SUPERIOR COURT

(Class Action Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-001079-207

DATE: October 28, 2021

PRESIDING: THE HONORABLE DONALD BISSON, J.S.C. (JB4644)

OPTION CONSOMMATEURS
Plaintiff

v.

GOOGLE LLC
Defendant

JUDGMENT

(On Applications for:
1) Dismissal or, Alternatively, for a Stay; and 2) Leave To File Evidence)

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1. INTRODUCTION

[1] The Court is seized with the following two applications:

1) An application by defendant Google LLC for dismissal of a motion for authorization of a Class Action, or, alternatively, for a stay, the whole on the basis of *Lis Pendens*, filed under Art. 168(1) of the *Code of Civil Procedure* ("CCP"); and

2) An application by Google for leave to file evidence at the authorization stage, filed under Art. 574 CCP.

[2] Google is the defendant party against a Modified Motion for Authorization of a class action (the "Modified Motion") filed[1] by Plaintiff Option Consommateurs, which is seeking authorization of a Class Action for the following 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 ».

[3] The Court will elaborate in details below with regards to the allegations and causes of action of the Modified Motion. For now, it is sufficient to note that Option Consommateurs alleges that Google is collecting personal information on class members who use Google Websites and third party Websites which integrate Google tools, the whole without obtaining sufficient consent from the members.

[4] Here are the details of the two preliminary motions filed by Google:

- An *Application for Dismissal or, Alternatively, Stay of Proceedings on the Basis of Lis Pendens*, in which Google seeks the dismissal, or alternatively the

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1 The original Motion for Authorization was filed on June 22, 2020 and leave to modify it was granted by the Court of March 18, 2021: Leclaire c. Google, 2021 QCCS 903. The Modified Motion is dated January 27, 2021.

stay, of the portions of the Modified Motion that overlap with two other class action proceedings instituted in Quebec against Google, namely *Lima* v. *Google LLC* (500-06-000940-185) (the "Lima Action") and *Homsy* v. *Google LLC* (500-06-001123-211) (the "Homsy Action"). Google alleges that these two actions commonly allege that Google illegally collects personal information via various services that it provides to persons residing in Quebec, and that the application to stay/dismiss for *Lis Pendens* aims to ensure that the services offered by Google that are targeted by the two actions will be excluded from the present proceedings in order to avoid any potential contradictory judgments;

- *An Application for Leave to Adduce Evidence*, in which Google seeks leave to adduce nine exhibits that it deems necessary for the Court to understand the allegations made in the Modified Motion and to determine whether the alleged facts appear to justify the conclusions sought by Option Consommateurs. Google submits that the evidence for which it requests leave to adduce is limited to precise subjects that are strictly circumscribed.

[5] Google seeks leave to file the following Exhibits:

Exhibit G-1:	In a bundle, extracts of the Terms of Service, in English and in French, of Google Analytics' Website;
Exhibit G-2:	In a bundle, extracts of the Privacy Disclosures Policy, in English and in French, of Google Analytics' Website;
Exhibit G-3:	In a bundle, extracts of the Upload Data Use Policy, in English and in French, of Google Analytics' Website;
Exhibit G-4:	In a bundle, extracts of the "Clear, enable, and manage cookies in Chrome" section, in English and in French, of Google' Website;
Exhibit G-5:	In a bundle, extracts of the "Choose your privacy settings" section, in English and in French, of Google' Website;
Exhibit G-6:	In a bundle, extracts of the disclosure when opening a private browsing session, in English and in French, on Google Chrome's Website;
Exhibit G-7:	In a bundle, extracts of the "How Chrome Incognito keeps your browsing private" section, in English and in French, of Google Chrome Help Center Webpage;
Exhibit G-8:	In a bundle, extracts of the "How private browsing works in Chrome" section, in English and in French, of Google Chrome Help Center Webpage;

Exhibit G-9: In a bundle, extracts of the disclosure when activating the "Do Not Track" feature, in English and in French, on Google Chrome's Website.

[6] Option Consommateurs is challenging both applications. It argues that:

- There is no identity of cause between the Lima Action and the Modified Motion. In any event, the Modified Motion cannot be suspended in favor of the Lima Action which is also suspended in favor of a British Columbia Class Action;

- There is no identity of cause and of parties between the Homsy Action and the Modified Motion. In any event, the Homsy Action was filed after the present one, so there can be no stay of the Modified Motion for *Lis Pendens*, based on the "first to file" rule, regardless that the modifications in the present file may have been made later than the initial filing in the Homsy Action; and

- The criteria of Art. 574 CCP are not met for any of the nine exhibits proposed by Google, as there is no factual context to them and they do not establish without debate the falsehood or improbability of the allegations of the Modified Motion nor do they complete, explain or clarify the allegations of the Modified Motion.

2. APPLICATION TO DISMISS OR TO STAY FOR *LIS PENDENS*

[7] The Court starts with the applicable law, and then applies it to the facts of the present file. Note that, at first glance, the Court is seized here with parallel class actions involving classes of members within Quebec only. There is no question of stay or *Lis Pendens* with regards to class members outside Quebec or parallel class actions outside Quebec[2]. The issue here is centered on intra-Quebec parallel class actions. The Court wrote "at first glance" because there could be a twist related to the fact that the Lima Action has been stayed in 2019 by a decision of this Court. See more on this below.

[8] The Court notes that Google LLC is the only defendant party in the Modified Motion, the Lima Action and the Homsy Action.

2.1 The applicable law and the general framework

[9] Art.168(1) CCP prevents a litigant from being able to multiply proceedings against the same defendant and make the same assertions:

> **168.** A party may ask that an application or a defence be dismissed if:
>
> (1) there is lis pendens or res judicata;

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2 On the issue of international *Lis Pendens*, see for the relevant applicable provisions and the status of the law: *FCA Canada inc.* c. *Garage Poirier & Poirier inc.*, 2019 QCCA 2213.

