

SUPERIOR COURT
(Class Actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-001078-209

DATE: August 3rd, 2022

BY THE HONOURABLE SUZANNE COURCHESNE, J.S.C.

EVAN ZUCKERMAN
Plaintiff

v.

MGM RESORTS INTERNATIONAL
Defendant

JUDGMENT ON AUTHORIZATION TO INSTITUTE A CLASS ACTION

1. OVERVIEW

[1] The Plaintiff Evan Zuckerman (**Zuckerman**) seeks authorization to commence a class action against MGM Resorts International (**MGM**) with respect to MGM's alleged failure to implement proper security measures to protect its customers' personal information, in relation to a data breach that occurred in July 2019 in its records¹.

[2] Zuckerman seeks to act on behalf of the following individuals:

All persons in Quebec², including their estates, executors or personal representatives, whose personal and/or financial information was lost by and/or stolen from Defendant as a result of the data breach that occurred on or about July 7, 2019;

(The Class or the Class members)

¹ Amended Application for Authorization to Institute a Class Action, dated November 2, 2021 (the **Application for Authorization**).

² The Plaintiff no longer seeks to represent a national class following a verbal amendment during the representations at the hearing on the authorization on February 8, 2022.

[3] MGM pleads that the Application for Authorization fails to meet all the criteria set out at article 575 of the Civil Code of Procedure (the **C.C.P.**).

[4] In addition, MGM seeks the dismissal of the Application for Authorization for the reason that Quebec courts lack jurisdiction³.

2. **CONTEXT**

[5] Zuckerman's claims are based on the following allegations and on the exhibits in support of his Application for Authorization.

[6] MGM operates luxurious resorts, casinos and hotels in the United States of America (the **US**), most of which are located in Las Vegas, Nevada.

[7] Zuckerman and millions of customers worldwide have stayed at one of MGM's hotels in Las Vegas and elsewhere. They have provided MGM with their personal and financial information, including their name, address, telephone number, email address, date of birth, credit card information, etc.

[8] On or about July 10, 2019, MGM learned that a few days earlier, its records and client information had been accessed and downloaded from an external cloud server by an unauthorized third party (the **Data Breach**).

[9] The Data Breach involves millions of MGM's customers having stayed at its various locations, including approximately 167,000 customers residing in Quebec.

[10] In August 2019, MGM emailed only a limited number of clients affected by the Data Breach. In June 2020, after it was reported by the media that a large amount of its clients' information database was posted on an internet hacking forum, MGM started sending emails to the customers impacted by the Data Breach.

[11] On June 12, 2020, Zuckerman was made aware of the Data Breach for the first time, when he received an email from MGM notifying him that his information was affected by the incident and that free credit monitoring services were offered for one year to help protect against the risk of misuse of his information.

[12] Zuckerman immediately signed up for the one year Equifax Canada credit monitoring services (the **Equifax plan**) mentioned in the email. On July 17, 2021, he renewed the Equifax plan and has been paying a monthly cost for these services since then.

[13] Zuckerman pleads that :

³ Application by Defendant MGM Resorts International for Declinatory Exception and subsidiarily for *Forum Non Conveniens*, dated December 11, 2020 (the **Application for Declinatory Exception**).

- MGM failed to implement the proper steps and required IT security measures in order to safeguard and protect the Class members' information;
- MGM failed to timely notify its customers who remained uninformed of the Data Breach during almost a year after it occurred and remain highly vulnerable to fraud and identity theft;
- MGM failed to offer adequate protection to Class members following the Data Breach by choosing not to immediately and automatically activate the credit monitoring services offered by credit agencies and by not immediately and automatically posting the proper fraud alerts for all Class members with said credit agencies;
- Credit monitoring services for only one year is wholly inadequate and will force the Class members to purchase additional coverage and insurance after the very short 12 month period has expired.

[14] He intends to claim compensatory, moral and punitive damages for the Class members for:

- Monetary losses related to fraud and identity theft;
- Fees and costs paid by the members to further protect themselves (credit monitoring services, fraud insurance or alerts etc.);
- Stress, anxiety, fear, inconvenience and/or loss of time due to the theft of their personal information;
- Additional inconveniences and damages related to delays in the processing of any requests or applications for credit in the future, the obligation to closely monitor their accounts for possible fraud or to close and reopen certain accounts, the obligation to obtain and regularly review their credit reports, and the negative impact on their credit scores.

3. ANALYSIS OF THE APPLICATION FOR AUTHORIZATION

3.1 Criteria for Authorization

[15] According to Article 575 C.C.P., the Court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that :

- 1) the claims of the members of the class raise identical, similar or related issues of law or fact;
- 2) the facts alleged appear to justify the conclusions sought;

- 3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
- 4) the class member appointed as representative is in a position to properly represent the class members.

