

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

STACEY THOMPSON-MARCIAL and BRIAN SMITH

Plaintiffs

- and -

TICKETMASTER LLC and TICKETMASTER CANADA LP

Defendants

Proceeding under the *Class Proceedings Act, 1992*

SECOND FRESH AS AMENDED CONSOLIDATED STATEMENT OF
CLAIM

(Notice of Action issued September 26, 2018)

AMENDED THIS SEP 11 2020 PURSUANT TO
MODIFIÉ CE SEP 11 2020 CONFORMÉMENT À

RULE/LA RÈGLE 26.02 (_____)

THE ORDER OF Justice Glynstein
L'ORDONNANCE DU

DATED / FAIT LE September 10, 2020

Quibands
.....
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

CLAIM

1. The following definitions apply:

- a) “**Applicable Ticket Sales Legislation**” means the **Quebec Consumer Protection Act**; the **Ticket Sales Act, 2017**; the **Ticket Speculation Act**, R.S.O. 1990, c. T.7, as amended; **The Ticket Sales Act**, S.S. 2010, c. T-13.1, as amended; and **The Amusements Act**, C.C.S.M., c. A70, as amended;
- b) “**CCQ**” means *Civil Code of Quebec*, c. CCQ-1991, as amended;
- c) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;
- d) “**Class**” or “**Class Members**” means all persons in Canada who purchased **Secondary Tickets** for personal, family or household purposes during the **Class Period**, and all members of the **Quebec Merchant Subclass**, save for the defendants and their employees, officers, directors, agents and representatives, and their family members;
- e) “**Class Period**” means the period from January 1, 2015, or the date on which **Ticketmaster** launched TradeDesk for events in Canada, and ongoing;
- f) “**Competition Act**” means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
- g) “**Consumer Class**” or “**Consumer Class Members**” means the **Class Members** save for the **Quebec Merchant Subclass Members**;
- h) “**Contract**” or “**Contracts**” means the contract entered into by **Ticketmaster Canada** and the **Class Members** for the purchase of **Secondary Tickets**;
- i) “**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;

- j) “**Double-Dip Fees**” means additional fees received by **Ticketmaster** as a result of **Primary Tickets** being resold as **Secondary Tickets** through software, websites, or other platforms owned or operated by the defendants, their agents or affiliates;
- k) “**Equivalent Consumer Protection Legislation**” means: the **Quebec Consumer Protection Act**; *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2; *Consumer Protection Act*, R.S.A. 2000, c. C-26.3; *The Consumer Protection and Business Practices Act*, S.S. 2014, c. C-30.2; *The Business Practices Act*, C.C.S.M. c. B120; *The Consumer Protection Act*, C.C.S.M. c. C200; *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1; *Business Practices Act*, R.S.P.E.I. 1988, c. B-7; *Consumer Protection Act*, R.S.P.E.I. 1988, c. C-19; all as amended;
- l) “**Live Events**” means live performance events, including concerts and sporting events in Canada;
- m) “*Negligence Act*” means the *Negligence Act*, R.S.O. 1990, c. N.1, as amended;
- n) “**NYAG**” means New York Attorney General;
- o) “**Ontario Consumer Protection Act**” means the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, as amended;
- p) “**Primary Tickets**” means **Live Events** tickets purchased when they are initially listed for sale through **Ticketmaster** or one of its affiliates or agents;
- q) “**Quebec Consumer Protection Act**” means the *Consumer Protection Act*, C.Q.L.R. c. P-40.1, as amended;

- r) “**Quebec Merchant Subclass**” or “**Quebec Merchant Subclass Members**” means all persons resident in Quebec who purchased **Secondary Tickets** for business purposes during the **Class Period**;
- s) “**Representations**” means the representations set out in paragraphs 20-21, below;
- t) “**Resellers**” means persons who purchase **Primary Tickets** and resell them to consumers as **Secondary Tickets** using Ticketmaster’s TradeDesk or TradeDesk POS inventory management software;
- u) “**Secondary Tickets**” means **Live Events** tickets which were purchased through **Ticketmaster** or one of its affiliates and subsequently relisted by Resellers using **Ticketmaster**’s TradeDesk or TradeDesk POS inventory management software and then sold through **Ticketmaster** or one of its affiliates or other ticket sale sites such as StubHub or Vivid Seats or others, including tickets labelled as “Verified Tickets by Ticketmaster”, “Ticketmaster Verified”, “TM Resale”, “TM+”, “TicketExchange”, “Tickets Now”, and/or “Fan-to-Fan”;
- v) “***Ticket Sales Act, 2017***” means the *Ticket Sales Act, 2017*, S.O. 2017, c. 33, Sched. 3;
- w) “**Ticketmaster**” means the defendants Ticketmaster Canada LP and Ticketmaster LLC;
- x) “**Ticketmaster Canada**” means the defendant Ticketmaster Canada LP;
- y) “**Ticketmaster App**” means the Ticketmaster software application, which is downloadable to any device which runs an iOS or Android operating system; and
- z) “**Website**” means www.ticketmaster.ca.

2. The plaintiffs, on their own behalf and on behalf of the Class Members, claim:

- a) an Order certifying this proceeding as a national class proceeding and appointing them as the representative plaintiffs for the Class;
- b) a Declaration that the defendants are liable to the plaintiffs and the Class Members for:
 - i. breach of the Ontario *Consumer Protection Act* and Equivalent Consumer Protection Legislation;
 - ii. breach of contract/warranty;
 - iii. breach of the *Competition Act*;
 - iv. breach of the *Ticket Sales Act, 2017*;
 - v. conspiracy;
 - vi. negligence;
 - vii. unjust enrichment; and
 - viii. waiver of tort;
- c) general damages in an amount to be determined;
- d) special damages in an amount to be determined;
- e) punitive damages in the amount of \$75 million;
- f) costs of administering the plan of distribution of the recovery of this action in such amount as this Honourable Court finds appropriate;
- g) an Order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- h) pre-judgment interest and post-judgment interest, compounded, or pursuant to ss. 128-29 of the *CJA*;
- i) full costs pursuant to s. 36 of the *Competition Act*;

- j) costs of this action pursuant to the *CPA* or, in the alternative, on a substantial indemnity basis or, in the further alternative, in an amount that provides full indemnity, plus applicable taxes; and
- k) such further and other relief as this Honourable Court deems just.

THE PARTIES

The plaintiffs

3. The plaintiff Stacey Thompson-Marcial resides in Toronto, Ontario. On or about April 23, 2018, she purchased two Secondary Tickets on the Website to a Childish Gambino concert, for a total of \$313.56, a price well in excess of the face value of the tickets. Ticketmaster was the exclusive vendor of Primary Tickets to the concert. All Primary Tickets were almost immediately sold out. She purchased Secondary Tickets that were inflated in price compared to the face price, and paid Double-Dip Fees to the defendants.

