

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class action)

No.: 500-06-001079-207

OPTION CONSOMMATEURS

Plaintiff

v.

GOOGLE LLC

Defendant

**APPLICATION FOR DISMISSAL OR, ALTERNATIVELY, STAY OF
PROCEEDINGS ON THE BASIS OF *LIS PENDENS*
(Arts. 18, 49 and 168 (1) CCP)**

**TO THE HONOURABLE DONAL BISSON, J.S.C., THE DEFENDANT GOOGLE LLC,
RESPECTFULLY SUBMITS THE FOLLOWING:**

I. INTRODUCTION

1. The Defendant Google LLC (“**Google**”) seeks the dismissal or, alternatively, the stay of the portions of the present matter which overlap with the *Applications for authorization to institute a class action* filed in two (2) different parallel matters filed in the province of Québec, namely *Lima c. Google LLC* (Court docket no. 500-06-000940-185) (the “**Lima Action**”), communicated herewith as **Exhibit R-1**, and *Homsy c. Google LLC* (Court docket no. 500-06-001123-211) (the “**Homsy Action**”), communicated herewith as **Exhibit R-2**;
2. While the present matter is extremely broad, Google respectfully submits that the it appears to be, on some aspects, *lis pendens* with the *Lima Action* and the *Homsy Action*. The dismissal or, alternatively, the stay of those aspects is consistent with the sound administration of justice in order to avoid the risk of contradictory judgments and of double recovery for members who are included in the overlapping classes;

II. PROCEDURAL CONTEXT

3. On June 22, 2020, the originating plaintiff Louis-Alexandre Leclaire filed a *Demande pour autorisation d'exercer une action collective* (the “**Leclaire Action**”) representing a class of members limited to individuals in Quebec who have browsed on a website in Google’s private browser or incognito mode;

4. On January 27, 2021, Plaintiff's counsel filed a *Demande de bene esse pour autorisation de modifier la Demande pour autorisation d'exercer une action collective* (the "**Amendment resulting in a new Action**"), which was not opposed by Google under reserve, *inter alia*, of the present Application, and which has been granted by the Court in its judgment dated March 18, 2021, as appears from the court record;
5. The newly authorized *Demande modifiée pour autorisation d'exercer une action collective* substantially amends the *Leclaire* Action in order to substitute *Option Consommateurs* as the representative Plaintiff, while also broadening the class definition (the "**Option Consommateurs Action**");
6. In the *Option Consommateurs* Action, the definition of the class introduced by the Amendment resulting in a new Action broadens the scope of the class, as appears from the definition of the class in the *Leclaire* Action and the proposed *Option Consommateurs* Action:

Leclaire Class :

Toute personne domiciliée au Québec ayant navigué sur le Web en mode de navigation privée sur un site web utilisant un des services publicitaires ou d'analyse offerts par GOOGLE tels que Google Analytics, Google Ad Manager ou le bouton d'ouverture de session « Sign in with Google ».

Option Consommateur Class :

Toute personne domiciliée au Québec ayant utilisé un service offert par GOOGLE qui ne nécessite pas la création d'un compte Google, tels que Google Search ou Google Maps, ou ayant navigué sur un site Web utilisant un des outils offerts par GOOGLE tels que Google Analytics, Google Ad Manager ou le bouton d'ouverture de session « Sign in with Google ».

7. Essentially, the *Option Consommateurs* Action appears to relate to any personal information collected by any Google service not requiring a Google account and to any personal information collected by any Google tool when someone is browsing a website even if not using a Google product to do so;

III. **SUMMARY OF THE PARALLEL ACTIONS**

8. Including the *Option Consommateurs* Action, Google currently faces eight (8) parallel actions in three (3) Canadian jurisdictions and has also settled three (3) others, all of which contain similar, related, and overlapping allegations that Google violated the privacy rights of its users by collecting their personal data and commercializing it for profit;
9. The total of eleven (11) class actions are identified as follows:

- (a) **Quebec:** the *Option Consommateurs* Action; the *Lima* Action, the *Homsy* Action and *Lima v Google LLC* (Court docket no. 500-06-000941-183) (the “**Settled Lima Action**”), communicated herewith as **Exhibit R-3**;
 - (b) **British Columbia:** *Sibble v Google LLC et al.* (Court docket no. VLC-S-S-208705ON) (the “**Sibble Action**”); *Brian Reid v Google LLC*, Case No. S-207444 (the “**Reid Action**”); *Kett v Google LLC* (Court docket no. VLC-S-S-188927) (the “**Kett Action**”); *Situmorang v Google LLC*, (Court docket no. VLC-S-S-2012870) (the “**Situmorang Action**”); and *Warner v Google LLC* (settled) (Court docket no. VLC-S-S-1711066) (the “**Settled Warner Action**”), the instituting motions of which are filed herewith respectively as **Exhibits R-4 to R-8**;
 - (c) **Ontario:** *Provost v Google LLC et al.*, (Court docket no. CV-20-00645911-00CPQC) (the “**Provost Action**”); and *Emond vs Google LLC* (settled) (Court docket CV-18-590521-0008), the instituting motions of which are filed herewith respectively as **Exhibits R-9 and R-10**;
10. The *Option Consommateurs*, *Sibble*, and *Provost* Actions all relate to any personal information collected by any Google service, with the exception that the *Option Consommateurs* Action is limited to services not requiring a Google account;
 11. The other parallel actions focus on subsets of Google services and/or specific types of data;
 12. The total of eleven (11) class actions identified above can be grouped in the following companion categories based on the specific type of data and service alleged to be at issue, and the province in which they were instituted:

<u>Subject matter</u>	<u>Quebec</u>	<u>British Columbia</u>	<u>Ontario</u>
All personal data	<i>Option Consommateurs</i>	<i>Sibble</i>	<i>Provost</i>
Private browsing / incognito mode		<i>Reid</i> (all personal data)	
Location Data (Search / Browsing)	<i>Lima</i>	<i>Kett</i>	<i>Emond</i> (Settled)
Location Data (Cell phone ID)	<i>Lima</i> (Settled)	<i>Warner</i> (Settled)	
Biometric Image Data	<i>Homsy</i>	<i>Situmorang</i>	

13. Both of the *Lima* Action and the *Homsy* Action were filed in Québec before the Amendment resulting in a new Action, leading to the broad scope of the class in the *Option Consommateurs* Action;

- i. **The *Lima* Action**

14. The *Lima* Action, filed on August 15, 2018 (Exhibit R-1) concerns location data allegedly collected by Google through its applications installed on smartphone devices running the Android or Apple iOS operating systems, as appears from the definitions of its class:

Lima Action:

All persons residing in Québec who used Google's services through Google applications on a smartphone running Android or iOS, or any other group to be determined by the Court

15. This Honourable Court has ordered the stay of the *Lima* Action in Quebec pending the application for certification of the *Kett* Action (*Kett v Google LLC* (Court docket no.VLC-S-S188927)) in British Columbia, on the grounds that the latter was instituted first and raises the same issues as the *Lima* Action, while also including Quebec members in its national class, the whole as appears from the judgment of the Honourable Thomas M. Davis, j.s.c., dated January 16, 2019, in court file no. 500-06-000940-185, communicated herewith as **Exhibit R-11**;
16. Given that the description of the class in the *Option Consommateurs* Action is so vague and general, the location data at issue in the *Lima* Action (and in the *Kett* Action) appears to overlap with some of the same data covered by the *Option Consommateurs* Action, which does not exclude individuals who have a Google account, but only excludes the use of the services requiring a Google account;
17. In fact, a multitude of Google services installed on smartphones operating iOS or Android do not require a Google account and are therefore included in the definition of the class in the *Option Consommateurs* Action;
18. For example, individuals in Quebec who use Google maps on their iOS or Android operated smartphones would be included in each of the *Option Consommateurs* and *Lima* classes;
19. The *Lima* Action would thus represent issues that are a subset of the *Option Consommateurs* Action, by alleging the following similar, related, and overlapping faults:
 - (a) Google, tracks, collects, and compiles location data through Google Apps installed on user mobile devices including GPS coordinates, latitude and longitude, map location, geographical location, nearby Wi-Fi networks, IP addresses, or other markers of physical orientation;

