CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

(Class Action)
SUPERIOR COURT

N°: 500-06-000486-098

OPTION CONSOMMATEURS

Plaintiff

- and -

CHANTAL NOEL DE TILLY

Designated person

-v.-

MEUBLES LÉON LTÉE

Defendant/Plaintiff in warranty

-v.-

CITIFINANCIÈRE CANADA INC.

Defendant in warranty

MEUBLES LÉON LTÉE'S STATEMENT OF DEFENCE

TO THE HONOURABLE MARC-ANDRÉ BLANCHARD, J.S.C., JUDGE DESIGNATED TO HEAR THE PROCEEDINGS RELATING TO THE PRESENT CLASS ACTION, DEFENDANT RESPECTFULLY SUBMITS THE FOLLOWING:

1. With regard to the allegations contained in paragraph 1 of the Motion to Institute Proceedings (hereinafter the "**Motion**"), Defendant relies on the June 21, 2012 Judgment granting the Motion for Certification and anything else not in conformity therewith is denied. Defendant will refer to the types of plan referred to by Plaintiff as "no no plans".

2. With regard to the allegations relating to the "frais d'adhésion annuels" contained in paragraph 2 of the Motion, it is impossible for Defendant to respond to this allegation as Defendant is not a party of the contract extending variable credit entered into by Citi with Defendant's clients, is not privy and is not in possession of

the necessary information, and Citi refused, on December 21, 2009, to provide the information relating to, amongst other things, which customer was charged an annual fee, what financing plan the customer had and when was the customer charged, as appears from a letter from Citi of December 21, 2009, **Exhibit D-1**. Defendant denies as drafted the remainder of the allegations contained in the said paragraph.

3. With regard to the allegations contained in paragraph 3 of the Motion, Defendant submits that this question was settled by a Transaction that was approved by this Court in the *Nathalie St-Pierre* v. *Leon* court file number 500-06-000207-031, this approval having acquired the authority of a final judgment (*res judicata*) (hereinafter "**the St-Pierre Transaction and Judgment**"), as appears from the Transaction document, **Exhibit D-2** and the Judgment and the rectified Judgment, **Exhibit D-3**. Subsidiarily, Defendant denies the allegations contained in paragraph 3 of the Motion.

4. With regard to the allegations contained in paragraphs 4 a) to d) and i) to m) of the Motion, Defendant relies on the June 21, 2012 Judgment granting the Motion for Certification and anything else not in conformity therewith is denied.

5. With regard to the allegations contained in paragraphs 4 e) to h) of the Motion, Defendant submits that these questions were settled by the St-Pierre Transaction and Judgment (D-2 and D-3). Subsidiarily, Defendant relies on the June 21, 2012 Judgment granting the Motion for Certification and anything else not in conformity therewith is denied.

6. Defendant admits the allegations contained in paragraphs 5 and 6 of the Motion.

7. With regard to the allegations contained in paragraphs 7 and 8 of the Motion, Defendant relies on Exhibit P-1, the annual notice dated March 24, 2009, and anything else not in conformity therewith is denied.

8. With regard to the allegations contained in paragraph 9 of the Motion, Defendant relies on Exhibit P-2, extracts from its website, and anything else not in conformity therewith is denied.

9. Defendant admits the allegations contained in paragraph 10 of the Motion.

10. With regard to the allegations contained in paragraph 11 of the Motion, Defendant relies on Exhibit P-3, examples of its advertising, and anything else not in conformity therewith is denied.

11. With regard to the allegations contained in paragraph 12 of the Motion, Defendant relies on Exhibit P-1, the annual notice dated March 24, 2009, and anything else not in conformity therewith is denied.

12. With regard to the allegations contained in paragraphs 13 and 14 of the Motion, Defendant relies on Exhibit P-3, examples of its advertising, and anything else not in conformity therewith is denied.

13. With regard to the allegations contained in paragraph 15 of the Motion, Defendant submits that these questions were settled by the St-Pierre Transaction and Judgment (D-2 and D-3). Subsidiarily, Defendant denies the allegations contained in paragraph 15 of the Motion.

14. Defendant denies the allegations contained in paragraph 16 of the Motion.

15. With regard to the allegations contained in paragraph 17 of the Motion, Defendant relies on Exhibit P-3, examples of its advertising, and anything else not in conformity therewith is denied.

16. With regard to the allegations relating to the "frais d'adhésion annuels" contained in paragraph 18 of the Motion, it is impossible for Defendant to respond to this allegation for the reasons explained in paragraph 2 of the present Defence. Defendant denies as drafted the remainder of the allegations contained in the said paragraph.

17. With regard to the allegations relating to the "frais d'adhésion annuels" contained in paragraph 19 of the Motion, it is impossible for Defendant to respond to this allegation for the reasons explained in paragraph 2 of the present Defence. As for the rest of the allegations contained in the said paragraph, Defendant admits that approximately five (5) years ago, the period of financing offered was fifteen (15) months and more and adds that today, the standard period of financing offered is eighteen (18) months.

