

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Class Actions Chamber)

No.: 500-06-001131-214

OPTION CONSOMMATEURS

Plaintiff

-and-

AURÉLIA TURON-LAGOT

Designated Member

v.

FLO HEALTH INC.

Defendant

APPLICATION FOR LEAVE TO ADDUCE EVIDENCE AND TO EXAMINE THE
PROPOSED CLASS REPRESENTATIVE AND THE PROPOSED CLASS
REPRESENTATIVE'S DESIGNATED MEMBER
(Article 574 of the *Code of Civil Procedure*)

TO THE HONOURABLE STÉPHANE LACOSTE OF THE SUPERIOR COURT OF
QUEBEC, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE DEFENDANT
RESPECTFULLY SUBMITS THE FOLLOWING:

A. FACTS AND PROCEDURAL HISTORY

1. The Defendant Flo Health Inc. ("**Flo**") is a technology start-up that provides reproductive and fertility information to millions of women worldwide through the Flo App (the "**App**"), a mobile application.
2. As disclosed in the App's Privacy Policy, Exhibit R-2, the App collects certain user data to operate the App, analyze user trends, and improve the user experience.
3. On February 15, 2021, Ms. Aurélie Turon-Lagot, an alleged user of the App, filed an application for authorization to institute a class action (the "**Initial Application**") against Flo on behalf of the following class:

Toute personne domiciliée au Québec ayant utilisé l'application de suivi de cycle menstruel, de l'ovulation et de la fertilité « Flo » offerte par Flo Health Inc. entre le 1^{er} juin 2016 et le 23 février 2019.

4. The Initial Application was served on Flo on March 1, 2021.
5. In her Initial Application, Ms. Turon-Lagot alleges (i) that Flo does business with third parties working “notably” in the fields of marketing and analytics, and (ii) that Flo communicated to these third parties – in a “non-encrypted” and “identifiable” format – certain personal user activity, including highly sensitive personal health information. Ms. Turon-Lagot’s allegations rest on two documents: a United States Federal Trade Commission (“**U.S. FTC**”) draft Complaint (Exhibit R-3) that contains no actual findings of fact, and an article from the *Wall Street Journal* (Exhibit R-4).
6. On November 17, 2021, Ms. Turon-Lagot amended her Initial Application to make Option consommateurs the Plaintiff and Ms. Turon-Lagot the Designated Member (the “**Amended Application**”). No amendments were made to either clarify the allegations or allege new facts which would support the above allegations.
7. It is in this context that Flo seeks permission to examine the proposed Class Representative and Designated Member, and to adduce evidence, in order to provide the Court with a complete and accurate understanding of the facts necessary to decide the Amended Application.
8. Flo submits that without the benefit of this examination and evidence, the Court’s analysis would be founded entirely on a U.S. FTC Complaint – that contains no findings or admissions – and reporting from a newspaper article that lacks context and creates a misimpression.

B. THE EXAMINATION OF THE PROPOSED DESIGNATED MEMBER AND THE PROPOSED CLASS REPRESENTATIVE

9. At the present stage of the litigation, the Court’s analysis of article 575(2) of the *Code of Civil Procedure* (“**CCP**”) turns entirely on the representative Plaintiff’s personal appearance of right, or, in a case where the representative Plaintiff is a legal person, the designated member’s personal appearance of right.
10. Ms. Turon-Lagot was originally proposed as the representative Plaintiff. In the Amended Application, she is now proposed as Option consommateurs’ Designated Member.
11. Thus, Ms. Turon-Lagot’s personal cause of action has been at issue since the filing of the Initial Application in February of 2021, which contained only two paragraphs on the subject.
12. No information was provided about Ms. Turon-Lagot, besides the fact that she used the App to monitor her menstrual cycle since 2017 and never consented to the use of “her personal information” by third parties.