- (b) Google manipulates settings and permission requests sent to customers in order to employ “dark patterns” enabling it to collect the location data without the user’s informed permission or knowledge;
 - (c) Google uses the location data as one of the characteristics used to build customer profiles without disclosing them to users;
 - (d) Google uses the profiles its builds, including location data on users, to sell behavioral advertising to its clients for commercial profit;
 - (e) Google misrepresents in its privacy policy that users can control the personal data that Google collects, thereby violating its own policies;
 - (f) Google continues to collect location data even when users have not enabled, and even when they have disabled location services or location history in their smartphone or google control settings;
 - (g) Google violates users’ fundamental right to privacy protected by the Competition Act, S.C. 1985, c. C-34;
 - (h) Google violates users’ fundamental right to privacy under provincial consumer and privacy laws;
20. In addition, each of these actions seek the same following remedies:
- (a) Compensatory damages for the alleged harm done to class members as a result of the alleged civil faults committed by Google;
 - (b) Punitive damages on the basis of Google’s alleged intentional civil faults and violations of consumer and privacy laws;

ii. The *Homsy* Action

21. The *Homsy* Action (Exhibits R-2) concerns the alleged extraction, collection, storage, and use by Google of facial biometric identifiers of both a user class of individuals who use Google photos and a non user class of individuals who do not use Google Photos but who still appear in photos stored on Google Photos by users, as appears from the following definition of the Québec class:

User Class: All individuals residing in the Province of Quebec, except for the Excluded Persons, who used Google Photos and who had their facial biometric identifiers extracted, collected, captured, received, or otherwise obtained by Google from photos uploaded to Google Photos since October 28th, 2015 (the "Class Period");*

[...]

Non-User Class: All individuals residing in the Province of Quebec, except for the Excluded Persons, who did not use Google Photos and who had their facial biometric identifiers extracted, collected, captured, received, or otherwise obtained by Google from photos uploaded to Google Photos during the Class Period;

22. Once again, given that the description of the class in the *Option Consommateurs* Action is so vague and general, it appears to overlap with the *Homsy* Action, because even individuals who do not use Google Photos in a Google account could be captured by a photo stored on Google Photos by users, while at the same time being users of Google services that do not require a Google account;
23. The *Homsy* Action would thus represent issues that are a subset of the *Option Consommateurs* Action, by alleging the following similar, related, and overlapping faults:
 - (a) Google extracts, collects, stores, and uses the facial biometric identifiers of individuals through Google Photos;
 - (b) Google employs facial recognition technology that captures and encodes images through an embedded computation of measurements of the human face's geometry, thereby allowing Google to collect biometric data in the form a numerical representations of the human face;
 - (c) Google fails to provide adequate notice, obtain informed consent, or publish biometric data retention policies;
 - (d) Google misrepresents in its terms of service and privacy policy that users can control the personal data that Google collects, thereby violating its own policies;
 - (e) Google violates users' fundamental right to privacy protected by the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5
 - (f) Google violates users' fundamental right to privacy under provincial consumer and privacy laws;
24. In addition, each of these actions seek the same following remedies:
 - (a) Declaratory orders that Google intentionally violated provincial and federal privacy and consumer protection laws
 - (b) Compensatory damages for the alleged harm done to class members as a result of the alleged civil faults committed by Google;
 - (c) Punitive damages on the basis of Google's alleged intentional civil faults and violations of consumer and privacy laws;

GROUNDS FOR GRANTING A STAY OF THE PRESENT PROCEEDINGS

i. The *Lima* Action

25. Allowing the *Option Consommateurs* and *Lima* Actions to proceed simultaneously risks conflicting judgments given that these actions appear to overlap on nearly all the faults alleged against Google with respect to the collection of location data;
26. Moreover, these actions create the potential for double recovery for individuals in Quebec who are included in both classes, given that both actions claim compensatory and punitive damages for the same alleged faults relating to the collection of location data of users of Google services not requiring a Google account;
27. In order to avoid *lis pendens* and the risk of contradictory judgments, the *Option Consommateurs* Action should clearly exclude location data allegedly collected by Google through its applications installed on smartphone devices running the Android or IOS operating systems;

