

CANADA

CLASS ACTION
SUPERIOR COURT

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-06-000476-099

NOELLA NEALE, domiciled and residing
at #114, 678 Citadel Drive, Port Coquitlam,
British Columbia, V3C-6M7

and

GABRIEL CLARK, domiciled and
residing at 492 Cariboo Crescent,
Coquitlam, British Columbia, V3C-4X7.

Petitioners

vs

GROUPE AEROPLAN INC, a
corporation with a head office at 5100
Boulevard De Maisonneuve Ouest,
Montréal, Québec H4A-3T2

Respondent

**MOTION FOR AUTHORIZATION TO
INSTITUTE A CLASS ACTION AND TO OBTAIN
THE STATUS OF REPRESENTATIVE
(A. 1002 C.C.P.)**

IN SUPPORT OF THEIR MOTION FOR PERMISSION TO INSTITUTE A CLASS ACTION
AND OBTAIN THE STATUS OF A REPRESENTATIVE, PETITIONERS RESPECTFULLY
SUBMIT AS FOLLOWS:

1. Petitioners wish to institute a class action on behalf of all the persons forming part of the following group, of which they are members (the “Group”):

All physical persons in Canada who are members of the Aeroplan program run by the Respondent and were subject to the changes made by the Respondent to the Aeroplan program concerning accumulation and expiry of Aeroplan Miles, as announced by the Respondent on October 16, 2006.

Petitioners' personal claim against the Respondent is based on the following facts:

2. The Respondent, Groupe Aeroplan Inc. ("Aeroplan"), is a corporation with a head office in Montréal, Québec, as seen in the SEDAR company listing filed as Exhibit P-1 to this Motion. Prior to June, 2008, Aeroplan operated as an income trust under the name Aeroplan Income Fund.

3. Aeroplan operates a loyalty marketing business in which Aeroplan members earn or purchase Aeroplan Miles ("Miles"). These Miles can then be exchanged for airline flights and other products and services.

Announcement of Aeroplan program changes

4. On October 16, 2006, Aeroplan issued a press release announcing two changes to the way Miles would be accumulated and would expire. A copy of this press release is filed as Exhibit P-2 to this Motion.

5. The first program change concerned the expiry of Miles. Aeroplan announced that, effective July 1, 2007, a member's Miles would expire if there had not been any transactions on the member's account in the previous twelve months. This new policy applied retroactively from July 1, 2007, backwards twelve months to June 30, 2006.

6. The previous Miles program expiry policy required three years of non-activity in a member's account before Miles would expire.

7. The second Miles program change concerned the accumulation and “date-stamping” of Miles. Aeroplan announced that, effective January 1, 2007, all Miles would be marked with the date they were acquired. Miles acquired prior to January 1, 2007, were assigned a date of December 31, 2006. Once a Mile was date-stamped, it would expire if it were not redeemed in the following eighty-four (84) months. For example, a Mile acquired on March 1, 2007, would expire if not redeemed by March 1, 2014. There had previously been no date-stamping type restrictions on Miles.

8. In addition to the changes described in the Aeroplan press release, Aeroplan announced that Miles that expired as a result of either the new one-year account activity rule or the new 84 monthly date-stamped expiry rule could be reinstated at a cost of \$30.00 plus \$0.01 per Mile reinstated.

Petitioner Noella Neale

9. Petitioner Noella Neale (“Neale”) became an Aeroplan member in the 1980’s. Her Aeroplan number is 938-363-462. She has accumulated Aeroplan Miles, *inter alia*, through Mastercard and Visa cards linked to the Aeroplan program. On or about July 31, 2007, Neale attempted to book a flight to San Francisco by redeeming Miles. On that date, she believed that she held 151 027 Miles in her account. Neale was shocked to be told by the Aeroplan agent that she had zero Miles in her account. The agent informed Neale that her Miles had expired since she had not had any transactions on her account for the period of July 17, 2006, until July 17, 2007.

10. Neale immediately wrote a letter to Aeroplan, dated July 31, 2007, in which she stated that she was unaware of the of the expiry policy and the fact that her Miles had expired on July 17, 2007. This letter is filed as Exhibit P-3 to this Motion.

11. Sometime in August, 2007, Neale received a letter from Aeroplan, dated August 7, 2007. In this letter, Aeroplan claimed to have advised Neale and all other members of the new Miles program policies in a letter mailed in June, 1996. The letter also stated that

members whose accounts may expire receive notice one or two months prior to expiration, provided they have a valid e-mail or mailing address. The letter also erroneously stated that there has been no activity on Neale's account for the previous three years. This letter is filed as Exhibit P-4 to this Motion. Neale never received the letter or the e-mail referred to in Aeroplan's letter.