[...]

[10] *Lis Pendens* upholds the stability of judgements and shields a defendant from having to defend itself multiple times against the same allegations. It follows the same rules as *res judicata*. Article 2848 of the *Civil Code of Quebec* ("CCQ") provides for the three conditions of *res judicata*:

> **2848.** The authority of *res judicata* is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.
>
> However, a judgment deciding a class action has the authority of *res judicata* with respect to the parties and the members of the group who have not excluded themselves therefrom.

[11] Therefore, there is *Lis Pendens* where the three conditions for *res judicata* are met, i.e. there must be identity of parties, object and cause[3].

[12] However, while Art. 168(1) CCP provides for the dismissal in the case of *Lis Pendens*, the courts will generally order a stay in the context of motions for authorization of a Class Action, since the famous *Hotte* v. *Servier Canada inc.*[4] decision from the Court of Appeal, as recently reaffirmed in *Genest* v. *Air Transat AT inc.*[5] As a result, the Court will not address the alternative conclusions to dismiss made by Google, as they are not the appropriate remedy. During the oral arguments, Google has agreed that dismissal is not the appropriate remedy.

[13] In addition, subject to exceptions which do not apply here, the general rule[6] is that, in case of *Lis Pendens*, the first motion for authorization of a Class Action to be filed is the one that proceeds, the subsequent one (or ones) being stayed.

[14] That means that, since any motion filed in the present file were filed AFTER the Lima Action was filed in 2018, the present file is therefore subsequent to the Lima Action. As a result, in the Court's view, it is therefore possible for Google to ask for a stay of the present file in light of the Lima Action, which is the first one. This is a classic application of the "first to file" rule (if the criteria are met, of course).

[15] However, it is not the case for the Homsy Action. The Homsy Action was filed on January 15, 2021, and that is **after** the initial motion for authorization in the present file, which was filed on June 22, 2020. The modifications allowed by the Court in March 2021

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3 *Rocois Construction inc.* v. *Québec Ready Mix inc.*, [1990] 2 S.C.R. 440, p. 448.
4 [1999] RJQ 2599 (C.A.).
5 [2021] QCCA 857, par. 8-9.
6 *Schmidt* c. *Johnson & Johnson inc.*, 2012 QCCA 2132.

which gave rise to the Modified Motion dated January 27, 2021 are considered to be retroactive to June 22, 2020[7].

[16] The Court cannot accept the following argument of Google:

> • Google argues that, as for Option Consommateurs' position to the effect that given the amendment has a retroactive effect and the present class action should not be stayed as a result of the Homsy Action, those arguments are ill-founded. In the present instance, according to Google, it was clear that the amendments to the Homsy Action were completely different from the original action, which was only limited to private browsing. In fact, Option Consommateurs even filed an identical separate Class Action, *Option Consommateurs* c. *Google LLC* (500-06-001127-212), making it clear that they were even doubting that it could be a legitimate amendment in this case. In order to be practical, Google accepted those amendments, but under reserve of the present preliminary motions.

[17] To accept this argument would mean that the Court would reverse the case law cited in the paragraphs above and start to analyze the merits of amendments, an exercise that the Quebec Courts have never done. Even if the amendments made were wide in scope, they were nevertheless authorized by the Court under Art. 206 and 585 Cpc.

[18] If the final result is to be considered as an unacceptable way to short-circuit the "first to file" rule, then it is for the Court of Appeal to change the law and to so decide; it is not for this Court to do so.

[19] Therefore, the Court cannot stay the present Modified Motion in light of the Homsy Action[8]. The Court can only study the issue with regards to the Lima Action.

[20] So, is there identity of parties, object and cause between the present file and the Lima Action so as to warrant a stay?

2.2 Decision

[21] The Court will study each criteria, but only with regards the Lima Action, and not the Homsy Action, as explained above.

[22] The Court adds that the Lima Action has been stayed by this Court on January 16, 2019[9] for a period ending 60 days after the final certification judgment to be rendered in the British Columbia Class Action file *Warner and Kett* v. *Google LLC*, court docket

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7 *Kennedy* c. *Colacem Canada inc.*, 2015 QCCS 222, par. 229 to 234; *FCA Canada inc.* c. *Garage Poirier & Poirier inc.*, *supra*, note 2, par. 55.

8 The Court is well aware that the attorneys for Google have mentioned at the hearing that their client might then ask for a stay of the Homsy Action in the Homsy file, in favour of the present file should it not be stayed. The hearing on the motion for authorization of a Class Action in the Homsy file is scheduled to take place on February 21, 2022.

9 *Lima* c. *Google*, 2019 QCCS 56 (filed as Exhibit R-11).

number VLC-S-S-188927. The Superior Court was of the opinion that the Lima Action raised the same issues as the BC file and that the members of the Lima Action were included in the BC file, and that the rights and interests of the Quebec class members were to be protected. The Court will study below the consequences of this, if needed and if any.

2.2.1 Identity of parties

[23] The proposed class in the Lima Action, filed on August 15, 2018, is the following:

> 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.

[24] Here is again the proposed class in the Modified Motion:

> 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 ».

[25] Here are the arguments of Google to pretend that there is identity of parties between the Lima Action and the Modified Motion:

> 1) The Lima Action 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;
>
> 2) Given the vague and overbroad description of the proposed class in the Modified Motion, it includes a multitude of Google services installed on smartphones operating iOS or Android that do not require a Google account. These same services and applications may also collect the location data targeted by the Lima Action;
>
> 3) For example, individuals in Quebec who use Google Maps on their iOS or Android operated smartphones could be included in both the proposed class in the Modified Motion and the class of the Lima Action.

[26] Option Consommateurs argues that the arguments of Google are not convincing since the mere fact of people being potentially members of two classes in two different class actions is not sufficient.

