

CANADA

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

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-001012-190

MICHAEL FORIAN-ZYTYNSKY,

[REDACTED]

-and-

ELISABETH PRASS, [REDACTED]

[REDACTED]

Petitioners

v.

CAPITAL ONE BANK, a legal person duly governed pursuant to the *Bank Act* (SC 1991, c. 46), having its principal establishment at 950, Avenue Beaumont, in the City of Montreal, District of Montreal, Province of Quebec, H3N 1V5;

-and-

CAPITAL ONE FINANCIAL CORPORATION, a legal person duly governed by the laws of the State of Virginia and the Federal laws of the United States of America, having its head office at 1680, Capital One Drive, in the City of McLean, State of Virginia, United States of America, 22102;

Defendants

**APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO
APPOINT THE STATUS OF REPRESENTATIVE PLAINTIFFS**
(ss. 571 & ff. C.C.P.)

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN THE CLASS ACTIONS DIVISION, IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONERS RESPECTFULLY STATE AS FOLLOWS:

A. THE PARTIES:

1. Petitioner Forian-Zytynsky, manager, is a consumer within the definition provided for at section 1(e) of the *Consumer Protection Act* (CQLR, c. P-40.1) (the “**CPA**”) and resides in the Judicial District of Longueuil.
2. Petitioner Prass, political aid, is also a consumer within the definition provided for at section 1(e) of the *CPA* and resides in the Judicial District of Montreal.
3. Defendant Capital One Bank (hereinafter “**Defendant Bank**”) is a merchant bank duly governed by the provisions of the *Bank Act* (SC 1991, c. 46) (the “**BA**”) whose principal establishment is situated in the Judicial District of Montreal, the whole as appears from an Extract of the Quebec Enterprise Registrar, communicated herewith as **Exhibit P-1**.
4. Defendant Bank is a bank within the definition of section 2 of the *BA*.
5. Defendant Bank is a federal financial institution whose main economic activity consists of issuing credit cards to various members of the public.
6. Defendant Capital One Financial Corporation (hereinafter “**Defendant Corporation**”) is a publically traded company on the New York Stock Exchange, the S&P 100 and the S&P 500.
7. Defendant Corporation the majority shareholder of Defendant Bank, the whole as appears from Exhibit P-1.
8. Defendant Corporation, through various subsidiaries, acts as a credit card issuer, a consumer banking corporation and a commercial banking corporation.

B. INTRODUCTION:

9. On or around the 29th of July, 2019, Defendants publically admitted that on or around the 19th of July, 2019, they discovered that the personal data of its credit card customers and persons whom had applied for credit cards was improperly and unlawfully accessed and shared by an individual, the whole as appears from

a copy of a News Release made by Defendant Corporation to investors, dated the 29th of July, 2019, communicated herewith as **Exhibit P-2**.

10. More specifically, in admitting the aforesaid data breach that occurred between the 22nd and 23rd of March, 2019, Defendants estimate that the data breach affected approximately One Hundred Million (100,000,000) individuals in the United States of America and approximately Six Million (6,000,000) individuals in Canada, the whole as appears from Exhibit P-2.
11. As admitted in the News Release, Exhibit P-2, the data breach mainly, if not exclusively affected “credit card customers” of Defendants.
12. Given that Defendant Corporation operates as a credit card issuer in Canada through Defendant Bank, Petitioner maintains that the Defendants are solidarily liable for the damages claimed herein.
13. On or around the 29th of July, 2019, several major media outlets reported on Defendants’ admission, the whole as appears from copies of articles from Global News, the New York Times and the Journal de Montreal, dated the 29th of July, 2019, communicated herewith as **Exhibit P-3 (en liasse)**.
14. Pursuant to the admissions made by Defendants, it is evident that same did not have a sufficient system or adequate measure in place to adequately protect the risks of its consumers’ personal and highly sensitive information from being improperly accessed by unauthorized individuals, stolen and compromised.
15. In the News Release, Exhibit P-2, Defendants acknowledged that its affected consumers are entitled to compensation by offering them free credit monitoring and identity protection plan.
16. In doing so, Defendants effectively admit, without limitation, that credit monitoring services **are** necessary in this situation given the theft and potential disclosure of class members’ personal information.
17. However, the “compensation” offered by Defendants is insufficient and leaves its consumers exposed and vulnerable after the termination of the period for which same shall be offered, given that the risks to which they are exposed (that are admitted by Defendants) do not disappear after that period, and consumers will, thereafter, likely assume added charges/expenses should they elect to maintain said protection.
18. In *Zuckerman*, this Honourable Court has previously held that “*setting up credit monitoring and security alerts, obtaining credit reports, and cancelling cards or closing accounts and replacing them are not “ordinary annoyances, anxieties and*

fears that people living in society routinely, if sometimes reluctantly, accept” but may amount to something more”¹.

