

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL
LOCALITY OF MONTRÉAL

(Class action)
SUPERIOR COURT

No: 500-06-001074-208

ENRICO GIOIOSA

Petitioner

v.

NAUTILUS PLUS INC.

Defendant

APPLICATION FOR AUTHORIZATION TO EXAMINE THE PETITIONER
(article 574 CCP)

TO THE HONOURABLE JUSTICE GARY D.D. MORRISON, S.C.J., THE DEFENDANT
NAUTILUS PLUS INC. RESPECTFULLY SUBMITS AS FOLLOWS:

1. The Defendant Nautilus Plus Inc. ("**Nautilus**") seeks the authorization of this Honorable Court to examine the Petitioner Enrico Gioiosa (the "**Petitioner**") pursuant to article 574, *para.* 3 of the *Code of Civil Procedure*, CQLR, c. C-25.01 ("**CCP**").

I. The Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff

2. On or around June 1st, 2020, the Petitioner filed an *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* (the "**Authorization Application**") against Nautilus on behalf of the following proposed class:

"All persons who, as of the 15th of March, 2020, had executed, in the Province of Quebec, a Consumer Service Contract with the Defendant and were as such subscribed to as members of one or more of Defendant's physical fitness studios and who have continued to be charged Service Fees (i.e. Membership Fees) by Defendant without being able to benefit from the correlative benefits as per their respective Consumer Service Contracts for the period of deprivation of usage." (the "**Proposed Class**")

3. The Petitioner alleges that further to the declaration by the World Health Organization on March 11, 2020 that the COVID-19 crisis was a global

pandemic, the Government of Quebec then declared same to constitute a State of Emergency, and pursuant to various decrees, ordered the immediate closure of all fitness health studios, including Nautilus' gym facilities (the "**Temporary Closure**"). As a result, Petitioner claims that he was deprived of his ability to obtain the usage of Nautilus' fitness studio equipment and other ancillary gym services as per his contract for services involving sequential performance dated October 30, 2019, (Exhibit R-3) (the "**Gym Contract**").

4. The Petitioner further alleges that Nautilus unilaterally modified the terms of its consumers contracts by extending the duration for an indeterminate period of time without the consent of Class members in breach of the *Consumer Protection Act*, CQLR, c. P-40.1 (the "**CPA**").
5. More specifically, the Petitioner contends that Nautilus continued collecting payments pursuant to the Gym Contract and extended his membership for a period equivalent to the time of Temporary Closure imposed by the Government of Quebec at the end of the subscription (without collecting any payment for such period), thus unilaterally modifying the Gym Contract in excess of the maximum duration of twelve (12) months provided by section 200 of the CPA.
6. The Petitioner further alleges that he contacted Nautilus to request that the Gym Contract be cancelled retroactively to the date of the Temporary Closure, which was refused by Nautilus.
7. As a result, the Petitioner claims that he, and each member of the Proposed Class, is entitled to a reimbursement of the membership fees, the cancellation of the Gym Contract and punitive damages of \$300.

II. The Relevance and Scope of the Examination of the Petitioner

8. In order to determine whether the allegations advanced by the Petitioner meet the criteria for authorization under article 575 CCP, and particularly whether the facts alleged justify the relief sought (art. 575(2) CCP), this Honorable Court must have a complete picture of the essential facts surrounding the Applicant's personal cause of action.
9. As presented, however, the Authorization Application advances general, unsubstantiated and contradictory allegations with respect to the Petitioner's individual cause of action and the relief sought, which justifies the examination of the Petitioner on these specific elements.
10. Indeed, despite alleging that Nautilus unilaterally and illegally extended the Gym Contract (para. 13 and 20 of the Authorization Application), the Petitioner files certain email exchanges with Nautilus following the Temporary Closure, which reveal that the Petitioner himself asked whether Nautilus would be "extending the membership of all members by the amount of time equal to the closure" or refunding amounts charged during the Temporary Closure and stating that "(a)s

far as I am concerned, if none of the two options mentioned above are part of the plan, this is highway robbery” (Exhibit R-4, page 3 of 5).