[27] The Court is of the opinion that there is identity of parties between the Lima Action and the Modified Motion. All members of the proposed class in the Lima Action are technically covered by the proposed class in the Modified Action. Everyone who has used Google on a smartphone via an application is covered by the definition of the class in the Modified Action.

2.2.2 Identity of object

[28] At the authorization stage, the object of the action is the authorization itself, not compensation for damages suffered[10].

[29] Here, there appears to be a shared identity of object between the Modified Motion and the Lima Action. In both cases, the applicant is seeking the same object, which is the authorization to institute a class action. Option Consommateurs is not challenging this.

[30] The Court concludes that there is therefore identity of object between the Lima Action and the Modified Motion.

2.2.3 Identity of cause

[31] There is identity of cause where the essence of the legal characterization of the facts alleged is identical in both actions[11].

[32] Here are the arguments of Google to convince the Court that there is identity of cause between the Modified Motion and the Lima Action:

> 1) Given that the description of the class in the Modified Motion is and vague and general, the location data at issue in the Lima Action appears to overlap with some of the same data covered by the Modified Motion. The Modified Motion does not exclude individuals who have a Google account, but only excludes the use of the services requiring a Google account;
>
> 2) The Plaintiff in the Lima Action is seeking compensatory damages for the alleged harm done to the putative class members as well as punitive damages for Google's alleged intentional breach of consumer protection laws;
>
> 3) The Lima Action would thus represent issues that are a subset of the Modified Motion, by alleging the following similar, related, and overlapping faults, as follows:
>
> > 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;

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10 *Genest* v. *Air Transat AT inc.*, *supra*, note 5, par. 15.

11 See, among many decisions: Grondin c. Volkswagen Group Canada inc., 2016 QCCS 2423, par. 69-71.

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*[12];

h) Google violates users' fundamental right to privacy under provincial consumer and privacy laws;

4) In addition, each of these actions is seeking 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 grounds of Google's alleged intentional civil faults and violations of consumer and privacy laws;

5) As a result, there appears to be a shared identity of cause as between the Modified Motion and the Lima Action.

[33] The Court has to study the allegations in the Modified Motion and in the Lima Action in order to decide.

[34] In the Modified Motion, the proposed common questions are the following[13]:

a) La Défenderesse procède-t-elle à la collecte et/ou à l'utilisation à des fins commerciales de renseignements personnels des membres du groupe par le biais des Services Google et/ou des Outils Google?

b) La collecte et/ou l'utilisation à des fins commerciales de renseignements personnels par le biais des Services Google et/ou des Outils Google est-elle effectuée par la Défenderesse sans le consentement suffisant des membres du groupe? Le cas échéant, cela constitue-t-il une faute?

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12 RSC 1985, c. C-34.

13 Par. 95 of the Modified Motion.

c) La Défenderesse a-t-elle, dans le cadre d'activités commerciales, installé ou fait installer un programme d'ordinateur dans l'ordinateur des membres du groupe sans leur consentement?

d) Quelle est la valeur des renseignements personnels collectés et/ou utilisés à des fins commerciales par la Défenderesse sans le consentement suffisant des membres du groupe?

e) Le cas échéant, les membres du groupe ont-ils subi des dommages découlant de la collecte et/ou de l'utilisation à des fins commerciales par la Défenderesse de leurs renseignements personnels effectuée(s) sans leur consentement?

f) Les membres du groupe sont-ils en droit d'exiger de la Défenderesse le remboursement des sommes engagées pour les présentes procédures et pour toute enquête relativement à la présente affaire?

g) La Défenderesse doit-elle être condamnée à payer des dommages-intérêts punitifs aux membres du groupe et, le cas échéant, quelle est la valeur des dommages-intérêts punitifs auxquels doit être condamnée la Défenderesse afin d'assurer leur fonction préventive?

[35] In the Lima Action, the proposed common questions are the following[14]:

a) Did the defendant improperly collect and use the Applicant and class members' personal information?

b) More particularly, did the defendant make the Applicant and class members' personal information available to third parties without their consent?

c) Was the defendant unjustly enriched and if so, should the defendant disgorge its profits?

d) Did the defendant breach its obligations towards the Applicant and class members and this under the Consumer Protection Act, the Civil Code of Québec, An Act Respecting the Protection of Persona/Information in the Private Sector and/or the Québec Charter of Human Rights and Freedoms?

e) Did the defendant breach its obligations towards the Applicant and class members under the Federal Trade Commission Act and the Consent Decree?

f) Did the defendant breach its obligations towards the Applicant and class members under the Network Advertising Initiative's Code of Conduct?

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[14] Par. 95 of the Motion for Authorization in the Lima Action.

g) As a result, did the Applicant and class members suffer damages and what is the nature of such damages?

h) Is the defendant liable to pay damages to the Applicant and class members, including monetary lasses incurred, inconvenience, anxiety and other moral and/or punitive damages?

i) In the affirmative, what is the amount of damages to be paid to the Applicant and class members?

[36] The comparison of the two lists of proposed common questions tend to show that there could be an identity of cause. However, in the Court's view, a detailed study of the factual allegations and of the causes of action on both files show that there is no identity of cause, for the following reasons.

[37] The Lima Action alleges that Google mislead consumers and improperly collected location data from users of its applications in smartphones running the Android mobile operating system and Apple's iOS, when users had not enabled or had disabled location services or location history, in violation of the class members' privacy rights, causing compensatory damages, moral damages and/or punitive damages. The Lima Action alleges that Google falsely represented that it did not collect location data when users had not enabled or had disabled location services or location history, because it was actually collecting such personal information in such circumstances.