4. The plaintiff Brian Smith resides in Toronto, Ontario. On or about June 30, 2018, they purchased two Secondary Tickets on the Website to a Foo Fighters concert, for a total of \$225.00 each plus service fees of \$42.75 each. Primary Tickets for this concert ranged in cost from \$49.00-\$99.00 each. Ticketmaster was the exclusive vendor of Primary Tickets to the Foo Fighters concert. Primary Tickets were almost immediately sold out. They purchased Secondary Tickets that were inflated in price compared to the face price, and paid Double-Dip Fees to the defendants.

The defendants

5. The defendant Ticketmaster Canada is an indirect, wholly-owned subsidiary of Live Nation Entertainment, Inc.

6. Ticketmaster Canada is in the business of online and telephone-based ticket sales, including operation of the Website, which is the largest source of tickets for Live Events throughout Canada.

Ticketmaster Canada is the company handling consumer transactions and collecting payments for tickets sold on the Website.

7. The defendant Ticketmaster LLC is a limited liability corporation organized under the laws of Virginia, and headquartered and carrying on business in West Hollywood, California. Ticketmaster LLC is the successor to a company of the same name organized under the laws of Delaware, and to Ticketmaster Corporation, which was another company also organized under the laws of Delaware.

8. From at least 2009 until approximately March 2013, Ticketmaster LLC controlled the domain name www.ticketmaster.ca and the associated Website. Ticketmaster LLC also offers the Ticketmaster App to consumers in Canada for download and use, through which both Primary Tickets and Secondary Tickets can be purchased.

9. Ticketmaster LLC developed, participated in or directed the development, promotion, maintenance, marketing and administration of TradeDesk and TradeDesk POS inventory management software. As described in this claim, Ticketmaster is aware through its use of TradeDesk and TradeDesk POS that Resellers obtain tickets in excess of prescribed ticket purchase limits, but it takes no action to stop them.

10. At all material times, the defendants functioned as an ongoing, organized and continuing business unit sharing common purposes and objectives. The defendants were agents of each other and each is vicariously responsible for the acts and omissions of the other as particularized herein.

FACTS

Overview

11. This is a class proceeding that seeks relief on behalf of Canadian consumers who unfairly paid excessive prices and fees to the defendants for Secondary Tickets. The defendants host a Live

Events ticket marketplace that they publicly represented and agreed in their Terms of Use and Purchase Policy would give all consumers a fair and equal chance of obtaining tickets. However, as explained below, these Representations and agreements were untrue. Although the defendants represented that they would strictly enforce their Terms of Use and Purchase Policy against all ticket purchasers, the defendants knew through Ticketmaster's TradeDesk and TradeDesk POS inventory management software that Resellers routinely breached the Ticketmaster Terms of Use and Purchase Policy by obtaining tickets in excess of prescribed limits. Although Ticketmaster had the means to confirm compliance with the Terms of Use and Purchase Policy through analysis of the TradeDesk and TradeDesk POS data, Ticketmaster knowingly failed to do so, or turned a blind eye to the issue.

12. Ticketmaster Canada sells Primary Tickets as an agent of third party clients such as musical artists, sports teams, event promoters, or event venues. The third party clients set the price of each Primary Ticket, as well as limits on how many Primary Tickets can be purchased per consumer. Ticketmaster collects and retains fees, including service fees and order processing fees, on each Primary Ticket sold. The amount of the fees collected by Ticketmaster are restricted by the terms of the contract with the third party client, and some of the fees may be shared with the third party client.

13. Ticketmaster obtains Double-Dip Fees on each Secondary Ticket sold through Ticketmaster sites.

14. Ticketmaster has dominated the market in Canada for the sale of Primary Tickets to Live Events tickets for many years.

15. Ticketmaster has also sought for many years to increase its market share and revenues arising from Secondary Tickets sold through Ticketmaster sites. It has succeeded in this respect.

Ticketmaster's policies

16. Ticketmaster Canada's Terms of Use and Purchase Policy set out the terms that apply when purchasing Live Events tickets. The Terms of Use and Purchase Policy and the Ticketmaster App are intended to create a fair and equal opportunity for all consumers seeking to acquire Primary Tickets and to prohibit mass ticket purchases by Resellers.

17. The Terms of Use state in part:

Code of Conduct

You agree that you will comply with all applicable laws, rules and regulations, and that **you will not:**

[...]

- **Order a number of tickets for an event that exceeds the stated limit for that event:**
- Use any password or code to participate in a presale or other offer on the Site if you did not receive the password or code from us or if you violate the terms of the presale or offer; or
- Use any area of the [Ticketmaster website, the "Site"] for commercial purposes, such as to conduct sales of tickets, products or services.

Ownership of Content and Grant of Conditional License

[...]

We grant you a limited, conditional, no-cost, non-exclusive, non-transferable, non-sublicensable license to view this Site and its Content as permitted by these Terms for non-commercial purposes only if, as a condition precedent, you agree that you will not:

[...]

- Use any robot, spider, offline reader, site search/retrieval application or other manual or automatic device, tool, or process to retrieve, index, data mine or in any way reproduce or circumvent the navigational structure or presentation of the Site or its contents, including with respect to any CAPTCHA displayed on the Site [...];
- Use any automated software or computer system to search for, reserve, buy or otherwise obtain tickets, tm ticket cash™, promotional codes, vouchers, gift cards or any other items available on the Site, including sending information from your computer to another computer where such software or system is active; [...]
- Access, reload or refresh transactional event or ticketing pages, or make any other request to transactional servers, more than once during any three-second interval;
- Request more than 1,000 pages of the Site in any 24-hour period, whether alone or with a group of individuals;

- Make more than 800 reserve requests on the Site in any 24-hour period, whether alone or with a group of individuals; [...]
- Use the Site or [its contents] in an attempt to, or in conjunction with, any device, program or service designed to circumvent any technological measure that effectively controls access to, or the rights in, the Site and/or [its contents] in any way including, without limitation, by manual or automatic device or process, for any purpose. [...]

Making Purchases

[...] You may not attempt to conceal your identity by using multiple Internet Protocol addresses or email addresses to conduct transactions on the Site. [...]