19. Consequently, Petitioners seeks to institute a class action on behalf of the following class:

Class:

All natural and legal persons affected by the Defendants data breaches reported on July 29, 2019, situated in Canada;

(hereinafter referred to as the “**Class**”).

C. CONDITIONS REQUIRED TO AUTHORIZE THIS CLASS ACTION AND TO APPOINT THE STATUS OF REPRESENTATIVE PLAINTIFFS (SECTION 575 C.C.P.):

i. THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT:

20. Petitioner Forian-Zytynsky has had an active account with Defendant Bank since approximately 2017 (the “**Forian Account**”).
21. Petitioner Prass has had an active account with Defendant Bank since approximately early 2019 (the “**Prass Account**”).
22. Petitioner Forian-Zytynsky was induced to open the Forian Account with Defendant Bank, after coming across an advertising from Defendant Bank.
23. Petitioner Prass was induced to open the Prass Account with Defendant Bank after receiving an offer to open same by mail.
24. Petitioner Forian-Zytynsky pays an annual fee to Defendant Bank for the Forian Account.
25. Petitioners’ contractual relationship with Defendant Bank includes and requires that such Defendant and its parent company, Defendant Corporation, take adequate measures and precautions to safeguard the personal and confidential information same provide them with.
26. Therefore, part of the contractual obligations owed by Defendants to Petitioners include the protection and non-disclosure of their personal and confidential information.

¹ *Zuckerman v. Target Corporation*, 2017 QCCS 110, para. 73 (“**Zuckerman**”).

27. According to the News Release, Exhibit P-2, class members' personal information that was compromised included names, addresses, zip/postal codes, phone numbers, email addresses, dates of birth, self-reported income, social insurance numbers, consumer status data and transactional data.
28. Defendants' security measures were evidentially insufficient prior to the data breach since Defendant Corporation admitted that vulnerabilities were fixed in order to address the issue.
29. Defendant Bank exercises banking operations when it emitted credit cards pursuant to section 409 of the *BA*.
30. Defendants are merchants pursuant to the definition provided for at section 1 of the *CPA*.
31. Moreover, pursuant to section 2 of the *CPA*, said *Act* finds application to the case at bar.
32. As such, Petitioners did not receive what they paid for to Defendant Bank, and thus, is entitled to a reduction of their obligations, as well as punitive damages of Three Hundred Dollars (\$300.00) each.
33. Independently of the fees paid, Petitioners were reasonably justified to expect that Defendants would observe and maintain an implied obligation of security with regards to their personal information; given Defendants' admission of the aforesaid data breach, said obligation was evidentially not respected by Defendants.
34. Petitioners' claim for damages is based on breaches by Defendants of the following legislation:
 - a. Section 16 of the *CPA* (with respect to members of the Class that are consumers);
 - b. Sections 1458 of the *Civil Code of Quebec* (CQLR, c. C-1991); and
 - c. Sections 5 & 9 of the *Charter of Human Rights and Freedoms* (CQLR, c. C-12).
35. Petitioners further submit that Defendants should be required to pay for their credit monitoring for a period of at least 10 years following the expiry of the "free period" in which same is allegedly to be offered by Defendants in order to monitor their credit due to the breaches and negligence of Defendants.
36. Petitioners' damages are a direct and proximate result of Defendants' omissions, breaches and negligence.

37. The punitive damages provided for in section 272 of the *CPA* have a preventative objective, that is, to discourage the repetition of such undesirable conduct.

38. Defendants' respective patrimonial situations are so significant that the foregoing amount of punitive damages is appropriate in the circumstances.

ii. THE CLAIMS OF THE MEMEBERS OF THE CLASS RAISE IDENTICAL, SIMILAR OR RELATED ISSUES OF LAW OR FACT:

39. All Class members, regardless of which of the Defendants they contracted with, have a common interest in proving Defendants' liability.