[38] Among others, extracts of paragraphs 2, 17 to 19, 56, 72 of the Motion for Authorization in the Lima Action demonstrate this:

> 2. For an unknown number of years, Google LLC ("Google") has been collecting location data from users of its services, including Google Maps, Chrome, and Search. Google collects the data from users of its applications on smartphones running the Android mobile operating system ("Android") and Apple's iOS. Google collects the data from users even when users have not enabled or have disabled location services or location history. Google deliberately and maliciously manipulated settings and employed "dark patterns" to collect the data without a user's informed permission or knowledge. Google collects, uses, retains and commercializes the location data it takes from users and profits from it. [...]
>
> 17. For an unknown number of years and continuing up to the time this application is filed, Google has collected location data without permission from users of Google Services. Specifically, Google has collected data about a user's location, including but not limited to GPS coordinates, latitude and longitude, map location, geographical location, nearby Wi-Fi networks, IP addresses, or other markers of physical orientation ("Location Data").
>
> 18. Egregiously, Google has collected Location Data even if users employed privacy settings that indicated that they would prevent Google from doing so.

> 19. Most Google Services that collect location data request at least an initial, express permission to use users' Location Data. For example, Google Maps will request permission to access Location Data to use it for navigation.
>
> 56. The Applicant and Class Members' Location data, collected, retained, used and made available to third parties by the Defendant, is « personal information » as provided for by *An Act Respecting the Protection of Personal Information in the Private Sector*.
>
> 72. By its conduct set out above, Google has been enriched by the collection, retention and use of the Location Data from the Applicant and Class Members. [...]

[39] In the Court's view, this is different than what the Modified Motion alleges. The Modified Motion alleges[15] that Google refuses or omits to obtain sufficient consent from class members:

- When not trying to obtain such a consent in the conditions of utilization or in the context of a very long and complex confidentiality policy;
- When ignoring the express requests of class members who chose the "Do Not Track" option in their web browser; and
- When falsely representing to class members that they can manage the personal information that Google collects on them, notably by saying that the private navigation mode allows them to surf the Web in confidentiality.

[40] This has nothing to do with allegations of false representations related to "Location History" or "Location Services". The facts at the basis of both files are therefore different.

[41] It is true that some of the terms used in the Modified Motion could technically be stretched to include location data as part of personal information collected by Google. However, the Modified Motion does not refer to the factual condition of users having not enabled or having disabled location services or location history on their phones; the Modified Motion never refers to location. The issue of personal information collected in the specific factual contexts of location and of the cases when users had not enabled or had disabled location services or location history is specific to the Lima Action and it is not part of the Modified Motion.

[42] As a result, there is no danger of contradictory judgments and there is therefore no identity of cause, in the Court's view.

[43] Option Consommateurs must therefore take note that the present file does not include the issue of personal information collected in the specific factual context of users

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15 See par. 4 of the Modified Motion.

having not enabled or having disabled location services or location history on their phones. This is in the Lima Action only.

2.2.4 Conclusion

[44] The Court concludes that there is no *Lis Pendens* between the Lima Action and the Modified Motion. This is also no possible *Lis Pendens* between the Homsy Action and the Modified Motion.

[45] Therefore, there is no need for the Court to address the issue of the consequences arising from the fact that the Lima Action is currently formally stayed by a decision of this Court. In other words, the Court does not need to decide if the criteria for international *Lis Pendens* provided for at Art. 3137 CCQ and 577 CCP would apply here and if there is a need to apply them to the present file with regards the *Warner and Kett* v. *Google LLC* Class Action in British Columbia. The Court notes that Google has not filed any evidence to support such arguments. The issue is therefore left for another day or another file.

[46] As a result, the Court will dismiss with judicial costs the *Application for Dismissal or, Alternatively, Stay of Proceedings on the Basis of Lis Pendens* of Google.

[47] The Court now addresses the second motion of Google.

3. APPLICATION FOR LEAVE TO FILE EVIDENCE

[48] The Court starts with the applicable law, and then applies it to the facts of the present file. Google is only seeking leave to file documents, and no examination is sought.

3.1 The applicable law

[49] In *Ward* c. *Procureur général du Canada*[16], this Court has summarized as follows all applicable principles under Art. 574 CCP for relevant evidence and examination at the Class Action authorization stage:

> [17] Les demandes de preuve appropriée à l'étape de l'autorisation sont prévues à l'article 574 Cpc. La jurisprudence de la Cour d'appel et de la Cour suprême du Canada nous enseigne quels sont les critères applicables :
>
> • le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;
>
> • une preuve n'est appropriée que si elle est pertinente et utile à la vérification des critères de l'article 575 Cpc. Le consentement de la partie demanderesse à une preuve suggérée par la défense ne suffit pas à en autoriser le dépôt;

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16 2021 QCCS 109, par. 17 to 21.

- la preuve documentaire et l'interrogatoire proposés doivent respecter les principes de la conduite raisonnable et de la proportionnalité posés aux articles 18 et 19 Cpc;

- la vérification de la véracité des allégations de la demande relève du fond. Une partie défenderesse ne peut mettre en preuve des éléments qui relèvent de la nature d'un moyen de défense au mérite;

- le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême du Canada et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;

- à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême du Canada, soit la démonstration d'une cause défendable. Le tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;

- le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le recours est fondé; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;

- la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;

- il doit être démontré que la preuve demandée est appropriée et pertinente dans les circonstances spécifiques et les faits propres du dossier, notamment en regard des allégations et du contenu de la demande d'autorisation;

- le fardeau de convaincre le tribunal de l'utilité et du caractère approprié de la preuve repose sur la partie qui la demande;

- le tribunal ne doit pas laisser les parties produire une preuve volumineuse et ne doit en aucun cas examiner la preuve produite en profondeur comme s'il s'agissait d'évaluer le fond de l'affaire;

- le processus d'autorisation d'une action collective n'est pas, du point de vue de la preuve, une sorte de préenquête sur le fond. C'est un mécanisme de filtrage;

