

CANADA
PROVINCE OF QUÉBEC
District of Montréal

SUPERIOR COURT
Class Action

File N°: 500-06-001018-197

TRACEY ARIAL et al.

Plaintiffs

v.

APPLE CANADA INC.

-and-

SAMSUNG ELECTRONICS CANADA

Defendants

**APPLICATION BY SAMSUNG ELECTRONICS CANADA FOR
LEAVE TO ADDUCE RELEVANT EVIDENCE**

(Articles 574, 575, 18 and 19 of the Code of Civil Procedure ("CCP"))

TO JUSTICE PIERRE-C. GAGNON, S.C.J., THE DEFENDANT SAMSUNG ELECTRONICS CANADA ("SAMSUNG") RESPECTFULLY SUBMITS THE FOLLOWING:

I. Introduction

1. On December 15, 2019, the Plaintiffs filed their *Amended Motion for authorization to Institute a Collective Action and to Obtain the Status of Representative*, as appears from the Court record (the "**Application**");
2. As it also appears from the Application, the Plaintiffs seek authorization to institute a class action on behalf of the following class:

"All persons in the Province of Quebec who purchased, leased and/or used the Phones, namely iPhone 5s, iPhone 5C, iPhone 6, iPhone 6S, iPhone 6S Plus, iPhone SE, iPhone 7, iPhone 7 plus, iPhone 8, iPhone 8 Plus, iPhone X, iPhone XR, iPhone XS, iPhone, XS Max, iPhone 11, iPhone 11 Pro, iPhone 11 Pro Max, Samsung Galaxy S7, Samsung Galaxy S8, Samsung Galaxy S9, Samsung Galaxy J3, Moto e5 Play, Mot g6 Play, Vivo 5 Mini and all additional Samsung models sold from 2013 forward, and any other phones sold or marketed by Defendants from 2013 forward."

3. The Plaintiffs allege that, although the Defendants market the cell phones they manufacture as emitting radiofrequency ("RF") radiation below applicable standards and as being completely safe to carry and use on or in close proximity to the human body, recent testing of the Defendants' products would have shown that the cell phone owners' potential RF exposure far exceeds these standards;
4. The Plaintiffs further allege that recent scientific publications have shown that RF exposure affects living organisms at levels well below most international and national guidelines;
5. The Plaintiffs' claim relies heavily on an investigation that was conducted by the *Chicago Tribune*, which concluded that some cell phone models (including some of the Defendants' smartphones) measured above the U.S. Federal Communications Commission ("FCC")'s limits for RF radiation;
6. The Plaintiffs suggest the following issues of fact and law to be dealt with collectively for the purposes of the proposed class action, as appears from pages 15 and 16 of the Application:
 - a. Whether Apple and Samsung properly tested their smartphones before selling them to the Plaintiffs and the Class;
 - b. Whether Apple and Samsung represented and/or warranted that their smartphones were safe for ordinary use;
 - c. Whether the smartphones were safe for ordinary use;
 - d. Whether the RF radiation from the smartphones placed Plaintiffs and Class members at risk for cancer and other health problems;
 - e. Whether Defendants owed a duty to Plaintiffs and Class members to disclose the dangers of their smartphones;
 - f. Whether Defendants intentionally misrepresented the safety of the Plaintiffs' and Class members' smartphones to them and the public;
 - g. Whether Plaintiffs or Class members are entitled to medical monitoring;
 - h. Whether Plaintiffs and the members of the Class have sustained financial loss, and the proper measure of any such financial loss;
 - i. Whether Plaintiffs and the members of the Class are entitled to restitution;

- j. Whether Plaintiffs and the members of the Class are entitled to punitive damages, and the proper measure of any such damages; and
- k. Whether Plaintiffs and the members of the Class are entitled to material damages, and the proper measure of any such damages.

II. The Evidence Samsung Seeks Leave to Adduce

7. The facts alleged in the Plaintiffs' Application and supporting exhibits in relation to the alleged health hazards of RF exposure are not only incomplete, but also misleading;
8. As a result, clarifications from Samsung are required in order to assist the Court in determining whether the authorization criteria of article 575 CCP are met and, in particular, whether Plaintiffs have shown an arguable case (para. 575 (2) CCP);

A. The FCC Reports

9. The FCC regulates interstate and international communications by radio, television, wire, satellite, and cable in the United States;
10. In order for the Court to assess the Plaintiffs' allegations in regards to the FCC's RF exposure guidelines, the Court must know and understand these guidelines which the Plaintiffs allege the Defendants' smartphones have exceeded;
11. In this regard, Samsung seeks leave to file, as **Exhibit S-1**, an FCC document entitled "*Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and Memorandum Opinion and Order - FCC 19-126*" released on December 4, 2019, in the Matter of:
 - *Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields (Docket No. 03-137)*;
 - *Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies (Docket No. 13-84)*;
 - *Targeted Changes to the Commission Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields (Docket No. 19-226)*;
12. This recent report highlights the FCC's guidelines and rules, which are crucial for the Court to determine whether the Plaintiffs have shown an arguable case;
13. In addition, Samsung seeks leave to file the FCC's own independent investigation report following the *Chicago Tribune's* investigation alleged by Plaintiffs, dated December 10, 2019 and entitled "*Results of Tests on Cell Phone RF Exposure Compliance*", communicated herewith as **Exhibit S-2**;

