CITATION: Thompson-Marcial v. Ticketmaster Canada LP, 2024 ONSC 2305
COURT FILE NO.: CV-18-00605906-00CP
DATE: 20240419

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: STACEY THOMPSON-MARCIAL AND BRIAN SMITH, Plaintiffs

AND:

TICKETMASTER CANADA LP and TICKETMASTER LLC, Defendants

BEFORE: Justice Glustein

COUNSEL: *Jean-Marc Leclerc, Caleb Edwards and Mohsen Seddigh*, for the plaintiffs

Christopher Richter, James Gotowiec and Alina Butt, for the defendants

Iqbal S. Brar and Christine Nasroui (counsel for the attendee, Crystal Watch in *Watch v. Live Nation Entertainment Inc.*, QBG-RG-00679-2018) (by videoconference)

HEARD: March 4-6, 2024

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REASONS FOR DECISION

NATURE OF THE MOTION AND OVERVIEW

[1] The plaintiffs Stacey Thompson-Marcial and Brian Smith bring this motion under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*Class Proceedings Act*") for certification of the proposed class action against the defendants Ticketmaster Canada LP ("Ticketmaster Canada") and Ticketmaster LLC (collectively, "Ticketmaster").

[2] The proposed class consists of all purchasers in Canada of "Secondary Tickets", i.e., live performance event tickets in Canada initially purchased through Ticketmaster or one of its affiliates[1] and subsequently resold through Ticketmaster or one of its affiliates, from January 1, 2015 or the date on which Ticketmaster launched TradeDesk (defined below) and ongoing.

[3] The plaintiffs allege that Ticketmaster knew that many professional resellers routinely violated ticket limits on primary market sales through Ticketmaster.ca,[2] by using multiple accounts under their control or "bots".[3] The plaintiffs allege that Ticketmaster knew that it had data available through its ticket inventory management system marketed to professional resellers known as TradeDesk or TradeDesk POS (collectively, "TradeDesk") which would have enabled Ticketmaster to determine whether professional resellers were using multiple accounts or bots to avoid ticket limits in the primary market.

[4] The plaintiffs allege that Ticketmaster knowingly or deliberately facilitated or turned a blind eye to professional resellers who purchased Primary Tickets contrary to ticket limits. The plaintiffs allege that Ticketmaster chose not to use the data to remove those professional resellers as purchasers from the primary market.

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[1] I refer to live event tickets in Canada purchased in the primary market when initially listed for sale through Ticketmaster or one of its affiliates as "Primary Tickets".

[2] Ticketmaster operates a technology platform accessible through its website at Ticketmaster.ca and related mobile apps that allows for the purchase of Primary and Secondary Tickets. In these reasons, I refer to these purchases collectively as being conducted through Ticketmaster.ca.

[3] A "bot" is software that automates ticket-buying on platforms such as Ticketmaster.ca. As described in the 2016 Report from the Office of the New York State Attorney General titled "Obstructed View: What's Blocking New Yorkers from Getting Tickets" (the "NYAG Report"), a bot performs hundreds of thousands of transactions simultaneously, using hundreds of purchaser names (real or invented), addresses and credit card numbers, which crowd out consumer purchasers: at pp. 8, 15-16. By way of example, one bot purchased over 1,000 tickets in one minute for a 2015 U2 concert at Madison Square Garden in New York City, and over 15,000 tickets in one day for the same U2 tour across North America (NYAG Report, at p. 18).

[5] In September 2018, the Canadian Broadcasting Corporation ("CBC") and the Toronto Star announced the results of a joint investigation, which included both video[4] and newspaper reports (the "Media Investigation"). In the Media Investigation, undercover investigative reporters attended a trade show in Las Vegas in July 2018 posing as professional resellers. TradeDesk representatives gave the reporters (believing them to be professional resellers) assurances that Ticketmaster would not use any data in TradeDesk to enforce the use of multiple accounts or bots by professional resellers in the primary market.

[6] The use of multiple accounts and bots is prohibited under Ticketmaster's Terms of Use ("TOU") and Purchase Policy ("PP").

[7] The factual background discussed above has given rise to class actions in (i) British Columbia: *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699 and the appeal decision in *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274,[5] (ii) Saskatchewan: *Watch v. Live Nation Entertainment Inc.*, 2022 SKKB 259, leave to appeal granted July 31, 2023,[6] and (iii) Quebec: see the stay decision in *McPhee v. Live Nation Entertainment Inc.*, 2019 QCCS 3820.

[8] The plaintiffs plead causes of action for breach of contract, misrepresentations under both the *Competition Act*, R.S.C. 1985, c. C-34 (the "*Competition Act*") and consumer protection legislation, breach of provincial ticketing legislation, unlawful means conspiracy, negligence, and unjust enrichment.

[9] At the hearing, Ticketmaster made 16 objections to certification. Ticketmaster:

(i) raised six objections under s. 5(1)(a),[7] submitting that all of the claims except unjust enrichment do not disclose a cause of action,

(ii) objected to certification of the proposed class under s. 5(1)(b) on the basis that it is overbroad,

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[4] A shorter version of the video from the Toronto Star is located at https://www.youtube.com/watch?v=M7say8OnfKE, with a longer version of the "CBC News Investigates" video located at https://www.youtube.com/watch?v=a0Mv2wqTh6A.