ii. The *Homsy* Action

28. Allowing the *Option Consommateurs* and *Homsy* Actions to proceed simultaneously risks conflicting judgments given that these actions appear to raise identical issues with regard to the individuals who did not use Google Photos and who allegedly had their facial biometric identifiers extracted, collected, captured, received, or otherwise obtained by Google from photos uploaded to Google Photos by users;
29. These actions also create the potential for double recovery for individuals in Quebec who are included in both classes, given that both actions claim compensatory and punitive damages related to the collection by Google of facial biometric identifiers for individuals who do not use Google Photos but who still appear in photos stored on Google Photos by users;
30. In order to avoid *lis pendens* and the risk of contradictory judgments, the *Option Consommateurs* Action should clearly exclude the “Non-User Class” of the *Homsy* Action, defined as follows:

Non-User Class: All individuals residing in the Province of Quebec, except for the Excluded Persons, who did not use Google Photos and who had their facial biometric identifiers extracted, collected, captured, received, or otherwise obtained by Google from photos uploaded to Google Photos during the Class Period;

31. Class counsel in British-Columbia, in the *Sibble* Action, has voluntarily excluded the facial biometrics identifiers in order to avoid the Defendants seeking a stay on the basis of overlap with the *Situmorang* Action, as appears from the Amended

Notice of Civil Claim in the Sibble (Exhibit R-4) class action and from the Notice of Claim in the Situmorang Action (Exhibit R-7);

32. Allowing the *Option Consommateurs* Action, in its actual format and the *Lima* and *Homsy* Actions to proceed simultaneously could create an important risk of conflicting judgments, which would be contrary to the interests of justice and to the overarching principles of judicial economy and proportionality that must guide all judicial proceedings;
33. Google submits it would be in the interest of all parties to narrow and circumscribe any potential overlapping issues in order to avoid any duplication and confusion between those Actions;
34. The present Application is well founded in facts and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

- A. **GRANT** the present *Application for Temporary Stay of Proceedings*;
- B. **DISMISS** the *Demande modifiée pour autorisation d'exercer une action collective* in the present matter with regards to location data allegedly collected by Google through its applications installed on smartphone devices running the Android or IOS operating systems;
- C. **ALTERNATIVELY, STAY** the *Demande pour autorisation d'exercer une action collective* in the present matter with regards to location data allegedly collected by Google through its applications installed on smartphone devices running the Android or IOS operating systems, until a final judgment is rendered in the matter of *Lima c. Google LLC* (Court docket no. 500-06-000940-185);
- D. **DISMISS** the *Demande modifiée pour autorisation d'exercer une action collective* in the present matter with regards to all individuals residing in the Province of Quebec who did not use Google Photos and who allegedly had their facial biometric identifiers extracted, collected, captured, received, or otherwise obtained by Google from photos uploaded to Google Photos by users;
- E. **ALTERNATIVELY, STAY** the *Demande pour autorisation d'exercer une action collective* in the present matter with regards to all individuals residing in the Province of Quebec who did not use Google Photos and who allegedly had their facial biometric identifiers extracted, collected, captured, received, or otherwise obtained by Google from photos uploaded to Google Photos by users until a final judgment is rendered in the matter of *Homsy c. Google LLC* (Court docket no. 500-06-001123-211);

- F. ISSUE** any other order necessary or advisable in the interests of the parties and/or of justice;
- G. THE WHOLE** without legal costs, save in case of contestation.

Montréal, September 3, 2021

Borden Ladner Gervais S.E.N.C.R.L., S.R.L.

Borden Ladner Gervais LLP

Lawyers for Defendant Google LLC

M^{re} Karine Chênevert

M^{re} François Grondin

M^{re} Patrick Plante

M^{re} Éloïse Gratton

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Notification: notification@blg.com

O/File: 296198-000014

AFFIDAVIT


I, the undersigned, Jennifer Bantog, Legal Administrative Assistant at the law firm of Fasken Martineau DuMoulin LLP, located at 2900 – 550 Burrard Street, Vancouver, British Columbia, affirm that:

1. I have reviewed the Exhibits R-4 to R-8, stated at paragraph 9b) of the present *Application* and listed in the List of Exhibits attached hereto, and confirm that they each include pleadings that were filed in the Supreme Court of British Columbia under the style of proceeding indicated.
2. All of the facts set forth in this affidavit are true.

