

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF **MONTRÉAL**

N°: **500-06-000777-157**

SUPERIOR COURT
(Class Action Division)

MARTIN ROBICHAUD

Representative / Plaintiff

-and-

Toutes les personnes physiques ayant acquis au Québec d’Intrawest ULC, ou de l’une de ses sociétés liées, des points du Club Intrawest, à l’exception de celles qui s’en sont départis avant l’introduction, en 2007, d’un prix plancher de revente de ces points devant être respecté pour transférer les pleins avantages liés à ces points et à la participation du Club Intrawest

The Class / Plaintiffs

-and-

INTRAWEST ULC

Defendant

SUMMARY DISCLOSURE OF ORAL GROUNDS OF DEFENCE

(Art. 170(2) C.C.P.)

THE DEFENDANT INTRAWEST ULC (“INTRAWEST”) SUMMARILY DISCLOSES ITS GROUNDS OF CONTESTATION AS FOLLOWS:

1. Intrawest admits the allegations contained at paragraph 1 of the Representative/Plaintiff’s *Demande introductive d’instance* (“DII”);
2. As regards paragraph 2 of the DII, it does not include any factual allegation and simply contains legal characterizations which are not admitted;
3. With respect to the allegations contained at paragraph 3 of the DII, Intrawest refers to Exhibit P-1 and denies any allegations not in conformity therewith;
4. Intrawest denies as drafted the allegations contained at paragraph 4 of the DII, and adds that Club Intrawest membership is not restricted to “consumers”;

5. Intrawest denies as drafted the allegations contained at paragraph 5 of the DII;
6. With respect to the allegations contained at paragraph 6 of the DII, Intrawest refers to Exhibit P-2 and denies any allegations not in conformity therewith;
7. With respect to the allegations contained at paragraph 7 of the DII, Intrawest refers to Exhibit P-3 and denies any allegations not in conformity therewith;
8. With respect to the allegations contained at paragraph 8 of the DII, Intrawest refers to Exhibit P-4 and denies any allegations not in conformity therewith;
9. With respect to the allegations contained at paragraph 9 of the DII, Intrawest refers to Exhibit P-5, denies any allegations not in conformity therewith, and adds that the letter was not sent by the "Club", but rather by Diamonds Resort International, as admitted by Plaintiff at paragraph 105 of the DII;
10. Intrawest admits the allegations contained at paragraph 10 of the DII;
11. Intrawest denies the self-serving and unfounded allegations contained at paragraphs 11 and 12 of the DII;
12. Intrawest denies the allegations contained at paragraph 13 of the DII;
13. Intrawest has no knowledge of the allegations contained at paragraphs 14 to 21 of the DII;
14. Intrawest denies the allegations contained at paragraphs 22 and 23 of the DII;
15. With respect to the allegations contained at paragraph 24 of the DII, Intrawest refers to Exhibit P-6 and denies any allegations not in conformity therewith;
16. Intrawest denies the allegations contained at paragraph 25 of the DII;
17. With respect to the allegations contained at paragraph 26 of the DII, Intrawest refers to Exhibit P-2 and Exhibit P-6 and denies any allegations not in conformity therewith;
18. Intrawest denies as drafted the allegations contained at paragraph 27 of the DII;
19. Intrawest denies the allegations contained at paragraph 28 of the DII;
20. Intrawest prays act of the admission contained at paragraph 29 of the DII;
21. Intrawest denies the allegations contained at paragraph 30 of the DII;
22. Intrawest has no knowledge of the allegations contained at paragraph 31 of the DII;

