent approximately four hours meeting with the design specialist who discussed and reviewed their options with them. They were not shown actual appliances. Instead, Mr. Bodley and his wife relied on the representations and warranties made by the design specialist who told them the KitchenAid appliances were top of the line, of good quality, reliable and superior to the alternative brand. After meeting with the design specialist, Mr. Bodley was left with the impression that KitchenAid provided the highest quality appliances with the highest

warranties. Based on these representations and warranties, Mr. Bodley purchased the KitchenAid package from Toll Brothers which included a stainless-steel KitchenAid dishwasher, Model No. KUDS30FXSS5, stove and microwave. Mr. Bodley paid substantially more for his KitchenAid dishwasher compared to the alternative brand offered by Toll Brothers.

93. The upper rack assembly in Mr. Bodley's dishwasher failed on or about April 11, 2017, as he was pulling out the top rack to load dishes. Attached hereto as Exhibit A are photographs of the failed rack assembly. Mr. Bodley purchased a replacement upper rack assembly to repair his dishwasher online from Sears. When the replacement parts arrived, he found the installation instructions to be too difficult to follow. Accordingly, Mr. Bodley paid a Sears technician to install the replacement parts. It took the Sears technician approximately one hour to install the replacement parts. Mr. Bodley paid approximately \$120 for the materials and labor to repair his dishwasher. Mr. Bodley was without a fully functioning dishwasher for several weeks until the dishwasher was repaired.

94. Upon purchasing his home, Mr. Bodley received an instruction manual for his KitchenAid dishwasher which included a copy of the KitchenAid warranty. A copy of the warranty Mr. Bodley received is attached hereto as Exhibit B. Mr. Bodley relied on the representations and warranties stated in Paragraphs 44-46 and 92. Were it not for these representations and warranties, Mr. Bodley would not have purchased the KitchenAid dishwasher. Had Defendant informed Toll Brothers of the defect with the upper rack assembly and attendant safety risk, the design specialist would not have recommended that Mr. Bodley purchase the KitchenAid dishwasher for installation in his new home and Mr. Bodley would have purchased an alternative dishwasher. Further, Mr. Bodley recommended the KitchenAid dishwasher to his daughter whose upper rack assembly also failed.

95. On June 12, 2017, Mr. Bodley's counsel provided Defendant with notice of its breach of warranty and CLRA violations and demanded that Defendant (1) pay all costs to investigate, repair, and replace all of the defective upper assembly rack systems utilized in dishwashers owned by Plaintiffs and members of the Class; and (2) provide notice to consumers of the defect. A copy of the notice is attached hereto as Exhibits D and E.

96. Defendant failed to provide or offer to provide remedies for its breach of warranty and CLRA violations.

B. Plaintiff Kyle Matson

97. Plaintiff Kyle Matson purchased a home in late November 2013 which was equipped with a KitchenAid dishwasher, Model No. KUDS30FXSS5. The home was built in November 2012 and purchased by the original owner on or about November 1, 2012. Had Ms. Matson been aware of the defects with the dishwasher she would have sought an adjustment of the purchase price to account for the replacement of the defective dishwasher.

98. The upper rack assembly in Ms. Matson's dishwasher failed in or about June or July 2016 as she was loading the top rack with dishes. She placed a rectangular size glass Pyrex dish onto the top rack and continued loading. Without warning, the right side of the upper rack suddenly failed sending the glass dish crashing down onto the stainless-steel dishwasher door. The glass dish shattered into dozens of pieces and sent shards of glass not only onto the lower rack of the dishwasher but onto the kitchen floor and countertop. The force of the impact turned the shattered glass into small projectiles which scratched the inside of the dishwasher as well as the wall of the kitchen island directly in front of the dishwasher. The impact of the glass against the kitchen island was so great that it scratched and chipped the custom blue paint on the island. It was

necessary for Ms. Matson to spend a considerable amount of time picking up the shattered glass from inside the dishwasher and the many pieces of glass that had scattered over the kitchen floor.

99. Ms. Matson purchased replacement parts online from Sears at a cost of approximately \$50.00. For several weeks Ms. Matson's dishwasher was substantially inoperable while she waited for the replacement parts to arrive. When the replacement parts did arrive, Ms. Matson and her husband found the replacement instructions to be too difficult to follow. She paid a repairman \$100.00 to install the replacement parts. Ms. Matson paid approximately \$20 to replace her broken dish and will incur additional costs to repair the damage to her kitchen island, according to proof.

100. On June 12, 2017, Ms. Matson's counsel provided Defendant with notice of its breach of warranty and demanded that Defendant (1) pay all costs to investigate, repair, and replace all of the defective upper assembly rack systems utilized in KitchenAid dishwashers; and (2) provide notice to consumers of the defect. A copy of the notice is attached hereto as Exhibit E.

101. Defendant failed to provide or offer to provide remedies for its breach of warranty violations.

C. **Plaintiff Ronald McCallum**

102. Plaintiff Ronald McCallum purchased an existing home on or about September 8, 2011. Subsequent to such purchase, Mr. McCallum began significant renovations to the existing structure, which was originally constructed in 1965. As a part of the renovations, two of the subject KitchenAid dishwashers were recommended to, and ultimately selected by, Mr. McCallum, which were then installed by the general contractor hired to oversee the renovation. Upon purchasing the two dishwashers, Mr. McCallum received an instruction manual for his KitchenAid dishwasher which included a copy of the KitchenAid warranty. Had Mr. McCallum been aware of the defect

with the KitchenAid dishwashers he would have selected a selected a different appliance; certainly, he would not have purchased two of the subject model if such defects were known.

103. Both upper rack assemblies of the KitchenAid dishwashers purchased by Mr. McCallum have failed although on different occasions. The failures resulted in the need to procure two replacement assemblies at a cost of approximately \$45 per assembly kit and has further incurred costs of approximately \$100 in two separate instances for home repair inspection and labor.

104. Mr. McCallum relied on the representations and warranties made by the Defendant and its agent sellers that the KitchenAid appliances were top of the line, of good quality, with the highest warranties, and were reliable and superior to alternative brands. Such representations and warranties formed the basis of his purchases for two of the subject KitchenAid dishwasher model for installation in his home.

105. Upon information and belief of Defendant's awareness of the defect, claims, complaints, and litigation, Mr. McCallum asserts that direct notice to Whirlpool prior to his formal joinder as a Named Plaintiff is not a requisite condition precedent to suit for breach of implied warranties or deceptive trade practices.⁶

VI. CLASS ALLEGATIONS

106. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23, on behalf of themselves and all others similarly situated (the "Class").

⁶ See *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 674 & n. 14 (Tex.2004); *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 188–89 (Tex.App.-Dallas 1996, no writ).

107. The Class which Plaintiffs seek to represent in this action is composed of classes preliminarily defined as follows:⁷

Nationwide Purchaser Class: All persons in the United States who purchased a KitchenAid dishwasher for installation in a private residence with an upper rack assembly bearing part number W10350375 or W10350376, as depicted in Exhibit A hereto.

Nationwide Subsequent Purchaser Consumer Subclass: All persons who purchased private residences in which a KitchenAid dishwasher with an upper rack assembly bearing part number W10350375 or W10350376, as depicted in Exhibit A hereto is installed.

California Consumer Subclass: All persons who purchased a KitchenAid dishwasher for installation in a private residence in California with an upper rack assembly bearing part number W10350375 or W10350376, as depicted in Exhibit A.

California Subsequent Purchaser Subclass: All persons who purchased private residences in California in which a KitchenAid dishwasher with an upper rack assembly bearing part number W10350375 or W10350376, as depicted in Exhibit A hereto is installed.

Texas Consumer Subclass: All persons who purchased a KitchenAid dishwasher for installation in a private residence in Texas with an upper rack assembly bearing part number W10350375 or W10350376, as depicted in Exhibit A.

Texas Subsequent Purchaser Subclass: All persons who purchased private residences in Texas in which a KitchenAid dishwasher with an upper rack assembly bearing part number W10350375 or W10350376, as depicted in Exhibit A hereto is installed.

Injunctive/Declaratory National Class: All owners⁸ of a KitchenAid dishwasher with an upper rack assembly bearing part number W10350375 or W10350376, as depicted in Exhibit A.

⁷ Plaintiffs filed this action with the intention to seek nationwide certification on multiple causes of action. Since such filing, this matter has been transferred to the current Court and consolidated into the matter styled *Burch v. Whirlpool*, which also seeks national certification albeit now on a more limited basis under the current state of the pleadings. For purposes of national certification, Plaintiffs anticipate preparation of a trial plan that considers the causes of action pleaded in the context of state laws through a national comparative compendium prior to the rigorous analysis required for class certification. However, in the alternative and if necessary, these Plaintiffs seek certification of the California classes, Texas classes, and Injunctive/Declaratory Class.

⁸ It is possible that subclasses may later be defined distinguishing between former and current owners for purposes of the National Injunctive/Declaratory Class, and same will be included in the anticipated Motion for Class Certification if determined necessary.

108. The California Consumer Subclass, California Subsequent Purchaser Subclass, Texas Consumer Subclass, Texas Subsequent Purchaser Subclass, and the Nationwide Subsequent Purchaser Consumer Subclass are referred to herein collectively as the “Consumer Subclasses.”

109. The following persons are excluded from the Class: (1) all Defendant and their subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the Class; and (3) the judge(s) to whom this case is assigned and any immediate family members thereof.

110. Plaintiffs reserve the right to modify or amend the Class definition, as appropriate.

111. Certification of Plaintiffs’ claims for class wide treatment is appropriate because Plaintiffs can prove the elements of their claims on a class-wide basis and because this case meets the requirements of Federal Rule of Civil Procedure 23.

112. **Numerosity (Rule 23(a)(1))**. The members of the Class are so numerous that individual joinder of all the members is impracticable. Plaintiffs are informed and believe, and thereon allege, that there are thousands of purchasers who have been damaged by the conduct alleged herein. It is anticipated that the class may be ascertained from sale and distribution accounts, warranty files, receipts and payment records. Additionally, administration of the class is feasible considering objective criteria defining class members *via* specific part number identification, model number, serial numbers, and upon notice.

113. The disposition of Plaintiffs’ claims will provide a substantial benefit to the persons and the court system by using Rule 23 as the vehicle to adjudicate the rights of thousands of individuals and/or entities in one action. Joining and naming each Class Member as a co-plaintiff is unreasonable and impracticable. Such a requirement would only result delay of remedy, loss of opportunity, and in Defendant’s retention or use of money that is necessary to compensate this Class.

114. **Commonality and Predominance (Rule 23(a)(2) and (b)(3))**. This action involves common questions of law and fact which predominate over any questions affecting individual class members including, without limitation, the following:

- a. Determination of the presence of a common defect and failure mode;
- b. Determination of substantial similarity in KitchenAid models over designated years of production pertaining to the manufacture and workmanship of upper rack assemblies bearing part number W10350375 or W10350376;
- c. Determination of the manner and date of discovery by the Defendant as to actual or constructive knowledge of defects;
- d. Whether Defendant violated California's Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.*, by, among other things, engaging in unfair, unlawful, or fraudulent practices;
- e. Whether Defendant violated California's Consumer Legal Remedies Act, Civ. Code § 1750 *et seq.*, by falsely advertising the dishwashers were of a certain quality when in fact, they were not;
- f. Whether Defendant violated Texas Business and Commerce Code §2.314 *et seq.*, by, among other things, marketing distributing, and selling dishwashers and replacement rack assembly kits not fit for the ordinary purposes for which they were to be used;
- g. Whether Defendant violated Texas Business and Commerce Code §17.50 *et seq.*, by, among other things, engaging in unfair, unlawful, or fraudulent practices;
- h. Whether Defendant breached its express warranties to Plaintiffs and the Class;
- i. Whether Defendant breached its implied warranties to Plaintiffs and the Class;
- j. Whether Defendant fraudulently concealed the defect;
- k. Whether Defendant continued the sale and marketing of dishwashers with upper rack assemblies bearing part number W10350375 or W10350376 despite actual or constructive knowledge of the defect;
- l. Whether Defendant continued the sale and marketing of upper rack adjuster service kits containing the same defect as the original upper rack assembly despite actual or constructive knowledge of the defect;

- m. Whether Plaintiffs and the Class are entitled to compensatory damages, and the amount of such damages;
- n. Appropriateness of an injunction requiring Defendant to cease and desist from selling, marketing, distributing, and/or placing into the stream of commerce any remaining dishwasher inventory with upper rack assemblies bearing part number W10350375 or W10350376;
- o. Appropriateness of an injunction requiring Defendant to cease and desist from selling, marketing, distributing, and/or placing into the stream of commerce any remaining upper rack adjuster service kit inventory with plastic adjusters for use in replacement of upper rack assemblies bearing part number W10350375 or W10350376;
- p. Appropriateness of injunctive or declaratory relief requiring Defendant to issue and publicly announce a recall of upper rack assemblies bearing part number W10350375 or W10350376;
- q. Appropriateness of formal declarations of defect and appropriate remedy of defect; and
- r. Declaration of application, interpretation, and scope of Defendant's warranty.

115. **Typicality (Rule 23(a)(3))**. Plaintiffs' claims are typical of the claims of the Class because Plaintiffs, like all members of the Class, have been damaged by Defendants' unlawful conduct, in that Plaintiffs have and will incur the cost of repairing and/or replacing the dishwashers. The factual bases and causes of action for Plaintiffs' claims are common to all members of the Class and represent a common course of misconduct resulting in injury to all Class members.

116. **Adequacy of Representation (Rule 23(a)(4))**. Plaintiffs are adequate representatives of the Class because their interests do not conflict with the interests of the Class and they have retained counsel competent and experienced in complex class action litigation and who specialize in class actions involving defective products. Plaintiffs intend to prosecute this action vigorously and the interests of the Class will be fairly and adequately protected by Plaintiffs and their counsel.

117. **Superiority (Rule 23(b)(3))**. A class action is superior to all other available means for the fair and efficient adjudication of this controversy in that:

- a. The prosecution of separate actions by individual members of the Class would create a foreseeable risk of inconsistent or varying adjudications which would establish incompatible results and standards for Defendants;
- b. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their own separate interests;
- c. Class action treatment avoids the waste and duplication inherent in potentially thousands of individual actions, and conserves the resources of the courts; and
- d. The claims of individual class members are not large when compared to the cost required to litigate such claims. The individual Class members' claims are on average approximately \$35-\$250 representing out-of-pocket costs associated with the materials and labor to repair the defect. Given the high cost of litigation, it would be impracticable for the members of the Class to seek individual redress for Defendant's wrongful conduct. The class action device provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. The case presents no significant management difficulties which outweigh these benefits;
- e. Injunctive relief will be available to prevent the sale, marketing, and/or distribution of these defective and dangerous products;
- f. A declaration of defect through class action mechanisms provides a significant benefit to the putative class members to determine eligibility for restitution or other remedy; and
- g. A declaration interpreting the applicability, enforceability, and scope of Defendant's warranty provides a significant benefit to the putative class members in seeking either a re-audit of prior warranty denials or availability of full redress.

118. **Injunctive/Declaratory Class (Rule(b)(2))**. The prerequisites to maintaining a class action for injunctive and equitable relief pursuant to FED. R. CIV. P. 23(b)(2) exist as Defendant has acted or refused to act on grounds generally applicable to the Class thereby making appropriate final injunctive and equitable relief with respect to the Class as a whole.

119. Defendant's actions and control over the marketing, sale, and distribution of the defective dishwashers and replacement upper rack assembly kits are generally applicable to the Class as a whole, and Plaintiffs seek, *inter alia*, equitable remedies with respect to the Class for cessation of distribution and recall of inventory.

120. Defendant's systemic policy and practices make declaratory relief with respect to the Class as a whole appropriate. Plaintiffs and the Class seek establishment, oversight, and enforcement of a widely noticed program for inspection, remediation and replacement of defective upper rack assemblies. Furthermore, Plaintiffs and the Class homogenously seek an order declaring or otherwise compelling Defendant re-audit prior warranty claims and thereafter provide reimbursement on warranty claims previously denied or only paid in part

121. **Notice.** Plaintiff cannot be certain of the form and manner of class notice it will propose until the Class is finally defined and some discovery concerning the identity of Class members is undertaken. Based on the experience of its counsel in previous cases, however, Plaintiff anticipates that direct notice by mail will be given to all Class members whose addresses can be identified and additional notice by publication in periodicals, on the Internet and by press releases and similar communications to relevant industry and trade groups.

VII. DAMAGES

122. As a result of the facts alleged herein, Plaintiffs and the Class seek economic relief under common law and designated statutory provisions, and further seek injunctive and declaratory relief under State and Federal laws.

123. As a result of the facts alleged herein, Plaintiffs and the Class have been economically damaged in one or more of the following amounts:

- a. The difference in market value between the dishwashers and dishwashers that are not defective.

- b. The cost of repairing and/or replacing the dishwasher, and any other amounts necessary to return Plaintiffs and the Class to the position they would have enjoyed had they not purchased the dishwashers.
- c. The cost of hiring a third party to install the replacement parts.

VIII. STATUTE OF LIMITATIONS

124. **Discovery Rule**. The defective nature of the dishwasher is latent and not perceptible to Plaintiffs and the Class. Plaintiffs and the Class did not become aware that they had suffered losses caused by the defective dishwashers until the rack assembly failed.

125. **Fraudulent Concealment Tolling**. Any applicable statutes of limitation have been tolled by Whirlpool's knowing and active concealment of facts as alleged herein. Without any fault or lack of diligence on their part, Plaintiffs and the Class have been kept ignorant of vital information essential to the pursuit of these claims. Plaintiffs and the Class could not reasonably have discovered the problems associated with the dishwasher on their own until the failure occurred.

126. **Estoppel**. Defendant is estopped from relying on any statutes of limitation in defense of this action. For the reasons described herein, Defendant was under a continuous duty to disclose to Plaintiffs and the Class the true character, quality and nature of the dishwashers, especially because the problems associated with the dishwashers pose unreasonable safety risks due to breakage of glass and other items when the rack assembly fails. Defendant failed to disclose the true character, quality, and nature of the dishwashers; indeed, Defendant maximized profitability by marketing and selling replacement kits containing the same defect. Plaintiffs and the Class reasonably relied upon Defendant's active concealment of these facts. Had the true facts been disclosed, Plaintiffs and the Class would not have purchased the dishwashers or replacement upper rack assembly kits containing the same defect.

FIRST CLAIM FOR RELIEF
(For Violation of Unfair Competition Law)
(By Plaintiffs and the Class Against Defendant)

127. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

128. Pursuant to California Bus. & Prof. Code § 17200, “unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”

129. Defendant’s actions, as alleged herein, constitute deceptive, unfair, fraudulent, and unlawful practices committed in violation of the California Bus. & Prof. Code § 17200, et seq.

130. All of the conduct and representations alleged herein occurred in the course of Defendant’s business and were part of a pattern or generalized course of conduct.

131. Furthermore, Defendant’s conduct was unlawful because it was fraudulent and violated the Consumer Legal Remedies Act, Song-Beverly Consumer Warranty Act, Magnuson-Moss Warranty Act as previously alleged.

132. The Warranty Exclusions and nondisclosure of the safety risk and property damage resulting from the failure of the dishwashers are unfair in that they: (1) violate public policy as expressed in the Consumer Legal Remedies Act, the Song-Beverly Consumer Warranty action, and the Magnuson-Moss Warranty Act; (2) are unethical, oppressive, unscrupulous and substantially injurious to consumers and these factors are not offset by the utility of Defendant’s conduct since the conduct is intended to and only provides impediments to the assertion of valid claims for recovery and limit the damages which Defendant is legally obligated to compensate; and (3) inflict injury on consumers which is not outweighed by any countervailing benefits to

consumers or competition and the injury to consumers is one consumers could reasonably have avoided.

133. Defendant's conduct was unfair because Whirlpool acted unscrupulously in a manner that is substantially injurious to consumers. In particular: (1) Whirlpool concealed information concerning the unreasonable safety risk posed by its defective product and continued to sell the product even after it was made aware of the danger; (2) Whirlpool capitalized on the unreasonable safety risk posed by its defective product through the marketing and sale of replacement assembly kits containing the defect even after it was made aware of the danger; and (3) Whirlpool asserts the term "nylon rack" does not include the rack assembly, or is otherwise not redressable through its warranty provisions, requiring Plaintiffs and the Class to install a replacement assembly at their own expense.

134. All of this conduct of Whirlpool has no utility or countervailing benefit, other than to attempt to avoid liability.

135. Plaintiffs and the Class could not reasonably have avoided injury as a result of Whirlpool's unfair conduct.

136. Defendant's conduct was fraudulent because Whirlpool failed to disclose the safety risks associated with the collapse of the upper rack assembly and related risks to safety and property. A reasonable consumer would not expect the upper rack in their dishwasher to suddenly collapse causing glassware and dishware to shatter and break damaging property and creating a risk of serious personal injury. Plaintiffs and members of the Class would not have purchased the dishwashers or similarly defective replacement kits but for the fraudulent, deceptive and unlawful conduct of Whirlpool.

137. Defendant's deceptive, unfair, fraudulent, and unlawful conduct alleged herein was specifically designed to and did induce Plaintiffs and members of the Class to purchase the dishwashers.

138. Plaintiffs and the Class reasonably and justifiably relied on Defendant's deceptive, unfair, and unlawful conduct alleged herein. But for such conduct, Plaintiffs and members of the Class would not have purchased the dishwashers.

139. Because of Defendant's unfair methods of competition and unfair or deceptive acts or practices, Plaintiffs and the Class have suffered injury-in-fact, lost money, and lost property, in that they have incurred actual costs to repair and/or replace their dishwashers.

140. Plaintiffs and the Class seek to recover from Defendant restitution of earnings, profits, compensation and benefit obtained as a result of the practices that are unlawful under California Bus. & Prof. Code § 17200 *et seq.*, according to proof.

SECOND CLAIM FOR RELIEF
(For Violation of the California Consumer Legal Remedies Act)
(Plaintiffs Bodley and the California Consumer Subclass Against Defendant)

141. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

142. The dishwashers are "goods" as defined by California Civil Code § 1761(a).

143. Whirlpool is a "person" as defined by California Civil Code § 1761(c).

144. Plaintiff Bodley and members of the California Consumer Subclass are "consumers" as defined by California Civil Code § 1761(d) who purchased the dishwashers for personal, family, and household purposes.

145. The purchase by Plaintiff Bodley and members of the California Consumer Subclass of the dishwashers are "transactions" as defined by Civil Code § 1761(e) and 1770.

146. Under the Consumers Legal Remedies Act (“CLRA”), Civil Code § 1770, et seq., the following methods of competition and unlawful when any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer:

a. Representing that goods “... have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have.” California Civil Code § 1770(a)(5).

b. Representing that goods “... are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.” California Civil Code § 1770(a)(7).

c. Inserting an unconscionable provision in the contract. California Civil Code § 1770(a)(19).

147. Defendant violated California Civil Code §§ 1770(a)(5) and (a)(7) by failing to disclose at the point of sale, or otherwise, that the dishwasher’s upper rack assembly was defective and posed an unreasonable risk of personal injury and property damage. Instead, Defendant represented, through advertising and other express representations that the dishwashers were manufactured using the highest quality standards, provided premium performance, were safe and reliable as alleged herein.

148. Whirlpool owed a duty to Plaintiff Bodley and the California Consumer Subclass to disclose the defects in, and the unreasonable safety risks associated with, the dishwashers.

149. The falsity of the representations and unreasonable safety risk concealed by Whirlpool are material, because a reasonable consumer would consider them to be important in deciding whether to purchase a KitchenAid dishwasher. A reasonable consumer would not expect the upper rack in their dishwasher to prematurely fail nor would they expect the dishwasher to expose them to unreasonable risks of injury.

150. Defendant violated California Civil Code § 1770(a)(19) by including in the Warranty the unconscionable Warranty Exclusions referenced in paragraph 49-52 herein.

151. Had Plaintiff Bodley and members of the California Consumer Subclass known that the representations and warranties made by Defendant concerning the dishwashers were false or had they been aware of the facts Defendant were obligated to disclose, Plaintiff Bodley and members of the California Consumer Subclass would not have purchased the dishwashers or would have required that the dishwasher be replaced in properties in which the dishwashers were already installed. Plaintiff Bodley and members of the California Consumer Subclass would not have made these purchases because: (1) if Initial Buyers, builders, distributors, retailers and sellers had known of the falsity of Defendant's representations and warranties, or had Defendant disclosed the facts it was obligated to disclose, they would have recommended against the purchase of the KitchenAid dishwashers and/or would have installed dishwashers manufactured by others in newly constructed single-family homes; and (2) irrespective of such recommendations, if Plaintiff Bodley and the California Consumer Subclass had been aware of the falsity of Defendant's representations and warranties or become aware of the facts Defendant was obligated to disclose, they would not have purchased the dishwashers or would have insisted that the dishwashers be removed and replaced.

152. Defendant was aware of the defect in the upper rack assembly at the time of sale to Plaintiff Bodley and the California Consumer Subclass.

153. Plaintiff Bodley served Defendant with notice of its violations of the CLRA pursuant to Civil Code § 1782 (the "Notice") by certified mail on June 12, 2017. A copy of the Notice is attached hereto as Exhibit D. Defendant failed to provide or offer to provide remedies for its violations of the CLRA within 30 days of the date of the Notice or at all.

154. Venue was originally asserted as proper pursuant to California Civil Code § 1780(c) because Defendant does business in Alameda County and the actions giving rise to this complaint arose within California jurisdiction and the KitchenAid dishwasher is installed in Alameda County. Attached hereto as Exhibit F is the Declaration of James Bodley establishing these original venue facts. This matter was thereafter transferred to the current Court upon motion of the Defendant and Order.

155. As a result of Defendant's unfair and deceptive acts and practices, Plaintiff Bodley and members of the California Consumer Subclass have been harmed and seek actual damages according to proof, attorneys' fees and costs and such other relief as the court deems proper.

THIRD CLAIM FOR RELIEF
(Deceptive Trade Practices)
(Plaintiff McCallum and the Texas Consumer Subclasses)

156. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

157. The dishwashers are "goods" as defined by Texas Deceptive Trade Practices Act (DTPA). § 17.45.

158. Whirlpool is a "person" as defined by the DTPA. TEX. BUS. & COMM. CODE § 17.45.

159. Plaintiff McCallum and the Texas Consumer Subclasses are consumers within the meaning of § 17.45(4) of the DTPA in that they are individuals who acquired by purchase the goods or products that form the basis of this lawsuit and suffered damages for which they did not receive full remedy or compensation from any third party, person, or entity.

160. Plaintiff McCallum and the Texas Consumer Subclasses seek to recover damages under the Texas DTPA, Tex. Bus. & Com. Code Ann. § 17.41 *et. seq.*, because the Defendant

knowingly and/or intentionally breached both expressed and implied warranties with respect to the referenced dishwasher. Furthermore, said Defendant continues to take advantage of consumers' lack of adequate or otherwise complete knowledge, ability, experience, or capacity to a grossly unfair degree, engaging in the following false, misleading, or deceptive acts or practices in the conduct of their trade or business:

- a. Explicit or implicit representation that the dishwashers and/or replacement upper rack assembly kits have sponsorship, approval, characteristics, uses, or benefits that they do not have;
- b. Representing that the dishwashers and replacement kits are of a particular standard, quality or grade, if they are of another;
- c. Knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair; and/or
- d. Representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve.

161. The Defendant engaged in the foregoing false, misleading, or deceptive acts or practices, despite knowing for an extended period of time that the dishwashers were manufactured in a defective manner, prone to failure, and had a high risk of failing.

162. Despite possessing superior knowledge of design, manufacture, and quality deficiencies, the Defendant knowingly and/or intentionally continued the sale of such product without adequate warnings; indeed, Defendant first capitalized on consumers' lack of knowledge by selling replacement upper rack assembly kits with the same defect (plastic adjusters) rather than promptly act to correct the defective product.

163. The Defendant's conduct in engaging in such false, misleading, and deceptive acts or practices constituted a producing cause of the damages suffered by Plaintiff McCallum and the Texas Consumer Subclasses such that the Plaintiffs have the right and standing to maintain an action against Defendant under the Texas DTPA pursuant to § 17.50.

164. Because of Defendant's unfair and deceptive acts and practices, Plaintiff McCallum and members of the Texas Consumer Subclass have been harmed and seek actual damages according to proof, attorneys' fees and costs and such other relief as the court deems proper.

165. Because the Defendant's conduct as described above in this Third Claim for Relief was committed knowingly and/or intentionally, all members of the Texas Consumer Subclasses are entitled to be awarded treble damages calculable in the aggregate of the actual damages according to proof.

166. Plaintiff McCallum and the Texas Consumer Subclasses aver that notice under Section 17.505 prior to filing suit was both impractical and unnecessary considering the scope of Defendant's actual and constructive knowledge of the defect.

167. False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are subject to action by the Texas Consumer Protection Division under Sections 17.47, 17.58, 17.60, and 17.61 of the Act. In light of the authority provided to the Attorney General's Office to investigate and prosecute violations of the Act, Plaintiffs are contemporaneously complying with the requirements of Section 17.501 regarding notice of this Second Amended Complaint to the Consumer Protection Division of Texas.

FOURTH CLAIM FOR RELIEF
(Fraudulent Concealment)
(By Plaintiffs and the Nationwide Purchaser Class Against Defendant)

168. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

169. Absent discovery, Plaintiffs and the Nationwide Purchaser Class are unaware of, and unable through reasonable investigation to obtain, the true names and identities of those individuals associated with Whirlpool responsible for disseminating false and misleading

representations and warranties regarding the KitchenAid dishwashers. Whirlpool is necessarily in possession of all of this information.

170. Defendant falsely represented that the dishwashers were manufactured with the highest quality standards, reliable, and came with outstanding warranties as alleged in paragraph 49 above. Defendant knew that this representation was false at the time it was made.

171. At all relevant times, Defendant knowingly concealed and intentionally failed to disclose to Plaintiffs and the Nationwide Purchaser Class that the upper rack assembly in the dishwasher was defective and would fail prematurely under ordinary use and conditions and expose the consumer/owner and other individuals to an unreasonable safety risk.

172. The concealed information is material in that a reasonable consumer would find information important when deciding whether to buy the dishwasher and, if so, how much to pay. All of the misrepresentations alleged herein are connected to and dependent upon a functioning upper rack assembly without which the dishwasher cannot operate.

173. Defendant was and continues to be under a duty to Plaintiff Bodley and the Nationwide Purchaser Class to disclose these facts because:

- a. Defendant had exclusive knowledge of material facts not known to Plaintiffs and the Nationwide Purchaser Class;
- b. Defendant withheld and actively concealed from Plaintiffs and the Nationwide Purchaser Class the fact that the dishwashers were and are defective and substantially likely to fail prematurely; and
- c. The dishwashers pose an unreasonable safety risk due to the collapse of the upper rack assembly which results in broken dishware and glassware.

174. Defendant fraudulently and intentionally concealed from and/or failed to disclose to Plaintiffs and the Nationwide Purchaser Class the facts described above with the intent to defraud Plaintiffs and the Nationwide Purchaser Class and for the purpose of inducing Plaintiffs

and the Nationwide Purchaser Class to rely on such misrepresentations and omissions by purchasing more expensive KitchenAid dishwashers to the exclusion less expensive dishwashers manufactured by others.

175. Plaintiffs and the Nationwide Purchaser Class were unaware the dishwashers were prone to premature failure because upper rack assembly was defective. Had Defendant disclosed the defective nature of the dishwashers, Plaintiffs and the Nationwide Purchaser Class would not have purchased the dishwashers containing the defective upper rack assembly.

176. As a direct and proximate cause of Defendant's misconduct, Plaintiffs and the Nationwide Purchaser Class have suffered actual damages as alleged herein. Plaintiffs and the Nationwide Purchaser Class demand judgment against Defendant for damages as detailed above in an amount to be proven at trial.

FIFTH CLAIM FOR RELIEF
(For Breach of Express Warranty)
(By Plaintiffs and the Consumer Subclasses against Defendant)

177. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

178. Whirlpool expressly made the representation and agreed that it would “pay for factory specified parts...to correct defects in material or workmanship that existed when this [dishwasher] was purchased: “nylon dish racks...”

179. The upper rack assembly is integrated into the nylon dish racks.

180. The “nylon dish racks” are expressly included in the warranty which promises future performance for five years. See Exhibit B. The “nylon racks” fail because of “defects in material” and which is specifically covered under the terms of the Warranty.

181. Mr. Bodley's rack assembly failed on or about April 11, 2017, which was within the five-year warranty period.

182. Ms. Matson's rack assembly failed in or about June or July 2016, which was within the five-year warranty period.

183. Mr. McCallum experienced two rack failures in 2016, both of which occurred within the five-year warranty period.

184. Plaintiffs have notified Defendant of its breach of the Warranty. The Notices attached hereto as Exhibits D and E provided Defendant with timely notice on behalf of the Class of the breach of the Warranty and the invalidity of the Warranty Exclusions alleged herein.

185. Defendant has failed to remedy the breach of its obligations to Plaintiffs and the Class. Further, while the Warranty provides that Defendant will repair or replace defects which existed at the time of purchase, complaints submitted by members of the Class demonstrate that Defendant has refused to honor its warranty regarding the defective upper rack assembly as alleged herein.

186. The express written warranty provides coverage for the racks for five years from the date of purchase. As such, the written warranty explicitly extends to future performance beyond one year. An assessment of whether the warranty had been breached necessarily would need to extend through five years, absent prior discovery of the defect by Plaintiffs. Plaintiffs did not discover the defects until their respective dishwashers failed as alleged. Therefore, the four-year statute of limitations breach of express written warranty began to run on the date of such discovery and the Plaintiffs claims are timely.

187. Defendant is not entitled to enforce the Warranty Exclusions described in Paragraph 48 because they are unconscionable and violate the provisions of applicable law including, without limitation, the Song-Beverly Consumer Warranty Act and the Magnuson – Moss Warranty Act.

188. As a result of Defendant’s breach of the Warranty and the warranties detailed herein Plaintiffs and the Class have suffered damages in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF
(Breach of Express Warranty under Song-Beverly Consumer Warranty Act)
(By Plaintiff Bodley and the California Consumer Subclasses against Defendant)

189. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

190. The allegations of this Claim for Relief are based on the breaches of warranty addressed fully in the Fifth Claim for Relief. The specific allegations of the Complaint relevant to that claim are detailed therein.

191. The dishwashers are consumer goods within the meaning of California’s Song-Beverly Consumer Warranty Act.

192. Defendant Whirlpool is a “manufacturer” within the meaning of the statute.

193. Plaintiffs and members of the Consumer Subclasses purchased dishwashers within the State of California.

194. Whirlpool expressly made the representation and agreed that it would “pay for factory specified parts...to correct defects in material or workmanship that existed when this [dishwasher] was purchased: “nylon dish racks...”

195. The upper rack assembly is integrated into the nylon dish racks.

196. The “nylon dish racks” are expressly included in the warranty which promises future performance for five years. The “nylon racks” fail because of “defects in material” and which is specifically covered under the terms of the Warranty.

197. Mr. Bodley’s rack assembly failed on or about April 11, 2017, which was within the five-year warranty period.

198. Plaintiffs have provided Defendant with notice of breach of the Warranty and a reasonable opportunity to cure the breach. In addition, the Notice afforded Defendant notice on behalf of the Consumer Subclasses of its breach of the warranty and a reasonable opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to the Consumer Subclasses under the Warranty.

199. The California Supreme Court has ruled that there is no privity requirement on a claim for express warranty.⁹

200. The express written warranty provides coverage for the racks for five years from the date of purchase. As such, the written warranty explicitly extends to future performance beyond one year. An assessment of whether the warranty had been breached necessarily would need to extend through five years, absent prior discovery of the defect by Plaintiffs. Plaintiffs did not discover the defects until their respective dishwashers failed as alleged herein. Therefore, the four-year statute of limitations breach of express written warranty began to run on the date of such discovery and the Plaintiffs claims are timely.

201. Because of Defendant’s breach of the warranty, Plaintiffs and the Consumer Subclasses have been damaged in an amount to be proven at trial.

⁹ *Seely v White Motor Co.*, (1965) 63 Cal.2d 9, 14.

SEVENTH CLAIM FOR RELIEF
(Breach of Express Warranty - Magnuson-Moss Warranty Act)
(By Plaintiffs and the Consumer Subclasses against Defendant)

202. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

203. The allegations of this Claim for Relief are based on the breaches of warranty addressed fully in the Fifth Claim for Relief. The specific allegations of the Complaint relevant to that claim are detailed therein.

204. The dishwashers are a consumer product as defined in 15 U.S.C. § 2301(1).

205. Plaintiffs and the members of the Consumer Subclasses are consumers as defined in 15 U.S.C. § 2301(3).

206. Defendant Whirlpool is a “supplier” and “warrantor” as defined in 15 U.S.C. § 2301(4) and (5).

207. The express warranties pertaining to the dishwashers are “written warranties” within the meaning of 15 U.S.C. § 2301(6).

208. Additionally, pursuant to 15 U.S.C. § 2304(d)(1), Defendant may not assess Plaintiffs or the Consumer Subclasses any costs the warrantor or his representatives incur in connection with the required remedy of a warranted product...[I]f any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.” Defendant has unreasonably refused to pay the material and labor costs associated with the repair of the defects in the dishwashers.

209. Plaintiffs have provided Defendant with notice of breach of the Warranty and a reasonable opportunity to cure the breach. In addition, the Notice afforded Defendant notice on behalf of the Consumer Subclasses of its breach of the Warranty and a reasonable opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to the Consumer Subclasses under the Warranty.

210. The California Supreme Court has determined that there is no privity requirement on a claim for express warranty.

211. The express written warranty provides coverage for the racks for five years from the date of purchase. As such, the written warranty explicitly extends to future performance beyond one year. An assessment of whether the warranty had been breached necessarily would need to extend through five years, absent prior discovery of the defect by Plaintiffs. Plaintiffs did not discover the defects until their respective dishwashers failed as alleged herein. Therefore, the four-year statute of limitations breach of express written warranty began to run on the date of such discovery and the Plaintiffs claims are timely.

212. As a direct and proximate result of the acts and omissions of Defendant as set forth herein, Plaintiffs and the Consumer Subclasses have been damaged in an amount to be proven at trial.

EIGHTH CLAIM FOR RELIEF
(Breach of Implied Warranty)
(By Plaintiffs and the Consumer Subclasses Against Defendant)

213. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

214. The sale by Defendant of the dishwashers was accompanied by implied warranties that the dishwashers were merchantable and fit for the ordinary purpose for which such products were sold (the “Implied Warranties”).

215. The dishwashers manufactured and sold by Defendant were defectively designed and manufactured and contained latent defects at the time of manufacture and sale.

216. At all times, Plaintiffs have used their dishwashers in a foreseeable manner and in the manner in which they were intended to be used. The defect, which existed at the time the dishwashers were sold to Plaintiffs or their agents, rendered them unfit for the ordinary purpose for which dishwashers are used and not merchantable.

217. Due to the defect alleged herein, the dishwashers were not of the same quality as those generally acceptable in the trade and were not fit for the ordinary purposes for which the goods are used. When the defect caused the rack to fall and drop onto the lower rack, the dishwasher was not capable of being operated at all. The failure of the upper racks drastically undermines the ordinary operation of the dishwashers and presents an unreasonable safety risk.

218. Defendant issued the Warranty to Plaintiffs Bodley, Plaintiff McCallum and the Consumer Subclasses. Defendant also extended the benefit of the Warranty to Plaintiff Matson and members of the Subsequent Purchaser Subclass because the Warranty only requires that the original purchase date for the dishwasher be supplied. Defendant is therefore in direct privity with each Plaintiff and all members of the Consumer Subclasses.

219. Further, the Implied Warranties incorporated into the transaction between Defendant and Initial Buyers were intended solely to benefit Plaintiffs and the Class. Defendant does not sell directly to end users. Plaintiffs and the Consumer Subclasses are therefore entitled to enforce the Implied Warranties against Defendant regardless of privity.

220. As to the California Consumer Subclasses, vertical privity is not required pursuant to California Civil Code section 1792, because Plaintiffs and the Consumer Subclasses were the intended beneficiaries of the purchase of the dishwashers from Whirlpool. The Initial Buyers are not the owners of the dishwashers. The implied warranties made by Defendant to Initial Buyers and others in the distribution chain would be of no economic value to them unless Plaintiffs and the Class received the benefit of such warranties. Under *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal. App. 3d 65, the Implied Warranties made by Defendant to the Initial Buyers are enforceable by Plaintiffs and the Consumer Subclasses.

221. Similarly, for the Texas Consumer Subclasses, vertical privity is also not required for breach of implied warranty claims. The implied warranty of merchantability assures buyers that goods are, among other things, “fit for the ordinary purposes for which such goods are used.” TEX. BUS. & COM. CODE § 2.314(b)(3). “A downstream purchaser who seeks to recover for economic loss under an implied-warranty theory, whether he buys the product new or used, seeks to hold the merchant accountable only for the state of the product when it passed to the first buyer.”¹⁰

222. Defendant breached the Implied Warranties by manufacturing and selling dishwashers which, at the time of sale, were: (1) not fit for their intended use, and (2) not of a merchantable quality. The dishwashers are neither merchantable nor fit for their intended use because: (1) the latent defect in the dishwashers insures that they will fail prematurely and therefore fail to clean dishes; and (2) the dishwashers are defective and dangerous in that the upper rack assembly suddenly and unexpectedly collapses, causing glassware and other dishes to fall and shatter, which exposes consumers to an unreasonable risk of personal injury and can result in

¹⁰ *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d. 132 (Tex. 2014); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 81 (Tex. 1977).

property damage. Purchasers of the dishwashers would not accept the safety risk posed by broken glass and dishware resulting from the failure of the rack assemblies in the dishwashers when there are other products for sale which do not present this risk.

223. Defendant has received timely notice of the breach of warranty alleged herein by reason of its own knowledge of the defect in the dishwashers.

224. Further, Plaintiffs have provided Defendant with written notices of the breach of the Implied Warranties and a reasonable opportunity to cure the breach. In addition, the Notices attached as Exhibits to this Second Amended Complaint afforded Defendant notice on behalf of the Class of its breach of the Implied Warranties and a reasonable opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to the Consumer Subclasses under the Implied Warranties.

225. Because the dishwashers either have failed or are certain to fail prematurely, Defendant is in breach of the Implied Warranties.

226. Defendants have failed to remedy the breach of the Warranty for Plaintiffs or the Consumer Subclasses.

227. The express written warranty provides coverage for the racks for five years from the date of purchase. As such, the written warranty explicitly extends to future performance beyond one year and thereby extends the implied warranty. An assessment of whether the warranty had been breached necessarily would need to extend through five years, absent prior discovery of the defect by Plaintiffs. A latent defect existed at the time of the sale of the dishwashers, but Plaintiffs did not discover the defects until their respective dishwashers failed as alleged above. Therefore, the four-year statute of limitations for breach of implied warranty began to run on the date of such discovery and the Plaintiffs claims are timely. Further, the statute of limitations for implied

warranty is tolled by fraudulent concealment. *E.g., Philips v. Ford Motor Co.*, No. 14- CV-02989-LHK, 2016 WL 1745948, at *14 (N.D. Cal. May 3, 2016).

