

C A N A D A

(Class Action)

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL
LOCALITY OF MONTRÉAL

SUPERIOR COURT

No: 500-06-001123-211

MICHAEL HOMSY

Applicant

v.

GOOGLE LLC

Respondent

**APPLICATION FOR AUTHORIZATION TO ADDUCE RELEVANT EVIDENCE AND TO
EXAMINE THE APPLICANT
(574 CCP)**

**TO THE HONOURABLE JUSTICE DONALD BISSON OF THE SUPERIOR COURT,
ACTING AS THE DESIGNATED JUDGE IN THE PRESENT CASE, THE
RESPONDENT GOOGLE LLC RESPECTFULLY SUBMITS AS FOLLOWS:**

I. INTRODUCTION

1. The Respondent Google LLC ("**Google**") hereby seeks the authorization of this Honourable Court to adduce relevant evidence and to examine the Applicant pursuant to article 574, paragraph 3 of the *Code of Civil Procedure*, RLRQ c C-25.01 ("**CCP**").
2. More specifically, Google seeks authorization to adduce as relevant evidence a Sworn Statement of Yael Marzan, Product Manager Lead of Google Photos, and its Annexes A to C, dated September 3, 2021, a copy of which is filed herewith as **Exhibit G-1**, and to examine the Applicant Michael Homsy on the specific circumstances/allegations outlined below.
3. As further detailed below, the Sworn Statement of Yael Marzan (Exhibit G-1) and the examination of the Applicant are relevant and necessary for the Court's analysis of the authorization criteria pursuant to article 575 CCP, and more particularly in order to correct, clarify and explain certain false, incomplete and ambiguous allegations advanced by the Applicant.

II. THE AUTHORIZATION APPLICATION

4. On or about January 15, 2021, the Applicant Michael Homsy filed an *Originating Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* (the “**Authorization Application**”) against Google on behalf of the following proposed class (the “**Class**” or the “**Class Members**”):

“**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;

“**Excluded Persons**” means Google and its parent corporations, subsidiaries, affiliates, predecessors, successors and assigns; and their current or former officers, directors, and legal representatives;”

5. The Authorization Application alleges that Google extracted, collected, stored, and used the “facial biometric identifiers” of the Applicant and the Class Members without providing any or adequate notice, without obtaining informed consent and without publishing biometric data retention policies (paras. 2 and 4 of the Authorization Application).
6. More specifically, the Authorization Application alleges that whenever a photo is uploaded to Google Photos, facial biometric identifiers are extracted from any detected face image, without consideration for whether the face belonged to a Google Photo user or non-user (paras. 30 and 31 of the Authorization Application).
7. It is alleged that Google used the Class Members’ facial biometric data “for its own competitive advantage in the marketplaces for photo-sharing and other services integrated with Google Photos, which services the Respondent has monetized, or may monetize, through data mining and targeted advertising” (para. 33 of the Authorization Application).
8. The Authorization Application further alleges that the facial biometric identifiers extracted and collected by Google through Google Photos are stored and remain accessible to Google, its personnel, and any third party that Google permits to access such data (para. 32 of the Authorization Application).
9. As a result thereof, the Authorization Application claims that Google (paras. 6-8 of the Authorization Application):

- a) Violated Class Members' rights to inviolability and privacy pursuant to the *Charter of Human Rights and Freedoms*, CQLR c C-12;
 - b) Failed to meet its obligations under the *Civil Code of Quebec*, CQLR c CCQ-1991 and the *Act Respecting the Protection of Personal Information in the Private Sector*, CQLR c P-39.1; and
 - c) Made misleading representations to the users of Google Photos regarding its privacy practices and policies by omitting or being ambiguous about the fact that it collected and retained sensitive personal information in the form of facial biometric data, the whole in violation of the *Consumer Protection Act*, CQLR.
10. With regard to his particular situation, which the Court must analyze to determine if the proposed class action should be authorized, the Applicant alleges that:
- a) On or about the month of March 2020, he purchased an Android Phone and he began using Google Photos after accepting Google's Terms of Use and Privacy Policy (paras. 48-49 of the Authorization Application);
 - b) He took photos of himself and others using his Android phone and uploaded an estimated 5,500 photos to the platform (paras. 50-51 of the Authorization Application);
 - c) He did not know that Google was extracting, collecting, storing and using facial biometric identifiers from his photos (para. 52 of the Authorization Application);
 - d) He was made aware of Google's storage and use of his facial biometric data in January 2021, after which he transferred his photos to Dropbox (paras. 53 and 56 of the Authorization Application);
 - e) Had he been made aware that Google was storing and using his facial biometric data, he would not have used Google Photos (para. 55 of the Authorization Application);
 - f) As a result of Google's violation of his right to privacy and inviolability, he suffered damages, including inconveniences, anxiety and pecuniary damages (para. 58 of the Authorization Application);
 - g) He has also been overcome with feelings of powerlessness, betrayal, fear, stress, and anxiety (para. 59 of the Authorization Application).