[16] At authorization, the Court's limited role is to "screen" or filter out "frivolous, clearly unfounded or untenable" claims, and the corresponding burden of the petitioner is not very onerous⁴. The criteria set out at Article 575 C.C.P. must be applied using a flexible, liberal, and generous approach.

[17] At this stage, the Court is ruling on a purely procedural question. The Court must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted⁵.

[18] Although the threshold for authorizing a class action is low, the Court's filtering or screening role at this stage must nonetheless be exercised and is necessary to avoid defendants having to defend themselves on the merits against untenable claims⁶.

[19] The rule of proportionality does not constitute a stand-alone factor and must be assessed with respect to each of the individual criteria set out at Article 575 C.C.P.⁷.

[20] If the cumulative criteria for authorization are met, the Court must authorize the class action; there is no residual discretion. The Court should err on the side of caution and authorize the class action where there is doubt as to whether the conditions are met⁸.

[21] MGM submits that Zuckerman's Application fails to meet the requirements set out at paragraphs (2) and (4) of Article 575 C.C.P.

[22] MGM also contests Quebec courts' jurisdiction.

3.1.1. The members of the class claims raise identical, similar or related issues of law or fact (575 (1) C.C.P.)

[23] At the authorization stage, the threshold requirement for common questions is low. Thus, even a single identical, similar or related question of law would be sufficient to meet

⁴ *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, paras. 59 and 65 (*Infineon*); *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, para. 37 (*Vivendi*); *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, paras. 7, 10, 11 and 56 (*L'Oratoire*); *Desjardins Cabinet de services financiers inc. c. Asselin*, 2020 CSC 30 (*Asselin*).

⁵ *L'Oratoire*, *supra*, note 4, para. 7.

⁶ *Infineon*, *supra*, note 4, para. 59 and 61.

⁷ *Vivendi*, *supra*, note 4, para. 66.

⁸ *Sibiga v. Fido Solutions inc.* 2016 QCCA 1299, para. 51.

the common questions requirement provided that it is significant enough to affect the outcome of the class action⁹.

[24] The proposed issues of fact or law are defined in the Application for authorization as follows:

- a) Was Defendant negligent and/or did Defendant commit a fault in the storing and safekeeping of the personal information of the Class Members whose information was ultimately compromised, lost and/or stolen on or before July 7, 2019?
- b) Did Defendant commit a fault and/or was negligent in the way in which it notified the Class Members about the Data Breach?
- c) Did Defendant commit a fault and/or was negligent in the delay in which it notified the Class Members about the Data Breach?
- d) Is Defendant liable to pay compensatory and/or moral damages to the Class Members as a result of the loss of said information, including without limitation actual monetary losses incurred, damages related to fraud or identity theft, decrease in credit score, out of pocket expenses, lost time, inconvenience, anxiety, fear and stress, and if so in what amounts?
- e) Is Defendant liable to pay punitive and/or exemplary damages to the Class Members, and if so in what amount?

[25] The Court is of the view that the above constitute common issues that will advance the resolution of the litigation with respect to all Class members in a significant way. This criteria is not contested by MGM and is satisfied.

[26] The Class definition is also adequate. It is drafted on the basis of an objective criteria, it is rational and sufficiently precise. It allows a person to determine whether or not he or she is a member of the Class.

[27] At this stage, it is premature to remove from the proposed definition the reference to estates, executors or personal representatives, considering the nature of part of the damages claimed (monetary and material losses). The definition may be redefined, if required, at a later stage of the proceedings (Art. 588 C.C.P.).

⁹ *Infineon, supra*, note 4, para. 72 ; *Vivendi, supra*, note 4, para. 58; *Asselin, supra* note 4, para. 25.

3.1.2. The facts alleged appear to justify the conclusions sought (575 (2) C.C.P.)

A) The applicable principles of law

[28] The applicant's burden at the stage of authorization is to establish an "arguable case" in light of the facts and the applicable law¹⁰. The legal threshold requirement of Article 575(2) C.C.P. is a simple burden of demonstration that the proposed legal syllogism is tenable¹¹.

[29] The applicant is not required to establish an arguable case in accordance with the civil standard of proof on a balance of probabilities and is not, unlike an applicant elsewhere in Canada, required to show that the claim has a "sufficient basis in fact"¹².

[30] The facts alleged, as long as they are sufficiently precise, are assumed to be true. They must have an evidentiary foundation that is not vague, unsubstantiated or imprecise¹³. Speculations, hypotheses and opinions are not assumed to be true and must be discarded¹⁴.