228. As a direct and proximate result of Defendant's breach of the Implied Warranties, Plaintiffs and members of the Class have been damaged in an amount to be proven at trial.

NINTH CLAIM FOR RELIEF
(Breach of Implied Warranty under Song-Beverly Consumer Warranty Act)
(By Plaintiff Bodley, Matson, and the California Consumer Subclasses against Defendant)

229. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

230. The allegations of this Claim for Relief are based on the breaches of warranty addressed fully in the Eighth Claim for Relief. The specific allegations of the Complaint relevant to that claim are detailed therein.

231. Under the Song-Beverly Consumer Warranty Act, California Civ. Code § 1792, *et seq.*, every sale of consumer goods in the State of California is accompanied by both a manufacturer's and retail seller's implied warranty that the goods are merchantable.

232. The dishwashers are consumer goods within the meaning of the statute.

233. Defendant Whirlpool is a "manufacturer" within the meaning of the statute.

234. Plaintiff Bodley, Plaintiff Matson, and members of the California Consumer Subclasses purchased dishwashers in the State of California.

235. By operation of law, the Defendant made the Implied Warranties to these Plaintiffs and the California Consumer Subclasses concerning the dishwashers.

236. Defendant has breached the Implied Warranties by selling dishwashers which were not of merchantable quality and which failed to perform the tasks for which they were intended.

237. The California Plaintiffs and all other California Consumer Subclasses Members do not have to be in privity with Defendant in order to enforce the Implied Warranties. California Civil Code § 1792, which provides that “[u]nless disclaimed in the manner prescribed by this chapter, every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer’s and the retail seller’s implied warranty that the goods are merchantable,” has no privity requirement.

238. Vertical privity is not required pursuant to California Civil Code § 1792; moreover, Plaintiffs and class members were the intended beneficiaries of the purchase of the dishwashers from Whirlpool. The implied warranties made by Defendant to Initial Buyers and others in the distribution chain would be of no economic value to them unless Plaintiffs and the Class received the benefit of such warranties. Under *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal. App. 3d 65, and *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d. 132 (Tex. 2014), the Implied Warranties made by Defendant to the Initial Buyers are enforceable by Plaintiffs and all members of the Class.

239. Plaintiffs have provided Defendant with notice of breach of the Implied Warranties and a reasonable opportunity to cure the breach. In addition, the Notice afforded Defendant notice on behalf of all Consumer Subclasses of its breach of the Implied Warranties and a reasonable opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to the Consumer Subclasses under the Implied Warranties.

240. The express written warranty provides coverage for the racks for five years from the date of purchase. As such, the written warranty explicitly extends to future performance beyond one year and thereby extends the implied warranty. An assessment of whether the warranty had been breached necessarily would need to extend through five years, absent prior discovery of the

defect by Plaintiffs. A latent defect existed at the time of the sale of the dishwashers, but Plaintiffs did not discover the defects until their respective dishwashers failed as alleged above. Therefore, the four-year statute of limitations for breach of implied warranty began to run on the date of such discovery and the Plaintiffs claims are timely. Further, the statute of limitations for implied warranty is tolled by fraudulent concealment.

241. Because of Defendant's breaches of the Implied Warranties, Plaintiffs and Consumer Subclasses Members have been damaged in an amount to be proven at trial.

TENTH CLAIM FOR RELIEF
(Breach of Implied Warranty - Magnuson-Moss Warranty Act)
(By Plaintiffs and the Consumer Subclasses against Defendant)

242. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

243. The allegations of this Claim for Relief are based on the breaches of warranty addressed fully in the Eighth Claim for Relief. The specific allegations of the Complaint relevant to that claim are detailed therein.

244. Plaintiffs and the Consumer Subclasses are consumers as defined in 15 U.S.C. § 2301(3).

245. Defendant is a supplier and warrantor as defined in 15 U.S.C. § 2301(4) and (5).

246. The dishwashers are consumer products as defined in 15 U.S.C. § 2301(1).

247. Under 15 U.S.C. §2301(7), Defendant extended the Implied Warranties to Plaintiffs and the Consumer Subclasses.

248. Defendant breached the Implied Warranties by selling dishwashers that were neither merchantable nor fit for their intended purpose.

249. Under 15 U.S.C. §2310(e), notice of breach of warranty need not be provided until

after Plaintiffs have been appointed Consumer Subclasses Representatives.

250. Plaintiffs have provided Defendant with notice of breach of the Implied Warranties and a reasonable opportunity to cure the breach. In addition, the Notice afforded Defendant notice on behalf of the Consumer Subclasses of its breach of the Implied Warranties and a reasonable opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to the Consumer Subclasses under the Implied Warranties.

251. Vertical privity is not required pursuant to California Civil Code § 1792; moreover, Plaintiffs and class members were the intended beneficiaries of the purchase of the dishwashers from Whirlpool. The implied warranties made by Defendant to Initial Buyers and others in the distribution chain would be of no economic value to them unless Plaintiffs and the Class received the benefit of such warranties. Under *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal. App. 3d 65, and *MAN Engines & Components, Inc. v. Shows*, 434 S.W.3d. 132 (Tex. 2014), the Implied Warranties made by Defendant to the Initial Buyers are enforceable by Plaintiffs and all members of the Class.

252. The express written warranty provides coverage for the racks for five years from the date of purchase. As such, the written warranty explicitly extends to future performance beyond one year and thereby extends the implied warranty. An assessment of whether the warranty had been breached necessarily would need to extend through five years, absent prior discovery of the defect by Plaintiffs. A latent defect existed at the time of the sale of the dishwashers, but Plaintiffs did not discover the defects until their respective dishwashers failed as alleged above. Therefore, the four-year statute of limitations breach of implied warranty began to run on the date of such discovery and the Plaintiffs claims are timely. Further, the statute of limitations for implied warranty is tolled by fraudulent concealment.

253. Because of Defendant's breach of the Implied Warranties, Plaintiffs and the Consumer Subclasses have been damaged in an amount to be proven at trial.

ELEVENTH CLAIM FOR RELIEF
(Injunctive/Declaratory Relief Pursuant to 28 U.S.C. § 2201)
(By Plaintiffs and on behalf of the Putative Class against Defendant)

254. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

255. There is an actual controversy between Defendant and the Class concerning the need for cessation of sale and recall of product and inventory pertaining to the subject dishwashers and replacement upper rack assembly kits as described herein.

256. Plaintiffs hereby seek injunctive relief to enjoin the Defendant from further selling, marketing, distributing, and/or continued placement of dishwashers or replacement upper rack assembly kits with the subject defect in the stream of commerce without making it safe for its ordinary and/or intended purposes and/or absent clear and specific warning to all consumers, including direct notification to distributors, retailers, installers, third-party sellers, and product owners.

257. There is an actual controversy between Defendant and the Class concerning the validity and scope of the limitations in the warranty pertaining to the dishwasher racks. A copy of the Warranty is attached as Exhibit B.

258. Whirlpool's warranty was uniform and applied equally to each member of the class no matter the state in which the class member resides. Furthermore, the administration of warranty claims was also handled without regard to the state in which the warranty claimant resided. Each class member has a claim arising from the common and uniform warranty which Whirlpool provided.

259. Pursuant to 28 U.S.C. § 2201 this Court may “declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

260. Whirlpool has wrongfully denied warranty claims as untimely or based on scope of warranty defenses despite the root cause of upper rack failures being the latent defects described herein.

261. Considering the contemporaneous notification of this proposed class action arising from violations of the Deceptive Trade Practices Act to the Consumer Protection Division of Texas Attorney General’s Office, Plaintiffs recognize that injunctive relief may be circumscribed by the Attorney General during the course of its investigation into the corporate name changes, alterations in registration for conducting business in the State of Texas, and product defect affecting State citizens. Plaintiffs will cooperate or otherwise coordinate its private pursuit of injunctive relief for not only Texas class members in conjunction with any State action, but further as to affected national class members to the extent necessary.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, prays the Court to certify the Class as defined hereinabove, to enter judgment against Defendant and in favor of the Class, and to award the following relief:

1. For Certification of the proposed Class and each Subclass thereof;
2. For compensatory damages as alleged herein, according to proof;
3. For restitution and/or disgorgement of revenues, earnings, profits, compensation, and benefits which were received by Defendant as a result of unlawful business acts or practices, according to proof;
4. For an order requiring Defendant to engage in a notice and/or recall campaign;
5. Compelling Defendant to establish a program to inspect, remediate and replace any defective upper rack assembly subject to third-party administration and enforcement;

6. Compelling Defendant to establish a program to re-audit and reimburse its warranty claims previously denied or only paid in part subject to third-party administration and enforcement;
7. For exemplary and punitive damages according to proof;
8. For costs and attorneys' fees, as allowed by law; and
9. For such other further legal or equitable relief as this Court may deem appropriate under the circumstances.

DATED: August __, 2018.

Respectfully submitted,
/s/ Rebecca Bell-Stanton
N. SCOTT CARPENTER
State Bar No. 00790428
REBECCA E. BELL-STANTON
State Bar No. 24026795
CARPENTER & SCHUMACHER, P.C. 2701
NORTH DALLAS PARKWAY, SUITE 570
Plano, Texas 75093
(972) 403-1133
(972) 403-0311 [Fax]
scarpenter@cstriallaw.com
rstanton@cstriallaw.com
**ATTORNEYS FOR PLAINTIFFS AND
PROPOSED CLASS**

CERTIFICATE OF SERVICE

I certify that on the ___ day of August, 2018 that the foregoing was served to all counsel of record *via* the Court's CM/ECF document filing system.

/s/ Rebecca Bell-Stanton
REBECCA BELL-STANTON

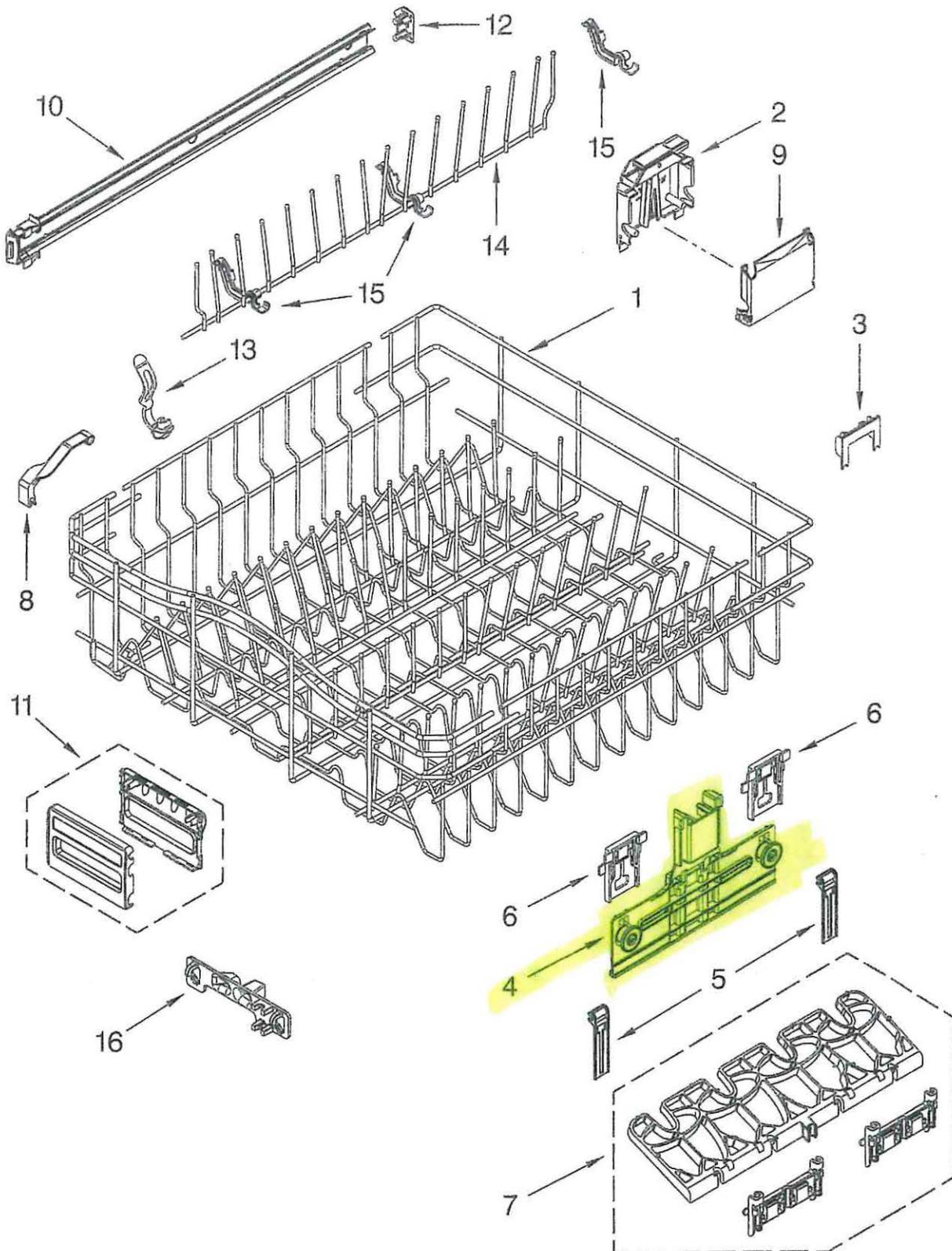
EXHIBIT

A



UPPER RACK AND TRACK PARTS

For Models: KUDS30FXBL5, KUDS30FXWH5, KUDS30FXSS5
(Black) (White) (Stainless)



FOR ORDERING INFORMATION REFER TO PARTS PRICE LIST

UPPER RACK AND TRACK PARTS

For Models: KUDS30FXBL5, KUDS30FXWH5, KUDS30FXSS5
 (Black) (White) (Stainless)

Illus. No.	Part No.	DESCRIPTION
1	W10312791	Dishrack, Upper
2		Housing, Adjuster
	W10320664	Left Hand
	W10320665	Right Hand
3	W10250160	Clip-Lock Adjuster Arm
4	W10350376	Adjuster Assembly
5	W10195839	Strap, Tether Adjuster
6	W10195840	Positioner, Adjuster
7	W10082649	Cup, Shelf
8	W10267076	Clip, Dispenser Guard
9	W10250162	Cover, Adjuster
10	W10324563	Track, Assembly
11	W10282826	Handle, Dishrack
12	W10195622	Stop, Track Non-Removable
13	W10077844	Clip, No Flip
14	8562030	Tine Row
15	W10082853	Clip, Pivot
16	8539102	Positioner, Dual

EXHIBIT

B

KITCHENAID® DISHWASHER WARRANTY

LIMITED WARRANTY

For one year from the date of purchase, when this major appliance is operated and maintained according to instructions attached to or furnished with the product, KitchenAid brand of Whirlpool Corporation or Whirlpool Canada LP (hereafter "KitchenAid") will pay for factory specified parts and repair labor to correct defects in materials or workmanship that existed when this major appliance was purchased. Service must be provided by a KitchenAid designated service company. YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT REPAIR AS PROVIDED HEREIN. This limited warranty is valid only in the United States or Canada and applies only when the major appliance is used in the country in which it was purchased. Proof of original purchase date is required to obtain service under this limited warranty.

SECOND THROUGH FIFTH YEAR LIMITED WARRANTY ON CERTAIN COMPONENT PARTS

In the second through the fifth year from the date of purchase, when this major appliance is operated and maintained according to instructions attached to or furnished with the product, KitchenAid will pay for factory specified parts for the following components to correct defects in materials or workmanship that existed when this major appliance was purchased: nylon dish racks and electronic controls.

LIFETIME LIMITED WARRANTY ON STAINLESS STEEL TUB AND INNER DOOR LINER

For the lifetime of the product from the date of purchase, when this major appliance is installed, operated and maintained according to instructions attached to or furnished with the product, KitchenAid will pay for factory specified parts and repair labor for the following components to correct defects in materials or workmanship that existed when this major appliance was purchased: stainless steel tub and inner door liner.

ITEMS EXCLUDED FROM WARRANTY

This limited warranty does not cover:

1. Replacement parts or repair labor if this major appliance is used for other than normal, single-family household use or when it is used in a manner that is inconsistent to published user or operator instructions and/or installation instructions.
2. Service calls to correct the installation of your major appliance, to instruct you on how to use your major appliance, to replace or repair house fuses, or to correct house wiring or plumbing.
3. Service calls to repair or replace appliance light bulbs, air filters or water filters. Consumable parts are excluded from warranty coverage.
4. Damage resulting from accident, alteration, misuse, abuse, fire, flood, acts of God, improper installation, installation not in accordance with electrical or plumbing codes, or use of products not approved by KitchenAid.
5. Cosmetic damage, including scratches, dents, chips or other damage to the finish of your major appliance, unless such damage results from defects in materials or workmanship and is reported to KitchenAid within 30 days from the date of purchase.
6. Any food or medicine loss due to refrigerator or freezer product failures.
7. Pickup and delivery. This major appliance is intended to be repaired in your home.
8. Repairs to parts or systems resulting from unauthorized modifications made to the appliance.
9. Expenses for travel and transportation for product service if your major appliance is located in a remote area where service by an authorized KitchenAid servicer is not available.
10. The removal and reinstallation of your major appliance if it is installed in an inaccessible location or is not installed in accordance with KitchenAid's published installation instructions.
11. Replacement parts or repair labor on major appliances with original model/serial numbers that have been removed, altered or cannot be easily determined.

DISCLAIMER OF IMPLIED WARRANTIES

IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, ARE LIMITED TO ONE YEAR OR THE SHORTEST PERIOD ALLOWED BY LAW. Some states and provinces do not allow limitations on the duration of implied warranties of merchantability or fitness, so this limitation may not apply to you. This warranty gives you specific legal rights, and you also may have other rights that vary from state to state or province to province.

LIMITATION OF REMEDIES; EXCLUSION OF INCIDENTAL AND CONSEQUENTIAL DAMAGES

YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT REPAIR AS PROVIDED HEREIN. KITCHENAID SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. Some states and provinces do not allow the exclusion or limitation of incidental or consequential damages, so these limitations and exclusion may not apply to you. This warranty gives you specific legal rights, and you also may have other rights that vary from state to state or province to province.

If outside the 50 United States and Canada, contact your authorized KitchenAid dealer to determine if another warranty applies.

If you think you need repair service, first see the "Troubleshooting" section of the Use & Care Guide. If you are unable to resolve the problem after checking "Troubleshooting," additional help can be found by checking the "Assistance or Service" section or by calling KitchenAid. In the U.S.A., call 1-800-422-1230. In Canada, call 1-800-807-6777.

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For additional product information or to view FAQs (Frequently Asked Questions), in U.S.A. visit: www.kitchenaid.com
In Canada visit: www.kitchenaid.ca

If you do not have access to the Internet and you need assistance using your product or you would like to schedule service, you may contact KitchenAid at the number below.

Have your complete model number ready. You can find your model and serial number on the label located near the door on the right-hand or left-hand side of the dishwasher interior.

For assistance or service in the U.S.A., call 1-800-422-1230. In Canada, call 1-800-807-6777.

If you need further assistance, you can write to KitchenAid with any questions or concerns at the address below:

In the U.S.A.:

KitchenAid Brand Home Appliances
Customer eXperience Center
553 Benson Road
Benton Harbor, MI 49022-2692

In Canada:

KitchenAid Brand Home Appliances
Customer eXperience Centre
200 – 6750 Century Avenue
Mississauga ON L5N 0B7

Please include a daytime phone number in your correspondence.

Please keep this User Instructions and model number information for future reference.

1 David M. Birka-White (State Bar No. 85721)
dbw@birka-white.com
2 Mindy M. Wong (State Bar No. 267820)
mwong@birka-white.com
3 BIRKA-WHITE LAW OFFICES
65 Oak Court
4 Danville, CA 94526
Telephone: (925) 362-9999
5 Facsimile: (925) 362-9970

6 N. Scott Carpenter (*Pro Hac Vice To Be Submitted*)
7 scarpenter@cstriallaw.com
Rebecca Bell-Stanton
8 rstanton@cstriallaw.com
Carpenter & Schumacher, P.C.
9 2701 Dallas Parkway, Suite 570
Plano, TX 75093
10 Telephone: (972) 403-1133
11 Facsimile: (972) 403-0311

12 *Attorneys for Plaintiffs*
JAMES BODLEY AND KYLE MATSON

13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 JAMES BODLEY AND KYLE MATSON, on
behalf of themselves and all others similarly
17 situated,

18 Plaintiff,

19 v.

20 KITCHENAID, INC., and DOES 1 through
10, inclusive,

21 Defendants.
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CASE NO.

**COMPLAINT FOR DAMAGES AND
INJUNCTION**

CLASS ACTION

JURY TRIAL DEMANDED

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1 Plaintiffs James Bodley and Kyle Matson (“Plaintiffs”), on behalf of themselves and all
2 others similarly situated, allege as follows:

3 **I. INTRODUCTION**

4 1. This case arises out of the manufacture and sale of dishwashers designed,
5 manufactured and sold by Defendant KitchenAid, Inc. (“Defendant” or “KitchenAid”) which are
6 equipped with a defective upper rack assembly depicted in **Exhibit A** hereto, including but not
7 limited to part numbers W10350375 and W10350376.

8 2. KitchenAid designed, manufactured, distributed and sold the dishwashers from
9 approximately 2011 to the present to Plaintiffs and Class Members.

10 3. At the time of sale, the dishwashers contained a defect in the upper rack assembly.
11 The rack assemblies in the dishwashers are prone to premature failure as the heat generated by the
12 dishwasher causes the plastic components to become brittle and break, causing the top rack to
13 suddenly and unexpectedly collapse.

14 4. The failure of the upper rack assembly results in property damage and creates an
15 unreasonable risk of personal injury because the upper rack assembly fails without warning to
16 Plaintiffs and the Class causing dishware and glassware to shatter and break.

17 5. The dishwasher will not operate without a functional upper rack assembly.
18 Moreover, the component part cannot be repaired and must be replaced, an expense that has and
19 must be incurred by Plaintiffs and the Class as alleged herein.

20 6. KitchenAid has known that the upper rack assembly was defective and not fit for
21 their intended purpose as alleged herein since shortly after they were first sold, at least 2011.
22 Nevertheless, KitchenAid actively concealed and failed to disclose the defect to Plaintiffs and the
23 Class at the time of purchase and thereafter and continued selling the dishwashers containing the
24 defective upper rack assembly.

25 7. KitchenAid had a duty to disclose the defect in the dishwashers to all prospective
26 purchasers particularly because of the unreasonable risk of serious physical injury posed by the
27 defect in the upper rack assembly. Had Plaintiffs and the Class been aware of the defect, they
28 would not have purchased a KitchenAid dishwasher but instead would have purchased a

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1 dishwasher manufactured by others.

2 8. Despite notice of the defect from hundreds of customer complaints, KitchenAid has
3 not recalled the dishwashers to repair the defect and when asked, has refused to pay for the parts
4 and labor associated with removing and replacing the defective rack assembly.

5 9. As a result of the defect in the dishwashers, Plaintiffs and members of the Class
6 have suffered actual damages.

7 10. Plaintiffs seek recovery on behalf of themselves and all persons who purchased the
8 dishwashers or properties in which the dishwashers were installed (the “Class”) for breach of
9 express and implied warranties and for violation of the provisions of the California consumer
10 protection and unfair business practice statutes.

11 **II. PARTIES**

12 11. Plaintiff James Bodley (“Bodley”) is a resident of Dublin, California, County of
13 Alameda. On or about November 6, 2012, Bodley became the first purchaser of a newly
14 constructed home in which a KitchenAid dishwasher bearing model number KUDS30FXSS5 was
15 installed.

16 12. Plaintiff Kyle Matson (“Maston”) is a resident of Martinez, California, County of
17 Contra Costa. On or about November 22, 2013, Matson purchased a home in which a KitchenAid
18 dishwasher bearing model number KUDS30FXSS5 was installed.

19 13. Defendant KitchenAid, Inc. (“KitchenAid”) is a Delaware corporation with its
20 principal place of business in Benton Harbor, Michigan. At all times relevant herein, KitchenAid
21 distributed, advertised, marketed, manufactured, warranted, and sold the KitchenAid dishwashers
22 equipped with the defective upper rack assembly.

23 14. Plaintiffs are unaware of the true names and capacities of the Defendants sued
24 herein as DOES 1 through 10, and therefore sue these Defendants by such fictitious names.
25 Plaintiffs will amend this complaint to allege their true names and capacities when they are
26 ascertained. Plaintiffs are informed and believe that each of the fictitiously named Defendants is
27 responsible in some manner for the occurrences herein alleged and that the damages suffered by
28 Plaintiffs and the class, were proximately caused by their conduct.

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1 15. Plaintiffs are informed and believe that all Defendants, including the fictitious Doe
2 Defendants 1 through 10, were at all relevant times acting as actual or ostensible agents,
3 conspirators, partners, joint venturers or employees of all other Defendants and that all acts alleged
4 herein occurred within the course and scope of that agency, employment, partnership, or enterprise,
5 and with the express or implied permission, knowledge, consent, authorization and ratification of
6 their co-Defendants.

7 **III. JURISDICTION AND VENUE**

8 16. This Court has jurisdiction over this action pursuant to the Class Action Fairness
9 Act, 28 U.S.C. § 1332(d), because this is a class action in which: (1) there are at least 100 class
10 members in the proposed class, (2) the combined claims of the proposed class members exceed
11 \$5,000,000 exclusive of interests and costs, and (3) there is minimal diversity as Plaintiffs and
12 members of the proposed class are citizens of California and KitchenAid is a citizen of other states
13 including Delaware and Michigan.

14 17. This Court has personal jurisdiction over Defendant because KitchenAid
15 purposefully availed itself of the privilege of conducting business activities within the State of
16 California by advertising, selling, and warranting the dishwashers to Plaintiffs and the proposed
17 class, and maintained systematic and continuous business contacts with the State of California, to
18 render the exercise of jurisdiction by this Court permissible under traditional notions of fair play
19 and substantial justice.

20 18. Venue is also proper in this District pursuant to 28 U.S.C. § 1391(a)(2) because a
21 substantial part of the events, misrepresentations and/or omissions giving rise to Plaintiffs' claims
22 alleged herein occurred in the Northern District when Defendant advertised, sold, marketed, and/or
23 warranted the dishwashers to Plaintiffs and the proposed class.

24 **IV. INTRADISTRICT ASSIGNMENT**

25 19. Venue in this Division of the Northern District is proper under Local Rule 3-2(c)
26 and (d) because a substantial part of the events or omissions which give rise to Plaintiffs' claims
27 occurred in Alameda County and Contra Costa County.

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V. FACTUAL ALLEGATIONS

A. The Latent Defect in the Dishwashers

20. The dishwashers designed, manufactured, marketed, and sold by KitchenAid contain defective rack assemblies that fail and cause the dishwasher to be inoperable.

21. The dishwashers utilize plastic parts in the top rack slide mechanism. These parts prematurely fail without warning causing the axles to separate from the wheels. The wheels come free allowing the rack to become unstable and fall. The loaded top rack falls onto the door or lower rack, causing dishware and glassware to shatter and break, causing property damage and a serious risk of personal injury. The design of the rack assembly cannot withstand normal or intended use.

22. Because of the defect in the rack assemblies, all KitchenAid dishwashers relevant to this litigation have upper rack assemblies that have failed or will ultimately fail prematurely.

23. The defect in the dishwasher is latent and not discoverable until the upper rack assembly fails, at which point the dishwasher is no longer operable and remains substantially inoperable until the defective rack assembly is replaced.

24. The dishwashers were manufactured and sold between 2011 to the present.

25. Notwithstanding their knowledge of the defect, KitchenAid continued the sale of the dishwashers without disclosing the defect or safety risk to consumers. Had Defendant disclosed the known facts Plaintiffs and the proposed Class would not have purchased the dishwashers or would have requested that they be replaced in homes purchased by Plaintiffs and the Class.

26. Plaintiffs were not aware of the defect in their dishwashers until the upper rack assemblies suddenly and unexpectedly failed.

B. Cost and Installation of Repair Assembly

27. When the upper rack assembly fails, Plaintiffs and members of the Class are required to purchase replacement rack assemblies at a cost of \$25-\$50 plus labor costs associated with installation of the rack assemblies at a cost of approximately \$100-\$250.

28. Defendant could have avoided damaging Plaintiffs and the proposed Class by disclosing the nature of the defect and paying for the replacement of the defective rack assembly. Defendant continues to refuse to do so as alleged herein.

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1 29. As a result of the Defect, Plaintiffs and the putative class have experienced or are
2 substantially certain to experience premature failure of their dishwashers and have incurred
3 damages as alleged herein.

4 **C. KitchenAid’s Warranties and Representations**

5 30. KitchenAid issued a written warranty (the “Warranty”) for the dishwasher.

6 31. The Warranty provides that: “For one year from the date of purchase, when this
7 major appliance is operated and maintained according to instructions attached to or furnished with
8 the product, KitchenAid....will pay for factor specified parts and repair labor to correct defects in
9 materials and workmanship that existed when this major appliance was purchased.” A copy of the
10 Warranty is attached hereto as **Exhibit B**.

11 32. The Warranty further provides, “In the second through fifth year from the date of
12 purchase, when this major appliance is operated and maintained according to instructions attached
13 to or furnished with the product, KitchenAid will pay for factory specified parts for the following
14 components to correct defects in materials or workmanship that existed when this major appliance
15 was purchased: nylon dish racks and electrical controls.”

16 33. Plaintiffs have provided KitchenAid with notice of breach of the Warranty and a
17 reasonable opportunity to cure the breach. *See Exhibit C* attached hereto. KitchenAid has failed
18 to remedy the breach of its obligations to Plaintiffs and the proposed Class under the Warranty.
19 Further, complaints submitted online to www.consumeraffairs.com by members of the Class
20 demonstrates that KitchenAid is refusing to warranty the defective upper rack assembly.

- 21 • On August 4, 2014, John H. of Cincinnati, OH wrote:

22 We have owned a KitchenAid Dishwasher, Model KUDS35FXSS8 for
23 16 months. **The wheels on the upper dish rack have already come off,**
24 rendering it unusable. This happened because the plastic tabs that hold the
25 wheels in place have become brittle and cracked off in this short time.
26 **Kitchen Aid’s warranty states that the dish rack is warranted for 5**
27 **years. However, Kitchen Aid customer service tells us that the wheel**
28 **assembly on the dish rack is not covered by this warranty.** Wheel
 assembly W10350376 is poorly designed and quickly fails. Do not buy a
 Kitchen Aid or Whirlpool dishwasher that uses this wheel assembly.

- 27 • On November 12, 2015, Carol of Baltimore, MD wrote:

28 I have a 4 year old Kitchenaid Dishwasher. We spent over \$1,000 for it

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CLASS ACTION COMPLAINT

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thinking we were investing in a very nice, long lasting machine. After a year, **the right clip on the top rack broke and needed to be repaired by a technician. 6 months later the other side broke and we needed another service call.** In the last few weeks, all 8 wheels have fallen off the bottom rack. We run the dishwasher about once every three days. I spoke to Kitchenaid customer service this morning via their online chat. The service representative admitted that there were so many complaints about my model that it should have been recalled. She said there was nothing she could do for me. **I called and spoke to a customer service representative and their supervisor and they both refused to provide the replacement parts.** My model is KUDE40FXSP3. I will never buy another Kitchenaid product. Even when they know there's an issue, they will not take responsibility for it.

- On February 8, 2016, Monica of Pine Brook, NJ wrote:

Currently own a KitchenAid Dishwasher, Model KUDE4FXSS0. **The top rack detached from the sliding mechanism.** There are no signs of parts. Afterwards two bottom wheels fell off on both sides. **Asked KitchenAid for assistance and they have to send a tech out at my cost.**

- On June 11, 2013, Jerri of Valley Park, MO wrote:

The Plastic wheels on my \$800 KitchenAid dishwasher Model KUDS30IX failed after a little over a year. My manual states that the rack is under warranty for 5 years... **KitchenAid says the warranty only applies to the nylon coating on the rack, not the wheels. They gave me a one-time replacement part that failed again after 6 months.**

See, **Exhibit D** attached hereto (emphasis added).

34. The Warranty purports to limit the rights and remedies of purchasers of the dishwashers as follows:

- a. KitchenAid purports to disclaim any implied warranties, including the warranties of merchantability and fitness for a particular use;
- b. KitchenAid purports to disclaim responsibility for any “incidental, consequential damages” arising from the use or loss of use of or failure of the dishwasher to perform as warranted; and
- c. The Warranty purports to provide that, “YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT REPAIR AS PROVIDED HEREIN.”

35. Each of these purported limitations and exclusions (the “Warranty Exclusions”) is unenforceable against Plaintiffs and the Class. The Warranty Exclusions were not bargained for by

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1 KitchenAid and its customers but were imposed unilaterally by KitchenAid. The Warranty
2 Exclusions are unfair in that they are outside the reasonable expectations of the parties thereto,
3 deny consumers an effective remedy and purport to limit the rights of consumers in ways that are
4 unenforceable under relevant state and federal law including, without limitation, the Song-Beverly
5 Consumer Warranty Act and Magnuson-Moss Warranty Act.

6 36. The unfairness of these limitations in remedy are reinforced by unenforceable
7 provisions of the Warranty stating that it is the “sole” and “exclusive remedy” for breach of
8 warranty or for manufacturing or design defects and the purported exclusion of implied warranties.
9 In fact, Plaintiffs and the proposed Class have substantial rights and remedies available to them
10 both for breach of implied and express warranty and for redress arising from the defective nature of
11 the dishwashers which KitchenAid cannot lawfully preclude them from asserting.

12 37. The provisions described in Paragraph 34 above both individually and in
13 combination, deprive Plaintiffs and the Class of any effective remedy for breach of KitchenAid’s
14 obligations to them.

15 38. In addition to the representations contained in the Warranty, KitchenAid engaged in
16 a marketing campaign for their “premium” dishwashers which are manufactured using “the highest
17 quality standards.” The KitchenAid website asserted that: (1) “All large KitchenAid® appliances
18 come with outstanding warranties that back up the premium quality of our appliances;” and (2)
19 “You chose quality and dependability when you chose a KitchenAid brand appliance.” Defendant
20 knew by at least 2011 that there was a defect in the upper rack assembly that would cause the
21 dishwashers to fail prematurely.

22 39. The representations and warranties made by KitchenAid concerning the dishwashers
23 were false because the upper rack assemblies prematurely fail due to a defect in the plastic
24 components which cause the upper rack assembly to collapse, creating a serious risk of physical
25 injury and property damage while also rendering the dishwashers substantially inoperable until the
26 defective rack assembly is replaced. Further, members of the Class have stated publicly that
27 KitchenAid has represented that the defective rack assembly is not covered under the terms of the
28 Warranty.

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1 40. KitchenAid was obligated to disclose that: (1) the upper rack assemblies in the
2 dishwasher have failed; and (2) the premature failure of the upper rack assembly posed a serious
3 safety risk due to its sudden collapse which results in broken dishware and glassware.

4 41. KitchenAid was obligated to disclose these facts to Plaintiffs and the Class because:
5 (1) the defect in the dishwashers poses an unreasonable safety risk; (2) disclosure was necessary to
6 qualify affirmative representations made concerning the dishwashers in order to make such
7 representations non-misleading; and (3) KitchenAid was uniquely in possession of the facts it did
8 not disclose, knew that such facts were not available to Plaintiffs and the Class and knew that such
9 facts would be highly material to any prospective purchaser or owner of a dishwasher.

10 42. Had KitchenAid disclosed these facts, Plaintiffs and the Class would not have
11 purchased any dishwasher containing the defective upper rack assembly.

12 43. KitchenAid knew or should have known with testing that the upper rack assembly
13 was defective and would fail prematurely.

14 44. Further, KitchenAid had actual knowledge of the defect in the upper rack assembly
15 based upon consumer complaints concerning the defect since at least 2011.

16 45. A few additional examples of consumer complaints posted on
17 www.consumeraffairs.com are as follows:

- 18 • On March 31, 2017, Betty of Henrico, VA wrote:
- 19 Bought Kitchenaid Model #KUDE40FXSS5 in 2012. Within first year the
20 top rack fell off the runners and had to be replaced...This machine cost
 \$1200 new.
- 21 • On February 11, 2016, Lorrie of Rainier, OR wrote:
- 22 KitchenAid Model KUDS30IXBL Purchased from Lowe's 3-29-14. Within a few
23 months of purchase, the top rack wheel broke off.
- 24 • On August 11, 2015, Marcel of Renton, WA wrote:



1 I too experienced the dishwasher top rack roller failure. The top rack rollers
2 are secured by (2) cheap very thin plastic spreader clips. These clips are
3 approximately 3/16 wide by 1/16 thick. If just one of these cheap clips
4 breaks - the roller wheel will separate causing the rack to collapse along
5 with progressive failure of the adjoining roller wheel clips.

- 6 • On January 29, 2015, Sanat of Novi, MI wrote:

7 2 years old dishwasher. ***Within 6 months, top rack roller axles broke.***

- 8 • On January 18, 2015, Mel of O'Fallon, MO wrote:

9 Purchased KitchenAid dishwasher model KUDS30FXSS5 in September
10 2012. ***The cheap plastic upper rack assembly has broken three times.***
11 The plastic parts to pull out the rack break every year and have fallen into
12 the chopper causing further damage.

- 13 • On January 3, 2015, Jan of Brigham, UT wrote:
14 Have only had my dishwasher ***4 months and the top rollers broke.*** I spent
15 a lot of money to get what I was told was a good dishwasher, so having
16 the rollers break after 4 months makes me angry. Then to find it isn't
17 covered under warranty really made me mad. Kitchenaid should be honest
18 and stand Behind their products!

- 19 • On November 23, 2014, Terry of Castle Rock, CO wrote:

20 The top rack adjuster is what connects the upper rack to the pull out guide.
21 In most Kitchenaid (and Whirlpool) dishwashers, the wheels of the
22 adjuster are connected with a plastic axle. These axles will routinely
23 break, causing the upper rack to fall onto the lower rack, or if you are luck,
24 just separate from the wheel guide. If you bought washers with this design,
25 you will have this problem. ***We have had our KUDS30X... for about 3***
26 ***years and have had to replace this part 7 times already.*** The part costs
27 about \$25 a pop from online part stores. This part will eventually wear
28 down and break no matter how careful you are when pulling out the top
rack.

- On December 24, 2014, Sana of El Cajon, CA wrote:

My Kitchen Aid Dishwasher Model KUDS301XSS4 Bought for \$753.14 is
three years old. It was working fine until the ***wheel to the top rack broke in***
October. I called the warranty department as I have a warranty bought for
\$127.37 just to discover that the warranty would not cover this kind of part
even though I can't use the machine without it.

- On June 6, 2014, Gerry of Encino, CA wrote:

Had dishwasher KUDS301XSS ***a little over a year and two small plastic***
parts on the upper glider both broke after just moderate use. Outside of
warranty by a few months and Whirlpool (Kitchenaid) sent their own
repairman who said the two parts were \$48...then charged \$130 for labor
and an additional \$85 for the service call.

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C O R P O R A T I O N S

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- On May 27, 2014, Scott of Decatur, AL wrote:



I also have a stainless steel KitchenAid dishwasher (KUDE40FXSS5) and while the machine is quiet and cleans reasonably well. **The adjuster assembly on the top rack has plastic tabs that become brittle and break, so that the wheels fall off. I have replaced this twice so far.** It is intensely frustrating! This problem could have been prevented with a metal tab instead of cheap plastic.

- On November 5, 2013, Kathryn of Gladwin, MI wrote:



I purchased a KitchenAid dishwasher in March 2011 from Lowe's. I chose the KitchenAid brand and paid a slightly higher amount as I was told they are well built and work better than any other brand on the market, and because I thought they would stand by their product. In December 2012, **the upper rack adjuster broke** because it is made of plastic and the dishwasher has the lift higher feature, that is used quite a bit. I contacted customer service and they said the part was out of stock and finally in late January I received the replacement part. **Last week it broke again, same place**, so I contacted customer service again and I asked them if anyone else has this issue and I was told they could not discuss this with me but there is no recall. Was told I am sorry but the part is in stock, call Marcone to order the part. The cost is \$40.00 plus shipping. I am so angry right now. I have a dishwasher that is useless. Without the top rack in the upper spray unit will not work.

- On November 6, 2011, Marcello of Houston, TX wrote:

We purchased a KUDS30CX in January 2011. First failure occurred in October 2011. The roller spindle on the top cage snapped and the roller fell off. The plastic spindle seems to be too brittle. **Second failure occurred November 2011 (less than 30 days from the first).** This time, the whole dishwasher just plain quit.

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1 See, **Exhibit E** attached hereto (emphasis added).

2 46. Complaints have also been submitted directly to www.KitchenAid.com:

3 • On May 6, 2017, Purnima Kumar of Dalls, TX wrote:

4 Bought 2 of these dishwashers 3 years ago.. **the racks broke**, the wheels
5 broke, and now new of the them the repair guy said the motor is broken and
needs replacement and its best to buy a new one...

6 • On July 20, 2016, Dishwasher Diva of Ellicott City, MD wrote:

7 We bought this dishwasher 4 years ago for our new home. Since that time
8 **we have spent approx. \$600 in repairs for new racks/brackets (plastic
parts for the top rack kept breaking).**

9 • On December 30, 2015, Laura of Windermere, FL wrote:

10 We purchased this product new 4 years ago. After the first year (like other
11 customers who posted feedback) **the cheap plastic parts on the top rack
broke. We repaired and about 1.5 years they broke again.**

12 • On September 15, 2015, Aaron of Arizona wrote:

13 The dishwasher upper rack has been an issue about 8 months after purchase.
14 The parts are plastic and have broken. **I too found out that they would not
cover under warranty.** Had to purchase parts in order to conveniently use
15 the product properly.

16 • On June 21, 2014, Unhappyconsumer2 of Atlanta, GA wrote:

17 We bought this unit in January of 2011 (to replace the 8 year old Kitchen
18 Aid that was put in our home from our builder) and have had consistant
19 problems with it ever since. **The upper rack is junk!! We have had it
replaced four times in 3 1/2 years** (only once covered with warranty.) Two
different repair companies have said how many of these they have to
frequently replace.

20 • On December 24, 2013, NeverAgain4AsLongAsILive of Chico, CA wrote:

21 **Rack repair will cost you a fortune..** I have had this dishwasher for two
22 years. It cleans nicely if you use the recommended detergent. However,
small plastic parts for the adjustable racks break every 3 - 4 months and they
23 cost over \$20 apiece.

