

# SUPERIOR COURT

(Class Action)

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL.

No.: 500-06-001066-204

DATE: August 2, 2023.

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**BY THE HONOURABLE PIERRE NOLLET, J.S.C.**

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**TRACY PATTERSON**  
Plaintiff - Class Representative

v.

**VIVID SEATS LLC, et al.**  
Defendants

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## **JUDGMENT APPROVING CLASS COUNSEL FEES REGARDING THE VIVID SEATS LLC SETTLEMENT**

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[1] On July 10, 2020, Plaintiff filed his *Amended Application for Authorization to Institute a Class Action* against multiple Defendants including VIVID SEATS LLC (hereinafter "**Vivid Seats**", or "**Defendant**"), on behalf of the following proposed class:

All persons in Canada, who purchased before March 11, 2020 one or more tickets from one of the Defendants for an event scheduled to take place after March 11, 2020, which event was subsequently either postponed, rescheduled or cancelled, without a full refund being timely provided by Defendants, or any other Group(s) or Sub-Group(s) to be determined by the Court;

[2] This action arises from the alleged refusal by multiple first and second market event ticket providers to provide timely refunds to consumers shortly after the March 2020 Covid-19 pandemic was declared, regarding events which were either cancelled, rescheduled or postponed due to the Covid-19 restrictions.

[3] On November 25, 2021, Plaintiff entered into a settlement in principle with VIVID SEATS regarding all persons in Quebec who purchased before March 11, 2020 at least one or more Tickets from VIVID SEATS to at least one or more events scheduled to take place after March 11, 2020, which events were subsequently either postponed or rescheduled.

[4] The settling parties continued their negotiations for many months thereafter, ultimately arriving at a formal transaction agreement in March 2022, the whole as appears more fully from a copy of the Settlement Agreement<sup>1</sup> together with its schedules and French translation (the "**Settlement Agreement**", or the "**VIVID SEATS Settlement Agreement**", or the "**Transaction**").

[5] The definitions set out in the Settlement Agreement are incorporated herein unless otherwise indicated.

[6] On April 13, 2022, this Court authorized the class action, for settlement purposes, on behalf of the following amended group:

"All persons in Quebec, who purchased before March 11, 2020 one or more tickets from Vivid Seats LLC for an event scheduled to take place after March 11, 2020, which event was subsequently postponed or rescheduled, without a full refund being provided by Vivid Seats LLC.;"

[7] The said Judgment also appointed Velvet Payments as Claims Administrator and ordered it and the Parties to disseminate notices to the Class, which was completed.

[8] The Claims Administrator Velvet Payments filed a detailed report setting out the details of the notice program conducted pursuant to the April 13, 2022, Judgment (the "**Final Closing Report**").

[9] On June 10, 2022, the Parties sought this Court's approval of the entire Settlement Agreement, including the approval of the Class Counsel's Fees<sup>2</sup>, (the "**VIVID SEATS Settlement Approval Application**").

[10] By letter to the Court dated June 16, 2022, the *Fonds d'aide aux actions collectives* (the "**FAAC**") detailed its position regarding the VIVID SEATS Settlement Approval

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<sup>1</sup> Exhibit R-1.

<sup>2</sup> Exhibit R-2.

Application, including the Class Counsel's Fees aspect<sup>3</sup> and the payment of the 2% holdback fee.

[11] The VIVID SEATS Settlement Approval Application was argued by all Parties, including the FAAC, on June 17, 2022 before the Honorable Justice Pierre-C. Gagnon.

[12] The Honorable Justice Gagnon took the matter of the VIVID SEATS Settlement Approval and Class Counsel's Fees approval under advisement.

[13] On July 26, 2022, the Honorable Justice Gagnon approved the VIVID SEATS Settlement and deferred his judgment on the Class Counsel's Fees aspect until after the Final Closing Report had been issued and filed by the Claims Administrator, as appears from the Court record.

[14] On August 3, 2022, the undersigned was appointed to case manage the present file in replacement of the Honorable Justice Gagnon.