Violation of these Terms

We may investigate any violation of these Terms, including unauthorized use of the Site. We may provide law enforcement with information you provide to us related to your transactions to assist in any investigation or prosecution of you. We may take legal action that we feel is appropriate. You agree that monetary damages may not provide us a sufficient remedy and that we may pursue injunctive or other relief for your violation of these Terms. If we determine that you have violated these Terms or the law, or for any other reason or for no reason, we may cancel your account, delete all your User Content and prevent you from accessing the Site at any time without notice to you. If that happens, you may no longer use the Site or any Content. You will still be bound by your obligations under these Terms. You agree that we will not be liable to you or any third party for termination of your access to the Site or to your account or any related information, and we will not be required to make the Site or your account or any related information available to you. We may also cancel any ticket or merchandise order, and tickets or merchandise acquired through your order. We may refuse to honor pending and future purchases made from all accounts we believe may be associated with you, or cancel a ticket or ticket order associated with any person we believe to be acting with you, or cancel your ticket postings, or exercise any other remedy available to us.

18. The Terms of Use also refer to the Purchase Policy, which states that Ticketmaster Canada will verify the ticket limit during the purchase process “with every transaction”:

Services Fees and Order Processing Fees

[...] For Secondary Tickets, the buyer will pay fees that may be reflected during the purchase process or that may be included and deducted from the amount displayed as the resale price of the ticket.

Number of Tickets or “Ticket Limits”

When purchasing tickets on our Site, you are limited to a specified number of tickets for each event (also known as a “ticket limit”). This ticket limit is posted during the purchase process and is verified with every transaction. This policy is in effect to discourage unfair ticket buying practices. We reserve the right to cancel any or all orders and tickets without notice to you if you exceed the posted limits. This includes orders associated with the same name, e-mail address, billing address, credit card number or other information. [...]

Unlawful Resale of Tickets: Promotions

Unlawful resale (or attempted resale), counterfeit or copy of tickets is grounds for seizure and cancellation without compensation...You are responsible for complying with all applicable ticket

resale laws. In addition, we reserve the right to restrict or deny ticket purchasing privileges to anyone that we determine to be, or has been, in violation of our policies.

[emphasis added]

Ticketmaster's Representations

19. In addition to the Terms of Use and Purchase Policy, the defendants have consistently represented to the public and to the Class that they police the Live Events tickets marketplace to ensure all consumers a fair and equal chance of obtaining tickets and that the Terms of Use and Purchase Policy will be strictly enforced.

20. Ticketmaster represented that:

- a) "Individual ticket types and event ticket limits set by the venue, artist and promoter **will be enforced**" [emphasis added]; and

Source: Statement by Ticketmaster, titled "New! Real-Time Over the Ticket Limit Verification for All Events", online:
<<http://pages.tmclient.ticketmaster.com/realtimeotl/>>

- b) the defendants use technology with the aim of "warding off bots and scalpers";

Source: Statement by Ticketmaster, titled "New! Real-Time Over the Ticket Limit Verification for All Events", online:
<<http://pages.tmclient.ticketmaster.com/realtimeotl/>>

- c) "We believe it is our job to offer a marketplace that offers a safe and fair place for fans to shop, buy and sell tickets [...]."

Source: Statement by Ticketmaster, online: <<https://youtu.be/a0Mv2wqTh6A?t=385>>

21. Through its Terms of Use and Purchase Policy, Ticketmaster represented that:

- a) it would enforce its Terms of Use and Purchase Policy as against all ticket purchasers;
- b) it would enforce posted ticket limits as against all ticket purchasers;

- c) it prohibited the use of multiple accounts, “bot” software, or other automated ticket-buying methods to bypass stated ticket-buying limits, in order to discourage unfair ticket buying practices and to maximize the ability to purchase Primary Tickets;
- d) all consumers would have a fair and equal opportunity to purchase Primary Tickets;
- e) The Ticketmaster marketplace would be governed by terms and conditions (effectively, rules) to prevent or discourage unfair ticket buying practices;
- f) Ticketmaster would monitor and police the marketplace to ensure compliance with the terms and conditions; and
- g) the fees retained by Ticketmaster are levied in part to assist with developing and maintaining appropriate digital security measures to discourage and prohibit breaches of the Terms of Use and Purchase Policy by Resellers.

Ticketmaster’s TradeDesk program

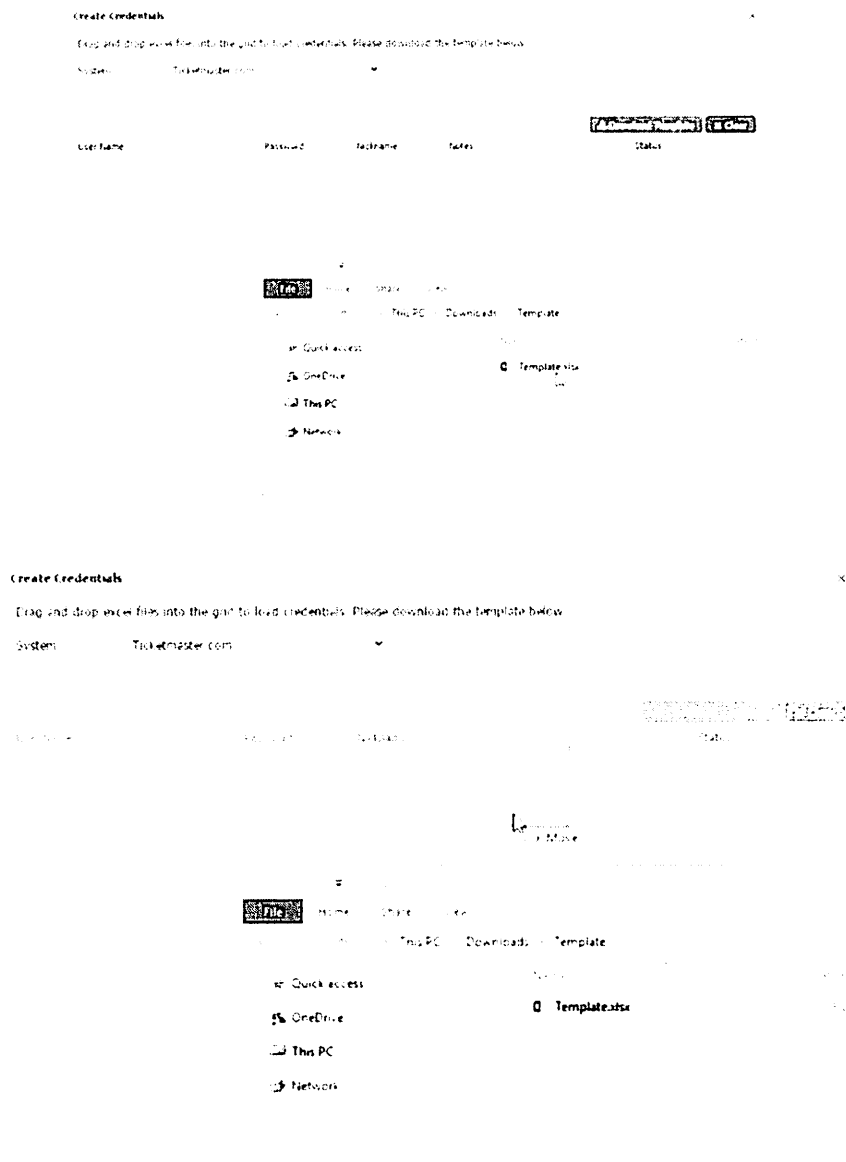
22. In or around January 1, 2015, Ticketmaster Canada and Ticketmaster LLC began making a program known as “TradeDesk” available to Resellers, at a Ticketmaster URL: <https://tradedesk.ticketmaster.com/>.