24 • On November 19, 2013, Abrush of Pittsburgh, PA wrote:

25 **Great dishwasher if the top rack didn't BREAK OVER AND OVER**

26 In the 2 and a half years I've had this dishwasher the top rack adjusters have
27 broken 6 times (each side has broken 3 times). It's crazy that a high end
dishwasher like this would have the entire top rack suspended by tiny little
28 plastic pins and wheels. Upon being heated and reheated the plastic becomes
brittle and breaks causing the entire top rack to collapse.

1 See, **Exhibit F** attached hereto (emphasis added).

2
3 **D. Reliance by Plaintiffs and the Class on Representations and**
4 **Omissions Made by KitchenAid to the Distribution Chain and**
5 **End Users**

6 47. KitchenAid does not sell directly to end users. KitchenAid knew and intended that
7 the dishwashers would be purchased by builders, developers, and individual owners from
8 distributors and/or retailers for installation in properties throughout California.

9 48. The dishwashers are sold to end users through distributors and retailers like Sears
10 Roebuck & Co. (“Sears”), The Home Depot, and Lowes. In certain instances, the dishwashers
11 were sold to initial purchasers who were builders and developers for installation in newly built
12 homes (“Initial Buyers”). The dishwashers purchased by Initial Buyers were ultimately installed in
13 properties owned by Plaintiffs and other members of the Class.

14 49. KitchenAid represented to Initial Buyers and members of the Class that the
15 dishwashers were top of the line appliances that came with outstanding warranties for the premium
16 quality appliance as alleged in Paragraph 38 above. Plaintiff Bodley and members of the Class
17 paid a premium price for the KitchenAid dishwasher based upon the representations and warranty
18 as alleged herein.

19 50. Defendant and Initial Buyers intended that all express and implied warranties were
20 for the benefit of Plaintiffs and the Class, the owners of the properties in which the dishwashers
21 were installed. Defendant contracted with Initial Buyers to supply dishwashers to be installed in
22 Plaintiffs’ and Class Members’ properties and knew that the Initial Buyers would not generally
23 own or occupy such properties. The express and implied warranties would be of no economic value
24 to Buyers unless the ultimate owner of the properties containing the dishwashers, Plaintiffs and
25 Class Members, received the benefit of such warranties.

26 51. At all times relevant herein, purchasers of the dishwashers relied on building
27 contractors, real estate developers, retailers, distributors, and installers of the dishwashers to advise
28 them concerning the advantages of purchasing a dishwasher. Accordingly, Defendant’s knew that
if they wanted to sell the dishwashers to end users it had first to convince building contractors, real

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1 estate developers, retailers, and distributors that they should recommend the purchase of
2 dishwashers manufactured by KitchenAid rather than dishwashers manufactured by others.

3 52. Plaintiff Bodley and other members of the Class were exposed to Defendant’s
4 representations and warranties as alleged herein by builders, developers, distributors, retailers and
5 installers in precisely the manner that KitchenAid intended. No statement made by KitchenAid to
6 promote the sale of the dishwashers could fairly omit KitchenAid’s knowledge that its product was
7 dangerous, would fail prematurely and had failed many times already.

8 53. Plaintiff Bodley’s exposure to Defendant’s representations to Initial Buyers is
9 detailed in Paragraph 58 below.

10 **E. Defendants’ Failure to Warn Class Members and Its Effect**

11 54. Defendant has been aware of the defect in the dishwashers since at least 2011.
12 Plaintiffs are informed and believe and thereon allege that Defendants have received hundreds if
13 not thousands of reports by distributors, sellers, and owners of the failed rack assemblies in the
14 dishwashers. Despite its knowledge of these claims and the defect in the rack assemblies,
15 Defendant has not disclosed the defect or the risk of personal injury and property damage to its
16 customers. Had Plaintiffs and the Class been aware of the defect, they would not have been
17 damaged as alleged herein.

18 55. The failure of the upper rack caused property damage and exposed Plaintiff Matson
19 to an unreasonable and dangerous safety risk and property damage as described in Paragraph 64
20 below. Her experience is comparable to the experience of dozens of other Class members.

- 21 • On January 3, 2015, Richard of Eclectic, AL wrote:
22 As noted in many other reviews there is a design issue with the upper
23 carriage. My wheels fell off New Years Eve and **the upper basket fell**
24 **down breaking 8 champagne glasses... several hundred dollars in**
25 **broken glasses...** dishwasher is 2 years old. Very unhappy.
- 26 • On November 5, 2014, Darrell of Livermore, CA wrote:
27 2/10/13 paid \$1,000. for KitchenAid Dishwasher + extended warranty.
28 10/12/2014 **upper tray fell; plastic clips broken, glasses everywhere.**
- On July 2, 2013, C of East New Market, MD wrote:
When I pulled the top rack out to unload it, **the left side collapsed**

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1 **without any warning, spilling dishes and glasses down onto the**
2 **crockery in the bottom rack and out onto the floor.** When I looked for
3 the cause, it was obvious that one of the two flimsy plastic “spring” pegs
4 that retain each wheel of the upper rack on its axle had broken. This
5 allowed the wheel to pull off the axle and thereby allow the entire left side
6 of the top rack to collapse. It seems to me the axles on the rack adjuster
7 (part number W10350376) are very poorly designed and is not made as
8 solidly as the wheels on the lower rack. This is despite the fact that both
9 upper and lower racks are of the same dimensions and so to me as an
10 average consumer, both should be able to support a full load of dishes.

11 See, **Exhibit G** attached hereto (emphasis added).

12 56. Plaintiffs and members of the Class do not know the dishwasher is defective until
13 the upper rack assembly collapses and breaks. This fact, combined with Defendant’s refusal to
14 provide reasonable and adequate notice to members of the Class regarding the safety-related
15 defects in the dishwashers severely compromises the rights of class members to be apprised of the
16 latent defect and related safety risk in or order to make legitimate claims against Defendant. This
17 unfair practice by Defendant further places members of the Class at risk of incurring costs to repair
18 and replace the defective component. Further, members of the Class have stated publicly that the
19 KitchenAid has represented that the defective upper rack assembly is not covered under the terms
20 of the Warranty.

21 **VI. PLAINTIFF’S INDIVIDUAL ALLEGATIONS**

22 **A. Plaintiff James Bodley**

23 57. Plaintiff James Bodley purchased a brand-new luxury home in November 2012 built
24 by Toll Brothers. Toll Brothers has an established reputation as a luxury home builder who installs
25 high-quality brand name products.

26 58. As part of their home purchase, Mr. Bodley and his wife went to the Toll Brothers
27 Design Center to meet with a design specialist to select additional amenities and finishes for
28 installation in their new home including, but not limited to, kitchen appliances, flooring, and
29 bathroom fixtures. The Bodleys spent approximately four hours meeting with the design specialist
30 who discussed and reviewed their options with them. They were not shown actual appliances.
31 Instead, Mr. Bodley and his wife relied on the representations and warranties made by the design
32 specialist who told them the KitchenAid appliances were top of the line, of good quality, reliable

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1 and superior to the alternative brand. After meeting with the design specialist, Mr. Bodley was left
2 with the impression that KitchenAid provided the highest quality appliances with the highest
3 warranties. Based on these representations and warranties, Mr. Bodley purchased the KitchenAid
4 package from Toll Brothers which included a stainless steel KitchenAid dishwasher, model No.
5 KUDS30FXSS5, stove and microwave. Mr. Bodley paid \$1,888 for the upgraded KitchenAid
6 package, which was approximately \$1,300 more than the alternative packaged brand offered by
7 Toll Brothers.

8 59. The upper rack assembly in Mr. Bodley's dishwasher failed on or about April 11,
9 2017, as he was pulling out the top rack to load dishes. Attached hereto as **Exhibit H** are
10 photographs of the failed rack assembly. Mr. Bodley purchased a replacement upper rack assembly
11 to repair his dishwasher online from Sears for \$35.51. When the replacement parts arrived, He
12 found the installation instructions to be too difficult to follow. Accordingly, Mr. Bodley paid a
13 Sears technician approximately \$219.14 to install the replacement parts, a portion of which was
14 attributable to repairs to the lower rack assembly. It took the Sears technician approximately one
15 hour to install the replacement parts. Mr. Bodley was without a fully functioning dishwasher for
16 several weeks until the dishwasher was repaired.

17 60. Upon purchasing his home, Mr. Bodley received an instruction manual for his
18 KitchenAid dishwasher which included a copy of the KitchenAid warranty. A copy of the
19 warranty Mr. Bodley received is attached hereto as Exhibit B. Mr. Bodley relied on the
20 representations and warranties stated in Paragraphs 31-32 and 58. Were it not for these
21 representations and warranties, Mr. Bodley would not have purchased the KitchenAid dishwasher.
22 Had KitchenAid informed Toll Brothers of the defect with the upper rack assembly and attendant
23 safety risk, the design specialist would not have recommended that Mr. Bodley purchase the
24 KitchenAid dishwasher for installation in his new home. Further, Mr. Bodley recommended the
25 KitchenAid dishwasher to his daughter whose upper rack assembly also failed.

26 61. On June 12, 2017, Mr. Bodley's counsel provided KitchenAid with notice of its
27 breach of warranty and CLRA violations and demanded that Defendant (1) pay all costs to
28 investigate, repair, and replace all of the defective upper assembly rack systems utilized in

1 dishwashers own by Plaintiffs and members of the Class; and (2) provide notice to consumers of
2 the defect. A copy of the notice is attached hereto as Exhibit C.

3 62. KitchenAid failed to provide or offer to provide remedies for its breach of warranty
4 and CLRA violations.

5 **B. Plaintiff Kyle Matson**

6 63. Plaintiff Kyle Matson purchased a home in late November 2013 which was
7 equipped with a KitchenAid dishwasher, Model No. KUDS30FXSS5. The home was built in
8 November 2012 and purchased by the original owner on or about November 1, 2012. Had
9 Ms. Matson been aware of the defects with the dishwasher she would have sought an adjustment of
10 the purchase price to account for the replacement of the defective dishwasher.

11 64. The upper rack assembly in Ms. Matson's dishwasher failed in or about June or July
12 2016 as she was loading the top rack with dishes. She loaded an 8 x 8 size glass Pyrex dish onto the
13 top rack and continued loading when the rack assembly on the right side suddenly failed sending
14 the glass dish crashing down. The glass dish shattered into dozens of pieces and sent shards of glass
15 not only onto the lower rack of the dishwasher but onto the kitchen floor and countertop. The force
16 of the impact turned the shattered glass into small projectiles which scratched the inside of the
17 dishwasher as well as the wall of the kitchen island directly in front of the dishwasher. The glass'
18 impact with the kitchen island was so great that it scratched the custom blue paint leaving chipped
19 paint. Ms. Matson spent a considerable amount of time picking up the shattered glass from inside
20 the dishwasher and the kitchen floor.

21 65. Ms. Matson purchased replacement parts online from Sears at a cost of
22 approximately \$50.00. For several weeks she was without a fully functioning dishwasher. When
23 the replacement parts arrived, Ms. Matson and her husband found the instructions to be too difficult
24 to follow. She paid a repairman \$100.00 to install the replacement parts. Ms. Matson will incur
25 additional costs to repair the damage to her kitchen island and replace the broken dish, according to
26 proof.

27 66. On June 12, 2017, Ms. Matson's counsel provided KitchenAid with notice of its
28 breach of warranty and demanded that Defendant (1) pay all costs to investigate, repair, and replace

1 all of the defective upper assembly rack systems utilized in KitchenAid dishwashers; and
2 (2) provide notice to consumers of the defect. A copy of the notice is attached hereto as Exhibit C.

3 67. KitchenAid failed to provide or offer to provide remedies for its breach of warranty
4 violations.

5 **VII. CLASS ALLEGATIONS**

6 68. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil
7 Procedure 23, on behalf of themselves and all others similarly situated (the “Class”).

8 69. The Class which Plaintiffs seek to represent in this action is composed of three
9 classes defined as follows:

10 **Nationwide Purchaser Class**: All persons in the United States who purchased a
11 KitchenAid dishwasher with an upper rack assembly bearing part number W10350375 or
12 W10350376, as depicted in Exhibit A hereto.

13 **Nationwide Subsequent Purchaser Consumer Subclass**: All persons who purchased
14 private residences in which a KitchenAid dishwasher with an upper rack assembly bearing
15 part number W10350375 or W10350376, as depicted in Exhibit A hereto is installed.

16 **California Class**: All persons in California who purchased a KitchenAid dishwasher with
17 an rack upper assembly bearing part number W10350375 or W10350376, as depicted in
18 Exhibit A hereto.

19 **California Consumer Subclass**: All persons who purchased a KitchenAid dishwasher with
20 an upper rack assembly bearing part number W10350375 or W10350376, as depicted in
21 Exhibit A hereto for installation on a private residence in California who are consumers
22 within the meaning of the Song-Beverly Consumer Warranty Act, Cal. Civ. Code § 1791,
23 and the Consumer Legal Remedies Act, Cal. Civ. Code § 1761.

24 **California Subsequent Purchaser Subclass**: All persons who purchased private residences
25 in California in which a KitchenAid dishwasher with an upper rack assembly bearing part
26 number W10350375 or W10350376, as depicted in Exhibit A hereto is installed.

27 70. The California Consumer Subclass, California Subsequent Purchaser Subclass and
28 the Nationwide Subsequent Purchaser Consumer Subclass are referred to herein collectively as the

1 “Consumer Subclasses.”

2 71. The following persons are excluded from the Class: (1) all Defendant and their
3 subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the
4 Class; and (3) the judge(s) to whom this case is assigned and any immediate family members
5 thereof.

6 72. Plaintiffs reserve the right to modify or amend the Class definition, as appropriate.

7 73. Certification of Plaintiffs’ claims for class wide treatment is appropriate because
8 Plaintiffs can prove the elements of their claims on a class-wide basis and because this case meets
9 the requirements of Federal Rule of Civil Procedure 23.

10 74. **Numerosity (Rule 23(a)(1))**. The members of the Class are so numerous that
11 individual joinder of all the members is impracticable. Plaintiffs are informed and believe, and
12 thereon allege, that there are at least thousands of purchasers who have been damaged by the
13 conduct alleged herein.

14 75. **Commonality and Predominance (Rule 23(a)(2) and (b)(3))**. This action involves
15 common questions of law and fact which predominate over any questions affecting individual class
16 members including, without limitation, the following:

- 17 a. Whether Defendant violated California’s Unfair Competition Law, Bus. & Prof.
18 Code § 17200 *et seq.*, by, among other things, engaging in unfair, unlawful, or
19 fraudulent practices;
- 20 b. Whether Defendant violated California’s Consumer Legal Remedies Act, Civ. Code
21 §1750 *et seq.*, by falsely advertising the dishwashers were of a certain quality when
22 in fact, they were not;
- 23 c. Whether Defendant breached its express warranties to Plaintiffs and the Class;
- 24 d. Whether Defendant breached its implied warranties to Plaintiffs and the Class; and
- 25 e. Whether Plaintiffs and the Class are entitled to compensatory damages, and the
26 amount of such damages.

27 76. **Typicality (Rule 23(a)(3))**. Plaintiffs’ claims are typical of the claims of the Class
28 because Plaintiffs, like all members of the Class, have been damaged by Defendants’ unlawful

1 conduct, in that Plaintiffs have and will incur the cost of repairing and/or replacing the dishwashers.
2 The factual bases and causes of action for Plaintiffs' claims are common to all members of the
3 Class and represent a common course of misconduct resulting in injury to all Class members.

4 77. **Adequacy of Representation (Rule 23(a)(4))**. Plaintiffs are adequate
5 representatives of the Class because their interests do not conflict with the interests of the Class and
6 they have retained counsel competent and experienced in complex class action litigation and who
7 specialize in class actions involving defective construction products. Plaintiffs intend to prosecute
8 this action vigorously and the interests of the Class will be fairly and adequately protected by
9 Plaintiffs and their counsel.

10 78. **Superiority (Rule 23(b)(3))**. A class action is superior to all other available means
11 for the fair and efficient adjudication of this controversy in that:

- 12 a. The prosecution of separate actions by individual members of the Class would
13 create a foreseeable risk of inconsistent or varying adjudications which would
14 establish incompatible results and standards for Defendants;
- 15 b. Adjudications with respect to individual members of the Class would, as a practical
16 matter, be dispositive of the interests of the other members not parties to the
17 individual adjudications or would substantially impair or impede their ability to
18 protect their own separate interests;
- 19 c. Class action treatment avoids the waste and duplication inherent in potentially
20 thousands of individual actions, and conserves the resources of the courts; and
- 21 d. The claims of individual class members are not large when compared to the cost
22 required to litigate such claims. The individual Class members' claims are on
23 average approximately \$25-\$250 representing out-of pocket costs associated with
24 the materials and labor to repair the Defect. Given the high cost of litigation, it
25 would be impracticable for the members of the Class to seek individual redress for
26 Defendant's wrongful conduct. The class action device provides the benefits of
27 single adjudication, economies of scale, and comprehensive supervision by a single
28 court. The case presents no significant management difficulties which outweigh

1 these benefits.

2 79. **Notice.** Plaintiff cannot be certain of the form and manner of class notice it will
3 propose until the class is finally defined and some discovery concerning the identity of Class
4 members is undertaken. Based on the experience of its counsel in previous cases, however, Plaintiff
5 anticipates that notice by mail will be given to all Class members who can be identified specifically
6 and that this notice will be supplemented by notice published in appropriate periodicals, notice
7 published on the Internet and by press releases and similar communications to relevant industry and
8 trade groups.

9 **VIII. DAMAGES**

10 80. As a result of the facts alleged herein, Plaintiffs and the Class have been damaged in
11 one or more of the following amounts:

12 a. The difference in market value between the dishwashers and dishwashers
13 that are not defective.

14 b. The cost of repairing and/or replacing the dishwasher, and any other amounts
15 necessary to return Plaintiffs and the Class to the position they would have enjoyed had they not
16 purchased the dishwashers.

17 c. The cost of hiring a third party to install the replacement parts.

18 **IX. STATUTE OF LIMITATIONS**

19 81. **Discovery Rule.** The defective nature of the dishwasher is latent and not
20 perceptible to Plaintiffs and the Class. Plaintiffs and the Class did not become aware that they had
21 suffered losses caused by the defective dishwashers until the rack assembly failed.

22 82. **Tolling.** Any applicable statutes of limitation have been tolled. Without any fault
23 or lack of diligence on their part, Plaintiffs and the Class have been kept ignorant of vital
24 information essential to the pursuit of these claims. Plaintiffs and the Class could not reasonably
25 have discovered the problems associated with the dishwasher on their own until the failure
26 occurred.

27 83. **Estoppel.** Defendant is estopped from relying on any statutes of limitation in
28 defense of this action. Defendant was under a continuous duty to disclose to Plaintiffs and the

1 Class the true character, quality and nature of the dishwashers, especially because the problems
2 associated with the dishwashers pose unreasonable safety risks due to breakage of class and other
3 items when the rack assembly fails. Defendant failed to disclose the true character, quality, and
4 nature of the dishwashers. Plaintiffs and the Class reasonably relied upon Defendant’s active
5 concealment of these facts. Had the true facts been disclosed, Plaintiffs and the Class would not
6 have purchased the dishwashers or would have required the dishwashers to be removed from
7 properties in which they were installed prior to purchase.

8 **FIRST CAUSE OF ACTION**

9 **(For Violation of the California Consumer Legal Remedies Act)**

10 **(Plaintiff Bodley and the Consumer Subclasses Against KitchenAid)**

11 84. Plaintiffs incorporate by reference each allegation set forth in the preceding
12 paragraphs.

13 85. The dishwashers are “goods” as defined by Civil Code § 1761(a).

14 86. KitchenAid is a “person” as defined by Civil Code § 1761(c).

15 87. Plaintiff Bodley and members of the Consumer Subclasses are “consumers” as
16 defined by Civil Code § 1761(d) who purchased the dishwashers for personal, family, and
17 household purposes.

18 88. The purchase by Plaintiff Bodley and members of the Consumer Subclasses of the
19 dishwashers are “transactions” as defined by Civil Code § 1761(e) and 1770.

20 89. Under the Consumers Legal Remedies Act (“CLRA”), Civil Code § 1770, *et seq.*,
21 the following methods of competition and unlawful when any person in a transaction intended to
22 result or which results in the sale or lease of goods or services to any consumer:

- 23 a. Representing that goods ... have sponsorship, approval, characteristics,
24 ingredients, uses, benefits, or quantities which they do not have.” Civil Code
25 § 1770(a)(5).
- 26 b. Representing that goods ... are of a particular standard, quality, or grade, or
27 that goods are of a particular style or model, if they are of another.” Civil
28 Code § 1770(a)(7).

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1 c. Inserting an unconscionable provision in the contract. Civil Code §
2 1770(a)(19).

3 90. Defendant violated Civil Code §§ 1770(a)(5) and (a)(7) by failing to disclose at the
4 point of sale, or otherwise, that the dishwasher’s upper rack assembly was defective and posed an
5 unreasonable risk of personal injury and property damage. Instead, KitchenAid represented,
6 through advertising and other express representations that the dishwashers were of premium
7 quality, reliable and superior to other brands as alleged herein.

8 91. Defendant violated Civil Code § 1770(a)(19) by including in the Warranty the
9 unconscionable Warranty Exclusions.

10 92. Had Plaintiff Bodley and members of the Consumer Subclasses known that the
11 representations and warranties made by Defendant concerning the dishwashers were false or had
12 they been aware of the facts Defendant were obligated to disclose, Plaintiff Bodley and members of
13 the Consumer Subclasses would not have purchased the dishwashers or purchased properties in
14 which the dishwashers were installed. Plaintiff Bodley and members of the Consumer Subclasses
15 would not have made these purchases because: (1) if Initial Buyers, builders, distributors, retailers
16 and sellers had known of the falsity of Defendant’s representations and warranties, or had
17 Defendant disclosed the facts it was obligated to disclose, they would have recommended against
18 the purchase of the dishwashers and/or would not have installed dishwashers manufactured by
19 others in newly constructed single-family homes; and (2) irrespective of such recommendations, if
20 Plaintiff Bodley and the Consumer Subclasses had been aware of the falsity of Defendants’
21 representations and warranties or become aware of the facts Defendant was obligated to disclose,
22 they would not have purchased the dishwashers or would have insisted that the dishwashers be
23 removed and replaced.

24 93. Defendant was aware of the defect in the upper rack assembly at the time of sale to
25 Plaintiff Bodley and the Class.

26 94. Plaintiff Bodley served Defendant with notice of their violations of the CLRA
27 pursuant to Civil Code § 1782 (the “Notice”) by certified mail on June 12, 2017. A copy of the
28 Notice is attached hereto as Exhibit C. Defendant failed to provide or offer to provide remedies for

1 its violations of the CLRA within 30 days of the date of the Notice.

2 95. Venue is proper pursuant to Civil Code § 1780(c) because Defendant does business
3 in Contra Costa County and the actions giving rise to this complaint arose in this jurisdiction.
4 Attached hereto as **Exhibit I** is the Declaration of James Bodley establishing this Court as the
5 proper venue for this action.

6 96. As a result of Defendant’s unfair and deceptive acts and practices, Plaintiff Bodley
7 and members of the Consumer Subclasses have been harmed and seek actual damages according to
8 proof, attorneys’ fees and costs and such other relief as the court deems proper.

9 **SECOND CAUSE OF ACTION**

10 **(For Breach of Express Warranty)**

11 **(By Plaintiffs and the Class against KitchenAid)**

12 97. Plaintiffs incorporate by reference each allegation set forth in the preceding
13 paragraphs.

14 98. Defendant made the representations warranties described in Paragraphs 31-32
15 (Written Warranty), 38 (website representations) and 49.

16 99. Defendant is not entitled to enforce the Warranty Exclusions described in Paragraph
17 34 because they are unconscionable and violate the provisions of applicable law including, without
18 limitation, the Song-Beverly Consumer Warranty Act and the Magnuson – Moss Warranty Act.

19 100. Because the dishwashers either have failed or are certain to fail prematurely,
20 Defendant is in breach of the Warranty. The breaches of the Warranty issued to Plaintiffs are
21 detailed in Paragraphs 58-62 (Bodley) and Paragraphs 64-67 (Matson). Warranties to the Plaintiffs
22 and the Class have also been breached because the dishwashers have failed or will fail prematurely
23 and because KitchenAid has asserted the upper rack assembly is not covered under the warranties
24 described in Paragraph 33 above.

25 101. Plaintiffs have notified KitchenAid of its breach of the Warranty. In addition, the
26 Notices attached hereto as Exhibits C provided Defendant with timely notice on behalf of the Class
27 of the breach of the Warranty and the invalidity of the Warranty Exclusions alleged herein.

28 102. Defendant has failed to remedy the breach of its obligations to Plaintiffs and the

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1 Class. Further, while the Warranty provides that KitchenAid will repair or replace defects which
2 existed at the time of purchase, complaints submitted by members of the Class demonstrate that
3 KitchenAid is refusing to honor its warranty regarding the defective upper rack assembly as alleged
4 in Paragraphs 33, 61-62, and 66-67 above.

5 103. As a result of Defendant’s breach of the Warranty and the warranties detailed herein
6 Plaintiffs and the Class have suffered damages in an amount to be proven at trial.

7 **THIRD CAUSE OF ACTION**

8 **(Breach of Express Warranty - Magnuson-Moss Warranty Act)**

9 **(By Plaintiffs and the Consumer Subclasses against KitchenAid)**

10 104. Plaintiffs incorporate by reference each allegation set forth in the preceding
11 paragraphs.

12 105. The allegations of this Claim for Relief are based on the breaches of warranty
13 addressed fully in the Second Claim for Relief. The specific allegations of the Complaint relevant
14 to that claim are detailed therein.

15 106. The dishwashers are a consumer product as defined in 15 U.S.C. § 2301(1).

16 107. Plaintiffs and the members of the Consumer Subclasses are consumers as defined in
17 15 U.S.C. § 2301(3).

18 108. Defendant KitchenAid is a “supplier” and “warrantor” as defined in
19 15 U.S.C. § 2301(4) and (5).

20 109. The express warranties pertaining to the dishwashers are “written warranties” within
21 the meaning of 15 U.S.C. § 2301(6).

22 110. Additionally, pursuant to 15 U.S.C. § 2304(d)(1), KitchenAid may not assess
23 Plaintiffs or the Consumer Subclasses any costs the warrantor or his representatives incur in
24 connection with the required remedy of a warranted product...[I]f any incidental expenses are
25 incurred because the remedy is not made within a reasonable time or because the warrantor
26 imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the
27 consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any
28 action against the warrantor.” KitchenAid has refused to pay all costs associated with the repair or

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1 replacement of the dishwashers.

2 111. Plaintiffs have provided KitchenAid with notice of breach of the Warranty and a
3 reasonable opportunity to cure the breach. In addition, the Notice afforded KitchenAid notice on
4 behalf of the Consumer Subclasses of its breach of the Warranty and a reasonable opportunity to
5 remedy the breach. KitchenAid has failed to remedy the breach of its obligations to the Consumer
6 Subclasses under the Warranty.

7 112. As a direct and proximate result of the acts and omissions of Defendant KitchenAid
8 as set forth herein, Plaintiffs and the Consumer Subclasses have been damaged as detailed in
9 Paragraph 80 in an amount to be proven at trial.

10 **FOURTH CAUSE OF ACTION**

11 **(Breach of Express Warranty under Song-Beverly Consumer Warranty Act)**

12 **(By Plaintiffs and the Consumer Subclasses against KitchenAid)**

13 113. Plaintiffs incorporate by reference each allegation set forth in the preceding
14 paragraphs.

15 114. The allegations of this Claim for Relief are based on the breaches of warranty
16 addressed fully in the Third Claim for Relief. The specific allegations of the Complaint relevant to
17 that claim are detailed therein.

18 115. The dishwashers are consumer goods within the meaning of California’s Song-
19 Beverly Consumer Warranty Act.

20 116. Defendant KitchenAid is a “manufacturer” within the meaning of the statute.

21 117. Plaintiffs and members of the Consumer Subclasses purchased dishwashers within
22 the State of California.

23 118. As alleged previously, KitchenAid breached the Warranty.

24 119. Plaintiffs have provided KitchenAid with notice of breach of the Warranty and a
25 reasonable opportunity to cure the breach. In addition, the Notice afforded KitchenAid notice on
26 behalf of the Consumer Subclasses of its breach of the warranty and a reasonable opportunity to
27 remedy the breach. KitchenAid has failed to remedy the breach of its obligations to the Consumer
28 Subclasses under the Warranty.

1 received the benefit of such warranties. The Initial Buyers are not users of the dishwashers. The
2 economic benefit of implied warranties made by KitchenAid to the Initial Buyers depends on the
3 ability of end users who buy their products to obtain redress from KitchenAid if the warranties are
4 breached.

5 128. Under *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal. App. 3d
6 65, the Implied Warranties made by KitchenAid to the Initial Buyers are enforceable whether or
7 not Plaintiffs or the Class were in privity of contract with KitchenAid. The implied warranties
8 made by KitchenAid to Initial Buyers and others in the distribution chain would be of no economic
9 value to them unless Plaintiffs and the Class received the benefit of such warranties.

10 129. KitchenAid breached the Implied Warranties by manufacturing and selling
11 dishwashers which, at the time of sale, were: (1) not fit for their intended use, and (2) not of a
12 merchantable quality. The dishwashers are neither merchantable nor fit for their intended use
13 because: (1) the latent defect in the dishwashers insures that they will fail prematurely and therefore
14 fail to clean dishes; and (2) the dishwashers are defective and dangerous in that the upper rack
15 assembly suddenly and unexpectedly collapses, causing glassware and other dishes to fall and
16 shatter, which can result in serious physical injuries and property damage. Purchasers of the
17 dishwashers would not accept the safety risk posed by broken glass resulting from the failure of the
18 rack assemblies in the dishwashers when there are other products for sale which do not present this
19 risk.

20 130. Defendant has received timely notice of the breach of warranty alleged herein by
21 reason of its own knowledge of the defect in the dishwashers.

22 131. Further, Plaintiffs have provided KitchenAid with notice of breach of the Implied
23 Warranties and a reasonable opportunity to cure the breach. In addition, the Notices attached
24 hereto as Exhibit B afforded Defendant notice on behalf of the Class of its breach of the Implied
25 Warranties and a reasonable opportunity to remedy the breach. Defendant has failed to remedy the
26 breach of its obligations to the Class under the Implied Warranties.

27 132. Because the dishwashers either have failed or are certain to fail prematurely,
28 Defendant is in breach of the Implied Warranties.

1 133. Defendants have failed to remedy the breach of the Warranty for either Plaintiffs or
2 the Class.

3 134. As a direct and proximate result of Defendant's breach of the Implied Warranties,
4 Plaintiffs and members of the Class have been damaged in an amount to be proven at trial.

5 **SIXTH CAUSE OF ACTION**

6 **(Breach of Implied Warranty - Magnuson-Moss Warranty Act)**

7 **(By Plaintiffs and the Consumer Subclasses against KitchenAid)**

8 135. Plaintiffs incorporate by reference each allegation set forth in the preceding
9 paragraphs.

10 136. The allegations of this Claim for Relief are based on the breaches of warranty
11 addressed fully in the Fifth Claim for Relief. The specific allegations of the Complaint relevant to
12 that claim are detailed therein.

13 137. Plaintiffs and the Consumer Subclasses are consumers as defined in 15 U.S.C.
14 § 2301(3).

15 138. Defendant is a supplier and warrantor as defined in 15 U.S.C. § 2301(4) and (5).

16 139. The dishwashers are consumer products as defined in 15 U.S.C. § 2301(1).

17 140. Under 15 U.S.C. §2301(7), Defendant extended the Implied Warranties to Plaintiffs
18 and the Consumer Subclasses.

19 141. Defendant breached the Implied Warranties by selling dishwashers that were neither
20 merchantable nor fit for their intended purpose.

21 142. Under 15 U.S.C. §2310(e), notice of breach of warranty need not be provided until
22 after Plaintiffs have been appointed Consumer Subclasses Representatives.

23 143. Plaintiffs have provided Defendants with notice of breach of the Implied Warranties
24 and a reasonable opportunity to cure the breach. In addition, the Notice afforded Defendants notice
25 on behalf of the Consumer Subclasses of its breach of the Implied Warranties and a reasonable
26 opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to
27 the Consumer Subclasses under the Implied Warranties.

28 144. As a result of Defendant's breach of the Implied Warranties, Plaintiffs and the

1 Consumer Subclasses have been damaged as detailed in Paragraph 80 in an amount to be proven at
2 trial.

3 **SEVENTH CAUSE OF ACTION**

4 **(Breach of Implied Warranty under Song-Beverly Consumer Warranty Act)**

5 **(By Plaintiffs and the Consumer Subclasses against KitchenAid)**

6 145. Plaintiffs incorporate by reference each allegation set forth in the preceding
7 paragraphs.

8 146. The allegations of this Claim for Relief are based on the breaches of warranty
9 addressed fully in the Fifth Claim for Relief. The specific allegations of the Complaint relevant to
10 that claim are detailed therein.

11 147. Under the Song-Beverly Consumer Warranty Act, Civ. Code § 1792, *et seq.*, every
12 sale of consumer goods in the State of California is accompanied by both a manufacturer's and
13 retail seller's implied warranty that the goods are merchantable.

14 148. The dishwashers are consumer goods within the meaning of the statute.

15 149. Defendant KitchenAid is a "manufacturer" within the meaning of the statute.

16 150. Plaintiffs and Consumer Subclasses Members purchased dishwashers in the State of
17 California.

18 151. By operation of law, all Defendant made the Implied Warranties to Plaintiffs and the
19 Consumer Subclasses concerning the dishwashers.

20 152. Defendant has breached the Implied Warranties by selling dishwashers which were
21 not of merchantable quality and which failed to perform the tasks for which they were intended.

22 153. Plaintiffs and all other Consumer Subclasses Members do not have to be in privity
23 with KitchenAid in order to enforce the Implied Warranties. Civil Code § 1792, which provides
24 that "[u]nless disclaimed in the manner prescribed by this chapter, every sale of consumer goods
25 that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's
26 implied warranty that the goods are merchantable," has no privity requirement.

27 154. Further, for the reasons stated in Paragraphs 47 through 51, Plaintiffs and the Class
28 are intended beneficiaries of the Implied Warranties between KitchenAid and the Buyers and are

1 therefore entitled to enforce the Implied Warranties against KitchenAid.

2 155. Plaintiffs have provided KitchenAid with notice of breach of the Implied Warranties
3 and a reasonable opportunity to cure the breach. In addition, the Notice afforded Defendant notice
4 on behalf of the Consumer Subclasses of its breach of the Implied Warranties and a reasonable
5 opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to
6 the Consumer Subclasses under the Implied Warranties.

7 156. As a result of Defendant’s breaches of the Implied Warranties, Plaintiffs and
8 Consumer Subclasses Members have been damaged as detailed in Paragraph 80 in an amount to be
9 proven at trial.

10 **EIGHTH CAUSE OF ACTION**

11 **(For Violation of Unfair Competition Law)**

12 **(By Plaintiffs and the Class against KitchenAid)**

13 157. Plaintiffs incorporate by reference each allegation set forth in the preceding
14 paragraphs.

15 158. Pursuant to Bus. & Prof. Code § 17200, “unfair competition shall mean and include
16 any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or
17 misleading advertising.”

18 159. Defendant’s actions, as alleged herein, constitute deceptive, unfair, fraudulent, and
19 unlawful practices committed in violation of the Bus. & Prof. Code § 17200, *et seq.*

20 160. All of the conduct and representations alleged herein occurred in the course of
21 Defendant’s business and were part of a pattern or generalized course of conduct.

22 161. Defendant’s conduct was fraudulent because KitchenAid failed to disclose the safety
23 risks associated with the sudden collapse of the upper rack assembly.

24 162. Defendant’s conduct was unlawful because it violated the Consumer Legal
25 Remedies Act, Magnuson-Moss Warranty Act and Song-Beverly Consumer Warranty Act as
26 previously alleged.

27 163. Defendant’s deceptive, unfair, fraudulent, and unlawful conduct alleged herein was
28 specifically designed to and did induce Plaintiffs and members of the Initial Purchaser Subclass to

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1 purchase the dishwashers.

2 164. Plaintiffs and members of the Initial Purchaser Subclass reasonably and justifiably
3 relied on Defendant's deceptive, unfair, and unlawful conduct alleged herein. But for such
4 conduct, Plaintiffs and members of the Initial Purchaser Subclass would not have purchased the
5 dishwashers.

6 165. The Warranty Exclusions and nondisclosure of the safety risk and property damage
7 resulting from the failure of the dishwashers are unfair in that they: (1) violate public policy as
8 expressed in the Consumer Legal Remedies Act, the Magnuson-Moss Warranty Act and the Song-
9 Beverly Consumer Warranty action; (2) are immoral, unethical, oppressive, unscrupulous and
10 substantially injurious to consumers and these factors are not offset by the utility of KitchenAid's
11 conduct since the conduct is intended to and does only provide impediments to the assertion of
12 valid claims for recovery and limit the damages which Defendant is legally obligated to
13 compensate; and (3) inflict injury on consumers which is not outweighed by any countervailing
14 benefits to consumers or competition and the injury to consumers is one consumers could
15 reasonably have avoided.

16 166. As a result of Defendant's unfair methods of competition and unfair or deceptive
17 acts or practices, Plaintiffs and members of the Initial Purchaser Subclass have suffered injury-in-
18 fact, lost money, and lost property, in that they have incurred actual costs to repair and/or replace
19 their dishwashers.

20 167. Plaintiffs and Class Members seek to recover from Defendants restitution of
21 earnings, profits, compensation and benefit obtained as a result of the practices that are unlawful
22 under Bus. & Prof. Code § 17200 *et seq.*, according to proof.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, prays
25 the Court to certify the Class as defined hereinabove, to enter judgment against Defendant and in
26 favor of the Class, and to award the following relief:

- 27 1. For Certification of the proposed Class and each Subclass thereof;
28 2. For compensatory damages as alleged herein, according to proof;

1 3. For restitution and/or disgorgement of revenues, earnings, profits, compensation,
2 and benefits which were received by Defendant as a result of unlawful business acts or practices,
3 according to proof;

4 4. For an order requiring Defendant to engage in a notice and/or recall campaign.

5 5. For exemplary and punitive damages according to proof;

6 6. For costs and attorneys' fees, as allowed by law; and

7 7. For such other further legal or equitable relief as this Court may deem appropriate
8 under the circumstances.

9 DATED: September 19, 2017

Respectfully submitted,

BIRKA-WHITE LAW OFFICES

11
12 By: 

DAVID M. BIRKA-WHITE

13 David M. Birka-White (State Bar No. 85721)
14 *dbw@birka-white.com*

Mindy M. Wong (State Bar No. 267820)
15 *mwong@birka-white.com*

16 BIRKA-WHITE LAW OFFICES
17 65 Oak Court
18 Danville, CA 94526
Telephone: (925) 362-9999
Facsimile: (925) 362-9970

19 N. Scott Carpenter (*Pro Hac Vice To Be Submitted*)
scarpenter@cstriallaw.com
20 Rebecca Bell-Stanton (*Pro Hac Vice To Be Submitted*)
rstanton@cstriallaw.com
21 Carpenter & Schumacher, P.C.
22 2701 Dallas Parkway, Suite 570
23 Plano, TX 75093
Telephone: (972) 403-1133
Facsimile: (972) 403-0311

24 *Attorneys for Plaintiffs*
25 JAMES BODLEY and KYLE MATSON
26
27
28

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DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs James Bodley and Kyle Matson, individually and on behalf of all others similarly situated, hereby demand a jury trial.

Dated: September 19, 2017

Respectfully submitted,

BIRKA-WHITE LAW OFFICES

By: /s/ David M. Birka-White

DAVID M. BIRKA-WHITE

Attorneys for Plaintiffs

James Bodley and Kyle Matson

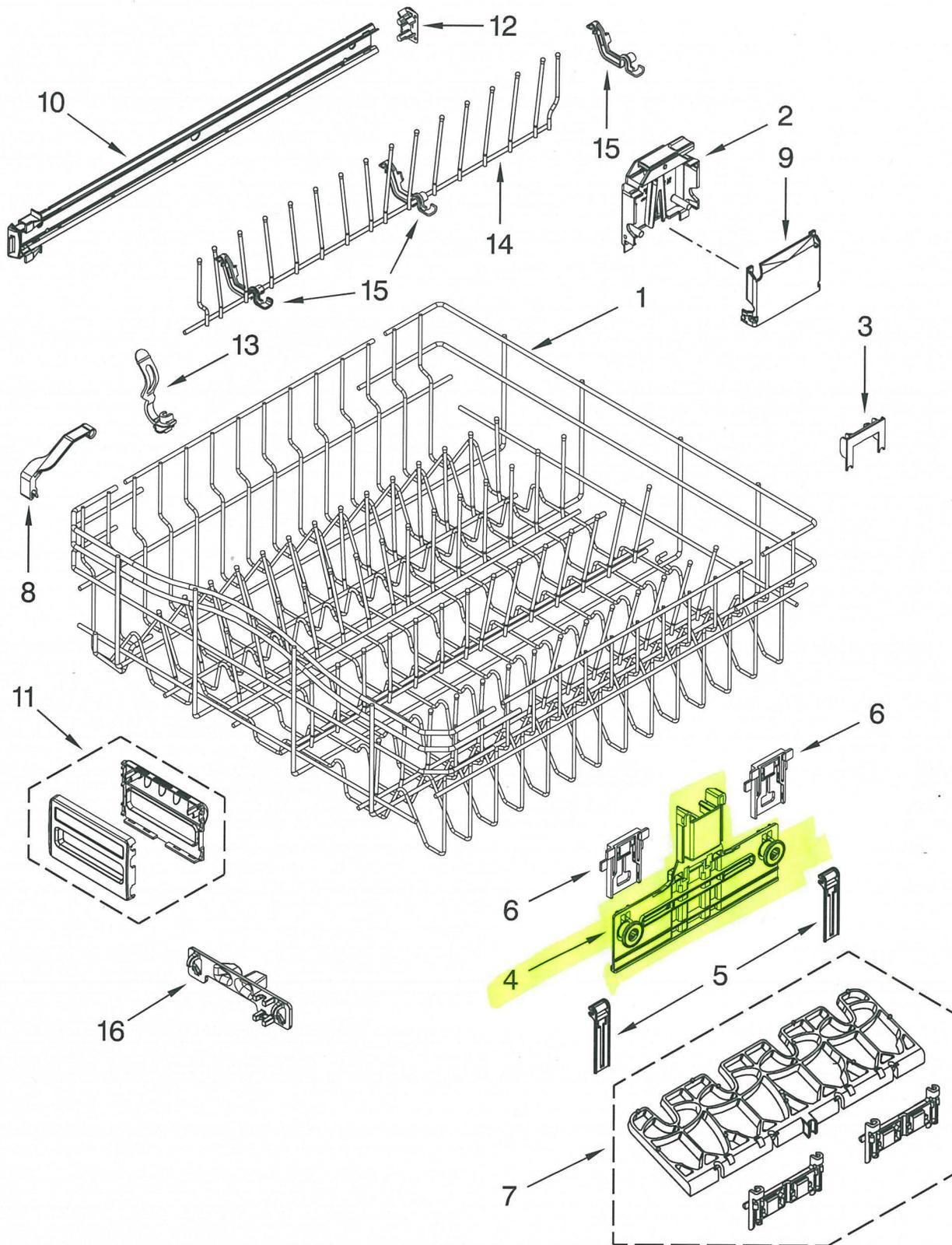
BIRKA-WHITE
LAW OFFICES

EXHIBIT A



UPPER RACK AND TRACK PARTS

For Models: KUDS30FXBL5, KUDS30FXWH5, KUDS30FXSS5
(Black) (White) (Stainless)



FOR ORDERING INFORMATION REFER TO PARTS PRICE LIST

UPPER RACK AND TRACK PARTS

For Models: KUDS30FXBL5, KUDS30FXWH5, KUDS30FXSS5
 (Black) (White) (Stainless)

Illus. No.	Part No.	DESCRIPTION
1	W10312791	Dishrack, Upper
2		Housing, Adjuster
	W10320664	Left Hand
	W10320665	Right Hand
3	W10250160	Clip-Lock Adjuster Arm
4	W10350376	Adjuster Assembly
5	W10195839	Strap, Tether Adjuster
6	W10195840	Positioner, Adjuster
7	W10082649	Cup, Shelf
8	W10267076	Clip, Dispenser Guard
9	W10250162	Cover, Adjuster
10	W10324563	Track, Assembly
11	W10282826	Handle, Dishrack
12	W10195622	Stop, Track Non-Removable
13	W10077844	Clip, No Flip
14	8562030	Tine Row
15	W10082853	Clip, Pivot
16	8539102	Positioner, Dual

EXHIBIT B

KITCHENAID® DISHWASHER WARRANTY**LIMITED WARRANTY**

For one year from the date of purchase, when this major appliance is operated and maintained according to instructions attached to or furnished with the product, KitchenAid brand of Whirlpool Corporation or Whirlpool Canada LP (hereafter "KitchenAid") will pay for factory specified parts and repair labor to correct defects in materials or workmanship that existed when this major appliance was purchased. Service must be provided by a KitchenAid designated service company. YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT REPAIR AS PROVIDED HEREIN. This limited warranty is valid only in the United States or Canada and applies only when the major appliance is used in the country in which it was purchased. Proof of original purchase date is required to obtain service under this limited warranty.