12. Neale had been saving Miles to send her daughter to New Zealand as a gift, scheduled for December, 2007. Faced with the loss of all her Miles, Neale ultimately reinstated an undetermined number of Miles in order to fulfill her promise to her daughter. Reinstating all of her lost Miles would have cost Neale more than \$1500.00

Petitioner Gabriel Clark

13. Petitioner Gabriel Clark ("Clark") became an Aeroplan member in the 1990's. Her Aeroplan membership number is 717-761-720. Her husband, Glen Clark, is also a member under the same membership number. As of September, 2007, Clark had a Miles balance of 48 987 Miles. In January, 2008, Clark was surprised to learn that her Aeroplan account had a zero Miles balance. She telephoned Aeroplan customer service and was informed by an agent that her account Miles had expired, since there had been no activity in the account since November 2, 2006. The agent informed her that an e-mail had been sent to her on July 5, 2007, explaining the new Aeroplan Miles expiration policy. Clark never received this e-mail.

Breach of Contract

14. The Petitioners, in good faith, signed up for the Aeroplan loyalty Miles program offered by the Respondent. They spent money on airplane flights and other products and services offered by Aeroplan program partners in order to be eligible to redeem the acquired Miles for other products and services.

15. The terms of the contract between Aeroplan and the individual Petitioners were entirely drawn up and stipulated by Aeroplan. The Petitioners had no opportunity to negotiate the terms of the contract or to make any changes to the terms. As such, the contract was a contract of adhesion per Article 1379 of the Québec Civil Code.

16. In consideration for their purchases and patronage of Aeroplan partners in order to acquire Miles, the Petitioners expected that, in return, Aeroplan would fairly operate the program in such a way that the Petitioners would be able to redeem Miles and not be deprived of Miles without adequate notice or without their consent.

17. Aeroplan is in breach of contract, per Article 1458 of the Québec Civil Code, because of the manner in which the Miles expiration and accumulation policies were announced and implemented.

The New “One-Year” Expiry Rule

18. Aeroplan breached the contract with the Petitioners in the manner that the new one-year expiry rule was announced and implemented. Aeroplan implemented the new rule starting July 1, 2007. However, Aeroplan purported to retroactively give effect to this rule by applying it retrospectively twelve months back to June 30, 2006. Since the new rules were publically announced only on October 16, 2006, the Petitioners were deprived of Miles that they had accumulated prior to the public announcement of the changes.

19. In any event, the Petitioners never received or never became aware of notices that Aeroplan purports to have sent advising them of the Miles program changes. However, even if they had received or become aware of these purported notices, the Petitioners would still have been deprived of Miles acquired prior to notice being given of the changes.

The New “84 Month Date-Stamp” Expiry Rule

20. Aeroplan breached the contract with the Petitioners in the manner that the new 84 month date-stamp expiry rule was announced and implemented. This rule took effect January 1, 2007. All Miles acquired prior to January 1, 2007, were retroactively date-stamped as December 31, 2006. In adopting this policy, Aeroplan wrongfully removed value from Miles that has been acquired before January 1, 2007 by limiting the time available for their future use. These Miles had previously not had any such limitations on them.

Non-adequacy of Notice Given by Aeroplan

21. Neither of the Petitioners received or became aware of the notices purportedly sent to them to advise them of the new Miles program changes. In general, the form and content of the notices used by Aeroplan were not adequate to accomplish the task of informing Aeroplan members of the changes. Given that the Miles program changes were a major alteration of the existing rules and that the ramifications on Aeroplan members if they were not adequately informed of the changes was large, the notice program used by Aeroplan was clearly not satisfactory or reasonable under the circumstances.

22. Aeroplan purportedly sent out letters and/or e-mail messages to Aeroplan members giving information about the program changes. In either case, the information was not delivered in a way that would attract the Aeroplan member's attention. Aeroplan sends correspondence by letter or e-mail to members on a very regular basis. In the large majority of cases, these messages concern relatively unimportant news such as contest promotions, the addition of new Aeroplan partners, or offers to apply for credit cards. The very mode of presentation and frequency of these messages gives the members the impression that they are not very important. In many cases, the messages are briefly reviewed and deleted or thrown away. It was simply not adequate to lump in the important notice of changes to the Miles program as one of several dozen e-mail messages or letters received from Aeroplan each year. Furthermore, in many cases, an e-mail message from a sender such as Aeroplan

is liable to be caught in a computer's spam filter, thereby making it much less likely that it would ever be seen by the intended recipient.

23. Overall, the efforts made by Aeroplan to notify its members of the Miles program changes were disproportionately small compared to the large potential financial losses that members risked incurring. Logically, no member with potentially thousands of dollars worth of redeemable Miles would let them expire, when a transaction as simple as a small purchase in a store would suffice to keep the account active. Considering the large number of members who have unexpectedly suffered loss of Miles as a result of the new rules, clearly a large number of Aeroplan members did not receive or become aware of the notices.