23. TradeDesk is a web-based inventory management system that allows Resellers to list large quantities of tickets purchased from Ticketmaster for resale quickly, enabling the selling of Secondary Tickets on an industrial scale. The TradeDesk homepage states that the program is “The Most Powerful Ticket Sales Tool. Ever.”

24. Every ticket to a particular Live Event, whether or not it is sold by Ticketmaster, has a barcode associated with the ticket. Ticketmaster has a record of all of the tickets and their associated barcodes. Through these records, Ticketmaster can distinguish between tickets sold on

its site and tickets sold directly by teams to season ticket holders and professional resellers that are not listed on the Ticketmaster site.

25. TradeDesk enables Resellers to aggregate tickets obtained from many different accounts, sometimes hundreds, and to list them for resale quickly and efficiently. The following sample still images from an earlier version of the TradeDesk software depict this process step by step, demonstrating the aggregation of tickets sourced from multiple accounts:



Drag and drop excel files into the grid to load credentials. Please download the template below.

System: Ticketmaster.com

User Name	Password	Nickname	Notes	Status
myaccount@email.com	mypassword	myaccount@ema		X
myaccount2@email.com	mypassword	myaccount2@em		X
myaccount3@email.com	mypassword	myaccount3@em		X
myaccount4@email.com	mypassword	myaccount4@em		X
myaccount5@email.com	mypassword	myaccount5@em		X
myaccount6@email.com	mypassword	myaccount6@em		X
myaccount7@email.com	mypassword	myaccount7@em		X

Buttons: Download Template, Clear, Cancel, Create

26. Through this account aggregation process, called “Sync,” Ticketmaster has the ability to trace the origin of the tickets. Indeed, one of the primary purposes of TradeDesk is to verify that the tickets are authentic so they can be resold to customers with the confidence they are purchasing legitimate and valid tickets. “Sync” also gives Ticketmaster the ability to determine if the tickets were obtained contrary to Ticketmaster’s Terms of Use and Purchase Policy, but Ticketmaster chooses to not do so. Although Ticketmaster’s TradeDesk Account Managers know that Resellers use TradeDesk to list thousands of tickets that have been obtained contrary to ticket limits, Ticketmaster deliberately decides to turn a blind eye to the knowledge obtained through TradeDesk or to share information with persons or entities responsible for running the Ticketmaster site for primary ticket sales.

27. TradeDesk and its data provides invaluable information to Ticketmaster to enable it to investigate and determine if a Reseller has breached the Terms of Use and Purchase Policy. Ticketmaster knowingly decided to not use or share the TradeDesk data within the Ticketmaster

corporate group to determine if Resellers were complying with the Terms of Use and Purchase Policy. Ticketmaster turned a blind eye to the breaches of the Terms of Use and Purchase Policy that it detected through its TradeDesk inventory management software, because this would dissuade Resellers' use of TradeDesk, through which Ticketmaster generated fees and profits and sought to further increase its market shares.

28. Ticketmaster also provides an additional program called TradeDesk POS, which is a web-based point of sale system for Resellers that assists with distributing inventory to various secondary marketplaces (including marketplaces unaffiliated with Ticketmaster, such as StubHub, Vivid Seats and others), fulfillment of orders and integration with accounting systems. Ticketmaster acquired and re-branded TradeDesk POS on May 1, 2017.

29. Ticketmaster has retained data from its TradeDesk and TradeDesk POS systems to enable the data to be analyzed in order to determine the nature and extent of the breaches of the Terms of Use and Purchase Policy. Ticketmaster has also retained e-mails from its TradeDesk and TradeDesk POS Account Managers, who oversee the daily business needs of Resellers and are assigned to sellers by regions. These e-mails further demonstrate Ticketmaster's knowledge of the breach of the Terms of Use and Purchase Policy.

Investigations into Ticketmaster's business practices

2016 investigation by the NYAG

30. In response to consumer complaints regarding the ticket resale industry, the NYAG commenced an investigation into the ticket resale industry and the process by which event tickets are distributed in the state of New York.

31. In January 2016, the NYAG published its report of findings from its investigation, entitled "Obstructed View: What's Blocking New Yorkers from Getting Tickets?" Among the findings

and conclusions in its report, which are equally applicable to the Canadian market and which are pleaded, relied upon and adopted herein, the NYAG stated:

- a) "Ticketing, to put it bluntly, is a fixed game";
- b) "NYAG has identified many instances in which Bots were able to purchase hundreds of tickets within moments of the release of tickets to the general public [...]";
- c) "The sources we interviewed uniformly stated that the usage of Bots has reached epidemic proportions in the ticketing industry";
- d) "Ticket limits are not regularly enforced [by Ticketmaster]";
- e) "In most cases, by examining the volume of resale business a reseller conducts, resale platforms can easily distinguish professional resellers [...] from fans that are simply reselling tickets purchased for their own personal use"; and
- f) "Some of the suggestions [provided by the NYAG to Ticketmaster] included investigating resellers regularly offering numbers of tickets to popular shows, among others."

32. Data from TradeDesk and TradeDesk POS facilitates Ticketmaster's ability to investigate, police and enforce these breaches of Ticketmaster's Terms of Use and Purchase Policy, but Ticketmaster has deliberately and knowingly decided to not use TradeDesk or TradeDesk POS for this purpose because it would negatively impact its profits and Secondary Sales. Although Ticketmaster represents that it takes all steps possible to ensure a fair and equal ticket marketplace, these representations were untrue because it turned a blind eye to the TradeDesk and TradeDesk POS data.