[5] In these reasons, I refer to the decision of the BC motions judge as *Gomel* and the decision of the BC Court of Appeal as *Live Nation*. Live Nation Entertainment, Inc. sought leave to appeal to the Supreme Court of Canada (Docket 40930). The Supreme Court denied leave on April 4, 2024: 2024 CanLII 27901 (SCC).

[6] Counsel in the *Watch* matter attended at the present certification hearing and made submissions as to the process to address (i) potential overlap between the present action and the *Watch* action and (ii) notice to Saskatchewan class counsel and Ticketmaster of any settlement in the Ontario action. I address that issue at the end of these reasons.

[7] Unless otherwise stated, all references to s. 5 and its subsections are to the *Class Proceedings Act*.

(iii) raised six objections under s. 5(1)(c) that all or certain proposed common issues ("PCIs") under all claims except negligence should not be certified,

(iv) raised two objections under s. 5(1)(c) that the PCIs related to aggregate and punitive damages should not be certified, and

(v) objected to certification under s. 5(1)(d) on the basis that a class action is not the preferable procedure.[8]

[10] Ticketmaster also brings a motion to strike the plaintiffs' expert reports prepared by Stefan Boedeker ("Boedeker") dated December 21, 2021 and July 11, 2023 (the "Boedeker Reports") which set out a methodology to calculate damages. Ticketmaster submits that the Boedeker Reports (i) cannot be filed based on my endorsement dated December 8, 2020 (the "Adjournment Endorsement") and (ii) in any event, are inadmissible under the principles in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, because they are irrelevant and unnecessary.

[11] In summary, I find:

(i) The claims for breach of contract, breach of ticketing legislation, unlawful means conspiracy, negligence, and unjust enrichment disclose a cause of action.

(ii) The claims under the *Competition Act* and consumer protection legislation do not disclose a cause of action.

(iii) The class definition is not overbroad.

(iv) The impugned PCIs are appropriate for certification. However, I do not certify the PCIs for the consumer protection legislation and the *Competition Act* claims because they do not disclose a cause of action.

(v) A class action is the preferable procedure to advance the common issues.

(vi) The Boedeker Reports are admissible, given the additional evidence filed by Ticketmaster after the Adjournment Endorsement which altered the proposed class definition and led to the methodology issues addressed by the Boedeker Reports. In any event, there is no prejudice to Ticketmaster as it delivered a responding expert report from Dr. Timothy Snail, who was not cross-examined.

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[8] Ticketmaster did not submit that the plaintiffs failed to meet the requirement under s. 5(1)(e) to have an adequate representative plaintiff.

FACTS

[12] I first review the background facts relevant to (i) the parties and (ii) the ticketing process in the secondary market. I then review the facts which address the issues in the present case.

Background facts

The parties

The plaintiffs

[13] The proposed representative plaintiff Stacey Thompson-Marcial is a resident of Toronto who bought two Secondary Tickets on Ticketmaster.ca for a Childish Gambino concert, for which she paid $313.56.

[14] The proposed representative plaintiff Brian Smith bought two Secondary Tickets on Ticketmaster.ca for a Foo Fighters concert on June 30, 2018. The price for the tickets they purchased was $225 each, plus service fees of $42.75 each. All assigned Primary Tickets in the sections where they wanted to sit were already sold out.

The defendants

[15] Ticketmaster Canada is an indirect, wholly owned subsidiary of Live Nation Entertainment, Inc. It acts as a sales agent for its clients (venues, sport teams, artists, promoters and others) who offer tickets to live events in Canada for sale to the public. The Primary Tickets are sold through Ticketmaster.ca.

[16] Ticketmaster Canada also provides a secondary market platform on Ticketmaster.ca, which allows individuals to buy and sell tickets to events for which Ticketmaster Canada is the primary market ticket seller. Ticketmaster Canada itself does not resell any tickets.

[17] The resale platform on Ticketmaster.ca is not enabled for an event where Ticketmaster's client does not allow it. It has also been enabled in different provinces at different times: Ontario, British Columbia, Alberta and Saskatchewan in 2015, Quebec in 2018, and Manitoba in 2023.

[18] Ticketmaster LLC is an operating company with business in the United States.

The operation of the secondary market

Sources and prices of tickets in the secondary market

[19] There is a substantial secondary market for live entertainment event tickets in Canada. It is a legal marketplace. Ticketmaster Canada was a relative latecomer to the secondary market. There are many websites unrelated to Ticketmaster Canada that operate in that market, including StubHub and Vivid Seats.

[20] Tickets listed on a secondary market platform may not have been acquired from Ticketmaster Canada even when Ticketmaster Canada is the primary ticket sales agent for the event. Most concert tickets are purchased directly from Ticketmaster Canada in the primary market; however, some may be sold or distributed through fan clubs or other means. Tickets to sporting events may be sold in the first instance directly to season ticket holders or professional resellers by the sporting teams themselves. Ticketmaster Canada is not involved in that transaction and does not earn any fees on the sale.