[31] The Court must consider not only the alleged facts but any inferences or presumptions of fact or law that may arise from these facts and can serve to establish the existence of an arguable case¹⁵.

[32] The plaintiff's individual cause of action must be analyzed to determine whether it meets the applicable criteria¹⁶.

B) The legal syllogism

[33] The syllogism proposed by Zuckerman is the following:

- MGM was negligent in the storing and safekeeping of the personal information of the Class members whose information was compromised, lost and/or stolen on July 7, 2019;
- MGM neglected to immediately and properly advise its customers of the Data Breach and to provide the appropriate protection;
- MGM's failures and acts caused damages to the Class members.

¹⁰ *L'Oratoire*, supra, note 4, para. 58; *Infineon*, supra, note 4, para. 65 and 67; *Vivendi*, supra, note 4, para. 37.

¹¹ *L'Oratoire*, supra, note 4, para. 58; *Infineon*, supra, note 4, para. 61.

¹² *L'Oratoire*, supra, note 4, para. 58.

¹³ *Infineon*, supra, note 4.

¹⁴ *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201, para. 38.

¹⁵ *L'Oratoire*, supra, note 4, para. 24.

¹⁶ *Id.*, para.7

- **Zuckerman's personal situation**

[34] On July 7, 2019, Zuckerman's personal information contained in MGM's records was accessed and downloaded by an unauthorized third party.

[35] By an email dated June 12, 2020, Zuckerman was made aware by MGM of the Data Breach, almost one year after its occurrence¹⁷. MGM advised him that his personal information was affected by the incident.

[36] Zuckerman signed up for the one year Equifax plan offered at no cost by MGM. On June 17, 2021, he renewed these services at a recurring monthly rate of \$15.95 plus taxes, which he has personally paid for since then¹⁸. He claims this amount from MGM as damages suffered as a direct result of the Data Breach.

[37] He allegedly experienced and continues to experience anxiety, stress, inconvenience, loss of time and fear due to the loss of his personal information.

C) Analysis

- **MGM's faults**

[38] In light of the alleged facts, Zuckerman presents an arguable case with respect to MGM's purported failure to adequately protect its clients' personal information, to properly and promptly notify the Class members of the Data Breach and to provide adequate measures to protect against the misuse of their information.

[39] MGM may present a valid defense against these allegations on the merits and could demonstrate that it acted promptly and adequately before and after the Data Breach. However, the facts alleged and the supporting evidence, which are deemed to be true, are detailed and appear sufficient at this stage to support the conclusions of fault on the part of MGM¹⁹.

[40] MGM argues that the type of information affected by the Data Breach does not trigger a reasonable expectation of privacy. It also contends that the information impacted by the breach did not contain useful information for potential hackers or purchasers of stolen data.

[41] The information concerned by the Data Breach includes the full names, contact information (postal addresses, telephone numbers, email addresses) and dates of birth of MGM's impacted customers. The "M Life" loyalty program account number of MGM's customers has also been stolen, according to Elena Seiple, Vice President, IT Information

¹⁷ Exhibit R-3.

¹⁸ Exhibit R-6.

¹⁹ Application for authorization, para. 9, 11, 12, 17, 18, 19, 20.1, 24, 25, 26, 37, 38, 39, 41, 44, 45, and 48; exhibits R-2 and R-5.

Security at MGM, who signed a sworn statement and was examined out-of-Court in support of the evidence adduced by MGM²⁰.

[42] The impacted information does not include any financial information, payment or credit card, nor password data. The Data Breach involved a data set that was, according to MGM, disorganized and contained inconsistent, and partially inaccurate and incomplete records²¹.

[43] Although their financial information was not involved in the incident, MGM's customers concerned by the Data Breach are at potential risk for SIM swapping and spear-phishing campaigns²². The date of birth combined with other personal information may represent sensitive data that required a higher level of protection.

[44] In July 2020, a hacker was reported trying to sell the stolen information of more than 142 million MGM hotel guests on the dark web²³.

[45] The Class members were offered credit monitoring services to help protect against the risk of misuse of their information, following the Data Breach.

[46] For these reasons, Zuckerman demonstrates a *prima facie* privacy violation at this stage. It would be premature, on the basis of incomplete evidence, to conclude that the information concerned by the Data Breach is insufficient to place the Class members at risk of fraud.

- The claim for moral and pecuniary damages

[47] There is no allegation that Zuckerman or any other Class member has been the victim of fraud or identity theft as a result of the Data Breach. Zuckerman claims for moral prejudice (anxiety, stress, inconvenience, etc.) and pecuniary damages (monthly costs for the renewal of the Equifax plan).

