

CANADA

SUPERIOR COURT
(Class Action)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^o : 500-06-06-000615-126

M [REDACTED] BELLEY, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner

-vs-

TD AUTO FINANCE SERVICES INC./
SERVICES DE FINANCEMENT AUTO TD
INC., a legal person constitute according to the
law, having its head office at 66 Wellington
Street West, in the City of Toronto, Province of
Ontario, M5K 1A2;

Respondent

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT OF
QUEBEC, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONER
STATES THE FOLLOWING:

GENERAL PRESENTATION

1. Petitioner wishes to institute a class action on behalf of the following group, of which Petitioner is a member, namely:
 - all persons (including their estates, executors, or personal representatives), consumers, corporations, firms, businesses, and other organisations (subject to Article 999 C.C.P.), in all of Canada (subsidiarily in Quebec), whose personal information was stored or saved on a data tape, which was lost by Respondent while in transit on or about March 12, 2008, or any other group to be determined by the Court;

(hereinafter, both Quebec resident and non-Quebec resident Class Members are collectively referred to as "Class Member(s)", "Group Member(s)", the "Group", the "Class", "Clients" or "Customers");

2. At all relevant times to the present proceedings, Daimlerchrysler Financial Services Canada Inc. / Services Financiers Daimlerchrysler inc. was involved in the business of leasing and financial services in the automotive industry, and was doing business under various names, *inter alia*, Daimlerchrysler Financial Services Canada Inc., Services Financiers Daimlerchrysler Canada Inc., Chrysler Credit Canada, Chrysler Financial, Chrysler Financial Canada, Crédit Chrysler Canada, Daimlerchrysler Financial, Daimlerchrysler Services Canada, Daimlerchrysler Services in Canada, Services Daimlerchrysler au Canada, Services Daimlerchrysler Canada, Services Financiers Chrysler, Services Financiers Chrysler Canada, Services Financiers Daimlerchrysler (hereinafter collectively "**Daimlerchrysler**"), the whole as more appears from the CIDREQ report on Daimlerchrysler from *Le registraire des entreprises* dated April 21, 2008, filed herewith, as **Exhibit R-1**;
3. On November 1, 2011, Daimlerchrysler amalgamated with other entities to become TD Auto Finance Services Inc./ Services de financement auto TD Inc. (hereinafter "**TD Auto Finance**") the whole as more fully appears from the affidavit of Sandra M. Mundy, secretary of the Respondent and the copy of the Federal Corporation Information issued by Industry Canada, filed in the context of Superior Court of Quebec file 500-06-000431-086 (hereinafter the "**Mazzonna File**"), together with a copy of the CIDREQ report on Respondent, dated March 28, 2012, filed herewith, *en liasse*, as **Exhibit R-2**;
4. Accordingly, all references made herein to Respondent will refer both to the Respondent itself and to its predecessor Daimlerchrysler who had committed the faults, negligence and omissions at the relevant times, the whole as more fully alleged hereinbelow;
5. As a result of the amalgamation detailed in Exhibit R-2, Respondent TD Auto Finance is responsible for the faults, negligence, and omissions committed at the relevant times by Daimlerchrysler;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER**The loss of the Class Members' personal information by Daimlerchrysler:**

6. As appears from Daimlerchrysler letter sent by regular mail to the Petitioner (and other Class Members), which was dated March 27, 2008 but only received by Class Members in the middle of April, 2008, a copy of said letter in both English and French versions being filed herewith, as **Exhibit R-3** (hereinafter the "**Notification Letter(s)**"), Daimlerchrysler stated and admitted the following:

"Dear M [REDACTED]:

One of the highest priorities at Chrysler Financial is our focus on your privacy and the protection of your personal information. It is for this reason we are writing to you today to notify you of a recent incident we had with the transfer of certain customer information stored on a data tape to a licensed third party credit reporting agency. **On March 12, 2008, we were notified by United Parcel Services ("UPS") that a data tape (the "Data Tape") sent by Chrysler Financial containing certain customer information was destroyed or lost in transit and never arrived at the agency.** The Data Tape cannot be easily accessed and requires specialized software and equipment to read, but **it did contain some personal information that Chrysler Financial had obtained from you (most importantly, name, address, and social insurance number).**

Chrysler Financial, in co-ordination with UPS, is conducting a thorough investigation but at this point in time the Data Tape has not been located. Having said that, we also have no reason to suspect that an unauthorized individual has actually retrieved and is using the personal information contained on the Data Tape, which we reiterate is not readily-accessible. **Nonetheless, as a precautionary measure we are alerting you to this recent incident so that you may be watchful for signs of any possible misuse of your personal information by an unauthorized recipient.**

We apologize for any inconvenience or alarm this may cause you. Chrysler Financial can confirm that this has not happened before within our quality control processes and, **since the incident, we have put into place additional measures with this and other third party agencies to ensure that this will not happen again.** Chrysler Financial has also, on a voluntary basis, disclosed this incident to the federal Privacy Commissioner's Office and the applicable provincial privacy offices.

We appreciate your business and want to assure you that Chrysler Financial remains committed to providing exceptional customer service while enforcing the strictest of privacy measures.

If you require any additional information or clarification, please do not hesitate to contact us at 1-800-263-6920.

Yours truly,

Brian Chillman
General Counsel
 Chrysler Financial..."