[21] Tickets that are listed for sale on secondary market platforms are listed by fans, season ticket holders and professional resellers. They can list tickets directly, or via companies called "aggregators" that help distribute inventory to various resale marketplaces. The seller who lists the ticket decides at what price they will offer the ticket and on which platforms (i.e., on StubHub, Vivid Seats, Ticketmaster or others). Secondary market tickets are commonly listed on multiple resale platforms at the same time. The ticket does not have to be listed at the same price on each platform.

[22] Professional resellers purchase tickets from a variety of sources, including venues, teams, season ticket holders, and the primary market.

[23] The price of a ticket in the secondary market may be higher or lower than the original face value of the ticket on the primary market. Many tickets on the secondary market are for highly popular, sold-out events, or for "premium" seats that are in highly desirable locations such as the front row of the venue. This tends to increase the market value of those tickets above their face value.

[24] From 2015 to mid-2020, sales by professional resellers have accounted for 30 to 40 percent of the annual resale gross transaction value on Ticketmaster.ca. The majority of sales in the resale market are by fans.

The Ticketmaster seat map and interface for purchasing tickets

[25] Tickets to events in Canada are listed for sale on Ticketmaster.ca. Each event has a "seat map," which is a map of the event venue showing the location of all seats and identifying the seats that are available for sale. A ticket purchaser can use the seat map to select and purchase tickets for a particular seat in the venue.

[26] In July 2015 Ticketmaster Canada began providing an integrated seat map on Ticketmaster.ca. It lists both primary and secondary market tickets for sale to fans. The secondary market functionality of the seat map is only enabled in Canadian markets where provincial legislation does not restrict the reselling of tickets.

Ticketmaster's sales process in the primary and secondary markets

[27] In the primary market, Ticketmaster Canada is generally granted the exclusive right to sell its clients' tickets as an agent. Ticketmaster Canada's clients determine the sales criteria, including whether the resale of tickets will be enabled on the platform. Ticketmaster Canada's

agreements differ with each client. However, whether in the primary or secondary market, Ticketmaster Canada does not own the tickets for sale on its platform.

[28] When ticketholders resell their tickets through Ticketmaster.ca, they pay a seller fee, which is calculated with reference to the sale price of the ticket. The purchaser also pays a resale service fee, which is also calculated with reference to the sale price chosen by the reseller. These fees are shared between Ticketmaster Canada and its clients. The exact share of fees depends on the particular agreement, but Ticketmaster Canada generally retains a minority percentage of these fees.

[29] Secondary sales marketplaces do not allow for purchasers to know who they are buying from. A purchaser of a resale ticket on Ticketmaster.ca cannot know whether the ticket was sold by another fan or by a professional reseller, or how the seller acquired the ticket in the first place.

[30] The secondary market platform on Ticketmaster.ca only provides tickets for events for which Ticketmaster Canada is the primary market ticketing agent. Ticketmaster cancels the original ticket barcode when it is sold on the Ticketmaster.ca resale platform and issues a new barcode to the secondary market buyer (a Verified Ticket), which ensures that the seller possesses the ticket and that the buyer is guaranteed entry to the event. All the secondary market tickets on Ticketmaster.ca are Verified Tickets.

[31] There is no requirement that a ticketholder who purchased a Primary Ticket on Ticketmaster.ca use that same platform if they want to resell their ticket. Ticketholders can resell a ticket on any resale platform they wish. However, if the ticket is not resold on Ticketmaster.ca, Ticketmaster Canada will not know whether the ticket has been resold or for what price.

[32] Fans, season ticket holders and professional resellers have a choice in the way they list their tickets for sale on Ticketmaster.ca. Fans typically list a ticket on Ticketmaster.ca's secondary market platform through the account they used to purchase their tickets. If they do so, the barcode is automatically verified and cancelled when the ticket is sold on Ticketmaster.ca.

[33] Season ticket holders have their own accounts, operated by the team for which they hold tickets. They can use those accounts to sell their tickets on Ticketmaster.ca's secondary market platform if they choose to do so.

Facts relevant to the certification issues

[34] I now review the facts directly relevant to the present case.

TradeDesk and TradeDesk POS[9]

[35] Professional resellers create a professional seller account in order to resell tickets on Ticketmaster.ca. Professional resellers typically have inventory which they acquired from various sources and list their inventory on a number of resale platforms at the same time. Once a professional reseller has an account to list inventory on Ticketmaster.ca, they have access to a software tool called TradeDesk that helps them manage and organize the tickets they have listed on Ticketmaster.ca. They also have the option of using a tool called TradeDesk POS to manage their inventory across secondary market platforms.

[36] TradeDesk and TradeDesk POS are two distinct products with different functionality. TradeDesk is free and available to the public. It was made available for Canadian events beginning in mid-2015, around the same time Ticketmaster made secondary tickets available on seat maps for events in Ontario.