- l'admission de preuve appropriée doit être faite avec modération et être réservée à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, du côté du demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté de la défense, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté. C'est là un « couloir étroit »;

- puisque le fardeau du demandeur à l'autorisation en est un de logique et non de preuve, il faut conséquemment éviter de laisser les parties passer de la logique à la preuve (prépondérante) et de faire ainsi un préprocès, ce qui n'est pas l'objet de la démarche d'autorisation;

- pour échapper à la perspective d'une action collective, la partie défenderesse souhaitera généralement présenter une preuve destinée à démontrer que l'action envisagée ne tient pas et, pour ce faire, elle pourrait bien forcer la note, sur le thème « abondance de biens ne nuit pas ». Le juge doit résister à cette propension, tout comme il doit se garder d'examiner sous toutes leurs coutures les éléments produits par l'une et l'autre des parties, au risque de transformer la nature d'un débat qui ne doit ni empiéter sur le fond, ni trancher celui-ci prématurément, ni porter sur les moyens de défense;

- à l'autorisation, le tribunal doit simplement porter un regard sommaire sur la preuve, qui devrait elle-même être d'une certaine frugalité;

- dans tous les cas, la preuve autorisée doit permettre d'évaluer les quatre critères que le juge de l'autorisation doit examiner et non le bien-fondé du dossier. Et si, par malheur, le juge de l'autorisation se retrouve devant des faits contradictoires, il doit faire prévaloir le principe général qui est de tenir pour avérés ceux de la demande d'autorisation, sauf s'ils apparaissent invraisemblables ou manifestement inexacts;

- Si l'on ne veut pas que les actions collectives accaparent une part indue des ressources judiciaires, ressources limitées, il serait donc utile, dans l'état actuel du droit, que l'on évite de faire au stade de l'autorisation ce qui, en réalité, appartient au fond.

[18] La Cour d'appel et la Cour suprême du Canada ajoutent que les seuls moyens de défense qui peuvent être tranchés par le juge d'autorisation sont ceux qui reposent sur une « pure question de droit au stade de l'autorisation si le sort de l'action collective projetée en dépend ».

[19] Dans l'arrêt *Durand* c. *Subway Franchise Systems of Canada*, la Cour d'appel vient d'ailleurs de rappeler ainsi ces critères :

> [50] Ces principes s'harmonisent d'ailleurs parfaitement avec les règles établies quant à la recevabilité et au poids à accorder à la preuve qui peut être déposée par la partie qui s'oppose à la demande d'autorisation, telle celle produite par les intimées en l'espèce.
>
> [51] Cette preuve doit en effet être essentielle, indispensable et limitée à ce qui permet de démontrer sans conteste que les faits allégués sont invraisemblables ou faux. Elle ne doit pas avoir pour effet de forcer la tenue d'un débat contradictoire sur une question de fond ou, dit autrement, entraîner la tenue d'un procès avant le procès.

> [52] Si la preuve déposée est susceptible d'être éventuellement contredite par le requérant, le juge de l'autorisation doit faire preuve de prudence et ne pas tenir pour acquis qu'elle est vraie. Il doit se rappeler qu'il ne doit tenir pour avérés que les faits allégués par le requérant et non pas ceux allégués par l'intimé, même lorsque la preuve produite par ce dernier démontre prima facie l'existence de ces faits.
>
> [53] À ce stade, le fardeau du requérant en étant un de logique (également qualifié de fardeau de démonstration) et non de preuve, il n'a d'ailleurs pas à offrir une preuve prépondérante de ce qu'il avance, mais bien, tout au plus, une « certaine preuve » et n'a pas l'obligation de contester la preuve que l'intimé dépose, ni d'y répondre. D'ailleurs, il n'est souvent pas en mesure de le faire puisqu'il n'a pas toujours toute la preuve en main, une bonne partie de celle-ci pouvant être en possession de l'intimé.
>
> [54] Bref, la preuve déposée par un intimé au soutien de sa contestation ne change pas le rôle du juge de l'autorisation qui peut, certes, trancher une pure question de droit et interpréter la loi pour déterminer si l'action collective projetée est frivole, mais qui ne peut, pour ce faire, apprécier la preuve comme s'il y avait eu un débat contradictoire ou encore présumer vraie celle déposée par l'intimé alors qu'elle est contestée ou simplement contestable.

[20] Enfin, il existe des décisions de la Cour supérieure qui autorisent le dépôt d'une preuve qui permet non seulement de démontrer le caractère invraisemblable ou faux de certaines allégations, mais également :

- de comprendre la nature des opérations de la partie défenderesse;
- de remplir un vide factuel laissé par la demande d'autorisation;
- de compléter, corriger ou contredire les allégations de la demande d'autorisation lorsqu'elle permet au tribunal d'avoir une meilleure compréhension du contexte factuel de la demande; ou
- d'être utile au débat d'autorisation.

[21] La Cour supérieure précise dans ces décisions que le poids de cette preuve sera décidé plus tard lors du débat sur l'autorisation.

[50] The Court must now apply these principles to the application of Google for leave to file nine exhibits, Exhibits G-1 to G-9.

3.2 General arguments of the parties

[51] The general position of Google is the following.

[52] Google argues that Option Consommateurs is making a variety of vague and overly broad claims related to the alleged collection by Google of personal information

regarding the class members. Google adds that the evidence it seeks leave to adduce will assist the Court in determining whether the authorization criteria of article 575 CCP are met and, in particular, whether Option Consommateurs has shown an arguable case (article 575 (2) CCP) as the evidence will:

- Complete the Court record and enable the court to understand, inter alia, the context of specific Google Tools and Services; and

- Demonstrate how certain allegations advanced by Option Consommateurs are false and/or misleading.