III. THE RELEVANCE OF THE SWORN STATEMENT OF Yael MARZAN

11. Google seeks this Honourable Court's permission to file the Sworn Statement of Yael Marzan, Product Manager Lead of Google Photos dated September 3, 2021 (Exhibit G-1), and the annexes in support thereof, in order to complete and correct certain allegations and evidence advanced in the Authorization Application.
12. Indeed, as will be further detailed below, the Authorization Application makes several vague, ambiguous and/or erroneous allegations with respect to the Google Photos service, its functioning and features, the consent and knowledge of the Applicant Mr. Homsy and of users in respect of the service, the use of the data associated with photos uploaded to Google Photos, third-party access to the data associated with photos uploaded to Google Photos and targeted advertising by Google.
13. The Sworn Statement of Yael Marzan and its supporting annexes A to C (Exhibit G-1) serve to correct these erroneous allegations and to provide all of the relevant and necessary information regarding the Google Photos service, its functioning and features and the optional face grouping feature available for users of Google Photos, in order to provide the Court with a true and complete factual matrix relating to the allegations of the Authorization Application.
14. More specifically, the Sworn Statement of Yael Marzan and its annexes A to C (Exhibit G-1) serves to:
 - a) Complete and clarify the vague and ambiguous allegation of the Authorization Application that Google Photos is pre-installed on all Android Phones and automatically uploads photos taken by the user (para. 26 of the Authorization Application), by explaining that automatic uploading of photos is done at the choice of the user;
 - b) Complete and clarify the vague and ambiguous allegations of the Authorization Application regarding the Google Photos service (see for example paras. 2, 22 and following of the Authorization Application) by explaining that:
 - i. the Google Photos face grouping feature is optional and can be disabled by the user at any time; and
 - ii. Google has both consumer accounts and enterprise accounts that operate differently with respect to Google Photos;
 - c) Correct and complete the Authorization Application's erroneous allegations that Google was allegedly "extracting, collecting, storing, and using facial biometric identifiers" without the Applicant's and users' knowledge (see for example paras. 2 and 52 of the Authorization Application), by explaining the Google Photos service and features (including namely face grouping which is erroneously described and defined as "biometrics" in the Authorization

Application), and the messages and links shown and/or offered to users and/or non-users regarding the Google Photos service.

- d) Complete, clarify and correct the Authorization Application's vague, ambiguous and/or erroneous allegations regarding Google's alleged collection, storage and use of the data associated with photos uploaded to Google Photos (see for example paras. 2, 33, 43, 52-56, 61, 64, 68, 74 and 78 of the Authorization Application), by:
 - i. Explaining how Google Photos functions in terms of photo organizing;
 - ii. Clarifying that face templates and face groups are private to each user's account;
 - iii. Clarifying that "Facenet" (Google's algorithm which processes images of faces) does not attempt to determine a person's identity from a photo; and
 - iv. Explaining how the data associated with a photo is stored and deleted;
 - e) Correct the Authorization Application's erroneous allegations that "facial biometric identifiers" are collected by Google and accessible to third-party developers (see for example para. 32 of the Authorization Application), by confirming that third-party partners who use the Google Photos API (software made available by Google to assist partners to integrate their products with Google Photos) are required to comply with Google's policies and cannot access any user data without the user's permission;
 - f) Correct the Authorization Application's erroneous allegations that "facial biometric data" is collected by Google and used for its own competitive advantage and for targeted advertising (see for example paras. 33 and 75 of the Authorization Application), by confirming that Google Photos is not used to target advertising and that no third party advertising is displayed on Google Photos whatsoever.
15. The Sworn Statement of Yael Marzan and the supporting annexes A to C (Exhibit G-1) thus serve to complete and correct the otherwise vague, ambiguous and/or erroneous allegations of the Authorization Application regarding the Google Photos service generally, including specifically its functioning, features and its use by Google. It provides the Court with the complete factual matrix regarding the allegations advanced by the Applicant in this regard and will assist this Honourable Court in its analysis of the authorization criteria, and specifically in its determination of whether the Applicant has established an arguable case pursuant to article 575 (2) CCP.