AND I HAVE SIGNED in Vancouver, this 3rd day of September, 2021:


Jennifer Bantog

Affirmed before me
in Vancouver, this 3rd day of September


Tracey M. Cohen, Q.C.

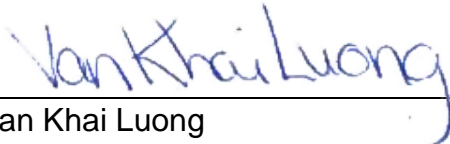
TRACEY COHEN, Q.C.
Barrister & Solicitor
Fasken Martineau DuMoulin LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3
604 631 3149

AFFIDAVIT

I, the undersigned, Van Khai Luong, paralegal at the law firm of Boren Ladner Gervais LLP, located at , 900 – 1000 de la Gauchetière Street West, Montreal, Quebec, affirm that:



3. I have reviewed the Exhibits R-1 to R-3, stated at paragraphs 1 and 9a) of the present *Application for dismissal or, alternatively, stay of proceedings on the basis of lis pendens* and listed in the List of Exhibits attached hereto, and confirm that they each include pleadings that were filed in the Superior Court of Québec under the style of proceeding indicated.
4. All of the facts set forth in this affidavit are true.

AND I HAVE SIGNED in Sainte-Marthe-sur-le-lac, this 3rd day of September, 2021:



Van Khai Luong

Declared under oath remotely before me by
technological means
in Sainte-Julie, this 3rd day of September

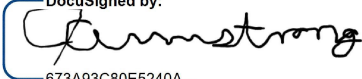
Nathalie Angers
Commissioner of Oaths # 137908
Commissioner for Oaths for Québec and for
outside of Québec

AFFIDAVIT

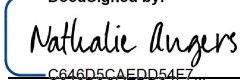
I, the undersigned, Jennifer Armstrong, Legal Assistant at the law firm of Fasken Martineau DuMoulin LLP, located at , 333 Bay Street, Suite 2400, Toronto, Ontario, affirm that:

1. I have reviewed the Exhibits R-9 and R-10, stated at paragraph 9c) of the present *Application for dismissal or, alternatively, stay of proceedings on the basis of lis pendens* and listed in the List of Exhibits attached hereto, and confirm that they each include pleadings that were filed in the Ontario Superior Court of Justice under the style of proceeding indicated.
2. All of the facts set forth in this affidavit are true.

AND I HAVE SIGNED in Pickering, this 3rd day of September, 2021:

DocuSigned by:

673A93C80E5240A
Jennifer Armstrong

Declared under oath remotely before me by
technological means
in Sainte-Julie, this 3rd day of September

DocuSigned by:

C648D5CAEDD54E7
Nathalie Angers
Commissioner of Oaths # 137908
Commissioner for Oaths for Québec and for
outside of Québec

**NOTICE OF PRESENTATION
CIVIL PRACTICE
(ROOM 2.16)**

TO: M^{re} Maxime Nasr
M^{re} Jean-Philippe Lincourt
M^{re} Rosalie Jetté
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Lawyers for Plaintiff

TAKE NOTICE that the *Application for dismissal or, alternatively, stay of proceedings on the basis of lis pendens* will be presented for hearing and adjudication before the Honourable justice Donald Bisson of the Superior Court, on October 15, 2021 at 9:30 a.m. in a room to be determined by the Honourable Justice Donald Bisson.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Montréal, September 3rd, 2021

Borden Ladner Gervais S.E.N.C.R.L., S.R.L.

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O/File: 296198-000014

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class action)

No.: 500-06-001079-207

LOUIS-ALEXANDRE
CONSOMMATEURS

OPTION

Plaintiff

v.