18. With regard to the allegations relating to its "partenaires d'affaires" contained in paragraph 20 of the Motion, it is impossible for Defendant to respond to this allegation for the reasons explained in paragraph 2 of the present Defence. Defendant denies the remainder of the allegations contained in the said paragraph.

19. With regard to the allegations contained in paragraph 21 of the Motion, Defendants relies on Exhibit P-2, extracts from its website, and anything else not in conformity therewith is denied.

20. Defendant has no knowledge of the allegations contained in paragraph 22 of the Motion.

21. With regard to the allegations relating to its "partenaires d'affaires" contained in paragraph 23 of the Motion, it is impossible for Defendant to respond to this

allegation for the reasons explained in paragraph 2 of the present Defence. Defendant denies the remainder of the allegations contained in the said paragraph.

22. With regard to the allegations contained in paragraph 24 of the Motion, Defendant submits that this question was settled by the St-Pierre Transaction and Judgment (D-2 and D-3). Subsidiarily, Defendant denies as drafted the allegations contained in paragraph 24 of the Motion.

23. With regard to the allegations contained in paragraphs 25 to 31 of the Motion, Defendant submits that these questions were settled by the St-Pierre Transaction and Judgment (D-2 and D-3). Subsidiarily, Defendant denies the allegations contained in paragraphs 25 to 31 of the Motion.

24. Defendant denies the allegations contained in paragraph 32 of the Motion.

25. With regard to the allegations contained in paragraph 33 of the Motion, Defendant submits that this question was settled by the St-Pierre Transaction and Judgment (D-2 and D-3). Subsidiarily, Defendant denies the allegations contained in paragraph 33 of the Motion.

26. Defendant denies the allegations contained in paragraphs 34 to 36 of the Motion.

27. With regard to the allegations contained in paragraph 37 of the Motion, Defendant relies on the Court file number 500-06-000161-022 (*Chartier* v. *Meubles Léon*) and anything else not in conformity therewith is denied.

28. Defendant denies the allegations contained in paragraphs 38 and 39 of the Motion.

29. With regard to the allegations contained in paragraphs 40 and 41 of the Motion, Defendant relies on Exhibits P-4, invoice dated September 11, 2008, and anything else not in conformity therewith is denied.

30. With regard to the allegations contained in paragraphs 42 to 48 of the Motion, it is impossible for Defendant to respond to these allegations for the reasons explained in paragraph 2 of the present Defence.

31. With regard to the allegations contained in paragraph 49 of the Motion, Defendant admits that the designated person has already purchased goods in one of its stores and as for the remainder of the said paragraph, it is impossible for Defendant to respond to this allegation for the reasons explained in paragraph 2 of the present Defence.

32. Defendant has no knowledge of the allegations contained in paragraphs 50 and 51 of the Motion.

33. With regard to the allegations contained in paragraph 52 of the Motion, it is impossible for Defendant to respond to this allegation for the reasons explained in paragraph 2 of the present Defence.

AND FOR FURTHER PLEA, DEFENDANT ADDS THE FOLLOWING:

I. ANNUAL FEE OF $21 CHARGED BY CITI

a) Chronology

34. Defendant is a well-established retailer, doing business across Canada, it sells a wide range of merchandise such as furniture, home electronics and major appliances.

35. Defendant is a family-owned business that has been in operation for over 103 years and that takes pride in being an honest and reputable retailer that sells quality merchandise to its clients.

36. Furthermore, Defendant takes great pride into the after sale service it provides its clients.

37. For several years now, many consumers have preferred to finance their purchases.

38. In light of this, Defendant had been using Defendant in warranty Citifinancière Canada Inc. (hereinafter "**Citi**") as its primary financing company since the 1970's but started, in the beginning of the 2000's, to use Visa Desjardins for its stores located in the Province of Québec.

39. In October 2008, Defendant became concerned about its deal with Citi since Citi was going through a difficult period and was unwilling to provide Defendant with the level of financing plans that Defendant was used to providing to its clients.

40. On November 10, 2008, Citi informed Leon that its portfolio had deteriorated with the removal of late-fee income and discount reduction and also, because of the current economic conditions that had led to increase bankruptcies in Québec and Ontario, as appears from **Exhibit D-4**.

41. On December 18, 2008, Defendant decided that Visa Desjardins would become its primary financing company across Canada, as appears from a Memorandum to All Store Managers, **Exhibit D-5**.

42. This Memorandum explains that as of December 22, 2008, new customer financing applications in Québec stores and in certain stores in the rest of Canada will only be processed by Visa Desjardins and that the only financing that would still be sent to Citi was for customers who already had an open account authorizing them to purchase on account through Citi.

43. This was the beginning of a gradual set-up in Defendant's stores across Canada to replace Citi by Visa Desjardins as its primary financing company.

44. Defendant ceased advertising Citi as its financing company in their advertisements in January 2009 except, inadvertently, in 9 ads in 2009 (p. 76, 78, 102, 104, 106 and 108 in The Gazette (P-3), p. 122 in the Journal de Montréal (P-3), in its January 2009 flyer (**Exhibit D-6**) and in its October ad (**Exhibit D-7**)) and one in 2010 (p. 114 of P-3).