(Emphasis Added)

7. Through its above-cited Notification Letter (Exhibit R-3), Respondent has clearly admitted the following, *inter alia*:
 - a) That it, and/or its mandatary UPS, lost the Data Tape which contained the personal information of the Class Members;
 - b) That the Class Member should be "watchful for signs of any possible misuse of your personal information by an unauthorized recipient", therefore implicitly admitting that it is reasonably possible that unauthorized persons could have received, accessed or misused the personal information of the Class Members;
 - c) That this loss of information my cause Class Members "inconvenience or alarm";
 - d) That Respondent has "put into place additional measures with this and other third party agencies to ensure that this will not happen again", therefore confirming that the required measures were not originally in place which would have prevented this loss of information in the first place;
8. As appears from the above-cited Notification Letter (Exhibit R-3), Respondent had first stated and confirmed to the Class Members that the lost "Data Tape" contained some of their personal information, "most importantly" their names, addresses, and social insurance numbers;
9. Furthermore, in the course of the Mazzonna File, Respondent's representative Mrs. Lynnette M. Barker ("**Barker**") filed an affidavit dated October 17, 2008, a

copy of which is filed herewith, as **Exhibit R-4** (hereinafter the "**Barker Affidavit**"), in which she categorically stated and confirmed the following to the Court, under oath, namely that:

a) "the **only** personal data which would have been recorded on the data tape are the customer's name, address, phone number and in certain cases, the social insurance number as well as other information related to the status and history of the customer's credit with DCFSCI" (paragraph 5 of the Barker Affidavit) (emphasis added);

b) "**The tape did not contain any other personal or financial information** concerning DCFSCI customers." (paragraph 6 of the Barker Affidavit) (emphasis added);

10. However, it was only when Barker was cross-examined on said paragraphs 5 and 6 of her affidavit, on June 23, 2009, that Barker confirmed that in fact, the Data Tape in question also contained the Class Members' **date of birth**, an important element which had been left out by Respondent beforehand, the whole as more fully appears from a copy of the transcript of said examination, together with the December 4, 2009 and March 22, 2010 letters from Respondent's attorneys providing various additional answers or undertakings, which were filed in the context of the Mazzonna File, filed herewith, *en liasse*, as **Exhibit R-5**;
11. Respondent has to date never issued any public notice or otherwise informed the rest of the Class Members of the fact that the lost or stolen Data Tape also contained their date of birth;
12. It is quite obvious that the date of birth (aside from the other lost personal information contained on the Data Tape, such as name, address and social insurance number), is an important element which would increase the risk of fraud and identity theft;
13. The Respondent conveniently neglected or refused to inform the Petitioner and the Class Members that their dates of birth had also been lost along with the other personal information;
14. Respondent knew or should have known that the Class Members had a right to be informed that their dates of birth had also been lost with the other lost personal information. Knowing this may have also influenced which steps the Class Members would reasonably have taken in order to protect themselves

such as signing up for credit monitoring, putting a fraud alert on their credit files, changing their identification or account numbers, purchasing insurance, etc.;

15. The Class Members, in good faith, were reasonably justified in assuming that Respondent would properly safeguard their personal information, which it clearly did not. Furthermore, the Class Members were reasonably justified in assuming that the Notification Letter was not misleading when it listed the information that had been lost. As stated above, the Notification Letter did not mention the date of birth;

Petitioner M [REDACTED] Belley:

16. Immediately following the loss of his personal information by Respondent, Petitioner fell victim to fraud and identity theft, the whole as detailed below;

April 29, 2008:

17. On April 29, 2008, Petitioner received a letter dated April 10, 2008 from TD Canada Trust Indirect Credit Centre in Ontario (hereinafter "TD") thanking him for setting up a loan which had been arranged through Rockland Ford Sales Ltd on April 10, 2008, a copy of said letter being filed herewith, as **Exhibit R-6**;
18. Shocked to receive said letter since he had not set up such a loan, Petitioner immediately called TD and spoke to a representative named Sophie, informing her that he had never set up the loan in question;
19. The said representative informed Petitioner that a Volkswagen Touareg had been purchased on a loan using his identity;
20. Petitioner contacted his financial institution, the CIBC, in order to have a freeze placed on his account;
21. Petitioner then tried contacting both the Equifax and TransUnion credit agencies but their offices were closed;

April 30, 2008:

22. On April 30, 2008, Petitioner went on-line to consult his credit files from Equifax and TransUnion. He noticed that many requests for credit had been filed under his name since March 2008;

23. Petitioner then contacted Sophie at the TD in order to inquire about the situation. He was told to go to a TD branch in order to fill out certain forms or paperwork and was advised to call the police about the incident;
24. Petitioner called credit agencies Equifax, TransUnion and Experian in order to ask that a fraud alert be placed on his credit files;
25. Petitioner called the Montreal Police Department and the Ontario Provincial Police PhoneBusters in order to advise them of the situation;
26. Petitioner then went to a TD branch in order to fill out the proper paperwork and he was told that an affidavit had to be signed before a notary regarding the fraud incident;
27. Petitioner also met with a CIBC representative who counseled him to immediately open a new bank account and to close the old account after a one (1) month transition period, which he did. During said one (1) month transition period, Petitioner was forced to receive a telephone call from the CIBC every time a cheque had to go through the account, in order to confirm its validity;

May 1, 2008:

28. On May 1, 2008, Petitioner consulted his credit file again through the Equifax website and noticed further credit activity on his file;
29. There was credit request under the HSBC Bank (hereinafter "HSBC") and Petitioner therefore contacted the HSBC who informed him that a second vehicle, namely an Infinity QX56, had been purchased under his name, on April 17, 2008, at Quality Wholesalers in Scarborough, Ontario;
30. Petitioner also noticed that another request for credit had been made with Fido Solutions as well;
31. Shocked by the entire situation, Petitioner called Daimlerchrysler and spoke to a representative named Orelie;
32. The said representative tried to reassure Plaintiff by stating that it would be practically impossible to use the information contained on the Data Tape if someone were to find it. However, the representative did not inform Petitioner:

a) that the envelope which carried the Data Tape had been found empty by UPS; and

b) that the Date of Birth of the Class Members was also on the lost or stolen Data Tape;