14. This report specifically concludes that all eight models of smartphones tested and evaluated, which include the Galaxy S9 and Galaxy J3 models manufactured and sold by Samsung, complied with the FCC Rules;
15. In order for the Court to determine whether Plaintiffs' Application meets the arguable case threshold, the results of the *Chicago Tribune's* investigation should be put in their proper context and the Court should have access to the FCC's own independent investigation report, which provides a comprehensive scientific account of the risks of human exposure to RF radiation—which is alleged by the Plaintiffs and forms the basis of their cause of action against the Defendants;

B. The Food and Drug Administration ("FDA") Literature Review

16. Plaintiffs allege that recent scientific publications have shown that RF radiation exposure affects living organisms at levels well below most international and national guidelines;
17. In this regard, this Court should have the benefit of considering the FDA's most recent independent literature review dated February 2020 and entitled "*Review of Published Literature between 2008 and 2018 of Relevance to Radiofrequency Radiation and Cancer*", communicated herewith as **Exhibit S-3**;
18. The authors analysed over 125 peer-reviewed articles published between January 1, 2008 and mid-2018 to assess a possible causal relationship between exposure to RF radiation and the formation of cancerous tumors;
19. They conclude that "...*there are no quantifiable adverse health effects in humans caused by exposures at or under the current cell phone exposure limits*" (p. 5);
20. This FDA review will provide the Court with an accurate and up-to-date appraisal of current scientific conclusions on RF radiation exposure in response to the Plaintiffs' biased and unsupported allegations and assertions in this regard;

C. Safety Code 6 and the Explanations Provided by Health Canada

21. The Plaintiffs allege that the Defendants' smartphones exceed applicable RF exposure standards. In so doing, however, the Plaintiffs focus on the FCC's guidelines, which apply in the United States;
22. In Canada, cell phones are regulated by Industry Canada and required to comply with Health Canada's "*Safety Code 6: Limits of Human Exposure to Radiofrequency Electromagnetic Energy in the Frequency Range from 3 KHZ to 300 GHZ*", communicated herewith as **Exhibit S-4**;
23. The Court will benefit from the guidelines set by Safety Code 6 in assessing whether the Defendants' smartphones involve RF exposure beyond the applicable Canadian standards, and thus whether the Plaintiffs have demonstrated an arguable case;

24. In addition, the Court will benefit from two brief documents published by Health Canada, which explain and contextualize Safety Code 6 for the general public;
25. The first document, "*Understanding Safety Code 6*", outlines the purpose and structure of Safety Code 6, as well as its science-based methodology and its consistency with the science-based standards in the United States, as appears from an excerpt from the Government of Canada website, communicated herewith as **Exhibit S-5**;
26. The second document, "*Fact Sheet – What is Safety Code 6?*" contradicts specific popular myths about RF exposure and Safety Code 6 with scientifically-based facts, as appears from an excerpt from the Government of Canada website, communicated herewith as **Exhibit S-6**;
27. It also explains that Health Canada's recommended limits with regards to RF electromagnetic energy does incorporate large security margins to ensure significant protection for all Canadians;

D. The Legal Warnings Provided by Samsung

28. At paragraph 96 and following, the Plaintiff alleges that Samsung has failed to warn cell phone users of the danger posed by its cell phones concerning RF exposure, or to provide instructions for safe use of its cell phones;
29. In response to the Plaintiffs' misleading allegations, Samsung intends to submit that, on the contrary, it provided all relevant information to users of the cell phones specifically identified in the Plaintiffs' class action with regards to RF energy exposure and compliance with the FCC's RF exposure limits;
30. Thus, in order for the Court to assess the Plaintiffs' allegations, Samsung seeks leave to adduce the user manuals of the cell phone models specifically identified in the Plaintiff's class action, which include legal warnings for cell phone users with regards to RF energy exposure:
 - Galaxy J3, as appears from the user manual "*SM J320VPP Product Safety and Warranty Information*" communicated herewith as **Exhibit S-7**;
 - Galaxy S7, as appears from the user manual "*Samsung Galaxy S7 Terms & Conditions/ Health and Safety Information*" communicated herewith as **Exhibit S-8**;
 - Galaxy S8, as appears from the user manual "*Samsung Galaxy S8 Terms & Conditions/ Health and Safety Information*" communicated herewith as **Exhibit S-9**;
 - Galaxy S9, as appears from the user manual "*Samsung Galaxy S9 Terms & Conditions / Health & Safety Information*" communicated herewith as **Exhibit S-10**;

31. This evidence would greatly assist the Court in determining whether the Plaintiffs have met their burden of demonstrated an arguable case (para. 575(2) *Cpc*) against Samsung.