45. Since then, Defendant has not advertised any publicity announcing Citi as its financing company.

46. On February 2, 2009, Defendant received an email from Citi mentioning that they would begin to notify their clients across Canada in February 2009 of the changes in the terms of their credit contract and that this would be effective in April or May 2009 which included a reference to a $21 annual account holder fee with accounts with a balance of $450 or more, as appears from the email of February 2, 2009, **Exhibit D-8**.

47. Nothing in the previous email from Citi (D-8) could have led Defendant to presume or to understand that Citi would intentionally breached the provisions of the *Consumer Protection Act* by charging a retroactive annual fee to its customers when the contract did not provide for any such fee.

48. Indeed, while section 129 of the *Consumer Protection Act* exceptionally authorizes a merchant to amend a contract extending variable credit in order to increase the amount chargeable as renewal fees, it does not authorize a merchant to implement such a fee in a contract, one of the essential elements of which was the very absence of such fee.

49. On April 6, 2009, Defendant received an email from Citi and certain documents such as the change of terms and a FAQ, as appears from the email of April 6, 2009, **Exhibit D-9**.

50. This email (D-9) mentioned that these changes could be confusing for customers and that if any of them called Defendant's stores, Citi asked Defendant to advise them that this was a Citi requirement and to contact Citi directly.

51. After receiving this email, Defendant remained confused by the modifications announced by Citi and did not fully grasp the impact that these modifications could have on it clients.

52. Nothing in the previous email from Citi (D-9) could have led Defendant to presume or to understand that Citi would intentionally breached the provisions of the *Consumer Protection Act* by charging a retroactive annual fee to its customers when the contract did not provide for any such fee.

53. On June 10, 2009, Defendant, still confused about the $21 annual fee, asked for some clarifications and also, if this fee was going to be charged in Québec considering the strict rules in Québec to which Citi replied that it would be charging this in Québec since its competition was charging it as well, as appears from the email exchange between Defendant and Citi on June 10, 2009, **Exhibit D-10**.

54. Nothing in the previous email exchange with Citi (D-10) could have led Defendant to presume or to understand that Citi would intentionally breached the provisions of the *Consumer Protection Act* by charging a retroactive annual fee to its customers when the contract did not provide for any such fee.

55. On June 18, 2009, Defendant addressed Citi another request in order to understand "in simple English" the definition of when the $21 fee applies to a customer, as appears from an email exchange of June 18 and 19, 2009, **Exhibit D-11**.

56. Nothing in the previous email exchange with Citi (D-11) could have led Defendant to presume or to understand that Citi would intentionally breached the provisions of the *Consumer Protection Act* by charging a retroactive annual fee to its customers when the contract did not provide for any such fee.

57. On July 3, 2009, Defendant sent a Memorandum to all of its Stores, Associates, Sales and Office Managers announcing that all customers who would like to finance their purchase must be asked to complete a Visa Desjardins financing application and those who are refused by Visa Desjardins and have an open to buy account with Citi could submit a financing request to Citi, as appears from the Memorandum of July 3, 2009, **Exhibit D-12**.

58. On October 26, 2009, Defendant sent another Memorandum to its Stores, Associates, Sales and Office Managers for the Québec stores only announcing that starting on November 2, 2009, Visa Desjardins would be its sole provider of financing in the province of Québec and that if a customer was turned down by Desjardins, Citi would no longer be an alternative, as appears from the Memorandum of October 26, 2009, **Exhibit D-13**.

59. On November 19, 2009, Plaintiff filed a Motion for Certification to Institute a Class Action against Defendant relating to the representations made before the $21 annual fee was charged by Citi, as appears from the Court record.

60. On November 30, 2009, Defendant received additional information from Citi:

    i. A copy of the documents that were sent to the Québec customers;

    ii. Inserts were sent, in March 2009, to customers receiving a statement;

    iii. Solo-mailings were sent to customers that were not receiving a statement in March 2009;

    iv. That 3,422 customers of Defendant's stores with existing accounts in Québec had been charged an Annual fee since May 1, 2009;

    as appears from the email of November 30, 2009, **Exhibit D-14**.

61. Nothing in the previous email from Citi (D-14) could have led Defendant to presume or to understand that Citi would intentionally breached the provisions of the *Consumer Protection Act* by charging a retroactive annual fee to its customers when the contract did not provide for any such fee.

62. Consequently, on December 4, 2009, Defendant asked Citi to confirm what it had finally understood from a telephone conversation of December 3, 2009 relating to $21 annual fee and also, requested the following information:

    i. Account No;

    ii. Type of Plan;

    iii. Plan Start Date;

    iv. Plan Expiry Date;

    v. Citi Anniversary Date;

    vi. Whether they have been charged a $21 fee;

    vii. Reason they were charged the $21 fee;

    viii. Date they were charged the $21 fee;

    ix. Whether the $21 fee has been paid; and

x. The Date the $21 fee was paid.

as appears from the letter of December 4, 2009, **Exhibit D-15**.

63. On December 21, 2009, Citi refused to confirm and provide the above mentioned information requested by Defendant except for the Notices that were sent to the Québec residents (D-1).