SECOND THROUGH FIFTH YEAR LIMITED WARRANTY ON CERTAIN COMPONENT PARTS

In the second through the fifth year from the date of purchase, when this major appliance is operated and maintained according to instructions attached to or furnished with the product, KitchenAid will pay for factory specified parts for the following components to correct defects in materials or workmanship that existed when this major appliance was purchased: nylon dish racks and electronic controls.

LIFETIME LIMITED WARRANTY ON STAINLESS STEEL TUB AND INNER DOOR LINER

For the lifetime of the product from the date of purchase, when this major appliance is installed, operated and maintained according to instructions attached to or furnished with the product, KitchenAid will pay for factory specified parts and repair labor for the following components to correct defects in materials or workmanship that existed when this major appliance was purchased: stainless steel tub and inner door liner.

ITEMS EXCLUDED FROM WARRANTY

This limited warranty does not cover:

1. Replacement parts or repair labor if this major appliance is used for other than normal, single-family household use or when it is used in a manner that is inconsistent to published user or operator instructions and/or installation instructions.
2. Service calls to correct the installation of your major appliance, to instruct you on how to use your major appliance, to replace or repair house fuses, or to correct house wiring or plumbing.
3. Service calls to repair or replace appliance light bulbs, air filters or water filters. Consumable parts are excluded from warranty coverage.
4. Damage resulting from accident, alteration, misuse, abuse, fire, flood, acts of God, improper installation, installation not in accordance with electrical or plumbing codes, or use of products not approved by KitchenAid.
5. Cosmetic damage, including scratches, dents, chips or other damage to the finish of your major appliance, unless such damage results from defects in materials or workmanship and is reported to KitchenAid within 30 days from the date of purchase.
6. Any food or medicine loss due to refrigerator or freezer product failures.
7. Pickup and delivery. This major appliance is intended to be repaired in your home.
8. Repairs to parts or systems resulting from unauthorized modifications made to the appliance.
9. Expenses for travel and transportation for product service if your major appliance is located in a remote area where service by an authorized KitchenAid servicer is not available.
10. The removal and reinstallation of your major appliance if it is installed in an inaccessible location or is not installed in accordance with KitchenAid's published installation instructions.
11. Replacement parts or repair labor on major appliances with original model/serial numbers that have been removed, altered or cannot be easily determined.

DISCLAIMER OF IMPLIED WARRANTIES

IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, ARE LIMITED TO ONE YEAR OR THE SHORTEST PERIOD ALLOWED BY LAW. Some states and provinces do not allow limitations on the duration of implied warranties of merchantability or fitness, so this limitation may not apply to you. This warranty gives you specific legal rights, and you also may have other rights that vary from state to state or province to province.

LIMITATION OF REMEDIES; EXCLUSION OF INCIDENTAL AND CONSEQUENTIAL DAMAGES

YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT REPAIR AS PROVIDED HEREIN. KITCHENAID SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. Some states and provinces do not allow the exclusion or limitation of incidental or consequential damages, so these limitations and exclusion may not apply to you. This warranty gives you specific legal rights, and you also may have other rights that vary from state to state or province to province.

If outside the 50 United States and Canada, contact your authorized KitchenAid dealer to determine if another warranty applies.

If you think you need repair service, first see the "Troubleshooting" section of the Use & Care Guide. If you are unable to resolve the problem after checking "Troubleshooting," additional help can be found by checking the "Assistance or Service" section or by calling KitchenAid. In the U.S.A., call 1-800-422-1230. In Canada, call 1-800-807-6777.

For additional product information or to view FAQs (Frequently Asked Questions), in U.S.A. visit: www.kitchenaid.com

In Canada visit: www.kitchenaid.ca

If you do not have access to the Internet and you need assistance using your product or you would like to schedule service, you may contact KitchenAid at the number below.

Have your complete model number ready. You can find your model and serial number on the label located near the door on the right-hand or left-hand side of the dishwasher interior.

For assistance or service in the U.S.A., call 1-800-422-1230. In Canada, call 1-800-807-6777.

If you need further assistance, you can write to KitchenAid with any questions or concerns at the address below:

In the U.S.A.:

KitchenAid Brand Home Appliances
Customer eXperience Center
553 Benson Road
Benton Harbor, MI 49022-2692

In Canada:

KitchenAid Brand Home Appliances
Customer eXperience Centre
200 – 6750 Century Avenue
Mississauga ON L5N 0B7

Please include a daytime phone number in your correspondence.

Please keep this User Instructions and model number information for future reference.

EXHIBIT C

CARPENTER & SCHUMACHER, P.C.

N. Scott Carpenter*
Managing Partner

Craig M. Schumacher**
Partner

Rebecca E. Bell-Stanton***
Partner

Douglas C. Heuvel

Attorneys and Counselors at Law

Parkway Centre IV
2701 North Dallas Parkway, Suite 570
Plano, Texas 75093
(972) 403-1133
Facsimile (972) 403-0311
www.cstriallaw.com

Mathew E. Mulkey
Anthony R. LaScalea
Matthew D. Warner

*Also Licensed in Oklahoma
**Also Licensed in Arkansas
***Also Licensed in Pennsylvania

June 12, 2017

NOTICE OF VIOLATION OF CONSUMER LEGAL REMEDIES ACT ("CLRA") AND BREACH OF WARRANTY

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4752

KITCHENAID, INC.
C/O WHIRLPOOL CORPORATION
Mr. Jeff Fettig, CEO
2000 M-63, Tax Dept.
Benton Harbor, MI 49022

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4738

SEARS, ROEBUCK, & Co.
Mr. Edward S. Lampert, CEO
3333 Beverly Road, B2-116B
Hoffman Estates, IL 60179

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4745

KITCHENAID, INC.
C/O CT CORPORATION SYSTEM
818 W 7th Street, Suite 930
Los Angeles, CA 90017

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4721

SEARS, ROEBUCK, & Co.
C/O CT CORPORATION SYSTEM
818 W 7th Street, Suite 930
Los Angeles, CA 90017

Re: KitchenAid Dishwashers

To Whom It May Concern:

Pursuant to the California Consumers Legal Remedies Act ("CLRA"), California Civil Code § 1750, et. seq., and specifically § 1782(a)(1)(2), Plaintiffs, Mr. James Bodley and Ms. Kyle Matson, on behalf of themselves and all others similarly situated, hereby notifies you that KitchenAid, Inc. ("KitchenAid") and Sears, Roebuck, & Co. ("Sears") violated California Civil Code § 1770. Such violation arises from the advertising and selling of KitchenAid dishwashers equipped with a lower and/or upper dishrack roller assembly bearing part numbers

#WW10712395 and #W10712394 (“defective assembly”), which are defective and not in conformance with the representations to Plaintiffs, thousands of California consumers, as well as consumers throughout the United States. This conduct includes, but is not limited to, the following violations of § 1770:

1. KitchenAid and Sears represented that KitchenAid dishwashers had benefits or characteristics that it did not actually have. Civ. Code § 1770(a)(5);
2. KitchenAid and Sears represented that KitchenAid dishwashers were of a particular standard or quality when it was of another. Civ. Code § 1770(a)(7); and
3. KitchenAid’s written warranty violates § 1770 (a)(19) by including unconscionable provisions including, without limitation: (1) purported limitations in the remedies available upon breach, the exclusion of incidental and consequential damages and the limitation of the amount of recoverable damages; and (2) purported exclusions of implied warranties.

The KitchenAid dishwasher models manufactured, designed, marketed, and sold by KitchenAid and Sears contain defective upper rack assemblies that fail and cause the dishwasher to be inoperable. The pertinent dishwasher models utilize plastic parts in the top rack slide mechanism. These parts prematurely fail causing the axles to separate from the wheels. The loaded top rack can fall onto the door or lower rack, causing glassware to break and presenting a substantial safety hazard. The design of the rack assembly, wheel, hub, and hook cannot withstand normal use. Once the defective assembly breaks, the dishwasher no longer works requiring replacement. Notwithstanding its knowledge of the defect, KitchenAid and Sears continued the sale of dishwashers without disclosing the defect or safety risk to consumers. Had KitchenAid and Sears disclosed the known facts Plaintiffs and consumers would not have purchased a KitchenAid dishwasher.

Mr. Bodley purchased a brand-new home in 2012 with a KitchenAid dishwasher (model No. KUDS30FXSS5). The upper rack assembly in Mr. Bodley’s dishwasher failed on or about April 11, 2017. He purchased replacement parts from Sears to repair his dishwasher at a cost of \$ 104.53. He is unable to install the replacement parts himself and will have to pay a technician to install the assembly.

Ms. Kyle Matson purchased a home in 2013 with a KitchenAid dishwasher (model No. KUDS30FXSS5). The upper rack assembly in Ms. Matson’s dishwasher failed in 2016. She too purchased replacement parts from Sears to repair her dishwasher.

Plaintiffs were not aware of the defect in their KitchenAid dishwasher until the upper rack assemblies suddenly and unexpectedly collapsed. The replacement assembly offered by KitchenAid and Sears is inadequate in that it does not repair the design defect in the original equipment assembly. It is also unlawful to require consumers to purchase and install a similarly defective replacement assembly. The cost to purchase and install the replacement assembly is an expense borne only by the Plaintiffs and all other similarly situated consumers at a cost of approximately \$200.

The defective assembly components can be identified by those appliances requiring replacement adjuster kits containing part W10712394 or W10712395. Although termed an “upgrade” for purposes of the ongoing sale of the W10712394 and W10712395 Adjuster Assembly Kits, the purchase of these additional kits is necessary for the dishwasher to function as represented.

This notice applies to all KitchenAid and other similarly designed dishwashers, including but not limited to dishwashers sold under the Whirlpool and Kenmore brands, which incorporate the part numbers W10712394, W10712395 and other similarly designed and manufactured parts.

Plaintiffs on behalf of themselves and all others similarly situated, hereby demands that KitchenAid and/or Sears: (1) pay all costs required to investigate, repair, and replace all of the defective upper assembly rack systems utilized in Whirlpool, KitchenAid, and Kenmore dishwashers; and (2) provide notice to consumers of the product defect set forth in this letter.

This letter also constitutes a notice on behalf of Plaintiffs and all persons similarly situated of the breach by Whirlpool and Sears of its express warranties and the implied warranties of merchantability and fitness for use.

Additionally, this letter serves as a demand that you preserve and maintain all of the following records, including electronically stored information (ESI) and data, pending resolution of this matter:

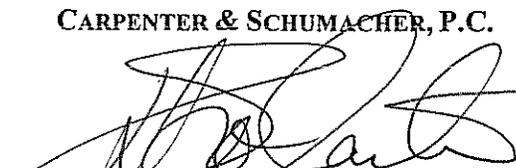
1. All internal manuals, written policies, directives, memoranda, correspondence, electronic mail, and other records of communication regarding all dishwashers manufactured with the defective assemblies bearing part numbers W10712394 and W10712395, or similarly designed or manufactured parts;
2. All advertising and marketing materials disseminated to consumers, retailers, plumbing contractors, and/or distributors that discuss or concern the assemblies referenced above;
3. Any complaints from any source concerning defective assemblies bearing part number W10712394 or W10712395, or similarly designed or manufactured parts;
4. All documents which reflect the sale of the Whirlpool, KitchenAid, and Kenmore dishwashers that contain part numbers W10712394 and W10712395 referenced above, or similarly designed or manufactured parts, in the United States, including manufacturing dates and model numbers;
5. All documents which reflect the materials used to manufacture the defective assemblies and all replacement assemblies from any source, including but not limited to Whirlpool and its suppliers; and

6. All listing agreements, testing records, and quality control records related to the assemblies bearing part number W10712394 or W10712395.

If you have any questions regarding this notice and demand, please contact the undersigned counsel at (844) 370-1133.

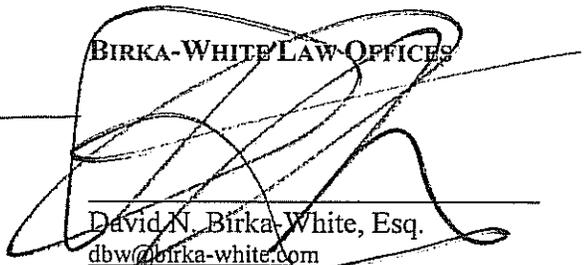
Sincerely,

CARPENTER & SCHUMACHER, P.C.



N. Scott Carpenter, Esq.
scarpenter@cstriallaw.com

BIRKA-WHITE LAW OFFICES



David N. Birka-White, Esq.
dbw@birka-white.com

NSC:brh

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

SEARS, ROEBUCK, & Co.
 Mr. Edward S. Lampert, CEO
 3333 Beverly Road, B2-116B
 Hoffman Estates, IL 60179

2. Article Number

(Transfer from service label)

7012 2920 0001 6275 4738

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

SEARS, ROEBUCK, & Co.
 c/o CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017

2. Article Number

(Transfer from service label)

7012 2920 0001 6275 4721

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee
 B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

U.S. Postal Service CERTIFIED MAIL RECEIPT

(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage \$
 Certified Fee
 Return Receipt Fee (Endorsement Required)
 Restricted Delivery Fee (Endorsement Required)
 Total Postage & Fees \$

Postmark Here

Sent To SEARS, ROEBUCK, & Co.
 Mr. Edward S. Lampert, CEO
 3333 Beverly Road, B2-116B
 Hoffman Estates, IL 60179

PS Form

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee
 B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

U.S. Postal Service CERTIFIED MAIL RECEIPT

(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage \$
 Certified Fee
 Return Receipt Fee (Endorsement Required)
 Restricted Delivery Fee (Endorsement Required)
 Total Postage & Fees \$

Postmark Here

Sent To SEARS, ROEBUCK, & Co.
 c/o CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017

PS Form

RECEIVED JUN 16 2017 5 27 PM '17

RECEIVED JUN 16 2017 5 27 PM '17

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

KITCHENAID, INC.
 C/O CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017

2. Article Number (Transfer from service label) **7012 2920 0001 6275 4745**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee

B. Received by (Printed Name) **CT CORPORATION SYSTEM**

818 West Seventh Street Suite 930 C. Date of Delivery **JUN 16 2017**

D. Is delivery address different from item 1? Yes No

If YES, enter delivery address below:

3. Service Type

Certified Mail Express Mail

Registered Return Receipt for Merchandise

Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees		

Sent To **KITCHENAID, INC.**
C/O CT CORPORATION SYSTEM
 Street, Apt. No. or PO Box No. **818 W 7th Street, Suite 930**
 City, State, ZIP+4 **Los Angeles, CA 90017**

PS Form 3800, A See reverse for instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

KITCHENAID, INC.
 C/O WHIRLPOOL CORPORATION
 Mr. Jeff Fettig, CEO
 2000 M-63, Tax Dept.
 Benton Harbor, MI 49022

2. Article Number (Transfer from service label) **7012 2920 0001 6275 4752**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee

x R. Hesse

B. Received by (Printed Name) **R. Hesse** C. Date of Delivery **6-16-17**

D. Is delivery address different from item 1? Yes No

If YES, enter delivery address below:

3. Service Type

Certified Mail Express Mail

Registered Return Receipt for Merchandise

Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees		

Sent To **KITCHENAID, INC.**
C/O WHIRLPOOL CORPORATION
 Street, Apt. No. or PO Box No. **Mr. Jeff Fettig, CEO**
 City, State, ZIP+4 **2000 M-63, Tax Dept. Benton Harbor, MI 49022**

PS Form 3800, A See reverse for instructions

EXHIBIT D

KitchenAid Dishwashers does NOT participate in the ConsumerAffairs accreditation program. [Learn More](#)



John H. of Cincinnati, OH
on Aug. 4, 2014

Satisfaction Rating
★ ★ ☆ ☆ ☆



We have owned a KitchenAid Dishwasher, Model KUDS35FXSS8 for 16 months. The wheels on the upper dish rack have already come off, rendering it unusable. This happened because the plastic tabs that hold the wheels in place have become brittle and cracked off in this short time. Kitchen Aid's warranty states that the dish rack is warranted for 5 years. However, Kitchen Aid customer service tells us that the wheel assembly on the dish rack is not covered by this warranty. Wheel assembly W10350376 is poorly designed and quickly fails. Do not buy a Kitchen Aid or Whirlpool dishwasher that uses this wheel assembly.

Helpful? Yes | No

Case 3:17-cv-05436-LB Document 1-1 Filed 09/19/17 Page 16 of 54

Case 3:17-cv-05436-LB Document 1-1 Filed 09/19/17 Page 17 of 54

The screenshot shows a web browser window with the URL https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=5. A notification at the top states: "KitchenAid Dishwashers does NOT participate in the ConsumerAffairs accreditation program. [Learn More](#)". The website header includes the "CONSUMERAFFAIRS" logo and navigation links for "Consumer News", "Buyers Guides", and "For Businesses". On the right side of the header, there are links for "Write a review", a search icon, and "Log in".

The main content area features a review by "Carol of Baltimore, MD on Nov. 12, 2015". The reviewer's profile picture is a grey silhouette. To the right of the name is a "Satisfaction Rating" of 1 star out of 5, represented by a red star and four grey stars.

The review text reads: "I have a 4 year old Kitchenaid Dishwasher. We spent over \$1,000 for it thinking we were investing in a very nice, long lasting machine. After a year, the right clip on the top rack broke and needed to be repaired by a technician. 6 months later the other side broke and we needed another service call. In the last few weeks, all 8 wheels have fallen off the bottom rack. We run the dishwasher about once every three days. I spoke to Kitchenaid customer service this morning via their online chat. The service representative admitted that there were so many complaints about my model that it should have been recalled. She said there was nothing she could do for me. I called and spoke to a customer service representative and their supervisor and they both refused to provide the replacement parts. My model is KUDE 40FXSP3. I will never buy another Kitchenaid product. Even when they know there's an issue, they will not take responsibility for it."

At the bottom of the review, there is a "Helpful?" section with "Yes" and "No" options, where "Yes" is currently selected.

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The screenshot shows a web browser window with the following elements:

- Browser Tab:** Top 834 Complaints and X
- Address Bar:** Secure | https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=4
- Page Header:** KitchenAid Dishwashers does NOT participate in the ConsumerAffairs accreditation program. [Learn More](#)
- Navigation Bar:** CONSUMERAFFAIRS | Consumer News | Buyers Guides | For Businesses | Write a review | Search | Log in
- Review:**
 - Author:** Monica of Pine Brook, NJ on Feb. 8, 2016
 - Satisfaction Rating:** 1 star (★☆☆☆☆)
 - Text:** Currently own a KitchenAid Dishwasher, Model KUDE4FXSS0. The top rack detached from the sliding mechanism. There are no signs of parts. Afterwards two bottom wheels fell off on both sides. Asked KitchenAid for assistance and they have to send a tech out at my cost.
 - Helpful?** Yes | No

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Top 834 Complaints and X

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 Jerri of Valley Park, MO on June 11, 2013

Satisfaction Rating 

The Plastic wheels on my \$800 KitchenAid dishwasher Model KUDS30IX failed after a little over a year. My manual states that the rack is under warranty for 5 years... KitchenAid says the warranty only applies to the nylon coating on the rack, not the wheels. They gave me a one-time replacement part that failed again after 6 months. They refuse to stand behind their product any further. I have never had a high-end product fail and receive such poor customer support. I feel they know they have a bad design and surely more customers have experienced this problem. I will never purchase another KitchenAid appliance!

Helpful? Yes | No

EXHIBIT E



Lorrie of Rainier, OR on Feb. 11, 2016

Satisfaction Rating



KitchenAid Model KUDS30IXBL Purchased from Lowe's 3-29-14. Within a few months of purchase, the top rack wheel broke off. Within 2 years, it would cancel and drain within 15 minutes of start up. This began just before Thanksgiving. :(Repairman came out since we purchased the warranty and replaced the rack holder with new metal parts and the front computer. First load of dishes after repair, it cancelled and drained within 15 minutes of start up. I'd rather go back to old fashioned knobs and dials.

Helpful? [Yes](#) | [No](#)

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The screenshot shows a web browser window with the URL https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=5. A notification at the top states: "KitchenAid Dishwashers does NOT participate in the ConsumerAffairs accreditation program. [Learn More](#)". The website header includes the "CONSUMERAFFAIRS" logo and navigation links for "Consumer News", "Buyers Guides", and "For Businesses". There are also buttons for "Write a review", a search icon, and "Log in".

The main content area features a review by "Marcel of Renton, WA on Aug. 11, 2015". The reviewer's profile picture is a grey silhouette. To the right of the name is a "Satisfaction Rating" of 1 star out of 5, represented by one red star and four grey stars.

The review includes a photograph of a dishwasher's interior top rack, showing a roller wheel that has detached from its track. Below the photo, the text reads: "I too experienced the dishwasher top rack roller failure. The top rack rollers are secured by (2) cheap very thin plastic spreader clips. These clips are approximately 3/16 wide by 1/16 thick. If just one of these cheap clips breaks - the roller wheel will separate causing the rack to collapse along with progressive failure of the adjoining roller wheel clips. This deliberate design and manufacturing defect by KitchenAid is an obvious attempt at planned obsolesce. This once celebrated company is no longer interested in producing durable quality products. Avoid the purchase of all KitchenAid dishwashers!"

At the bottom of the review box, there is a "Helpful?" section with "Yes" and "No" radio buttons, where "Yes" is selected.

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Top 834 Complaints and X

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Satisfaction Rating
★☆☆☆☆

Sanat of Novi, MI on Jan. 29, 2015

2 years old dishwasher. Within 6 months, top rack roller axles broke. After a year, stopped cleaning top rack items. I found out the Chopper Assembly was broken. Had to replace it. Both are cheap plastic parts. Terrible experience with this brand.

Helpful? Yes | No

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Top 834 Complaints and 

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Mel of O'Fallon, MO on
Jan. 18, 2015

Satisfaction Rating
    

Purchased KitchenAid dishwasher model KUDS30FXSS5 in September 2012. The cheap plastic upper rack assembly has broken three times. The plastic parts to pull out the rack break every year and have fallen into the chopper causing further damage. Clearly this machine is made with plastic parts that cannot withstand normal usage. I will not buy a KitchenAid appliance ever again.

Helpful? Yes | No

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Top 834 Complaints and

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Jan of Brigham, UT on Jan. 3, 2015 *Satisfaction Rating*
★ ★ ☆ ☆ ☆

Have only had my dishwasher 4 months and the top rollers broke. I spent a lot of money to get what I was told was a good dishwasher, so having the rollers break after 4 months makes me angry. Then to find it isn't covered under warranty really made me mad. Kitchenaid should be honest and stand Behind their products!

Helpful? Yes | No

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Top 834 Complaints and... X

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 Terry of Castle Rock, CO on Nov. 23, 2014 Satisfaction Rating
★☆☆☆☆

The top rack adjuster is what connects the upper rack to the pull out guide. In most Kitchenaid (and Whirlpool) dishwashers, the wheels of the adjuster are connected with a plastic axle. These axles will routinely break, causing the upper rack to fall onto the lower rack, or if you are lucky, just separate from the wheel guide. If you bought washers with this design, you will have this problem. We have had our KUDS30X... for about 3 years and have had to replace this part 7 times already. The part costs about \$25 a pop from online part stores. This part will eventually wear down and break no matter how careful you are when pulling out the top rack. It is still used on even Kitchenaid's top of the line washers. Really Kitchenaid, how much would it cost you to redesign this flawed part? If you are shopping for a dishwasher, look at the wheels on the upper rack. If it has a plastic axle, walk away.

Helpful? Yes | No

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Gerry of Encino, CA on June 6, 2014

Satisfaction Rating

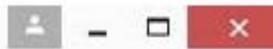


Had dishwasher KUDS30IXSS a little over a year and two small plastic parts on the upper glider both broke after just moderate use. Outside of warranty by a few months and Whirlpool (Kitchenaid) sent their own repairman who said the two parts were \$48. Took 10 minutes to replace them and then charged \$130 for labor and an additional \$85 for the service call. I have never, ever had a service where they charge labor and service charge. It's one or the other (Also, \$130 for 10 minutes of labor?). Complained and repairman said it's company policy and should take it up with Whirlpool which we are. We recently had our Kitchenaid side by side built-in go out as well, luckily under warranty. Their products and service have gone steadily downhll year after year. We were loyal customers at one time but no longer. Check all the reviews out there on any appliances you are considering before you buy another Kitchenaid.

Helpful? Yes | No

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Top 834 Complaints and

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Scott of Decatur, AL on
May 27, 2014

Satisfaction Rating



I also have a stainless steel KitchenAid dishwasher (KUDE40FXSS5) and while the machine is quiet and cleans reasonably well. The adjuster assembly on the top rack has plastic tabs that become brittle and break, so that the wheels fall off. I have replaced this twice so far. It is intensely frustrating! This problem could have been prevented with a metal tab instead of cheap plastic.

Helpful? Yes | No

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Top 834 Complaints and

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 Kathryn of Gladwin, MI on Nov. 5, 2013 Satisfaction Rating ★☆☆☆☆



I purchased a KitchenAid dishwasher in March 2011 from Lowe's. I chose the KitchenAid brand and paid a slightly higher amount as I was told they are well built and work better than any other brand on the market, and because I thought they would stand by their product. In December 2012, the upper rack adjuster broke because it is made of plastic and the dishwasher has the lift higher feature, that is used quite a bit. I contacted customer service and they said the part was out of stock and finally in late January I received the replacement part. Last week it broke again, same place, so I contacted customer service again and I asked them if anyone else has this issue and I was told they could not discuss this with me but there is no recall. Was told I am sorry but the part is in stock, call Marcone to order the part. The cost is \$40.00 plus shipping. I am so angry right now. I have a dishwasher that is useless. Without the top rack in the upper spray unit will not work.

Helpful? Yes | No

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The screenshot shows a web browser window with the URL https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=17. The page title is "KitchenAid Dishwashers does NOT participate in the ConsumerAffairs accreditation program. [Learn More](#)". The navigation bar includes "CONSUMERAFFAIRS", "News", "Guides", "For Businesses", "Write a review", a search icon, and "Log in".

The review is by "Marcello of Houston, TX on Nov. 6, 2011" with a "Satisfaction Rating" of 3 stars (3 yellow stars, 2 grey stars). The review text is as follows:

We purchased a KUDS30CX in January 2011. First failure occurred in October 2011. The roller spindle on the top cage snapped and the roller fell off. The plastic spindle seems to be too brittle. Second failure occurred November 2011 (less than 30 days from the first) . This time, the whole dishwasher just plain quit. There were no lights like it was unplugged, nothing. The Sears people are wonderful about coming out and fixing and they will be coming out next week. However what happens after the warranty runs out? Are there lemon laws with these appliances?

We paid a lot for the dishwasher and with all these posts I am wondering if we made a big mistake. Am I destined to have repeat nightmare failures like these other posts? The machine cleans well unlike the other brands which don't seem to work all the time. I know that there are a lot of new gizmos on these new dishwashers but these gizmos don't seem to be the source of the failures. Also there are many posts on websites about the control panel failing that span back years. Did they ever get this fixed or is that expected now?

At the bottom of the review box, there is a "Helpful?" section with "Yes" and "No" options.

EXHIBIT F

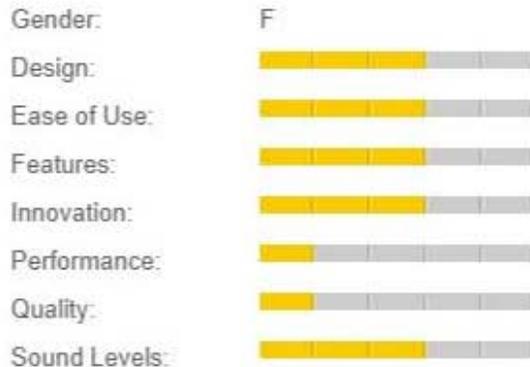
By Purnima Kumar
From Dallas, TX

★★★★★ 2.0

5/6/2017

dissatisfied with this product

Bought 2 of these dishwashers 3 years ago.. the racks broke, the wheels broke, and now new of the them the repair guy said the motor is broken and needs replacement and its best to buy a new one...I use the dishwashers not more than 3 times a week.. for one of them to crash in 3 years is very disappointing.. these are expensive dishwashers.. I need to get the exact model so it matches my other one, but the model is discontinued?? what is the closest replacement. He said it would be \$425.00 to replace just the motor!! and I can get a new one for around \$700.00 but I cant find it anywhere?!?! Can you'll help??



No, I would not recommend this to a friend

Merchant response: Purnima Kumar:

Thank you for your review.

We would like to inquire further about your review with you. Please respond back to this email address Maytag_Reviews@Maytag.com with your name, user # (97912163), phone number, street address, zip code, reviewer name, model & serial number, and date of purchase on the appliance.

We look forward to your reply.

Was this review helpful? Yes / No You may also flag this review

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1. (2) Among leading premium brands, with rinse aid.



By Dishwasher Diva
From Ellicott City, MD



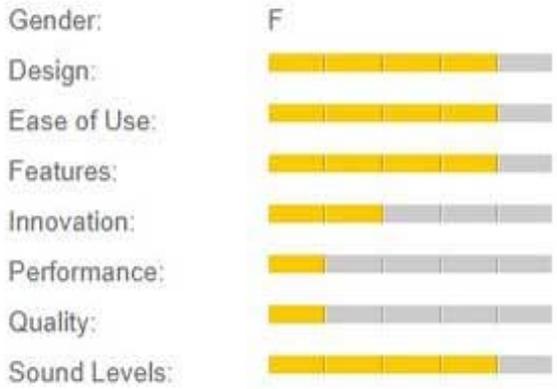
7/20/2016



Not what we hoped for

This review was submitted as a sweepstakes entry.

We bought this dishwasher 4 years ago for our new home. Since that time we have spent approx. \$600 in repairs for new racks/brackets (plastic parts for the top rack kept breaking). Now our top rack is no longer cleaning. At this point, I'm thinking we cut our losses and look for a replacement rather than pay for more repairs.



No, I would not recommend this to a friend

Merchant response: We're sorry to hear of the experience that you have encountered with your dishwasher Dishwasher Diva. We would like to discuss this further with you. Please email us at NAR_Customer_Solutions@kitchenaid.com at your earliest convenience with your user id 84367589, name, address, a phone number and best time to reach you along with your model and serial number.

(1 of 1 customers found this review helpful)

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1. (2) Among leading premium brands, with rinse aid.

Was this review helpful? Yes / No You may also flag this review

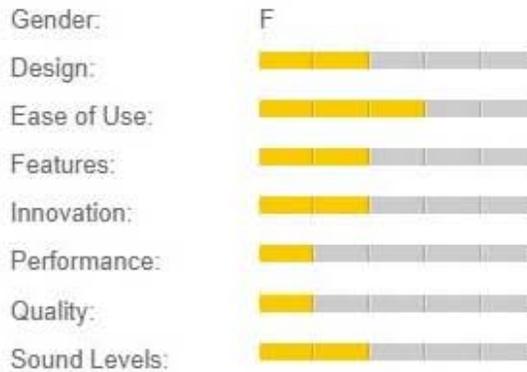
By Laura
From Windermere, FL

★★★★★ 1.0

12/30/2015

Terrible product

We purchased this product new 4 years ago. After the first year (like other customers who posted feedback) the cheap plastic parts on the top rack broke. We repaired and about 1.5 years they broke again. This week, the unit has stopped working altogether. Total piece of junk and it wasn't a cheap unit when purchased. No one needs this much aggravation from a new appliance. KitchenAid should be embarrassed.



No, I would not recommend this to a friend

(2 of 2 customers found this review helpful)

Was this review helpful? Yes / No You may also flag this review

By Unhappy In
Mesquite
From Mesquite, NV

★★★★★ 1.0

12/21/2015

Didn't last very long.

This was installed as a upgraded appliance package when I bought the

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1. (2) Among leading premium brands, with rinse aid.

Was this review helpful? Yes / No You may also flag this review

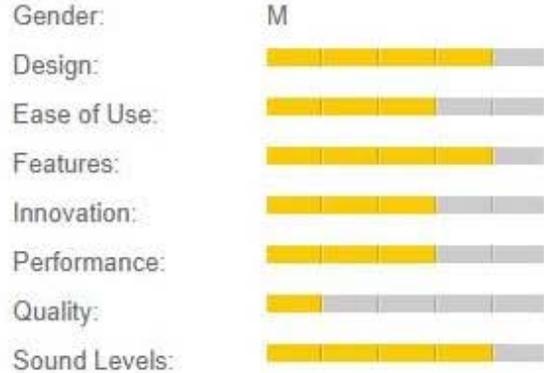
By Aaron
From Arizona

★★★★★ 10

9/15/2015

Upper Rack Problem

The dishwasher upper rack has been an issue about 8 months after purchase. The parts are plastic and have broken. I too found out that they would not cover under warranty. Had to purchase parts in order to conveniently use the product properly. Hopefully, they will fix this issue with future products and gain back customer confidence.



No, I would not recommend this to a friend

(2 of 2 customers found this review helpful)

Was this review helpful? Yes / No You may also flag this review

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1. (2) Among leading premium brands, with rinse aid.



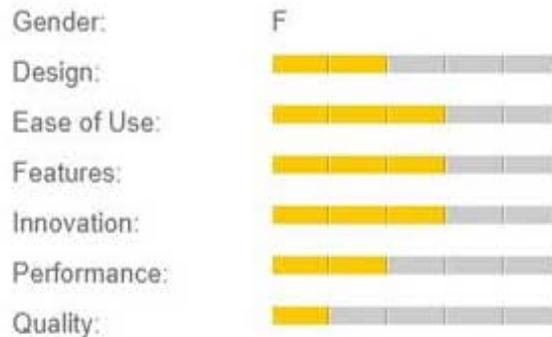
By Unhappyconsumer2
From Atlanta, GA

★★★★★ 2.0

6/21/2014

Poor quality parts!!!

We bought this unit in January of 2011 (to replace the 8 year old Kitchen Aid that was put in our home from our builder) and have had consistent problems with it ever since. The upper rack is junk!! We have had it replaced four times in 3 1/2 years (only once covered with warranty.) Two different repair companies have said how many of these they have to frequently replace. Now at only 3 1/2 years of use, the control board is malfunctioning so the dry cycle doesn't work. We are kicking this junk out of here and replacing with a better quality brand. We will NEVER purchase Kitchen Aid appliances again!!!!!!!



No, I would not recommend this to a friend

(2 of 2 customers found this review helpful)

Was this review helpful? / You may also flag this review

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1. (2) Among leading premium brands, with rinse aid.

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24-Inch 4-Cycle/6-Optio: x

www.kitchenaid.com/shop/-[KUDS30FXSS]-402324/KUDS30FXSS/#pr-header-back-to-top-link

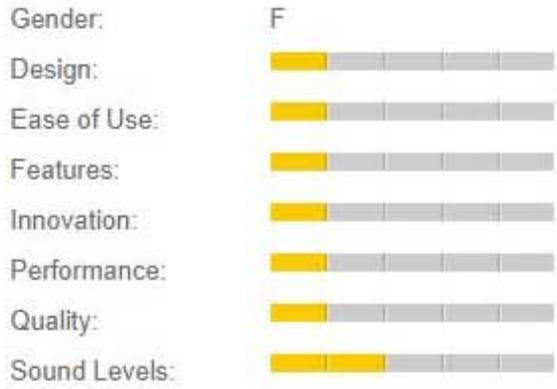
Sort by Newest

By NeverAgain4AsLongAs 1.0
 From Chico, CA

12/24/2013

Rack repair will cost you a fortune.

I have had this dishwasher for two years. It cleans nicely if you use the recommended detergent. However, small plastic parts for the adjustable racks break every 3 - 4 months and they cost over \$20 apiece. Completely disappointed in KitchenAid. Same with my oven, which blows a fuse every time I use the self clean cycle. Have to use chemical oven cleaner now. What happened to this brand.



No, I would not recommend this to a friend

(2 of 2 customers found this review helpful)

Was this review helpful? Yes / No You may also flag this review

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1. (2) Among leading premium brands, with rinse aid.

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By Abrush
From Pittsburgh, PA,
USA



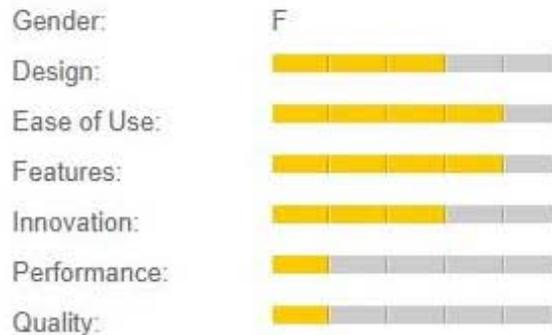
11/19/2013

Great dishwasher if the top rack didn't BREAK OVER AND OVER

In the 2 and a half years I've had this dishwasher the top rack adjusters have broken 6 times (each side has broken 3 times). It's crazy that a high end dishwasher like this would have the entire top rack suspended by tiny little plastic pins and wheels. Upon being heated and reheated the plastic becomes brittle and breaks causing the entire top rack to collapse.

I'd encourage you to read the reviews on Amazon before purchasing as dozens of other reviews have said the same thing.

Otherwise, the dishwasher is nice and does a fine job, as long as it has Rinse Aid. I would have nothing bad to say about it if it weren't for those blasted wheels, and I NEVER take the time to write reviews!



No, I would not recommend this to a friend

(4 of 4 customers found this review helpful)

Was this review helpful? Yes / No You may also flag this review

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1. (2) Among leading premium brands, with rinse aid.

EXHIBIT G

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C of East New Market, MD on July 2, 2013 *Satisfaction Rating* ★☆☆☆☆

When I pulled the top rack out to unload it, the left side collapsed without any warning, spilling dishes and glasses down onto the crockery in the bottom rack and out onto the floor. When I looked for the cause, it was obvious that one of the two flimsy plastic "spring" pegs that retain each wheel of the upper rack on its axle had broken. This allowed the wheel to pull off the axle and thereby allow the entire left side of the top rack to collapse. It seems to me the axles on the rack adjuster (part number W10350376) are very poorly designed and is not made as solidly as the wheels on the lower rack. This is despite the fact that both upper and lower racks are of the same dimensions and so to me as an average consumer, both should be able to support a full load of dishes.

Helpful? Yes | No

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 darrell of Livermore, CA on Nov. 5, 2014 Satisfaction Rating
★☆☆☆☆

2/10/13 paid \$1,000. for KitchenAid Dishwasher + extended warranty. 10/12/2014 upper tray fell; plastic clips broken, glasses everywhere. Called LOWE'S. Told repair facility will be here in 2 Days. Asked about correction for plastic clips, told there are none. Same clips to be reinstalled... Not good answer. Called LOWE'S. No help, runaround, dance with me. Feed me fertilizer, thinking I am a plant. Unhappy man, unhappy wife. Calling 7-On Your Side - television news program. If no warranty, my cost at \$485.75, every 18 months. Cannot extend warranty. Do not buy KitchenAid Dishwasher.