[48] MGM contends that the alleged inconveniences and expense for credit monitoring protection allegedly incurred by Zuckerman are insufficient to constitute compensable harm and to serve as a basis for authorizing a class action.

[49] The purported inconveniences are broken down as follows: i) stress and anxiety, ii) inconvenience, iii) loss of time, and iv) fear due to the loss of personal information²⁴. Some of the supporting allegations generally refer to potential or future prejudice ("that *may* become necessary", "that *may* be required to"); other alleged damages correspond to inconsequential and transitory inconveniences such as monitoring of accounts.

²⁰ Examination on affidavit of Elena Seiple held on June 17, 2021, pages 42-44; Application for authorization, para. 20.1.

²¹ Sworn Statement of Elena Seiple signed on March 23, 2021.

²² Exhibits R-2 and R-5.

²³ Exhibit R-5; Application for Authorization, para. 13-16.

²⁴ Application for authorization, para. 27, 28, 29, 38, 40 and 54 to 60.

[50] Zuckerman produced a list of online submission of 405 purported Class members where a part of them succinctly allege stress, anxiety, fear, loss of sleep, loss of time, and inconveniences. Some of them refer to fraud or identity theft, without further details²⁵.

[51] In *Mustapha*²⁶, the Supreme Court has provided guidance on the distinction between minor and transient upsets and compensable injury. Compensable injury must be "serious and prolonged" and rise above the ordinary annoyances, anxieties and fears that a person living in society may experience.

[52] In similar cases of data security incidents, the courts have determined that the alleged inconveniences did not exceed the threshold of ordinary annoyances²⁷.

[53] However, in *Zuckerman c. Target*²⁸, the authorization judge considered that "other matters such as setting up credit monitoring and security alerts, obtaining credit reports, and cancelling cards or closing accounts and replacing them are not "ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept" but may amount to something more. These are potentially matters for which class members would be entitled to compensation."

[54] Zuckerman claims that because of the number of MGM clients impacted by the Data Breach (over 142 million), it will take much longer than one to two years for the perpetrators to use or sell the stolen client information. For that reason, he contends that credit monitoring services for a period of one year is wholly inadequate and in consequence, on June 17, 2021, he renewed the Equifax plan at a recurring monthly rate of \$15.95 plus taxes²⁹.

[55] MGM argues that the alleged extension amounts to nothing more than a manufactured, self-made damage to create a personal interest for Zuckerman and to contest MGM's declinatory exception.

[56] In *Lévy c. Nissan Canada inc.*³⁰, it was similarly argued by the defendant that Ms. Lévy had not suffered a compensable prejudice and that her additional initiative to extend the credit monitoring program to six years (with the first year paid for by Nissan Canada) were superfluous and tactical in order to artificially generate a monetary claim. Justice Pierre C. Gagnon decided that the circumstances would be clarified at the trial on

²⁵ Exhibit R-7A (under seal); Application for authorization, para. 74 j).

²⁶ *Mustapha v. Culligan of Canada Ltd*, 2008 SCC 27.

²⁷ *Sofio c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820; *Li c. Equifax inc.*, 2019 QCCS 4340; *Bourbonnière c. Yahoo! Inc.*, 2019 QCCS 2624; *Mazzona c. DaimlerChrysler Financial Services Canada Inc. /Services financiers DaimlerChrysler inc.*, 2012 QCCS 958.

²⁸ 2017 QCCS 110, para. 73.

²⁹ Application for authorization, para. 45.

³⁰ *Levy v. Nissan Canada inc.*, 2019 QCCS 3957, para. 104-108 (appeal granted in part: 2021 QCCA 682).

the merits and that at this stage, Ms. Lévy alleged a compensable injury, comparable to that recognized in the *Zuckerman* case.

[57] In *Fortier c. Uber Canada inc.*³¹, Justice Gary D.D. Morrison made a similar determination and decided that at this stage, the Court was not in a position to conclude that the plaintiff's claim was artificial and that he did not have to spend money in order to access his credit file.

[58] Zuckerman incurred out-of-pocket costs associated with the monitoring of his credit. This expense may or may not constitute a direct, logical and immediate consequence of MGM's alleged fault but it is not for the Court to determine at this stage, on the basis of incomplete evidence. MGM's arguments are serious but the circumstances surrounding Zuckerman's decision to extend the Equifax plan are issues to be decided on the merits.

[59] In addition, the Court is of the view that the alleged fact that personal information of Class members was published on a public forum and offered for sale on the dark web, before they were even informed of the Data Breach by MGM³² constitutes a source of stress, anxiety and fear potentially exceeding the ordinary annoyances of daily life.

