C A N A D A

PROVINCE OF QUEBEC **S U P E R I O R C O U R T**

DISTRICT OF MONTREAL (Class Action)

Nº 500-06-001111-208/500-06-001155-213

FAY LEUNG

Representative Plaintiff

v.

UBER CANADA INC.

-and-

UBER B.V.

-and-

UBER PORTIER B.V.

-and-

UBER TECHNOLOGIES, INC.

-and-

UBER PORTIER CANADA, INC.

Defendants

BRIEF OF PROFESSOR PHIL LORD IN OPPOSITION TO THE PROPOSED CLASS ACTION SETTLEMENT (arts 579, 590 *Cpc*)

TO THE HONOURABLE PIERRE-C. GAGNON, SITTING AS CASE MANAGEMENT JUDGE, THE CLASS MEMBER RESPECTFULLY SUBMITS THE FOLLOWING:

A. Introduction

1. Phil Lord (hereinafter the "**Class Member**") files this Brief in opposition to the proposed class action settlement agreement, executed by the representative plaintiff, counsel

for the representative plaintiff, and agents of the defendants on the 23rd, 24th, and 26th days of November 2021 (hereinafter the "**Proposed Settlement**");[1]

2. As detailed below, the Class Member is a law professor in the province of Ontario;

3. The Class Member is domiciled at 9778 Camomille Street, Quebec, Quebec, G2B 0P2. He also maintains a residence in the province of Ontario;

4. The Class Member is a licensed attorney in the province of Quebec. The Class Member consents, and prefers, to be served electronically at the coordinates listed below, pursuant to articles 133 and 134 of the *Code of Civil Procedure*;[2]

5. During the period identified in the Proposed Settlement, the Class Member paid service and/or delivery fees on the defendants' platform for transactions conducted in the province of Quebec. He is therefore a member of the putative class;

6. The Class Member intends to appear in person at the hearing on the approval of the Proposed Settlement, preferably by a technological means. The Class Member is disposed to make oral submissions in English or French;

7. For the reasons that follow, the Class Member respectfully submits that the Proposed Settlement is not fair and reasonable, and is not in the best interests of class members;

B. The Class Member

8. The Class Member was born to a Francophone family in Quebec City;

9. Throughout his life and career, the Class Member benefitted from great opportunity in the province of Quebec;

10. The Class Member studied at Quebec's public schools, colleges, and universities. He was admitted to the McGill University Faculty of Law at the age of 18. Taxpayers funded almost entirely his education;

11. Upon graduation from the McGill University Faculty of Law, the Class Member practised civil and commercial litigation at a litigation boutique in Montreal;

12. The Class Member subsequently pursued an LL.M. at the McGill University Faculty of Law, with generous funding from the Canadian federal government. He was then a judicial law clerk at the Federal Court;

[1] This document is titled "Entente de règlement, transaction et quittance."
[2] CQLR c C-25.01.

13. The Class Member currently serves as a law professor at Lakehead University's Bora Laskin Faculty of Law, in Thunder Bay, Ontario;

14. The Class Member is called to the bar in the province of Quebec and in the American states of New York and Massachusetts. He is a governor of the Quebec Bar Foundation;

15. The Class Member holds three financial services designations and is a fellow of the Chartered Institute of Arbitrators;

16. As a result of his legal practice, work at the Federal Court, and research projects, the Class Member has developed a close familiarity with the rules governing class proceedings in the province of Quebec;

17. Given his busy schedule as a law student, lawyer, and law professor, the Class Member has spent tens of thousands of dollars on the defendants' platforms;

18. As a native Quebecer and member of the Quebec Bar, the Class Member has a broader interest in the adequate governance of class proceedings in the province of Quebec and in ensuring that the settlement of class proceedings safeguards the interests of class members;

19. The Class Member's current position affords him the time, independence, and flexibility necessary to prepare and file this Brief;