13. The Amended Application filed in November of 2021 does not provide any additional information about Ms. Turon-Lagot or her personal cause of action.
14. Moreover, as appears from the Amended Application, the new Plaintiff, Option consommateurs, has provided little more than generic allegations that could be made in any class action. It has made just a single allegation regarding the subject matter of the present action, namely privacy, and refers to its knowledge in the area with oblique and vague references to the “many research reports” it has produced on the collection of data.
15. Option consommateurs says very little about why it was added as a party to this action, or the role it will play as the Plaintiff.
16. Flo submits that ensuring that the Plaintiff and Designated Member can adequately represent the class is especially important in this case, given that the *entire* case rests on two documents that could never be filed as evidence of fact pursuant to the usual rules, namely (a) a document from the U.S. FTC in which not a single finding of fact was made, and (b) a piece of misleading hearsay from the *Wall Street Journal* that according to Flo, creates a misimpression.
17. Without proper allegations pertaining to Ms. Turon-Lagot’s personal cause of action and the role and knowledge of Option consommateurs in advancing it, and without any allegations of substance pertaining to the proposed Plaintiff and Designated Member under article 575(4) CCP, the Court does not have the information required to assess whether the criteria of articles 575(2) and (4) CCP are met.
18. As a result, Flo seeks leave to examine Ms. Turon-Lagot for no more than 90 minutes, on the following subjects:
 - (i) Her use of the App;
 - (ii) What she knows about any alleged public distribution of the data collected;
 - (iii) Her basis for believing she has received targeted advertisements based on data she shared with App;
 - (iv) How she learned of the impugned communication of data;
 - (v) What actions she took to protect her privacy thereafter;
 - (vi) Whether she has shared personal health information with other Apps or third-parties;
 - (vii) Whether she still uses the App, and if not, her dates of use;
 - (viii) What she knows about other class members;
 - (ix) Her consent to Flo’s Privacy Policy;

- (x) Her allegation that Flo took “no action” following the *Wall Street Journal* article, and any knowledge that she may have that supports this allegation, notably in light of the *Wall Street Journal* and FTC evidence;
 - (xi) Whether she read or approved the allegations in the Application (and the exhibits) before their filing; and
 - (xii) Her understanding of the reason for the damages claimed, as pertains to quantum and heads of damage.
19. Given the foregoing, Flo also seeks leave to examine a representative of Option consommateurs for no more than 90 minutes, on the following subjects:
- (i) Why it was added as a party to the proceedings;
 - (ii) What it knew about the proceedings when it was added;
 - (iii) What investigations it made about the subject matter of the proceedings, before and after it was added;
 - (iv) What it knows about how Apps are built and information sharing for that purpose in the technology industry;
 - (v) What it adds to these particular proceedings that the Designated Member cannot add herself; and
 - (vi) The existence and nature of any financial interest in these proceedings.

C. EVIDENCE CONCERNING THE PROCEEDINGS BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

20. In the Amended Application, as in the Initial Application, the Plaintiff refers to a draft (*i.e.*, never filed) U.S. FTC Complaint (the “**Draft Complaint**”) in an attempt to substantiate her central allegations.
21. This can be seen from paragraphs 22, 24, 26, and 28 of the Amended Application, which contain the core allegations in support of the proposed cause of action. In these paragraphs, the U.S. FTC Draft Complaint is presented as an authoritative document that *actually contains* findings of fact. Yet the Draft Complaint was resolved in a settlement with Flo, in which Flo made no admission of wrongdoing.
22. In reality, the U.S. FTC Complaint is merely a *draft* document instituting proceedings, in which *allegations* – not conclusions or findings – of fact are made. In that sense, it is analogous to a draft copy of an application to institute proceedings in the Superior Court of Quebec that was never filed at the greffe.

23. The rules of evidence pertaining to the burden of demonstration at authorization are not so liberal as to allow mere allegations in a draft document to be transformed into conclusions or findings of fact.
24. Moreover, the U.S. FTC, in a Consent Order issued on June 17, 2021, made no actual findings pertaining to the cause of action alleged herein by the Plaintiff against Flo, as appears from a copy of said Consent Order, communicated herewith as **Exhibit F-1**, which contains just two findings of fact, and establishes that the Draft Complaint was indeed a mere draft.
25. Finally, the Consent Order is not in any way, shape, or form, an admission of wrongdoing by Flo, as appears from a copy of Flo's press release following the termination of the FTC proceedings, **Exhibit F-2**. This is also indispensable context necessary to a proper evaluation of the authorization criteria.