23. As regards paragraph 32 of the DII, it does not include any factual allegation and simply contains legal characterizations which are not admitted;
24. With respect to the allegations contained at paragraph 33 of the DII, Intrawest refers to Exhibit P-2 and Exhibit P-6 and denies any allegations not in conformity therewith;
25. Intrawest denies the allegations contained at paragraphs 34 and 35 of the DII;
26. Intrawest has no knowledge of the allegations contained at paragraphs 36 and 37 of the DII;
27. Intrawest denies as drafted the allegations contained at paragraphs 38 and 39 of the DII;
28. Intrawest denies the allegations contained at paragraphs 40, 41, 42, 43, 44, 45 and 46 of the DII;
29. Intrawest denies the allegations contained at paragraphs 47 and 48 of the DII, and adds that the terms governing the exercise of Intrawest's Right to Repurchase were outlined in the document titled "Programme de rachat Club Intrawest" (the "**Repurchase Program**"). A copy of this document, updated as of February 21, 2008 and provided to Mr. Robichaud at the time he joined Club Intrawest (hereinafter, the "**Club**") in May 2009 is communicated as **Exhibit D-1**;
30. Intrawest denies the allegations contained at paragraphs 49, 50, 51, 52, 53, 54 and 55 of the DII;
31. With respect to the allegations contained at paragraph 56, Intrawest refers to exhibits P-2 and P-4 regarding the purchase and sale of the 160 Club Intrawest points, and denies the other self-serving allegations contained in this paragraph;
32. Intrawest denies the self-serving allegations and ill-founded legal conclusions contained at paragraphs 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 of the DII;
33. Intrawest denies the allegations contained at paragraph 67 of the DII, and adds that this serious and unfounded accusation is not supported by an iota of evidence;
34. Intrawest denies the allegations contained at paragraph 68, and adds that the disgorgement of profits remedy sought therein is not available under Québec law;
35. With respect to the allegations contained at paragraph 69 of the DII, Intrawest admits that Mr. Robichaud was appointed as representative-plaintiff and denies the balance of the allegations contained in this paragraph;
36. Intrawest denies the self-serving allegations and ill-founded legal conclusions contained at paragraphs 70, 71, 72, 73, 74, 75, 76 and 77 of the DII;

37. With respect to the allegations contained at paragraph 78 of the DII, Intrawest refers to Exhibit P-2 and denies any allegations not in conformity therewith;
38. Intrawest denies the self-serving allegations and ill-founded legal conclusions contained at paragraphs 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99 and 100 of the DII;
39. As regards paragraph 101 of the DII, it does not include any factual allegation and simply contains legal conclusions, which are not admitted;
40. Intrawest prays act of the admission contained at paragraph 102 of the DII;
41. With respect to the allegations contained at paragraph 103 of the DII, Intrawest refers to Exhibit P-9 and denies any allegations not in conformity therewith;
42. With respect to the allegations contained at paragraphs 104 and 105 of the DII, Intrawest refers to Exhibit P-10 and denies any allegations not in conformity therewith;
43. Intrawest prays act of the admission contained at paragraph 106 of the DII;
44. As regards the reservation of right contained at paragraph 107, it is invalid and without effect;

AND, TO FURTHER RE-ESTABLISH THE FACTS, INTRAWEST STATES AS FOLLOWS:

A. Club Intrawest and ExtraOrdinaryEscapes

45. Club Intrawest, now Embarc®, (hereinafter the “**Club**”) is a vacation ownership product. Club membership provides exclusive access to the various resorts and vacation homes owned and operated by the Club;
46. Club members can book vacation homes by using their Club membership points (the “**Points**”). The number of Points required for a specific reservation varies depending on the time of year and the size of the vacation home. The number of Points owned by a member determines the Points available to him or her per year to make such reservations.
47. As of January 29, 2016, the Club included nine resorts across North America, located in Vancouver (British Columbia), Ucluelet (British Columbia), Whistler (British Columbia) and Panorama (British Columbia), Blue Mountain (Ontario), Tremblant (Québec), Palm Desert (California), Sandestin (Florida), and Zihuatanejo (Mexico), as appears from Exhibit P-9;
48. Eligible Club Intrawest members also have the opportunity to adhere to the ExtraOrdinaryEscapes vacation exchange program, which offers an additional exclusive set of benefits, including access to Extraordinary Escapes travel

partners such as World of Hilton, Disney Vacation Club, Royal Caribbean, by paying annual membership fees and the applicable reservation fees.

B. Selling Membership Points and Value Preservation Mechanisms

49. At all relevant times during the period covered by this class action, Club members could terminate their membership by selling their Points at any time. They could also sell a portion of their Points or acquire additional Points, to adapt to their changing vacation needs or for other reasons;

i) Minimum Price Requirement

50. In 2007, minimum requirements for the transfer of Points and ExtraOrdinary Escapes benefits were defined jointly by Club members and ExtraOrdinary Escapes and implemented as a measure to protect the value of the Points and reflect the value of the ExtraOrdinary Escapes benefits;

51. Since 2007, Club members who are selling their membership Points and want to pass along the benefits associated with the ExtraOrdinary Escapes program to their purchaser may apply to do so, provided that they meet the following criteria must be met:

- a) the member selling the Points is eligible for ExtraOrdinary Escapes (although not necessarily an active member of ExtraOrdinary Escapes);
- b) the Points sold meet the minimum price requirement;
- c) the purchaser pays an ExtraOrdinary Escapes Enrollment Fee of \$10 US for each Point purchased;
- d) the purchaser has not attended a sales presentation provided by Intrawest (or its successor) in the previous 12 months;

52. Contrary to the allegations of the DII, those minimum requirements are beneficial to the Club members as they protect the value of the Points they purchased and ensure that the resale price of membership Points offering eligibility to the ExtraOrdinary Escapes program remains above a certain minimum price;

53. Club members can also sell their Points at a price below the minimum price requirement. In such a case, the purchaser will enjoy the full benefits of the Club membership, but will not be eligible to enroll in the ExtraOrdinary Escapes program;

ii) Right of First Refusal

54. Until the Sale of Club Intrawest (discussed below), Intrawest had a right of first refusal regarding the resale of a member's Points (the "**Right of First Refusal**").