E. Information from Industry Canada on Samsung's Smartphones Identified in the Class Action

32. As already mentioned, the Plaintiffs allege that the Defendants' smartphones exceed applicable RF exposure standards, a gratuitous assertion that Samsung denies;
33. In order for the Court to assess these allegations, Samsung seeks leave to adduce excerpts from Industry Canada's website which attest that Samsung's smartphones are fully compliant with applicable standards:
- Galaxy J3 (Certification Number: 649E-SMJ337W), as appears from an excerpt from the Government of Canada website, communicated herewith as **Exhibit S-11**;
 - Galaxy S7 (Certification Number: 649E-SMG930W8), as appears from an excerpt from the Government of Canada website, communicated *en liasse* as **Exhibit S-12**;
 - Galaxy S8 (Certification Number: 649E-SMG950U), as appears from an excerpt from the Government of Canada Website, communicated herewith as **Exhibit S-13**;
 - Galaxy S9 (Certification Number: 649E-SMG960U), as appears from an excerpt from the Government of Canada website, communicated herewith as **Exhibit S-14**;
34. This evidence would greatly assist the Court in determining whether the Plaintiffs have met their burden of demonstrated an arguable case (para. 575(2) *Cpc*) against Samsung.

F. The Cell Phones that are Falsely Attributed to Samsung

35. At paragraph 71 of the Application, Plaintiffs define the "Samsung class" as "*All persons, who purchased, leased or used a Samsung Galaxy S7, S8, S9, Moto e5, Moto g6Play and Vivo 5 Mini or J3 for personal or household use or any other Samsung phone from 2013 forward in the province of Québec and in Canada*";
36. However, it should be brought to the attention of the Court that the *Moto e5* and *Moto g6 Play* cell phones are manufactured and sold by Motorola Inc., while the *Vivo 5 Mini* are manufactured and sold by BLU Products as appears from extracts from the Motorola and BLU websites, communicated *en liasse* as **Exhibit S-15**;

37. Therefore, the Plaintiffs' allegations and proposed class definition are partly incorrect and contradicted by public information readily accessible online showing that Samsung is not the manufacturer and seller of these cell phones models;
38. Samsung respectfully submits that the above stated evidence is essential to a proper determination of whether the Plaintiffs' proposed class action should be authorized against Samsung;
39. The present *Application for Leave to Adduce Relevant Evidence* is well founded in fact and law.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

- A. **GRANT** the present *Application for Leave to Adduce Relevant Evidence*;
- B. **ALLOW** Defendant Samsung Electronics Canada to file Exhibit S-1, Exhibit S-2, Exhibit S-3, Exhibit S-4, Exhibit S-5, Exhibit S-6, Exhibit S-7, Exhibit S-8, Exhibit S-9, Exhibit S-10, Exhibit S-11, Exhibit S-12, Exhibit S-13, Exhibit S-14 and Exhibit S-15, as described above, into the Court record;
- C. **THE WHOLE**, with cost to follow suit.

Montréal, March 13, 2020



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TAKE NOTICE that the foregoing *Application by Samsung Electronics Canada for Leave to Adduce Relevant Evidence* will be presented for hearing and adjudication before Honourable justice Pierre-C. Gagnon of the Superior Court, at a date and time to be determined by the Court.

KINDLY GOVERN YOURSELF ACCORDINGLY.

Montréal, March 13, 2020



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LIST OF EXHIBITS

- Exhibit S-1:** Resolution of Notice of Inquiry- Second Report – Order- Proposed Rulemaking- FCC 19-126 dated 2019-12-04;
- Exhibit S-2:** Results of Tests on Cell Phone RF Exposure Compliance dated 2019-12-10;
- Exhibit S-3:** Review of Published Literature between 2008-2018 of Relevance to Radiofrequency Radiation - Cancer;
- Exhibit S-4:** Safety Code 6 - Limits of Human Exposure to Radiofrequency Electromagnetic Energy in a Range 3 KHZ to 300 GHZ;
- Exhibit S-5:** Understanding Safety Code;
- Exhibit S-6:** Fact Sheet - What is Safety Code 6;
- Exhibit S-7:** SM J320VPP Product Safety and Warranty Information;
- Exhibit S-8:** Samsung Galaxy S7 Terms and Conditions/Health and Safety Information;

- Exhibit S-9:** Samsung Galaxy S8 Terms and Conditions/Health and Safety Information;
- Exhibit S-10:** Samsung Galaxy S9 Terms and Conditions/Health and Safety Information;
- Exhibit S-11:** Galaxy J3 - Certification Number 649E-SMJ337W;
- Exhibit S-12:** Galaxy S7 - Certification Number 649E-SMG930W8, *en liasse*;
- Exhibit S-13:** Galaxy S8 - Certification Number 649E-SMG950U;
- Exhibit S-14:** Galaxy S9 - Certification Number 649E-SMG960U;
- Exhibit S-15:** Motorola - Cell Phones Moto e5 –Moto G6 Play - Vivo 5 Mini *en liasse*.

Montréal, March 13, 2020



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EVIDENCE & EXHIBITS S-1 TO S-15
(Articles 574, 575, 18 and 19 of the Code of Civil
Procedure ("CCP"))

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