Investigation by CBC News and the Toronto Star

33. On September 19, 2018, CBC News and the *Toronto Star* announced that their reporter(s) posed undercover as Resellers at a ticket convention in Las Vegas, Nevada, and spoke with Ticketmaster representatives on or about July 19, 2018. Among other things, the undercover video (located at <https://www.youtube.com/watch?v=M7say8OnfKE>) uncovered that:

- a) When asked “I want to know the straight goods on whether Ticketmaster is going to be policing us using our multiple accounts,” a Ticketmaster TradeDesk representative stated: “Uh, No. I have a gentleman who’s got over 200 ticketmaster.com accounts right into the point of sale who syncs his tickets in every day”;
- b) When asked “How many brokers are using multiple accounts?,” the Ticketmaster representative stated “I’d say pretty damn near every one of them. [...] Yeah, I mean I can’t think of any of my clients that aren’t using multiple – I mean you have to because you want to get a good show, the ticket limit is 6 or 8 ... You’re not going to make a living on 8 tickets.”
- c) The Ticketmaster representative further stated that “The policing of bots, going after those types of things, falls completely on the primary side. We have no input on it, no involvement with it. [...] We don’t share reports, we don’t share names, we don’t share account information with the primary side period.”
- d) A further investigative video dated July 18, 2018 (located at <https://www.youtube.com/watch?v=a0Mv2wqTh6A>) revealed the following:
 - i. In response to the question “How many tickets do I need to move to make this worthwhile,” a Ticketmaster representative stated “I’ve brought in

people that are extremely small that have just had a few sets of tickets and just had the gumption to try and they become pretty good partners for me, doing half a million of whatever [in total sales].”

- ii. The Ticketmaster representative stated: “We’ve spent millions of dollars on this [TradeDesk] tool, so that last thing we want to do is, you know, get brokers caught up to where they can’t sell inventory with us. Or kind of like another way to think of it, we’re not trying to build a better mousetrap.”
- iii. The Ticketmaster representative further stated: “I think our biggest broker right now has probably grabbed five million.”

34. After the *CBC/Toronto Star* investigation, Ticketmaster LLC stated that it would conduct an internal review of its Resellers’ accounts and employee practices “to ensure that [Ticketmaster] policies are being upheld by all stakeholders.” It further stated: “Moving forward [Ticketmaster] will be putting additional measures in place to proactively monitor for this type of inappropriate activity.”

Ticketmaster’s deception

35. The defendants hold themselves out publicly as providing an equal and fair opportunity for all consumers to acquire Primary Tickets, including through the verification and enforcement of Ticketmaster’s Terms of Use and Purchase Policy, and taking extensive digital security measures to discourage and prohibit mass purchases of Primary Tickets by Resellers.

36. Ticketmaster knows or is willfully blind to the fact that virtually all of the Resellers using TradeDesk or TradeDesk POS purchase large quantities of Primary Tickets by using multiple Ticketmaster accounts, “bot” or other software tools, and/or other prohibited methods, contrary to Ticketmaster’s Terms of Use and Purchase Policy. Ticketmaster has the means to detect unfair

purchasing of Primary Tickets through TradeDesk or TradeDesk POS but it deliberately chooses not to use these tools for this purpose.

37. Consumers have been deceived by Ticketmaster, which fails to verify ticket sales limits and enforcement of the Terms of Use and Purchase Policy by Resellers through the TradeDesk and TradeDesk POS data. Through its administration of TradeDesk and TradeDesk POS, Ticketmaster knows that Resellers routinely acquire Primary Tickets in excess of ticket sales limits and in violation of the Terms of Use and Purchase Policy. Ticketmaster does not enforce the rules because the defendants receive substantial profits from facilitating the interests of Resellers, including by collecting and retaining fees from the Reseller on the sale of Primary Tickets, and then collecting and retaining Double-Dip Fees from both the Reseller and the end consumer on Secondary Tickets sold through Ticketmaster sites, and by increasing its market share through the use of TradeDesk and TradeDesk POS.

RIGHTS OF ACTION

Breach of the Ontario *Consumer Protection Act* and Equivalent Consumer Protection Legislation

38. The Consumer Class Members purchased Secondary Tickets for personal, family or household purposes, and are “consumers” as defined by s. 1 of the Ontario *Consumer Protection Act* and/or equivalent provisions of the Equivalent Consumer Protection Legislation.

39. Ticketmaster Canada is in the business of selling Secondary Tickets and is a “supplier” as defined by s. 1 of the Ontario *Consumer Protection Act* and/or equivalent provisions of the Equivalent Consumer Protection Legislation. The other defendant is an agent of Ticketmaster Canada for the purposes of supplying tickets to consumers in Canada.

40. With each Secondary Ticket purchase, the defendants entered into consumer agreements or consumer transactions, as defined by s. 1 of the Ontario *Consumer Protection Act* and/or equivalent provisions of the Equivalent Consumer Protection Legislation.

41. The contracting defendant Ticketmaster Canada is located in Ontario, for the purposes of s. 2(1) of the Ontario *Consumer Protection Act*. As a result, pursuant to s. 2(1), the Ontario *Consumer Protection Act* applies to all of the Consumer Class Members across Canada.

42. In the alternative, the plaintiffs plead that the Terms of Use adopt the law of Ontario, and that the Ontario *Consumer Protection Act* therefore applies to all of the Consumer Class Members across Canada.

43. In the further alternative, the plaintiffs plead that the Consumer Class Members resident outside of Ontario are consumers under the Equivalent Consumer Protection Legislation, as applicable to their province of residence.

44. Throughout the Class Period, Ticketmaster made the Representations on the Website and the Ticketmaster App, through its Terms of Use and Purchase Policy, in advertisements, and in public statements, as particularized in paragraphs 20-21 above, which are representations as set out in s. 1 of the Ontario *Consumer Protection Act* and/or equivalent provisions of the Equivalent Consumer Protection Legislation.

45. Throughout the Class Period, there have been webpages on the Website containing the full text of the Terms of the Use and the Purchase Policy, which contain statements that they are binding on all purchasers and vendors of both Primary Tickets and Secondary Tickets sold through Ticketmaster.

46. Throughout the Class Period, the Website has stated that all Primary Ticket and Secondary Ticket purchases sold through Ticketmaster are subject to the Terms of Use, which incorporate the Purchase Policy by reference.

47. Ticketmaster advertises the sale of Primary Tickets for many Live Events across Canada through its Website, automated emails, the Ticketmaster App, internet advertisements, and radio, print and television advertisements.