64. In the December 21, 2009 letter (D-1), Citi also claims that Defendant was informed on February 2, 2009 of the fact that Citi was implementing an annual fee but nothing in the exchange of correspondence with Citi could have led Defendant to presume or to understand that Citi would intentionally breached the provisions of the *Consumer Protection Act* by charging a retroactive annual fee to its customers when the contract did not provide for any such fee.

65. On January 6, 2010, Defendant informed Citi that:

i. It had come to Defendant's attention 6 weeks ago that the $21 "Membership fee" being charged to accounts was improper;

ii. That Defendant believed that the $21 "Membership fee" would be charged on no payment plans created after May 1, 2009 but that Defendant now understood that Citi had been charging this fee retroactively to no payment plans entered prior to May 1, 2009;

iii. Therefore, such additional charge to Defendant's customers during the no no plans was contrary to both the spirit and intent of their agreement in consideration of the substantial fees that Defendant had paid to Citi;

iv. Citi was to immediately cease any retroactive charges to Defendant's customers who have no no plans that were established before May 1, 2009 and to credit those who were charged;

v. Cease and desist using Defendant's logo;

as appears from the letter of January 6, 2010, **Exhibit D-16**.

66. On January 14, 2010, Citi invited Defendant to re-assess its position about being unaware of the fact that existing customers would be charged the annual fee, asked on what grounds Defendant was asking Citi to cease charging the fee and offer refunds and finally, refused to cease using Defendant's name and logo, as appears from the letter of January 14, 2010, **Exhibit D-17**.

67. It appears from Exhibit D-17 that Citi was conditioning its cooperation in resolving the legal differences between the parties, created by Citi's actions, to the maintaining of the business relationship with Defendant.

68. Finally, in the beginning of the year 2010, the business relationship between Defendant and Citi officially came to an end even though Visa Desjardins had been the primary financing company used by Defendant since 2008.

b) Citi's liability

69. Defendant filed an Action in warranty against Citi in the present file, as appears from the Court record.

70. In the present Class Action, Plaintiff contends that:

> « 20. Ainsi, après avoir représenté aux membres du groupe qu'ils n'auraient rien à payer tout au cours d'une période donnée, la Défenderesse et **ses partenaires d'affaires contreviennent aux Représentations en facturant des « *frais d'adhésion annuels* » et en exigeant le paiement de ces frais des membres du groupe**.
>
> 23. Bref, les membres du groupe sont prisonniers de la Défenderesse et **de ses partenaires d'affaires qui, sans égard aucun pour les membres et les représentations qui leur ont été faites, n'hésitent pas à changer les conditions en vertu desquelles le crédit leur a été octroyés**.
>
> 50. Le ou vers le 23 septembre 2009, ayant été préalablement informé par la Défenderesse **qu'il devait s'adresser au fournisseur de crédit de cette dernière pour toute question relative au paiement des achats effectués chez la Défenderesse**, le conjoint de la Personne désignée, M. Stéphane Landry, téléphone à ce fournisseur de crédit. À cette occasion, furieux de constater qu'on a facturé à sa conjointe des « *frais d'adhésion annuels* » et d'apprendre qu'on a utilisé une partie du paiement mensuel volontaire pour payer ces frais, il indique à la représentante du fournisseur de crédit qu'il considère que la Personne désignée n'a pas à payer ces frais qu'il considère illégaux et non conformes aux Représentations qui ont été faites à sa conjointe et à lui-même.
>
> 51. Lors de cet appel, **la représentante du fournisseur de crédit tiers de la Défenderesse** informe M. Landry que **l'imposition des « *frais d'adhésion annuels* » constitue une nouvelle politique du fournisseur de crédit**, que la Personne

désignée a été avisée à l'avance, par l'état de compte du 23 mars 2009 (pièce P-6), que de pareils frais allaient être réclamés et, en définitive, que **le fournisseur de crédit tiers refuse catégoriquement leur demande de remboursement.**

52. Or, tel qu'il appert de l'état de compte du 23 mars 2009 (pièce P-6), la Personne désignée, qui n'a pas reçu d'autre avis que cet état de compte, **n'a jamais été avisé de la nature des « *changements importants* » apportés à sa convention de crédit**. » (Our emphasis)

71. The Contract of credit for the financing of merchandise purchased at Defendant's stores mentioned in the present file is between Citi and the consumer who made the purchase, as appears from an example of the Contract of credit, **Exhibit D-18**.

72. Defendant is not, and has never been, a party to the said Contract of credit (D-18).

73. Sections 1 and 18 of the Contract of credit (D-18) provides the following:

« 1 PROCÉDURE DE CRÉDIT RENOUVELABLE : CitiFinancière Canada Inc. (étant désignée dans la présente par **"nous"**, "notre", "nos", "CitiFinancière", "Services au détail CitiFinancière") offrira son plan de crédit renouvelable au demandeur (étant désigné dans la présente par les mots "vous", "votre", "vos", "emprunteur" ou "consommateur") suivant les modalités qui sont énoncées dans la présente convention de crédit et d'achat au détail ("convention"). [...]