[37] TradeDesk allows its users to manage and monitor the resale tickets they have listed on Ticketmaster.ca, including those purchased using other accounts. Professional resellers may need to manage multiple accounts for many reasons that have nothing to do with circumventing ticket limits. For example, a professional reseller might work with multiple season ticket holders to sell tickets that they do not intend to use. Those tickets are held separately in each season ticket holder's account. Using TradeDesk, resellers have a single account through which they can manage these tickets.

[38] As described above, all tickets on Ticketmaster.ca's secondary market platform are verified. It is not practical for a professional reseller to manually upload each individual ticket they list for sale to their own account to then be verified. TradeDesk provides a function called "Sync" which automates the process of verifying the barcodes on ticket inventory so that tickets can be listed on Ticketmaster.ca and then reissued with new barcodes once they are sold.

[39] TradeDesk cannot be used to purchase tickets on the primary market and has never had functionality allowing it to do so. As a result of having no role in the primary market, TradeDesk is not able to distinguish the source of a seller's ticket inventory– whether from Ticketmaster Canada or from another source, such as a venue or team, a season ticket holder or another reseller.

[40] TradeDesk POS is a web-based point of sale system that supports a professional reseller's business more broadly than TradeDesk. It was acquired by Ticketmaster and re-branded on May 1, 2017.

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[9] In these reasons, I refer to TradeDesk and TradeDesk POS collectively as TradeDesk, as there is no distinction between the two products for the purposes of the certification issues. However, in this subsection of my reasons, the references relate to the distinct TradeDesk and TradeDesk POS products.

[41] TradeDesk POS allows its users to price tickets that have already been purchased through Ticketmaster or acquired from another source, distribute that inventory to various marketplaces (including Ticketmaster.ca and competitor platforms like StubHub), fulfil orders and integrate with the users' accounting software. As with TradeDesk, TradeDesk POS cannot be used to purchase tickets on the primary market.

[42] Ticketmaster Canada's competitors have offerings which are similar to TradeDesk POS with similar functionality. For example, StubHub provides a tool called Ticket Utils and Vivid Seats offers a tool called Skybox.

The TOU and PP

[43] To access Ticketmaster.ca, a user must agree to the TOU. The full TOU are available on the website by clicking a link on the homepage. They have been available throughout the class period. It is necessary to consent to the TOU before a user can create an account on Ticketmaster.ca, and each time a user signs into their account and makes a purchase.

[44] In exchange for granting a "limited, conditional, no-cost, non-exclusive, non-transferable, non-sublicensable license to view this Site…" each user agrees under the TOU that they will not engage in certain conduct, including "the use of automated software or computer systems to search for, reserve, buy or otherwise obtain tickets" or "[a]ccess, reload or refresh transactional event or ticketing pages, or make any other request to transactional servers, more than once during any three-second interval."

[45] The TOU states that the terms "govern your use of the Ticketmaster sites and applications". It sets out a "Code of Conduct", where each user agrees that they will "comply with all applicable laws, rules and regulations," and that they will not take certain actions, including "order[ing] a number of tickets for an event that exceeds the stated limit for that event." Users agree that "[y]ou may not attempt to conceal your identity by using multiple Internet Protocol addresses or email addresses to conduct transactions on the Site."

[46] Under the TOU, ticket limits are imposed as a policy "to discourage unfair ticket buying practices". The user agrees not to "[u]se any area of the Site for commercial purposes."

[47] Ticketmaster Canada "may investigate any violation of these Terms" and reserves the right to take legal action that it believes is appropriate against users who violate the TOU, including preventing the user from accessing the site. The TOU also puts users on notice that Ticketmaster may provide law enforcement with their information to assist in investigations.

[48] The TOU contains a "limitation of liability" provision that the user "acknowledge[s] and agree[s] that [Ticketmaster] will have no liability or responsibility whatsoever for … any failure of another user of the site to conform to the Codes of Conduct."

[49] Under the PP, Ticketmaster states that it verifies compliance with the ticket limit "with every transaction":

> 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. [Emphasis added.]

Public statements by Ticketmaster

[50] Ticketmaster also made the following public statements that it would enforce ticket limits:

(i) "Individual ticket types and event ticket limits set by the venue, artist and promoter **will be enforced.**"

(ii) Ticketmaster uses technology with the aim of "**warding off bots and scalpers.**"

(iii) "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** […]."

(iv) "**Our verification process starts with the member account but we also employ methods that go beyond to identify purchases that are the same person but different accounts.**" [Emphasis added.]

The NYAG Report

[51] In response to consumer complaints regarding the ticket resale industry, the New York Attorney General ("NYAG") commenced an investigation into the ticket resale industry and the process by which event tickets are distributed in the state of New York.

[52] In January 2016, the NYAG published its report. The key findings of the NYAG included:

(i) "Ticketing, to put it bluntly, is a fixed game."

(ii) "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 […]."

(iii) "The sources we interviewed uniformly stated that the usage of Bots has reached epidemic proportions in the ticketing industry."

(iv) "Ticket limits are not regularly enforced [by Ticketmaster]."

(v) "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."

(vi) "Some of the suggestions [provided by the NYAG to Ticketmaster] included […] investigating resellers regularly offering numbers of tickets to popular shows, among others."