[60] Exhibit R-5 states that the personal data concerned by the Data Breach "presents a host of opportunities that cybercriminals will all too eagerly seize. Data like this is frequently used to launch spear phishing campaigns. [...] Exposed phone numbers create an additional risk: SIM swapping".

[61] In its letter to Zuckerman, MGM apologized for the inconvenience that the situation may cause him³³.

[62] For all of these reasons, the Court concludes that the allegations of moral and pecuniary damages are sufficient at this stage of the proceedings to meet the low standard required by Art. 575(2) C.C.P.

- **The claim for punitive damages**

[63] Zuckerman claims that MGM's conduct was grossly or intentionally negligent and that punitive damages should be awarded to the Class members under section 5, which guarantees the right to privacy, and section 49 of the Quebec *Charter of Human Rights and Freedoms (the Charter)*³⁴.

³¹ 2021 QCCS 4053, para. 48-52.

³² Application for authorization, para. 11 and 16; Exhibits R-2 and R-5.

³³ Exhibit R-3.

³⁴ CQLR, c. C-12.

[64] The second paragraph of section 49 of the Charter authorizes the award of punitive damages where the unlawful interference with rights or freedoms protected by the Charter is intentional.

[65] The case law requires proof:

- (i) that the author of the interference wished to cause the consequences of the wrongful interference, or
- (ii) that he or she was aware of the immediate and natural or extremely probable consequences of his or her misconduct³⁵.

[66] The notion of intentional inference requires more than simple negligence but is not as strict as a specific intent³⁶.

[67] The claim for punitive damages can stand alone, even in the absence of compensatory damages³⁷.

[68] The allegations of the Application for authorization supporting the claim for punitive damages are the following:

48. In fact, without limiting the generality of the foregoing, Defendant was grossly negligent and/or intentionally negligent when it:

- a. did not follow or properly implement an effective data security industry standard to protect the Class Members' personal information, which information MGM allowed to be accessed and downloaded from an external cloud server by unauthorized parties;
- b. tried to downplay and hide the magnitude of the Data Breach for almost 1 year;
- c. failed to promptly notify the Plaintiff and the Class Members of the Data Breach for almost one year, which in and of itself is abusive and egregious, justifying an award for such punitive damages;
- d. failed to properly ensure that Plaintiff and Class Members are protected by credit monitoring services by both Equifax Canada and TransUnion and failing to post fraud alerts on the Class Members' credit files immediately after the Data Breach;

³⁵ *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *Imperial Tobacco Canada Ltée v. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, para. 1000.

³⁶ *Id.*; *Levy v. Nissan Canada inc.*, 2021 QCCA 682, para. 30.

³⁷ *De Montigny v. Brossard (Succession)*, 2010 SCC 51, para. 45-46; *Richard v. Time Inc.*, 2012 SCC 8, para. 14

- e. waited until after the media has exposed the fact that the personal information of millions of MGM clients was published on a hacking forum before notifying the Class Members, the whole as reported in the R-2 articles;
- f. failed to provide assistance and relevant information about the Data Breach on its websites;
- g. failed to even provide a telephone number for Class Members to call in order to access information about the Data Breach. [...]
- h. failed to offer indemnification and proper coverage to Class Members.
- i. intentionally and in bad faith withheld and failed to divulge to the public, this Honorable Court, and the Class Members that the Class Members' unique "M Life" loyalty points program account number had also been stolen in the Data Breach. [...]

[69] The Court applies the following reasoning of the Court of appeal in *Levy v. Nissan*³⁸ and takes into account, in the first place, the almost one-year delay before MGM notified the impacted clients of the Data Breach and of the suggested measures to protect against the misuse of their information:

[35] Moreover, the more than one-month delay between the breach and the web posting and sending of the letters could potentially be viewed as conduct undertaken (or abstained from) in full knowledge of the prejudicial consequences that could be suffered by Respondent's customers during such period. This may be the case notwithstanding Respondent's explanation that there was an investigation of the incident ongoing at the time, which will be an issue for the merits. Nevertheless, the failure is alleged by Appellant, which is sufficient at this stage of the proceedings. Indeed, the judge acknowledges that the delay appears to be "excessive" even when considered in light of the Act respecting the protection of personal information in the private sector. Conduct after the breach can potentially give rise to punitive damages. Here, Nissan's delay perpetuated and aggravated the violation of its customers' right to privacy. The violation did not end when the data was breached. Rather, the violation commenced with the breach and continued, as alleged, while the information was in the hands of the perpetrators and Respondent did not act to protect its customers or enable them to protect themselves.