18. FRAIS ANNUELS, FRAIS MINIMUMS ET AUTRES DÉBITS : Il n'y a pas de frais annuels ni de frais d'adhésion, mais **nous pourrons imputer ces frais sur avis écrit** tel qu'exigé par la loi. » (Our emphasis)

74. For the reasons exposed below, Section 18 of the Contract of credit (D-18) contravenes the *Consumer Protection Act*, and subsidiarily, could not justify Citi in charging an annual fee to Defendant's customers in the context of the contractual relationship created.

75. Any annual fee or any other fee that would have been charged to Defendant's customers would have been charged by Citi, not by Defendant.

76. As it will be shown at trial, each time a consumer enters into a contract with Defendant and chooses a financing plan, a tripartite contractual relationship is formed in virtue of which Defendant promises that the credit company, in the present instance Citi, undertakes to respect the financing plan chosen by the consumer.

77. In fact and for each transaction, Citi ratifies Defendant's undertaking and binds itself to respect the financing plan that was advertised by Defendant and accepted by the consumer.

78. In the present case (as in all tripartite relationships described by Defendant in Exhibit D-14), the promise made by Defendant to the designated person Ms. Chantal Noël de Tilly (hereinafter "**Tilly**") had been ratified by Citi, as was also the case for every class member, by a computerized exchange in which Citi accepts to pay a discounted amount relating to the financing plan chosen by the consumer, as appears from an email of July 2, 2008, an email of September 3, 2008, an computerized exchange between Defendant and Citi and the Customer archive Inquiry, **Exhibit D-19 *en liasse***.

79. The discounted amount paid by Citi to Defendant generates Citi a substantial fee for its acceptance to offer no no plans to Defendant's customers and constitutes Citi's ratification of Defendant's promise to its customers.

80. This ratification released Defendant from its promise and the performance of the promise is borne solely by Citi.

81. Nothing in the above exchange of correspondence with Citi could have led Defendant to presume or to understand that Citi would intentionally breached the provisions of the *Consumer Protection Act* by charging a retroactive annual fee to its customers when the contract did not provide for any such fee.

82. Since Citi refused, on December 21, 2009, to provide the information relating to, amongst other things, which customer was charged an annual fee, what financing plan the customer had and when was the customer charged (D-1), Defendant has no knowledge of whether Citi ever charged or continues to charge an annual fee of $21 or any other fee to persons who have purchased merchandise in one of its stores and if it did, Defendant has no knowledge of the number of persons who were charged since this information is in Citi's possession (section 17 c) of the Contract of credit D-18).

83. Defendant never consented or agreed that Citi charge an annual fee of $21 or any other fee to a person who had purchased merchandise in one of its stores.

84. Defendant never charged any annual fee or any other fee or collected or received payment for any annual fee or any other fee that would of been charged to Defendant's customers by Citi.

85. Defendant was not aware that Citi would retroactively charge an annual fee or any other fee when Defendant made representations to its clients that they would have nothing to pay until a certain date.

86. Therefore, only Citi is liable to reimburse such fees to Defendant's customers.

87. Subsidiarily, if Defendant has incurred any liability for the fee that was charged by Citi, such liability is solidarily shared with Citi who should incur 100% of the ultimate liability.

88. The Notice that was sent by Citi to Defendant's customers under provision 129 of the *Consumer Protection Act* is illegal and is *the causa causan* of the prejudice suffered by the group members. The Notice is illegal for the following reasons:

    i. Citi can't amend the Contract of credit to charge an annual fee that was never charged to Defendant's customers without executing a new contract;

    ii. The Notice did not otherwise meet the requirements of the *Consumer Protection Act* for its validity.

89. The amounts of $25.00 and $100.00 claimed by Plaintiff are unfounded in fact and in law.

90. Furthermore, the amount claimed as punitive damages is also unfounded in fact and in law as Citi intentionally breached the law without Defendant's knowledge and despite its obligations towards Defendant and subsidiarily, the said amount claimed is grossly exaggerated.

c) Members of the group

91. If this Court concludes that the present Class Action should be granted, Defendant submits the group should be modified in the following manner:

92. The Motion for Certification to Institute a Class Action was instituted on November 19, 2009.

93. Therefore, the starting date for the group is November 19, 2006.

94. According to Citi, the $21 annual fee was charged to consumers as of May 1, 2009 by Citi.

95. As mentioned previously, the primary financing company used by Defendant, as of December 18, 2008, was Visa Desjardins and Citi was used for customers who already had an open to buy account with Citi.

96. Therefore, the number of Defendant's clients to whom Defendant would have represented that they had nothing to pay until a certain period of time **and** who

financed their purchase with Citi (and not with Visa Desjardins) is most likely limited but this information is in Citi's possession. Defendant reserves it right to amend this section once Citi has provided the information requested by Defendant on December 4, 2009 (D-15).

97. Defendant submits that its following clients should be excluded from the group:

    i. If they financed their purchase with Visa Desjardins;

    ii. If they weren't charged a $21 annual fee by Citi (this information is also in Citi's possession);

    iii. If the date of expiration of their financing plan was **BEFORE May 1, 2009** whether or not the customer has paid within the terms of the financing plan.