20. Given the amounts at issue in the Proposed Settlement, the Class Member respectfully draws the Court's attention to the fact that doing so would likely be prohibitively expensive for other class members;

C. The Overall Amount of the Proposed Settlement is Unreasonably Low

21. Pursuant to the Proposed Settlement, the defendants will issue credits of CAD 55,000 to charitable organisations;

22. This is, on its face, patently unreasonable;

23. The defendants' platforms appear to be widely used in the province of Quebec. The proposed class is broadly defined and encompasses several years. It likely includes a significant portion of Quebecers;

24. At paragraphs 50 and 51 of her Amended Application for Authorization to Institute a Class Action, the representative plaintiff recognises that she does not have sufficient information to estimate the size of the class. She nonetheless estimates the class to

include tens or hundreds of thousands of individuals, each of whom was allegedly charged illegal fees of several dollars *per transaction*;[3]

25. Even these figures likely significantly underestimate the size of the class. Evidence before the Ontario Superior Court of Justice in *Heller v Uber Technologies Inc* established that, over a period of just over nine years, 366,359 individuals provided delivery or driving services on the defendants' platforms;[4]

26. In other words, in the province of Ontario, hundreds of thousands of individuals *worked* for the defendants as independent contractors. Many more likely use the defendants' platforms as clients;

27. As of 2019, there were over 800,000 users of the defendants' platforms in Canada.[5] Usage appears to have grown significantly since, notably as a result of the COVID-19 pandemic;[6]

28. The proposed class action was settled prior to the authorisation stage.[7] The record before the Court is extremely sparse, and neither party had the opportunity to adduce relevant evidence that would sufficiently guide the Court as to the scope of the proposed class and of the class members' cumulative claims, which likely significantly exceed the amount of the Proposed Settlement;

29. With due respect to learned counsel for the parties, the Class Member strongly emphasises that only the defendants have this information. Neither the Court nor the representative plaintiff does;

30. In these circumstances, the Class Member respectfully emphasises that avoiding disclosure of this evidence can reasonably be assumed to have potentially motivated the defendants to settle the proposed class action at this early stage;

31. This Court is essentially asked to approve a settlement which affects the rights of an unknown yet significant number of plaintiffs for a nominal amount, none of which will go to class members;

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[3] See "Demande pour autorisation d'exercer une action collective et pour être représentante" of the representative plaintiff, dated May 21, 2021. While this document appears not be named in compliance with the *Regulation of the Superior Court of Québec in civil matters* (CQLR c C-25.01, r 0.2.4), it is an amended version of the same proceeding dated December 21, 2020. Proceedings in both court files (500-06-001111-208 and 500-06-001155-213) allege that fees of several dollars per transaction were charged.

[4] 2021 ONSC 5518 at paras 72-73. This figure includes both the Uber and Uber Eats applications. Of these individuals, 37.9% provided Uber Eats services, and 31.3% provided both Uber and Uber Eats services.

[5] See *Setoguchi v Uber BV*, 2021 ABQB 18 at para 89.

[6] See Exhibit P-8.

[7] *Code of Civil Procedure*, *supra* note 2, art 575.

32. Because class members will not receive a direct payment or credit, the defendants will likely never be required to disclose information they retained regarding the size of the class (and identity of class members), even for settlement administration purposes;

33. Counsel for the parties bear the burden of establishing that the Proposed Settlement is fair and in the best interests of class members;[8]

34. The mere fact that they came to a settlement does not establish that the settlement is reasonable;

35. In an often-cited passage of *Pellemans v Lacroix*, Justice André Prévost notes:

> L'analyse de ces critères constitue un exercice délicat puisque l'habituel débat contradictoire fait place à l'unanimité des parties qui ont signé la transaction et qui ont tout intérêt à la voir approuvée par le tribunal. D'une part, le juge n'a généralement qu'une connaissance limitée des circonstances et des enjeux du litige. D'autre part, il doit en principe encourager le règlement des litiges par la voie de la négociation, ceci étant généralement dans le meilleur intérêt des parties. Le Tribunal doit donc se montrer vigilant.[9]