33. The representative promised Plaintiff that an executive at Daimlerchrysler would be contacting him shortly with further information;

May 2, 2008:

34. On May 2, 2008, Petitioner consulted his credit file again through the TransUnion website and called the Montreal police department to give them an update;

35. Petitioner also contacted insurance companies *Assurance La Capitale* and *Assurance Banque Nationale* in order to inform them of the fraud that had occurred, since it turned out that fraudulent insurance policies had been contracted using his identity in order to insure the vehicles mentioned above;

36. Petitioner also called Dell Canada to receive information since it had inquired into his credit. The Dell Canada employee informed him that no items had been purchased using his identity;

37. Petitioner also had to contact Fido Solutions and fill out and send them a form confirming the fraud;

38. Plaintiff also met with the notary in order to complete the affidavit required by the TD and Plaintiff remitted the said affidavit to the TD that same day;

May 5, 2008:

39. On May 5, 2008, a representative of *Assurance La Capitale* called the Petitioner and asked him various additional questions about the identity theft that had occurred;

40. Thereafter, a Montreal police officer contacted Petitioner asking various questions about the identity theft as well. He also informed Petitioner that there would be at least a six (6) month delay for them to pursue the investigation;

May 6, 2008:

41. On May 6, 2008, having not received the call back from Daimlerchrysler, Petitioner called back and spoke with Mr. Denis Brochu, a representative of Daimlerchrysler, who merely suggested that it was a "pure coincidence" that Petitioner had fell victim to identity theft after Daimlerchrysler had lost the private information;

May 9, 2008:

42. On May 9, 2008, Petitioner receives a letter from the Royal Bank of Canada (hereinafter "**RBC**") informing him that a third vehicle had been purchased using his identity. Petitioner then scheduled a May 13, 2008 appointment with RBC in order to clear up the situation. He also met with a CIBC representative regarding this additional fraud occurrence;

May 12, 2008:

43. On May 12, 2008, Plaintiff called back the representatives at the HSBC and the TD in order to give them a general update and to inform them of the six (6) month delay the Montreal Police had mentioned;

May 13, 2008:

44. On May 13, 2008, Petitioner had his meeting with the RBC representative, as mentioned above, and he also met with an employee at the CIBC concerning the various automatic payments which had been set up for the stolen vehicles in question;
45. During that CIBC meeting, Petitioner received a telephone call from a HSBC representative confirming that a fourth car had been purchased using his identity;

May 20, 2008:

46. On May 20, 2008, Petitioner communicated with a representative at insurance company *Industrielle Alliance* in order to inform them of the situation;
47. Furthermore, Mr. Pidcock, a police officer from the City of Ottawa, contacted Petitioner concerning the identity theft and the numerous vehicles purchased

using his identity;

May 21, 2008:

48. On May 21, 2008, Petitioner sent a letter to the police officer Pidcock, explaining his situation and providing copies of the relevant documents, the whole as more fully appears from a copy of said letter, filed herewith, as **Exhibit R-7**;
49. That same day, Petitioner also received confirmation from *Industrielle Alliance* that the insurance policy mentioned above would be cancelled;

May 28, 2008:

50. On May 28, 2008, Petitioner sent to *Industrielle Alliance* a written confirmation that he is not the owner or buyer of the stolen vehicle;
51. That same day, Petitioner wrote a formal demand letter to Brian Chillman, General Counsel for Chrysler Financial (who had signed the original Exhibit R-3 Notification Letter), in which Plaintiff *inter alia*:
 - a) explained his situation and all the unfortunate problems he had encountered after Daimlerchrysler had lost his personal information on the Data Tape;
 - b) confirmed that he had been informed that the fraudster had used VOID cheque number 115 when purchasing all four (4) vehicles mentioned above and that it was the same VOID cheque number 115 that he had given to Champlain Dodge Chrysler in May 2004 when he had initially leased his Dodge Caravan from Daimlerchrysler;
 - c) mentioned the fact that the Ottawa police detective in charge of the investigation had confirmed to Petitioner that he was aware of at least one other person who had received the Notification Letter from Daimlerchrysler and who had fallen victim to a similar identity theft, with three (3) vehicles purchased under that person's identity as well;
 - d) requested to be informed of the exact nature of the personal information that had been lost so that he may advise the various private and governmental institutions and in order to make sure that such information is changed and cannot be used in the future;

e) confirmed the details of the costs incurred and time spent by Petitioner as of May 23, 2008, dealing with these various fraud occurrences; and

f) put Daimlerchrysler on notice that he was holding it liable for his damages suffered and that he would be filing the proper legal proceeding under the circumstances;

the whole as more fully appears from a copy of Petitioner's demand letter dated May 28, 2008, filed herewith, as **Exhibit R-8**;

52. Mr. Chillman (and Respondent in general) has to date never responded to Petitioner's said demand letter;

June 3, 2008:

53. On June 3, 2008, Petitioner met with a notary and signed two (2) affidavits and transmitted same to the HSBC;

June 23, 2008:

54. Petitioner met with the RBC representative since the RBC had mistakenly sent him a collection letter dated June 16, 2008 regarding a payment due for the stolen vehicle mentioned above;

July 4, 2008:

55. On July 4, 2008, Petitioner called the Police in order to ask for an update about his case but no new information was available;
56. Petitioner also contacted the RBC representative to give him the police file numbers in both Montreal and Ottawa. The RBC representative confirms that Petitioner should no longer be receiving collection letters;
57. Petitioner communicated with Equifax and TransUnion in order to update his file;

July 7, 2008:

58. On July 7, 2008, Petitioner spoke to a representative of *La Capitale Assurance* who confirmed that it would be cancelling the charges due pursuant to the identity theft mentioned above;

July 12, 2008:

59. On July 12, 2008, Petitioner received a call from Mr. Girard from the *département de sécurité* of the HSBC and Petitioner had to explain the whole story once again;

July 15, 2008:

60. On July 15, 2008, Petitioner consulted his credit reports with Equifax and TransUnion and he was forced to update his information once again;

August 22, 2008:

61. On August 22, 2008, Petitioner received two (2) letters from the HSBC (both dated August 20, 2008) confirming that it had accepted his contestations of the two (2) fraudulent HSBC loans and confirming that the two (2) loan accounts in question would be closed, the whole as more fully appears from a copy of said letters, together with the September 15, 2008 *Demande de mise à jour de mon dossier d'historique de crédit* form Petitioner filed with Equifax in relation to the HSBC loans in question, filed herewith, *en liasse*, as **Exhibit R-9**;

September 12, 2008:

62. On September 12, 2008, Petitioner met with a RBC representative for 90 minutes in order to complete the required documentation declaring that he was victim of identity theft, as mentioned above;

September 15, 2008:

63. As appears from Exhibit R-8, on September 15, 2008, Petitioner forwarded a copy of the two (2) letters received from HSBC in August 2008 (Exhibit R-8) to Equifax. He also sent copies to TransUnion;

September 22, 2008:

64. On September 22, 2008, Petitioner requested that RBC research the cheque that was used to purchase the stolen vehicle;
65. That same day, Petitioner sent letters to each of the RBC, the TD, the HSBC and Mr. Brochu at Daimlerchrysler requesting access to his personal information contained in their files, the whole as more fully appears from a copy of said letters, filed herewith respectively as **Exhibit R-10**, **Exhibit R-11**, **Exhibit R-12** and **Exhibit R-13**;

September 25, 2008:

66. On September 25, 2008, Petitioner received a call from TD confirming that the cheque used for the theft had been a VOID cheque from his CIBC account bearing cheque number 115, which had been remitted to Daimlerchrysler originally, as mentioned above;

September 30, 2008:

67. On September 30, 2008, Petitioner sent a letter to Mark D. Norman, Chairman, President and Chief Executive Officer of Daimlerchrysler Canada, explaining his situation following the loss of his information and confirming his past telephone conversation with Mr. Brochu on May 6, 2008 (detailed above) and his May 28, 2008 letter to Brian Chillman (Exhibit R-8) that had gone unanswered, the whole as more fully appears from a copy of said letter, filed herewith, as **Exhibit R-14**;
68. Mr. Norman (and Respondent in general) has to this day never responded to Petitioner's said letter;

October 3, 2008 and thereafter:

69. On October 3, 2008, Petitioner received a copy of the various documents that Respondent had in its file concerning Petitioner's vehicle lease, a copy of which are filed herewith, as **Exhibit R-15**;
70. In the fall of 2008, having still not received a response from Respondent, Petitioner contacted *La Fracture*, a television news magazine which deals with consumer issues, explaining his unfortunate situation;

71. Petitioner was later interviewed and on November 25, 2008, Radio-Canada aired Petitioner's story on said news magazine;
72. Respondent did not contact Petitioner after the *La Fracture* episode aired;
73. Finally, and as a result of the above, Petitioner suffered further damages since his credit score had dropped from a very strong score of 779 on March 15, 2007, to a very weak score of 639 on July 15, 2008. Gradually since July 2008, Petitioner's credit score has been re-established;

The Respondent's negligence and faults committed:

74. Respondent was clearly negligent in the manner in which said information was being transferred and/or stored in the first place;
75. In fact, the personal information in question was entrusted to Respondent by the Class Members in the sole context of a lease of an automobile or truck. The lost Data Tape contained the personal information of all of Respondent's Canadian lease customers¹;
76. Respondent had the personal information housed and stored in the United States of America, namely at its data center location in Michigan, USA, when Respondent conducted its business in Canada and it clearly knew that it would be making monthly credit reports to a credit agency located in Rouyn-Noranda, Quebec;
77. In the context of said monthly credit reporting, Respondent chose to send the sensitive personal information of the Class Member by merely saving the information on a physical Data Tape, and physically shipping the Data Tape to the credit agency, instead of using a more secure method of transferring information (as it only began to do following the loss of information in question);
78. Furthermore, Respondent did not even keep a back-up of the information saved on the Data Tape before it sent it out and ultimately lost it. In fact, Respondent cannot even confirm which information exactly was lost since it did not keep a back-up²;

¹ As confirmed by Respondent's representative, Mrs. Lynnette M. Barker, during her June 23, 2009 cross-examination on affidavit in the Mazzonna file (transcript, Exhibit R-5, page 51, lines 3 and following).

² As confirmed by Respondent's representative, Mrs. Lynnette M. Barker, during her June 23, 2009 cross-examination on affidavit in the Mazzonna file (transcript, Exhibit R-5, page 42, lines 10 and following).