GOOGLE LLC

Defendant

**LIST OF THE EXHIBITS COMMUNICATED WITH THE APPLICATION
BY DEFENDANT GOOGLE LLC
(Art. 247 C.C.P.)**

EXHIBIT R-1: *Lima c. Google LLC* (Court docket no. 500-06-000940-185) matter

EXHIBIT R-2: *Homsy c. Google LLC* (Court docket no. 500-06-001123-211) matter

EXHIBIT R-3: Québec: the *Option Consommateurs* Action; the *Lima* Action, the *Homsy* Action and *Lima v Google LLC* (Court docket no. 500-06-000941-183)

EXHIBIT R-4: *Sibble v Google LLC et al.* (Court docket no. VLC-S-S-208705ON) (the "**Sibble Action**")

EXHIBIT R-5: *Brian Reid v Google LLC*, Case No. S-207444 (the "**Reid Action**");

EXHIBIT R-6: *Kett v Google LLC* (Court docket no. VLC-S-S-188927) (the "**Kett Action**")

EXHIBIT R-7: *Situmorang v Google LLC*, (Court docket no. VLC-S-S-2012870) (the "**Situmorang Action**")

EXHIBIT R-8: *Warner v Google LLC* (settled) (Court docket no. VLC-S-S-1711066) (the "**Settled Warner Action**")

EXHIBIT R-9: *Provost v Google LLC et al*, (Court docket no. CV-20-00645911-00CPQC) (the "**Provost Action**")

EXHIBIT R-10: *Emond vs Google LLC* (settled) (Court docket CV-18-590521-0008);

EXHIBIT R-11: Judgment of the Honourable Thomas M. Davis, j.s.c., dated January 16, 2019, in court file no. 500-06-000940-185

Copy of these exhibits is hereby notified.

Montréal, September 3rd, 2021

Borden Ladner Gervais S.E.N.C.R.L., S.R.L.

Borden Ladner Gervais LLP

Lawyers for Defendant Google LLC

M^{re} Karine Chênevert

M^{re} François Grondin

M^{re} Patrick Plante

M^{re} Éloïse Gratton

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Angers, Nathalie

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Envoyé: September 3, 2021 4:01 PM
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Cc: Chênevert, Karine; Plante, Patrick; Grondin, François; Gratton, Eloïse
Objet: NOTIFICATION: 500-06-001079-207 / Option Consommateur c. Google LLC /
Application for Dismissal or, Alternatively, Stay of Proceedings on the Basis of Lis
Pendens and Exhibits R-1 to R-11
Pièces jointes: Google Exhibits R-1 to R-11.zip; Application for dismissal or_ alternatively_ stay on the
basis of lis pendens(124008820.6).pdf

Suivi:

Destinataire

Réception

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Chênevert, Karine

Remis: 2021-09-03 4:02 PM

Plante, Patrick

Remis: 2021-09-03 4:02 PM

Grondin, François

Remis: 2021-09-03 4:02 PM

Gratton, Eloïse

Remis: 2021-09-03 4:02 PM

BORDEREAU DE NOTIFICATION PAR COURRIER ÉLECTRONIQUE (ARTICLE 134 C.P.C.)

DATE :

Montréal, le 3 septembre 2021

EXPÉDITEUR :

Nom : M^{es} Karine Chênevert /François Grondin / Patrick Plante / Éloïse Gratton
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Notre dossier : 296198-000014

DESTINATAIRE(S) :

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Votre dossier : 2002-097

NUMÉRO DE DOSSIER DE COUR ET NATURE DU DOCUMENT NOTIFIÉ :

Numéro de dossier : 500-06-001079-207
Parties : Option Consommateur c. Google LLC
Nature du document : **Application for Dismissal or, Alternatively, Stay of Proceedings on the Basis of Lis Pendens and Exhibits R-1 to R-11**

Nombre de pages : -17- excluding exhibits
(pièces jointes seulement)



Nathalie Angers

Adjointe à la pratique pour / Practice Assistant for Karine Chênevert,
Ève Gaudet, Gabrielle Tremblay, Jasmine Kavadias Landry

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SUPERIOR COURT
(Class action)

DISTRICT OF MONTRÉAL
No.: 500-06-001079-207

OPTION CONSOMMATEURS

Plaintiff

v.

GOOGLE LLC

Defendant

**APPLICATION FOR DISMISSAL OR,
ALTERNATIVELY, STAY OF
PROCEEDINGS ON THE BASIS OF *LIS
PENDENS*
(Arts. 18, 49 and 168 (1) CCP)**

ORIGINAL

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