This Right of First Refusal is also part of the value preservation tools that were used by Intrawest to control Club membership and protect its value;

55. This Right of First Refusal was expressly disclosed in the agreement entered into by each of the putative class members as well as in the summary of the terms of the agreement, as appears inter alia from the following excerpts from:

a) the *Entente d'achat et d'adhésion* (Exhibit P-2, the “**Agreement**”), under Section 7 “Droit de premier refus” :

7. Droit de premier refus Aux termes des droits réservés dans la déclaration, la société a un droit de premier refus pour le rachat de l'Adhésion et des Points de Villégiature de l'acheteur. L'acheteur convient qu'avant de revendre l'Adhésion et les Points de Villégiature à un tiers, il offrira à la société le droit de premier refus conformément à la procédure prévue dans la déclaration.

b) And the *Résumé des éléments clés de votre adhésion – Reconnaissance des termes de l'entente* (Exhibit P-6, the “**Summary**”), under “Revente”:

Revente

Vous avez le droit de vendre votre adhésion au Club Intrawest à tout moment, sous réserve du droit de la société d'exercer son premier refus. [...]

56. The above-cited clauses were brought to the attention of Mr. Robichaud and the other putative class members who purchased Points from Intrawest;

57. Contrary to the allegations of the DII, the Right of First Refusal was not used to prevent the sale of Points, but rather allowed Intrawest to repurchase Points at the same “net to seller” price and on the same terms and conditions as those set out in the purchase agreement agreed to by the purchaser.

iii) Right to Repurchase

58. Contrary to the allegations of the DII, during the relevant period, Intrawest used its Right of First Refusal in accordance with the terms of the Repurchase Program (Exhibit D-1), which defines, *inter alia*, how a Club member can participate to the Repurchase Program, the related process, and the formula used to determine the repurchase price, the whole as appears from Exhibit D-1;

iv) Value of the Points

59. As stated above, Intrawest implemented various value preservation mechanisms and measures, which were adequately disclosed to the Club members. It also provided support in various forms to Club members who sought to sell their Points;

60. At all relevant times, Intrawest did not guarantee that a Club member could recover the integral amount paid for the purchase of Points at the time of an eventual resale, and neither Intrawest nor its agents made any representations to the putative class members in this regard;
61. As regards the bare allegations of the DII pertaining to the alleged 75% loss in value of the Points between 2007, they amount to nothing more than unsupported hypotheses and are plainly false;
62. Contrary to the allegations of the DII, the price of the Points sold by Intrawest to new or existing Club members continuously increased since 2007, as appears from the price history chart for the period of 2007 to 2016 communicated herewith as **Exhibit D-2**;

C. Representations Made to Putative Class Members and Disclosure of Annual Contribution

63. Club members are required to pay annual resort dues, which represent their contribution to the Club's annual operating budget for the maintenance of the various Club resorts and vacation homes (the "**Annual Contribution**"). Accordingly, the Annual Contribution is not a "fee" as alleged in the DII;
64. The amount of the Annual Contribution for the current year is disclosed in the agreement entered into at the time of the purchase of the Points, and the Summary includes additional details regarding the annual invoicing of the Annual Contribution, as appears *inter alia* from the Agreement (Exhibit P-2) and the Summary (Exhibit P-6);
65. The amount of each Annual Contribution is clearly disclosed to each Club member;

D. Mr. Robichaud's Personal Right of Action

66. Mr. Robichaud seeks orders against Intrawest forcing it to reimburse any difference between the price paid by Mr. Robichaud for the purchase of 160 Points on May 9, 2009, as well as the Annual Contribution paid by Mr. Robichaud between 2009 and 2016 without any opposition;
67. Mr. Robichaud seeks those remedies based on the "general impression" allegedly generated by representations made by Intrawest representatives at the time he purchased the 160 Points at issue on May 9, 2009 and on the alleged failure to disclose the annual resort fees in the documents provided to him at that time;
68. The combined effect of Mr. Robichaud's claims and the conclusions sought is a free Club membership allowing him to book and stay at vacation properties operated by the Club and ExtraOrdinary Escapes for nearly 8 years free of any costs.

