

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-06-000947-180

SUPERIOR COURT
(Class Action Chambers)

PANAGIOTIS LEVENTAKIS

Applicant

v.

AUDIBLE INC.

and

APPLE, INC.

and

APPLE CANADA INC.

and

AMAZON.COM, INC.

and

AMAZON.COM.CA, INC.

Defendants

APPLICATION TO TEMPORARILY STAY THE CLASS ACTION
(Articles 18, 49 and 577 of the *Code of Civil Procedure* (“CCP”)
and Article 3137 of the *Civil Code of Québec* (“CCQ”))

TO THE HONOURABLE JUSTICE GARY D.D. MORRISON, J.S.C, SITTING IN AND FOR THE DISTRICT OF MONTRÉAL, THE APPLICANT RESPECTFULLY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. The Applicant seeks a stay of the *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* which was filed on September 28, 2018 (the “**Québec Action**”) pending a final judgment on the putative class action before the British Columbia Supreme Court, in *Williams v. Audible Inc. et al.*, court docket number VLC-S-S-1810561 (the “**BC Action**”) filed on September 27, 2018.
2. This application for a stay is predicated upon the existence of a parallel class action filed in British Columbia which raises the same issues and which includes the

members of the Québec Action, and thus seeks to avoid the possibility of contradictory judgments and to ensure a sound and efficient use of judicial resources, all the while protecting the interests of the putative class members who are Québec residents.

3. For the reasons further detailed below, the Applicant submits that it is in the interests of justice and consistent with the principles of proportionality and judicial economy that the overlapping issues raised in the Québec Action and the BC Action be adjudicated by a single court, which the Applicant proposes to be the Supreme Court of British Columbia.

II. THE PARALLEL CLASS ACTIONS

a. The Québec Action

4. The Québec Applicant, Panagiotis Leventakis, seeks to represent the following class in the Québec Action:

“All persons, entities, partnerships or organizations in Québec who purchased digital audiobooks from the Defendants (“Class Members”) or any other group to be determined by the Court, between 2003 and 2017 (“Class Period”).”

As appears from a copy of the *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* communicated herewith as **Exhibit P-1**.

5. The Québec Action alleges that the Defendants chose not to compete with each other in the market for digital audiobooks. The Québec Action further alleges that the Defendants manipulated the market for their supposed mutual benefit, allegedly restricting the supply of digital audiobooks by allegedly excluding those produced by third parties from a majority of the market and thus allegedly overcharging class members. The Québec Action alleges that these actions caused compensatory, moral and/or punitive damages to the class members.
6. These allegations are refuted by the Defendants.

b. The BC Action

7. The BC Action proposes the following putative class:

“Customers of Audible, Amazon and Apple (“Class Members”), to be defined in the Plaintiff’s application for class certification) who purchased audiobooks from the Defendants during the class period.”

As appears from a copy of the *Notice of Civil Claim* communicated herewith as **Exhibit P-2**.

8. As appears from the foregoing, the proposed class in the Québec Action is included in the proposed class in the BC Action and relates to the same Defendants.
9. Moreover, the BC Action asserts the same allegations of fault and similar causes of action.
10. The defences to those allegations will also be similar.

c. The Ontario Action

11. Another putative class action is pending in Canada in *Sweet v. Audible Inc. et al.*, court file number CV-18-606353-00CP, which was issued on October 4, 2018 before the Ontario Superior Court of Justice (the “**Ontario Action**”). The Ontario Action proposes the following putative class:

“Customers of Audible, Amazon and Apple in Canada (“Class Members”, to be defined in the Plaintiff’s motion for class certification) who purchased audiobooks, from the Defendants during the class period.”

As appears from a copy of the *Statement of Claim* communicated herewith as **Exhibit P-3**.

12. While otherwise drafted in similar terms to the Québec Action and the BC Action, the parties to the Ontario Action have not taken any steps to move the case forward since the filing of the class action as the plaintiff in the Ontario action is prepared to await the outcome of the BC Action.