[36] At the present stage of the proceedings, where we are only considering the allegations, delays in the management of the incident can potentially be the source of damages in addition to the conduct of Respondent in failing to protect personal information prior to the breach.

³⁸ 2021 QCCA 682.

[37] It would be premature at this stage to decide that there is no possible basis for the award of punitive damages since the granting of such damages must be based on an analysis of Respondent's overall conduct. The allegations need only be sufficient in order to comprehend the gist of the proposed narrative. Here, Respondent's conduct after the data breach as alleged is relevant and could potentially be the source for a condemnation of punitive damages. In any event, doubt as to whether the standard has been met should be interpreted in favour of the plaintiff at the authorization stage.

(References omitted)

[70] Similarly, Zuckerman's application meets the applicable standard at this stage, in light of his allegations, and provides an arguable case that MGM's conduct might constitute an illicit and intentional violation of the right to respect one's private life, as protected by the Charter. MGM may have valid reasons for the delay of several months before notifying its impacted clients but it would be premature to rule out the possibility that its conduct entitles the members to punitive damages, under the alleged circumstances.

* * *

[71] MGM has raised serious issues arising from the Application for authorization as drafted.

[72] Despite doubts as to the merits of Zuckerman's case and of this class action, the Court is of the view that the evidentiary and the legal threshold requirements under article 575 (2) C.C.P. have been met and that the action is not clearly frivolous and manifestly destined to fail.

3.1.3 The composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others, or for consolidation of proceedings (575(3) C.C.P.)

[73] This criteria must be given the same broad and liberal interpretation as the other conditions set forth at Article 575 C.C.P.

[74] Zuckerman alleges that the Class is composed of approximately 167,000 members, scattered across the province. It would be impractical, if not impossible, to contact each and every Class member to obtain mandates and to join them in one action.

[75] As of February 2022, 405 purported Class members had registered their information and comments on the Class counsel website³⁹.

[76] Also, the magnitude of the damages that could be awarded for personal claims makes it impracticable for class members to file individual actions against MGM.

³⁹ Exhibit R-7A (under seal).

[77] This criteria is not contested by MGM and is satisfied.

3.1.4. The class member appointed as representative plaintiff is in a position to properly represent the class members (575(4) C.C.P.)

[78] Three conditions must be met in deciding whether an applicant should be granted the status of representative plaintiff. The applicant must show an interest in the suit, competence, and an absence of conflict with the class members⁴⁰.

[79] These factors are to be interpreted liberally, which means that “[n]o proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly”⁴¹.

[80] MGM submits that Zuckerman is not in a position to properly represent the Class members as he did not suffer any compensable damages as a result of the Data Breach.

[81] The Court has previously determined that Zuckerman’s individual case and claim for damages, although imperfect, are tenable at this preliminary stage.

[82] For the reasons alleged in the Application for authorization⁴², taken as true, the Court considers that Zuckerman fulfills the applicable requirements to be appointed Class representative.

4. ANALYSIS OF THE APPLICATION FOR DECLINATORY EXCEPTION

4.1. Jurisdiction under art. 3148 C.C.Q.

[83] MGM submits that this Court lacks jurisdiction over the Application for authorization for the reason that it presents no real and substantial connection to Québec.

[84] The Court must determine whether it has jurisdiction to hear the matter against MGM in light of the factors enumerated in Article 3148 C.C.Q.:

3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases

(1) the defendant has his domicile or his residence in Québec;

(2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;

⁴⁰ *L’Oratoire*, *supra*, note 4, para. 32; *Infineon*, *supra*, note 4, para. 149; *Union des consommateurs v. Air Canada*, 2014 QCCA 523, para. 82.

⁴¹ *Infineon*, *supra*, note 4, para. 149.

⁴² Application for authorization, para. 74.

(3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

(4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;

(5) the defendant has submitted to their jurisdiction.

[...]

[85] In view of the allegations of the Application for authorization, the jurisdiction of the Quebec courts is not established under Article 3148(1°) and (2°) C.C.Q. MGM is a Delaware, US corporation having its headquarters in the city of Las Vegas, Nevada, US. MGM does not have any establishment in Quebec and has never been registered to do business in Québec⁴³.

[86] MGM did not submit, or agree to submit, to the Québec courts' jurisdiction. Therefore, subsections (4) and (5) of Article 3148 C.C.Q. are not applicable either.

[87] Thus, the analysis must be made on the basis of subsection (3) of Art. 3148 C.C.Q. The Court agrees that no fault was committed in Québec as any alleged failings of MGM to safeguard customers' personal information and to promptly notify its customers of the Data Breach, occurred in the United States.