79. Respondent also chose not to encrypt or otherwise password-protect the personal information contained on the Data Tape, making it accessible to any person who may gain control of it (for example in the case of theft or in the case of loss);
80. In this regard, the information on the Data Tape was easily accessible using a tape drive which could be purchased from many suppliers and over the internet and in any case, the information on the Data Tape could easily be converted into regular DVD format by data conversion businesses;
81. Respondent also chose to simply send the Data Tape in a sealed envelope by way of regular United Parcel Service du Canada Ltée ("**UPS**") shipping while knowing very well that such a method of transport is not secure and the packages sent in this manner can be lost or stolen;
82. Respondent did not inform UPS of the nature of what was contained in the envelope, namely that it contained the sensitive personal information of approximately 240,000 of its customers. Instead, Respondent simply declared that it was a "3480 computer cartridge" with a **declared value of only "\$5.00 U.S.**", the whole as more fully appears from the Customs Packing List created by Respondent and remitted to UPS with the shipping envelope, filed herewith, as **Exhibit R-16**;
83. Accordingly, Respondent chose to declare the total value of the shipment at a nominal value of \$5.00 U.S., therefore attributing no value whatsoever (and no concern for) the sensitive personal information of its approximately 240,000 customers;
84. Respondent declared such a nominal value since it was aware of UPS' shipping policies and shipping costs and Respondent wanted to reduce its monthly recurring shipping costs for sending the Data Tape to the credit agency in Quebec;
85. Respondent was therefore at fault and negligent when it decided to favor the reduction of its own shipping costs instead of protecting the personal information it had collected from the Class Members;
86. With regard to these UPS shipping costs and policies, we refer the Court to UPS's representative Mark Maliska's affidavit dated November 19, 2008 and his written examination on affidavit dated March 26, 2009, filed in the context of the Mazzonna File, and filed herewith, *en liasse*, as **Exhibit R-17**, in which the UPS representative states that:

"It is UPS' policy that the value of any package to be shipped may not exceed the local currency equivalent of US\$50,000 (for jewellery, US\$500). Accordingly, UPS will not accept to ship a package if the declared value exceeds the local currency equivalent of US\$50,000. The charge relating directly to a package where the declared value is US\$50,000 would be US\$748.50 (US\$1.50 per US\$100 of declared value up to a maximum of US\$50,000, with no charge on the first US\$100 of declared value, or on a package where the declared value is less than US\$100)."

87. Respondent therefore attributed zero value to the personal information of its approximate 240,000 customer contained on the Data Tape in order to save on its monthly shipping costs;
88. All of the above evidences Respondent's negligence and fault in the manner in which the Class Members' personal information was being transferred and/or stored;
89. Petitioner invokes the following sections of provincial and federal legislation which apply under the circumstances and Petitioner respectfully submits that the mere fact that his personal information was entrusted to the Respondent in the context of a vehicle lease and subsequently lost by Respondent as detailed above constitutes an unlawful violation of his fundamental rights which makes Respondent liable to pay compensatory, moral and punitive damages:
 - a) Sections 3, 35, 36, 37 and 1621 of the *Civil Code of Quebec*, LRQ, c C-1991;
 - b) Sections 5 and 49 of the *Charter of Human Rights and Freedoms*, RDQ, c C-12;
 - c) Sections 1, 2, 10, 13 and 17 of the *Act Respecting the Protection of Personal Information in the Private Sector*, RSQ, c P-39.1;
 - d) Sections 2, 3, 5 and 11 of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, as well as its sections 4.1, 4.3, 4.7 to 4.7.4 of its Schedule 1;

Respondent's faults and negligence after it discovered that it had lost the Class Members' personal information:

90. As appears from the above-cited Notification Letter (Exhibit R-3), Respondent never offered any credit monitoring services to the Class Members, who had now become more at risk to be a victim of fraud and/or identity theft due to the loss of their personal information;
91. In fact, and as appears from the Notification Letter (Exhibit R-3), Respondent did not even alert the credit bureaus, such as Equifax and TransUnion, of the loss of the Class Members' personal information in order to have the appropriate alert marked on the Class Members' credit files. Here as well, Respondent simply chose not to spend the money and time required in order to have these alerts posted on the credit files, therefore passing off this inconvenience and expense to the Class Members themselves;
92. Furthermore, and as stated above, Respondent chose to simply not mention in the Notification Letters sent to the Class Members that their date of birth was also among the information that had been lost or stolen;
93. Although Respondent was aware of the loss of the information since as early as March 12, 2008, Respondent chose to only notify the Class Members, by regular mail, namely by sending the said Exhibit R-3 Notification Letters received by the Class Members in the middle of April 2008. Respondent clearly had the necessary contact information and the notification and delivery means in order to contact the Class Members much quicker, which would have helped in preventing further fraud exposure for Class Members. Respondent's lack of haste in notifying Class Members in this regard is therefore indicative of its negligence in the preservation, protection and safe keeping of the Class Members' personal information and interests;
94. Basically, and as appears from all of the above, Respondent was negligent when it lost the Class Members' personal information and all it did thereafter was to send them the Exhibit R-3 Notification Letters, by regular mail, simply admitting its mistake but offering no relief or assistance whatsoever to their Customers;
95. Respondent, in the Exhibit R-3 Notification Letters, did not even offer to compensate the Class Members for any loss or damages stemming from the loss of their personal information contained in the Data Tape, which is the very least Respondent should have done under the circumstances;

The damages suffered by Class Members as a result of Respondent's loss of their personal information;