40. In the case at bar, the legal and factual backgrounds at issue are common to all members of the Class.

41. Every Class member who paid fees to Defendants did so under the reasonable expectation and implied term that their private information would be safeguarded; Defendants clearly failed in doing so.

42. Ever Class member who has paid fees to Defendants should thus be entitled to a reduction of their obligations and a creditor monitoring plan that properly and justly compensates the prejudice suffered (Petitioners request 10 years).

43. Additionally and independently of any fees paid to Defendants by any Class member, every Class member provided their utmost personal and sensitive information to Defendants under the reasonable and implied provision that same would be safeguarded; Defendants clearly failed in this regard.

44. As such, each Class member is also justified in claiming moral damages and punitive damages.

45. All of the damages to the Class members are a direct and proximate result of the Defendants' negligence, as evidenced by the aforesaid data breach.

46. Individual questions, if any, pale by comparison to the common questions that are significant to the outcome of the present Application.

47. The recourses of the Class members raise identical, similar or related questions of law or of fact, namely:

a. Were Defendants negligent in the storing and safekeeping of the personal and financial information of the Class members whose information was compromised?

b. Are Class members entitled to compensatory, moral and/or punitive damages, and if so, what is the quantum of said damages?

iii. THE COMPOSITION OF THE CLASS:

48. The composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings.
49. According to Exhibits P-2 and P-3 (*en liasse*), there are approximately 100 million Americans and approximately 6 million Canadians affected by the aforesaid data breach.
50. Class members are very numerous and are dispersed across the Province, across Canada and the United States of America.
51. These facts demonstrate that it would be impossible to contact each and every Class member to obtain mandates and to join them in one action.
52. In these circumstances, a class action is the only appropriate procedure for all Class members to effectively pursue their respective rights and have access to justice without overburdening the court system.

iv. THE CLASS MEMBERS REQUESTING TO BE APPOINTED AS REPRESENTATIVE PLAINTIFFS ARE IN A POSITION TO PROPERLY REPRESENT THE CLASS MEMBERS:

53. Petitioners respectfully request that they be appointed as representative plaintiffs for the following main reasons:
 - a. They are each a member of the Class and each have a personal interest in seeking the conclusions sought herein;
 - b. They are both competent, in that they each have the potential to be the mandatary of the action if it had proceeded under section 91 of the *Code of Civil Procedure* (CQLR, c. C-25.01) (the "**CCP**"); and
 - c. Their respective interests are not antagonistic to those of other Class members.
54. Additionally, Petitioners respectfully submit that:
 - a. They each have the time, energy, will and determination to assume all the responsibilities incumbent upon him/her in order to diligently carry out the action;
 - b. They each have mandated their attorneys to file the present Application for the sole purpose of having their rights, as well as the rights of other Class members, recognized and protected so that they can be compensated and

have their credit monitored free of charge for a 10 year period beyond the period that is to be offered by Defendants;

- c. They each cooperate and will continue to fully cooperate with their attorneys, who have experience in consumer protection-related class actions involving banks; and
- d. They each understand the nature of the action.

- 55. As for identifying other Class members, Petitioners draw certain inferences from the situation and realize that by all accounts, there is a very significant number of Class members that find themselves in an identical situation, and thus, it would not be useful to attempt to identify each of them given their sheer numbers.
- 56. For the above reasons, Petitioners respectfully submit that their respective interests and competences are such that the present class action could proceed fairly and in the best interests of Class members.

D. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT:

- 57. The action that Petitioners wish to institute on behalf of the members of the Class is an action in damages.
- 58. The conclusions that Petitioners wish to introduce by way of an Originating Application are:

GRANT the Representative Plaintiffs' action against Defendants on behalf of all Class members;

CONDEMN Defendants to pay to the Representative Plaintiffs and Class members moral damages in an amount to be determined;

CONDEMN Defendants to pay to the Representative Plaintiffs and Class members compensatory damages in an amount to be determined

CONDEMN Defendants to pay each Class member the sum of Three Hundred Dollars (\$300.00) as punitive damages;

ORDER the collective recovery of all damages to the Class members;