[53] The NYAG Report reviewed numerous examples of professional resellers violating ticket limits with bots and multiple accounts, including:

(i) one broker who paid 25 employees wages to keep separate ticket accounts to purchase tickets as directed by management,

(ii) one broker with annual revenues of $42 million in 2013 with multiple customer bots, 10,000+ IP addresses, and 500+ credit cards, and

(iii) a list of 12 brokers who each purchased more than $3 million in tickets, with up to 4,500 transactions being effected with the same credit card.

[54] The NYAG Report concluded with recommendations including that:

(i) "[W]herever ticket vendors claim that ticket limits are enforced, they should enforce those limits as a matter of course on a per-person basis. If such limits are not actually being enforced, ticket vendors must make that clear."

(ii) "Ticket Vendors Must Address the Bot Epidemic" – **the NYAG reviewed their discussions with Ticketmaster about** "**concrete reforms, such as** preemptive enforcement of ticket limits, **analyzing purchase data to identify ongoing Bot operations for prosecution, and investigating resellers of large volumes of tickets to popular shows**, among others." [Emphasis added.]

The Ontario Report

[55] An Ontario Government report was published February 27, 2017 entitled "Consultation on ticket buying and resale" (the "Ontario Report"). It noted that two-thirds of the approximately 35,000 participants in its survey[10] had bought tickets on a ticket resale website, and "**94% of them said they did so because tickets were sold out on Ticketmaster or the event venue's website**". Consequently, the conclusion from the survey was that purchasers of live event tickets wanted to "**see rules**" that **"[s]top the use of bots"** and **"[a]llow everyone a chance to purchase tickets at a fair price"**. [Emphasis added.]

[10] The representative plaintiff Brian Smith participated in the survey.

The Media Investigation

[56] In July 2018, reporters from the CBC and the Toronto Star attended at a professional resellers convention in Las Vegas to conduct an undercover investigation. They presented themselves as professional resellers and attended at a "Ticketmaster Resale" booth which was promoting TradeDesk and TradeDesk POS.

[57] On September 19, 2018, CBC News and the Toronto Star announced the investigation. In the undercover videos:[11]

(i) When the undercover journalist stated "**I want to know the straight goods on whether Ticketmaster is going to be policing us using our multiple accounts**," a Ticketmaster 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";

(ii) When asked by the undercover journalist "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."

(iii) 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.**"

(iv) 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 [in total sales]."

(v) 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**."

(vi) The Ticketmaster representative stated: "I think our biggest broker right now has probably grabbed five million." [Emphasis added.]

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[11] See footnote 4 above for the links to those videos.

[58] In an article about the investigation published in the Toronto Star on September 19, 2018, the Ticketmaster representatives were quoted to have said:

(i) "**We don't spend any time looking at your Ticketmaster.com account. I don't care what you buy. It doesn't matter to me.** I'm more concentrating on, are you getting good sell-through [*i.e.* successful secondary sales]."

(ii) "**There's total separation between Ticketmaster and our division. It's church and state ... We don't monitor that at all.**"

(iii) "If you've got 100 Tickemtaster.com accounts and you're out there buying inventory, the system is automatically going to sync them and move them over to create the (resale) listing" …"It's pushing it over for you … That's the way we're going. That's what we're investing our money in."

(iv) "**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** […]." [Emphasis added.]

[59] The Toronto Star and the CBC reported that Ticketmaster incentivized professional resellers to use TradeDesk because Ticketmaster would charge lower selling fees if certain sales volume targets were met (examples described are $500,000 and $1 million).

Comments from Jared Smith after the Media Investigation

[60] Jared Smith (then Chief Executive Officer of Live Nation Entertainment Inc.) was reported as having acknowledged that Ticketmaster ought to have used TradeDesk data to detect breaches of ticket limits by professional resellers. He was quoted as stating:[12]

(i) "There's clearly **some things that we're not doing well enough.**"

(ii) "**We'll learn from it and we'll make some changes.**"

(iii) "**We probably don't do enough to look into TradeDesk.**"

(iv) "**The reality is, yeah, (TradeDesk users) could have more than their ticket limit**."

(v) "We absolutely do not turn a blind eye to the misuse of our products". "**We absolutely don't condone what [the Ticketmaster representative] said. What he said doesn't represent our policies. It doesn't represent ... who we are**."

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[12] Robert Cribb and Marco Chown Oved, "Ticketmaster's 'TradeDesk' Scalper tool explained", The Toronto Star (25 September 2018).

(vi) "**Do some individuals have too many accounts? That's where we need to make sure that we're diligent and regularly checking on the backside ... to ensure that 100 per cent of those tickets are sourced cleanly and within our policy.**" [Emphasis added.]

Evidence that data from the secondary market can be used to determine whether tickets were purchased above ticket limits in the primary market

[61] Boedeker is a statistician and an economist who is currently the Managing Director of the Berkeley Research Group LLC in its Las Vegas office. He states that:

> My work focuses on the application of economic, statistical, and financial models to a variety of areas, such as providing solutions to business problems, supporting complex litigation, and conducting economic impact studies. I have rendered expert opinions in my field in individual plaintiff cases as well as multi-plaintiff and class action matters. I have extensive experience applying economic and statistical theories to employment related matters.