37. Petitioner and likely the other Class Members have already and will continue to experience anxiety, fear, inconvenience and/or loss of time due to the loss of their personal information, which has made Petitioner and other Class Members potential targets for fraud and/or identity theft;
38. The Petitioner and the Class Members have suffered certain inconveniences including but not limited to the following:
- a) Delays in the processing of any future requests or applications for credit in the future;
 - b) The obligation to closely monitor their accounts looking for possible fraud for all periods subsequent to the loss of information of March 12, 2008;
 - c) The obligation to be even more attentive than normally necessary concerning the communication of their personal information, due to the higher possibility of fraudulent activity caused by Respondent's loss of the information;
 - d) The obligation to inform their financial institutions of the loss of the information by the Respondent and to deal with said financial institution in order to reduce risk of fraud as much as possible;
 - e) Obtaining their credit report in order to look for unauthorized transaction or fraud;
39. Petitioner and many Class Members have also paid certain fees or costs in order to further protect themselves, such as in order to activate a credit monitoring service, in order to obtain their credit report, in order to replace their personal identification such as social insurance numbers, driver's licence numbers, in order to purchase insurance, etc. Respondent is solely responsible and liable for these costs or fees paid by the Petitioner and/or other Class Members and for the inconvenience caused to Class Members in this regard;
40. Furthermore, Class Members such as the Petitioner who have already fallen victim to fraud or identity theft have been inconvenienced by the loss of funds and/or loss of time dealing with the fraud, which again Respondent is solely responsible and

liable to compensate;

41. As a result of the loss of information by Respondent detailed hereinabove, certain Class Members such as the Petitioner decided or were advised to completely change their bank account numbers. In the case of the Petitioner particularly, he kept the old bank account open for approximately one month, as a transition period, in order to transfer all his payments to his new account (as per his financial institution's suggestion);
42. Certain Class Members who chose to change their bank account number were forced to pay certain extra fees or charges in this regard, such as but not limited to the charges associated with ordering of replacements cheques bearing the new account numbers. The Petitioner's financial institution was nice enough to waive these fees for the Petitioner in particular;
43. Furthermore, and as a result of being forced to change their bank account numbers in this regard, the Petitioner and certain Class Members were also inconvenienced (including loss of time) by being obliged to inform certain third parties of the change in bank account number, for example informing their employer if automatic deposits are being made, and informing other financial institutions or corporations if automatic debits are being made on the existing account (which usually involves sending a VOID cheque to the organization in order to effect the change in bank account number to be automatically debited). In the case of the Petitioner, he was forced to inform his car and home insurance companies of the change of bank account numbers;
44. Moreover, said Class Members may have been forced to pay service charges, interest, or penalties when dealing with issues of returned cheques and/or NSF cheques and/or failed automatic debits or credits during the transition period following the change of bank account numbers. Again, Petitioner's particular financial institution waived all fees stemming from his change account (which was only done because of the loss of information by Respondent);
45. Some Class Members such as Petitioner saw their credit score drop considerably as a result of the loss of information by Respondent. Respondent is liable for all damages and expenses disbursed by the Petitioner and the Class Members in order to monitor and possible rectify their credit scores;

Punitive Damages:

91. For all of the reasons more fully detailed above, which are reiterated as though recited at length in the present section, Petitioner respectfully submits that Respondent was grossly and/or intentionally negligent and is liable to pay punitive damages to the Class Members;
92. In fact, without limiting the generality of the forgoing, Respondent was grossly negligent and/or intentionally negligent when it:
- a) decided to send the personal information of the Class Members without encrypting it in the first place, by way of normal UPS delivery;
 - b) decided not to inform UPS of the content of the Data Tape in question and to only associate a nominal value of 5.00\$ USD to the Data Tape being sent, therefore associating no value whatsoever to the personal information of the Class Members;
 - c) decided to only notify the Class Members several weeks after the loss by way of the Notification Letter sent by regular mail, in which it failed to mention very important information such as the fact that the date of birth was also lost and that the envelop had been located empty;
 - d) decided never to even offer to compensate the Petitioner and the Class Members for the measures that had to be taken in order to counter the fraudulent activities made under their names nor to compensate them for any other financial losses stemming from the said loss of information;
93. Considering the above and considering the fact that Respondent has violated various laws which have been enacted in order to protect the class members personal information, Respondent is liable to pay punitive damages to all of the Class Members due to the loss of private information itself, aside from any other compensable damages suffered by the Class Members;
94. Respondent's above detailed actions qualify its fault as intentional which is a result of wild and foolhardy recklessness in disregard for the rights of the Class Members, with full knowledge of the immediate and natural or at least extremely probable consequences that its action would cause to the Class Members;
95. Respondent's negligence has shown a malicious, oppressive and high-handed conduct that represents a marked departure from ordinary standards of decency. In

that event, punitive damages should be awarded to Class Members;

The investigation conducted by the Office of the Privacy Commissioner of Canada:

96. Another person who had received the Exhibit R-3 Notification letter filed a complaint with the Office of the Privacy Commissioner of Canada (hereinafter the "OPCC") regarding the loss of her personal information by the Respondent, the whole as more fully appears from a copy of the complaint letter sent to the OPCC dated May 28, 2008, filed herewith, as **Exhibit R-18**;
97. Upon receipt of the Exhibit R-18 complaint letter, the OPCC launched an investigation into this loss of information by the Respondent, in order to ascertain whether Respondent had contravened the *Personal Information Protection and Electronic Documents Act* (hereinafter "**PIPEDA**") or PIPEDA's "Principles";
98. On January 19, 2010, the OPCC issued its investigation findings, the whole as more fully appears from a copy of said findings, which are being filed herewith as **Exhibit R-19**, as though recited at length herein the present motion (hereinafter the "**OPCC Findings**");
99. As appears from the OPCC Findings (Exhibit R-19), the OPCC's investigation uncovered the following facts, *inter alia*:
 - a) That Petitioner's complaint was well founded;
 - b) That the Class is comprised of 240,000 of Respondent's clients;
 - c) That the lost information in question "*peuvent être considérés comme délicats*";
 - d) That Respondent admitted that many of the Class Members, including the Petitioner, had received the Notification Letter late (namely over five (5) weeks after the loss of the information) since Respondent had decided to suspend the sending of the Notification Letters when Respondent (or its messenger service) had mistakenly believed to have found the lost Data Tape (The Data Tape has never been recovered as far as Petitioner is aware);
 - e) That this information on the Data Tape was not encrypted ("*pas encodés*");

f) That Respondent admitted that it had not advised UPS that the Data Tape contained the sensitive personal information of its clients;

g) That Respondent admitted that it had not asked UPS to take any special measures in order to protect the package which contained the personal information of its clients;