98. All of the expiration dates of the financing plans advertised by Defendant in 2007 and filed by Plaintiff as Exhibit P-3 expired before May 1, 2009 except two: the December 14, 2007 ads in the Montreal Gazette (p.34 of P-3) and the Journal de Montréal (p. 52 of P-3) that expired on or after May 19, 2009.

99. Therefore, Defendant submits that the group should only start on December 14, 2007 instead of November 19, 2006.

100. Defendant had advertised Citi as a possible financing company at only 9 occasions in 2009: in January 2009 (p.76 and 78 of The Gazette P-3), in its January 2009 flyer (D-6), in February 2009 (p.122 of the Journal de Montréal P-3), in October 2009 (p. 102 and 104 of The Gazette P-3), in its October ad (D-7), in November 2009 (p. 106 of The Gazette P-3) and in December 2009 (p. 108 of The Gazette P-3).

101. The last ad ever advertised by Defendant in which it refers to Citi as a possible financing company was on January 29, 2010 for a financing period of 15 months that expired on April 30, 2011 subject to delivery.

II. *RES JUDICATA* ON PUBLICITY ISSUES UNTIL OCTOBER 20, 2010

102. On August 3, 2003, Mrs. Nathalie St-Pierre (hereinafter "St-Pierre") instituted a Motion for Certification of a Class Action in the *St-Pierre* v. *Léon* matter, court number 500-06-000207-031 (hereinafter the "St-Pierre matter").

103. On June 27, 2005, the Honourable Paul G. Chaput (hereinafter "Justice Chaput") granted the Motion for Certification to Institute a Class Action in the St-Pierre matter, as appears from a copy of the judgment, **Exhibit D-20**.

104. The class action group in the St-Pierre matter was described as follows :

> "Tous les consommateurs du Québec qui, **depuis le 7 août 2000**, ont acheté un bien meuble chez l'intimé (sic) et qui ont fait financer leur achat par une institution financière choisie par l'intimée" (Our emphasis)

105. On October 30, 2009, as the trial was set to begin on November 2, 2009, the parties settled the St-Pierre matter.

106. On November 2, 2009, the parties informed Justice Chaput that the St-Pierre matter was settled and that they would present a Motion in order to obtain the Court's Approval of the Transaction.

107. Plaintiffs instituted their Motion for Certification on November 19, 2009, three weeks after a settlement was reached in the St-Pierre matter.

108. Afterwards, the parties participated in settlement discussions because of the situation created by Plaintiffs' Motion for Certification; such negotiations were unsuccessful.

109. On September 9, 2010, Justice Chaput convened the parties in the St-Pierre matter to a case management hearing.

110. Plaintiffs' attorneys were present at that meeting and announced that they would contest the Motion to Approve the Transaction in the St-Pierre matter, without specifying on behalf of whom and on what grounds.

111. On September 10, 2010, Justice Chaput informed the parties that the Motion to Approve the Transaction would be heard on November 29, 2010.

112. On November 29, 2010, Plaintiffs' attorneys attended the hearing of the Motion to Approve the Transaction in the St-Pierre matter and informed everyone, for the first time, that they were representing Tilly who is the designated person in the present Class Action (par. 8 of D-3).

113. Since Tilly had signed an affidavit but was not present in Court to be examined, Justice Chaput postponed the hearing of the Motion to Approve the Transaction until the beginning of 2011, in order for Tilly to be examined and also, in order for Tilly's attorneys to provide the other attorneys with their written representations by December 13, 2010 (par. 9 of D-3).

114. On February 25, 2011, Tilly was present at the hearing of the Motion to Approve the Transaction in the St-Pierre matter and presented the following arguments:

"1. La transaction ne sert pas les intérêts des membres du groupe;

2. La transaction est contraire à l'ordre public;

3. Une partie significative du nouveau groupe est privée du droit de s'exclure du recours collectif;

4. La représentante transige sur des droits pour lesquels elle n'est pas autorisée à représenter le groupe;

5. La représentante transige pour un groupe qu'elle ne représente pas;

6. La preuve au dossier est insuffisante pour permettre au tribunal de se prononcer le caractère approprié de la transaction." (Our emphasis)

as appears from the "Sommaire d'argumentation de Chantal Noël de Tilly", **Exhibit D-21**.

115. The same day, and after being examined by Me Philippe Trudel who represented St-Pierre (and the group members, including Tilly), Tilly finally withdrew her opposition to the Motion to Approve the Transaction and declared that she wanted to exclude herself from the St-Pierre group.

116. Justice Chaput took notice of Tilly's exclusion and declared that her opposition to the Motion to Approve the Transaction was withdrawn (par. 20 of D-3).

117. On May 16, 2011, Justice Chaput approved the Transaction in the St-Pierre matter, which includes the following release (D-2):

"La demanderesse donne à la défenderesse **une quittance complète et finale** pour toutes les causes d'action soulevées dans les présentes procédures ainsi que **pour tout manquement de la défenderesse aux dispositions de la *Loi sur la Protection du consommateur* relatives à la publicité sur le crédit jusqu'à la date de la publication de l'avis**;

Sont toutefois exclus de cette quittance tous les membres du groupe décrit à la Requête pour autorisation d'exercer un recours collectif datée du 19 novembre 2009 déposée au dossier de la Cour Supérieure numéro 500-06-000486-098 pour ce qui a trait à la question de la divulgation de frais d'adhésion annuels ou équivalents ayant pu être facturés à ceux-ci." (Our emphasis)

118. Furthermore, Justice Chaput decided that the end date of the group period would be October 20, 2010, meaning that the period covered by the release is for more than ten (10) years from August 7, 2000 to October 20, 2010.