24. To recapitulate, the Petitioners allege that, considering the importance of the changes to the Miles program, better notice was required, including some sort of confirmation that members had actually been made aware of the changes. The need for better notice is even more important in this case, where:

- a) Large potential financial losses to Aeroplan members would be the result of non-compliance with the new rules;
- b) Aeroplan was purporting to retroactively attach new limitations and rules to Miles previously acquired by the member;
- c) Aeroplan was in the habit of sending voluminous amounts of information to members and sent this important notice in the same mode, thereby insufficiently differentiating it from other communications emanating from Aeroplan.

Damages

25. The Respondent is civilly responsible for damages suffered by the Petitioners as a result of its unilateral changes to the Miles program and/or by the inadequacy of notice given to the Petitioners of these changes. These damages include or will include:

- a) Lost redemption value of Miles expired;
- b) Amounts spent to re-instate expired Miles;
- c) Loss of time spent interacting with Aeroplan customer relations following discovery of loss of Miles;

The Facts Giving Rise to Personal Claims by Each Group Member Against the Respondent are:

26. The claims of each of the Group Members are founded on the same underlying facts as the Petitioners' as pertains to the acts and omissions of the Respondent in the announcement and implementation of the Miles program changes.

27. Each Group Member has certain facts particular to his or her claim. However, these particular facts are subservient to the common issues of the civil liability of the Respondent generally against Group Members.

The Composition of the Group Makes the Application of Articles 59 or 67 of the Quebec Code of Civil Procedure Difficult or Impractical Because:

28. The number of Members of the Group are so numerous that joinder of all Members is impracticable. While the exact number of Group Members is unknown to the Petitioners at this time, Aeroplan has thousands of members, each of whom is potentially a Group

Member. The exact number of potential Group Members can be discerned from records kept by the Respondent.

29. The potential Group Members are widely dispersed in the province of Quebec and throughout Canada.

The Identical, Similar, or Related Questions of Law or Fact Between each Group Member and Respondent which the Petitioners Wish to Have Decided by the Class Action Are:

30. 1) Was there a contract between Group Members and the Respondent?

2) If there is a contract, is it a contract of adhesion?

3) Was the Respondent legally allowed to alter the terms of the contract unilaterally by changing the Miles program rules?

4) Was the Respondent legally allowed to alter the status and value of previously existing Miles by retroactively assigning these Miles a “date-stamp” of December 31, 2006, for the purposes of applying the new eighty-four month expiration rule that came into effect on January 1, 2007?

5) Was the Respondent legally allowed to alter the status and value of previously existing Miles by retroactively including Miles acquired prior to July 1, 2007, for the purposes of applying the new one year expiration rule that came into effect on July 1, 2007?

6) Was the notice program used by the Respondent to inform Aeroplan members of the new Miles program rules adequate and enforceable, taking into account all the facts of the situation?

7) Is the Respondent civilly responsible for damages suffered by Group Members as a result of its acts or omissions in the announcement and implementation of the new Miles program rules?

8) Is the Respondent liable to pay exemplary damages as a result of its acts or omissions in the announcement and implementation of the new Miles program rules?

It is Expedient That the Bringing of a Class Action for the Benefit of Group Members Be Authorized as:

31. The majority of issues to be determined by the Court are common to every Group Member.

32. The relatively small claim of individual Group Members may discourage them from pursuing this legal dispute in any other forum.

33. The large number of potential litigants could lead to a multitude of individual legal actions in different jurisdictions, possibly leading to contradictory judgments on questions of facts and law.

The Nature of the Recourse Which the Petitioners Wish to Exercise on Behalf of Group Members is:

34. An action in civil responsibility against the Respondent based on the contract between the Respondent and individual Group Members. The action is based on the civil responsibility of the Respondent arising from the Respondent's acts and/or omissions in the

announcement and implementation of the new Miles program expiration rules announced by the Respondent on October 16, 2006.

Conclusions

GRANT the Petitioners' Motion against the Respondent;

AUTHORIZE the Petitioners to commence this action as a class action;

ORDER the Respondent to reinstate to Group Members all Miles expired pursuant to the new Miles program rules or otherwise compensate them for the value of the expired Miles;

ORDER the Respondent to refund Group Members for any monetary amounts expended to reinstate lost Miles under the new Miles program rules;

ORDER the Respondent to pay a monetary amount of \$50 to each of the Group Members for the inconvenience caused by the implementation of the new Miles program rules;

ORDER the Respondent to pay exemplary damages;

THE WHOLE with costs, including the costs of all expert reports and publication of notices.