III. STATUS OF THE PARALLEL CLASS ACTIONS

a. The Québec Action

13. On December 13, 2018, the Québec Action was assigned to be case managed by Mr. Justice Gary D.D. Morrison;
14. No other procedural steps have been taken in the Québec Action since the Application was filed.

b. The BC Action

15. On January 7, 2019, the BC Action was assigned to be case managed by Madam Justice Karen Horsman.

16. A Judicial Management Conference has been scheduled to proceed before Justice Karen Horsman on February 20, 2019.

c. The Ontario Action

17. On December 21, 2018, the Ontario Action was assigned to be case managed by Mr. Justice Paul M. Perell.

18. The plaintiff in the Ontario Action is prepared to await the outcome of the BC Action.

IV. LIS PENDENS AND STAY OF PROCEEDINGS

19. It is trite law that this Court has inherent jurisdiction to stay any action brought before it if such a stay is consistent with the principles of proportionality and judicial economy, or when there is a risk of contradictory judgments in related matters before different courts.

20. Article 3137 CCQ also specifically provides that this Court may stay its ruling on an action brought before it if there is a situation of “international” *lis pendens*, namely “if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec”.

A. Lis Pendens

a. Same Parties

21. There is juridical identity of the parties by representation. The class membership in the BC Action includes the class members in the Québec Action, whereas the Québec Action proposes a provincial class composed of Québec residents only.

b. Same Cause

22. The Québec Action and the BC Action are based on the same key allegations of fact and assert the same causes of action, namely that the Defendants allegedly chose not to compete with each other in the market for digital audiobooks. Rather they allegedly manipulated the market for their supposed mutual benefit, allegedly restricting the supply of digital audiobooks by excluding those produced by third parties from a majority of the market and thus allegedly overcharging class members. These alleged actions caused compensatory, moral and/or punitive damages to the class members. The Defendants refute these allegations in both jurisdictions.

c. Same Object

23. The object of the Québec Action and the BC Action is the same: both seek the recovery of damages, compensatory, moral and punitive, allegedly suffered as a result of the Defendants' alleged impugned conduct. This object is being contested in both jurisdictions.

B. Stay of Proceedings

24. The Applicant herein seeks a stay of the Québec Action for a period ending sixty (60) days after the final certification judgment to be rendered in the BC Action.

25. The stay sought is consistent with the principles of proportionality and judicial economy. It serves to avoid a multiplicity of parallel proceedings progressing at once, which would result in significant and avoidable costs for all parties involved, and be unnecessarily demanding on limited judicial resources.

26. It is also consistent with the "spirit of mutual comity" between courts of different provinces recognized by the Supreme Court of Canada in the landmark decision *Canada Post Corp. v. Lépine*, 2009 1 SCR 549, at para. 57.

27. In fact, by using a single proceeding, Québec residents will benefit from judicial economy and their counsel will not expend time and costs simultaneously in more than one jurisdiction.

28. In light of the foregoing, the Applicant herein respectfully submits that this Court should use its discretion to stay the Québec Action, as it is in the interest of justice and of the putative class members.

V. THE RIGHTS AND INTERESTS OF QUÉBEC CLASS MEMBERS IN THE CONTEXT OF A TEMPORARY STAY

29. The temporary stay of the Québec Action in favour of the BC Action would serve the rights and interests of Québec residents, in accordance with article 577 CCP.

30. Indeed, the causes of action asserted in the BC Action duplicate the causes of action asserted in the Québec Action, such that the rights of the putative class members in the Québec Action will be asserted in a similar fashion in the BC Action.

31. The Courts of British Columbia will protect the rights and interests of Québec putative class members in the same fashion as a Québec Court would, given the experience of the class action bench in both jurisdictions. Moreover, Québec

residents will benefit from judicial economy and will save time and legal costs by having British Columbia counsel pursue the certification stage in British Columbia.

