

CANADA

PROVINCE OF QUEBEC
DISTRICT OF QUEBEC

SUPERIOR COURT
(Class Action)

N^o.: 200-06-000207-160

PATRICIA PAQUETTE

Applicant

v.

SAMSUNG ELECTRONICS CANADA INC.

and

SAMSUNG ELECTRONICS AMERICA INC.

Respondents

**APPLICATION FOR LEAVE TO EXAMINE THE PROPOSED CLASS
REPRESENTATIVE AND TO ADDUCE EVIDENCE**

(ART. 574 al. 3 C.C.P.)

**TO THE HONOURABLE JUSTICE DANIEL DUMAIS, RESPONDENTS
RESPECTFULLY SUBMIT AS FOLLOWS:**

1. The Respondents are hereby seeking permission to examine the Applicant in her capacity as Proposed Class Representative.
2. The Respondents are also seeking this Court's permission in order to adduce the following evidence, to be used in connection with the hearing of the Applicant's Motion for authorization to institute a class action in the present proceedings (the "**Application for Authorization**"):
 - a. to the extent that the examination of the Applicant is allowed, the transcripts thereof, as well as any and all documents or other evidence provided by the Applicant in the course of such examination; and
 - b. a solemn declaration substantially similar to the solemn declaration of Mr. Steven Cull dated December 13, 2018 and attached herewith as Exhibit R-1, together with its supporting exhibits.

The Application for Authorization and its Shortcomings

3. The Application for Authorization was instituted on or about November 9, 2016, in the middle of the recall program conducted by the Respondents.
4. It seeks the authorization of a class action for the class described as follows (the "**Proposed Class**"):

« Toutes les personnes domiciliées ou résidant au Québec qui ont acheté un Samsung Galaxy Note 7 vendu, fabriqué, commercialisé ou distribué par l'une ou l'autre des défenderesses. »

5. The Application for Authorization is largely based on unsubstantiated allegations and assumptions regarding the recall program and it includes no details whatsoever regarding the actions undertaken by the Respondents to address the situation, to the benefit of the Proposed Class.
6. The proceedings in demand include no evidence either regarding (i) any alleged false and misleading representations, (ii) the allegation that they would have intentionally hidden information from the consumers and (iii) the assumption that they would have not acted in a timely manner.
7. Indeed, the Application for Authorization alleges (without any factual basis in support) that the Respondents would somehow have intentionally hidden from the public the fact that the Samsung Galaxy Note 7 mobile devices (the "**NOTE7**") could potentially be subject to thermal runaway event (see Paragraphs 13, 22 and 40 of the Application for Authorization). (A thermal runaway event refers to a situation where an increase in the temperature of a particular substance changes its condition in a way that causes a further increase in temperature, creating a cycle that leads to a destructive result).
8. Moreover, while the Application for Authorization does recognize that the Respondents conducted a recall program, the theory put forward in demand is nevertheless based on the assumption that the Respondents would somehow not have initiated the recall program in a timely manner (see Paragraph 46 of the Application for Authorization).
9. These false and unsupported assumptions are central to the Applicant's proposed class action and in particular to her claim for punitive damages.
10. Yet, a cursory review of the underlying facts, including the true timing of the recall program, and a review of its main features, would allow this Court to very readily see that these tenets are false.
11. Indeed, as a matter of fact, and contrary to what is gratuitously assumed in demand, the Respondents (i) did not know about the issues affecting the NOTE7

at the time of the launch of the product, and (ii) they deployed a comprehensive recall program only a few days following the discovery of the problem and within two weeks of launching the device.

12. Furthermore, by way of example, having reviewed the timing of the recall program, Madam Justice Rady of the Ontario Superior Court of Justice commented as follows in her October 16, 2018 decision rejecting certification of a similar class action in Ontario:

"[74] In my view, the defendant's prompt response in concert with Health Canada to safety issues, the recall, the termination of sales, and the compensation package, demonstrates the response of a responsible corporate citizen. It is behavior that should be encouraged rather than discouraged"

(our underlines)

13. The Application for Authorization also assumes that the Proposed Class, including the Applicant, would allegedly suffer residual damages, and this, despite the comprehensive recall conducted by the Defendants.
14. Again, the allegations of residual damages in demand are only generic, and are totally unsubstantiated and unsupported.
15. In fact, quite to the contrary, the recall program was very thorough and it sought to properly address any and all damages, troubles and inconveniences potentially suffered by the Proposed Class.
16. A cursory review of the details of the recall program would allow this Court to assess for itself whether the unsubstantiated allegations of residual damages in demand have any basis in fact.
17. By way of example, in dismissing certification in Ontario, Madam Justice Rady said in her October 16, 2018 decision:

"[78] As to the adequacy of the plan, it is quite possible that some people are out of pocket to some extent. It is also the case that some people sustained no loss at all as the plaintiff's expert acknowledges. In any event, no recall program is likely to satisfy every purchaser. However, the law does not demand perfect compensation. Indeed, perfect compensation is unlikely even if pursued by way of class action.