Helpful? Yes | No

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Top 834 Complaints and X

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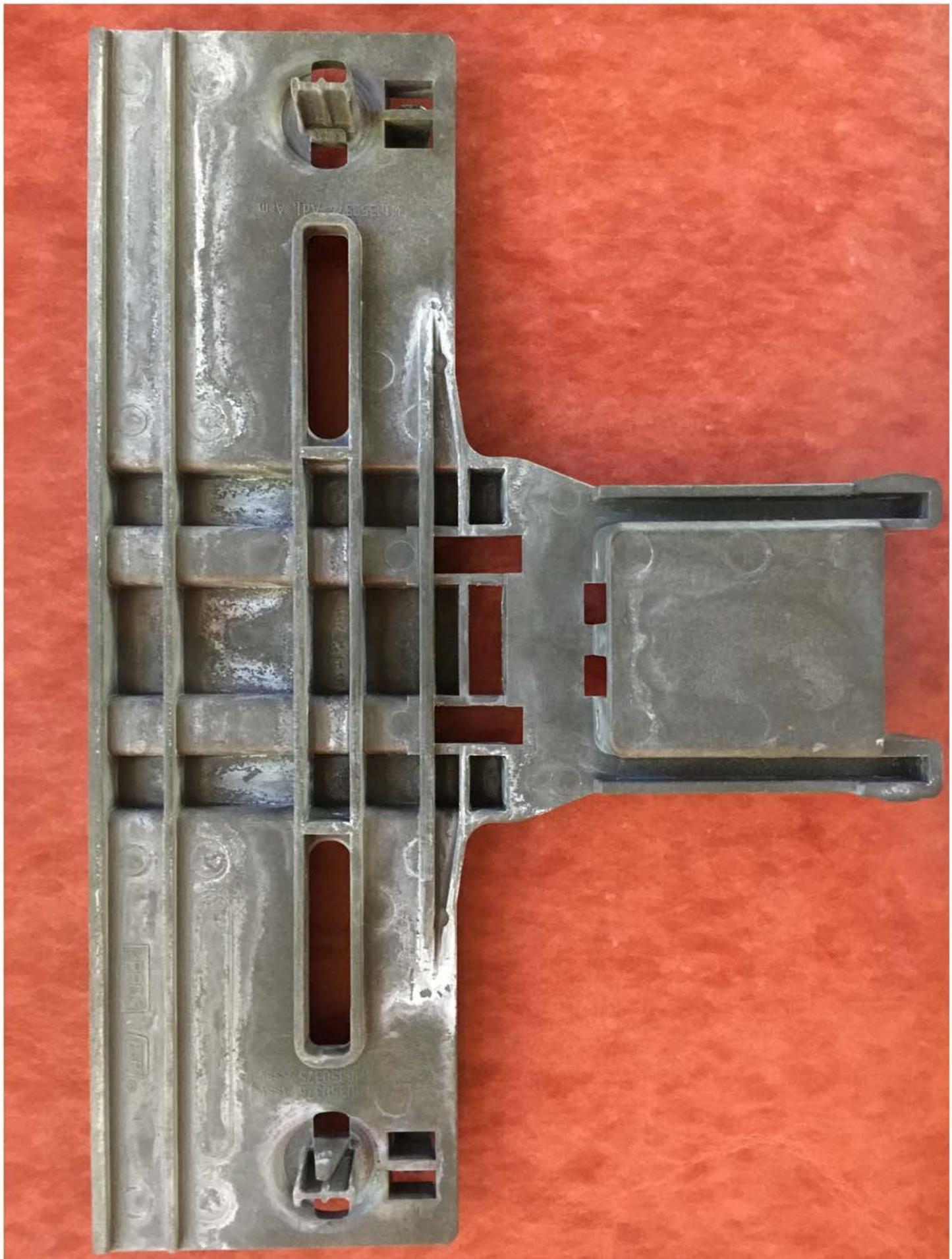
CONSUMERAFFAIRS News Guides For Businesses Write a review Log in

 Richard of Eclectic, AL on Jan. 3, 2015 *Satisfaction Rating* ★☆☆☆☆

As noted in many other reviews there is a design issue with the upper carriage. My wheels fell off New Years Eve and the upper basket fell down breaking 8 champagne glasses... several hundred dollars in broken glasses... dishwasher is 2 years old. Very unhappy.

Helpful? Yes No

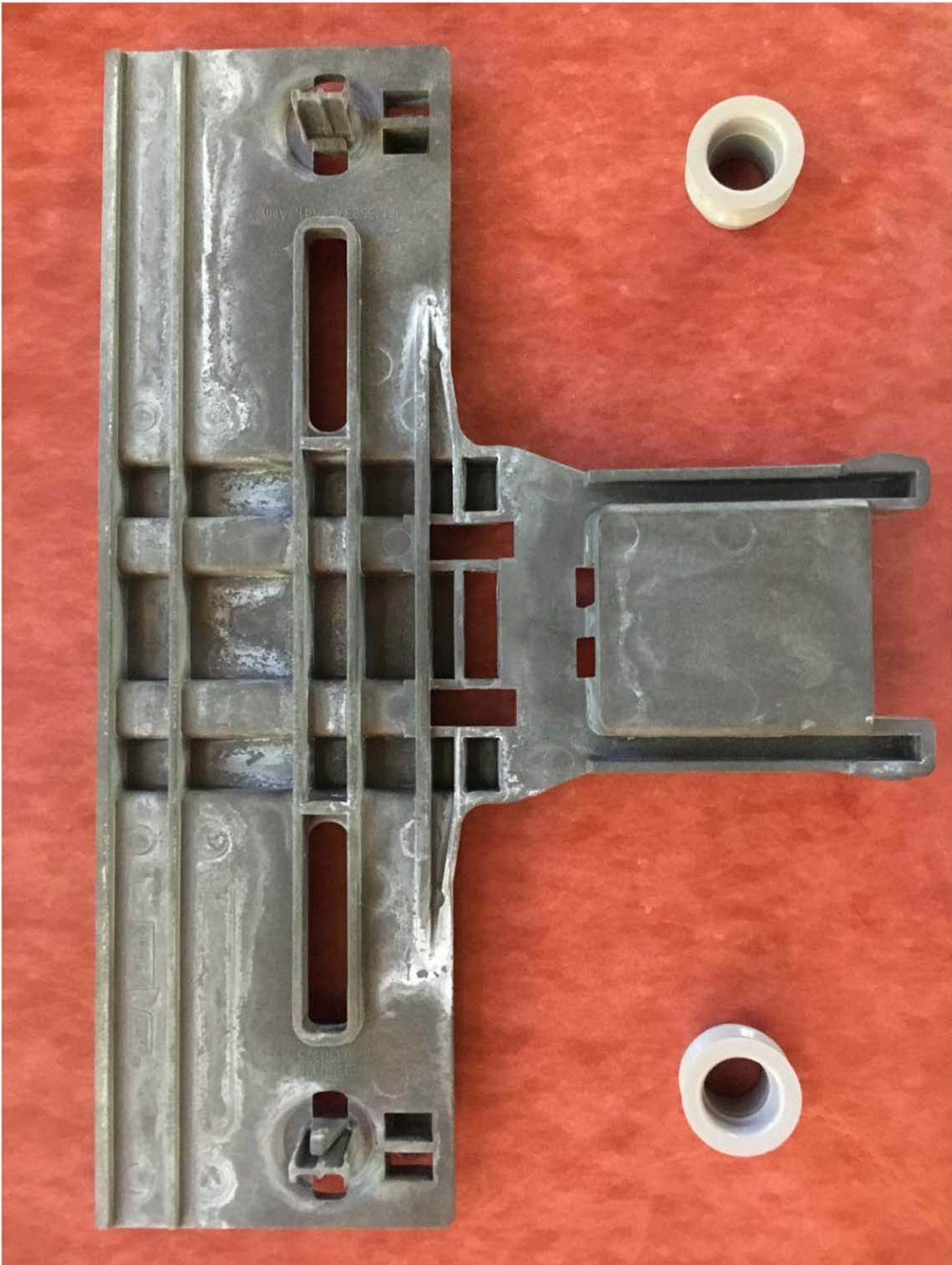
EXHIBIT H

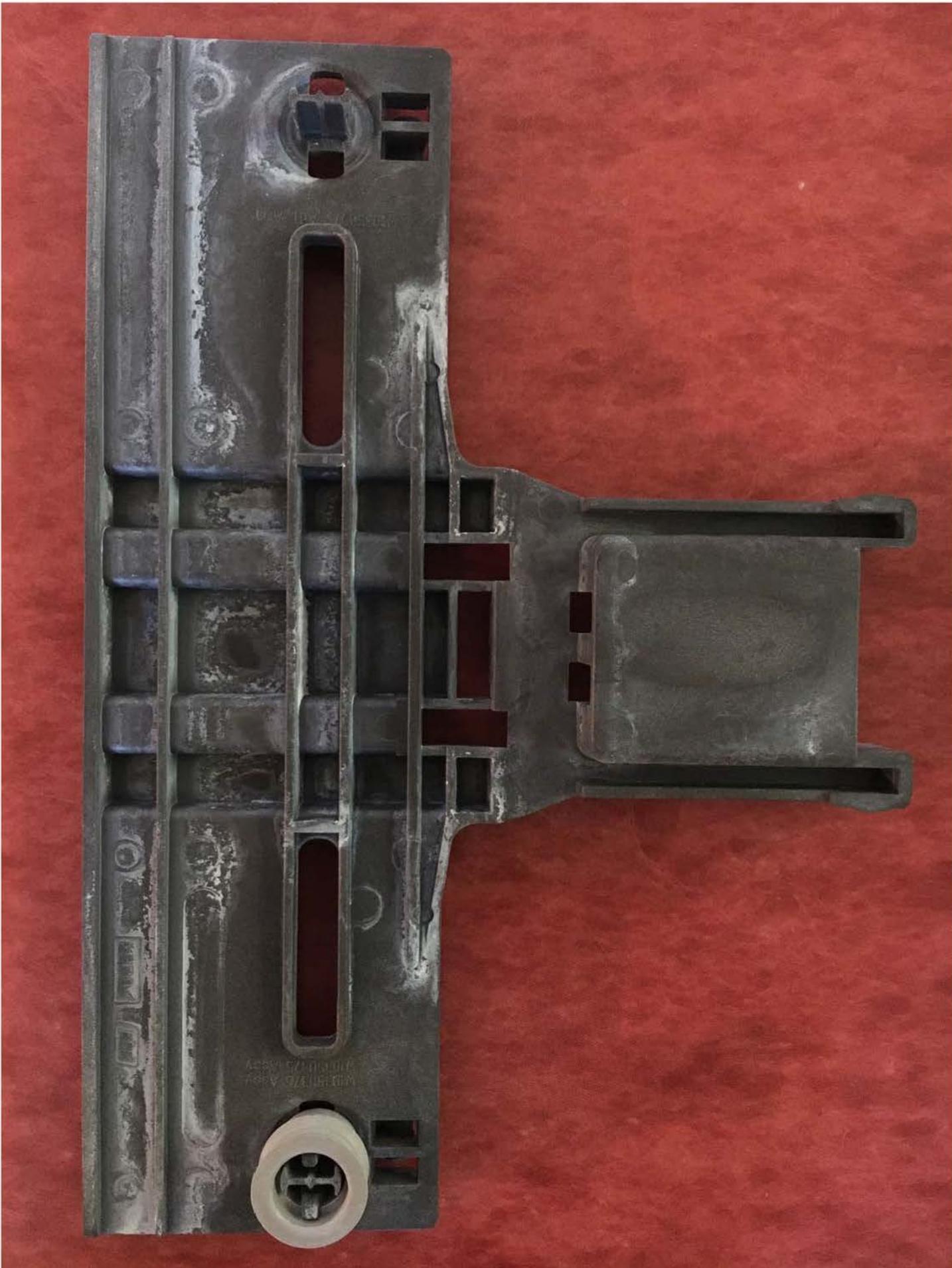


Plaintiff Bodley - Failed Upper Rack Assembly 2









Plaintiff Bodley - Failed Upper Rack Assembly 1







EXHIBIT I

1 David M. Birka-White (State Bar No. 85721)
dbw@birka-white.com
2 Mindy M. Wong (State Bar No. 267820)
mwong@birka-white.com
3 BIRKA-WHITE LAW OFFICES
65 Oak Court
4 Danville, CA 94526
Telephone: (925) 362-9999
5 Facsimile: (925) 362-9970

6 N. Scott Carpenter (Pro Hac Vice Pending)
scarpenter@cstriallaw.com
7 Rebecca Bell-Stanton
rstanton@cstriallaw.com
8 Carpenter & Schumacher, P.C.
2701 Dallas Parkway, Suite 570
9 Plano, TX 75093
Telephone: (972) 403-1133
10 Facsimile: (972) 403-0311

11 Attorneys for Plaintiffs
JAMES BODLEY AND KYLE MATSON

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 JAMES BODLEY AND KYLE MATSON,
16 on behalf of themselves and all others
similarly situated,

17 Plaintiff,

18 v.

19 KITCHENAID, INC., and DOES 1
20 through 10, inclusive,

21 Defendants.

Case No.

DECLARATION OF JAMES BODLEY

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I, JAMES BODLEY, declare as follows:

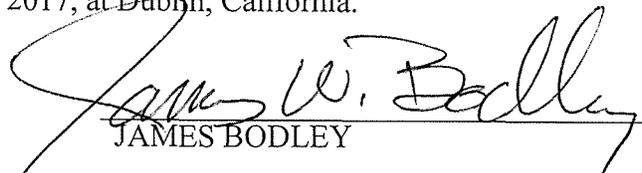
1. I am a Plaintiff and proposed class representative in this case. I have personal knowledge of the matters set forth below, except as to those matters stated herein which are based on information and belief, which matters I believe to be true. If called to testify, I could and would testify competently to these matters herein included.

2. I am informed and believe that venue is proper in this court under Civil Code § 1780(d) because all transactions giving rise to this lawsuit occurred in Alameda County and KitchenAid marketed and sold its dishwashers throughout the State of California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this ~~4~~ day of August, 2017, at Dublin, California.

September 6


JAMES BODLEY

1 David M. Birka-White (State Bar No. 85721)
dbw@birka-white.com
2 Mindy M. Wong (State Bar No. 267820)
mwong@birka-white.com
3 BIRKA-WHITE LAW OFFICES
65 Oak Court
4 Danville, CA 94526
5 Telephone: (925) 362-9999
Facsimile: (925) 362-9970

6 N. Scott Carpenter (*Pro Hac Vice*)
7 scarpenter@cstriallaw.com
Rebecca Bell-Stanton (*Pro Hac Vice*)
8 rstanton@cstriallaw.com
Carpenter & Schumacher, P.C.
9 2701 Dallas Parkway, Suite 570
Plano, TX 75093
10 Telephone: (972) 403-1133
11 Facsimile: (972) 403-0311

12 *Attorneys for Plaintiffs*
JAMES BODLEY AND KYLE MATSON

13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 JAMES BODLEY AND KYLE MATSON, on
behalf of themselves and all others similarly
17 situated,
18 Plaintiff,
19 v.
20 WHIRLPOOL CORPORATION and DOES 1
through 10, inclusive,
21 Defendants.

CASE NO. 3:17-cv-05436-JST
**FIRST AMENDED COMPLAINT
FOR DAMAGES**
CLASS ACTION
JURY TRIAL DEMANDED

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1 Plaintiffs James Bodley and Kyle Matson (“Plaintiffs”), on behalf of themselves and all
2 others similarly situated, allege as follows:

3 **I. INTRODUCTION**

4 1. This case arises out of the manufacture and sale of KitchenAid brand dishwashers
5 designed, manufactured and sold by Defendant Whirlpool Corporation (“Defendant” or
6 “Whirlpool”) which are equipped with a defective upper rack assembly depicted in **Exhibit A**
7 hereto, including but not limited to part numbers W10350375 and W10350376.

8 2. Defendant designed, manufactured, distributed and sold the dishwashers, including
9 but not limited to model KUDS30FXSS5, from approximately 2011 to at least 2016, according to
10 proof, to Plaintiffs and the Class.

11 3. At the time of sale, the dishwashers contained a defect in the upper rack assembly.
12 The upper rack assemblies in the dishwashers are defective and fail as the heat generated by the
13 dishwasher causes the plastic components to become brittle and break, which in turn causes the top
14 rack to suddenly and unexpectedly collapse.

15 4. The failure of the upper rack assembly results in property damage and creates an
16 unreasonable risk of personal injury because the upper rack assembly fails without warning causing
17 dishware and glassware to shatter and break.

18 5. The dishwasher will not operate without a functional upper rack assembly.
19 Moreover, the component part cannot be repaired and must be replaced, an expense Whirlpool
20 refuses to pay and must be incurred by Plaintiffs and the Class as alleged herein.

21 6. Defendant has known that the upper rack assembly was defective and not fit for
22 their intended purpose as alleged herein since shortly after they were first sold, at least 2011.
23 Nevertheless, Defendant actively concealed and failed to disclose the defect to Plaintiffs and the
24 Class at the time of purchase continued selling the dishwashers containing the defective upper rack
25 assembly. On information and belief, Whirlpool continued selling the dishwashers containing the
26 defective upper rack assembly until approximately 2016, according to proof.

27 7. Defendant had a duty to disclose the defect in the dishwashers to all prospective
28 purchasers particularly because of the unreasonable risk of serious physical injury posed by the

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1 defect in the upper rack assembly. Had Plaintiffs and the Class been aware of the defect, they
2 would not have purchased a KitchenAid dishwasher but instead would have purchased a
3 dishwasher manufactured by others.

4 8. Despite having notice of the defect, Defendant has not recalled the dishwashers to
5 repair the defect and when asked, has refused to pay for the parts and labor associated with
6 removing and replacing the defective rack assembly.

7 9. As a result of the defect in the dishwashers, Plaintiffs and members of the Class
8 have suffered actual damages.

9 10. Plaintiffs seek recovery on behalf of themselves and all persons who purchased the
10 dishwashers or properties in which the dishwashers were installed (the “Class”) for breach of
11 express and implied warranties, fraudulent concealment, and for violation of the provisions of the
12 California consumer protection and unfair business practice statutes.

13 **II. PARTIES**

14 11. Plaintiff James Bodley (“Bodley”) is a resident of Dublin, California, County of
15 Alameda. On or about November 6, 2012, Bodley became the first purchaser of a newly
16 constructed home in which a KitchenAid dishwasher bearing model number KUDS30FXSS5 was
17 installed.

18 12. Plaintiff Kyle Matson (“Maston”) is a resident of Martinez, California, County of
19 Contra Costa. On or about November 22, 2013, Matson purchased a home in which a KitchenAid
20 dishwasher bearing model number KUDS30FXSS5 was installed.

21 13. Defendant Whirlpool Corporation is a Delaware corporation with its principal place
22 of business in Benton Harbor, Michigan. Whirlpool is the number one major appliance
23 manufacturer in the world. Whirlpool sells appliances to its trade customers under a variety of
24 brand names for re-sale to consumers including, but not limited to, Kenmore, KitchenAid and
25 Whirlpool. At all times relevant herein, Whirlpool distributed, advertised, marketed, manufactured,
26 warranted, and sold KitchenAid dishwashers equipped with a defective upper rack assembly.

27 14. Plaintiff is informed and believed and thereupon alleges that Whirlpool has engaged
28 in substantial business within California over the past two decades, including specifically the sale

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1 of the dishwashers in question. Whirlpool has distribution centers and sales offices within
2 California. Plaintiff further is informed and believed that the volume of sales by Whirlpool in
3 California exceeds any other state within the United States and that the application of California
4 law would be appropriate. Plaintiff further alleges that a choice of law decision at the pleading
5 stage is premature prior to discovery and a development of the factual record.

6 15. Plaintiffs are unaware of the true names and capacities of the Defendants sued
7 herein as DOES 1 through 10, and therefore sue these Defendants by such fictitious names.
8 Plaintiffs will amend this complaint to allege their true names and capacities when they are
9 ascertained. Plaintiffs are informed and believe that each of the fictitiously named Defendants is
10 responsible in some manner for the occurrences herein alleged and that the damages suffered by
11 Plaintiffs and the class, were proximately caused by their conduct.

12 16. Plaintiffs are informed and believe that all Defendants, including the fictitious Doe
13 Defendants 1 through 10, were at all relevant times acting as actual or ostensible agents,
14 conspirators, partners, joint venturers or employees of all other Defendants and that all acts alleged
15 herein occurred within the course and scope of that agency, employment, partnership, or enterprise,
16 and with the express or implied permission, knowledge, consent, authorization and ratification of
17 their co-Defendants.

18 **III. JURISDICTION AND VENUE**

19 17. This Court has jurisdiction over this action pursuant to the Class Action Fairness
20 Act, 28 U.S.C. § 1332(d), because this is a class action in which: (1) there are at least 100 class
21 members in the proposed class; (2) the combined claims of the proposed class members exceed
22 \$5,000,000 exclusive of interests and costs; and (3) there is minimal diversity as Plaintiffs and
23 certain members of the proposed class are citizens of California and Defendant is a citizen of other
24 states including Delaware and Michigan.

25 18. This Court has personal jurisdiction over Defendant because Defendant purposefully
26 availed itself of the privilege of conducting business activities within the State of California by
27 advertising, selling, and warranting the dishwashers to Plaintiffs and the proposed class, and
28 maintained systematic and continuous business contacts with the State of California, to render the

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1 exercise of jurisdiction by this Court permissible under traditional notions of fair play and
2 substantial justice.

3 19. Venue is also proper in this District pursuant to 28 U.S.C. § 1391(a)(2) because a
4 substantial part of the events, misrepresentations and/or omissions giving rise to Plaintiffs’ claims
5 alleged herein occurred in the Northern District when Defendant advertised, sold, marketed, and/or
6 warranted the dishwashers to Plaintiffs and the proposed class.

7 **IV. INTRADISTRICT ASSIGNMENT**

8 20. Venue in this Division of the Northern District is proper under Local Rule 3-2(c)
9 and (d) because a substantial part of the events or omissions which give rise to Plaintiffs’ claims
10 occurred in Alameda County and Contra Costa County and the dishwashers that are the subject of
11 this action are located in Alameda and Contra Costa counties.

12 **V. FACTUAL ALLEGATIONS**

13 **A. The Latent Defect in the Dishwashers**

14 21. The dishwashers designed, manufactured, marketed, and sold by Defendant contain
15 defective rack assemblies that fail and cause the dishwasher to be substantially inoperable.

16 22. The dishwashers utilize plastic parts in the top rack slide mechanism. These parts
17 prematurely fail without warning because the plastic hooks that retain the wheel to the rack break.
18 Once these hooks break, it allows the wheel to detach from the wheel hub causing the rack to fall.
19 The loaded top rack falls onto the open door or lower rack, causing dishware and glassware to
20 shatter and break, which in turn causes property damage and exposing consumers to an
21 unreasonable risk of personal injury. The design of the rack assembly cannot withstand normal or
22 intended use.

23 23. Owners of the dishwashers cannot and do not cause the rack assembly failures nor
24 can they prevent them.

25 24. Because of the defect in the rack assemblies, all KitchenAid dishwashers relevant to
26 this litigation have upper rack assemblies that have failed or will fail before the end of their
27 expected useful life.

28 25. The defect in the dishwasher is latent and not discoverable until the upper rack

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1 assembly fails, at which point the dishwasher is no longer operable and remains substantially
2 inoperable until the defective rack assembly is replaced.

3 26. Plaintiff is informed and believes that the dishwashers were manufactured and sold
4 between 2011 to the present and 2016, according to proof.

5 27. Notwithstanding their knowledge of the defect as alleged herein, Defendant
6 continued the sale of the dishwashers without disclosing the defect or safety risk to consumers. Had
7 Defendant disclosed the known facts Plaintiffs and the proposed Class would not have purchased
8 the dishwashers or would have requested that they be replaced in homes purchased by Plaintiffs
9 and the Class.

10 28. Plaintiffs were not aware of the defect in their dishwashers until the upper rack
11 assemblies suddenly and unexpectedly failed.

12 **B. Cost and Installation of Repair Assembly**

13 29. When the upper rack assembly fails, Plaintiffs and members of the Class are
14 required to purchase replacement rack assemblies at a cost of \$35 plus labor costs associated with
15 installation of the rack assemblies of approximately \$100-\$150.

16 30. Defendant could have avoided damaging Plaintiffs and the proposed Class by
17 disclosing the nature of the defect and paying for the replacement of the defective rack assembly
18 with a redesigned rack assembly. Defendant continues to refuse to do so as alleged herein.

19 31. As a result of the Defect, Plaintiffs and the putative class have experienced, or are
20 substantially certain to experience, premature failure of their dishwashers and have incurred
21 damages as alleged herein.

22 **C. Defendant’s Knowledge and Suppression of the Defect**

23 Plaintiffs are informed and believe that:

24 32. As early as 2011, numerous customers reported failures of the dishwashers to
25 Defendant through its KitchenAid Customer Service Center. Failures were also reported to
26 Defendant’s distributors and retailers, who in turn reported them to Defendant.

27 33. Between 2011 and 2016, the reports of failures went to Defendant’s engineers who
28 inspected, researched, analyzed, tested and prepared reports concluding that the upper rack

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1 assembly was defective and unfit for its intended purpose.

2 34. Defendant’s engineers opined that the design was inadequate and there was no way
3 to repair the defect.

4 35. The engineers recommended that the upper rack assembly be replaced with a new
5 design. During or about 2016, according to proof, the defective plastic upper rack assembly was
6 abandoned and replaced with a stainless-steel design.¹

7 36. Although Defendant knew that the latent defect in the upper rack assembly posed an
8 unreasonable safety risk and rendered the dishwasher unmerchantable, Whirlpool did not disclose
9 the defect to its distributors, sellers, or others in the chain of distribution, including the end user.
10 Instead, Whirlpool actively concealed the defect and continued to sell the dishwashers.

11 37. At all times relevant hereto, Defendant was under a continuous duty to disclose to
12 distributors, sellers, installers and end users: (1) the defect in the upper rack assembly, (2) the
13 safety issues related thereto, including the risk of property damage and physical injury; and (3) the
14 existence of numerous reports of the failures of the upper rack assembly, including reports of
15 property damage.

16 38. Whirlpool had this duty because the facts it failed to disclose: (1) are contrary to
17 representations made by Defendant that the dishwashers were manufactured with the highest
18 quality, provided premium performance, were dependable and reliable; (2) relate to a safety issue;
19 (3) were material facts in the exclusive knowledge of Whirlpool; and (4) were material and actively
20 concealed by Whirlpool; and (5) constituted information omitted from statements made by
21 Whirlpool concerning the safety and reliability of the dishwashers.

22 39. Whirlpool continues to deny that there is a defect thereby actively concealing and
23 denying the defect, notwithstanding the fact that it abandoned the use of the defective plastic rack
24

25 _____
26 ¹ For a period of time, Whirlpool continued to sell the same part known to be defective to members
27 of the Class. The replacement rack assemblies were offered for sale by Whirlpool online and at
28 retail stores.

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1 assembly and replaced it with a metal assembly.²

2 **D. Defendant’s Misrepresentations and Omissions Concerning the**
3 **Dishwashers**

4 40. Defendant issued a written warranty (the “Warranty”) for the KitchenAid
5 dishwasher.

6 41. The Warranty provides that: “For one year from the date of purchase, when this
7 major appliance is operated and maintained according to instructions attached to or furnished with
8 the product, KitchenAid brand of Whirlpool Corporation or Whirlpool Canada LP (hereafter
9 “KitchenAid”) *will pay for factory specified parts and repair labor to correct defects in materials*
10 and workmanship that existed when this major appliance was purchased.” (Emphasis added.) A
11 copy of the Warranty is attached hereto as **Exhibit B**.

12 42. The Warranty further provides, “In the second through fifth year from the date of
13 purchase, when this major appliance is operated and maintained according to instructions attached
14 to or furnished with the product, KitchenAid *will pay for factory specified parts for the following*
15 *components to correct defects in materials* or workmanship that existed when this major appliance
16 was purchased: nylon dish racks and electrical controls.” (Emphasis added.)

17 43. The Warranty can be found on the KitchenAid website and in the User Manual for
18 the dishwasher. Both documents have been displayed on the KitchenAid and Sears websites from
19 approximately 2011 to the present.

20 44. Plaintiffs have provided Defendant with notice of breach of the Warranty and a
21 reasonable opportunity to cure the breach. *See Exhibit C* attached hereto. Defendant has failed to
22 remedy the breach of its obligations to Plaintiffs and the proposed Class under the Warranty.

23 45. The Warranty purports to limit the rights and remedies of purchasers of the
24 dishwashers as follows:

25 _____
26 ² See *Burch v. Whirlpool Corporation*, U.S. District Court, Western District of Michigan, Case No.
27 1:17-cv-00018, *Defendant Whirlpool Corporation’s Answer to Plaintiff’s Amended Class Action*
28 *Complaint*, Docket No. 23, ¶¶ 3, 15, 16 (Whirlpool denies that its dishwashers are defective, that its
dishwashers contained defective rack adjusters, or the existence of any defect.)

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- 1 a. Defendant purports to disclaim any implied warranties, including the
- 2 warranties of merchantability and fitness for a particular use;
- 3 b. Defendant purports to disclaim responsibility for any “incidental,
- 4 consequential damages” arising from the use or loss of use of or failure of
- 5 the dishwasher to perform as warranted; and
- 6 c. The Warranty purports to provide that, “YOUR SOLE AND EXCLUSIVE
- 7 REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT
- 8 REPAIR AS PROVIDED HEREIN.”

9 46. Each of these purported limitations and exclusions (the “Warranty Exclusions”) is
 10 unenforceable against Plaintiffs and the Class. The Warranty Exclusions were not bargained for by
 11 Defendant and its customers but were imposed unilaterally by Defendant. The Warranty Exclusions
 12 are unfair in that they are outside the reasonable expectations of the parties thereto, deny consumers
 13 an effective remedy and purport to limit the rights of consumers in ways that are unenforceable
 14 under relevant state and federal law including, without limitation, the Song-Beverly Consumer
 15 Warranty Act and Magnuson-Moss Warranty Act.

16 47. The unfairness of these limitations in remedy are reinforced by unenforceable
 17 provisions of the Warranty stating that it is the “sole” and “exclusive remedy” for breach of
 18 warranty or for manufacturing or design defects and the purported exclusion of implied warranties.
 19 In fact, Plaintiffs and the proposed Class have substantial rights and remedies available to them
 20 both for breach of implied and express warranty and for redress arising from the defective nature of
 21 the dishwashers which Defendant cannot lawfully preclude them from asserting.

22 48. The provisions described in Paragraph 45 above, both individually and in
 23 combination, if enforced as Whirlpool unlawfully asserts, would deprive Plaintiffs and the Class of
 24 any effective remedy for breach of Defendant’s obligations to them.

25 49. In addition to the representations contained in the Warranty, Defendant engaged in a
 26 marketing campaign for their “premium” dishwashers which are manufactured using “the highest
 27 quality standards.” During the relevant time period, the KitchenAid website asserted that: (1) “All
 28 large KitchenAid® appliances come with outstanding warranties that back up the premium quality

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1 of our appliances;” and (2) “You chose quality and dependability when you chose a KitchenAid
2 brand appliance.” Whirlpool markets its KitchenAid products as high-performance appliances.
3 Defendant knew by at least 2011 that there was a defect in the upper rack assembly that would
4 cause the dishwashers to fail prematurely.

5 50. The representations and warranties made by Defendant concerning the dishwashers
6 were false because the upper rack assemblies are defective and prematurely fail due to a defect in
7 the plastic components. The defect causes the upper rack assembly to collapse, creating a serious
8 risk of physical injury and property damage. The defect also renders the dishwashers substantially
9 inoperable until the defective rack assembly is replaced with the redesigned metal assembly.
10 Further, members of the Class have stated that Defendant has represented that the defective rack
11 assembly is not covered under the terms of the Warranty.

12 51. Complaints submitted online to www.consumeraffairs.com by members of the Class
13 demonstrates that Defendant is refusing to warranty the defective upper rack assembly.

- 14 ▪ On August 4, 2014, John H. of Cincinnati, OH wrote:

15 We have owned a KitchenAid Dishwasher, Model KUDS35FXSS8 for
16 16 months. **The wheels on the upper dish rack have already come off,**
17 rendering it unusable. This happened because the plastic tabs that hold the
18 wheels in place have become brittle and cracked off in this short time. **Kitchen**
19 **Aid’s warranty states that the dish rack is warranted for 5 years. However,**
20 **Kitchen Aid customer service tells us that the wheel assembly on the dish**
21 **rack is not covered by this warranty.** Wheel assembly W10350376 is poorly
22 designed and quickly fails. Do not buy a Kitchen Aid or Whirlpool dishwasher
23 that uses this wheel assembly.

- 20 ▪ On June 11, 2013, Jerri of Valley Park, MO wrote:

21 The Plastic wheels on my \$800 KitchenAid dishwasher Model KUDS30IX
22 failed after a little over a year. My manual states that the rack is under warranty
23 for 5 years... **KitchenAid says the warranty only applies to the nylon coating**
24 **on the rack, not the wheels. They gave me a one-time replacement part that**
25 **failed again after 6 months.**

24 Additional complaints submitted to the third-party website as well as the KitchenAid wesbsite are
25 attached hereto as **Exhibit D.**

26 52. Defendant was obligated to disclose that: (1) the upper rack assemblies in the
27 dishwasher have failed; (2) the only effective remedy for the defect is to replace the upper rack
28 assembly with a non-defective replacement part or replace the dishwasher, which Whirlpool now

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1 concedes; and (3) the rack assembly is purportedly not covered under the five-year warranty.

2 53. Defendant was obligated to disclose these facts to Plaintiffs and the Class because:
3 (1) the defect in the dishwashers poses an unreasonable safety risk due to its sudden collapse which
4 results in broken dishware and glassware; (2) disclosure was necessary to qualify affirmative
5 representations made concerning the dishwashers in order to make such representations non-
6 misleading; and (3) Defendant was uniquely in possession of the facts it did not disclose, knew that
7 such facts were not available to Plaintiffs and the Class and knew that such facts would be highly
8 material to any prospective purchaser or owner of a dishwasher.

9 54. Instead of disclosing these facts, since at least 2011 Whirlpool has engaged in a
10 practice of deceptive material misrepresentations and omissions in connection with the marketing,
11 advertising, and sale of the dishwashers. Had Whirlpool disclosed the known history of upper rack
12 failures and the risks and consequences of such failures, including the risk of serious laceration
13 injuries due to broken glassware and dishware upon failure, Plaintiffs and the Class would not have
14 purchased any dishwashers containing the defective upper rack assembly and would have
15 purchased an alternative dishwasher from another manufacturer.

16 55. Defendant knew or should have known with testing that the upper rack assembly
17 was defective and would fail prematurely.

18 56. Further, Defendant had actual knowledge of the defect in the upper rack assembly
19 based upon calls to their warranty department, consumer complaints concerning the defect that
20 were posted on the KitchenAid website as well as third party websites, and the. The large volume
21 of orders for a replacement upper rack assembly through Whirlpool and its distributors also reflects
22 Defendant’s knowledge of the defect.

23 **E. Reasonable Interpretation of Warranty Language**

24 57. Whirlpool devised a warranty that employed language that would lead a normal
25 consumer to believe that all defects in materials and workmanship are covered for one year; and the
26 upper rack assembly, which is integrated into the upper rack, is covered for up to five years.

27 58. The Magnuson-Moss Act requires that when a written warranty is provided, the
28 warrant shall “fully and conspicuously disclose in simple and readily understood language the

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1 terms and conditions of such warranty.” 15 U.S.C. Code § 2302(a). Such full and conspicuous
2 disclosure “may require inclusion in the written warranty of (5) [e]xceptions and exclusions from
3 the terms of the warranty.”

4 59. Federal regulations enacted pursuant to the provisions of the Magnuson-Moss Act
5 require that a Defendant “shall clearly and conspicuously disclose in a single document in simple
6 and readily understood language, the following items of information:...(2) A clear description and
7 identification of products, or parts, or characteristics, or components or properties covered by **and**
8 **where necessary for clarification, excluded from the warranty.**” 16 CFR Section 701.3 (emphasis
9 added).

10 60. The Song-Beverly Act require that express warranties be set forth “in simple and
11 readily understood language” and “shall conform to the federal standards for disclosure of warranty
12 terms and conditions” set forth in the Magnuson-Moss Act and federal regulations. Civil Code
13 § 1793.1(a).

14 61. The written warranty at issue in this case is on a standard pre-printed form drafted
15 by Defendant. The written warranty was provided on a take it or leave it basis. Neither Plaintiffs
16 nor class members participated in the drafting of the written warranty or had an opportunity to
17 negotiate the specific terms of the written warranty. The written warranty is a contract of adhesion
18 that should be construed against Defendant.

19 62. The express written warranty in this case provides, *inter alia*, that “defects in
20 materials” are covered by the warranty.

21 63. It is not be readily understood by the average consumer that a written warranty that
22 expressly asserts that it covers “defects in materials” would purportedly not provide coverage for
23 defects that occurred because the materials selected were not suitable for their intended purpose in
24 the dishwasher. If Defendant intended to exclude from the warranty coverage for materials
25 selected that were not suitable for their intended purpose, Defendant was under an affirmative
26 obligation to state this exclusion in readily understood language in its written warranty - a simple
27 task. It did not do so because it intended to deceive the purchasers of its product, according to
28 proof.

1 64. The written warranty also expressly provides that “nylon dish racks” are covered by
2 the warranty through the fifth year after the date of purchase. The average consumer would quite
3 appropriately be led to believe that coverage of the nylon dish racks would include all components
4 integrated into the dish racks and necessary for the dish racks to function properly. The written
5 warranty does not define “nylon dish racks” and does not state that the warranty allegedly does not
6 cover the wheels that are integrated into the rack and which are required to allow the rack to
7 function. Unknown to the purchaser, the rack assembly can only be deconstructed from the upper
8 rack with professional assistance or by someone who happens to possess a professional level of
9 maintenance proficiency. If Defendant intended to exclude discreet components integrated into the
10 dish racks, from the warranty coverage, it could have easily done so. Defendant was under an
11 affirmative obligation to state this exclusion in readily understood language in its written warranty.
12 It did not do so.

13 65. Under “Items Excluded from Warranty”, the written warranty specifically sets forth
14 several exclusions. It does not state that “design defects” are excluded. It does not state that the
15 wheel assembly integrated into the dish racks are excluded. It does not state that the suitability of
16 the materials for their intended use is excluded. If Defendant intended to exclude any of the
17 foregoing from the warranty coverage, Defendant was under an affirmative obligation to state this
18 exclusion in readily understood language in its written warranty. Again, Whirlpool chose not to
19 do so.

20 66. The written warranty does not state in readily understood language that “materials
21 and workmanship” allegedly only provides coverage for “manufacturing defects,” and cannot now
22 belatedly be unfairly and unlawfully enforced against its purchasers.

23 **F. Reliance by Consumers on Representations and Omissions Made**
24 **by Defendant to the Distribution Chain and End Users**

25 67. Almost all purchasers of dishwashers rely on builders, contractors, major appliance
26 dealers and others (collectively, “Advisors”) to advise them concerning the advantages and
27 disadvantages of purchasing a particular type and brand of dishwasher.
28

1 68. Whirlpool knows Advisors will recommend the KitchenAid dishwashers only if
2 they are convinced it is reliable and safe. Whirlpool's advertising campaign convinced Advisors
3 that the dishwashers were of manufactured using the highest quality standards, were dependable,
4 and come with outstanding warranties as alleged in paragraph 49 herein. As alleged herein,
5 Whirlpool was aware that the dishwashers were not of the highest quality, safe or reliable.

6 69. Whirlpool intended that all statements it made concerning the premium quality and
7 reliability of the product as well as the terms of the product warranty, would be communicated
8 down the distribution chain from Advisors to consumers. The Advisors are professionals who, as a
9 matter of ordinary professional practice, reply on representations made to them by Whirlpool
10 regarding the products they recommend and the terms of the warranties for such products. The
11 Advisors convey those representations to members of the Class.

12 70. In or about May 2010, Whirlpool entered into an agreement to supply appliances to
13 a large number of home builders, including Toll Brothers, the builder of Plaintiff Bodley's home.³
14 Whirlpool provides marketing materials and training to the these "Trade Partners" in order to
15 convey information regarding the quality, dependability, and reliability of the product to end users
16 like Plaintiff Bodley and members of the Class.

17 71. Whirlpool's material omissions persuaded Advisors to promote their sale to end-
18 users like Plaintiffs and the Class. This reliance pervaded all transactions throughout the period
19 relating to the KitchenAid dishwashers containing the defective upper racks.

20 72. If the Advisors had been aware of either (1) the falsity of Whirlpool's
21 representations concerning the quality and reliability of the dishwashers or (2) that the dishwashers
22 had failed causing property damage and creating an unreasonable safety risk, the Advisors would
23 have recommended that Plaintiff Bodley and the Class not purchase the KitchenAid dishwashers.⁴

24 _____
25 ³ See, http://www.builderonline.com/products/appliances/whirlpool-gains-big-builder-business_o.

26 ⁴ Plaintiffs are not required to plead that the advisors who were exposed to the misrepresentations
27 or omissions repeated them to Plaintiffs. *E.g., Thrifty-Tel, Inc. v. Bezenek*, 46 Cal.App.4th 1559
28 (1996); *see also City of Industry v. City of Fillmore*, 198 Cal.App.4th 191 (2011).

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1 73. If the Advisors had recommended against purchasing the dishwashers, Plaintiff
2 Bodley and the Class would not have purchased them. The reliance by Plaintiff Bodley and the
3 Class on the Advisors was reasonable because the Advisors are in the business of advising
4 consumers concerning the purchase of major appliances.

5 **G. Defendant’s Breach of the Implied Warranty of Merchantability**

6 74. “[E]very sale of consumer goods that are sold at retail in this state shall be
7 accompanied by the manufacturer’s and the retail seller’s implied warranty that the goods are
8 merchantable.” Civ. Code § 1792. This statutory warranty does not require vertical privity between
9 the plaintiff and the manufacturer or seller.⁵ The Legislature intended that Plaintiffs and the Class
10 could enforce Whirlpool’s implied warranty of merchantability whether or not they were in privity
11 with Whirlpool.

12 75. Defendant does not sell directly to end users. Defendant knew and intended that the
13 dishwashers would be purchased by builders, developers, and individual owners from distributors
14 and/or retailers for installation in properties throughout California.

15 76. The dishwashers are sold to end users through distributors and retailers like Sears
16 Roebuck & Co. (“Sears”), The Home Depot, and Lowes. In certain instances, the dishwashers
17 were sold to initial purchasers who were builders and developers for installation in newly built
18 homes (“Initial Buyers”). The dishwashers purchased by Initial Buyers were ultimately installed in
19 properties owned by Plaintiffs and other members of the Class.

20 77. Defendant represented to Initial Buyers and members of the Class that the
21 KitchenAid dishwashers were top of the line appliances that came with outstanding warranties for
22 the premium quality appliance as alleged in Paragraph 49 above. Plaintiff Bodley and members of
23 the Class paid a premium price for the KitchenAid dishwasher based upon the representations and
24 warranty as alleged herein.

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⁵ *E.g., Keegan v. American Honda Motor Co., Inc.*, 838 F.Supp.2d 929, 946-47 (C.D. Cal. 2012).

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1 78. Defendant and Initial Buyers intended that all express and implied warranties were
2 for the benefit of Plaintiffs and the Class, the owners of the properties in which the dishwashers
3 were installed. Defendant contracted with Initial Buyers to supply dishwashers to be installed in
4 Plaintiffs' and Class Members' properties and knew that the Initial Buyers would not generally
5 own or occupy such properties. The express and implied warranties would be of no economic value
6 to Buyers unless the ultimate owner of the properties containing the dishwashers, Plaintiffs and
7 Class Members, received the benefit of such warranties.

8 79. At all times relevant herein, purchasers of the dishwashers relied on building
9 contractors, real estate developers, retailers, distributors, and installers of the dishwashers to advise
10 them concerning the advantages of purchasing a dishwasher. Accordingly, Defendant knew that if
11 they wanted to sell the dishwashers to end users it had first to convince building contractors, real
12 estate developers, retailers, and distributors that they should recommend the purchase of
13 dishwashers manufactured by Defendant rather than dishwashers manufactured by others.