[88] However, the Québec courts have jurisdiction to hear this claim under Article 3148 (3°) C.C.Q. because Zuckerman established *prima facie* that he suffered prejudice in Quebec as a result of MGM's purported faults. He alleges that in order to further protect his identity after the one-year Equifax plan provided by MGM had expired, he renewed the plan as of July 2021⁴⁴.

[89] As decided by the Court of Appeal in *Zuckerman c. Target Corporation*⁴⁵, the alleged expense of \$15.95 incurred by Zuckerman for credit monitoring is sufficient to confer jurisdiction to the Québec courts:

[8] There is more. The Appellant alleged that he spent \$19.95 on a credit monitoring service to guard against potential fraud given the possibility that his personal information in Respondent's possession may have been stolen. Respondent had indicated in an e-mail that it would arrange to provide this service but Appellant did not wish to wait and, as alleged, contracted and paid for the service. In any event, Appellant professed that the credit monitoring service offered by Respondent was inadequate. This is prejudice

⁴³ Application for authorization, para. 2 and 6; Sworn Statement of Elena Seiple signed on March 23, 2021.

⁴⁴ Application for authorization, para. 45 and exhibit R-6.

⁴⁵ 2015 QCCA 1809.

suffered in Quebec and is sufficient to accord jurisdiction over the proposed class action.

[9] The judge chose to analyze this damage and agreed with Respondent that the expense of \$19.95 was not “a logical, direct and immediate consequence” of Respondent’s alleged fault. Again, however appropriate this analysis might have been at an authorization hearing, it was not correct on the declinatory where the parties proceeded on the basis of the allegations of Appellant’s written pleading to seek a determination as to whether there was jurisdiction on application of article 3148 C.C.Q. The judge committed an error in taking his analysis beyond ascertaining allegations sufficient to justify exercising jurisdiction.

(The Court underlines)

[90] Again, at this stage, the Court does not have to rule on the merits of the dispute nor does it have to decide whether Zuckerman’s allegation has been added, and his Equifax plan renewed, for the sole purpose of giving the Quebec courts jurisdiction.

4.2. *Forum non conveniens*

[91] Once jurisdiction is established, the party contesting jurisdiction may raise the doctrine of *forum non conveniens*. MGM submits that it is in the interests of justice that the Court decline jurisdiction in favor of the US District Court for the District of Nevada.

[92] Article 3135 C.C.Q. provides the following:

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.

[93] As provided in that section, two distinct criteria must be met for the Quebec court, otherwise competent, to decline jurisdiction under the doctrine of *forum non conveniens*: (1) the situation must be exceptional; and (2) the foreign forum must be in a better position to decide the dispute:

[41] Il ne suffit donc pas de prouver que les autorités d'un autre État seront à même de trancher le litige. Une situation exceptionnelle doit être démontrée pour que les tribunaux déclinent compétence lorsqu'ils sont valablement saisis. Il faut par ailleurs établir que l'autre État est clairement le mieux placé pour trancher le litige, c'est-à-dire qu'il se dégage du dossier une impression nette tendant vers un seul et même forum étranger⁴⁶.

(Footnotes omitted)

⁴⁶ *Transax Technologies inc. c. Red Baron Corp. Ltd.*, 2017 QCCA 626.

[94] In the context of a class action, Art. 3135 C.C.Q. must be read in conjunction with Art. 577 C.C.P. which requires the Court, when asked to decline jurisdiction, to have regard for the protection of the rights and interests of Québec residents⁴⁷.

[95] The court's power not to exercise jurisdiction remains a discretionary power.

[96] In light of the various applicable criteria⁴⁸, MGM raises the following factors in support of its demand:

- MGM is domiciled in the United States, having its head office in Las Vegas, Nevada;
- The Data Breach and the alleged faults would have occurred in the United States;
- The obligations arising from a contract between Zuckerman and MGM, if any, would have been performed in the United States;
- Numerous proposed class actions related to the Data Breach have already been filed and will proceed in the US District Court for the District of Nevada, making that court the natural forum to hear the dispute;
- The relevant evidence is located in the United States and, more particularly, at MGM's headquarters located in Las Vegas, Nevada, US;
- The majority of the witnesses reside in the United States and will likely have to testify in the United States, resulting in a duplication of proceedings on the same Data Breach and allegations of fault; and
- Should the Application proceed in Québec, there is a risk that this Court and the US District Court for the District of Nevada will render contradictory judgments.

[97] MGM filed the sworn declaration of Ms. Seiple in support of its demand⁴⁹.