The Petitioners Request That They be Ascribed the Status of Representative for the Following Reasons:

35. They are Group Members. They are informed of the facts upon which this Motion is based. They have the required time, determination, and energy to bring this matter to a conclusion. They collaborate with their attorneys, respond diligently and intelligently to

requests from their attorneys, and comprehend the nature of a class action proceeding. They are not in conflict with other Group Members.

The Petitioners Propose that the Class Action be Brought Before the Superior Court of the District of Montréal because:

36. The Respondent's head office is in the District of Montréal.

Wherefore the Petitioners Ask:

THAT the present Motion be granted;

THAT the bringing of a class action be authorized as follows:

An action in civil responsibility against the Respondent based on the contract between the Respondent and individual Group Members. The action is based on the civil responsibility of the Respondent arising from the Respondent's acts and/or omissions in the announcement and implementation of the new Miles program expiration rules announced by the Respondent on October 16, 2006.

THAT the status of Representatives be ascribed to the Petitioners for the bringing of the class action for the benefit of the following group, namely:

All physical persons in Canada who are members of the Aeroplan program run by the Respondent and were subject to the changes made by the Respondent to the Aeroplan program concerning accumulation and expiry of Aeroplan Miles, as announced by the Respondent on October 16, 2006.

THAT the principal questions of law and fact to be dealt with collectively be identified as follows:

- 1) Was there a contract between Group Members and the Respondent?
- 2) If there is a contract, is it a contract of adhesion?
- 3) Was the Respondent legally allowed to alter the terms of the contract unilaterally by changing the Miles program rules?
- 4) Was the Respondent legally allowed to alter the status and value of previously existing Miles by retroactively assigning these Miles a “date-stamp” of December 31, 2006, for the purposes of applying the new eighty-four month expiration rule that came into effect on January 1, 2007?
- 5) Was the Respondent legally allowed to alter the status and value of previously existing Miles by retroactively including Miles acquired prior to July 1, 2007, for the purposes of applying the new one year expiration rule that came into effect on July 1, 2007?
- 6) Was the notice program used by the Respondent to inform Aeroplan members of the new Miles program rules adequate and enforceable, taking into account all the facts of the situation?
- 7) Is the Respondent civilly responsible for damages suffered by Group Members as a result of its acts or omissions in the announcement and implementation of the new Miles program rules?

8) Is the Respondent liable to pay exemplary damages as a result of its acts or omissions in the announcement and implementation of the new Miles program rules?

THAT the conclusions sought in relation to the above principal questions be the following:

GRANT the Petitioners' Motion against the Respondent;

AUTHORIZE the Petitioners to commence this action as a class action;

ORDER the Respondent to reinstate to Group Members all Miles expired pursuant to the new Miles program rules or otherwise compensate them for the value of the expired Miles;

ORDER the Respondent to refund Group Members for any monetary amounts expended to reinstate lost Miles under the new Miles program rules;

ORDER the Respondent to pay a monetary amount of \$50 to each of the Group Members for the inconvenience caused by the implementation of the new Miles program rules;

ORDER the Respondent to pay exemplary damages;

THE WHOLE with costs, including the costs of all expert reports and publication of notices.

THAT is be declared that any Group Member who has not requested his exclusion from the Group be bound by any judgment to be rendered on the class action. THAT the delay for exclusion be fixed at one hundred twenty (120) days from the notice to members;

THAT a Notice to Group Members be published, in French or English as appropriate, in the following manners:

- a) Copy of the Notice to Group Members sent to each of the Group Members by post, based on data kept by the Respondent;
- b) Posting on the website of the Respondent;
- c) Posting on the website of Petitioners' counsel;
- d) Publication of the Notice to Group Members in newspapers and other media as set by the Court.

THAT the Court record be referred to the Chief Justice so that he may fix the district in which the class action is to be brought and the judge before whom it is to be heard.

June 30, 2009

MERCHANT LAW GROUP LLP

MERCHANT LAW GROUP LLP
ATTORNEYS FOR THE PETITIONERS

NOTICE OF PRESENTATION

Take notice that the Petitioners have filed this Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative at the Clerk of the Québec Superior Court in the judicial district of Montréal.

This Motion will be presented before one of the Honourable Judges of the Superior Court, sitting in and for the district of Montréal, on Tuesday, August 4, 2009, at the Montréal Courthouse, 1 Notre-Dame Est, Montréal, Québec, H2Y-1B6, in Room 2.16, at 9:00 A.M., or as soon as counsel can be heard.

Please govern yourself accordingly,

June 30, 2009,

MERCHANT LAW GROUP LLP

MERCHANT LAW GROUP LLP

Attorneys for the Petitioners