CONDEMN the Defendants to pay interest and the additional indemnity on the above sums according to law from the date of service of the present *Application to Authorize a Class Action*;

DECLARE that Defendant Capital One Financial Corporation is solidarily liable with Defendant Capital One Bank for the monetary condemnation sought herein;

ORDER Defendants to deposit in the office of this Honourable Court the totality of the sums which form part of the collective recovery, with interests and costs;

ORDER that the claims of individual Class members be the object of collective liquidation if the proof permits and alternatively, by individual liquidation;

CONDEMN Defendants to bear the costs of the present action at all levels, including the costs of all exhibits, notices, the costs of management of the claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this Honourable Court shall determine.

59. The interests of justice favour that this Application be granted in accordance with its conclusions.

E. JURISDICTION:

60. Petitioners respectfully suggest that this class action be exercised before the Superior Court in the judicial district of Montreal, since Petitioner Prass is domiciled and resides in the district of Montreal, Petitioner Forian-Zytynsky is employed therein, Defendant Bank's principal establishment is situated therein and Petitioners attorneys practice in such district.

WHEREFORE, PETITIONERS PRAY THAT BY JUDGMENT TO BE RENDERED HEREIN, THIS HONOURABLE COURT:

61. **GRANT** the present Application;

62. **AUTHORIZE** the bringing of a class action in the form of an Originating Application in damages;

63. **APPOINT** Petitioners the status of Representative Plaintiffs of the persons included in the Class herein described as:

Class:

All natural and legal persons affected by the Defendants data breaches reported on July 29, 2019, situated in Canada;

(hereinafter referred to as the "**Class**")

Or any other Class to be determined by the Court;

64. **IDENTIFY** the principle questions of fact and law to be treated collectively as the following:

- a. Were Defendants negligent in the storing and safekeeping of the personal and financial information of the Class members whose information was compromised?
 - b. Are Class members entitled to compensatory, moral and/or punitive damages, and if so, what is the quantum of said damages?
65. **IDENTIFY** the conclusions sought by the class action to be instituted as being the following:
- a. **GRANT** the Representative Plaintiffs' action against Defendants on behalf of all Class members;
 - b. **CONDEMN** Defendants to pay to the Representative Plaintiffs and Class members moral damages in an amount to be determined;
 - c. **CONDEMN** Defendants to pay to the Representative Plaintiffs and Class members compensatory damages in an amount to be determined;
 - d. **CONDEMN** Defendants to pay each Class member the sum of Three Hundred Dollars (\$300.00) as punitive damages;
 - e. **ORDER** the collective recovery of all damages to the Class members;
 - f. **CONDEMN** the Defendants to pay interest and the additional indemnity on the above sums according to law from the date of service of the present *Application to Authorize a Class Action*;
 - g. **DECLARE** that Defendant Capital One Financial Corporation is solidarily liable with Defendant Capital One Bank for the monetary condemnation sought herein;
 - h. **ORDER** Defendants to deposit in the office of this Honourable Court the totality of the sums which form part of the collective recovery, with interests and costs;
 - i. **ORDER** that the claims of individual Class members be the object of collective liquidation if the proof permits and alternatively, by individual liquidation;
 - j. **CONDEMN** Defendants to bear the costs of the present action at all levels, including the costs of all exhibits, notices, the costs of management of the claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;
 - k. **RENDER** any other order that this Honourable Court shall determine.

66. **DECLARE** that all members of the Class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;
67. **FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusions will be bound by any judgment to be rendered herein;
68. **ORDER** the publication of a notice to the members of the Class in accordance with section 579 of the *C.C.P.* within sixty (60) days from the judgment to be rendered herein in the “News” sections of the Saturday editions of *Le Journal de Montreal* and the *Montreal Gazette*;
69. **ORDER** that said notice be published on the Defendants’ various websites, Facebook pages and Twitter accounts, in a conspicuous place, with a link stating “Notice of a Class Action”;
70. **ORDER** Defendants to send an Abbreviated Notice by e-mail to each Class member, to their last known e-mail address, with the subject line “Notice of a Class Action”;
71. **ORDER** Defendants to send a Notice by regular mail to each Class member, to their last known physical address, with the subject line “Notice of a Class Action”;
72. **RENDER** any other order that this Honourable Court shall determine;
73. **THE WHOLE** with costs, including the court stamp, bailiff fees, stenographer fees and publication fees.