IV. THE RELEVANCE AND SCOPE OF THE EXAMINATION OF THE APPLICANT

16. As explained, the Authorization Application offers only general, vague and unsubstantiated assertions with regard to the Applicant's individual cause of action, which must be analyzed to determine whether there is an arguable case against Google (article 575 (2) of the CCP) and the Applicant's ability to properly represent the members of the proposed Class (article 575(4) CCP).
17. In this context, the examination of the Applicant before the hearing of the Authorization Application is both useful and necessary to provide this Honourable Court with the complete and true facts relating to:
 - a) The elements giving rise to the Applicant's own personal cause of action as against Google, including the circumstances surrounding:
 - i. Any alleged representations the Applicant would have seen and/or relied upon regarding Google Photos' services (see for example paras. 43-44 and 49 of the Authorization Application);
 - ii. The Applicant's acceptance of the Terms of Use and Privacy Policy (see paras. 38, 39 and 49 of the Authorization Application);
 - iii. The Applicant's actual use of Google Photos (paras. 47-48, 50-51 of the Authorization Application);
 - iv. The Applicant's alleged damages, which are only vaguely described as inconveniences, anxiety and pecuniary damages (paras. 58-59 of the Authorization Application);
 - v. The Applicant's discovery of Google's alleged practices in January of 2021 (para. 53 of the Authorization Application)
 - b) The Applicant's ability to properly represent the members of the proposed class, including the circumstances surrounding:
 - i. The manner in which he was called upon to act as an Applicant;
 - ii. The representativeness of his personal cause of action in relation to the proposed class members; and
 - iii. His personal capacity to properly represent the proposed class.
18. The Applicant's examination regarding these subjects is limited to what is relevant and useful to this Honourable 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 Applicant's ability to properly represent the members of the proposed class (article 575 (4) CCP).

19. The examination, which will not exceed two hours, is proportionate to the nature and to the importance of this proposed class action.
20. The Respondent suggests that this examination be held out of court and before the hearing of the Authorization Application.
21. It is thus in the interest of justice and the parties that the Respondent be authorized to adduce as relevant evidence the Sworn Statement of Yael Marzan and the supporting annexes A to C (Exhibit G-1), and to examine the Applicant on the specific above-listed circumstances/allegations.
22. The present Application is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present motion;

AUTHORIZE the Respondent Google LLC to file a Sworn Statement of Yael Marzan, Product Manager Lead of Google Photos, and its Annexes A to C, dated September 3, 2021 a copy of which is filed herewith as **Exhibit G-1**;

AUTHORIZE the Respondent Google LLC to examine the Applicant Michael Homsy out of court and before the hearing of the *Originating Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* for a maximum of two hours regarding the following subjects:

- i. Any representations that the Applicant would have seen and/or relied upon regarding Google Photos' services;
 - ii. The Applicant's acceptance of the Terms of Use and Privacy Policy;
 - iii. The Applicant's actual use of Google Photos;
 - iv. The Applicant's alleged damages, which are only vaguely described as inconveniences, anxiety and pecuniary damages;
 - v. The Applicant's discovery of Google's alleged practices in January of 2021.
- b) The Applicant's ability to properly represent the members of the proposed class, including the circumstances surrounding:

- i. The manner in which he was called upon to act as an Applicant;
- ii. The representativeness of his personal cause of action in relation to the proposed class members; and
- iii. His personal capacity to properly represent the proposed class.

THE WHOLE with legal costs.

Montréal, this September 3, 2021

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NOTICE OF PRESENTATION

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TAKE NOTICE that the present *Application for Authorization to Adduce Relevant Evidence and to Examine the Applicant* will be presented for adjudication before the honourable justice Donald Bisson S.C.J. of the Superior Court, sitting in civil practice division for the district of Montréal on **September 17, 2021**, at a time to be determined at the Montréal courthouse, located at 1 Notre-Dame Street East, Montréal, Quebec, H2Y 1B6, in a room to be determined or by videoconference in a virtual room to be determined.

DO GOVERN YOURSELVES ACCORDINGLY.

Montréal, this September 3, 2021

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LIST OF EXHIBIT

EXHIBIT G-1

Sworn Statement of Yael Marzan, Product Manager Lead of
Google Photos, and its Annexes A to C

Montréal, this September 3, 2021

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