36. At this highly preliminary stage, the risk of inadequate compensation to class members is correspondingly high;

37. As detailed below, even a cursory assessment of the jurisprudential criteria establishes that the Proposed Settlement should not be approved. The criteria include the probability of success on the merits, the nature and extent of the evidence on record, and the objections or recommendation of neutral third parties and class members;[10]

38. Counsel for the representative plaintiff will undoubtedly emphasise that success on the merits is unlikely or highly uncertain;

39. First, the evidence on record, and law on the relevant issues, simply do not support a claim of significant uncertainty. The representative plaintiff relies on expansive and stringent obligations imposed by the *Consumer Protection Act*, which prohibits charging a price higher than the advertised price,[11] making false or misleading representations,[12] and failing to disclose an important fact;[13]

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[8] See e.g. *Halfon v Moose International Inc*, 2017 QCCS 4300 at para 22 [*Halfon*].
[9] 2011 QCCS 1345 at para 21 [*Pellemans*].
[10] See *ibid* at para 20; *Halfon* at para 22.
[11] CQLR c P-40.1, s 224. The representative plaintiff also relies on s 12.
[12] *Ibid*, s 219.
[13] *Ibid*, s 228.

40. It bears emphasising that each of the relevant statutory provisions is broad in its language and its interpretation;

41. For example, section 219 requires that all representations made to a consumer be completely truthful.[14] This obligation applies to all representations made to a consumer, not solely those that lead a consumer to enter into a contract;[15]

42. The relevant standard is that of the "credulous and inexperienced" person.[16] This standard is lower than other standards employed by courts, such as those of the average or reasonably informed person;

43. Additionally, the Consumer Protection Act specifically provides for punitive damages;[17]

44. Given the facts alleged in the Amended Application for Authorization to Institute a Class Action,[18] the extremely sparse record before this Court, and the interpretation of the relevant statutory provisions, success on the merits is neither unlikely nor highly uncertain;

45. Even if this Court were to find that success on the merits is uncertain, this is true of all class proceedings, a significant portion of which get settled;[19]

46. The defendants are large corporations with major operations in the province of Quebec. Their solvency has not been questioned;[20]

47. Given the likely size of the proposed class, and magnitude of the cumulative claims, the defendants would continue to have a significant incentive to settle along the years-long path to a decision on the merits;[21]

48. Additionally, the defendants have retained sophisticated counsel and will incur substantial legal fees in defending against the proposed class action;

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[14] *Ibid*.
[15] See e.g. *Adams v Amex Bank of Canada*, 2009 QCCS 2695 at para 174 [*Adams*]; *Primo Bedding Company Inc v Air Canada*, 2019 QCCS 3333 at para 46. The Class Member discloses involvement in the latter case in 2019 as an associate at Renno Vathilakis inc.
[16] See *Richard v Time Inc*, 2012 SCC 8 at para 69. See also *Adams*, *supra* note 15 at para 126; *Richard v Time Inc*, 2007 QCCS 3390 at paras 45-47.
[17] *Consumer Protection Act*, *supra* note 11, s 272.
[18] *Supra* note 3.
[19] See Catherine Piché, *L'action collective: ses succès et ses défis* (Montreal: Themis, 2019) at 56. From an empirical survey, the author finds that a settlement is approved by the Court in 34.33% of class actions in Quebec.
[20] See e.g. *Pellemans* at para 22.
[21] See Piché, *supra* note 19 at 51 (finding that almost nine years elapse between before a judgment is rendered on the merits).

