

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

S U P E R I O R C O U R T
(Class Action)

N° 500-06-000809-166

NAOMI ZOUZOUT

Petitioner

v.

WAYFAIR LLC

Respondent

**WAYFAIR LLC'S APPLICATION FOR PERMISSION TO EXAMINE
THE PETITIONER AND LEAVE TO FILE RELEVANT EVIDENCE
AT THE AUTHORIZATION HEARING
(Art. 574 of the Code of Civil Procedure)**

**TO AN HONOURABLE JUSTICE OF THE SUPERIOR COURT, IN AND FOR THE
DISTRICT OF MONTREAL, DESIGNATED TO HEAR THE APPLICATION FOR
AUTHORIZATION IN THE PRESENT FILE, RESPONDENT WAYFAIR LLC
RESPECTFULLY SUBMITS THE FOLLOWING:**

I. OBJECT OF THIS APPLICATION

1. Respondent Wayfair LLC ("**Wayfair**") seeks leave to file the following evidence at the hearing on Petitioner's *Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff* (the "**Application for Authorization**"):
 - a) A screen shot from the wayfair.com website accessed from Canada (**Exhibit D-1**) and a table of Canadian revenue generated on Wayfair's websites (**Exhibit D-2, under seal**), copies of which are communicated in support hereof;
 - b) The terms of use for wayfair.com (**Exhibit D-3**), Joss & Main (**Exhibit D-4**), AllModern (**Exhibit D-5**), Birch Lane (**Exhibit D-6**), Dwell Studio (**Exhibit D-7**), and Wayfair Supply (**Exhibit D-8**) (collectively the "**Terms of Use**"), copies of which are communicated in support hereof;
 - c) A post that appeared on RedFlagDeals (**Exhibit D-9**), the order placed by Jenny Lauzon (**Exhibit D-10**) and her exchange with customer service

(**Exhibit D-11**), the order placed by the Petitioner Naomi Zouzout for a Milano 5 Seating Group (**Exhibit D-12**) and information related to her activity on wayfair.ca when she placed that order (**Exhibit D-13**), and the order placed by David Zouzout for two Milano 5 Seating Groups (**Exhibit D-14**), copies of which are communicated in support hereof;

- d) Screen shots of Ann Putnam's Facebook page (**Exhibit D-15**), a screen shot of Michaela Krestenic's Facebook page (**Exhibit D-16**) and screen shots from Laura O'Brien's Twitter page (**Exhibit D-17**), copies of which are communicated in support hereof;
- e) An affidavit from Elizabeth Graham, Wayfair's VP of Sales and Service, explaining Wayfair's business operations in Canada, its terms of use for online purchasing, the safeguards it implemented to ensure accurate pricing and information regarding the pricing errors alleged in the Plaintiff's Application (the "**Affidavit**"), a copy of which is communicated herewith as **Exhibit D-18**;

- 2. Wayfair also seeks permission to examine the Petitioner, Naomi Zouzout, concerning the nature of the action and her knowledge of the facts giving rise to it, the investigation that she has done in order to identify other potential class members, and her ability to act as the representative, the whole as will be detailed further below;
- 3. The evidence that Wayfair seeks to obtain and adduce will enable the Court to undertake an informed analysis of the authorization criteria set out in Article 575 of the *Code of Civil Procedure*;

II. PROCEDURAL CONTEXT

- 4. On or around September 12, 2016, the Petitioner filed her *Application for Authorization*, whereby she seeks permission to institute a class action on behalf of the following group:

All persons in Canada (subsidiarily Quebec) who, since September 12th, 2013 (the "Class Period"), ordered or purchased any goods from Wayfair LLC and/or its affiliated brands, including Wayfair.com, Wayfair.ca, Joss & Main, DwellStudio, AllModern, Birch Lane and Wayfair Supply (hereinafter "Wayfair"), and who, after receiving a confirmation of their purchase from Wayfair at the price which Wayfair initially advertised, subsequently had their purchase cancelled by Wayfair, who did not respect the price it initially advertised,

the whole as appears from the Application for Authorization;