32. The parties are represented by the same counsel in British Columbia and Québec. In the context of the stay requested herein, counsel for the Applicants and for the Defendants, both in British Columbia and Québec, have agreed to cooperate to ensure an efficient conduct of the proceedings and the coordination of the Québec and the BC Action. Indeed, Québec counsel will attend the certification hearing in order to ensure that the putative Québec class members' rights and interests are taken into account and protected.
33. Moreover, the Applicant agrees that the Québec Action should be temporarily stayed in favour of the BC Action.

VI. CONCLUSION

34. For the reasons stated above, the Applicant seeks a stay of the Québec Action pending a final certification judgment in the BC Action.
35. If the stay is granted, the Applicant undertakes to provide this Court with an update on the status of the BC Action on a semi-annual basis, and to advise this Court within 30 days of any significant development in the BC Action that may affect the course of the Québec Action.
36. The Applicant agrees that this application and statements herein are not intended to be used and will not be used in any motion to certify or authorize any other class proceeding, including the BC Action, as evidence that the authorization or certification criteria are or are not satisfied, or in the context of any other preliminary applications, as the case may be, including but not limited to any application raising lack of subject-matter jurisdiction.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the *Application to Temporarily Stay the Class Action*;

STAY any and all proceedings related to the *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* for a period ending sixty (60) days after the final certification judgment to be rendered in the BC Action (court docket number VLC-S-S-1810561);

PRAY ACT of the Applicant's undertaking to provide this Court with an update on the status of the BC Action on a semiannual basis, and to advise this Court within

30 days of any significant development in the BC Action that may affect the course of the Québec Action, and **ORDER** the Applicant to comply with said undertaking;

THE WHOLE, without costs.

Montréal, February 18, 2019

(sgd) Klein Avocats Plaideurs Inc.

Me Careen Hannouche
Klein Avocats Plaideurs Inc.

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H2Y 2W2

Counsel for the Applicant

AFFIDAVIT

I, the undersigned, Careen Hannouche, lawyer, having my professional domicile at 500, Place d'Armes, suite 1800, in the city and district of Montréal, solemnly declare the following:

1. I am counsel for the applicant for the present *Application to Temporarily Stay the Class Action*;
2. All the facts alleged in the present application are true;

And I have signed:

(sgd) Careen Hannouche

Careen Hannouche

Solemnly declared before me
in Montréal, on this 18th day of February 2019

(sgd) Emmanuelle Duclos, 213149

Commissioner for the taking of oaths
for the province of Québec

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**NOTICE OF PRESENTATION
(ART 146 and 574 al. 2 C.C.P.)**

TO :

Me Margaret Weltrowska
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**Counsel for the defendants Audible Inc., Amazon.com, Inc.,
Amazon.com.ca, Inc.**

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Counsel for the defendants Apple, Inc. and Apple Canada Inc.

TAKE NOTICE that the *Application to Temporarily Stay the Class Action* will be presented before the honourable Justice Gary D.D. Morrison of the Superior Court at the Montreal Courthouse located at 1, Notre-Dame Est, at a date and time to be determined by this honorable judge.

GOVERN YOURSELVES ACCORDINGLY.

Montréal, February 18, 2019

(sgd) Klein Avocats Plaideurs Inc.

Klein Avocats Plaideurs Inc.
Attorneys for the Applicant

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LIST OF EXHIBITS

EXHIBIT P-1: Application for Authorization to Institute a Class Action and to Obtain the Status of Representative.

EXHIBIT P-2: Notice of Civil Claim filed in *Williams v. Audible Inc. et al.*, court docket number VLC-S-S-1810561.

EXHIBIT P-3: Statement of Claim filed in *Sweet v. Audible Inc. et al.*, court docket number CV-18-606353-00CP.

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**APPLICATION TO TEMPORARILY
STAY THE CLASS ACTION
LIST OF EXHIBITS AND
EXHIBITS P-1, P-2 AND P-3**

COPY FOR THE COURT

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