[62] In his report dated December 21, 2021 and his reply report dated July 11, 2023, Boedeker sets out the basis for his conclusion that he could apply data from sales in the secondary market to data from sales in the primary market, to determine (i) whether Primary Tickets were purchased by resellers in amounts that exceeded prescribed ticket limits, (ii) whether these Primary Tickets were resold in Ticketmaster's secondary market, and (iii) the consequential overcharges stemming from the above sales and resales, all of which can be established by the use of existing economic concepts, well-established statistical and econometric modeling techniques, and other analytical methods routinely applied to large-scale databases housing transactional data.

[63] Boedeker relies on 37 separate data points known to be available from Ticketmaster, based on sources including (i) the affidavit evidence of Larry Plawsky ("Plawsky"), the Executive Vice-President and General Manager of Ticketmaster Resale and Category Management, (ii) academic and government studies of the ticketing industry, and (iii) transaction-level Ticketmaster data extracted at the Competition Bureau.

[64] Boedeker concludes that "Ticketmaster maintains extremely detailed transaction-level data on sales on a variety of their platforms. […] This data could be aggregated and analyzed with sophisticated computer systems to attempt to track connections and to determine the extent to which purchasers violated ticket quantity limits and marked up those illicit purchases on the secondary market […]."

[65] Boedeker further concludes that he could calculate the fees charged by Ticketmaster Canada on the sale of Secondary Tickets ("Double Dip Fees"), as well as the difference between the face price and the resale price, all on an aggregate basis. He concludes:

> The complaint seeks damages for double-dip fees and inflated ticket prices paid by the class members compared to the face price. There are formulaic methods

> which would permit these representative plaintiffs to establish a verifiable sample of losses or permit them to project losses from a sample or set of samples to definable classes of ticket purchasers. This means that in the context of this lawsuit, the representative plaintiffs can potentially with a degree of certainty prove losses subject to adequate discovery.

[66] Plawsky states that the Ticketmaster data in the primary and secondary markets (i) is not linked, (ii) was never intended to be linked, and (iii) are kept separate in the ordinary course of business. However, Plawsky does not suggest that Boedeker cannot do the analysis he proposes. To the contrary, Plawsky states that:

> The two sets of data (primary and secondary) are kept separate and never linked to each other or analyzed together in the ordinary course of Ticketmaster Canada's business. **However, the two sets of data can be linked to one another, if there are fields in common between them. A Ticketmaster Canada employee could map one set of data onto the other using a common field to connect the primary and resale transaction data.** [Emphasis added.]

[67] Boedeker's evidence is that "even if none of Defendants' data systems have been exclusively designed to track all the relationships between the Primary and Secondary Markets, they nonetheless contain numerous, detailed data points that can be utilized to assess the claims alleged in the litigation and that a nexus between the data for the Primary and Secondary Markets can be ascertained with additional discovery."

[68] Dr. Timothy Snail, who filed a responding expert report on behalf of Ticketmaster, challenges whether Boedeker is using the correct methodology to conduct the appropriate calculation of damages. However, he does not state that the linkages Boedker proposes are not possible.

[69] Further, to the extent Plawsky or Dr. Snail challenge the ability of Boedeker to work with certain data (such as the Sync feature discussed at para. 38 above), Boedker addresses such concerns in his reply report by proposing methods to work with other information to close any informational gaps that might arise.

Evidence of the representative plaintiffs

[70] Thompson-Marcial and Brian Smith's affidavits set out their evidence about their experience purchasing tickets with Ticketmaster.

[71] Brian Smith purchased tickets to a Foo Fighters concert on the secondary market on Ticketmaster.ca just under two weeks before the concert was scheduled to take place. As noted above, they purchased seats on the secondary market because all the tickets in the sections where they wanted to sit were already sold out.

[72] Brian Smith states in their affidavit that they have "been aware for many years that there are professional Resellers who use multiple accounts, bot software, or other automated ticket-buying methods to bypass stated ticket-buying limits, in violation of Ticketmaster's stated

policies." They explained on cross-examination that they have been aware of this since at least 2015.

[73] Thompson-Marcial accepted the terms on Ticketmaster's website without reading them prior to her purchase.

The history of related class action litigation in British Columbia and Saskatchewan

[74] Following the disclosure of the Media Investigation, proposed class proceedings were commenced in Ontario, Saskatchewan, Quebec, and BC. The claims are not coordinated and differ significantly (although not entirely) in the causes of action and theories advanced.

The Ontario actions

[75] A statement of claim was issued by Thompson-Marcial on November 5, 2018. It was consolidated with a claim brought by Brian Smith. The consolidated claim was then further amended, resulting in a Fresh as Consolidated Statement of Claim. The current pleading is the "Second Fresh as Amended Amended Consolidated Statement of Claim" (which I refer to as the "Claim").