D. EVIDENCE CONCERNING CONSENT AND THE PURPOSES OF COMMUNICATION OF THE DATA

26. The Amended Application, the U.S. FTC draft Complaint, and the *Wall Street Journal* article filed as Exhibit R-4 all include several incorrect assumptions about the nature of the data that was shared by Flo: "*highly sensitive personal information about their health*" (see, e.g., paragraphs 3, 4, and 5 of the Amended Application).
27. The Plaintiff relies on these sources in support of her assertion that Flo shared the personal information of users with third parties.
28. The *Wall Street Journal* article, though admissible into evidence at the authorization stage, is hearsay, and Flo intends to show via the evidence it seeks to be allowed to file that this assertion is an inaccurate description of Flo's actual practices during the relevant time.
29. More particularly, Flo requests permission to file into the record evidence showing (i) that the Privacy Policy filed as Exhibit R-2 was consented to prior to the use of the App and (ii) evidence concerning the legitimate purposes of the communication of the data at issue.
 - (i) *Evidence Showing that the Privacy Policy Was Accepted Prior to Use of the App*
30. In any privacy case, users' consent to the collection or disclosure of data can be a determinative issue.
31. Flo's Privacy Policy, which has been filed into the Court record as Exhibit R-2, contains explicit explanations with respect to what information will be disclosed to third parties.
32. Specifically, the Privacy Policy in force at the time Ms. Turon-Lagot began using the app in May of 2017 provided that Flo may share certain personal information with suppliers of "software applications, web hosting, and other technologies for the App." The Privacy Policy explained that the information in question was only what was "reasonably necessary" for the purposes of "perform[ing] their work".

33. The May 2017 Privacy Policy (Exhibit R-2, fifth document, in force as of March, as appears from the document) disclosed, in conspicuous language with bolded headings, exactly the purpose of the communication of data to third parties. Section 3, which is entitled “Disclosure of Information”, explains that information may be disclosed to third party “vendors who supply software applications, web hosting, and other technologies for the App” and that the purpose of disclosure is to share that which is “reasonably necessary to allow them to perform their work or comply with the law”.
34. Given the clear, explicit, and specific disclosures in said Privacy Policy (Exhibit R-2, fifth document), and given the extent to which the Amended Application itself refers to that Privacy Policy, Flo must be allowed to introduce evidence as to how users were made aware (a) of its existence, and (b) of its contents.
35. Flo therefore seeks to file an example of the positive consent that all users had to provide, in the form of examples of screenshots showing that users had to indicate their consent to the Privacy Policy before using the app.
36. These screenshots, which are essential to an appreciation of the Plaintiff’s allegations regarding lack of consent, are submitted *en liasse* as **Exhibit F-3**. The Plaintiff and Designated Member have been put in demand to recognize their origin and integrity.
 - (ii) *Evidence Concerning the Legitimate Purposes of the Communication of the Data*
37. The article from the *Wall Street Journal* referred to in the Application as Exhibit R-4 states that “Software development kits – or SDKs – are common inside of Apps and Facebook’s are among the most widely distributed.”
38. In order to provide essential context regarding SDKs, Flo seeks to adduce, as **Exhibit F-4**, a collection of publicly available documents concerning with the information technology tools used to build and maintain apps like the Flo App, and that provide information on tools known as Software Development Kits, as well as their functions.
39. The documents filed as Exhibit F-4 show that SDKs created by third party software developers can have a number of functions, one of which is to send certain pieces of data (sometimes referred to as “app events”) back to the third-party software developer in order for it to generate analytical reports. These reports, in turn, provide an App creator with information as to how the App is being used by customers, the parts of the App which work well, those that may not work so well, and how the App can be improved.
40. This is a common and legitimate purpose of SDKs, and in fact, the purposes of disclosure of data to third parties listed in the Privacy Policy, and reproduced above, are common and legitimate, as appears from a draft affidavit from an information technology expert that Flo seeks leave to adduce as **Exhibit F-5**.
41. This affidavit filed as Exhibit F-5 further establishes that the analytics data that App creators obtain through use of SDKs is very important to App creators.

42. Establishing the common and legitimate nature of the purposes of the disclosure of data is essential to an assessment of whether a statutory breach or a fault was committed, and more specifically, the Court's determination of whether the Plaintiff can make out an arguable case under article 575(2) CCP.
43. Given the foregoing, Flo should also be authorized to file Exhibits F-4, and F-5 since they will provide the Court with indispensable context.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

- A. **GRANT** the present Application for Leave to Adduce Evidence and to Examine the Proposed Class Representative and the Proposed Class Representative's Designated Member;
- B. **ALLOW** the Defendant Flo Health Inc. to file into the record Exhibits F-1, F-2, F-3 and F-4, as well as a signed copy of the draft affidavit filed as Exhibit F-5;
- C. **ALLOW** the Defendant Flo Health Inc. to examine the proposed designated member, Ms. Aurélie Turon-Lagot, for 90 minutes or less, out of Court; and
- D. **ALLOW** the Defendant Flo Health Inc. to examine the proposed class representative, Option consommateurs, for 90 minutes or less, out of Court.

MONTREAL, January 3, 2022

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ORIGINAL

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