119. As mentioned by Justice Chaput in his judgment in the St-Pierre matter, the Notice to the members, as required by section 1025 C.C.P., was published on October 30, 2010 which Notice informed the members that they could get a copy of the Transaction document on the class action attorneys' websites.

120. Since the group period in the St-Pierre matter was open ended, the **Notice to the members of October 30, 2010 (par. 22 of D-3) and the Transaction (par. 9 of D-2)** specified that the parties would ask the Court to close the group as of the day of the publication of the Notice to the members.

121. Two members informed the Court of their objection to the Transaction, but they were not present at the hearing nor were their objections argued.

122. Also, there was an opposition from Tilly, who ended up excluding herself from the St-Pierre group and withdrew her opposition (par. 10 of D-3).

123. As appears from the following excerpts of his judgment (D-3), Justice Chaput evaluated and questioned the scope of the release, including the right for members to exclude themselves, before approving the Transaction:

> "[18] Quant au droit d'un membre de s'exclure du groupe décrit dans le jugement d'autorisation du recours, l'article 1007 C.p.c. dispose comme suit :
>
> > « 1007. Un membre peut s'exclure du groupe en avisant le greffier de sa décision, par courrier recommandé ou certifié, avant l'expiration du délai d'exclusion.
> >
> > Un membre qui s'exclut n'est lié par aucun jugement sur la demande du représentant. »
>
> [19] **Dans le jugement d'autorisation du 27 juin 2005, ce délai est fixé à 30 jours de la publication de l'avis.**
>
> (...)

[21] **Comme le prévoit l'article 9 de la transaction, les parties recherchent l'extension de son effet aux membres dont les droits sont nés après l'ouverture du recours.**

[22] **Ainsi, dans l'avis aux membres publié le 30 octobre 2010 en vue de la présentation de la requête en approbation de transaction, il est annoncé ce qui suit :**

> **« 6. Les parties demanderont également au tribunal de préciser la description du groupe afin que celui-ci inclut les personnes qui ont financé leur achat jusqu'à la date de la publication du présent avis;»**

[23] À la fin, ce qui est envisagé, c'est une modification du groupe comme le prévoit l'article 1022 C.p.c. : (...)

[24] **Telle modification peut être faite pour inclure dans le groupe des personnes qui, depuis l'introduction de la demande, se sont retrouvées dans la même situation que les membres visés par le groupe initialement décrit.**

[25] **Comme l'écrit la Cour d'appel dans l'arrêt *La Société des loteries du Québec (Loto-Québec)* c. *Brochu*:**

> « Dans ce contexte, il n'y a pas lieu de donner au troisième alinéa de l'article 1022 *C.p.c.* l'interprétation restrictive que propose l'appelante selon laquelle le juge ne pourrait modifier la composition du groupe qu'en vue de le scinder ou de le restreindre. Une telle interprétation est incompatible avec la liberté d'action dont doit jouir le juge chargé de la gestion du recours collectif « si les circonstances l'exigent ». Les balises à l'exercice de cette discrétion, fixées par le législateur à l'article 1045 *C.p.c.*, sont suffisantes sans qu'il soit nécessaire de restreindre davantage le pouvoir de modification conféré par l'article 1022, al. 3. En outre, la Cour suprême a exprimé à plusieurs reprises la nécessité de donner une

> interprétation souple et libérale à la législation sur les recours collectifs.
>
> [8] En l'espèce, l'appelante n'a pas réussi à démontrer que le premier juge a exercé cette discrétion de manière inappropriée. La solution qu'il a retenue respecte le double objectif de favoriser l'accessibilité à la justice et d'éviter la multiplicité des recours. **En modifiant la description du groupe, il n'a pas changé l'objet du recours collectif** qui est de déterminer si les utilisateurs d'appareils de loterie vidéo sont devenus des joueurs pathologiques parce que l'appelante a mis à leur disposition des appareils susceptibles de causer cette maladie sans mise en garde adéquate. **Il a simplement ajouté au recours initial la réclamation de ceux qui ont eu les mêmes problèmes à une époque ultérieure évitant ainsi l'institution d'un nouveau recours collectif à la seule fin de couvrir la période de plus de cinq années écoulée depuis l'autorisation du recours[8]. (Références omises)»**

[26] **Ainsi, en l'espèce, la clôture du groupe est fixée au 20 octobre 2010.**

(...)

[52] Le tribunal s'est interrogé sur la portée très générale des termes de la quittance, notamment quant à «tout manquement de la défenderesse aux dispositions de la Loi sur la Protection du consommateur **relatives** à la publicité sur le crédit jusqu'à la date de la publication de l'avis».