14 80. Plaintiff Bodley and other members of the Class were exposed to Defendant's
15 representations and warranties as alleged herein by builders, developers, distributors, retailers and
16 installers in precisely the manner that Defendant intended. No statement made by Defendant to
17 promote the sale of the dishwashers could fairly omit Defendant's knowledge that its product was
18 dangerous, would fail prematurely and had failed many times already.

19 81. Plaintiff Bodley's exposure to Defendant's representations to Initial Buyers is
20 detailed in Paragraph 85 below.

21 **H. Defendant's Failure to Disclose Material Facts to Plaintiffs**
22 **and the Class**

23 82. Defendant has been aware of the defect in the dishwashers since at least 2011.
24 Plaintiffs are informed and believe and thereon allege that Defendant has received hundreds if not
25 thousands of reports by distributors, sellers, and owners of the failed rack assemblies in the
26 dishwashers. Despite its knowledge of these claims and the defect in the rack assemblies,
27 Defendant has not disclosed the defect or the risk of personal injury and property damage to its
28

1 customers. Had Plaintiffs and the Class been aware of the defect, they would not have been
2 damaged as alleged herein.

3 83. Plaintiffs and members of the Class do not know the dishwasher is defective until
4 the upper rack assembly collapses and breaks. This fact, combined with Defendant’s refusal to
5 provide reasonable and adequate notice to members of the Class regarding the safety-related
6 defects in the dishwashers severely compromises the rights of class members to be apprised of the
7 latent defect and related safety risk in order to make legitimate claims against Defendant. This
8 unfair, unlawful and fraudulent practice by Defendant has required members of the Class to incur
9 out of pocket costs for the materials and labor to replace the defective rack assembly or placed class
10 members at risk to do so.

11 **VI. PLAINTIFF’S INDIVIDUAL ALLEGATIONS**

12 **A. Plaintiff James Bodley**

13 84. Plaintiff James Bodley purchased a brand-new luxury home in November 2012 built
14 by Toll Brothers. Toll Brothers has an established reputation as a luxury home builder who installs
15 high-quality brand name products. Whirlpool Corporation is a “vendor partner” of Toll Brothers.

16 85. As part of their home purchase, Mr. Bodley and his wife went to the Toll Brothers
17 Design Center to meet with a design specialist to select additional amenities and finishes for
18 installation in their new home including, but not limited to, kitchen appliances, flooring, and
19 bathroom fixtures. The Bodleys spent approximately four hours meeting with the design specialist
20 who discussed and reviewed their options with them. They were not shown actual appliances.
21 Instead, Mr. Bodley and his wife relied on the representations and warranties made by the design
22 specialist who told them the KitchenAid appliances were top of the line, of good quality, reliable
23 and superior to the alternative brand. After meeting with the design specialist, Mr. Bodley was left
24 with the impression that KitchenAid provided the highest quality appliances with the highest
25 warranties. Based on these representations and warranties, Mr. Bodley purchased the KitchenAid
26 package from Toll Brothers which included a stainless-steel KitchenAid dishwasher, Model No.
27 KUDS30FXSS5, stove and microwave. Mr. Bodley paid substantially more for his KitchenAid
28 dishwasher compared to the alternative brand offered by Toll Brothers.

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1 86. The upper rack assembly in Mr. Bodley’s dishwasher failed on or about
2 April 11, 2017, as he was pulling out the top rack to load dishes. Attached hereto as **Exhibit E** are
3 photographs of the failed rack assembly. Mr. Bodley purchased a replacement upper rack assembly
4 to repair his dishwasher online from Sears. When the replacement parts arrived, he found the
5 installation instructions to be too difficult to follow. Accordingly, Mr. Bodley paid a Sears
6 technician to install the replacement parts. It took the Sears technician approximately one hour to
7 install the replacement parts. Mr. Bodley paid approximately \$120 for the materials and labor to
8 repair his dishwasher. Mr. Bodley was without a fully functioning dishwasher for several weeks
9 until the dishwasher was repaired.

10 87. Upon purchasing his home, Mr. Bodley received an instruction manual for his
11 KitchenAid dishwasher which included a copy of the KitchenAid warranty. A copy of the
12 warranty Mr. Bodley received is attached hereto as Exhibit B. Mr. Bodley relied on the
13 representations and warranties stated in Paragraphs 41-42 and 85. Were it not for these
14 representations and warranties, Mr. Bodley would not have purchased the KitchenAid dishwasher.
15 Had Defendant informed Toll Brothers of the defect with the upper rack assembly and attendant
16 safety risk, the design specialist would not have recommended that Mr. Bodley purchase the
17 KitchenAid dishwasher for installation in his new home and Mr. Bodley would have purchased an
18 alternative dishwasher. Further, Mr. Bodley recommended the KitchenAid dishwasher to his
19 daughter whose upper rack assembly also failed.

20 88. On June 12, 2017, Mr. Bodley’s counsel provided Defendant with notice of its
21 breach of warranty and CLRA violations and demanded that Defendant (1) pay all costs to
22 investigate, repair, and replace all of the defective upper assembly rack systems utilized in
23 dishwashers owned by Plaintiffs and members of the Class; and (2) provide notice to consumers of
24 the defect. A copy of the notice is attached hereto as Exhibit C.

25 89. Defendant failed to provide or offer to provide remedies for its breach of warranty
26 and CLRA violations.

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1 **B. Plaintiff Kyle Matson**

2 90. Plaintiff Kyle Matson purchased a home in late November 2013 which was
3 equipped with a KitchenAid dishwasher, Model No. KUDS30FXSS5. The home was built in
4 November 2012 and purchased by the original owner on or about November 1, 2012. Had
5 Ms. Matson been aware of the defects with the dishwasher she would have sought an adjustment of
6 the purchase price to account for the replacement of the defective dishwasher.

7 91. The upper rack assembly in Ms. Matson’s dishwasher failed in or about June or July
8 2016 as she was loading the top rack with dishes. She placed a rectangular size glass Pyrex dish
9 onto the top rack and continued loading. Without warning, the right side of the upper rack suddenly
10 failed sending the glass dish crashing down onto the stainless-steel dishwasher door. The glass dish
11 shattered into dozens of pieces and sent shards of glass not only onto the lower rack of the
12 dishwasher but onto the kitchen floor and countertop. The force of the impact turned the shattered
13 glass into small projectiles which scratched the inside of the dishwasher as well as the wall of the
14 kitchen island directly in front of the dishwasher. The impact of the glass against the kitchen island
15 was so great that it scratched and chipped the custom blue paint on the island. It was necessary for
16 Ms. Matson to spend a considerable amount of time picking up the shattered glass from inside the
17 dishwasher and the many pieces of glass that had scattered over the kitchen floor.

18 92. Ms. Matson purchased replacement parts online from Sears at a cost of
19 approximately \$50.00. For several weeks Ms. Matson’s dishwasher was substantially inoperable
20 while she waited for the replacement parts to arrive. When the replacement parts did arrive,
21 Ms. Matson and her husband found the replacement instructions to be too difficult to follow. She
22 paid a repairman \$100.00 to install the replacement parts. Ms. Matson paid approximately \$20 to
23 replace her broken dish and will incur additional costs to repair the damage to her kitchen island,
24 according to proof.

25 93. On June 12, 2017, Ms. Matson’s counsel provided Defendant with notice of its
26 breach of warranty and demanded that Defendant (1) pay all costs to investigate, repair, and replace
27 all of the defective upper assembly rack systems utilized in KitchenAid dishwashers; and
28 (2) provide notice to consumers of the defect. A copy of the notice is attached hereto as Exhibit C.

1 94. Defendant failed to provide or offer to provide remedies for its breach of warranty
2 violations.

3 **VII. CLASS ALLEGATIONS**

4 95. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil
5 Procedure 23, on behalf of themselves and all others similarly situated (the “Class”).

6 96. The Class which Plaintiffs seek to represent in this action is composed of four
7 classes defined as follows:

8 **Nationwide Purchaser Class**: All persons in the United States who purchased a
9 KitchenAid dishwasher for installation in a private residence with an upper rack assembly
10 bearing part number W10350375 or W10350376, as depicted in Exhibit A hereto.

11 **Nationwide Subsequent Purchaser Consumer Subclass**: All persons who purchased
12 private residences in which a KitchenAid dishwasher with an upper rack assembly bearing
13 part number W10350375 or W10350376, as depicted in Exhibit A hereto is installed.

14 **California Consumer Subclass**: All persons who purchased a KitchenAid dishwasher for
15 installation in a private residence in California with an upper rack assembly bearing part
16 number W10350375 or W10350376, as depicted in Exhibit A.

17 **California Subsequent Purchaser Subclass**: All persons who purchased private residences
18 in California in which a KitchenAid dishwasher with an upper rack assembly bearing part
19 number W10350375 or W10350376, as depicted in Exhibit A hereto.

20 97. The California Consumer Subclass, California Subsequent Purchaser Subclass and
21 the Nationwide Subsequent Purchaser Consumer Subclass are referred to herein collectively as the
22 “Consumer Subclasses.”

23 98. The following persons are excluded from the Class: (1) all Defendant and their
24 subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the
25 Class; and (3) the judge(s) to whom this case is assigned and any immediate family members
26 thereof.

27 99. Plaintiffs reserve the right to modify or amend the Class definition, as appropriate.
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1 100. Certification of Plaintiffs’ claims for class wide treatment is appropriate because
2 Plaintiffs can prove the elements of their claims on a class-wide basis and because this case meets
3 the requirements of Federal Rule of Civil Procedure 23.

4 101. **Numerosity (Rule 23(a)(1))**. The members of the Class are so numerous that
5 individual joinder of all the members is impracticable. Plaintiffs are informed and believe, and
6 thereon allege, that there are at least thousands of purchasers who have been damaged by the
7 conduct alleged herein.

8 102. **Commonality and Predominance (Rule 23(a)(2) and (b)(3))**. This action involves
9 common questions of law and fact which predominate over any questions affecting individual class
10 members including, without limitation, the following:

- 11 a. Whether Defendant violated California’s Unfair Competition Law, Bus. & Prof.
12 Code § 17200 *et seq.*, by, among other things, engaging in unfair, unlawful, or
13 fraudulent practices;
- 14 b. Whether Defendant violated California’s Consumer Legal Remedies Act, Civ. Code
15 §1750 *et seq.*, by falsely advertising the dishwashers were of a certain quality when
16 in fact, they were not;
- 17 c. Whether Defendant breached its express warranties to Plaintiffs and the Class;
- 18 d. Whether Defendant breached its implied warranties to Plaintiffs and the Class;
- 19 e. Whether Defendant fraudulently concealed the defect; and
- 20 f. Whether Plaintiffs and the Class are entitled to compensatory damages, and the
21 amount of such damages.

22 103. **Typicality (Rule 23(a)(3))**. Plaintiffs’ claims are typical of the claims of the Class
23 because Plaintiffs, like all members of the Class, have been damaged by Defendants’ unlawful
24 conduct, in that Plaintiffs have and will incur the cost of repairing and/or replacing the dishwashers.
25 The factual bases and causes of action for Plaintiffs’ claims are common to all members of the
26 Class and represent a common course of misconduct resulting in injury to all Class members.

27 104. **Adequacy of Representation (Rule 23(a)(4))**. Plaintiffs are adequate
28 representatives of the Class because their interests do not conflict with the interests of the Class and

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1 they have retained counsel competent and experienced in complex class action litigation and who
2 specialize in class actions involving defective construction products. Plaintiffs intend to prosecute
3 this action vigorously and the interests of the Class will be fairly and adequately protected by
4 Plaintiffs and their counsel.

5 105. **Superiority (Rule 23(b)(3))**. A class action is superior to all other available means
6 for the fair and efficient adjudication of this controversy in that:

- 7 a. The prosecution of separate actions by individual members of the Class would
8 create a foreseeable risk of inconsistent or varying adjudications which would
9 establish incompatible results and standards for Defendants;
- 10 b. Adjudications with respect to individual members of the Class would, as a practical
11 matter, be dispositive of the interests of the other members not parties to the
12 individual adjudications or would substantially impair or impede their ability to
13 protect their own separate interests;
- 14 c. Class action treatment avoids the waste and duplication inherent in potentially
15 thousands of individual actions, and conserves the resources of the courts; and
- 16 d. The claims of individual class members are not large when compared to the cost
17 required to litigate such claims. The individual Class members' claims are on
18 average approximately \$35-\$150 representing out-of pocket costs associated with
19 the materials and labor to repair the defect. Given the high cost of litigation, it
20 would be impracticable for the members of the Class to seek individual redress for
21 Defendant's wrongful conduct. The class action device provides the benefits of
22 single adjudication, economies of scale, and comprehensive supervision by a single
23 court. The case presents no significant management difficulties which outweigh
24 these benefits.

25 106. **Notice**. Plaintiff cannot be certain of the form and manner of class notice it will
26 propose until the Class is finally defined and some discovery concerning the identity of Class
27 members is undertaken. Based on the experience of its counsel in previous cases, however, Plaintiff
28 anticipates that direct notice by mail will be given to all Class members whose addresses can be

1 identified and additional notice by publication in periodicals, on the Internet and by press releases
2 and similar communications to relevant industry and trade groups.

3 **VIII. DAMAGES**

4 107. As a result of the facts alleged herein, Plaintiffs and the Class have been damaged in
5 one or more of the following amounts:

6 a. The difference in market value between the dishwashers and dishwashers
7 that are not defective.

8 b. The cost of repairing and/or replacing the dishwasher, and any other amounts
9 necessary to return Plaintiffs and the Class to the position they would have enjoyed had they not
10 purchased the dishwashers.

11 c. The cost of hiring a third party to install the replacement parts.

12 **IX. STATUTE OF LIMITATIONS**

13 108. **Discovery Rule**. The defective nature of the dishwasher is latent and not
14 perceptible to Plaintiffs and the Class. Plaintiffs and the Class did not become aware that they had
15 suffered losses caused by the defective dishwashers until the rack assembly failed.

16 109. **Fraudulent Concealment Tolling**. Any applicable statutes of limitation have been
17 tolled by Whirlpool’s knowing and active concealment of facts as alleged herein. Without any
18 fault or lack of diligence on their part, Plaintiffs and the Class have been kept ignorant of vital
19 information essential to the pursuit of these claims. Plaintiffs and the Class could not reasonably
20 have discovered the problems associated with the dishwasher on their own until the failure
21 occurred.

22 110. **Estoppel**. Defendant is estopped from relying on any statutes of limitation in
23 defense of this action. For the reasons described herein, including but not limited to paragraphs 27,
24 36, 37, 38, 54, and 83, Defendant was under a continuous duty to disclose to Plaintiffs and the
25 Class the true character, quality and nature of the dishwashers, especially because the problems
26 associated with the dishwashers pose unreasonable safety risks due to breakage of glass and other
27 items when the rack assembly fails. Defendant failed to disclose the true character, quality, and
28 nature of the dishwashers. Plaintiffs and the Class reasonably relied upon Defendant’s active

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1 concealment of these facts. Had the true facts been disclosed, Plaintiffs and the Class would not
2 have purchased the dishwashers.

3 **FIRST CLAIM FOR RELIEF**

4 **(For Violation of Unfair Competition Law)**

5 **(By Plaintiff Bodley and the Class Against Defendant)**

6 111. Plaintiffs incorporate by reference each allegation set forth in the preceding
7 paragraphs.

8 112. Pursuant to Bus. & Prof. Code § 17200, “unfair competition shall mean and include
9 any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or
10 misleading advertising.”

11 113. Defendant’s actions, as alleged herein, constitute deceptive, unfair, fraudulent, and
12 unlawful practices committed in violation of the Bus. & Prof. Code § 17200, *et seq.*

13 114. All of the conduct and representations alleged herein occurred in the course of
14 Defendant’s business and were part of a pattern or generalized course of conduct.

15 115. Defendant’s conduct was *unlawful* because it was fraudulent and violated the
16 Consumer Legal Remedies Act, Song-Beverly Consumer Warranty Act, Magnuson-Moss Warranty
17 Act as previously alleged.

18 116. The Warranty Exclusions and nondisclosure of the safety risk and property damage
19 resulting from the failure of the dishwashers are *unfair* in that they: (1) violate public policy as
20 expressed in the Consumer Legal Remedies Act, the Song-Beverly Consumer Warranty action, and
21 the Magnuson-Moss Warranty Act; (2) are unethical, oppressive, unscrupulous and substantially
22 injurious to consumers and these factors are not offset by the utility of Defendant’s conduct since
23 the conduct is intended to and only provides impediments to the assertion of valid claims for
24 recovery and limit the damages which Defendant is legally obligated to compensate; and (3) inflict
25 injury on consumers which is not outweighed by any countervailing benefits to consumers or
26 competition and the injury to consumers is one consumers could reasonably have avoided.

27 117. Defendant’s conduct was unfair because Whirlpool acted unscrupulously in a
28 manner that is substantially injurious to consumers. In particular: (1) Whirlpool concealed

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1 information concerning the unreasonable safety risk posed by its defective product and continued to
2 sell the product even after it was made aware of the danger; and (2) Whirlpool asserts the term
3 “nylon rack” does not include the rack assembly, requiring Plaintiff Bodley and the Class to install
4 a replacement assembly at their own expense.

5 118. All of this conduct of Whirlpool has no utility or countervailing benefit, other than
6 to attempt to avoid liability.

7 119. Plaintiff Bodley and the Class could not reasonably have avoided injury as a result
8 of Whirlpool’s unfair conduct.

9 120. Defendant’s conduct was *fraudulent* because Whirlpool failed to disclose the safety
10 risks associated with the sudden collapse of the upper rack assembly and related risks to safety and
11 property. A reasonable consumer would not expect the upper rack in their dishwasher to suddenly
12 collapse causing glassware and dishware to shatter and break damaging property and creating a risk
13 of serious personal injury. Plaintiff Bodley and members of the Class would not have purchased
14 the dishwashers but for the fraudulent, deceptive and unlawful conduct of Whirlpool.

15 121. Defendant’s deceptive, unfair, fraudulent, and unlawful conduct alleged herein was
16 specifically designed to and did induce Plaintiff Bodley and members of the Class to purchase the
17 dishwashers.

18 122. Plaintiff Bodley and the Class reasonably and justifiably relied on Defendant’s
19 deceptive, unfair, and unlawful conduct alleged herein. But for such conduct, Plaintiff Bodley and
20 members of the Class would not have purchased the dishwashers.

21 123. As a result of Defendant’s unfair methods of competition and unfair or deceptive
22 acts or practices, Plaintiff Bodley and the Class have suffered injury-in-fact, lost money, and lost
23 property, in that they have incurred actual costs to repair and/or replace their dishwashers. Plaintiff
24 Bodley incurred approximately \$120 in out-of-pocket costs to repair his dishwasher.

25 124. Plaintiff Bodley and the Class seek to recover from Defendant restitution of
26 earnings, profits, compensation and benefit obtained as a result of the practices that are unlawful
27 under Bus. & Prof. Code § 17200 *et seq.*, according to proof.

28

SECOND CLAIM FOR RELIEF

(For Violation of the California Consumer Legal Remedies Act)

(Plaintiff Bodley and the California Consumer Subclass Against Defendant)

125. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

126. The dishwashers are “goods” as defined by Civil Code § 1761(a).

127. Whirlpool is a “person” as defined by Civil Code § 1761(c).

128. Plaintiff Bodley and members of the California Consumer Subclass are “consumers” as defined by Civil Code § 1761(d) who purchased the dishwashers for personal, family, and household purposes.

129. The purchase by Plaintiff Bodley and members of the California Consumer Subclass of the dishwashers are “transactions” as defined by Civil Code § 1761(e) and 1770.

130. Under the Consumers Legal Remedies Act (“CLRA”), Civil Code § 1770, *et seq.*, the following methods of competition and unlawful when any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer:

- a. Representing that goods “... have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have.” Civil Code § 1770(a)(5).
- b. Representing that goods “... are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.” Civil Code § 1770(a)(7).
- c. Inserting an unconscionable provision in the contract. Civil Code § 1770(a)(19).

131. Defendant violated Civil Code §§ 1770(a)(5) and (a)(7) by failing to disclose at the point of sale, or otherwise, that the dishwasher’s upper rack assembly was defective and posed an unreasonable risk of personal injury and property damage. Instead, Defendant represented, through advertising and other express representations that the dishwashers were manufactured using the highest quality standards, provided premium performance, were safe and reliable as alleged in

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1 paragraph 49 herein.

2 132. For the reasons stated in paragraphs 37-38, Whirlpool owed a duty to Plaintiff
3 Bodley and the California Consumer Subclass to disclose the defects in, and the unreasonable
4 safety risks associated with, the dishwashers.

5 133. The falsity of the representations and unreasonable safety risk concealed by
6 Whirlpool are material, because a reasonable consumer would consider them to be important in
7 deciding whether or not to purchase a KitchenAid dishwasher. A reasonable consumer would not
8 expect the upper rack in their dishwasher to prematurely fail nor would they expect the dishwasher
9 to expose them to unreasonable risks of injury.

10 134. Defendant violated Civil Code § 1770(a)(19) by including in the Warranty the
11 unconscionable Warranty Exclusions referenced in paragraph 45 herein.

12 135. Had Plaintiff Bodley and members of the California Consumer Subclass known that
13 the representations and warranties made by Defendant concerning the dishwashers were false or
14 had they been aware of the facts Defendant were obligated to disclose, Plaintiff Bodley and
15 members of the California Consumer Subclass would not have purchased the dishwashers or would
16 have required that the dishwasher be replaced in properties in which the dishwashers were already
17 installed. Plaintiff Bodley and members of the California Consumer Subclass would not have made
18 these purchases because: (1) if Initial Buyers, builders, distributors, retailers and sellers had known
19 of the falsity of Defendant's representations and warranties, or had Defendant disclosed the facts it
20 was obligated to disclose, they would have recommended against the purchase of the KitchenAid
21 dishwashers and/or would have installed dishwashers manufactured by others in newly constructed
22 single-family homes; and (2) irrespective of such recommendations, if Plaintiff Bodley and the
23 California Consumer Subclass had been aware of the falsity of Defendant's representations and
24 warranties or become aware of the facts Defendant was obligated to disclose, they would not have
25 purchased the dishwashers or would have insisted that the dishwashers be removed and replaced.

26 136. Defendant was aware of the defect in the upper rack assembly at the time of sale to
27 Plaintiff Bodley and the California Consumer Subclass.

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1 137. Plaintiff Bodley served Defendant with notice of their violations of the CLRA
2 pursuant to Civil Code § 1782 (the “Notice”) by certified mail on June 12, 2017. A copy of the
3 Notice is attached hereto as Exhibit C. Defendant failed to provide or offer to provide remedies for
4 its violations of the CLRA within 30 days of the date of the Notice or at all.

5 138. Venue is proper pursuant to Civil Code § 1780(c) because Defendant does business
6 in Alameda County and the actions giving rise to this complaint arose in this jurisdiction and the
7 KitchenAid dishwasher is installed in Alameda County. Attached hereto as **Exhibit F** is the
8 Declaration of James Bodley establishing this Court as the proper venue for this action.

9 139. As a result of Defendant’s unfair and deceptive acts and practices, Plaintiff Bodley
10 and members of the California Consumer Subclass has been harmed and seek actual damages
11 according to proof, attorneys’ fees and costs and such other relief as the court deems proper.

12 **THIRD CLAIM FOR RELIEF**

13 **(Fraudulent Concealment)**

14 **(By Plaintiff Bodley and the Nationwide Purchaser Class Against Defendant)**

15 140. Plaintiffs incorporate by reference each allegation set forth in the preceding
16 paragraphs.

17 141. Absent discovery, Plaintiff Bodley and the Nationwide Purchaser Class are unaware
18 of, and unable through reasonable investigation to obtain, the true names and identities of those
19 individuals associated with Whirlpool responsible for disseminating false and misleading
20 representations and warranties regarding the KitchenAid dishwashers. Whirlpool is necessarily in
21 possession of all of this information.

22 142. Defendant falsely represented that the dishwashers were manufactured with the
23 highest quality standards, reliable, and came with outstanding warranties as alleged in paragraph 49
24 above. Defendant knew that this representation was false at the time it was made.

25 143. At all relevant times, Defendant knowingly concealed and intentionally failed to
26 disclose to Plaintiff Bodley and the Nationwide Purchaser Class that the upper rack assembly in the
27 dishwasher was defective and would fail prematurely under ordinary use and conditions and expose
28 the consumer/owner and other individuals to an unreasonable safety risk.

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1 144. The concealed information is material in that a reasonable consumer would find
2 information important when deciding whether to buy the dishwasher and, if so, how much to pay.
3 All of the misrepresentations alleged herein are connected to and dependent upon a functioning
4 upper rack assembly without which the dishwasher cannot operate.

5 145. Defendant was and continues to be under a duty to Plaintiff Bodley and the
6 Nationwide Purchaser Class to disclose these facts because:

- 7 a. Defendant had exclusive knowledge of material facts not known to Plaintiff
- 8 Bodley and the Nationwide Purchaser Class;
- 9 b. Defendant withheld and actively concealed from Plaintiff Bodley and the
- 10 Nationwide Purchaser Class the fact that the dishwashers were and are
- 11 defective and substantially likely to fail prematurely; and
- 12 c. The dishwashers pose an unreasonable safety risk due to the sudden collapse
- 13 of the upper rack assembly which results in broken dishware and glassware.

14 146. Defendant fraudulently and intentionally concealed from and/or failed to disclose to
15 Plaintiff Bodley and the Nationwide Purchaser Class the facts described above with the intent to
16 defraud Plaintiff Bodley and the Nationwide Purchaser Class and for the purpose of inducing
17 Plaintiff Bodley and the Nationwide Purchaser Class to rely on such misrepresentations and
18 omissions by purchasing more expensive KitchenAid dishwashers to the exclusion less expensive
19 dishwashers manufactured by others.

20 147. Plaintiff Bodley and the Nationwide Purchaser Class were unaware the dishwashers
21 were prone to premature failure because upper rack assembly was defective. Had Defendant
22 disclosed the defective nature of the dishwashers, Plaintiff Bodley and the Nationwide Purchaser
23 Class would not have purchased the dishwashers containing the defective upper rack assembly.

24 148. As a direct and proximate cause of Defendant’s misconduct, Plaintiff Bodley and the
25 Nationwide Purchaser Class have suffered actual damages as alleged herein.

26 Plaintiff Bodley and the Nationwide Purchaser Class demand judgment against Defendant for
27 damages as detailed in Paragraph 107 in an amount to be proven at trial.

28

FOURTH CLAIM FOR RELIEF

(For Breach of Express Warranty)

(By Plaintiffs and the Consumer Subclasses against Defendant)

149. Plaintiffs incorporate by reference each allegation set forth in the preceding paragraphs.

150. Whirlpool expressly made the representation and agreed that it would “pay for factory specified parts...to correct *defects in material* or workmanship that existed when this [dishwasher] was purchased: “*nylon dish racks*...”

151. The upper rack assembly is integrated into the nylon dish racks.

152. The “nylon dish racks” are expressly included in the warranty which promises future performance for five years. The “nylon racks” fail because of “*defects in material*” and which is specifically covered under the terms of the Warranty.

153. Mr. Bodley’s rack assembly failed on or about April 11, 2017, which was within the five-year warranty period.

154. Ms. Maton’s rack assembly failed in or about June or July 2016, which was within the five-year warranty period.

155. Plaintiffs have notified Defendant of its breach of the Warranty. The Notice attached hereto as Exhibit C provided Defendant with timely notice on behalf of the Class of the breach of the Warranty and the invalidity of the Warranty Exclusions alleged herein.

156. Defendant has failed to remedy the breach of its obligations to Plaintiffs and the Class. Further, while the Warranty provides that Defendant will repair or replace defects which existed at the time of purchase, complaints submitted by members of the Class demonstrate that Defendant is refusing to honor its warranty regarding the defective upper rack assembly as alleged in paragraphs 50-51.

157. The express written warranty provides coverage for the racks for five years from the date of purchase. As such, the written warranty explicitly extends to future performance beyond one year. An assessment of whether the warranty had been breached necessarily would need to extend through five years, absent prior discovery of the defect by Plaintiffs. Plaintiffs did not

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1 discover the defects until their respective dishwashers failed as alleged in paragraphs 86 and 91
2 herein. Therefore, the four-year statute of limitations breach of express written warranty began to
3 run on the date of such discovery and the Plaintiffs claims are timely.

4 158. Defendant is not entitled to enforce the Warranty Exclusions described in Paragraph
5 45 because they are unconscionable and violate the provisions of applicable law including, without
6 limitation, the Song-Beverly Consumer Warranty Act and the Magnuson – Moss Warranty Act.

7 159. As a result of Defendant’s breach of the Warranty and the warranties detailed herein
8 Plaintiffs and the Class have suffered damages in an amount to be proven at trial.

9 **FIFTH CLAIM FOR RELIEF**

10 **(Breach of Express Warranty under Song-Beverly Consumer Warranty Act)**

11 **(By Plaintiffs and the Consumer Subclasses against Defendant)**

12 160. Plaintiffs incorporate by reference each allegation set forth in the preceding
13 paragraphs.

14 161. The allegations of this Claim for Relief are based on the breaches of warranty
15 addressed fully in the Fourth Claim for Relief. The specific allegations of the Complaint relevant to
16 that claim are detailed therein.

17 162. The dishwashers are consumer goods within the meaning of California’s Song-
18 Beverly Consumer Warranty Act.

19 163. Defendant Whirlpool is a “manufacturer” within the meaning of the statute.

20 164. Plaintiffs and members of the Consumer Subclasses purchased dishwashers within
21 the State of California.

22 165. Whirlpool expressly made the representation and agreed that it would “pay for
23 factory specified parts...to correct *defects in material* or workmanship that existed when this
24 [dishwasher] was purchased: “*nylon dish racks...*”

25 166. The upper rack assembly is integrated into the nylon dish racks.

26 167. The “nylon dish racks” are expressly included in the warranty which promises future
27 performance for five years. The “nylon racks” fail because of “*defects in material*” and which is
28 specifically covered under the terms of the Warranty.

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1 that claim are detailed therein.

2 175. The dishwashers are a consumer product as defined in 15 U.S.C. § 2301(1).

3 176. Plaintiffs and the members of the Consumer Subclasses are consumers as defined in
4 15 U.S.C. § 2301(3).

5 177. Defendant Whirlpool is a “supplier” and “warrantor” as defined in
6 15 U.S.C. § 2301(4) and (5).

7 178. The express warranties pertaining to the dishwashers are “written warranties” within
8 the meaning of 15 U.S.C. § 2301(6).

9 179. Additionally, pursuant to 15 U.S.C. § 2304(d)(1), Defendant may not assess
10 Plaintiffs or the Consumer Subclasses any costs the warrantor or his representatives incur in
11 connection with the required remedy of a warranted product...[I]f any incidental expenses are
12 incurred because the remedy is not made within a reasonable time or because the warrantor
13 imposed an unreasonable duty upon the consumer as a condition of securing remedy, then the
14 consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any
15 action against the warrantor.” Defendant has unreasonably refused to pay the material and labor
16 costs associated with the repair of the defects in the dishwashers.

17 180. Plaintiffs have provided Defendant with notice of breach of the Warranty and a
18 reasonable opportunity to cure the breach. In addition, the Notice afforded Defendant notice on
19 behalf of the Consumer Subclasses of its breach of the Warranty and a reasonable opportunity to
20 remedy the breach. Defendant has failed to remedy the breach of its obligations to the Consumer
21 Subclasses under the Warranty.

22 181. The California Supreme Court has ruled that there is no privity requirement on a
23 claim for express warranty.

24 182. The express written warranty provides coverage for the racks for five years from the
25 date of purchase. As such, the written warranty explicitly extends to future performance beyond
26 one year. An assessment of whether the warranty had been breached necessarily would need to
27 extend through five years, absent prior discovery of the defect by Plaintiffs. Plaintiffs did not
28 discover the defects until their respective dishwashers failed as alleged in paragraphs 86 and 91

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1 herein. Therefore, the four-year statute of limitations breach of express written warranty began to
2 run on the date of such discovery and the Plaintiffs claims are timely.

3 183. As a direct and proximate result of the acts and omissions of Defendant as set forth
4 herein, Plaintiffs and the Consumer Subclasses have been damaged as detailed in Paragraph 107 in
5 an amount to be proven at trial.

6 **SEVENTH CLAIM FOR RELIEF**

7 **(Breach of Implied Warranty)**

8 **(By Plaintiffs and the Consumer Subclasses Against Defendant)**

9 184. Plaintiffs incorporate by reference each allegation set forth in the preceding
10 paragraphs.

11 185. The sale by Defendant of the dishwashers was accompanied by implied warranties
12 that the dishwashers were merchantable and fit for the ordinary purpose for which such products
13 were sold (the “Implied Warranties”).

14 186. The dishwashers manufactured and sold by Defendant were defectively designed
15 and manufactured and contained latent defects at the time of manufacture and sale.

16 187. At all times, Plaintiffs have used their dishwashers in a foreseeable manner and in
17 the manner in which they were intended to be used. The defect, which existed at the time the
18 dishwashers were sold to Plaintiffs or their agents, rendered them unfit for the ordinary purpose for
19 which dishwashers are used and not merchantable.

20 188. Due to the defect alleged herein, the dishwashers were not of the same quality as
21 those generally acceptable in the trade and were not fit for the ordinary purposes for which the
22 goods are used. When the defect caused the rack to fall and drop onto the lower rack, the
23 dishwasher was not capable of being operated at all. The failure of the upper racks drastically
24 undermine the ordinary operation of the dishwashers and presents an unreasonable safety risk.

25 189. Defendant issued the Warranty to Plaintiff Bodley and the Consumer Subclasses.
26 Defendant also extended the benefit of the Warranty to members of the Subsequent Purchaser
27 Subclass because the Warranty only requires that the original purchase date for the dishwasher be
28 supplied. Defendant is therefore in direct privity with each Plaintiff and all members of the

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1 Consumer Subclasses.

2 190. Further, the Implied Warranties incorporated into the transaction between
3 Defendant and Initial Buyers were intended solely to benefit Plaintiffs and the Class. Defendant
4 does not sell directly to end users. Plaintiffs and the Consumer Subclasses are therefore entitled to
5 enforce the Implied Warranties against Defendant.

6 191. The vertical privity is not require pursuant to Civil Code section 1792, Plaintiffs and
7 the Consumer Subclasses were the intended beneficiaries of the purchase of the dishwashers from
8 Whirlpool. The Initial Buyers are not the owners of the dishwashers. The implied warranties made
9 by Defendant to Initial Buyers and others in the distribution chain would be of no economic value
10 to them unless Plaintiffs and the Class received the benefit of such warranties. Under *Gilbert*
11 *Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal. App. 3d 65, the Implied Warranties
12 made by Defendant to the Initial Buyers are enforceable by Plaintiffs and the Consumer
13 Subclasses.

14 192. Defendant breached the Implied Warranties by manufacturing and selling
15 dishwashers which, at the time of sale, were: (1) not fit for their intended use, and (2) not of a
16 merchantable quality. The dishwashers are neither merchantable nor fit for their intended use
17 because: (1) the latent defect in the dishwashers insures that they will fail prematurely and therefore
18 fail to clean dishes; and (2) the dishwashers are defective and dangerous in that the upper rack
19 assembly suddenly and unexpectedly collapses, causing glassware and other dishes to fall and
20 shatter, which exposes consumers to an unreasonable risk of personal injury and can result in
21 property damage. Purchasers of the dishwashers would not accept the safety risk posed by broken
22 glass and dishware resulting from the failure of the rack assemblies in the dishwashers when there
23 are other products for sale which do not present this risk.

24 193. Defendant has received timely notice of the breach of warranty alleged herein by
25 reason of its own knowledge of the defect in the dishwashers.

26 194. Further, Plaintiffs have provided Defendant with notice of breach of the Implied
27 Warranties and a reasonable opportunity to cure the breach. In addition, the Notices attached
28 hereto as Exhibit B afforded Defendant notice on behalf of the Class of its breach of the Implied

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1 Warranties and a reasonable opportunity to remedy the breach. Defendant has failed to remedy the
2 breach of its obligations to the Consumer Subclasses under the Implied Warranties.

3 195. Because the dishwashers either have failed or are certain to fail prematurely,
4 Defendant is in breach of the Implied Warranties.

5 196. Defendants have failed to remedy the breach of the Warranty for either Plaintiffs or
6 the Consumer Subclasses.

7 197. The express written warranty provides coverage for the racks for five years from the
8 date of purchase. As such, the written warranty explicitly extends to future performance beyond
9 one year and thereby extends the implied warranty. An assessment of whether the warranty had
10 been breached necessarily would need to extend through five years, absent prior discovery of the
11 defect by Plaintiffs. A latent defect existed at the time of the sale of the dishwashers but Plaintiffs
12 did not discover the defects until their respective dishwashers failed as alleged above, in paragraphs
13 86 and 91. Therefore, the four-year statute of limitations breach of implied warranty began to run
14 on the date of such discovery and the Plaintiffs claims are timely. Further, the statute of limitations
15 for implied warranty is tolled by fraudulent concealment. *E.g.*, Philips v. Ford Motor Co., No. 14-
16 CV-02989-LHK, 2016 WL 1745948, at *14 (N.D. Cal. May 3, 2016).

17 198. As a direct and proximate result of Defendant’s breach of the Implied Warranties,
18 Plaintiffs and members of the Class have been damaged as alleged in paragraph 107 herein in an
19 amount to be proven at trial.

20 **EIGHTH CLAIM FOR RELIEF**

21 **(Breach of Implied Warranty under Song-Beverly Consumer Warranty Act)**

22 **(By Plaintiffs and the Consumer Subclasses against Defendant)**

23 199. Plaintiffs incorporate by reference each allegation set forth in the preceding
24 paragraphs.

25 200. The allegations of this Claim for Relief are based on the breaches of warranty
26 addressed fully in the Seventh Claim for Relief. The specific allegations of the Complaint relevant
27 to that claim are detailed therein.

28 201. Under the Song-Beverly Consumer Warranty Act, Civ. Code § 1792, *et seq.*, every

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1 sale of consumer goods in the State of California is accompanied by both a manufacturer’s and
2 retail seller’s implied warranty that the goods are merchantable.

3 202. The dishwashers are consumer goods within the meaning of the statute.

4 203. Defendant Whirlpool is a “manufacturer” within the meaning of the statute.

5 204. Plaintiffs and members of the Consumer Subclasses purchased dishwashers in the
6 State of California.

7 205. By operation of law, the Defendant made the Implied Warranties to Plaintiffs and
8 the Consumer Subclasses concerning the dishwashers.

9 206. Defendant has breached the Implied Warranties by selling dishwashers which were
10 not of merchantable quality and which failed to perform the tasks for which they were intended.

11 207. Plaintiffs and all other Consumer Subclasses Members do not have to be in privity
12 with Defendant in order to enforce the Implied Warranties. Civil Code § 1792, which provides that
13 “[u]nless disclaimed in the manner prescribed by this chapter, every sale of consumer goods that
14 are sold at retail in this state shall be accompanied by the manufacturer’s and the retail seller’s
15 implied warranty that the goods are merchantable,” has no privity requirement.

16 208. The vertical privity is not require pursuant to Civil Code section 1792, moreover,
17 Plaintiffs and class members were the intended beneficiaries of the purchase of the dishwashers
18 from Whirlpool. The Initial Buyers are not the owners of the dishwashers. The implied warranties
19 made by Defendant to Initial Buyers and others in the distribution chain would be of no economic
20 value to them unless Plaintiffs and the Class received the benefit of such warranties. Under *Gilbert*
21 *Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal. App. 3d 65, the Implied Warranties
22 made by Defendant to the Initial Buyers are enforceable by Plaintiffs and the Class.

23 209. Plaintiffs have provided Defendant with notice of breach of the Implied Warranties
24 and a reasonable opportunity to cure the breach. In addition, the Notice afforded Defendant notice
25 on behalf of the Consumer Subclasses of its breach of the Implied Warranties and a reasonable
26 opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to
27 the Consumer Subclasses under the Implied Warranties.

28 210. The express written warranty provides coverage for the racks for five years from the

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1 date of purchase. As such, the written warranty explicitly extends to future performance beyond
2 one year and thereby extends the implied warranty. An assessment of whether the warranty had
3 been breached necessarily would need to extend through five years, absent prior discovery of the
4 defect by Plaintiffs. A latent defect existed at the time of the sale of the dishwashers but Plaintiffs
5 did not discover the defects until their respective dishwashers failed as alleged above, in paragraphs
6 86 and 91. Therefore, the four-year statute of limitations breach of implied warranty began to run
7 on the date of such discovery and the Plaintiffs claims are timely. Further, the statute of limitations
8 for implied warranty is tolled by fraudulent concealment. *E.g.*, *Philips v. Ford Motor Co.*, No. 14-
9 CV-02989-LHK, 2016 WL 1745948, at *14 (N.D. Cal. May 3, 2016).

10 211. As a result of Defendant’s breaches of the Implied Warranties, Plaintiffs and
11 Consumer Subclasses Members have been damaged as detailed in Paragraph 107 in an amount to
12 be proven at trial.

13 **NINTH CLAIM FOR RELIEF**

14 **(Breach of Implied Warranty - Magnuson-Moss Warranty Act)**

15 **(By Plaintiffs and the Consumer Subclasses against Defendant)**

16 212. Plaintiffs incorporate by reference each allegation set forth in the preceding
17 paragraphs.

18 213. The allegations of this Claim for Relief are based on the breaches of warranty
19 addressed fully in the Seventh Claim for Relief. The specific allegations of the Complaint relevant
20 to that claim are detailed therein.

21 214. Plaintiffs and the Consumer Subclasses are consumers as defined in 15 U.S.C.
22 § 2301(3).

23 215. Defendant is a supplier and warrantor as defined in 15 U.S.C. § 2301(4)
24 and (5).

25 216. The dishwashers are consumer products as defined in 15 U.S.C. § 2301(1).

26 217. Under 15 U.S.C. §2301(7), Defendant extended the Implied Warranties to Plaintiffs
27 and the Consumer Subclasses.

28 218. Defendant breached the Implied Warranties by selling dishwashers that were neither

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1 merchantable nor fit for their intended purpose.

2 219. Under 15 U.S.C. §2310(e), notice of breach of warranty need not be provided until
3 after Plaintiffs have been appointed Consumer Subclasses Representatives.

4 220. Plaintiffs have provided Defendant with notice of breach of the Implied Warranties
5 and a reasonable opportunity to cure the breach. In addition, the Notice afforded Defendant notice
6 on behalf of the Consumer Subclasses of its breach of the Implied Warranties and a reasonable
7 opportunity to remedy the breach. Defendant has failed to remedy the breach of its obligations to
8 the Consumer Subclasses under the Implied Warranties.