48. Throughout the Class Period, Ticketmaster made the Representations to consumers, as described in this claim. The Representations were false, misleading, deceptive and constituted unconscionable representations, contrary to ss. 14 and 15 of the Ontario *Consumer Protection Act* and/or Equivalent Consumer Protection Legislation because:

- a) Ticketmaster knew through the data in its TradeDesk and TradeDesk POS software that Resellers violated the Terms of Use and Purchase Policy to exceed stated ticket-buying limits;
- b) Ticketmaster knew through the data in its TradeDesk and TradeDesk POS software that it did not maintain a marketplace which was designed to prevent or discourage unfair ticket buying practices, nor did it monitor or enforce the Terms of Use or Purchase Policy; and
- c) Ticketmaster knew that the data in its TradeDesk and TradeDesk POS could be used to determine if Resellers violated the Terms of Use and Purchase Policy to exceed stated ticket-buying limits, but ignored or turned a blind eye to the TradeDesk and TradeDesk POS data.

49. As a result of the defendants' false, misleading, deceptive and unconscionable Representations, Class Members purchased Secondary Tickets at significantly higher prices than

the face price of Primary Tickets, and paid Double-Dip Fees on Secondary Tickets resold through Ticketmaster, as the plaintiffs did for the Foo Fighters and Childish Gambino concerts.

50. To the extent necessary, Class Members are entitled to a waiver of any notice requirements under s. 18(15) of the Ontario *Consumer Protection Act* and/or equivalent provisions of the Equivalent Consumer Protection Legislation, as the defendants concealed the actual state of affairs from Class Members.

51. Class Members are entitled to damages pursuant to s. 18 of the Ontario *Consumer Protection Act* and/or equivalent provisions of the Equivalent Consumer Protection Legislation.

52. The plaintiffs and Class Members have suffered damages in the amount of the difference between the price of the Secondary Tickets and the Primary Tickets, including the Double-Dip Fees, and are entitled to recovery pursuant to the Ontario *Consumer Protection Act* and/or equivalent provisions of the Equivalent Consumer Protection Legislation. In the alternative, the plaintiffs and Class Members claim common law damages including restitutionary damages.

53. In addition, the Class Members are entitled to exemplary or punitive damages pursuant to s. 18(11) of the Ontario *Consumer Protection Act* and/or equivalent provisions of the Equivalent Consumer Protection Legislation.

Quebec

54. The Quebec *Consumer Protection Act* applies to the Quebec Merchant Subclass Members.

55. With respect to the Quebec Merchant Subclass Members and the Consumer Class Members resident in Quebec, the defendants' unlawful conduct as particularized herein is also contrary to:

- a) s. 236.1(b) of the Quebec *Consumer Protection Act*, because the Double-Dip Fees collected by Ticketmaster on Secondary Ticket sales are not compliant with the

agreements which Ticketmaster has with its third party event provider clients for the sale of Primary Tickets; and

- b) s. 236.2 of the Quebec *Consumer Protection Act*, because Ticketmaster permits and facilitates the resale of tickets obtained using “software enabling the purchase of tickets by circumventing a security measure or control system put in place by the producer of a show or by the seller authorized by the producer”.

Breach of contract/warranty

56. Ticketmaster Canada entered into standard form Contracts with the Class Members for the purchase of certain Secondary Tickets. The Contracts are comprised of the Terms of Use and Purchase Policy.

57. Among other things, the Terms of Use provide that:

- a) ticket purchasers must comply with stated ticket-buying limits;
- b) ticket purchasers must not use the Website for commercial purposes, such as the purchasing and selling of tickets *en masse*;
- c) ticket purchasers must not use any means, such as multiple accounts, “bots” or automated software, to navigate, search, purchase and otherwise use the Website;
- d) ticket purchasers must not use any type of technology to circumvent Ticketmaster’s policies, including the stated ticket-buying limits; and
- e) ticket purchasers must not conceal their identity when conducting transactions on the Website.

58. The Purchase Policy is incorporated by reference into the Terms of Use and provides, among others, that:

- a) ticket purchasers are limited to a specified number of tickets in efforts to “discourage unfair ticket buying practices”;
- b) Ticketmaster will “verify” the posted ticket limit “with every transaction”;
- c) ticket purchases may be cancelled without notice if purchasers exceed the posted ticket-buying limits;
- d) the unlawful resale of tickets constitutes grounds for seizure and cancellation without compensation; and
- e) Ticketmaster reserves the right to restrict or deny ticket purchasing privileges to anyone who violates Ticketmaster policies.

59. Ticketmaster’s policies, as pleaded, are in effect “to discourage unfair ticket buying practices”. Accordingly, it was an implied term of the Contracts that all prospective ticket purchasers would be treated fairly and equally, including enforcement of the Terms of Use and Purchase Policy in respect of all ticket buyers. Specifically, the Contracts contain an express or implied condition/promise or warranty that all Ticketmaster Canada transactions would take place in accordance with the Terms of Use and Purchase Policy, including a prohibition on any purchasers, including Resellers, violating the Terms of Use and Purchase Policy.

60. It was also an express or implied term of the Contracts that Ticketmaster Canada would not conspire, agree or arrange with professional Resellers or others, or encourage or acquiesce to the violation of the Terms of Use or Purchase Policy by professional Resellers.

61. Ticketmaster Canada owed a duty to act honestly in the performance of its contractual obligations, in accordance with the reasonable expectations of the parties. It was within the reasonable expectations of the parties that Ticketmaster Canada and related corporations would enforce the posted ticket limits, the Terms of Use and the Purchase Policy honestly and

consistently, not selectively or arbitrarily to favour Resellers to the detriment of consumers, including through the use of defendants' TradeDesk and TradeDesk POS software to detect whether the Terms of Use and Purchase Policy had been complied with by Resellers.

62. The plaintiffs and the Class Members purchased certain Secondary Tickets in a market controlled by and established by the defendants. In order to maintain the integrity of the market and to provide all prospective purchasers of Live Events tickets with an equal opportunity to purchase face value Primary Tickets, it was essential that all Ticketmaster Canada transactions take place in accordance with the terms of the Contracts (*i.e.* the Terms of Use and Purchase Policy), including that Ticketmaster would enforce the Purchase Policy and Terms of Use in respect of all ticket buyers, including professional Resellers, including through using the data in Ticketmaster's TradeDesk and TradeDesk POS software in order to determine if Resellers breached the Terms of Use and Purchase Policy.

63. In the context of the Purchase Policy and Terms of Use, it was within the reasonable expectation of the Class Members that Secondary Tickets were being offered for sale after they had been purchased as Primary Tickets in compliance with the Terms of Use and Purchase Policy.

64. Ticketmaster Canada breached the Contracts by permitting Resellers to purchase Primary Tickets in excess of stated limits, in violation of the Terms of Use and Purchase Policy. Through its administration of the TradeDesk and TradeDesk POS software, Ticketmaster Canada knew Resellers acquired Live Event tickets in excess of stated limits, contrary to the Terms of Use and the Purchase Policy.