[53] Google says that the evidence is related to the common issues a) to c) proposed by Option Consommateurs, namely (in English):

> a) Does the defendant collect and/or use personal information of class members for commercial purposes through Google Services and/or Google Tools?
>
> b) Is collection and/or use for commercial purposes of personal information through the Google Services and/or Google Tools carried out by the defendant without the sufficient consent of class members? If so, does this constitute a fault?
>
> c) Did the defendant, in the course of commercial activities, install or cause to be installed a computer program on the computers of class members without their consent?

[54] Option Consommateurs disagrees and argues that the criteria of Art. 574 CCP are not met for any of the nine proposed exhibits, as they do not establish without debate the falsehood or improbability of the allegations of the Modified Motion nor do they complete, explain or clarify the allegations of the Modified Motion. Option Consommateurs also argues that, since Google has not asked to put into evidence the sworn declarations describing the context and origins of these exhibits, they cannot be admitted into evidence as there is no context.

[55] Here is again a list of the nine exhibits:

Exhibit G-1:	In a bundle, extracts of the Terms of Service, in English and in French, of Google Analytics' Website;
Exhibit G-2:	In a bundle, extracts of the Privacy Disclosures Policy, in English and in French, of Google Analytics' Website;
Exhibit G-3:	In a bundle, extracts of the Upload Data Use Policy, in English and in French, of Google Analytics' Website;

Exhibit G-4:	In a bundle, extracts of the "Clear, enable, and manage cookies in Chrome" section, in English and in French, of Google' Website;
Exhibit G-5:	In a bundle, extracts of the "Choose your privacy settings" section, in English and in French, of Google' Website;
Exhibit G-6:	In a bundle, extracts of the disclosure when opening a private browsing session, in English and in French, on Google Chrome's Website;
Exhibit G-7:	In a bundle, extracts of the "How Chrome Incognito keeps your browsing private" section, in English and in French, of Google Chrome Help Center webpage;
Exhibit G-8:	In a bundle, extracts of the "How private browsing works in Chrome" section, in English and in French, of Google Chrome Help Center Webpage;
Exhibit G-9:	In a bundle, extracts of the disclosure when activating the "Do Not Track" feature, in English and in French, on Google Chrome's Website.

[56] The application of Google for leave to file evidence is accompanied by a sworn declaration dated September 3, 2021 made by Ms. Van Khai Luong, paralegal at Borden Ladner Gervais LLP, the law firm representing Google. Ms. Luong indicates that she accessed at specific dates the various English and French Webpages of Google's Websites in order to get the nine exhibits. Google has also filed another sworn declaration, by Mr. Andre Golueke, Senior Legal Operations Manager at Google LLC, dated October 7, 2021, to the same effect.

[57] Google has not formally asked the Court for leave to file into evidence at authorization these two sworn declarations. As indicated above, Option Consommateurs argues that, as a result of this omission, the Court cannot accept these two sworn declarations into evidence and that therefore, since there is no absolutely no factual context whatsoever surrounding the nine exhibits, they cannot be admitted into evidence.

[58] At the hearing, in its oral reply, Google has verbally asked the Court for leave to file these sworn declarations into evidence at authorization. Option Consommateurs has challenged this position, on the grounds that it is too late for Google to do so at the last minute of the last hour, that it does not respect the timetable set by the Court for the filing of all preliminary proceedings and that there are no factual grounds or any other valid reason to do so. In addition, Option Consommateurs objects to the Court even considering the sworn declaration, by Mr. Andre Golueke of Google, dated October 7, 2021, as it is clearly outside the timetable set by the Court for filing preliminary evidence.

[59] What should the Court decide?

3.3 Decision

[60] The Court will first deal with the merits of the exhibits, following the classification proposed by Google in its plan of arguments and accepted by Option Consommateurs.

[61] The Court starts its analysis with the exhibits related to Google Analytics.

3.3.1 Exhibits related to Google Analytics (Exhibits G-1 to G-3)

[62] Here are Google's arguments on Exhibits G-1 to G-3:

1) At par. 33, 34 and 38 of the Modified Motion, Option Consommateurs alleges that Google collects personal information from the class members while they are visiting Websites operated by third parties using Google Tools, such as Google Analytics, without obtaining proper consent;

2) However, this statement blatantly ignores the role played by the third party Websites and the contractual relationship that they have with Google. In accordance with their agreements with Google, third party Websites are the ones required to disclose to their own users their use of Google Analytics, which is only a tool offered by Google. Third party Websites also assume the burden of disclosing to their own users how they collect and process user data;

3) Google submits that Exhibit G-1, Google Analytics' Terms of Service, is necessary to demonstrate that third party Websites are required to abide by certain rules and that those rules provide *inter alia* that they must disclose the use of Google Analytics to the visitors on their Websites. See section 7:

> **7. Privacy**
>
> [...] You must post a Privacy Policy and that Privacy Policy must provide notice of Your use of cookies, identifiers for mobile devices (e.g., Android Advertising Identifier or Advertising Identifier for iOS) or similar technology used to collect data. You must disclose the use of Google Analytics, and how it collects and processes data. This can be done by displaying a prominent link to the site "How Google uses data when you use our partners' sites or apps", (located at www.google.com/policies/privacy/partners/, or any other URL Google may provide from time to time). You will use commercially reasonable efforts to ensure that a User is provided with clear and comprehensive information about, and consents to, the storing and accessing of cookies or other information on the User's device where such activity occurs in connection with the Service and where providing such information and obtaining such consent is required by law.[...]
>
> [Emphasis added]

4) Section 7 of the Google Analytics Terms of Service (Exhibit G-1) also provide that third-party Websites have to comply with the Google Analytics Policies, which include, inter alia, the Privacy Disclosures Policy (Exhibit G-2) and the Upload Data Use Policy (Exhibit G-3):

> **7. Privacy**
>
> [...] You must not circumvent any privacy features (e.g., an opt-out) that are part of the Service. You will comply with all applicable Google Analytics policies located at www.google.com/analytics/ policies/ (or such other URL as Google may provide) as modified from time to time (the "Google Analytics Policies"). [...]
>
> [Emphasis added]