[15] The Claims Administrator, Velvet Payments, issued its Final Closing Report on January 30, 2023, which was communicated to the Court on February 2, 2023<sup>4</sup>.

[16] The Settlement Agreement provides for the following relief to the Class:

[17] Each Eligible Member had the option to either:

- Receive a full Reimbursement of their Order, in USD, less any previous refunds received for their Order, in exchange for their valid ticket(s); OR
- Maintain their Order (keep their Ticket(s)).

[18] Pursuant to the Settlement Agreement, the Defendant bears the internal costs of the claims process, on top of any fees or costs payable to the Claims Administrator (including any costs related to notifications, the settlement website, etc.).

[19] The Professional Mandate & Attorneys' Fee Agreement was signed by Plaintiff and Class Counsel on June 29, 2020.

[20] According to Section 2 of the Professional Mandate & Attorneys' Fee Agreement, the fees payable were as follows:

"2. The Representative hereby consents to have his/her attorneys withhold, retain and keep as payment on any amount of money received on behalf of himself/herself and on behalf of all other members of the group:

- a) all disbursements incurred; and

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<sup>3</sup> Exhibit R-3.

<sup>4</sup> Exhibit R-4.

b) attorneys' fees with regard to the present class action of the higher of the following two calculations:

(i) an amount equal to thirty-three percent (33%) of the total amount received, including interest, from any source whatsoever, whether by settlement or by judgment;

or

(ii) an amount equal to multiplying the total number of hours worked on by the attorneys or other professionals in accordance with their hourly rates, which range between \$350 and \$750 per hour. This amount will then be multiplied by a multiplier 3.5 to arrive at the total fee. (The hourly rates are reviewed from time to time)

and

c) all applicable taxes on said amounts in paragraphs (a) and (b).

[21] There was one single Mandate & Attorneys' Fee Agreement for all Classes of all Defendants.

[22] The Class Counsel's Fees now varies pursuant to each settlement agreement with each Defendant.

[23] As of the date of the original VIVID SEATS Settlement Approval Application (R-2), on June 10, 2022, the straight docketed time of Class Counsel in this matter (all Defendants included), was \$ 483,850 (plus taxes)<sup>5</sup> in fees, plus \$ 7,649.62 (taxes included) for a total of 874.8 hours.

[24] Since then, there are no doubts several additional hours involved in completing the file through each settlement.

[25] According to Article 11 of the VIVID SEATS Settlement Agreement, the Class Counsel's Fees is as follows:

#### 11.1 Class Counsel's Fees and Release

(a) As part of the application for approval detailed at Article 4.2(a), Class Counsel will seek the Court's approval of Class Counsel's Fees and Disbursements for the higher of:

(i). \$36,000 USD (plus GST and PST) ; or

(ii) 30% of the Reimbursements, in USD (plus GST and PST).

The Defendant will take no position on this request, other than that it has agreed to pay this amount.

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<sup>5</sup> Unless otherwise indicated, all amounts are in Canadian dollars.

[26] Class Counsel is asking this Court to approve payment by VIVID SEATS of an amount representing all expenses, disbursements, and fees, namely USD 36,000 (plus GST and PST) or the corresponding amount in CAD<sup>6</sup>.

[27] The FAAC argues that the Court cannot disregard the content of the Final Closing Report, nor the fact that it is a file involving several Defendants, some of whom have already settled, as well as the fact that the number of hours that the Class Counsel claim to have spent on the file (which includes, but is not limited to defendant VIVID SEATS LLC) are with respect to all Defendants.

[28] The Final Closing Report indicates that, as of January 2023, from the 192 Class Members identified by VIVID SEATS and for which emails were sent to inform them of the Settlement Agreement and the possibility to claim, 103 emails had been opened.

[29] Overall, two claims were submitted and approved and eight claims were approved for ticket purchase from repeat customers before the end of the Claim period. The total value of the amount refunded is USD 5 616.08 inclusive of the 2% withholding amount with respect to FAAC which has not been remitted to it yet.