11. As further support for his personal cause of action, the Petitioner files an email dated May 29, 2020, wherein he states that he is concerned that “once the gyms do reopen, they will be with limited capacity on a first come first serve basis and my contract extension will be effectively useless” (Exhibit R-4, page 2 of 5). In this same email, the Applicant requests that Nautilus cancel the Gym Contract without penalty and refund him for all payments charged to his credit card since the Temporary Closure.
12. The Applicant also makes general reference to an extract of Nautilus’ website with respect to the measures taken by Nautilus as a result of the Temporary Closure (Exhibit R-5), concluding that Nautilus has unilaterally modified the terms of “all of its consumer contracts for an indeterminate period without written consent of its consumers (...)” without providing any context regarding the Petitioner’s consultation of Nautilus’ website or providing or referring to any other communications from Nautilus to its consumers regarding the Temporary Closure.
13. The general and vague allegations advanced in support of the Petitioner’s claim, which are seemingly contradicted by the Petitioner’s own communications filed in support of the Authorization Application, requires clarification so that this Honourable Court can determine whether the Petitioner has advanced an arguable personal cause of action and has demonstrated his interest in and/or ability to properly represent the Proposed Class.
14. In fact, the Authorization Application makes no reference whatsoever to any efforts made by the Petitioner to identify other Class members who may have similarly requested the termination of his or her Gym Contract. On the contrary, the Applicant states that he drew “certain inferences” from the situation which makes him believe that “a very significant number of Class members find themselves in an identical situation” (Authorization Application, para. 43).
15. In this context, the examination of the Petitioner before the hearing of the Authorization Application is relevant and useful to provide this Honourable Court with the complete and necessary facts relating to:
 - i. The communications between the Petitioner and Nautilus regarding the Petitioner’s Gym Contract and membership following the Temporary Closure;
 - ii. The Petitioner’s consultation of Nautilus’ web site and other communications from Nautilus to its consumers regarding the COVID-19 pandemic and the Temporary Closure;
 - iii. The Petitioner’s use of Nautilus’ gym facilities prior to and after the Temporary Closure;

- iv. The facts regarding the Petitioner's ability to properly represent the members of the proposed class, including the nature of the steps taken by him leading up to and culminating in the filing of the Authorization Application, as well as his efforts, if any, to identify other members of the Proposed Class.
16. The Petitioner's examination regarding these subjects is limited to what is relevant and useful to this Honorable Court's analysis of the criteria for authorization of the class action pursuant to article 575 CCP, and more particularly with regard to the appearance of right requirement (article 575(2) CCP) and the Petitioner's ability to properly represent the members of the proposed Class members (article 575(4) CCP).
17. The examination, which will not exceed two hours, is proportionate to the nature, importance and complexity of this proposed class action.
18. Nautilus suggests that this examination be held out of court and before the hearing of the Authorization Application and that due to measures in place to curtail the COVID-19 pandemic, could be held by videoconference.
19. It is in the interest of justice and the parties that Nautilus be authorized to examine the Petitioner.
20. The present Application is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present Application;

AUTHORIZE Defendant Nautilus Plus Inc. to examine the Petitioner Enrico Gioiosa out of court and before the hearing of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* for a maximum of two hours regarding the following subjects:

- i. The communications between the Petitioner and Nautilus regarding the Petitioner's Gym Contract and membership following the Temporary Closure;
- ii. The Petitioner's consultation of Nautilus' web site and other communications from Nautilus to its consumers regarding the COVID-19 pandemic and the Temporary Closure;
- iii. The Petitioner's use of Nautilus' gym facilities prior to and after the Temporary Closure;
- iv. The facts regarding the Petitioner's ability to properly represent the members of the proposed class, including the nature of the steps taken by him leading up to and culminating in the filing of the Authorization

Application, as well as his efforts, if any, to identify other members of the Proposed Class..

THE WHOLE with legal costs.

Montreal, this September 30, 2020

Fasken Martineau DuMoulin

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ORIGINAL

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