[98] After consideration and assessment of the various criteria and factors presented by the parties, the Court is not satisfied that the forum proposed by MGM, the US District Court for the District of Nevada, would be more efficient and clearly in the best position for disposing of the claims of the Class members. At this point, consolidated class action

⁴⁷ *Ranger c. Aphria inc.*, 2021 QCCS 534, para. 72-73; *Hakim c. Pfizer inc.*, 2021 QCCS 160, para. 21.

⁴⁸ *Boucher v. Stelco inc.*, 2005 SCC 64, para. 37.

⁴⁹ Sworn Statement of Elena Seiple signed on March 23, 2021.

proceedings were filed for US residents only and there is no evidence that the US Class proceedings counsel would accept to include Québec residents in the US proposed class.

[99] When considering the forum in light of the interests and rights of the Class members, the courts in Nevada are not in a better position to decide this matter. The Class is potentially composed of 167,000 Québec residents who purportedly suffered a prejudice in Québec and who would be compelled to sue a large US corporation in Nevada to recover their damages, should the Court decline jurisdiction.

[100] The fact that witnesses and evidence are mostly located in Nevada undeniably makes it more convenient for MGM to be sued in Nevada but the argument is also true for Zuckerman and the Class members who have an interest in instituting the proceedings in Québec, where they reside and where their evidence is located.

[101] The situation presented by MGM is not so exceptional to convince the Court that it is in the interests of the parties and of justice to decline jurisdiction.

[102] Finally, in accordance with Art. 576 C.C.P. and in light of the Plaintiff's allegations⁵⁰, the Courts determines that the class action is to be instituted in the judicial district of Montreal.

WHEREFORE, THE COURT:

[103] **GRANTS** Plaintiff's *Amended Application for Authorization to Institute a Class Action*;

[104] **DISMISSES** Defendant's *Application for Declinatory Exception and Subsidiarily for Forum Non Conveniens*;

[105] **AUTHORIZES** the bringing of a class action against the Defendant in the form of an Application to institute proceedings in damages ;

[106] **APPOINTS** the Plaintiff as the Representative Plaintiff representing all persons included in the Class herein described as:

All persons in Quebec, including their estates, executors or personal representatives, whose personal and/or financial information was lost by and/or stolen from Defendant as a result of the data breach that occurred on or about July 7, 2019;

[107] **IDENTIFIES** the principle issues of law and fact to be treated collectively as the following:

a) Was Defendant negligent and/or did Defendant commit a fault in the storing and safekeeping of the personal information of the Class

⁵⁰ Application for authorization, para. 73.

Members whose information was ultimately compromised, lost and/or stolen on or before July 7, 2019 ?

b) Did Defendant commit a fault and/or was negligent in the way in which it notified the Class Members about the Data Breach?

c) Did Defendant commit a fault and/or was negligent in the delay in which it notified the Class Members about the Data Breach?

d) Is Defendant liable to pay compensatory and/or moral damages to the Class Members as a result of the loss of said information, including without limitation actual monetary losses incurred, damages related to fraud or identity theft, decrease in credit score, out of pocket expenses, lost time, inconvenience, anxiety, fear, and stress, and if so in what amounts ?

e) Is Defendant liable to pay punitive and/or exemplary damages to the Class Members, and if so in what amount?

[108] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

GRANT the Class Action of Plaintiff on behalf of all the Class Members against Defendant;

CONDEMN Defendant to pay to the Class Members compensatory damages for all monetary losses caused as a result of Defendant's loss of Class Members' information, and ORDER collective recovery of these sums;

CONDEMN Defendant to pay to the Class Members compensatory and/or moral damages, in the amount to be determined by the Court, as a result of Defendant's loss of Class Members' information, including without limitation for actual monetary losses incurred, damages related to fraud or identity theft, decrease in credit score, out of pocket expenses, lost time, inconvenience, anxiety, fear, and stress, and ORDER collective recovery of these sums;

CONDEMN Defendant to pay an amount in punitive / exemplary damages to every Class Member, in the amount to be determined by the Court, and ORDER collective recovery of these sums;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise Class Members.

[109] **DECLARES** that all Class Members who have not requested their exclusion from the Class in the prescribed delay to be bound by any Judgment to be rendered on the class action to be instituted ;

[110] **FIXES** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the Class Members ;

[111] **ORDERS** the publication of a notice to Class members in accordance with Article 579 C.C.P., pursuant to a further order of the Court and **CONVENES** the parties to a hearing to be scheduled to discuss the issues of notice to Class members and the costs related to said notice ;

[112] **DETERMINES** that the class action shall be brought in the judicial district of Montreal ;

[113] **THE WHOLE** with judicial costs.



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Hearing date: February 8, 2022