5) The Privacy Disclosures Policy (Exhibit G-2) requires third party Websites to disclose the use of Google Analytics and how it collects and processes data;

6) Google Analytics is a tool to collect data, which can be used by third parties. Those third parties, and not Google, must disclose the use of Google Analytics and the collection of data;

7) Google Analytics customers also undertake not to provide Google with any data that could allow it to personally identify an individual (such as names, social security numbers, email addresses, or any similar data), or data that permanently identifies a particular device (such as a mobile phone's unique device identifier if such an identifier cannot be reset), even in hashed form. See Exhibit G-3, Upload Data Use Policy;

8) Such general information on a defendant's operations and its contractual relationship with its customers has been considered by this Court as useful at the authorization stage and therefore Google should be entitled to adduce such evidence. See Société AGIL OBNL v. Bell Canada[17] and Gartner v. Ford Motor Company of Canada, Limited[18];

9) Google submits that the obligation of third party Websites to collect consent is relevant to the litigation. Option Consommateurs generally asserts that Google fails to obtain sufficient consent from the putative class members in the context of the use of the Google Services or Tools, including when they visit third party Websites. Setting aside the role of third party Websites is obviously misleading while the class action clearly seeks to hold Google liable for the information allegedly collected when a user visits a third party Website.

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17 2019 QCCS 4432, par. 7-16.
18 2019 QCCS 5459, para. 6.

[63] The Court is of the opinion that Exhibits G-1 to G-3 cannot be admitted into evidence under Art. 574 CCP for the following reasons:

- Although it may be true that the documentation establishing the contractual relationship and respective obligations of the parties is sometimes judged useful and is allowed under Art. 574 CCP, it is not the case here. Exhibits G-1 to G-3 are in the nature of a defence on the merits as they try to show that third parties have various contractual agreements with Google which would exonerate Google from committing any fault. The relationship of Google with third parties is an element for the merits;

- Even if the Court considered as valid evidence the two sworn declarations of Ms. Van Khai Luong and Mr. Andre Golueke, Google has not submitted any evidence to explain the context of Exhibits G-1 to G-3, how they apply, to whom, where, when, what is their occurrence in the class members' use of Google services. The two sworn declarations do not contain any of this and the exhibits themselves do not indicate this. And even if Google had done so, the context of third parties implication and their consequences on class members are clearly matters for the merits;

- The argument of Google that class members must be advised by third party Websites that data may be collected when they visit Websites is a defence on the merits, similar to recourses in warranty;

- The argument that Google Analytics customers (i.e. the third-party Websites) must not provide Google with any personally identifiable information is also an argument for the merits.

[64] The Court does not accept Exhibits G-1 to G-3.

3.3.2 Exhibits related to cookies (Exhibits G-4 and G-5)

[65] Here are Google's arguments on Exhibits G-4 and G-5:

1) Option Consommateurs, at paragraphs 34 and following of the Modified Motion, alleges that Google uses "cookies" in the context of both the use of the Google Tools and the Google Services and adds as Exhibit R-9 the section "Types of cookies used by Google" from the Website "Privacy Policy and Terms of Service";

2) According to Option Consommateurs, Google is therefore able to determine what putative class members are looking for, where they are, what they are doing and more as they conduct their online activities;

3) Option Consommateurs also generally asserts that Google fails to obtain sufficient consent from the putative class members in the context of the use of the Google Services or Tools;

4) Exhibits G-4 and G-5 are two extracts from Google's Website respectively entitled "Clear, enable, and manage cookies in Chrome" and "Choose your privacy setting". These extracts will assist the Court in understanding not only what "cookies" are, but also how the class members can allow, block and clears cookies, thus providing consent when they allow cookies;

5) As admitted by Option Consommateurs, the notion of consent is central to its Class Action and Exhibits G-4 and G-5 are essential to not only explain how cookies work, but also demonstrate how class members can manage consent to the use of cookies. Google also provides users with the ability to choose to block third party cookies. Of course, those exhibits are only related to Google Chrome as Google cannot be held liable for the representations made by other browsers to the putative class members.

[66] In the Court's view, Exhibits G-4 and G-5 are clearly elements for the defence on the merits. The impact of what members are exposed to in terms of options on various Websites, the possibilities of various settings, the effect of these settings and the comprehension of these settings and effects are all element which need considerable evidence and context, and that can only be made on the merit.

[67] In addition, same as above, Google has not submitted any evidence to explain the context of Exhibits G-4 and G-5, how they apply, to whom, where, when, what is their occurrence in the class members' use of Google services.

[68] The Court does not accept Exhibits G-4 and G-5.

3.3.3 Exhibits related to private browsing (Exhibits G-6 to G-8)

[69] Here are Google's arguments on Exhibits G-6 to G-8:

1) Option Consommateurs alleges, at paragraphs 64 to 67 of the Modified Motion, that Google misleads class members as to how private browsing operates by falsely representing that it is a simple and secure way to ensure the privacy of their personal information and to prevent Google from collecting and using it for commercial purposes;

2) However, every time a Chrome user opens a private browsing session, the notice at Exhibit G-6 indicates to the Chrome user not only which information that will not be saved by Chrome (such as the browsing history, cookies and site data) but also how certain activities may still be visible (such as to Websites visited by the user or to the user's internet service provider);

3) The Chrome user can also access Exhibit G-7, a Webpage in the Google Chrome Help Center entitled "How Chrome Incognito keeps your browsing private" and Exhibit G-8, another webpage entitled "How private browsing works in Chrome". Those two Webpages provide information to the putative class members as to how Google Chrome's Incognito Mode operates and demonstrate that Google makes no misleading or false representations whatsoever to the class members;