i) No Representations Regarding Resale Price

69. The Club was never described as such, and the representations made at the time Mr. Robichaud joined the Club did not create that “general impression”, as admitted by Mr. Robichaud;
70. Moreover, the Club is not a financial instrument or investment vehicle and was not represented as such to Mr. Robichaud or any of the other putative class members.
71. In fact, both the Agreement (Exhibit P-2) and the Summary (Exhibit P-6) specify that the Club IntraWest points should not be considered as an investment possibility. The Agreement also includes a confirmation that Mr. Robichaud purchases the Points for his own personal use, and not based on potential resale perspectives or other potential monetary or financial benefits, as appears from Exhibit P-2, at section 8;
72. Contrary to the allegations of the DII, it was never represented to Mr. Robichaud at the time of the purchase of the 160 Points at issue that he could recover the integral purchase price of the Points by reselling them at any time, as admitted by Mr. Robichaud;
73. Based on Mr. Robichaud’s own testimony, on May 9, 2009, an IntraWest agent answered his questions regarding the resale possibilities by explaining the value protection mechanisms discussed above, namely the Right to Repurchase and the Right of First Refusal;

ii) The Annual Contribution Was Disclosed and Paid Without Opposition

74. The amount of the Annual Contribution owed by Mr. Robichaud for the balance of the year 2009 was clearly disclosed in the Agreement entered into by Mr. Robichaud on May 9, 2009 (Exhibit P-2), as appears from Exhibit P-2. This is admitted by Mr. Robichaud;
75. The Summary (Exhibit P-6) executed by Mr. Robichaud on the same day also clearly discloses that the Annual Contribution represents a member’s contribution to the Club’s operating budget and are invoiced on an annual basis;
76. Contrary to the allegations of the DII, Mr. Robichaud admitted that he understood that the amount of the Annual Contribution would be determined on an annual basis, and would increase over time;
77. Moreover, contrary to the allegations of the DII, the amount of the Annual Contribution did not vary in an “unpredictable way” during Mr. Robichaud’s membership, but rather remained essentially the same between 2009 and 2017, increasing by less than 5% annually on average, as appears from Exhibit P-7;

iii) Mr. Robichaud's Claim is Prescribed

78. Mr. Robichaud's purported right of action arising from the alleged failure to adequately disclose the amount of the Annual Contribution in the Agreement, Mr. Robichaud's arose, at the latest, at the time he was asked to pay the Annual Contribution for the year 2010, the amount of which was different from that specified in the Agreement.
79. As for the second proposed cause of action, namely the alleged failure to disclose purported restrictions to the sale of the Points and the alleged resulting loss of value of the points, Mr. Robichaud became aware of those restrictions at the latest on May 20, 2009, when he purchased 300 additional Points for other Club members (the "**Second Purchase**"). The contractual documents relating to this Second Purchase and executed by Mr. Robichaud clearly disclose the minimum price requirement and other impugned restrictions, as appears from a copy of the Sale and Transfer Worksheet and related agreement communicated as **Exhibit D-3**;
80. The motion for authorization to institute a class action herein was filed on December 30, 2015, long after the three-year prescription period relating to the above-mentioned claims had elapsed. Mr. Robichaud's claim is thus prescribed;

E. The Sale of Club Intrawest

81. On November 24, 2015, Intrawest entered into a purchase agreement with Diamond Resorts Corporation and Diamonds Resorts International, Inc. (collectively "**Diamond**") whereby Diamond acquired the Club and all of the Club's management contracts (the "**Sale**");
82. On January 29, 2016, Diamond announced that the sale had closed and that it had completed its acquisition of the Club, as appears from Exhibit P-9;
83. Since the Sale, Intrawest has not been involved in or exercised any control over the operations of the Club, directly or indirectly;
84. All of the facts alleged herein are true;

FOR THESE REASONS, MAY IT PLEASE THE COURT:

DISMISS the *Demande introductive d'instance*;

THE WHOLE, with judicial costs.

Montreal, May 24, 2019

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Our reference: 10253-79

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SUPERIOR COURT
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MARTIN ROBICHAUD ET AL.

Plaintiffs

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Toutes les personnes physiques ayant acquis au Québec d'Intrawest ULC, ou de l'une de ses sociétés liées, des points du Club Intrawest, à l'exception de celles qui s'en sont départis avant l'introduction, en 2007, d'un prix plancher de revente de ces points devant être respecté pour transférer les pleins avantages liés à ces points et à la participation du Club Intrawest

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v.

INTRAWEST ULC

Defendant

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OF ORAL GROUNDS OF DEFENCE**
(Art. 170(2) C.C.P.)

ORIGINAL

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