49. These factors weigh in favour of the representative plaintiff. As is ostensibly often the case in class proceedings, the defendants are incentivised to come to a settlement even if they are persuaded that they will prevail on the merits;

50. In light of these issues, the amount of the Proposed Settlement does not adequately reflect the risks and probability of success on the merits, especially given the sparse evidence on record;[22]

51. The jurisprudential criteria used to assess a proposed settlement also include the objection of class members or neutral third parties to a proposed settlement;[23]

52. As noted above, most class members likely lack the financial and other resources necessary to file briefs in opposition to the Proposed Settlement;

53. Members of the legal community in Quebec have little incentive to do the same;

54. Although the Class Member is a member of the proposed class, his main interest is in the adequate governance of class proceedings in the province of Quebec and in ensuring that the settlement of these proceedings safeguards the interests of class members;

55. These factors militate in favour of this Court affording particular weight to the submissions provided in this Brief and to submissions that may be provided by individual class members;

56. As of February 3, 2022, approximately one week after the notice was sent to class members, five individuals had already filed their notice of exclusion from the Proposed Settlement;

57. The Court is also required to assess the expertise and experience of the lawyers who recommend the Proposed Settlement;[24]

58. Given the legal fees of CAD 63,500 provided for in the Proposed Settlement and the absence of direct compensation to class members, the Court should be particularly "vigilant";[25]

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[22] As noted, these are criteria to weigh in assessing a proposed settlement. See *Pellemans* at para 20; *Halfon* at para 22.
[23] See *Pellemans* at para 20; *Halfon* at para 22.
[24] See *Pellemans* at para 20; *Halfon* at para 22.
[25] *Pellemans* at para 21. On the latter issue, see also *Pellemans* at para 22 ("L'ensemble des critères apparaissent, ici, satisfaits car […] les sommes obtenues par la transaction, ajoutées à celles déjà versées ou à venir, indemnisent les membres du groupe *pour la presque totalité des sommes* en capital qu'ils ont investies" [emphasis added].)

59. It bears emphasising, both symbolically and substantively, that the legal fees exceed the amount that will be distributed to charitable organisations (in lieu of class members) pursuant to the Proposed Settlement;

60. In class proceedings, counsel for a representative plaintiff generally has a personal incentive to settle proceedings expeditiously, which may not always align with the interests of class members;

61. This incentive, coupled with the specific circumstances of this case, exacerbate the risk of inadequate compensation to class members;

D. <u>The Form of Compensation Is Inadequate and Prejudicial to Class Members</u>

62. The Proposed Settlement adopts a highly unusual compensation method that is prejudicial to the interests of class members;

63. My colleague, Professor Catherine Piché of the Université de Montréal, has conducted a comprehensive empirical survey of *all* class actions in Quebec;[26]

64. She finds that cash compensation is used in 73 percent of class action settlements;[27]

65. In contrast, coupons or discounts are used in just 5 percent of settlements;[28]

66. Cash compensation is the rule, not the exception;

67. It is generally more efficient. Adopting cash compensation increases the likelihood that class members will receive the compensation to which they are entitled;

68. In class proceedings, an overall average of 56 percent of class members actually receive compensation;[29]

69. Given these statistics, choosing an appropriate form of compensation is necessary for class proceedings to advance (as they seek to) access to justice and equity;[30]

[26] See Piché, *supra* note 19.
[27] See *ibid* at 131.
[28] See *ibid* at 136.
[29] See *ibid* at 138.
[30] See e.g. *Bisaillon v Concordia University*, 2006 SCC 19 at para 16.

70. Compensation by way of coupons or discounts can benefit defendants by building customer loyalty.[31] This raises obvious concerns, as defendants are alleged to have engaged in illegal conduct;

71. Additionally, not all coupons or discounts are redeemed, which reduces the overall amount of compensation disbursed by defendants;[32]

72. The comments of Prof. Piché and other scholars on these issues were recently cited with approval in *Abihsira v Stubhub Inc*;[33]

73. Counsel for the parties bear the burden of justifying their unusual decision not to adopt cash compensation, as this decision is generally prejudicial to class members;

74. They have not done so;

75. Additionally, the Class Member respectfully submits that cash compensation is neither impossible nor impractical, as class members have likely used the defendants' platforms multiple times and as the defendants retain business records regarding their clients;