5. The Petitioner alleges that Wayfair is acting in violation of the Quebec *Consumer Protection Act* (the “CPA”) every time it cancels an order due to a pricing error (para. 9);
6. The Petitioner adds that Wayfair also violated section 52 of the *Competition Act* when it lists an incorrect price because it “recklessly makes a representation to the public that is false or misleading in a material respect” (para. 10);
7. The Petitioner also alleges that Wayfair is “a repeat offender” (para. 18) and is demonstrating gross negligence in allowing pricing errors to occur “5-10 times per week” (para. 35 and 36). Petitioner therefore concludes that any pricing mistake made by Wayfair is inexcusable (para. 36);
8. Pursuant to Article 575 *CCP*, at the authorization stage, this Honourable Court will have to determine if the four conditions to exercise a class action are satisfied;
9. When it facilitates such analysis, the Court may allow relevant evidence to be submitted by the Respondent, based on Article 574 *CCP*;
10. Wayfair submits that the documents communicated as Exhibits D-1 through D-18 are useful, necessary and appropriate to respond to Petitioners’ allegations, to provide a complete picture of the circumstance under which the pricing errors alleged by Petitioner occurred, and are relevant to evaluating the criteria for authorization;

III. BUSINESS IN CANADA

11. Wayfair submits that paragraphs 2 to 9 of the Affidavit, as well as Exhibits D-1 and D-2, constitute relevant and appropriate evidence for the purposes of the hearing on the Application for Authorization;
12. These statements and documents provide information related to Wayfair’s business. In particular, they shed light on the spectrum of products offered to Canadian customers, in comparison to what is available to US customers;
13. Further, the Affidavit explains that Wayfair does not have a place of business in Quebec or even in Canada, but that on January 4, 2016, it launched a website dedicated to Canadian customers;
14. Such evidence is relevant and helpful at the authorization stage because Respondent will argue that this Court does not have jurisdiction over members of the proposed class residing outside of Quebec, considering that none of the conditions enumerated at Article 3148 of the *Civil Code of Quebec* are met with respect to such individuals;
15. Thus, the Respondent’s position, as will be presented at the hearing on authorization, is that the class definition should be limited to residents of Quebec only;

16. The Court will be in a better position to evaluate the proper scope of the class if it is in possession of information describing how Wayfair does business with Canadian customers, both inside and outside Quebec;
17. This evidence will also help the Court in evaluating whether there are any grounds for the class period to start in September 2013 as proposed, rather than in January 2016, when Wayfair launched a website dedicated to Canadian customers;

IV. PRICE SETTING AND VERIFICATION

18. Paragraphs 10 through 12 of the Affidavit explain how the prices are set for the products sold on Wayfair's websites;
19. These paragraphs also describe the safeguards put in place by Wayfair to verify the accuracy of such prices;
20. Considering Petitioner's allegations that Wayfair is grossly negligent and that any pricing mistake appearing on its websites are inexcusable (para. 36), the proposed evidence will allow the Respondent to contradict these bold, general and unsubstantiated claims;
21. Thus, this evidence will allow the Court to better assess whether the facts alleged by the Petitioner appear to justify the conclusions sought (art . 575(2) CCP);

V. TERMS OF USE

22. Wayfair submits that the Terms of Use (Exhibits D-3, D-4, D-5, D-6, D-7 and D-8) constitute relevant and appropriate evidence for the purposes of the hearing on the Application for Authorization;
23. These documents, along with paragraphs 13 to 15 of the Affidavit, show that the same *Order Acceptance* clause, which Plaintiff alleges at paragraph 15 of her Application for Authorization, is present in the Terms of Use for *all* of Wayfair's websites, namely, wayfair.com, Joss & Main, AllModern, Birch Lane, Dwell Studio and Wayfair Supply;
24. Because Respondent will argue that, contrary to what Petitioner alleges at paragraphs 15 and 16 of her Application for Authorization, such clauses are clearly valid in Quebec in the context of Internet transactions, it is important that Respondent be able to adduce evidence showing that the Order Acceptance clause is in fact a pre-condition for placing orders on all of its websites;
25. Such evidence will help the Court determine whether the facts alleged by the Petitioner appear to justify the conclusions sought, pursuant to art. 575(2) CCP;
26. In addition, as stated at paragraph 15 of the Affidavit and illustrated in Exhibits D-3 through D-8, all Wayfair's Terms of Use contain an arbitration clause;