4) Google clearly explains that private browsing means that browsing history and cookies are not saved on the user's device and that when the Incognito window is closed, Google discards any site data and cookies associated with that browsing session. Here is an extract of Exhibit G-8 "How Private Browsing Works in Chrome":

> Chrome doesn't save your browsing history or information entered in forms. Cookies and site data are remembered while you're browsing, but deleted when you exit Incognito mode. You can choose to block third-party cookies when you open a new incognito window. Learn more about cookies.
>
> [Emphasis added]

5) Not only are those Exhibits relevant to the Court's understanding of how private browsing works, but they also clearly contradict the allegations made by Option Consommateurs regarding "false representations" supposedly made by Google on this service;

6) Google submits Exhibits G-6 to G-8 allow the Court to understand that Google provides clear notice and makes no false representations with regards to private browsing, contrary to what is alleged by Option Consommateurs, and are essential for a proper determination in that regard at authorization.

[70] The Court cannot accept Exhibits G-6 to G-8 as they are not useful and do not establish without debate the falsehood or improbability of the allegations of the Modified Motion. These Exhibits are a further illustration of the kind of warnings that Google allegedly makes, according to paragraphs 61 to 66 of the Modified Motion and Exhibits R-8, R-11 and R-13. However, the following allegations at paragraphs 67 to 70 and 72 of the Modified Motion are to the effect that Google still collects personal information notwithstanding these warnings. So, in the Court's view, it is not useful to file additional such warnings, as similar warnings are already in the file.

[71] Also, Exhibits G-6 to G-8 only refers to Google's browser Chrome, and not to all other browsers which are covered by the Modified Motion (See Exhibit R-13).

[72] In addition, same as above, Google has not submitted any evidence to explain the context of Exhibits G-6 to G-8, how they apply, to whom, where, when, what is their occurrence in the class members' use of Google services.

[73] The Court does not accept Exhibits G-6 to G-8.

3.3.4 Exhibit related to the "Do Not Track" feature (Exhibit G-9)

[74] Here are Google's arguments on Exhibit G-9:

1) At paragraphs 54 to 60 of the Modified Motion, Option Consommateurs outlines its understanding of the "Do Not Track" feature by alleging that Google does not obtain the consent of the putative class members and chooses to ignore their wishes by collecting and using their personal information for commercial purposes;

2) Google makes no false representations to the class members and does in fact request and obtain their consent with respect to the "Do Not Track" feature. The functioning of this feature is clearly disclosed to the user when he or she turns it on as the user will receive the notice at Exhibit G-9, which also allows him or her to access to Exhibit R-12, filed by Option Consommateurs;

3) The notice at Exhibit G-9 ("Disclosure when activating the "Do Not Track" feature") clearly explains that many Websites will still collect the user's browsing data to improve security, provide content, services, ads and recommendations on their Websites, and generate reporting statistics:

> Enabling "Do Not Track" means that a request will be included with your browsing traffic. Any effect depends on whether a Website responds to the request, and how the request is interpreted. [...]
>
> [Emphasis added]

4) This Exhibit will demonstrate and assist the Court in understanding the "Do Not Track" feature, that no false representation is made by Google and that the user must provide a clear consent when activating the "Do Not Track" feature;

5) Exhibit G-9 demonstrates that Google provides clear notice with regards to the "Do Not Track" feature, and shows that feature is simply not intended to be used as Option Consommateurs contends

[75] The Court cannot accept Exhibit G-9 since it is not useful, as all information contained in it is already included in Exhibit R-12 filed by Option Consommateurs. The factual elements that Google mentions in its arguments are not supported by any evidence. In addition, same as above, Google has not submitted any evidence to explain the context of Exhibit G-9, how it applies, to whom, where, when, what is its occurrence in the class members' use of Google services.

[76] The Court does not accept Exhibit G-9.

3.3.5 Conclusion

[77] The Court has not accepted any of Google's proposed nine exhibits.

[78] There is therefore no need for the Court to formally decide the issues of the absence by Google of having omitted to ask the Court for leave to file the two sworn declarations, or of the fate of the oral motion of Google for leave to file these two sworn declarations, or of the delay taken by Google to communicate the sworn declaration of Mr. Andre Golueke.

[79] As a result, the Court will dismiss with judicial costs the *Application for authorization to adduce relevant evidence*.

4. FINAL COMMENTS

[80] The Court indicates that the next step in the file is the hearing on the Modified Motion, set for June 7, 2022 at 9:30 am in room 17.09 at the Montreal Courthouse, with TEAMS video link if required and needed, with the following timetable:

- Date for Option Consommateurs to communicate its plan of arguments of 30 pages maximum and authorities: May 13, 2022;

- Date for Google to communicate its plan of arguments of 30 pages maximum and authorities: May 27, 2022.

[81] The Court reminds the parties to send to it electronic copies of their plans and authorities.

FOR THESE REASONS, THE COURT:

[82] **DISMISSES** the *Application for Dismissal or, Alternatively, Stay of Proceedings on the Basis of Lis Pendens* of defendant Google LLC (plumitif no. 17);

[83] **DISMISSES** the *Application for authorization to adduce relevant evidence* of defendant Google LLC (plumitif no. 14);

[84] **REMINDS** the parties that the next step in the file is the hearing on the *Modified Motion for Authorization of a class action* (dated January 27, 2021), which is set for June 7, 2022 at 9:30 am in room 17.09 at the Montreal Courthouse, with TEAMS video link if required and needed, with the following timetable:

- Date for Option Consommateurs to communicate its plan of arguments of 30 pages maximum and authorities: May 13, 2022;

- Date for Google to communicate its plan of arguments of 30 pages maximum and authorities: May 27, 2022;

[85] **THE WHOLE**, with judicial costs in favour of Plaintiff Option Consommateurs.

DONALD BISSON, J.S.C.

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Hearing date: October 15, 2021