The BC action

[76] An action was started in BC on October 19, 2018. The BC action is restricted to a class of BC residents. The proposed class period is January 25, 2010 to at least September, 2018, for a proposed class of persons who purchased any resale ticket on any resale platform (including third party platforms like StubHub), provided the original ticket was sold by Ticketmaster.

[77] The BC claim is similar but different from the Ontario claim. Like the Ontario claim, it pleads representations about a fair marketplace and seeks to certify consumer protection, misleading advertising, and unjust enrichment claims. Unlike the Ontario claim, the BC claim (i) is brought on behalf of only BC residents, (ii) has no claims under contract or ticketing legislation, (iii) relies on a damages theory that the representations "distorted" and caused a "general inflationary effect" in the secondary market, (iv) proposes a different class by including secondary sales on third party platforms, and (v) asserts claims for negligent misrepresentation.

[78] In October 2019, Ticketmaster brought a motion to stay the BC action in favour of the Saskatchewan action. Justice Tammen dismissed the motion in reasons dated December 16, 2019: *Gomel v. Ticketmaster Canada LLP*, 2019 BCSC 2178.

[79] A motion to certify the BC action was heard by the BC Supreme Court on November 16, 2020 and decided in April 2021 (previously defined as the *Gomel* decision). Justice Tammen certified claims for deceptive practices and unconscionable practices contrary to the BC *Business Practices and Consumer Protection Act*, SBC 2004, c. 2 ("*BPCPA*"). The court also certified common issues related to damages but declined to certify the plaintiff's "restoration" claim under the *BPCPA* or claims under the *Competition Act*, negligent misrepresentation or unjust enrichment.

[80] Ticketmaster appealed and the plaintiff cross-appealed. In July 2023, the BC Court of Appeal allowed both appeals, in part (previously defined as the *Live Nation* decision). In allowing Ticketmaster's appeal, the court held that the motions court judge erred by certifying common issues related to damages in the absence of any expert methodology to support the "general inflationary effect" damages theory. The court remitted the case to Justice Tammen to consider whether a valid expert methodology was possible. The court dismissed all other aspects of Ticketmaster's appeal.

[81] The plaintiff also appealed the *Gomel* decision. The court allowed the plaintiff's appeal and held that claims for "restoration" under the *BPCPA* should be certified and that common issues regarding the *Competition Act*, unjust enrichment and disgorgement should be remitted to the certification judge for reconsideration, including whether the plaintiff should be permitted to adduce an expert methodology on the "general inflationary effect" theory.

[82] The Supreme Court of Canada denied Ticketmaster's application for leave to appeal on April 4, 2024.

[83] As a result of the developments in the BC case, the Ontario action does not seek to certify a claim on behalf of BC residents.

The Saskatchewan action

[84] Crystal Watch ("Watch") filed a national "drip pricing" claim against Ticketmaster in Saskatchewan on March 7, 2018. "Drip pricing" is the practice of building hidden fees and surcharges into the online purchasing process, which only become evident once the purchaser moves closer to the actual purchase.

[85] After the Media Investigation became public, Watch amended her drip pricing claim to add claims to attempt to cover causes of action flowing from the Media Investigation. The claim alleged that "Ticketmaster conspired with others in the resale of tickets originally sold by Ticketmaster." In addition to conspiracy, the claim pleaded breaches of various provisions of the *Competition Act*, including price fixing and bid rigging.

[86] Like the BC claim, there are some similarities between the Watch claim and the Ontario claim. Both make claims for breach of contract and unjust enrichment. However, the Saskatchewan claim also advances claims for conspiracy contrary to the *Competition Act*, the tort of interference with economic interests, and breach of ticketing legislation in Saskatchewan only.

[87] A certification hearing regarding the amended claim covering both drip pricing and secondary sales allegations took place in Saskatchewan the week of September 14, 2020. The plaintiff sought to certify a national class. Counsel for the proposed representative plaintiffs in Ontario attended and submitted to the Saskatchewan court that the secondary sales allegations should not be certified on a national basis.

[88] On November 25, 2022, Justice Mitchell certified the "drip pricing" claims but not the TradeDesk claim. The court relied in several respects on the decision of Justice Tammen in *Gomel*.

[89] Both parties appealed and cross-appealed. In July 2023, the Saskatchewan Court of Appeal granted leave to both parties, partly based on the intervening *Live Nation* decision of the BC Court of Appeal, which had been released earlier in that same month.

[90] In her leave decision, Jackson J.A. noted that the BC Court of Appeal had reversed the BC Supreme Court's analysis that formed the basis for several conclusions in the *Watch* decision: Reasons for Decision dated July 31, 2023 in *Crystal Watch v. Live Nation Entertainment Inc.*, Docket CAC4120.

The Quebec action

[91] As noted above, a proposed class proceeding in *McPhee* was brought in Quebec but was stayed in favour of the *Watch* action in Saskatchewan.

ANALYSIS

[92] At paras. 9-10 above I summarized Ticketmaster's objections on the certification motion and its motion to strike the Boedeker Reports

[93] I first review the certification objections for each of the s. 5(1)(a) – (d) requirements.[13] I then consider the motion to strike the Boedeker Reports.