[53] Même si le tribunal n'est pas lié par cette entente, il y donnera effet, sauf si le montant est sans commune mesure avec les services rendus ou les résultats obtenus.

[54] Dans les circonstances de la présente affaire, le montant est justifié.

(...)

[56] Au départ, il convient de noter que le texte intégral de la transaction a été mis à la disposition des membres comme le prévoit l'avis du 30 octobre 2010 et que seules deux oppositions ont été formulées, dont l'une, non plaidée, et l'autre, retirée.

(...)

[58] Aussi les termes de la quittance sont généraux, la quittance comporte une limite: elle ne vise pas le groupe décrit au recours numéro 500-06-000486-098.

[59] L'on ne peut écarter que, de façon générale, la conformité ou non de la publicité à la *Loi sur la protection du consommateur* faisait l'objet du litige et que c'est l'objet visé par la quittance." (Our emphasis)

124. Justice Chaput did not require that the parties in the St-Pierre matter send a new Notice to members pursuant to section 1006 C.C.P. since, as he mentioned in his judgment (par. 19 of D-3), a Notice was published after the Motion for Certification was granted in 2005.

125. Justice Chaput rendered his judgment, and that judgment was not appealed.

126. Tilly had the intention to bring up before Justice Chaput the argument concerning the right for a member to exclude himself/herself; however instead of doing so, she excluded herself from the group and withdrew her opposition.

127. There is identity of parties between Plaintiff's group and St-Pierre's group, although both cases clearly target the same members:

St-Pierre's group	Plaintiff's group
Tous les **consommateurs du Québec** qui, depuis le 7 août 2000, **ont acheté un bien meuble chez l'intimé** (sic) et qui ont fait **financer leur achat** par une institution financière choisie par l'intimée	Toute **personne qui a acheté au Québec un bien ou un service de l'Intimée Léon**, qui **s'est prévalue de son programme de financement** de type « achetez maintenant; payez plus tard » et qui s'est vue facturer des « frais d'adhésion annuels », ou tout autre frais équivalent.

128. Plaintiff instituted its Motion for Certification on November 19, 2009.

129. Since Justice Chaput decided that the end date of the St-Pierre group would be October 20, 2010, the period covered by the release, which is part of the Transaction, is from August 7, 2000 to October 20, 2010.

130. Therefore, Defendant resubmits to this Court that the members of Plaintiff's group from the opening date until October 20, 2010 for the publicity issue should be excluded from the group or their claim be dismissed.

131. On February 2, 2012, Defendant served a Motion to partially dismiss the Motion for Certification based on *res judicata*, as appears from the Court record.

132. On June 21, 2012, this honourable Court dismissed Defendant's Motion to partially dismiss the Motion for Certification based on *res judicata* and granted the Motion for Certification, as appears from the Court record.

133. On July 19, 2012, Defendant filed a Motion for leave to appeal from the judgment dismissing Defendant's Motion to partially dismiss the Motion for Certification based on *res judicata*, as appears from the Court record.

134. On August 31, 2012, the honourable Court of appeal dismissed Defendant's Motion to partially dismiss the Motion for Certification based on *res judicata*, recognizing Defendant's right to raise this question anew, as appears from the Court record.

135. Defendant's respectfully resubmits the question of *res judicata* raised in its Motion to partially dismiss to this honourable Court.

136. As for the members of Plaintiff's group after October 20, 2010 relating to advertising issues, Defendant submits that its advertising is in total conformity with the *Consumer Protection Act*.

137. Furthermore, the Transaction provides that Defendant, without any admission whatsoever, « s'engage à modifier ses pratiques publicitaires afin d'informer les consommateurs dans ses publicités diffusées au Québec des modalités du crédit qu'elle annonce selon l'annexe ci-jointe » and « s'engage aussi à ne pas donner dans ses publicités plus d'importance à la mensualité exigée qu'au prix de vente du bien » (D-2).

138. The annex appended to the Transaction (D-2) was reviewed and approved by St-Pierre and the group members', including Tilly's, attorneys, before it was signed and submitted to Justice Chaput.

139. Even thought its advertising respected the *Consumer Protection Act*, Defendant's advertisements were modified according to the Transaction in the St-Pierre matter which has been approved by this Court and has acquired the authority of a final judgment (*res judicata*).

140. All subsequent advertisement was done by Defendant in conformity with the Judgment (D-2).

141. As for the period between the end date of the group period in the St-Pierre matter, October 20, 2010 and the modification of the advertisement by Defendant in May 2010 and in January 2011 as described in the annex appended to the Transaction (D-2), Defendant's advertising was in total conformity with the *Consumer Protection Act*.

SUBSIDIARILY

142. Defendant's advertising complied, at all times, with the *Consumer Protection Act* and therefore, Plaintiff's claim should be dismissed.

143. The amount of $100.00 claimed by Plaintiff is unfounded in fact and in law.

144. Furthermore, the amount claimed as punitive damages is grossly exaggerated.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

MAINTAIN the present Defence;

DISMISS Plaintiff's Motion to Institute Proceedings;

THE WHOLE WITH COSTS.

Montréal, March 1, 2013

Jeansonne Avocats, Inc.

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