27. It is imperative that evidence of such clauses be adduced as it is directly relevant to the definition of the proposed class. Indeed, as a consequence of the arbitration clause being part of all the contracts concluded by Wayfair with each of the proposed class members, Respondent Wayfair will argue, pursuant to Article 3148 CCQ, that:

- a) All corporate customers should be excluded from the class definition;
- b) Any claim based on a violation of the *Competition Act* should be excluded from the proposed class action;

VI. CANADIAN PRICING ERRORS

28. Wayfair submits that paragraphs 16 through 44 of the Affidavit, along with Exhibits D-9, D-10, D-11, D-12, D-13 and D-14, are relevant for the purposes of the hearing on the Application for Authorization;
29. This portion of the Affidavit provides missing information related to the allegations contained at paragraphs 25, 28-36 and 45-55 of the Application for Authorization, and the exhibits filed by Petitioner in support thereof, which paint an incomplete and inaccurate picture of the situation;
30. Exhibit D-9 provides the complete contents of the initial post that appeared on RedFlagDeals, along with the associated comments, whereas Exhibit P-6, communicated by the Petitioner, only contains an excerpt of the entire thread;
31. Exhibits D-10 and D-11 provide details regarding the order placed by Ms. Lauzon, as alleged at paragraphs 30 and 31 of the Application for Authorization;
32. Exhibit D-12 provides details regarding the order placed by the Petitioner Naomi Zouzout for a Milano 5 Seating Group, and Exhibit D-13 shows her activity on wayfair.ca when she placed her order;
33. Exhibit D-14 shows the order placed for two of the same Milano patio sets by a person with the same last name as Petitioner;
34. Further, paragraphs 16 through 44 of the Affidavit provide additional relevant information with respect to the three Canadian pricing errors alleged by Petitioner, in particular:
 - a) Only three of the pricing errors alleged by the Petitioner relate to Canadian customers, namely, customers who ordered the Montgomery Loveseat, the Laguna Seating Group and the Milano Seating Group;
 - b) All three pricing errors were made on the wayfair.ca website and occurred in 2016;

- c) Several customers who placed orders for the Montgomery Loveseat clearly assumed that the displayed price was the result of a pricing error;
 - d) Only 26 of the customers who ordered the Montgomery Loveseat as a result of a pricing error were residents of Quebec;
 - e) None of the customers who ordered the Laguna Seating Group while it was erroneously priced were residents of Quebec;
 - f) Only 6 of the customers who ordered the Milano Seating Group while it was erroneously priced were residents of Quebec;
35. Such evidence is relevant and appropriate at the authorization stage, as it will help the Court to properly define what should be the scope of the proposed class and the class period and, ultimately, decide whether a class action is the proper vehicle for the alleged claim, in particular considering the condition stipulated at art. 575(3) *CCP*;
36. In addition, paragraphs 37 to 43 of the Affidavit in particular, along with Exhibits D-12, D-13 and D-14, will be useful to the Court in its assessment of whether the Petitioner is in a position to properly represent the class members (art. 575(4) *CCP*);

VII. OTHER ALLEGED PRICING ERRORS

37. Wayfair submits that paragraphs 45 through 51 of the Affidavit and Exhibits D-15, D-16 and D-17 are relevant for the purposes of the hearing on the Application for Authorization;
38. These statements and documents show that only three of the pricing errors alleged by the Petitioner relate to Canadian customers and that all other pricing errors alleged were reported by residents of the United States;
39. There is no evidence put forth by Petitioner that any of these other purported pricing errors alleged at paragraphs 20-23 and 27 of the Application for Authorization, affected any Canadian resident in any way;
40. Further, these purported incidents mentioned on the Internet by US residents are all related to orders placed on the wayfair.com website;
41. Paragraphs 4 through 9 of the Affidavit explain when and where Canadian customers are able to order from Wayfair. In particular, paragraph 8 explains that there have only been negligible sales to Canadian customers on wayfair.com in 2016;
42. Such evidence is relevant and appropriate at the authorization stage, as it will help the Court in its assessment of whether the facts alleged justify the conclusions sought (art. 575(2)) and will also allow it to properly define the class period and the

scope of the proposed class, particularly regarding whether the class should be limited to customers that placed orders on wayfair.ca;