[79] There were features of the defendant's package that were advantageous to consumers. Those advancing claims under it were not required to prove liability, causation or damages in order to receive a full refund for the phone plus a \$25 credit; or a replacement phone and a \$100 credit. Refunds for Note7 accessories were also offered."

18. As to her personal situation, the Applicant alleges having suffered "important stress" and anxiety in relation with this situation (see Paragraphs 28, 29 and 54 of the Application for Authorization). Mainly on that unsubstantiated and subjective basis, she is seeking substantial compensatory and punitive damages from the Respondents.

19. By comparison, in Ontario, while dealing specifically with the issue of stress and anxiety, in light of the details of the recall program, Madam Justice Rady mentioned as follows:

"[80] Furthermore, surely there is a certain amount of stress, upset, anxiety, inconvenience and irritation associated with daily living. However, they must rise to a sufficient level beyond de minimus in order to attract compensation in excess of what was offered by the defendant: see Healey v. Lakeridge Health Corp., 2011 ONCA 55; Mustapha v. Culligan of Canada Ltd., supra."

20. Regarding any potential loss of data, which the Applicant also invokes generally at Paragraphs 24 and 54 of the Application for Authorization, without any details, this is what Madam Justice Rady said in Ontario:

"[49] With respect to the data loss claim, there is no pleading of a causal nexus between the alleged negligence and the alleged damage. Further, there is good reason to conclude on the basis of the evidence in the record that such a claim cannot possibly succeed."

[50] There is evidence that automatic backups are available on mobile devices, including through a Cloud-based backup for the Note7 device. Some consumers may have backed up data before they powered down their devices pursuant to the Notice to do so. Further, the Note7 had a removable SD card for data. The Note7 prompted users to elect to store photographs on the SD card rather than on the hard drive. Some users may have removed the SD card before returning the Note7. Consequently, data loss claims, if any, will vary from user to user."

[51] At the very least, the evidence demonstrates that the issue of data loss is highly individualized and would vary widely from user to user. There is simply no commonality that would permit recovery across the class. Ultimately, the individual inquiries necessary would overwhelm the process. This aspect of the claim would not survive the commonality inquiry."

21. The shortcomings in the allegations and evidence in demand in the present matter are manifest, substantial and material.

22. It would be grossly unfair and completely unjust to authorize major class action proceedings, including a baseless claim for punitive damages, on such an inaccurate and truncated factual basis.
23. The evidence for which authorization is hereby sought is very relevant for this court to assess properly and fairly the application of the statutory criteria for authorizing class actions in Quebec laid out by Article 575 C.C.P.

The Examination of the Proposed Class Representative

24. As mentioned above, the Applicant alleges that she (and the Proposed Class) would have suffered unquantified damages in the form of stress, anxiety, trouble and inconvenience, data loss, usage deficit, incidental costs and physical damages (see Paragraph 54 of the Application for Authorization).
25. On that basis she is seeking compensatory damages in the amount of 20M\$, and punitive damages in the amount of 5M\$.
26. The lack of any details or information whatsoever on her personal circumstances does not allow for an adequate assessment by this Court of her potential right of action.
27. Thus, the examination of the Applicant is required in order to allow this Court to assess:
 - a. whether the factual allegations in the Application for Authorization support her conclusions that the Respondents committed intentional wrongful acts and/or omissions, particularly regarding the timing and manner in which the recall process was conducted;
 - b. the extent to which she truly suffers damages and to assess whether any damages were actually suffered by the Proposed Class, using the Applicant's own experience;
 - c. whether all Proposed Class members suffered the alleged damages.
28. In light of the above, the Respondents propose that her examination cover the following items:
 - a. The circumstances in which the Applicant purchased her NOTE7;
 - b. The representations made by the Respondents to the Applicant, if any;
 - c. The circumstances in which she was made aware of the recall process;
 - d. The means at her disposal to participate in the recall process, including the means to return the products in her possession;

- e. How she participated in the recall process, including whether she registered her NOTE7 with the Canadian Product Exchange website;
 - f. The damages she allegedly suffered in relation with any data lost and whether she followed the applicable NOTE7 start up/back up process;
 - g. The damages she allegedly suffered in relation to her purchase of a NOTE7, including her alleged stress, anxiety, trouble and inconvenience, usage deficit, incidental costs and any physical damages;
 - h. The compensations offered by the Respondents to the Applicant and the class, including details regarding:
 - i. The phone model she received in replacement of her NOTE7;
 - ii. The date on which she subscribed to the recall process;
 - iii. The delay in which she received the new phone following her subscription to the recall process;
 - iv. The additional compensation, gift, refund or credits received;
 - v. The return instructions provided by Samsung for the return of her NOTE7;
 - i. Whether she returned, sold or gave her NOTE7 and the circumstances in connection therewith;
 - j. Whether an inquiry was completed by the Applicant before the Application for Authorization was instituted and whether she identified other potential members of the Proposed Class.
29. The proposed examination of the Applicant should not take longer than two hours and the Respondents suggest that the examination takes place out of Court, prior to the authorization hearing.