9 221. The vertical privity is not require pursuant to Civil Code section 1792, moreover,
10 Plaintiffs and class members were the intended beneficiaries of the purchase of the dishwashers
11 from Whirlpool. The Initial Buyers are not the owners of the dishwashers. The implied warranties
12 made by Defendant to Initial Buyers and others in the distribution chain would be of no economic
13 value to them unless Plaintiffs and the Class received the benefit of such warranties. Under *Gilbert*
14 *Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal. App. 3d 65, the Implied Warranties
15 made by Defendant to the Initial Buyers are enforceable by Plaintiffs and the Class.

16 222. The express written warranty provides coverage for the racks for five years from the
17 date of purchase. As such, the written warranty explicitly extends to future performance beyond
18 one year and thereby extends the implied warranty. An assessment of whether the warranty had
19 been breached necessarily would need to extend through five years, absent prior discovery of the
20 defect by Plaintiffs. A latent defect existed at the time of the sale of the dishwashers but Plaintiffs
21 did not discover the defects until their respective dishwashers failed as alleged above, in paragraphs
22 86 and 91. Therefore, the four-year statute of limitations breach of implied warranty began to run
23 on the date of such discovery and the Plaintiffs claims are timely. Further, the statute of limitations
24 for implied warranty is tolled by fraudulent concealment. *E.g.*, *Philips v. Ford Motor Co.*, No. 14-
25 CV-02989-LHK, 2016 WL 1745948, at *14 (N.D. Cal. May 3, 2016).

26 223. As a result of Defendant's breach of the Implied Warranties, Plaintiffs and the
27 Consumer Subclasses have been damaged as detailed in Paragraph 107 in an amount to be proven
28 at trial.

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PRAYER FOR RELIEF

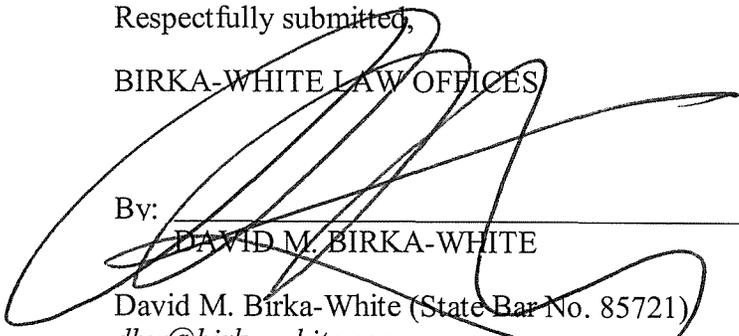
WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, prays the Court to certify the Class as defined hereinabove, to enter judgment against Defendant and in favor of the Class, and to award the following relief:

- 1. For Certification of the proposed Class and each Subclass thereof;
- 2. For compensatory damages as alleged herein, according to proof;
- 3. For restitution and/or disgorgement of revenues, earnings, profits, compensation, and benefits which were received by Defendant as a result of unlawful business acts or practices, according to proof;
- 4. For an order requiring Defendant to engage in a notice and/or recall campaign.
- 5. For exemplary and punitive damages according to proof;
- 6. For costs and attorneys’ fees, as allowed by law; and
- 7. For such other further legal or equitable relief as this Court may deem appropriate under the circumstances.

DATED: November 6, 2017

Respectfully submitted,

BIRKA-WHITE LAW OFFICES

By: 
DAVID M. BIRKA-WHITE

David M. Birka-White (State Bar No. 85721)
dbw@birka-white.com
Mindy M. Wong (State Bar No. 267820)
mwong@birka-white.com
BIRKA-WHITE LAW OFFICES
65 Oak Court
Danville, CA 94526
Telephone: (925) 362-9999
Facsimile: (925) 362-9970

N. Scott Carpenter (*Pro Hac Vice*)
scarpenter@cstriallaw.com
Rebecca Bell-Stanton (*Pro Hac Vice*)
rstanton@cstriallaw.com
Carpenter & Schumacher, P.C.
2701 Dallas Parkway, Suite 570
Plano, TX 75093

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Telephone: (972) 403-1133
Facsimile: (972) 403-0311

Attorneys for Plaintiffs
JAMES BODLEY and KYLE MATSON

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DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs James Bodley and Kyle Matson, individually and on behalf of all others similarly situated, hereby demand a jury trial.

Dated: November 6, 2017

Respectfully submitted,

BIRKA-WHITE LAW OFFICES

By: _____

DAVID M. BIRKA-WHITE
Attorneys for Plaintiffs
James Bodley and Kyle Matson

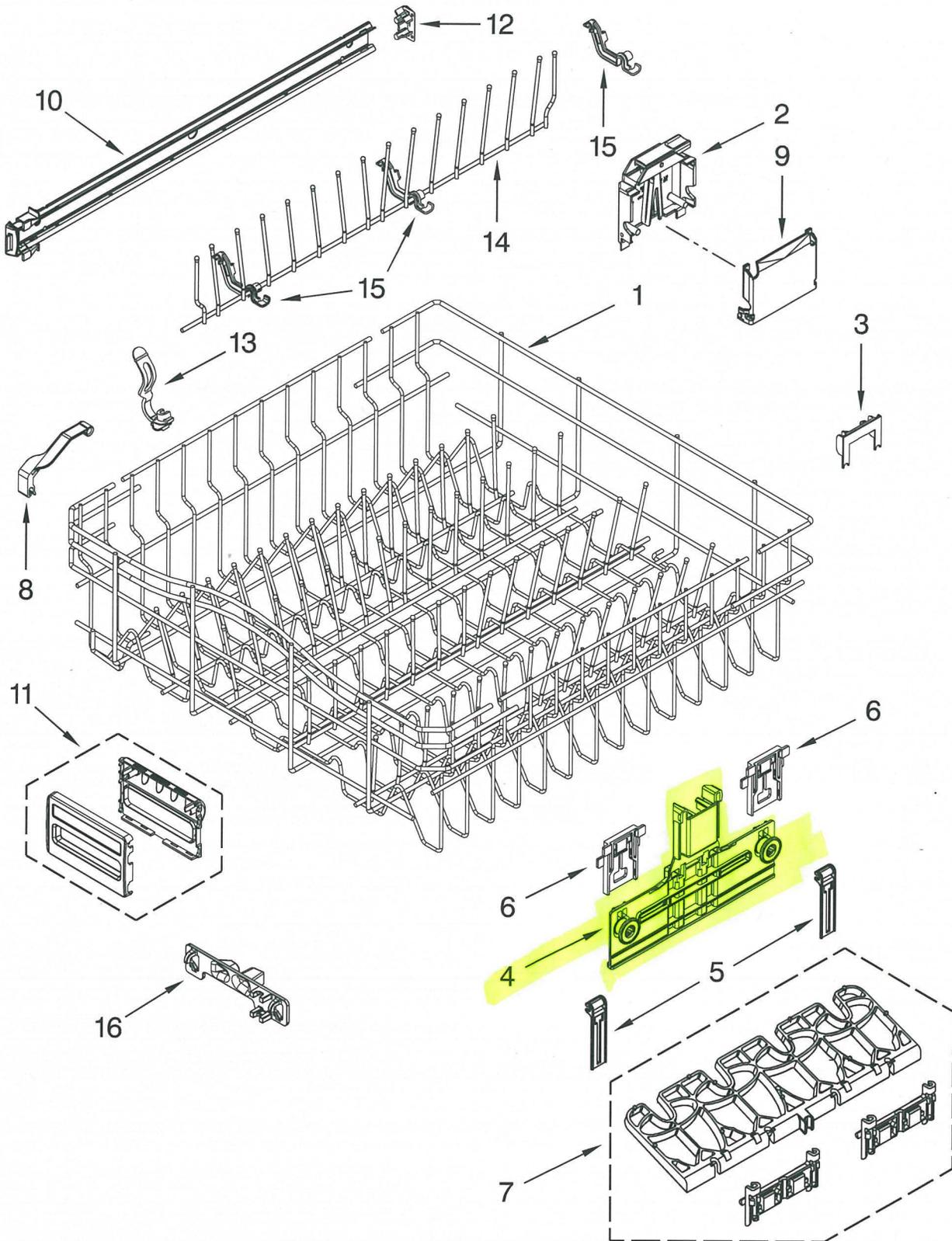
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EXHIBIT A



UPPER RACK AND TRACK PARTS

For Models: KUDS30FXBL5, KUDS30FXWH5, KUDS30FXSS5
(Black) (White) (Stainless)



FOR ORDERING INFORMATION REFER TO PARTS PRICE LIST

UPPER RACK AND TRACK PARTSFor Models: KUDS30FXBL5, KUDS30FXWH5, KUDS30FXSS5
(Black) (White) (Stainless)

Illus. No.	Part No.	DESCRIPTION
1	W10312791	Dishrack, Upper
2		Housing, Adjuster
	W10320664	Left Hand
	W10320665	Right Hand
3	W10250160	Clip-Lock Adjuster Arm
4	W10350376	Adjuster Assembly
5	W10195839	Strap, Tether Adjuster
6	W10195840	Positioner, Adjuster
7	W10082649	Cup, Shelf
8	W10267076	Clip, Dispenser Guard
9	W10250162	Cover, Adjuster
10	W10324563	Track, Assembly
11	W10282826	Handle, Dishrack
12	W10195622	Stop, Track Non-Removable
13	W10077844	Clip, No Flip
14	8562030	Tine Row
15	W10082853	Clip, Pivot
16	8539102	Positioner, Dual

EXHIBIT B

KITCHENAID® DISHWASHER WARRANTY**LIMITED WARRANTY**

For one year from the date of purchase, when this major appliance is operated and maintained according to instructions attached to or furnished with the product, KitchenAid brand of Whirlpool Corporation or Whirlpool Canada LP (hereafter "KitchenAid") will pay for factory specified parts and repair labor to correct defects in materials or workmanship that existed when this major appliance was purchased. Service must be provided by a KitchenAid designated service company. YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT REPAIR AS PROVIDED HEREIN. This limited warranty is valid only in the United States or Canada and applies only when the major appliance is used in the country in which it was purchased. Proof of original purchase date is required to obtain service under this limited warranty.

SECOND THROUGH FIFTH YEAR LIMITED WARRANTY ON CERTAIN COMPONENT PARTS

In the second through the fifth year from the date of purchase, when this major appliance is operated and maintained according to instructions attached to or furnished with the product, KitchenAid will pay for factory specified parts for the following components to correct defects in materials or workmanship that existed when this major appliance was purchased: nylon dish racks and electronic controls.

LIFETIME LIMITED WARRANTY ON STAINLESS STEEL TUB AND INNER DOOR LINER

For the lifetime of the product from the date of purchase, when this major appliance is installed, operated and maintained according to instructions attached to or furnished with the product, KitchenAid will pay for factory specified parts and repair labor for the following components to correct defects in materials or workmanship that existed when this major appliance was purchased: stainless steel tub and inner door liner.

ITEMS EXCLUDED FROM WARRANTY

This limited warranty does not cover:

1. Replacement parts or repair labor if this major appliance is used for other than normal, single-family household use or when it is used in a manner that is inconsistent to published user or operator instructions and/or installation instructions.
2. Service calls to correct the installation of your major appliance, to instruct you on how to use your major appliance, to replace or repair house fuses, or to correct house wiring or plumbing.
3. Service calls to repair or replace appliance light bulbs, air filters or water filters. Consumable parts are excluded from warranty coverage.
4. Damage resulting from accident, alteration, misuse, abuse, fire, flood, acts of God, improper installation, installation not in accordance with electrical or plumbing codes, or use of products not approved by KitchenAid.
5. Cosmetic damage, including scratches, dents, chips or other damage to the finish of your major appliance, unless such damage results from defects in materials or workmanship and is reported to KitchenAid within 30 days from the date of purchase.
6. Any food or medicine loss due to refrigerator or freezer product failures.
7. Pickup and delivery. This major appliance is intended to be repaired in your home.
8. Repairs to parts or systems resulting from unauthorized modifications made to the appliance.
9. Expenses for travel and transportation for product service if your major appliance is located in a remote area where service by an authorized KitchenAid servicer is not available.
10. The removal and reinstallation of your major appliance if it is installed in an inaccessible location or is not installed in accordance with KitchenAid's published installation instructions.
11. Replacement parts or repair labor on major appliances with original model/serial numbers that have been removed, altered or cannot be easily determined.

DISCLAIMER OF IMPLIED WARRANTIES

IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, ARE LIMITED TO ONE YEAR OR THE SHORTEST PERIOD ALLOWED BY LAW. Some states and provinces do not allow limitations on the duration of implied warranties of merchantability or fitness, so this limitation may not apply to you. This warranty gives you specific legal rights, and you also may have other rights that vary from state to state or province to province.

LIMITATION OF REMEDIES; EXCLUSION OF INCIDENTAL AND CONSEQUENTIAL DAMAGES

YOUR SOLE AND EXCLUSIVE REMEDY UNDER THIS LIMITED WARRANTY SHALL BE PRODUCT REPAIR AS PROVIDED HEREIN. KITCHENAID SHALL NOT BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. Some states and provinces do not allow the exclusion or limitation of incidental or consequential damages, so these limitations and exclusion may not apply to you. This warranty gives you specific legal rights, and you also may have other rights that vary from state to state or province to province.

If outside the 50 United States and Canada, contact your authorized KitchenAid dealer to determine if another warranty applies.

If you think you need repair service, first see the "Troubleshooting" section of the Use & Care Guide. If you are unable to resolve the problem after checking "Troubleshooting," additional help can be found by checking the "Assistance or Service" section or by calling KitchenAid. In the U.S.A., call 1-800-422-1230. In Canada, call 1-800-807-6777.

For additional product information or to view FAQs (Frequently Asked Questions), in U.S.A. visit: www.kitchenaid.com

In Canada visit: www.kitchenaid.ca

If you do not have access to the Internet and you need assistance using your product or you would like to schedule service, you may contact KitchenAid at the number below.

Have your complete model number ready. You can find your model and serial number on the label located near the door on the right-hand or left-hand side of the dishwasher interior.

For assistance or service in the U.S.A., call 1-800-422-1230. In Canada, call 1-800-807-6777.

If you need further assistance, you can write to KitchenAid with any questions or concerns at the address below:

In the U.S.A.:

KitchenAid Brand Home Appliances
Customer eXperience Center
553 Benson Road
Benton Harbor, MI 49022-2692

In Canada:

KitchenAid Brand Home Appliances
Customer eXperience Centre
200 – 6750 Century Avenue
Mississauga ON L5N 0B7

Please include a daytime phone number in your correspondence.

Please keep this User Instructions and model number information for future reference.

EXHIBIT C

CARPENTER & SCHUMACHER, P.C.

N. Scott Carpenter*
Managing Partner

Craig M. Schumacher**
Partner

Rebecca E. Bell-Stanton***
Partner

Douglas C. Heuvel

Attorneys and Counselors at Law

Parkway Centre IV
2701 North Dallas Parkway, Suite 570
Plano, Texas 75093
(972) 403-1133
Facsimile (972) 403-0311
www.cstriallaw.com

Mathew E. Mulkey

Anthony R. LaScalea

Matthew D. Warner

*Also Licensed in Oklahoma
**Also Licensed in Arkansas
***Also Licensed in Pennsylvania

June 12, 2017

NOTICE OF VIOLATION OF CONSUMER LEGAL REMEDIES ACT ("CLRA") AND BREACH OF WARRANTY

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4752

KITCHENAID, INC.
C/O WHIRLPOOL CORPORATION
Mr. Jeff Fettig, CEO
2000 M-63, Tax Dept.
Benton Harbor, MI 49022

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4738

SEARS, ROEBUCK, & Co.
Mr. Edward S. Lampert, CEO
3333 Beverly Road, B2-116B
Hoffman Estates, IL 60179

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4745

KITCHENAID, INC.
C/O CT CORPORATION SYSTEM
818 W 7th Street, Suite 930
Los Angeles, CA 90017

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4721

SEARS, ROEBUCK, & Co.
C/O CT CORPORATION SYSTEM
818 W 7th Street, Suite 930
Los Angeles, CA 90017

Re: KitchenAid Dishwashers

To Whom It May Concern:

Pursuant to the California Consumers Legal Remedies Act ("CLRA"), California Civil Code § 1750, et. seq., and specifically § 1782(a)(1)(2), Plaintiffs, Mr. James Bodley and Ms. Kyle Matson, on behalf of themselves and all others similarly situated, hereby notifies you that KitchenAid, Inc. ("KitchenAid") and Sears, Roebuck, & Co. ("Sears") violated California Civil Code § 1770. Such violation arises from the advertising and selling of KitchenAid dishwashers equipped with a lower and/or upper dishrack roller assembly bearing part numbers

#WW10712395 and #W10712394 (“defective assembly”), which are defective and not in conformance with the representations to Plaintiffs, thousands of California consumers, as well as consumers throughout the United States. This conduct includes, but is not limited to, the following violations of § 1770:

1. KitchenAid and Sears represented that KitchenAid dishwashers had benefits or characteristics that it did not actually have. Civ. Code § 1770(a)(5);
2. KitchenAid and Sears represented that KitchenAid dishwashers were of a particular standard or quality when it was of another. Civ. Code § 1770(a)(7); and
3. KitchenAid’s written warranty violates § 1770 (a)(19) by including unconscionable provisions including, without limitation: (1) purported limitations in the remedies available upon breach, the exclusion of incidental and consequential damages and the limitation of the amount of recoverable damages; and (2) purported exclusions of implied warranties.

The KitchenAid dishwasher models manufactured, designed, marketed, and sold by KitchenAid and Sears contain defective upper rack assemblies that fail and cause the dishwasher to be inoperable. The pertinent dishwasher models utilize plastic parts in the top rack slide mechanism. These parts prematurely fail causing the axles to separate from the wheels. The loaded top rack can fall onto the door or lower rack, causing glassware to break and presenting a substantial safety hazard. The design of the rack assembly, wheel, hub, and hook cannot withstand normal use. Once the defective assembly breaks, the dishwasher no longer works requiring replacement. Notwithstanding its knowledge of the defect, KitchenAid and Sears continued the sale of dishwashers without disclosing the defect or safety risk to consumers. Had KitchenAid and Sears disclosed the known facts Plaintiffs and consumers would not have purchased a KitchenAid dishwasher.

Mr. Bodley purchased a brand-new home in 2012 with a KitchenAid dishwasher (model No. KUDS30FXSS5). The upper rack assembly in Mr. Bodley’s dishwasher failed on or about April 11, 2017. He purchased replacement parts from Sears to repair his dishwasher at a cost of \$ 104.53. He is unable to install the replacement parts himself and will have to pay a technician to install the assembly.

Ms. Kyle Matson purchased a home in 2013 with a KitchenAid dishwasher (model No. KUDS30FXSS5). The upper rack assembly in Ms. Matson’s dishwasher failed in 2016. She too purchased replacement parts from Sears to repair her dishwasher.

Plaintiffs were not aware of the defect in their KitchenAid dishwasher until the upper rack assemblies suddenly and unexpectedly collapsed. The replacement assembly offered by KitchenAid and Sears is inadequate in that it does not repair the design defect in the original equipment assembly. It is also unlawful to require consumers to purchase and install a similarly defective replacement assembly. The cost to purchase and install the replacement assembly is an expense borne only by the Plaintiffs and all other similarly situated consumers at a cost of approximately \$200.

The defective assembly components can be identified by those appliances requiring replacement adjuster kits containing part W10712394 or W10712395. Although termed an “upgrade” for purposes of the ongoing sale of the W10712394 and W10712395 Adjuster Assembly Kits, the purchase of these additional kits is necessary for the dishwasher to function as represented.

This notice applies to all KitchenAid and other similarly designed dishwashers, including but not limited to dishwashers sold under the Whirlpool and Kenmore brands, which incorporate the part numbers W10712394, W10712395 and other similarly designed and manufactured parts.

Plaintiffs on behalf of themselves and all others similarly situated, hereby demands that KitchenAid and/or Sears: (1) pay all costs required to investigate, repair, and replace all of the defective upper assembly rack systems utilized in Whirlpool, KitchenAid, and Kenmore dishwashers; and (2) provide notice to consumers of the product defect set forth in this letter.

This letter also constitutes a notice on behalf of Plaintiffs and all persons similarly situated of the breach by Whirlpool and Sears of its express warranties and the implied warranties of merchantability and fitness for use.

Additionally, this letter serves as a demand that you preserve and maintain all of the following records, including electronically stored information (ESI) and data, pending resolution of this matter:

1. All internal manuals, written policies, directives, memoranda, correspondence, electronic mail, and other records of communication regarding all dishwashers manufactured with the defective assemblies bearing part numbers W10712394 and W10712395, or similarly designed or manufactured parts;
2. All advertising and marketing materials disseminated to consumers, retailers, plumbing contractors, and/or distributors that discuss or concern the assemblies referenced above;
3. Any complaints from any source concerning defective assemblies bearing part number W10712394 or W10712395, or similarly designed or manufactured parts;
4. All documents which reflect the sale of the Whirlpool, KitchenAid, and Kenmore dishwashers that contain part numbers W10712394 and W10712395 referenced above, or similarly designed or manufactured parts, in the United States, including manufacturing dates and model numbers;
5. All documents which reflect the materials used to manufacture the defective assemblies and all replacement assemblies from any source, including but not limited to Whirlpool and its suppliers; and

6. All listing agreements, testing records, and quality control records related to the assemblies bearing part number W10712394 or W10712395.

If you have any questions regarding this notice and demand, please contact the undersigned counsel at (844) 370-1133.

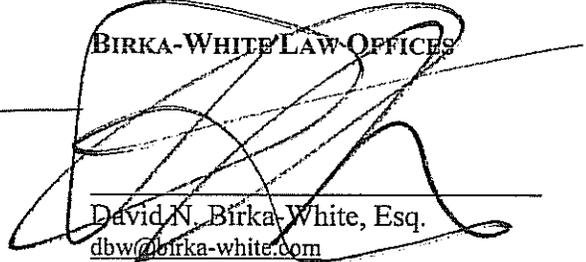
Sincerely,

CARPENTER & SCHUMACHER, P.C.



N. Scott Carpenter, Esq.
scarpenter@cstriallaw.com

BIRKA-WHITE LAW OFFICES



David N. Birka-White, Esq.
dbw@birka-white.com

NSC:brh

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

SEARS, ROEBUCK, & Co.
 Mr. Edward S. Lampert, CEO
 3333 Beverly Road, B2-116B
 Hoffman Estates, IL 60179

2. Article Number
 (Transfer from service label) **7012 2920 0001 6275 4738**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

U.S. Postal Service
CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

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OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To: SEARS, ROEBUCK, & Co.
 Mr. Edward S. Lampert, CEO
 3333 Beverly Road, B2-116B
 Hoffman Estates, IL 60179

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

SEARS, ROEBUCK, & Co.
 c/o CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017

2. Article Number
 (Transfer from service label) **7012 2920 0001 6275 4721**

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

U.S. Postal Service
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Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To: SEARS, ROEBUCK, & Co.
 c/o CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

KITCHENAID, INC.
 C/O CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017

2. Article Number (Transfer from service label) **7012 2920 0001 6275 4745**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature _____

Agent
 Addressee

B. Received by (Printed Name) **CT CORPORATION SYSTEM**
 818 West Seventh Street
 Suite 930

C. Date of Delivery **JUN 16 2017**

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

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Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To **KITCHENAID, INC.**
C/O CT CORPORATION SYSTEM
 Street, Apt. No. or PO Box No. **818 W 7th Street, Suite 930**
 City, State, ZIP+4 **Los Angeles, CA 90017**

PS Form 3800, A See reverse for instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

KITCHENAID, INC.
 C/O WHIRLPOOL CORPORATION
 Mr. Jeff Fettig, CEO
 2000 M-63, Tax Dept.
 Benton Harbor, MI 49022

2. Article Number (Transfer from service label) **7012 2920 0001 6275 4752**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature **x R. Hesse**

Agent
 Addressee

B. Received by (Printed Name) **R. Hesse**

C. Date of Delivery **6-16-17**

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

U.S. Postal Service™
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OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To **KITCHENAID, INC.**
C/O WHIRLPOOL CORPORATION
 Street, Apt. No. or PO Box No. **Mr. Jeff Fettig, CEO**
 City, State, ZIP **2000 M-63, Tax Dept.**
Benton Harbor, MI 49022

PS Form 3800, A See reverse for instructions

Case 1:18-cv-00594-PLM-RSK ECF No. 73-3 filed 08/09/18 PageID.1063 Page 12 of 36

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EXHIBIT D

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John H. of Cincinnati, OH
on Aug. 4, 2014

Satisfaction Rating



We have owned a KitchenAid Dishwasher, Model KUDS35FXSS8 for 16 months. The wheels on the upper dish rack have already come off, rendering it unusable. This happened because the plastic tabs that hold the wheels in place have become brittle and cracked off in this short time. Kitchen Aid's warranty states that the dish rack is warranted for 5 years. However, Kitchen Aid customer service tells us that the wheel assembly on the dish rack is not covered by this warranty. Wheel assembly W10350376 is poorly designed and quickly fails. Do not buy a Kitchen Aid or Whirlpool dishwasher that uses this wheel assembly.

Helpful? Yes | No

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 16 of 46

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 17 of 46

Top 834 Complaints and ×

Secure | https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=13

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Jerri of Valley Park, MO on June 11, 2013 Satisfaction Rating ★☆☆☆☆

The Plastic wheels on my \$800 KitchenAid dishwasher Model KUDS30IX failed after a little over a year. My manual states that the rack is under warranty for 5 years... KitchenAid says the warranty only applies to the nylon coating on the rack, not the wheels. They gave me a one-time replacement part that failed again after 6 months. They refuse to stand behind their product any further. I have never had a high-end product fail and receive such poor customer support. I feel they know they have a bad design and surely more customers have experienced this problem. I will never purchase another KitchenAid appliance!

Helpful? Yes | No

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 18 of 46

Top 834 Complaints and X

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 Carol of Baltimore, MD on Nov. 12, 2015 Satisfaction Rating
★☆☆☆☆

I have a 4 year old Kitchenaid Dishwasher. We spent over \$1,000 for it thinking we were investing in a very nice, long lasting machine. After a year, the right clip on the top rack broke and needed to be repaired by a technician. 6 months later the other side broke and we needed another service call. In the last few weeks, all 8 wheels have fallen off the bottom rack. We run the dishwasher about once every three days. I spoke to Kitchenaid customer service this morning via their online chat. The service representative admitted that there were so many complaints about my model that it should have been recalled. She said there was nothing she could do for me. I called and spoke to a customer service representative and their supervisor and they both refused to provide the replacement parts. My model is KUDE 40FXSP3. I will never buy another Kitchenaid product. Even when they know there's an issue, they will not take responsibility for it.

Helpful? Yes | No

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 Monica of Pine Brook, NJ on Feb. 8, 2016

Satisfaction Rating






Currently own a KitchenAid Dishwasher, Model KUDE4FXSS0. The top rack detached from the sliding mechanism. There are no signs of parts. Afterwards two bottom wheels fell off on both sides. Asked KitchenAid for assistance and they have to send a tech out at my cost.

Helpful? Yes | No

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Lorrie of Rainier, OR on Feb. 11, 2016

Satisfaction Rating



KitchenAid Model KUDS30IXBL Purchased from Lowe's 3-29-14. Within a few months of purchase, the top rack wheel broke off. Within 2 years, it would cancel and drain within 15 minutes of start up. This began just before Thanksgiving. :(Repairman came out since we purchased the warranty and replaced the rack holder with new metal parts and the front computer. First load of dishes after repair, it cancelled and drained within 15 minutes of start up. I'd rather go back to old fashioned knobs and dials.

Helpful? [Yes](#) | [No](#)

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Top 834 Complaints and X

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Marcel of Renton, WA on Aug. 11, 2015 Satisfaction Rating ★☆☆☆☆



I too experienced the dishwasher top rack roller failure. The top rack rollers are secured by (2) cheap very thin plastic spreader clips. These clips are approximately 3/16 wide by 1/16 thick. If just one of these cheap clips breaks - the roller wheel will separate causing the rack to collapse along with progressive failure of the adjoining roller wheel clips. This deliberate design and manufacturing defect by KitchenAid is an obvious attempt at planned obsolesce. This once celebrated company is no longer interested in producing durable quality products. Avoid the purchase of all KitchenAid dishwashers!

Helpful? Yes | No

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Top 834 Complaints and ×

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Sanat of Novi, MI on Jan. 29, 2015 Satisfaction Rating
★☆☆☆☆

2 years old dishwasher. Within 6 months, top rack roller axles broke. After a year, stopped cleaning top rack items. I found out the Chopper Assembly was broken. Had to replace it. Both are cheap plastic parts. Terrible experience with this brand.

Helpful? Yes | No

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Top 834 Complaints and 

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Mel of O'Fallon, MO on
Jan. 18, 2015

Satisfaction Rating
    

Purchased KitchenAid dishwasher model KUDS30FXSS5 in September 2012. The cheap plastic upper rack assembly has broken three times. The plastic parts to pull out the rack break every year and have fallen into the chopper causing further damage. Clearly this machine is made with plastic parts that cannot withstand normal usage. I will not buy a KitchenAid appliance ever again.

Helpful? Yes | No

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 24 of 46

Top 834 Complaints and ✕

Secure | https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=8 ☆

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Jan of Brigham, UT on
Jan. 3, 2015

Satisfaction Rating

★ ★ ☆ ☆ ☆

Have only had my dishwasher 4 months and the top rollers broke. I spent a lot of money to get what I was told was a good dishwasher, so having the rollers break after 4 months makes me angry. Then to find it isn't covered under warranty really made me mad. Kitchenaid should be honest and stand Behind their products!

Helpful? Yes | No

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 25 of 46

Top 834 Complaints and... X

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 Terry of Castle Rock, CO on Nov. 23, 2014 Satisfaction Rating
★☆☆☆☆

The top rack adjuster is what connects the upper rack to the pull out guide. In most Kitchenaid (and Whirlpool) dishwashers, the wheels of the adjuster are connected with a plastic axle. These axles will routinely break, causing the upper rack to fall onto the lower rack, or if you are lucky, just separate from the wheel guide. If you bought washers with this design, you will have this problem. We have had our KUDS30X... for about 3 years and have had to replace this part 7 times already. The part costs about \$25 a pop from online part stores. This part will eventually wear down and break no matter how careful you are when pulling out the top rack. It is still used on even Kitchenaid's top of the line washers. Really Kitchenaid, how much would it cost you to redesign this flawed part? If you are shopping for a dishwasher, look at the wheels on the upper rack. If it has a plastic axle, walk away.

Helpful? Yes | No

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Gerry of Encino, CA on
June 6, 2014

Satisfaction Rating



Had dishwasher KUDS30IXSS a little over a year and two small plastic parts on the upper glider both broke after just moderate use. Outside of warranty by a few months and Whirlpool (Kitchenaid) sent their own repairman who said the two parts were \$48. Took 10 minutes to replace them and then charged \$130 for labor and an additional \$85 for the service call. I have never, ever had a service where they charge labor and service charge. It's one or the other (Also, \$130 for 10 minutes of labor?). Complained and repairman said it's company policy and should take it up with Whirlpool which we are. We recently had our Kitchenaid side by side built-in go out as well, luckily under warranty. Their products and service have gone steadily down hill year after year. We were loyal customers at one time but no longer. Check all the reviews out there on any appliances you are considering before you buy another Kitchenaid.

Helpful? Yes No



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Scott of Decatur, AL on
May 27, 2014

Satisfaction Rating



I also have a stainless steel KitchenAid dishwasher (KUDE40FXSS5) and while the machine is quiet and cleans reasonably well. The adjuster assembly on the top rack has plastic tabs that become brittle and break, so that the wheels fall off. I have replaced this twice so far. It is intensely frustrating! This problem could have been prevented with a metal tab instead of cheap plastic.

Helpful? Yes | No

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 28 of 46

Top 834 Complaints and

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 Kathryn of Gladwin, MI on Nov. 5, 2013 Satisfaction Rating
★☆☆☆☆



I purchased a KitchenAid dishwasher in March 2011 from Lowe's. I chose the KitchenAid brand and paid a slightly higher amount as I was told they are well built and work better than any other brand on the market, and because I thought they would stand by their product. In December 2012, the upper rack adjuster broke because it is made of plastic and the dishwasher has the lift higher feature, that is used quite a bit. I contacted customer service and they said the part was out of stock and finally in late January I received the replacement part. Last week it broke again, same place, so I contacted customer service again and I asked them if anyone else has this issue and I was told they could not discuss this with me but there is no recall. Was told I am sorry but the part is in stock, call Marcone to order the part. The cost is \$40.00 plus shipping. I am so angry right now. I have a dishwasher that is useless. Without the top rack in the upper spray unit will not work.

Helpful? Yes | No

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 29 of 46

Top 834 Complaints and

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 Marcello of Houston, TX on Nov. 6, 2011 Satisfaction Rating
★★★★☆

We purchased a KUDS30CX in January 2011. First failure occurred in October 2011. The roller spindle on the top cage snapped and the roller fell off. The plastic spindle seems to be too brittle. Second failure occurred November 2011 (less than 30 days from the first) . This time, the whole dishwasher just plain quit. There were no lights like it was unplugged, nothing. The Sears people are wonderful about coming out and fixing and they will be coming out next week. However what happens after the warranty runs out? Are there lemon laws with these appliances?

We paid a lot for the dishwasher and with all these posts I am wondering if we made a big mistake. Am I destined to have repeat nightmare failures like these other posts? The machine cleans well unlike the other brands which don't seem to work all the time. I know that there are a lot of new gizmos on these new dishwashers but these gizmos don't seem to be the source of the failures. Also there are many posts on websites about the control panel failing that span back years. Did they ever get this fixed or is that expected now?

Helpful? Yes | No

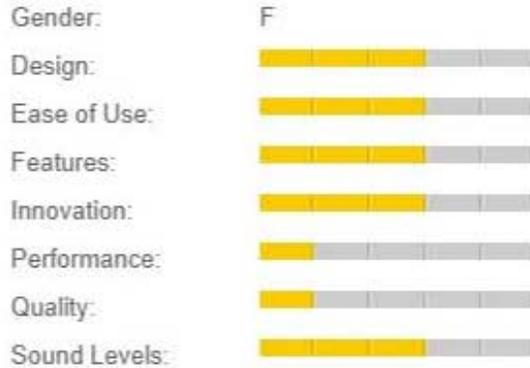
By Purnima Kumar
From Dallas, TX

★★★★★ 2.0

5/6/2017

dissatisfied with this product

Bought 2 of these dishwashers 3 years ago.. the racks broke, the wheels broke, and now new of the them the repair guy said the motor is broken and needs replacement and its best to buy a new one...I use the dishwashers not more than 3 times a week.. for one of them to crash in 3 years is very disappointing.. these are expensive dishwashers.. I need to get the exact model so it matches my other one, but the model is discontinued?? what is the closest replacement. He said it would be \$425.00 to replace just the motor!! and I can get a new one for around \$700.00 but I cant find it anywhere?!?! Can you'll help??



No, I would not recommend this to a friend

Merchant response: Purnima Kumar:

Thank you for your review.

We would like to inquire further about your review with you. Please respond back to this email address Maytag_Reviews@Maytag.com with your name, user # (97912163), phone number, street address, zip code, reviewer name, model & serial number, and date of purchase on the appliance.

We look forward to your reply.

Was this review helpful? Yes / No You may also flag this review

This product has been discontinued, but there may be limited availability at our local retailer. Please visit our [Fully Integrated Category](#) page to view all of our current models.

[REGISTER THIS PRODUCT >](#)

[MANUALS & LITERATURE >](#)

[EXTENDED SERVICE PLANS >](#)

[SCHEDULE SERVICE >](#)

1. (2) Among leading premium brands, with rinse aid.



By Dishwasher Diva
From Ellicott City, MD



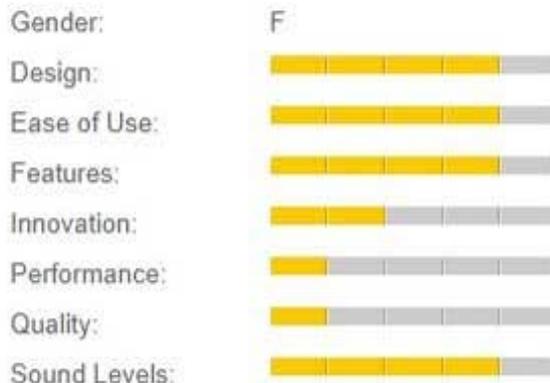
7/20/2016



Not what we hoped for

This review was submitted as a sweepstakes entry.

We bought this dishwasher 4 years ago for our new home. Since that time we have spent approx. \$600 in repairs for new racks/brackets (plastic parts for the top rack kept breaking). Now our top rack is no longer cleaning. At this point, I'm thinking we cut our losses and look for a replacement rather than pay for more repairs.



No, I would not recommend this to a friend

Merchant response: We're sorry to hear of the experience that you have encountered with your dishwasher Dishwasher Diva. We would like to discuss this further with you. Please email us at NAR_Customer_Solutions@kitchenaid.com at your earliest convenience with your user id 84367589, name, address, a phone number and best time to reach you along with your model and serial number.

(1 of 1 customers found this review helpful)

This product has been discontinued, but there may be limited availability at our local retailer. Please visit our **Fully Integrated Category** page to view all of our current models.

[REGISTER THIS PRODUCT >](#)

[MANUALS & LITERATURE >](#)

[EXTENDED SERVICE PLANS >](#)

[SCHEDULE SERVICE >](#)

1. (2) Among leading premium brands, with rinse aid.

Was this review helpful? Yes / No You may also flag this review

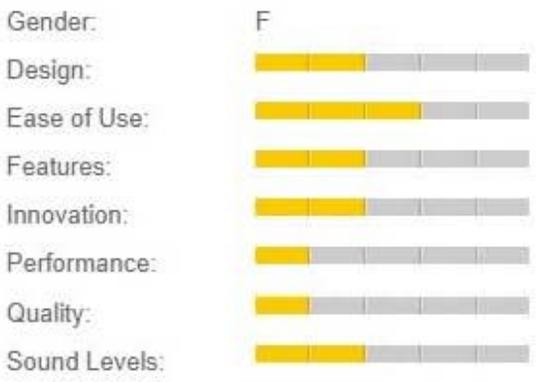
By Laura
From Windermere, FL

★★★★★ 1.0

12/30/2015

Terrible product

We purchased this product new 4 years ago. After the first year (like other customers who posted feedback) the cheap plastic parts on the top rack broke. We repaired and about 1.5 years they broke again. This week, the unit has stopped working altogether. Total piece of junk and it wasn't a cheap unit when purchased. No one needs this much aggravation from a new appliance. KitchenAid should be embarrassed.



No, I would not recommend this to a friend

(2 of 2 customers found this review helpful)

Was this review helpful? Yes / No You may also flag this review

By Unhappy In
Mesquite
From Mesquite, NV

★★★★★ 1.0

12/21/2015

Didn't last very long.

This was installed as a upgraded appliance package when I bought the

This product has been discontinued, but there may be limited availability at our local retailer. Please visit our [Fully Integrated Category](#) page to view all of our current models.

[REGISTER THIS PRODUCT >](#)

[MANUALS & LITERATURE >](#)

[EXTENDED SERVICE PLANS >](#)

[SCHEDULE SERVICE >](#)

1. (2) Among leading premium brands, with rinse aid.

Was this review helpful? Yes / No You may also flag this review

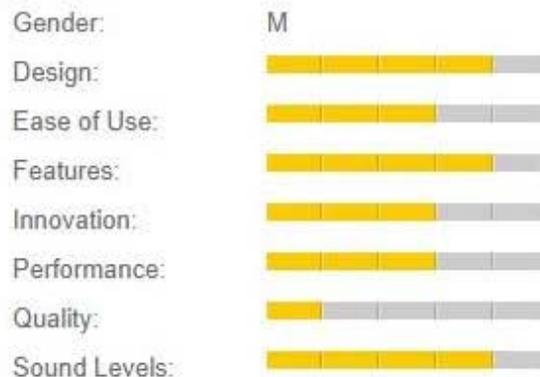
By Aaron
From Arizona

★★★★★ 10

9/15/2015

Upper Rack Problem

The dishwasher upper rack has been an issue about 8 months after purchase. The parts are plastic and have broken. I too found out that they would not cover under warranty. Had to purchase parts in order to conveniently use the product properly. Hopefully, they will fix this issue with future products and gain back customer confidence.



No, I would not recommend this to a friend

(2 of 2 customers found this review helpful)

Was this review helpful? Yes / No You may also flag this review

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[REGISTER THIS PRODUCT >](#)

[MANUALS & LITERATURE >](#)

[EXTENDED SERVICE PLANS >](#)

[SCHEDULE SERVICE >](#)

1. (2) Among leading premium brands, with rinse aid.

24-Inch 4-Cycle/6-Optio

www.kitchenaid.com/shop/-[KUDS30FXSS]-402324/KUDS30FXSS/#pr-header-back-to-top-link

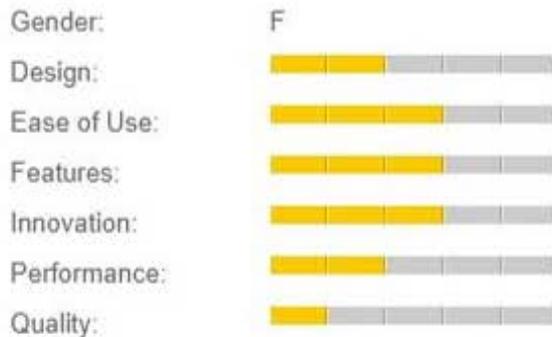
By Unhappyconsumer2
From Atlanta, GA

★★★★★ 2.0

6/21/2014

Poor quality parts!!!

We bought this unit in January of 2011 (to replace the 8 year old Kitchen Aid that was put in our home from our builder) and have had consistent problems with it ever since. The upper rack is junk!! We have had it replaced four times in 3 1/2 years (only once covered with warranty.) Two different repair companies have said how many of these they have to frequently replace. Now at only 3 1/2 years of use, the control board is malfunctioning so the dry cycle doesn't work. We are kicking this junk out of here and replacing with a better quality brand. We will NEVER purchase Kitchen Aid appliances again!!!!!!!



No, I would not recommend this to a friend

(2 of 2 customers found this review helpful)

Was this review helpful? / You may also flag this review

This product has been discontinued, but there may be limited availability at our local retailer. Please visit our Fully Integrated Category page to view all of our current models.