65. Ticketmaster Canada failed to act in the good faith performance of the Contracts and failed to have appropriate regard to the legitimate contractual interests of the plaintiffs and the Class Members. Rather, Ticketmaster Canada undermined the Class Members' interests in bad

faith by failing to use the TradeDesk and TradeDesk POS software in order to determine if Resellers breached the Terms of Use and Purchase Policy. Indeed, Ticketmaster Canada itself described the conduct revealed in the *CBC/Toronto Star* investigation related to TradeDesk as “inappropriate”.

66. Ticketmaster Canada knowingly misled the plaintiffs and the Class Members about matters directly linked to the performance of the Contracts, and therefore breached its general duty of honesty in contractual performance.

67. As a result of Ticketmaster Canada’s breach of its Contracts with the Class Members, the plaintiffs and the Class Members have sustained damages in the amount of the difference in price between the Primary Tickets and Secondary Tickets, and the payment of Double-Dip Fees. In the alternative, the plaintiffs and Class Members claim common law damages including restitutionary damages.

68. The plaintiffs plead that the law of breach of contract of all common law provinces and territories is the same as the law of Ontario.

Quebec

69. The plaintiffs plead that the defendant Ticketmaster Canada’s breach of the Contracts, as particularized herein, is in contravention of art. 1458 of the *CCQ*.

Breach of s. 52 of the *Competition Act*

70. Ticketmaster knowingly or recklessly made false or materially misleading representations to the public, including the Class Members, for the purposes of promoting the use of their ticket purchasing services and/or for the purpose of promoting their business interests, contrary to s. 52 of the *Competition Act*.

- a) Throughout the Class Period, Ticketmaster made the Representations to the public. The Representations were false and materially misleading because Ticketmaster knew through its TradeDesk and TradeDesk POS software that Resellers violated the Terms of Use and Purchase Policy to exceed stated ticket-buying limits.

71. Ticketmaster's Representations were false or misleading in a material respect, contrary to s. 52 of the *Competition Act* because Ticketmaster knew through the data in its TradeDesk and TradeDesk POS software that Resellers violated the Terms of Use and Purchase Policy to exceed stated ticket-buying limits. Ticketmaster knew of these practices based on its administration and management of the TradeDesk and TradeDesk POS platform, among other things.

72. The Representations created the impression that consumers, including the Class Members, had a fair and equal opportunity with Resellers to acquire Live Event tickets at face value, when this was not true. The Representations were false, misleading and/or deceptive. Through their administration and management of the TradeDesk and TradeDesk POS software, the defendants knew Resellers violated the Terms of Use and Purchase Policy to purchase tickets in excess of posted ticket limits.

Damages

73. The plaintiffs claim on their own behalf, and on behalf of the other Class Members, loss and damage and full costs under s. 36(1) of the *Competition Act* as a result of the breach of s. 52 of the *Competition Act*.

Negligence

74. As pleaded above, the plaintiffs and the Class Members purchased certain Secondary Tickets in a market controlled by and established by the defendants. The defendants have implemented standard terms for ticket purchasers (the Terms of Use and Purchase Policy), which

define the conditions under which Ticketmaster will accept offers to purchase Live Events tickets. In these circumstances, the defendants owed a duty of care to the plaintiffs and the Class Members to ensure that professional Resellers complied with the Terms of Use and Privacy Policy and particularly, the posted ticket limits.

75. There is a sufficient degree of proximity to establish a duty of care because:

- a) the Class Members were users of the defendants' services;
- b) the defendants agreed to provide standard terms applicable to all purchasers of Live Event tickets, which invited the plaintiffs and the Class Members' reasonable reliance on the defendants' consistent enforcement of posted ticket limits, including through policing of the Terms of Use and Purchase Policy for all purchasers;
- c) in the circumstances, it was reasonable for the plaintiffs and the Class Members to expect that the defendants would take reasonable care in the provision of their ticket purchasing services;
- d) in the circumstances, it was reasonable for the plaintiffs and the Class Members to expect that the defendants would monitor compliance with the Terms of Use and Purchase Policy for all purchasers through review and analysis of the data in its TradeDesk and TradeDesk POS software;
- e) the Class Members were entirely vulnerable to the defendants' practices with respect to enforcement of posted ticket limits and the enforcement of the Terms of Use and Purchase Policy;
- f) by establishing and publishing the Terms of Use and Purchase Policy, the defendants promised that they would be bound by them;

- g) there was a contractual relationship between certain Class Members and the defendant Ticketmaster Canada; and
- h) the defendants were aware of the identities of the Class Members.

76. It was reasonably foreseeable to the defendants that, if they failed to monitor compliance with the Terms of Use and Purchase Policy through the analysis of data in the TradeDesk and TradeDesk POS software, Resellers would systematically violate the Terms of Use and Purchase Policy, causing the Class Members to sustain damages, such that the defendants were under an obligation to be mindful of the Class Members when deciding whether to monitor compliance with the Terms of Use and Purchase Policy.

77. In particular, the defendants knew, or ought to have known that, if they failed to implement appropriate measures, policies and procedures to monitor compliance with the Terms of Use and Purchase Policy through the analysis of data in the TradeDesk and TradeDesk POS software, Resellers would systematically violate the Terms of Use and Purchase Policy to move tickets from the primary market to the secondary market *en masse*, including through the use of the TradeDesk and TradeDesk POS software, resulting in the Class Members sustaining damages in the form of over-payment for Secondary Tickets, including Double-Dip Fees, in the absence of availability of Primary Tickets to purchase at face value.

78. The defendants breached their duty of care, particulars of which include, *inter alia*:

- a) they failed to use data in the TradeDesk and TradeDesk POS software to monitor compliance with the Terms of Use and Purchase Policy;
- b) they created TradeDesk and TradeDesk POS without regard to Ticketmaster's knowledge of the breaches of the Terms of Use and Purchase Policy by Resellers that;

- c) they allowed Resellers to engage in the *en masse* purchase and resale of Primary Tickets in circumstances where they knew that it was reasonable for Class Members to expect that the defendants were monitoring compliance by Resellers with the Terms of Use and Purchase Policy; and
- d) with regard to the defendant Ticketmaster Canada, it breached the Contracts, as particularized above.

79. As a result of the defendants' negligence, the Class Members sustained damages in the form of over-payment for Secondary Tickets, including Double-Dip Fees, as described below.

80. The plaintiffs plead and rely on the *Negligence Act*, and equivalent provincial and territorial legislation. The plaintiffs plead that the law of negligence of all common law provinces and territories is the same as the law of Ontario.