[30] The following Counsel Fees have already been approved by the Honorable Justice Gagnon: a) \$ 40 000 in the StubHub portion of the file, (reduced from the claimed amount of \$ 100 000) and b) \$ 27 000 in the SeatGeek portion of the file.

[31] Other settlements have been reached with other Defendants although not all have been approved yet. Class Counsel is claiming USD 31 500. (\$ 47 421.) in the Internet Referral Services portion of the file and \$ 230 000. in the Ticketmaster and Live Nation other portion of the file.

[32] Overall, the claimed and granted amounts for Class Counsel's Fees could reach \$ 385 914 and possibly more according to the various Settlement Agreements, should all remaining Class Counsel's Fees be approved as requested.

[33] In his StubHub decision, the Honorable Justice Gagnon made several comments to which the Court adheres to, namely:

[24] Fondamentalement, le Tribunal doit vérifier que l'avocat des membres du Groupe ait droit à une rémunération raisonnable et proportionnelle, en tenant compte des paramètres particuliers de l'affaire [citation omise]

[25] Les facteurs à considérer (selon une pondération variant selon le cas d'espèce), sont généralement les suivants :

- l'expérience des avocats;
- le temps qu'ils ont consacré à l'affaire;

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<sup>6</sup> CAD 47 421,00 as of the date hereof.

- la difficulté du problème soumis;
- l'importance du dossier;
- la responsabilité assumée;
- la prestation de services professionnels inhabituels ou exigeant une compétence ou une célérité exceptionnelle;
- le résultat obtenu;
- les honoraires convenus;
- la finalité du recours;
- le risque assumé par les avocats en demande [citation omise].

[...]

[34] Justice Gagnon has already examined such criteria and the Court shares his conclusion with respect to the general aspects of the file that regard all Defendants. The Court must however consider the same criteria in respect of the VIVID SEATS portion of the file.

[35] In the StubHub settlement there were an estimated 204 Class Members, which is above what was estimated in the present case. Justice Gagnon concluded that the typical StubHub client would likely have a real opportunity to use its credit, given the considerable number of events available through StubHub. The actual results in the StubHub file are not known to the Court.

[36] Here, given the Final Closing Report, VIVID SEATS Class Members did not opt to use the credit «en masse». On the contrary, they chose not to claim the credit and keep their ticket. Obviously, if and when the canceled event was rescheduled, VIVID SEATS Class Members who chose to keep their ticket had the ability to attend the event.

[37] In StubHub, the issued credit was valued at 120% of the cost of the returned ticket. In the present case, the credit corresponds to 100 % of the cost of the returned ticket.

[38] There are other differences between the two agreements, but ultimately, the recourse against VIVID SEATS cannot be said to have been worth it for the VIVID SEATS Class Members.

[39] The Class Counsel's Fees of 33%<sup>7</sup> or 30%<sup>8</sup> of the Reimbursements might have been adequate if all customers had claimed their credit. In the present context, the Court acknowledges that such calculation would be grossly under valuating Counsel's work.

[40] When attorneys plead in favor of very significant fees in a successful class action, one of the key elements (but not the only one) to support their argument for significant

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<sup>7</sup> Based on the Mandate & Attorneys' Fee Agreement.

<sup>8</sup> Based on the IRS Settlement Agreement.

fees, is the fact that class counsel do accept a significant amount of risk if the matter is unsuccessful.

[41] Here is an example of what the Honorable Justice Piché recently wrote on the subject, quoting other class counsel:

[114] Les procureurs-demandeurs font grand état du risque global de leur pratique. Ils expliquent que la convention à pourcentage doit être respectée autant lorsque le dossier est gagné que perdu, auquel cas aucune rémunération n'est touchée. Ils illustrent leurs propos d'une panoplie d'exemples de dossiers importants sur le plan sociétal dans lesquels ils n'ont souvent touché aucune rémunération<sup>9</sup>.

[The Court underlines]

[42] In a class action, it is often said that a fee agreement based on a percentage of the result may override the time dedicated to the matter<sup>10</sup>. This is to account for the risk taken by counsel when accepting the mandate. When the success is less than convincing, it is for the Court to ensure that the rewriting of the rules is acceptable.