101. As appears from the OPCC Findings (Exhibit R-19), the OPCC concluded and/or mentioned the following, *inter alia*:

a) *"J'estime que les mesures en place pour protéger les renseignements contre une perte ou un vol n'étaient malheureusement pas adéquates compte tenu de la nature très délicate des renseignements et du grand nombre de personnes touchées. Il semble que UPS ne connaissait même pas la nature délicate du contenu de la cartouche."*;

b) *"Le principe 4.7 stipule que les renseignements personnels doivent être protégés au moyen de mesures de sécurité correspondant à leur degré de sensibilité. De plus, le principe 4.1.3 prévoit que, lorsque des renseignements sont confiés à une tierce partie, l'organisation doit, par voie contractuelle ou autre, fournir un degré comparable de protection."*;

c) *"Chrysler n'a manifestement pas tenu compte des dispositions de l'un ou l'autre des principes susmentionnés lorsqu'elle a eu recours, comme elle le faisait couramment, aux services de UPS pour transporter les données délicates de centaines de milliers de consommateurs sans obliger le fournisseur indépendant, par voie contractuelle ou autre, à prendre des mesures de sécurité appropriées."*;

d) *"Le fait que le mis en cause [namely the Respondent] n'ait pas pris les mesures de sécurité adéquates et que la cartouche n'ait jamais été retrouvée me préoccupe encore plus. Si Chrysler avait encodé les données sur la cartouche, elle aurait atténué le risque qu'une personne y ait accès sans autorisation."*;

e) "(...) depuis l'incident et pour éviter que cela se reproduise, le mis en cause [namely the Respondent] a cessé d'utiliser des cartouches et un service de messagerie terrestre pour transporter ce type de renseignements personnels. Il a également veillé à ce que les renseignements soient désormais encodés lorsqu'ils sont transmis pour éviter que des personnes non autorisées y aient accès.";

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

102. Every member of the Group had his or her personal information in the Data Tape lost by Respondent as described hereinabove, including names, addresses, date of birth, telephone numbers, information related to the status and history of the customer's credit with Respondent, and social insurance numbers;
103. Every member of the Group has or will experience anxiety, inconvenience, loss of time, and/or fear due to the loss of personal information;
104. Every member of the group had to closely monitor his or her accounts looking for possible fraud from now on and for all periods subsequent to the loss of information;
105. Every member of the Group will be inconvenienced by any safety measures that may become necessary in order to prevent further fraud exposure, such as signing up for credit monitoring service, posting an alert on their accounts or credit files, changing their personal information or account numbers, transferring money from one account to another, etc.;
106. Furthermore, every Group Member may be required to pay costs or fees in order to sign up for such credit monitoring services, to post an alert on their accounts or credit files, to change their personal information, to purchase insurance, or in order to otherwise protect themselves from further fraud exposure;
107. Moreover, as mentioned above, Respondent chose to send out the Exhibit R-3 Notification Letters to the Class Members by regular mail although Respondent knew or should have known that a letter sent by regular mail does not provide the sender with a confirmation of receipt and such regular mail has the greatest chance of being delayed, misplaced or lost. It is therefore possible that many Class Members have not actually been notified of the loss of their information, for whatever reason, and their credit file is therefore even more at risk since said

Class Members will not even be looking for possible fraudulent use of their credit file or information, and will not have the opportunity to take further preventative measures in order to protect their credit file. These Class Members therefore do not even know that they may be entitled to claim damages from Respondent;

108. Every member of the Group can still fall victim to fraud or identity theft, in the future, due to Respondent's negligence in the safekeeping of their personal information;
109. Most members of the Group have not been informed that their date of birth was also lost by Daimlerchrysler along with the other personal information, as detailed above;

CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

110. The composition of the group makes the application of article 59 or 67 C.C.P. impractical for the following reasons:

- a) The number of persons included in the group is estimated at 239,277, according to information provided by the Respondent, divided geographically as follows:

<u>Province/State</u>	<u>Number of Customers</u>
British Columbia	19,609
Alberta	34,696
Saskatchewan	5,989
Manitoba	5,879
Ontario	95,250
Quebec	62,235
New Brunswick	5,516
Newfoundland & Labrador	3,505
Nova Scotia	5,101
Prince Edward Island	800
Northwest Territories	542

Nunavut	4
Yukon	148
Washington (USA)	1
Texas (USA)	1
Kansas (USA)	1

b) The names and addresses of persons included in the group are not known to the Petitioner (but are clearly known to Respondent). However, Petitioner, through the undersigned attorneys, has been able to compile a list of over 140 Class Members, some of which added in their personal comments or concerns, the whole as more fully appears from a copy of said list, being filed herewith as though recited at length herein, as **Exhibit R-20**;

c) All the facts alleged in the preceding paragraphs make the application of articles 59 or 67 C.C.P. impossible;

111. The recourses of the members raise identical, similar or related questions of fact or law, namely:

a) Was Respondent negligent in the handling of and subsequent loss of the personal information of the Group Members?

b) Is Respondent liable to pay damages to the Group Members as a result of the loss of said information, including actual monetary losses incurred, lost time, inconvenience, anxiety and other moral and/or punitive damages caused by the loss of said information, and if so in what amount?