Montreal, July 30th, 2019

(SGD) STEIN & STEIN INC.

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SUMMONS
(Articles 145 and following C.C.P.)

Filing of a judicial application

Take notice that Petitioners have filed this Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiffs in the office of the Superior Court, Class Actions Division, in the judicial district of **Montreal**.

Defendant's answer

You must answer the application in writing, personally or through a lawyer, at the courthouse of **Montreal** situated at **1, Notre-Dame East, Montreal, QC, H2Y 1B6** within 15 days of service of the application or, if you have no domicile, residence or establishment in Québec, within 30 days. The answer must be notified to the Petitioners' lawyer or, if the Petitioners are not represented, to the Petitioners.

Failure to answer

If you fail to answer within the time limit of 15 or 30 days, as applicable, a default judgement may be rendered against you without further notice and you may, according to the circumstances, be required to pay the legal costs.

Content of answer

In your answer, you must state your intention to:

- negotiate a settlement;
- propose mediation to resolve the dispute;
- defend the application and, in the cases required by the Code, cooperate with the plaintiff in preparing the case protocol that is to govern the conduct of the proceeding. The protocol must be filed with the court office in the district specified above within 45 days after service of the summons or, in family matters or if you have no domicile, residence or establishment in Québec, within 3 months after service;
- propose a settlement conference.

The answer to the summons must include your contact information and, if you are represented by a lawyer, the lawyer's name and contact information.

Change of judicial district

You may ask the court to refer the originating Application to the district of your domicile or residence, or of your elected domicile or the district designated by an agreement with the plaintiff.

If the application pertains to an employment contract, consumer contract or insurance contract, or to the exercise of a hypothecary right on an immovable serving as your main residence, and if you are the employee, consumer, insured person, beneficiary of the insurance contract or hypothecary debtor, you may ask for a referral to the district of your domicile or residence or the district where the immovable is situated or the loss occurred.

The request must be filed with the special clerk of the district of territorial jurisdiction after it has been notified to the other parties and to the office of the court already seized of the originating application.

Transfer of application to Small Claims Division

If you qualify to act as a plaintiff under the rules governing the recovery of small claims, you may also contact the clerk of the court to request that the application be processed according to those rules. If you make this request, the plaintiff's legal costs will not exceed those prescribed for the recovery of small claims.

Calling to a case management conference

Within 20 days after the case protocol mentioned above is filed, the court may call you to a case management conference to ensure the orderly progress of the proceeding. Failing this, the protocol is presumed to be accepted.

Exhibits supporting the application

In support of the originating application, the plaintiff intends to use the following exhibits:

EXHIBIT P-1: Extract of the Quebec Enterprise Register for Defendant Capital One Bank;

EXHIBIT P-2: A copy of the News Release made by Defendants to its investors, dated the 29th of July, 2019;

EXHIBIT P-3: Copies of the news articles of Global News, the New York Times and Le Journal de Montreal, all dated the 29th of July, 2019 (*en liasse*);

These exhibits are available on request.

Notice of presentation of an application

If the application is an application in the course of a proceeding or an application under Book III, V, excepting an application in family matters mentioned in article 409, or VI of the Code, the establishment of a case protocol is not required; however, the application must be accompanied by a notice stating the date and time it is to be presented.

Montreal, July 30th, 2019

(SGD) STEIN & STEIN INC.

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NOTICE OF PRESENTATION

(ss. 146 & 574, al. 2 C.C.P.)

TO: ALL DEFENDANTS

TAKE NOTICE that Petitioners' *Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiffs* will be presentable before one of the Honourable Judges of the Superior Court, sitting in the Class Actions Division, in and for the District of Montreal, at the **Montreal Court House**, located at **1, rue Notre Dame Est, Montreal, Quebec, H2Y 1B6**, on the date set by the coordinator of the Class Actions Division.

DO GOVERN YOURSELVES ACCORDINGLY.

Montreal, July 30th, 2019

(SGD) STEIN & STEIN INC.

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NO.: 500-06-001012-190

**SUPERIOR COURT
(Class Actions Division)
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

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-and-
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ORIGINAL

CODE NO. BS0327

FILE NO.12461-2

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