The Limited Evidence in Defence

30. In order for this Court to properly assess the legal theory put forward by the Applicant, it is vital that the details and timing of the recall program conducted by the Respondents be presented before this Court.
31. By way of example, after having reviewed this evidence, Madam Justice Rady commented as follows:

"[75] It appears from the evidence reviewed by the defendant's expert that 21,953 Note7s were sold in Canada between August 19, 2016 and

September 1, 2016. As already noted, by October, 35,293 Note7s had been distributed. Some 568 were returned before sales were halted on September 2, 2016 pursuant to a program that permitted the return of the device within a specified time of sale for a full refund.

[76] Through the first recall program, the defendant replaced approximately 13,340 original phones. Through the second, consumers acquired 5,015 Galaxy S7s or S7 Edges with a \$100 credit; and 7,110 other devices or refunds with a \$25 credit. While the \$25 and \$100 credit system ended on December 31, 2016, some carriers provided their customers similar credits after that date, which were reimbursed by the defendant.

[77] The class has already received compensation and as a result, access to justice issues do not arise. In *Hollick*, supra the court noted that the existence of a compensation scheme does not by itself militate against certification but it is "one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns" (at para. 33)."

32. To this end, the solemn declaration of Steven Cull dated December 13, 2018 and attached herewith as Exhibit R-1 will demonstrate that:
- a. The Respondents released the NOTE7 mobile devices on August 19, 2016, halted sales on September 2, 2016 and initiated the recall process on September 6, 2018, that is, merely 18 days after the release of said devices;
 - b. Contrary to the Applicant's allegations, the Respondents had no previous knowledge that the battery of the NOTE7 devices were defective;
 - c. The Respondents acted in a timely manner after they were made aware of the defect affecting the battery of the NOTE7 device;
 - d. The recall process initiated by the Respondents adequately addressed any issue related to the device itself as well as any potential damages to the Proposed Class.
33. This additional evidence is necessary, useful and reasonable in order to establish that the conclusions sought by the Applicant are not supported by her vague and unsubstantiated factual allegations.

Conclusion

34. The Application for Authorization was uninformed, premature and opportunistic. It sought to capitalize on media coverage and the associated potentially negative perception towards the Respondents.

35. The examination of the Applicant and the additional evidence for which leave is sought herein will ensure that the Respondents will not be unfairly dragged into a significant and expensive class action on the basis of assumptions made in vague, ambiguous, generic and unsubstantiated allegations.
36. The additional evidence is short neutral, objective and proportional. It will not lengthen the debate between the parties on authorization.
37. In contrast, not allowing the Respondents to present it would deny them the opportunity to have a fair debate before this Court.

WHEREFORE, MAY PLEASE THE COURT TO:

GRANT the present Application;

AUTHORIZE the Respondents to examine the Applicant, out of Court before the hearing on the *Demande pour autorisation d'exercer une action collective*;

AUTHORIZE the Respondents to produce in the Court's records the transcripts of such examination (or parts thereof) as well as any and all documents or other evidence provided by the Applicant in the course of such examination;

AUTHORIZE the Respondents to submit evidence, in the form of a solemn declaration substantially similar to the solemn declaration of Mr. Steven Cull dated December 13, 2018 and attached herewith as Exhibit R-1;

ISSUE any orders that the Court may consider useful to facilitate the conduct of the examination;

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

MONTREAL, December 14, 2018



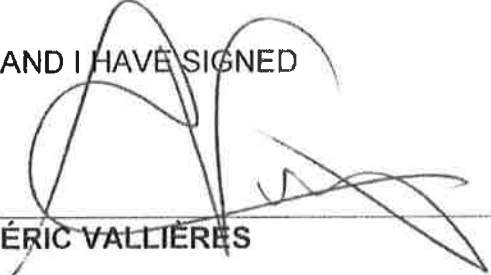
McMILLAN LLP
Attorneys for Respondents

AFFIDAVIT

I, the undersigned, **Éric Vallières**, attorney, carrying on business with the firm of McMillan LLP, at 1000 Sherbrooke Street West, suite 2700, in the City and District of Montreal, province of Quebec, H3A 3G4, do solemnly declare as follows:

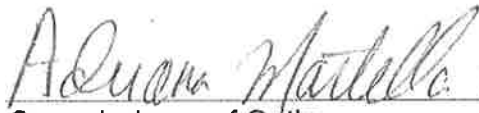
1. I am one of the attorneys for the SAMSUNG ELECTRONICS CANADA INC. and SAMSUNG ELECTRONICS AMERICA INC. herein;
2. All the facts alleged in herein are true and correct.

AND I HAVE SIGNED



ÉRIC VALLIÈRES

SOLEMNLY DECLARED before me,
At Montreal, this 14th day of December 2018



Commissioner of Oaths
for the province of Quebec



NOTICE OF PRESENTATION


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Attorneys for PATRICIA PAQUETTE

TAKE NOTICE THAT the foregoing *Application for leave to examine the proposed class representative and to adduce evidence* will be presented for adjudication before the Honourable Daniel Dumais, J.S.C., at a date, time and place to be confirmed.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, December 14, 2018



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