VIII. EXAMINATION OF THE PETITIONER

43. Wayfair also seeks permission to examine the Petitioner, Naomi Zouzout, on the following topics:

a) The nature of the action and her knowledge of the facts giving rise to it; more specifically, the circumstances which brought her to purchase the Milano Seating Group as alleged at paragraphs 45 to 87 of the Application for Authorization;

b) The investigation that she has done in order to identify other potential members of the class;

c) Her ability to act as the representative of the class and whether she meets the legislative conditions;

44. The requested examination will provide key information that will allow the Court to make an informed decision as to whether the Petitioner is in a position to properly represent the class members (art. 575(4) CCP) and whether the facts alleged appear to justify the conclusions sought (art. 575(2) CCP);

45. The Respondent submits that the examination of the Petitioner could be limited to a duration of two hours and that it should be held out of Court for reasons of judicial economy and to allow the parties to better prepare for the hearing on authorization;

IX. CONCLUSION

46. In sum, both the examination of the Petitioner and the filing of the evidence contained in Exhibits D-1 through D-18 are necessary to allow Wayfair to respond to the allegations put forth by the Petitioner in her Application for Authorization, several of which are either inaccurate or incomplete, and will further enable the Court to decide whether the conditions for authorization have been met;

47. This application is well-founded in fact and in law.

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

GRANT the present *Application*;

AUTHORIZE Respondent Wayfair LLC to examine out of Court the Petitioner, Naomi Zouzout, for a maximum duration of two hours, on the following topics:

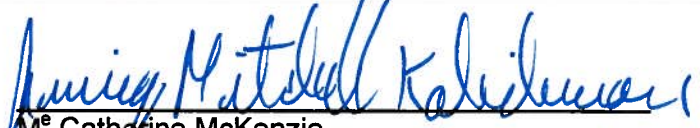
- a) The nature of the action and her knowledge of it; more specifically the circumstances which brought her to purchase the Milano Seating Group, as alleged at paragraphs 45 to 87 of the Application for Authorization;
- b) The investigation that she has done in order to identify other potential members of the class;
- c) Her ability to act as the representative of the class and whether she meets the legislative conditions.

AUTHORIZE Respondent Wayfair LLC to file the following evidence at the hearing on the motion for authorization of the class action:

- a) A screen shot from the wayfair.com website accessed from Canada (**Exhibit D-1**) and a table of Canadian revenue generated on Wayfair's websites (**Exhibit D-2, under seal**);
- b) The terms of use for wayfair.com (**Exhibit D-3**), Joss & Main (**Exhibit D-4**), AllModern (**Exhibit D-5**), Birch Lane (**Exhibit D-6**), Dwell Studio (**Exhibit D-7**), and Wayfair Supply (**Exhibit D-8**);
- c) A post that appeared on RedFlagDeals (**Exhibit D-9**), the order placed by Jenny Lauzon (**Exhibit D-10**) and her exchange with customer service (**Exhibit D-11**), the order placed by the Petitioner Naomi Zouzout for a Milano 5 Seating Group (**Exhibit D-12**) and information related to her activity on wayfair.ca when she placed that order (**Exhibit D-13**), and the order placed by David Zouzout for two Milano 5 Seating Groups (**Exhibit D-14**);
- d) Screen shots of Ann Putnam's Facebook page (**Exhibit D-15**), a screen shot of Michaela Krestenic's Facebook page (**Exhibit D-16**) and screen shots from Laura O'Brien's Twitter page (**Exhibit D-17**);
- e) An affidavit from Elizabeth Graham, Wayfair's VP of Sales and Service, dated December 20, 2016 (**Exhibit D-18**).

THE WHOLE without costs, except in the event of contestation.

MONTREAL, December 21, 2016



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