E. <u>Compensation to Third Parties Is Inadequate and Prejudicial to Class Members</u>

76. Even if counsel for the parties had adequately justified their decision not to use cash compensation, other forms of compensation are generally used to compensate *class members*, not third parties;

77. In other words, the credits which will be issued to charitable organisations could have instead been issued to class members;

78. Professor Piché finds that compensation to third parties is used in some 22 percent of class action settlements;[34]

79. She notes that this mode of compensation exacerbates the potential conflict of interests identified in the previous section;[35]

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[31] See Piché, *supra* note 19 at 135. See also Howard M Erichson, "Aggregation as Disempowerment: Red Flags in Class Action Settlements" (2017) 92:2 Notre Dame L Rev 859.
[32] See *ibid* at 135. See also Christopher R Leslie, "The Need to Study Coupon Settlements in Class Action Litigation" (2005) 18:4 Geo J Legal Ethics 1395.
[33] 2020 QCCS 2593 at paras 25-37. See also *Abihsira v Johnston*, 2019 QCCA 657 at para 68 [*Abihsira QCCA 2019*].
[34] See Piché, *supra* note 19 at 131.
[35] See *ibid.*

80. This form of compensation is useful when class members cannot be readily identified or where individual claims have a low dollar value, which would make the process of settlement administration prohibitively expensive;

81. As mentioned, we can reasonably assume that class members can be readily identified and reached from the defendants' business records. The credits could be issued to class members quickly and at a nominal cost;

82. There is therefore no apparent reason to resort to a mode of compensation through which class members, who were allegedly harmed by the defendants, receive no compensation;

83. The Proposed Settlement combines two unusual and prejudicial forms of compensation (respectively used in 22 percent and 5 percent of cases)[36] by providing for a payment to third parties *and* in the form of credits;

84. In summary, class members will receive *no* compensation. Charitable organisations will receive the nominal sum of CAD 55,000, but only in the form of credits. Therefore, the defendants will pay *even less* than CAD 55,000;[37]

F. Conclusion

85. For the foregoing reasons, the Class Member respectfully submits that the Proposed Settlement is not fair and reasonable, and is not in the best interests of class members;

86. It should therefore not be approved;

87. While the class action regime does not provide for a more tailored remedy at this stage, denying the settlement will not prejudice class members;

88. Counsel for the parties will get back to work;

89. They will engage in productive settlement negotiations, taking into account this Court's indication that their first attempt was not sufficient;

90. As they do, the proceedings will move forward, hopefully beyond the stage of documentary disclosure;

91. If approved, the Proposed Settlement has the potential to, at least symbolically, undermine the class action regime which millions of Quebecers rely on to seek justice;

[36] See *ibid* at 131, 136.
[37] See also *Abihsira QCCA 2019* at para 72.

92. That is why a law professor felt compelled to spend a dozen hours writing a Brief opposing it;

93. We can expect more of the parties. And we should;

FOR THESE REASONS, MAY IT PLEASE THE COURT:

DENY the Proposed Settlement.

QUEBEC, this 10th day of February 2022

M^tre Phil Lord
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Quebec, Quebec, G2B 0P2
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O.f. 1109.1
P.c.n. ALB2N8

SWORN STATEMENT

I, Phil Lord, domiciled at 9778 Camomille Street, Quebec, Quebec, G2B 0P2, solemnly declare as follows:

1. I am a class member in this proceeding;

2. I have read the appended Brief of Professor Phil Lord in Opposition to the Proposed Class Action Settlement, which I wrote;

3. All alleged facts are true.

And I signed: DocuSigned by: Phil Lord AFAE35AED43F43C...

Phil Lord

Sworn before me by a technological means in Quebec City, this 10th day of February 2022

DocuSigned by: Élisabeth Lachance 34A91CE79F25428...

M^tre Élisabeth Lachance
Barreau du Québec N° 3432858

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ORIGINAL