[43] When the class action does not attract any response or very little, Class Counsel share a responsibility through the fees they can claim.

[44] The Court of Appeal determined that the court should not hesitate, if necessary, to revise these fees according to their real value, to arbitrate them and to reduce them if they are useless, exaggerated, or disproportionate to what the Class gains from the Class Action<sup>11</sup>.

[45] When the approval of a settlement is not conditional upon the approval of the amount of fees claimed, the judge may modify the quantum of the fees if he or she considers that the amount claimed is unreasonable.

[46] Reaching a settlement is often less expensive for the defendants than litigating the matter. This does not escape the experienced counsel and it may at times lead to settlements that seem to favor the class counsel over the class itself. It is for the Court to ensure that such is not the case.

[47] To avoid an unreasonably low fee, the Mandate & Attorneys' Fee Agreement and the VIVID SEATS Settlement Agreement provided for the higher of two amounts to be paid.

[48] Based on the current results, in the Mandate & Attorneys' Fee Agreement the higher fee would have corresponded to the total number of hours worked on by the attorneys (at a rate between 350 \$/hour to 700 \$/hour) multiplied by 3.5. This would result

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<sup>9</sup> *Bergeron c. Procureur Général du Québec*, 2023 QCCS 1264.

<sup>10</sup> *A.B. c. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527, par. 54

<sup>11</sup> *Option Consommateurs c. Banque Amex du Canada*, 2018 QCCA 305, par. 61 et 62.

in a payment of \$ 1,7 million in Class Counsel Fees. Such an amount cannot be supported by the balancing act required by the criteria mentioned above.

[49] The parties modified the Professional Mandate & Attorneys' Fee Agreement in the Settlement Agreement to provide for such fee to be **the higher** of USD 36 000 or 30% of the total refunds.

[50] The parties willingly put a cap (USD 36 000) on the hourly fees and costs that could be claimed, being now the higher amount. The basis for such amount was not explained otherwise than through generalities.

[51] Considering Article 127 of the *Act Respecting The Barreau Du Québec*<sup>12</sup> which provides the following: "The oath of the advocate shall make proof as to his services having been required and as to the nature, duration and value thereof, but such oath may be contradicted in the same way as any other testimony."

[52] Considering the Solemn Declaration of Me David Assor dated March 2, 2023, filed in support of the Application, which is deemed to be true as concerning the professional services rendered and disbursements in this Class Action since it has not been contradicted<sup>13</sup>;

[53] Considering the representations made by the attorneys for VIVID SEATS, confirming their agreement to pay the approved Class Counsel's Fees.

[54] Considering the representations made by the attorneys for the Fonds d'aide aux actions collectives;

[55] Seeing that an amount of \$ 40 000. was granted by the Honorable Justice Gagnon in the StubHub portion of the file and \$ 27 000. in the SeatGeek one;

[56] Seeing that on this day through a separate judgment the Court is awarding \$ 30 000 as Class Counsel's Fees for the Internet Referral Services Settlement;

[57] Considering that the Court is of the view that the results in the current file are even less probing than in the Internet Referral Services file, an amount of \$ 25 000 will constitute a fair compensation in the VIVID SEATS file.

**FOR THESE REASONS, THE COURT :**

[58] **ORDERS** that the definitions found in the Vivid Seats Settlement Agreement find application in the present Judgment save and except if specifically modified herein;

[59] **GRANTS** in part the Application for Approval of Class Counsel's Fees.

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<sup>12</sup> RLRQ c. B-1.

<sup>13</sup> *Guilbert c. Sony BMG Musique (Canada) inc.*, 2007 QCCS 432, par. 62-63.

[60] **APPROVES** Class Counsel's Fees of \$ 25 000 plus GST and PST.

[61] **ORDERS** Defendant, **Vivid Seats LLC** to pay \$ 25 000 plus GST and PST to Class Counsel within 15 days of this judgment.

[62] **WITHOUT** other legal costs.

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PIERRE NOLLET, J.S.C.

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Hearing date:        On docket