Quebec

81. The plaintiffs plead that the defendants' lack of diligence and prudence, as particularized herein, is in contravention of art. 1457 of the *CCQ*.

Breach of the *Ticket Sales Act, 2017*

82. The plaintiffs plead that, with regard to the Class Members resident in Ontario, the defendants breached s. 4 of the *Ticket Sales Act, 2017*, which prohibits persons from using software, including bots and other automated ticket purchasing software, intended to circumvent security measures that are used to ensure an equitable ticket buying process.

83. Contrary to s. 4(3) of the *Ticket Sales Act, 2017*, through the use of the TradeDesk and TradeDesk POS software, among other things, the defendants knowingly made tickets available for sale or facilitated the sale of tickets that were obtained through the use of software prohibited by s. 4(1) of the *Ticket Sales Act, 2017*.

84. As a result of this breach, Class Members resident in Ontario are entitled to damages pursuant to s. 11(3) of the *Ticket Sales Act, 2017*, including restitution and exemplary and/or punitive damages.

Conspiracy

85. The defendants and unnamed professional Resellers voluntarily entered into agreements with each other to use unlawful means, which resulted in loss and damage, including special damages, to the plaintiffs and other Class Members. The unlawful means were to violate the Applicable Ticket Sales Legislation, including s. 60 of the *Amusements Act, C.C.S.M., c. A70*, as amended; s. 7(2) of the Saskatchewan *Ticket Sales Act*; ss. 236.1, 236.2, and 236.4 of the Quebec *Consumer Protection Act*; ss. 2(a) and 2(b) of the *Ticket Speculation Act, R.S.O. 1990, c. T.7*, as amended (until its repeal on July 1, 2018); and s. 4 of the *Ticket Sales Act, 2017* (commencing with its coming into force on July 1, 2018).

86. The defendants and their unnamed co-conspirators carried out the following acts in furtherance of the conspiracy:

- a) developed and maintained tools, including the TradeDesk and TradeDesk POS, to assist Resellers in the purchase of Primary Tickets and the sale of Secondary Tickets;
- b) referred to Resellers on the TradeDesk and TradeDesk POS software as Ticketmaster's "partners"; and
- c) agreed that data on the TradeDesk and TradeDesk POS software would not be used to monitor compliance with the Terms of Use and Purchase Policy.

87. The defendants knew, or ought to have known, that their overt and covert acts as particularized above facilitated the Resellers' unlawful conduct pursuant to the Applicable Ticket

Sales Legislation. The defendants agreed and conspired to assist the Resellers' contravention of the Applicable Ticket Sales Legislation by agreeing to turn a blind eye to their activities by agreeing to not use TradeDesk and TradeDesk POS to detect them.

88. The plaintiffs state that the law governing the tort of conspiracy for all defendants is the common law of Ontario because Ticketmaster Canada is headquartered in Ontario, and Ontario is the *situs* of the tort. In the alternative, the plaintiffs plead that the law of conspiracy of all common law provinces and territories is the same as the law of Ontario.

Damages

89. The acts in furtherance of the conspiracy caused injury and loss to the plaintiffs and the Class Members in the amount of the difference between the price of the Secondary Tickets, including the Double-Dip Fees, and the Primary Tickets.

90. As a result of the conspiracy, the defendants are jointly and severally liable.

Quebec

91. The plaintiffs plead that the defendants' unlawful means conspiracy, as particularized herein, is in contravention of art. 1457 of the *CCQ*.

Unjust enrichment

92. The defendants' conduct particularized herein caused Class Members to pay well in excess of the face value of tickets to Live Events, which, in the case of Secondary Tickets on the Website or the Ticketmaster App, included Double-Dip Fees. As a result of their conduct, the defendants were enriched by the payment of Double-Dip Fees.

93. The plaintiffs and Class Members have suffered corresponding deprivation and loss.

94. There is no juristic reason for the defendants' enrichment and the Class Members' corresponding deprivation. The Class Members are entitled to restitution as a result of the defendants' unjust enrichment.

DAMAGES

95. The defendants' negligence, conspiracy, breach of contract/warranty, breaches of consumer protection legislation, breaches of the *Competition Act*, and unjust enrichment have caused the plaintiffs and Class Members to suffer general, special and punitive damages for which the defendants are liable.

96. The plaintiffs and Class Members suffered damages, including:

a) the difference in the price of Secondary Tickets versus the price of Primary Tickets;

and

b) the Double-Dip Fees collected by Ticketmaster on the sale of Secondary Tickets.

97. The defendants' conduct, as particularized above, was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, willful, and in complete disregard of the rights of the Class Members and, as such, renders the defendants liable to pay punitive damages.

98. The plaintiffs claim aggregate damages as an appropriate remedy pursuant to the *CPA*. The aggregate or a part of the defendants' liability can reasonably be determined without proof by class members.

Waiver of tort

99. In the alternative to damages, in all of the circumstances, the plaintiffs plead an entitlement to "waive the tort" and claim an accounting or other such restitutionary remedy for disgorgement of the revenues generated by the defendants as a result of their negligence and unlawful conspiracy.

100. As a direct, proximate, and foreseeable result of the defendants' wrongful conduct, the plaintiffs and other Class Members overpaid for Live Events tickets, including Double-Dip Fees. As a result of the defendants' negligence and unlawful conspiracy, the defendants profited from the sale of Secondary Tickets on their Website and on the Ticketmaster App at *supra*-competitive and artificially inflated prices, and were accordingly unjustly enriched. The defendants accepted and retained the unlawful revenues that resulted from their negligence and unlawful conspiracy. It would be unconscionable for the defendants to retain the resulting unlawful revenues that they obtained.

DISCOVERABILITY

101. The plaintiffs and the Class Members did not discover, and could not have discovered through the exercise of reasonable diligence, the existence of the breaches particularized herein during the Class Period.

STATUTES RELIED UPON BY THE PLAINTIFFS

102. The plaintiffs plead and rely upon the *CJA*, *Competition Act*, *CPA*, *Negligence Act*, Ontario *Consumer Protection Act* and Equivalent Consumer Protection Legislation, Applicable Ticket Sales Legislation, and other equivalent provincial and territorial legislation, and such further and other statutes as counsel may advise.

SERVICE OF FOREIGN DEFENDANTS

103. Pursuant to r. 17.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the plaintiffs plead and rely upon rr. 17.02(f), 17.02(g) and 17.02(p) in support of the service of the Notice of Action and this Statement of Claim upon the defendant Ticketmaster LLC outside of Ontario without a court order.

September ____, 2020

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Court File No. CV-18-00605906-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

SECOND FRESH AS AMENDED CONSOLIDATED
STATEMENT OF CLAIM

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