112. The interests of justice favour that this motion be granted in accordance with its conclusions;

NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

113. The action that Petitioner wishes to institute for the benefit of the members of the class is an action in damages;

114. The conclusions that Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT Plaintiffs' action against Defendant;

CONDEMN Defendant to pay to the members of the group compensatory damages for all monetary losses caused as a result of Defendant's loss of said member's personal information;

CONDEMN Defendant to pay to the members of the group compensatory and/or moral damages to every Group Member in the amount to be determined by the Court as a result of Defendant's loss of said member's personal information;

CONDEMN Defendant to pay an amount in punitive / exemplary damages to every Group Member, in the amount to be determine by the Court, with interest as well the additional indemnity;

GRANT the class action of Petitioners on behalf of all the members of the group;

ORDER the treatment of individual claims of each member of the group in accordance with articles 1037 to 1040 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

115. Petitioner suggests that this class action be exercised before the Superior Court in the District of Montreal for the following reasons:

a) A great number of the members of the Group reside in the judicial District of Montreal;

b) Respondent carries on business in the District of Montreal;

c) The undersigned attorneys representing the Petitioner and the proposed Group and Respondent's attorneys practice in the district of Montreal;

d) The Mazzonna file already proceeded in the judicial district of Montreal, as appears from the Court record;

116. Petitioner who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the members of the group for the following reason:

a) His personal information was lost by Respondent as described hereinabove;

b) He has already and will continue to suffer anxiety, inconvenience, stress, loss of time, and out-of-pocket expenses as a result of said loss of information;

c) He has already fallen, and may in the future fall, victim to fraud and/or identity theft because of Respondent's loss of his personal information;

d) He has followed this matter since March of 2008 and decided to institute the present proceedings after the Mazzonna file failed to be authorized by this Honorable Court due to the level of damages suffered by Mrs. Mazzonna specifically, which level of damages pales in comparison to the level suffered by the Petitioner;

e) He understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interest of the Members of the Group;

f) He is available to dedicate the time necessary for the present action before the Courts of Quebec and to collaborate with Class attorneys in this regard and Petitioner is ready and available to manage and direct the present action in the interest of the Members of the Group that Petitioner wishes to represent;

g) Petitioner is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class;

h) His interests are not antagonistic to those of other members of the group;

i) He has given the mandate to the undersigned attorneys to obtain all relevant information to the present action and intends to keep informed of all developments;

j) He, with the assistance of the undersigned attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other Members of the Group and to keep them informed;

117. The present motion is well founded in fact and in law;

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the group herein described as:

All persons (including their estates, executors, or personal representatives), consumers, corporations, firms, businesses, and other organisations (subject to Article 999 C.C.P.), in all of Canada (subsidiarily in Quebec), whose personal information was stored or saved on a data tape, which was lost by Respondent while in transit on or about March 12, 2008, or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

Was Respondent negligent in the handling of and subsequent loss of the personal information of the Group Members?

Is Respondent liable to pay damages to the Group Members as a result of the loss of said information, including actual monetary losses incurred, lost time, inconvenience, anxiety and other moral and/or punitive damages caused by the loss of said information, and if so in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT Plaintiffs' action against Defendant;

CONDEMN Defendant to pay to the members of the group compensatory damages for all monetary losses caused as a result of Defendant's loss of said member's personal information;

CONDEMN Defendant to pay to the members of the group compensatory and/or moral damages to every Group Member in the amount to be determined by the Court as a result of Defendant's loss of said member's personal information;

CONDEMN Defendant to pay an amount in punitive / exemplary damages to every Group Member, in the amount to be determine by the Court, with interest as well the additional indemnity;

GRANT the class action of Petitioners on behalf of all the members of the group;

ORDER the treatment of individual claims of each member of the group in accordance with articles 1037 to 1040 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

DECLARE that all members of the group that have not requested their exclusion from the group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;

FIX the delay of exclusion at 30 days from the date of the publication of the notice to the members;

ORDER the publication of a notice to the members of the group in accordance with Article 1006 C.C.P. and convene the parties to a subsequent hearing in this regard;

THE WHOLE with costs including the costs related to preparation and publication of the notices to class members.

MONTREAL, May 22, 2012

LEX GROUP INC.

(s) David Assor

Per: David Assor
Attorneys for Petitioner and the Class
Members

NOTICE OF PRESENTATION

TO:

**TD AUTO FINANCE SERVICES
INC./ SERVICES DE
FINANCEMENT AUTO TD INC.,**
66 Wellington Street West, in the
City of Toronto, Province of
Ontario, M5K 1A2;

TAKE NOTICE that the Petitioner has filed this MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO ASCRIBE THE STATUS OF REPRESENTATIVE in the office of the Superior Court of the Judicial District of Montreal. The Motion will be presented before one of the Honourable Judges of the Superior Court of Québec, District of Montréal, on **June 8, 2012 at 9:00 AM**, in room **2.16** of the Courthouse of Montréal situated at 1 Notre Dame East, Montréal, Québec. On that date, the Court may exercise such powers as are necessary to ensure the orderly progress of the proceeding or the Court may hear the case.

DO GOVERN YOURSELF ACCORDINGLY.

MONTREAL, May 22, 2012

LEX GROUP INC.

(s) David Assor

Per: David Assor
Attorneys for Petitioner and the Class
Members