- [REGISTER THIS PRODUCT >](#)
- [MANUALS & LITERATURE >](#)
- [EXTENDED SERVICE PLANS >](#)
- [SCHEDULE SERVICE >](#)

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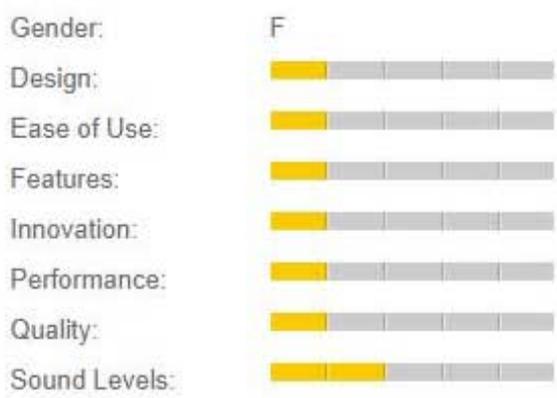


By NeverAgain4AsLongAs... 1.0
From Chico, CA

12/24/2013

Rack repair will cost you a fortune.

I have had this dishwasher for two years. It cleans nicely if you use the recommended detergent. However, small plastic parts for the adjustable racks break every 3 - 4 months and they cost over \$20 apiece. Completely disappointed in KitchenAid. Same with my oven, which blows a fuse every time I use the self clean cycle. Have to use chemical oven cleaner now. What happened to this brand.



No, I would not recommend this to a friend

(2 of 2 customers found this review helpful)

Was this review helpful? Yes / No You may also flag this review

This product has been discontinued, but there may be limited availability at our local retailer. Please visit our [Fully Integrated Category](#) page to view all of our current models.

[REGISTER THIS PRODUCT >](#)

[MANUALS & LITERATURE >](#)

[EXTENDED SERVICE PLANS >](#)

[SCHEDULE SERVICE >](#)

1. (2) Among leading premium brands, with rinse aid.

24-Inch 4-Cycle/6-Optio x

www.kitchenaid.com/shop/-[KUDS30FXSS]-402324/KUDS30FXSS/#pr-header-back-to-top-link

Reviewed by 100 customers

Sort by Newest

By Abrush
From Pittsburgh, PA,
 USA



11/19/2013

Great dishwasher if the top rack didn't BREAK OVER AND OVER

In the 2 and a half years I've had this dishwasher the top rack adjusters have broken 6 times (each side has broken 3 times). It's crazy that a high end dishwasher like this would have the entire top rack suspended by tiny little plastic pins and wheels. Upon being heated and reheated the plastic becomes brittle and breaks causing the entire top rack to collapse.

I'd encourage you to read the reviews on Amazon before purchasing as dozens of other reviews have said the same thing.

Otherwise, the dishwasher is nice and does a fine job, as long as it has Rinse Aid. I would have nothing bad to say about it if it weren't for those blasted wheels, and I NEVER take the time to write reviews!



No, I would not recommend this to a friend

(4 of 4 customers found this review helpful)

Was this review helpful? Yes / No You may also flag this review

This product has been discontinued, but there may be limited availability at our local retailer. Please visit our [Fully Integrated Category](#) page to view all of our current models.

[REGISTER THIS PRODUCT >](#)

[MANUALS & LITERATURE >](#)

[EXTENDED SERVICE PLANS >](#)

[SCHEDULE SERVICE >](#)

1. (2) Among leading premium brands, with rinse aid.

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 37 of 46

Top 834 Complaints and X

Secure | https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=13

KitchenAid Dishwashers does NOT participate in the ConsumerAffairs accreditation program. [Learn More](#)

CONSUMERAFFAIRS

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C of East New Market, MD on July 2, 2013

Satisfaction Rating



When I pulled the top rack out to unload it, the left side collapsed without any warning, spilling dishes and glasses down onto the crockery in the bottom rack and out onto the floor. When I looked for the cause, it was obvious that one of the two flimsy plastic "spring" pegs that retain each wheel of the upper rack on its axle had broken. This allowed the wheel to pull off the axle and thereby allow the entire left side of the top rack to collapse. It seems to me the axles on the rack adjuster (part number W10350376) are very poorly designed and is not made as solidly as the wheels on the lower rack. This is despite the fact that both upper and lower racks are of the same dimensions and so to me as an average consumer, both should be able to support a full load of dishes.

Helpful? Yes | No

Top 834 Complaints and ×

Secure | https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=9

KitchenAid Dishwashers does NOT participate in the ConsumerAffairs accreditation program. [Learn More](#)

CONSUMERAFFAIRS Consumer News Buyers Guides For Businesses [Write a review](#) Search Log in

 darrell of Livermore, CA on Nov. 5, 2014 Satisfaction Rating
★☆☆☆☆

2/10/13 paid \$1,000. for KitchenAid Dishwasher + extended warranty. 10/12/2014 upper tray fell; plastic clips broken, glasses everywhere. Called LOWE'S. Told repair facility will be here in 2 Days. Asked about correction for plastic clips, told there are none. Same clips to be reinstalled... Not good answer. Called LOWE'S. No help, runaround, dance with me. Feed me fertilizer, thinking I am a plant. Unhappy man, unhappy wife. Calling 7-On Your Side - television news program. If no warranty, my cost at \$485.75, every 18 months. Cannot extend warranty. Do not buy KitchenAid Dishwasher.

Helpful? Yes | No

Case 3:17-cv-05436-JST Document 24-1 Filed 11/06/17 Page 39 of 46

Top 834 Complaints and ×

Secure | https://www.consumeraffairs.com/homeowners/kit_dishwasher.html?page=8

KitchenAid Dishwashers does NOT participate in the ConsumerAffairs accreditation program. [Learn More](#)

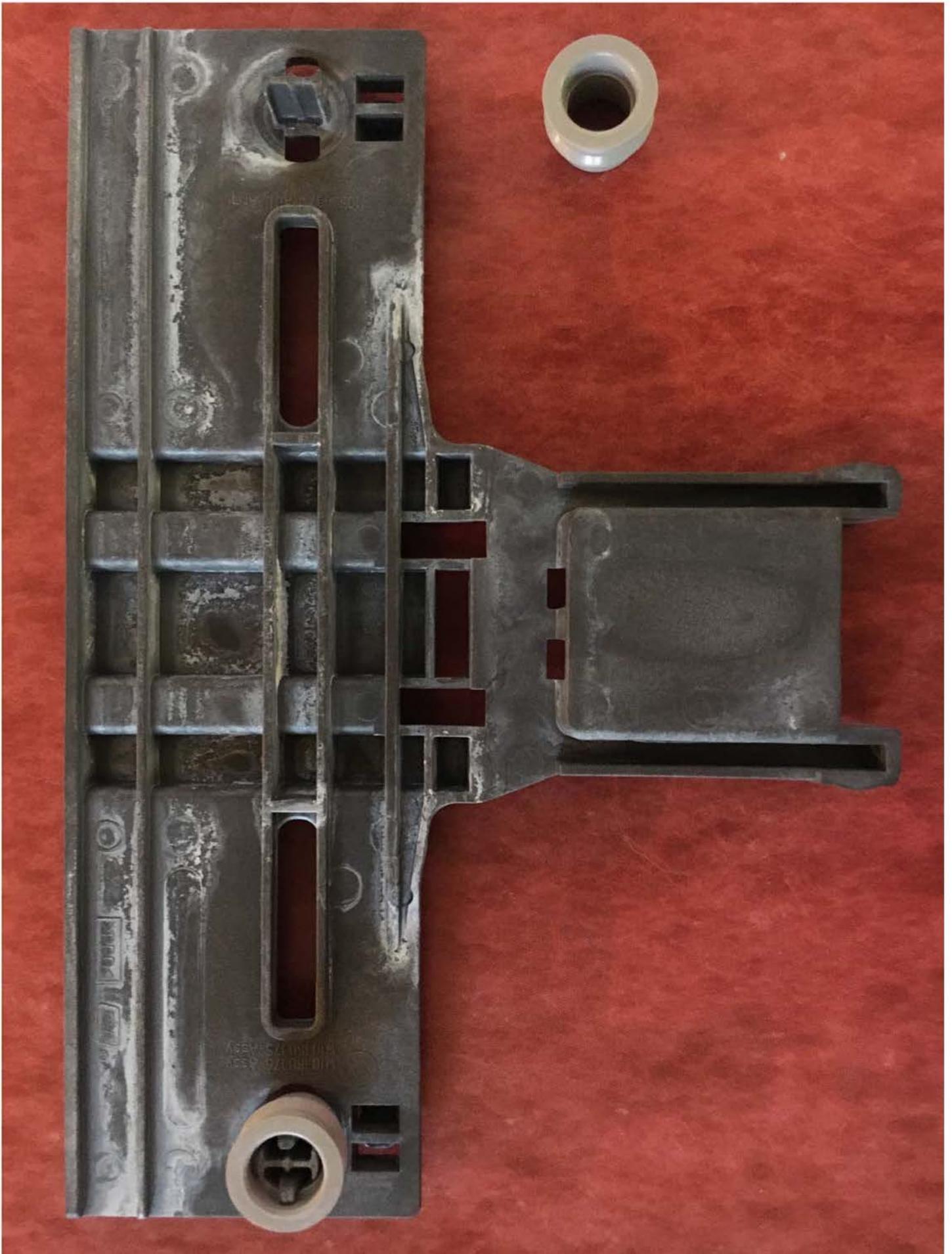
CONSUMERAFFAIRS News Guides For Businesses [Write a review](#) [Log in](#)

 Richard of Eclectic, AL on Jan. 3, 2015 *Satisfaction Rating* ★☆☆☆☆

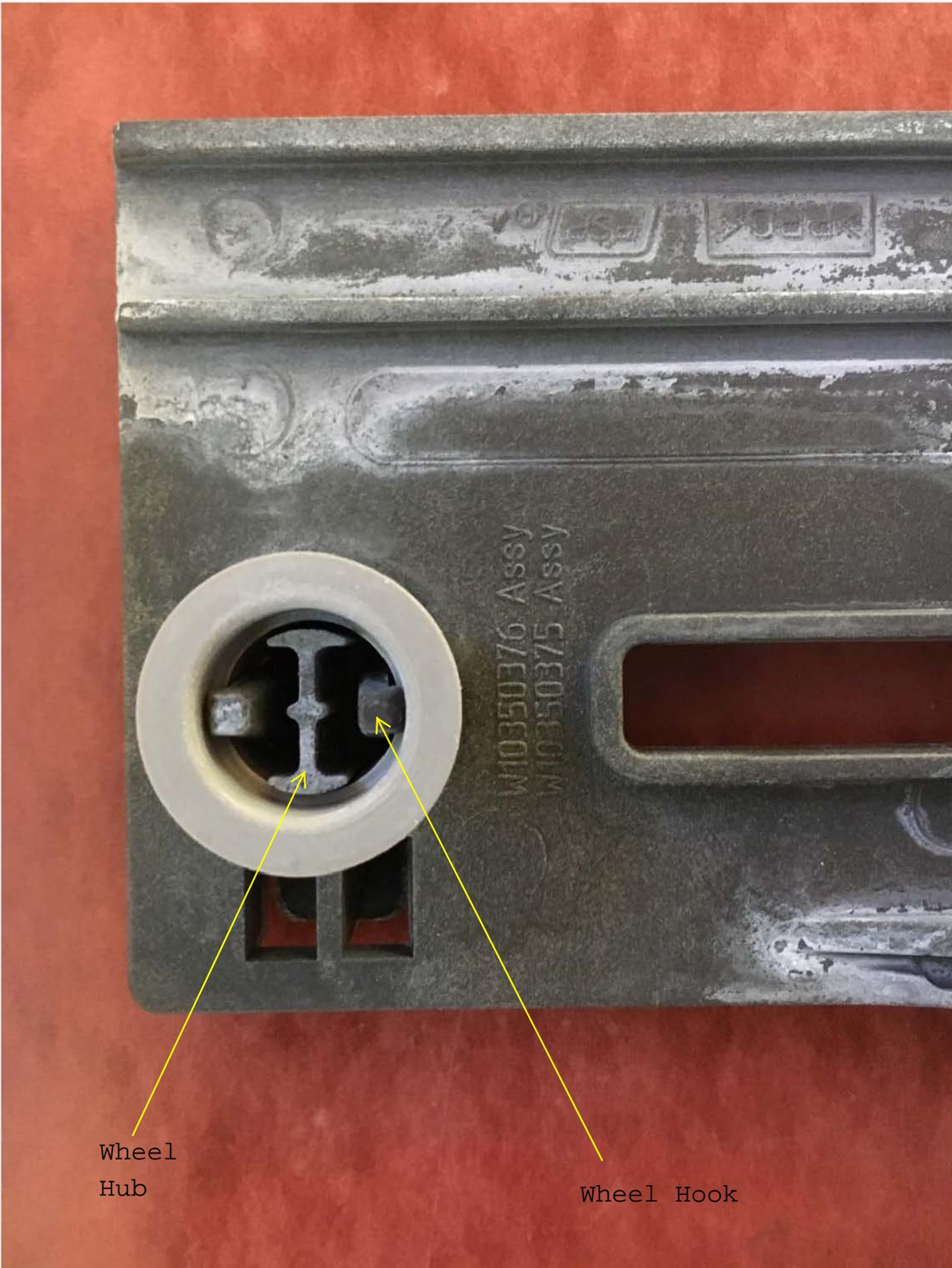
As noted in many other reviews there is a design issue with the upper carriage. My wheels fell off New Years Eve and the upper basket fell down breaking 8 champagne glasses... several hundred dollars in broken glasses... dishwasher is 2 years old. Very unhappy.

Helpful? Yes No

EXHIBIT E



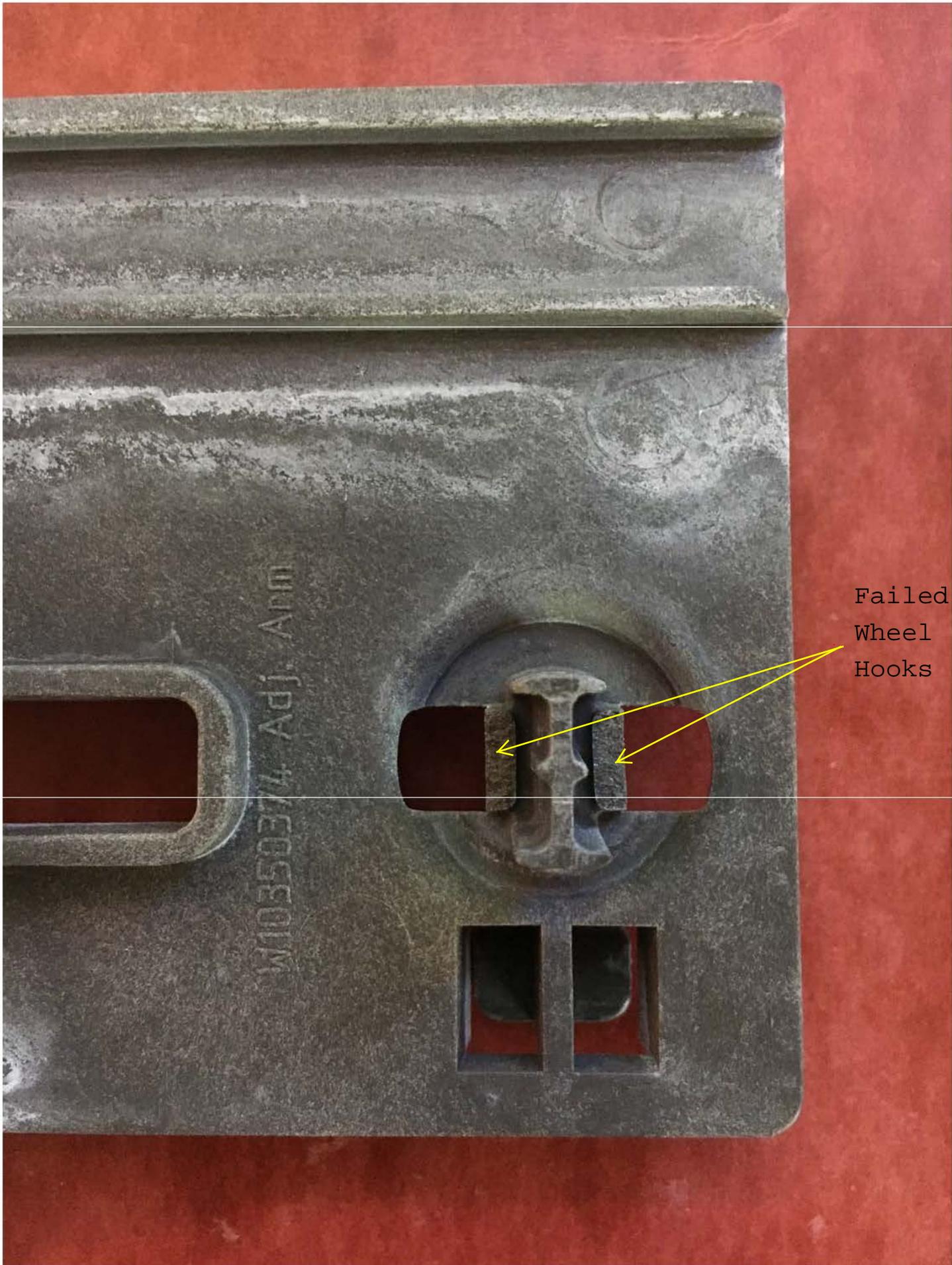
Failed Rack Assembly



Wheel
Hub

Wheel Hook

Wheel remains attached.



Failed
Wheel
Hooks

Wheel has detached.

EXHIBIT F

1 David M. Birka-White (State Bar No. 85721)
dbw@birka-white.com
2 Mindy M. Wong (State Bar No. 267820)
mwong@birka-white.com
3 BIRKA-WHITE LAW OFFICES
65 Oak Court
4 Danville, CA 94526
Telephone: (925) 362-9999
5 Facsimile: (925) 362-9970

6 N. Scott Carpenter (*Pro Hac Vice*)
7 scarpenter@cstriallaw.com
Rebecca Bell-Stanton (*Pro Hac Vice*)
8 rstanton@cstriallaw.com
Carpenter & Schumacher, P.C.
9 2701 Dallas Parkway, Suite 570
Plano, TX 75093
10 Telephone: (972) 403-1133
Facsimile: (972) 403-0311
11

12 *Attorneys for Plaintiffs*
JAMES BODLEY AND KYLE MATSON

13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 JAMES BODLEY AND KYLE MATSON, on
behalf of themselves and all others similarly
17 situated,

18 Plaintiff,

19 v.

20 WHIRLPOOL CORPORATION., and DOES
1 through 10, inclusive,

21 Defendants.
22
23
24
25
26
27
28

CASE NO. 3:17-cv-05436-JST

**FIRST AMENDED COMPLAINT
FOR DAMAGES**

CLASS ACTION

JURY TRIAL DEMANDED

BIRKA-WHITE
LAW OFFICES

1 I, JAMES BODLEY, declare as follows:

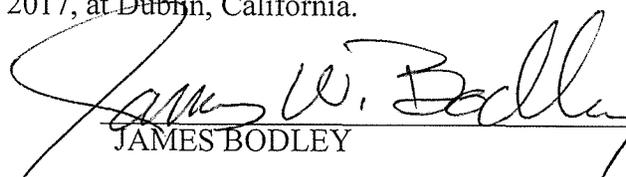
2 1. I am a Plaintiff and proposed class representative in this case. I have personal
3 knowledge of the matters set forth below, except as to those matters stated herein which are based
4 on information and belief, which matters I believe to be true. If called to testify, I could and
5 would testify competently to these matters herein included.

6 2. I am informed and believe that venue is proper in this court under Civil Code
7 § 1780(d) because all transactions giving rise to this lawsuit occurred in Alameda County and
8 KitchenAid marketed and sold its dishwashers throughout the State of California.

9 I declare under penalty of perjury under the laws of the State of California that the
10 foregoing is true and correct.

11 Executed this ~~4~~ day of August, 2017, at Dublin, California.

12 September 6

13 
14 JAMES BODLEY

15
16
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18
19
20
21
22
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25
26
27
28

EXHIBIT

D

CARPENTER & SCHUMACHER, P.C.

N. Scott Carpenter*
Managing Partner

Craig M. Schumacher**
Partner

Rebecca E. Bell-Stanton***
Partner

Douglas C. Heuvel

Attorneys and Counselors at Law

Parkway Centre IV
2701 North Dallas Parkway, Suite 570
Plano, Texas 75093
(972) 403-1133
Facsimile (972) 403-0311
www.cstriallaw.com

Mathew E. Mulkey
Anthony R. LaScalea
Matthew D. Warner

*Also Licensed In Oklahoma
**Also Licensed In Arkansas
***Also Licensed In Pennsylvania

June 12, 2017

**NOTICE OF VIOLATION OF
CONSUMER LEGAL REMEDIES ACT ("CLRA") AND BREACH OF WARRANTY**

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4752

KITCHENAID, INC.
c/o WHIRLPOOL CORPORATION
Mr. Jeff Fettig, CEO
2000 M-63, Tax Dept.
Benton Harbor, MI 49022

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4738

SEARS, ROEBUCK, & CO.
Mr. Edward S. Lampert, CEO
3333 Beverly Road, B2-116B
Hoffman Estates, IL 60179

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4745

KITCHENAID, INC.
c/o CT CORPORATION SYSTEM
818 W 7th Street, Suite 930
Los Angeles, CA 90017

Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4721

SEARS, ROEBUCK, & CO.
c/o CT CORPORATION SYSTEM
818 W 7th Street, Suite 930
Los Angeles, CA 90017

Re: KitchenAid Dishwashers

To Whom It May Concern:

Pursuant to the California Consumers Legal Remedies Act ("CLRA"), California Civil Code § 1750, et. seq., and specifically § 1782(a)(1)(2), Plaintiffs, Mr. James Bodley and Ms. Kyle Matson, on behalf of themselves and all others similarly situated, hereby notifies you that KitchenAid, Inc. ("KitchenAid") and Sears, Roebuck, & Co. ("Sears") violated California Civil Code § 1770. Such violation arises from the advertising and selling of KitchenAid dishwashers equipped with a lower and/or upper dishrack roller assembly bearing part numbers

#WW10712395 and #W10712394 (“defective assembly”), which are defective and not in conformance with the representations to Plaintiffs, thousands of California consumers, as well as consumers throughout the United States. This conduct includes, but is not limited to, the following violations of § 1770:

1. KitchenAid and Sears represented that KitchenAid dishwashers had benefits or characteristics that it did not actually have. Civ. Code § 1770(a)(5);
2. KitchenAid and Sears represented that KitchenAid dishwashers were of a particular standard or quality when it was of another. Civ. Code § 1770(a)(7); and
3. KitchenAid’s written warranty violates § 1770 (a)(19) by including unconscionable provisions including, without limitation: (1) purported limitations in the remedies available upon breach, the exclusion of incidental and consequential damages and the limitation of the amount of recoverable damages; and (2) purported exclusions of implied warranties.

The KitchenAid dishwasher models manufactured, designed, marketed, and sold by KitchenAid and Sears contain defective upper rack assemblies that fail and cause the dishwasher to be inoperable. The pertinent dishwasher models utilize plastic parts in the top rack slide mechanism. These parts prematurely fail causing the axles to separate from the wheels. The loaded top rack can fall onto the door or lower rack, causing glassware to break and presenting a substantial safety hazard. The design of the rack assembly, wheel, hub, and hook cannot withstand normal use. Once the defective assembly breaks, the dishwasher no longer works requiring replacement. Notwithstanding its knowledge of the defect, KitchenAid and Sears continued the sale of dishwashers without disclosing the defect or safety risk to consumers. Had KitchenAid and Sears disclosed the known facts Plaintiffs and consumers would not have purchased a KitchenAid dishwasher.

Mr. Bodley purchased a brand-new home in 2012 with a KitchenAid dishwasher (model No. KUDS30FXSS5). The upper rack assembly in Mr. Bodley’s dishwasher failed on or about April 11, 2017. He purchased replacement parts from Sears to repair his dishwasher at a cost of \$ 104.53. He is unable to install the replacement parts himself and will have to pay a technician to install the assembly.

Ms. Kyle Matson purchased a home in 2013 with a KitchenAid dishwasher (model No. KUDS30FXSS5). The upper rack assembly in Ms. Matson’s dishwasher failed in 2016. She too purchased replacement parts from Sears to repair her dishwasher.

Plaintiffs were not aware of the defect in their KitchenAid dishwasher until the upper rack assemblies suddenly and unexpectedly collapsed. The replacement assembly offered by KitchenAid and Sears is inadequate in that it does not repair the design defect in the original equipment assembly. It is also unlawful to require consumers to purchase and install a similarly defective replacement assembly. The cost to purchase and install the replacement assembly is an expense borne only by the Plaintiffs and all other similarly situated consumers at a cost of approximately \$200.

The defective assembly components can be identified by those appliances requiring replacement adjuster kits containing part W10712394 or W10712395. Although termed an "upgrade" for purposes of the ongoing sale of the W10712394 and W10712395 Adjuster Assembly Kits, the purchase of these additional kits is necessary for the dishwasher to function as represented.

This notice applies to all KitchenAid and other similarly designed dishwashers, including but not limited to dishwashers sold under the Whirlpool and Kenmore brands, which incorporate the part numbers W10712394, W10712395 and other similarly designed and manufactured parts.

Plaintiffs on behalf of themselves and all others similarly situated, hereby demands that KitchenAid and/or Sears: (1) pay all costs required to investigate, repair, and replace all of the defective upper assembly rack systems utilized in Whirlpool, KitchenAid, and Kenmore dishwashers; and (2) provide notice to consumers of the product defect set forth in this letter.

This letter also constitutes a notice on behalf of Plaintiffs and all persons similarly situated of the breach by Whirlpool and Sears of its express warranties and the implied warranties of merchantability and fitness for use.

Additionally, this letter serves as a demand that you preserve and maintain all of the following records, including electronically stored information (ESI) and data, pending resolution of this matter:

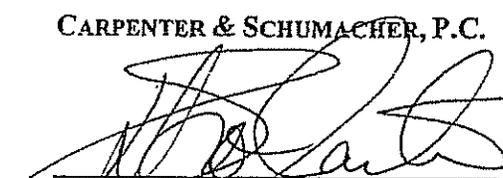
1. All internal manuals, written policies, directives, memoranda, correspondence, electronic mail, and other records of communication regarding all dishwashers manufactured with the defective assemblies bearing part numbers W10712394 and W10712395, or similarly designed or manufactured parts;
2. All advertising and marketing materials disseminated to consumers, retailers, plumbing contractors, and/or distributors that discuss or concern the assemblies referenced above;
3. Any complaints from any source concerning defective assemblies bearing part number W10712394 or W10712395, or similarly designed or manufactured parts;
4. All documents which reflect the sale of the Whirlpool, KitchenAid, and Kenmore dishwashers that contain part numbers W10712394 and W10712395 referenced above, or similarly designed or manufactured parts, in the United States, including manufacturing dates and model numbers;
5. All documents which reflect the materials used to manufacture the defective assemblies and all replacement assemblies from any source, including but not limited to Whirlpool and its suppliers; and

6. All listing agreements, testing records, and quality control records related to the assemblies bearing part number W10712394 or W10712395.

If you have any questions regarding this notice and demand, please contact the undersigned counsel at (844) 370-1133.

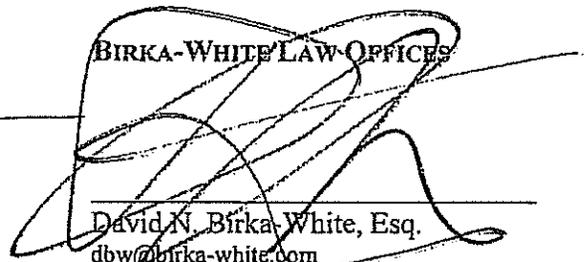
Sincerely,

CARPENTER & SCHUMACHER, P.C.



N. Scott Carpenter, Esq.
scarpenter@cstriallaw.com

BIRKA-WHITE LAW OFFICES



David N. Birka-White, Esq.
dbw@birka-white.com

NSC:brh

Case 1:08-cv-00854-PJM-RSK
 Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
 Print your name and address on the reverse so that we can return the card to you.
 Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
 SEARS, ROEBUCK, & Co.
 Mr. Edward S. Lampert, CEO
 3333 Beverly Road, B2-116B
 Hoffman Estates, IL 60179

2. Article Number
 (Transfer from service label) 7012 2920 0001 6275 4738

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

A. Signature
 B. Received by (Printed Name)
 C. Date of Delivery
 D. Is delivery address different from item 1? If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.
 4. Restricted Delivery? (Extra Fee) Yes

7012 2920 0001 6275 4738

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)
 For delivery information visit our website at www.usps.com
OFFICIAL USE

Postage \$
 Certified Fee
 Return Receipt Fee (Endorsement Required)
 Restricted Delivery Fee (Endorsement Required)
 Total Postage & Fees \$
 Postmark Here
 Sent To SEARS, ROEBUCK, & Co.
 Mr. Edward S. Lampert, CEO
 3333 Beverly Road, B2-116B
 Hoffman Estates, IL 60179
 Street, Apt. or PO Box
 City, State

SENDER: COMPLETE THIS SECTION
 Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
 Print your name and address on the reverse so that we can return the card to you.
 Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
 SEARS, ROEBUCK, & Co.
 c/o CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017

2. Article Number
 (Transfer from service label) 7012 2920 0001 6275 4721

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY
 A. Signature
 B. Received by (Printed Name)
 C. Date of Delivery
 D. Is delivery address different from item 1? If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.
 4. Restricted Delivery? (Extra Fee) Yes

7012 2920 0001 6275 4721

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)
 For delivery information visit our website at www.usps.com
OFFICIAL USE

Postage \$
 Certified Fee
 Return Receipt Fee (Endorsement Required)
 Restricted Delivery Fee (Endorsement Required)
 Total Postage & Fees \$
 Postmark Here
 Sent To SEARS, ROEBUCK, & Co.
 c/o CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017
 Street, Apt. or PO Box
 City, State

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

KITCHENAID, INC.
 C/O CT CORPORATION SYSTEM
 818 W 7th Street, Suite 930
 Los Angeles, CA 90017

2. Article Number
 (Transfer from service label) **7012 2920 0001 6275 4745**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

KITCHENAID, INC.
 C/O WHIRLPOOL CORPORATION
 Mr. Jeff Fettig, CEO
 2000 M-63, Tax Dept.
 Benton Harbor, MI 49022

2. Article Number
 (Transfer from service label) **7012 2920 0001 6275 4752**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

CT CORPORATION SYSTEM

A. Signature Agent Addressee

B. Received by (Printed Name) **818 West Seventh Street Suite 930 Los Angeles, CA 90017**

C. Date of Delivery **JUN 16 2017**

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent Addressee
x R. Hessler

B. Received by (Printed Name) **R. Hessler**

C. Date of Delivery **6-16-17**

D. Is delivery address different from item 1? Yes No
 If YES, enter delivery address below:

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage \$

Certified Fee

Return Receipt Fee (Endorsement Required)

Restricted Delivery Fee (Endorsement Required)

Total Postage & Fees \$

Postmark Here

Sent To **KITCHENAID, INC.**
C/O CT CORPORATION SYSTEM
818 W 7th Street, Suite 930
Los Angeles, CA 90017

PS Form 3811, February 2004

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage \$

Certified Fee

Return Receipt Fee (Endorsement Required)

Restricted Delivery Fee (Endorsement Required)

Total Postage & Fees \$

Postmark Here

Sent To **KITCHENAID, INC.**
C/O WHIRLPOOL CORPORATION
Mr. Jeff Fettig, CEO
2000 M-63, Tax Dept.
Benton Harbor, MI 49022

PS Form 3811, February 2004

7012 2920 0001 6275 4745

7012 2920 0001 6275 4752

EXHIBIT

E

CARPENTER & SCHUMACHER, P.C.

N. Scott Carpenter*
Managing Partner

Craig M. Schumacher**
Partner

Rebecca E. Bell-Stanton***
Partner

Douglas C. Heuvel

Attorneys and Counselors at Law

Parkway Centre IV
2701 North Dallas Parkway, Suite 570
Plano, Texas 75093
(972) 403-1133
Facsimile (972) 403-0311
www.cstriallaw.com

Mathew E. Mulkey
Anthony R. LaScalea
Matthew D. Warner

*Also Licensed in Oklahoma
**Also Licensed in Arkansas
***Also Licensed in Pennsylvania

October 11, 2017

**NOTICE OF VIOLATION OF
CONSUMER LEGAL REMEDIES ACT ("CLRA") AND BREACH OF WARRANTY**

*Via Certified Mail
Return Receipt Requested
Letter No.: 7012 2920 0001 6275 4929*

KITCHENAID, INC.
553 Benson Road
Benton Harbor, MI 49022-2692

Re: KitchenAid Dishwashers

To Whom It May Concern:

Pursuant to the California Consumers Legal Remedies Act ("CLRA"), California Civil Code § 1750, et. seq., and specifically § 1782(a)(1)(2), Plaintiffs, Mr. James Bodley and Ms. Kyle Matson, on behalf of themselves and all others similarly situated, hereby notifies you that KitchenAid, Inc. ("KitchenAid") and Sears, Roebuck, & Co. ("Sears") violated California Civil Code § 1770. Such violation arises from the advertising and selling of KitchenAid dishwashers equipped with a lower and/or upper dishrack roller assembly bearing part numbers

#WW10712395 and #W10712394 (“defective assembly”), which are defective and not in conformance with the representations to Plaintiffs, thousands of California consumers, as well as consumers throughout the United States. This conduct includes, but is not limited to, the following violations of § 1770:

1. KitchenAid and Sears represented that KitchenAid dishwashers had benefits or characteristics that it did not actually have. Civ. Code § 1770(a)(5);
2. KitchenAid and Sears represented that KitchenAid dishwashers were of a particular standard or quality when it was of another. Civ. Code § 1770(a)(7); and
3. KitchenAid’s written warranty violates § 1770 (a)(19) by including unconscionable provisions including, without limitation: (1) purported limitations in the remedies available upon breach, the exclusion of incidental and consequential damages and the limitation of the amount of recoverable damages; and (2) purported exclusions of implied warranties.

The KitchenAid dishwasher models manufactured, designed, marketed, and sold by KitchenAid and Sears contain defective upper rack assemblies that fail and cause the dishwasher to be inoperable. The pertinent dishwasher models utilize plastic parts in the top rack slide mechanism. These parts prematurely fail causing the axles to separate from the wheels. The loaded top rack can fall onto the door or lower rack, causing glassware to break and presenting a substantial safety hazard. The design of the rack assembly, wheel, hub, and hook cannot withstand normal use. Once the defective assembly breaks, the dishwasher no longer works requiring replacement. Notwithstanding its knowledge of the defect, KitchenAid and Sears continued the sale of dishwashers without disclosing the defect or safety risk to consumers. Had KitchenAid and Sears disclosed the known facts Plaintiffs and consumers would not have purchased a KitchenAid dishwasher.

Mr. Bodley purchased a brand-new home in 2012 with a KitchenAid dishwasher (model No. KUDS30FXSS5). The upper rack assembly in Mr. Bodley’s dishwasher failed on or about April 11, 2017. He purchased replacement parts from Sears to repair his dishwasher at a cost of \$ 104.53. He is unable to install the replacement parts himself and will have to pay a technician to install the assembly.

Ms. Kyle Matson purchased a home in 2013 with a KitchenAid dishwasher (model No. KUDS30FXSS5). The upper rack assembly in Ms. Matson’s dishwasher failed in 2016. She too purchased replacement parts from Sears to repair her dishwasher.

Plaintiffs were not aware of the defect in their KitchenAid dishwasher until the upper rack assemblies suddenly and unexpectedly collapsed. The replacement assembly offered by KitchenAid and Sears is inadequate in that it does not repair the design defect in the original equipment assembly. It is also unlawful to require consumers to purchase and install a similarly defective replacement assembly. The cost to purchase and install the replacement assembly is an expense borne only by the Plaintiffs and all other similarly situated consumers at a cost of approximately \$200.

The defective assembly components can be identified by those appliances requiring replacement adjuster kits containing part W10712394 or W10712395. Although termed an "upgrade" for purposes of the ongoing sale of the W10712394 and W10712395 Adjuster Assembly Kits, the purchase of these additional kits is necessary for the dishwasher to function as represented.

This notice applies to all KitchenAid and other similarly designed dishwashers, including but not limited to dishwashers sold under the Whirlpool and Kenmore brands, which incorporate the part numbers W10712394, W10712395 and other similarly designed and manufactured parts.

Plaintiffs on behalf of themselves and all others similarly situated, hereby demands that KitchenAid and/or Sears: (1) pay all costs required to investigate, repair, and replace all of the defective upper assembly rack systems utilized in Whirlpool, KitchenAid, and Kenmore dishwashers; and (2) provide notice to consumers of the product defect set forth in this letter.

This letter also constitutes a notice on behalf of Plaintiffs and all persons similarly situated of the breach by Whirlpool and Sears of its express warranties and the implied warranties of merchantability and fitness for use.

Additionally, this letter serves as a demand that you preserve and maintain all of the following records, including electronically stored information (ESI) and data, pending resolution of this matter:

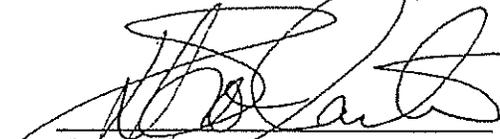
1. All internal manuals, written policies, directives, memoranda, correspondence, electronic mail, and other records of communication regarding all dishwashers manufactured with the defective assemblies bearing part numbers W10712394 and W10712395, or similarly designed or manufactured parts;
2. All advertising and marketing materials disseminated to consumers, retailers, plumbing contractors, and/or distributors that discuss or concern the assemblies referenced above;
3. Any complaints from any source concerning defective assemblies bearing part number W10712394 or W10712395, or similarly designed or manufactured parts;
4. All documents which reflect the sale of the Whirlpool, KitchenAid, and Kenmore dishwashers that contain part numbers W10712394 and W10712395 referenced above, or similarly designed or manufactured parts, in the United States, including manufacturing dates and model numbers;
5. All documents which reflect the materials used to manufacture the defective assemblies and all replacement assemblies from any source, including but not limited to Whirlpool and its suppliers; and

6. All listing agreements, testing records, and quality control records related to the assemblies bearing part number W10712394 or W10712395.

If you have any questions regarding this notice and demand, please contact the undersigned counsel at (844) 370-1133.

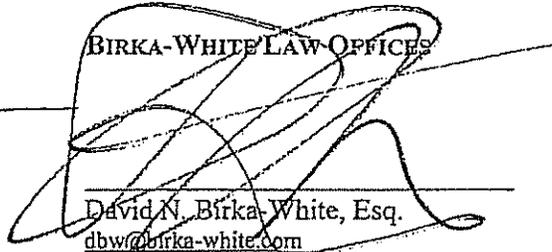
Sincerely,

CARPENTER & SCHUMACHER, P.C.



N. Scott Carpenter, Esq.
scarpenter@cstriallaw.com

BIRKA-WHITE LAW OFFICES



David N. Birka-White, Esq.
dbw@birka-white.com

NSC:brh

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Signature X <i>R. H. Harkes</i> <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: KitchenAid, Inc. 553 Benson Road Benton Harbor, MI 49022-2692	B. Received by (Printed Name) <i>R. Harkes</i>	C. Date of Delivery 10-16-17
2. Article Number (Transfer from service label)	D. Is delivery address different from Item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
	7012 2920 0001 6275 4929	

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

U.S. Postal Service CERTIFIED MAIL RECEIPT (Domestic Mail Only. No Insurance Coverage Provided)											
For delivery information, visit our website at www.usps.com											
7012 2920 0001 6275 4929	<table border="1"> <tr> <td>Postage</td> <td>\$</td> </tr> <tr> <td>Certified Fee</td> <td></td> </tr> <tr> <td>Return Receipt Fee (Endorsement Required)</td> <td></td> </tr> <tr> <td>Restricted Delivery Fee (Endorsement Required)</td> <td></td> </tr> <tr> <td>Total Postage & Fees</td> <td>\$</td> </tr> </table>	Postage	\$	Certified Fee		Return Receipt Fee (Endorsement Required)		Restricted Delivery Fee (Endorsement Required)		Total Postage & Fees	\$
Postage	\$										
Certified Fee											
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Restricted Delivery Fee (Endorsement Required)											
Total Postage & Fees	\$										
Postmark Here											
<table border="1"> <tr> <td>Sent To</td> <td>KitchenAid, Inc.</td> </tr> <tr> <td>Street, Apt. N or PO Box Nt</td> <td>553 Benson Road</td> </tr> <tr> <td>City, State, Z.</td> <td>Benton Harbor, MI 49022-2692</td> </tr> </table>		Sent To	KitchenAid, Inc.	Street, Apt. N or PO Box Nt	553 Benson Road	City, State, Z.	Benton Harbor, MI 49022-2692				
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Street, Apt. N or PO Box Nt	553 Benson Road										
City, State, Z.	Benton Harbor, MI 49022-2692										

EXHIBIT

F

1 David M. Birka-White (State Bar No. 85721)
dbw@birka-white.com
2 Mindy M. Wong (State Bar No. 267820)
mwong@birka-white.com
3 BIRKA-WHITE LAW OFFICES
65 Oak Court
4 Danville, CA 94526
Telephone: (925) 362-9999
5 Facsimile: (925) 362-9970

6 N. Scott Carpenter (*Pro Hac Vice*)
7 scarpenter@cstriallaw.com
Rebecca Bell-Stanton (*Pro Hac Vice*)
8 rstanton@cstriallaw.com
Carpenter & Schumacher, P.C.
9 2701 Dallas Parkway, Suite 570
Plano, TX 75093
10 Telephone: (972) 403-1133
11 Facsimile: (972) 403-0311

12 *Attorneys for Plaintiffs*
JAMES BODLEY AND KYLE MATSON

13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 JAMES BODLEY AND KYLE MATSON, on
behalf of themselves and all others similarly
17 situated,

18 Plaintiff,

19 v.

20 WHIRLPOOL CORPORATION., and DOES
1 through 10, inclusive,

21 Defendants.
22
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CASE NO. 3:17-cv-05436-JST

**FIRST AMENDED COMPLAINT
FOR DAMAGES**

CLASS ACTION

JURY TRIAL DEMANDED

BIRKA-WHITE

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I, JAMES BODLEY, declare as follows:

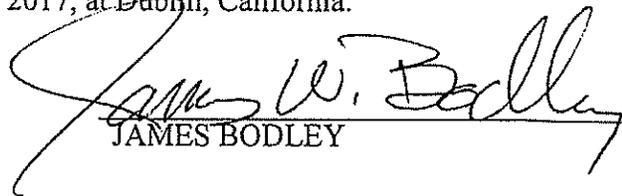
1. I am a Plaintiff and proposed class representative in this case. I have personal knowledge of the matters set forth below, except as to those matters stated herein which are based on information and belief, which matters I believe to be true. If called to testify, I could and would testify competently to these matters herein included.

2. I am informed and believe that venue is proper in this court under Civil Code § 1780(d) because all transactions giving rise to this lawsuit occurred in Alameda County and KitchenAid marketed and sold its dishwashers throughout the State of California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this ~~8~~ day of August, 2017, at Dublin, California.

September 6


JAMES BODLEY