Cause of action objections under s. 5(1)(a)

[94] As noted above, Ticketmaster submits that the contract, *Competition Act*, consumer protection legislation, ticketing legislation, unlawful means conspiracy, and negligence claims do not disclose a cause of action.

[95] I first review the applicable law under s. 5(1)(a). I then consider the individual causes of action challenged by Ticketmaster.

The applicable law under s. 5(1)(a)

[96] In *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589, leave to appeal refused, 2021 ONSC 5906 (Div. Ct.), the court set out the test under s. 5(1)(a), at paras. 66-72:

> The test under s. 5(1)(a) is the same as on a motion to strike: the "plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed": *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 63.

[13] As noted at footnote 8 above, Ticketmaster raises no objection to the requirement for a representative plaintiff under s. 5(1)(e).

> A claim should not be dismissed unless the court is satisfied "beyond reasonable doubt" that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at 980.
>
> The inquiry is into the legal adequacy of the causes of action pled, not the evidence for or against those causes of action: *Brozmanova v. Tarshis*, 2018 ONCA 523, at para. 25.
>
> "All allegations of fact pleaded are assumed to be true unless they are patently ridiculous, manifestly incapable of proof, or amount to bald conclusory statements unsupported by material facts": *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, at para. 58(b).
>
> "The pleading must be read generously to allow for drafting deficiencies and the plaintiff's lack of access to key documents and discovery information. The court should err on the side of permitting an arguable claim to proceed to trial": *Wright*, at para. 58(d).
>
> No evidence is admissible: *Wright*, at para. 58 (a). However, the court can assess documents incorporated by reference into the pleading in evaluating the legal tenability of the claim: *Das v. George Weston Limited*, 2018 ONCA 1053, at para. 74, leave to appeal ref'd [2019] S.C.C.A. No. 69.
>
> Consequently, the threshold for satisfying the cause of action requirement is "very low": *McLaren v. Stratford (City)*, [2005] O.J. No. 2288 (S.C.), at para. 21.

[97] In *Gilani*, the court also considered the effect of the decision in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, in which the Supreme Court reviewed the applicable test on a motion to strike a novel cause of action. In *Gilani*, the court held that *Atlantic Lottery* did not change the s. 5(1)(a) test, but rather affirmed that while the court can determine the viability of novel causes of action, the court will only strike a claim if it is "hopeless", i.e., plain and obvious and beyond reasonable doubt that the claim cannot succeed: at paras. 73-78, citing *Atlantic Lottery*, at paras. 18-19.

[98] I now address each of the cause of action objections.

Cause of action objection 1: Breach of contract (Objection 1)[14]

[99] The court can consider the TOU and PP to determine whether the Claim discloses a cause of action, since those documents are incorporated by reference into the Claim. As the court held in *Del Giudice v. Thompson*, 2024 ONCA 70, at para. 18:

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[14] I have numbered Ticketmaster's 16 objections to certification for ease of reference and address each sequentially.

> It is well established that a statement of claim is deemed to include any document to which it refers, and which forms an integral part of the plaintiffs' claim: *McCreight*, at para. 32. As the appellants had pleaded that they had contracts and a credit application with Capital One (and that Capital One had breached the contracts and exceeded the terms of the application), these documents were incorporated by reference into the Fresh as Amended Statement of Claim. It was therefore permissible to consider those documents in determining whether the appellants had pleaded viable causes of action.

[100] However, the role of the court in contractual interpretation under the s. 5(1)(a) test is not any different than under the settled law. The court can only review the contract to determine whether it is plain and obvious that the contract cannot support the interpretation proposed by the plaintiff. The court cannot assess the merits of competing positions, unless the plaintiff's position is "hopeless".

[101] In *Live Nation*, the court took the same approach when considering the scope of the TOU and PP in representations under the *BPCPA*. Marchand J.A. (as he then was) held, at para. 66:

> **I agree that if the Terms of Use and Purchase Policy were patently incapable of amounting to deceptive or unconscionable conduct as defined, then the pleadings would disclose no cause of action and the plaintiff's claims under the *BPCPA* should not have been certified.** … However, in my view, it is not "plain and obvious" that (1) the Terms of Use and Purchase Policy could not reasonably be taken to have made the representations alleged by the plaintiff or (2) the representations could not reasonably have constituted deceptive and/or unconscionable conduct, as defined. [Emphasis added.]

[102] I adopt the same approach for a contractual analysis of the TOU and PP. Unless the TOU or PP are "patently incapable" of supporting a claim for breach of contract, then the claim discloses a cause of action.

The pleadings

[103] The plaintiffs' allegations of breach of contract are at paras. 57-70 of the Claim, with additional allegations at paras. 71-74 seeking disgorgement if contractual damages are not available for either the difference between the price paid and face value or for Double Dip Fees.

[104] With respect to the alleged contract, the plaintiffs plead in the Claim that:

(i) "The Contracts are comprised of the Terms of Use and Purchase Policy": at para. 57.

(ii) Under the PP, Ticketmaster "will 'verify' the posted ticket limit 'with every transaction'": at para. 59.

(iii) 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…": at para. 60.

(iv) "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": at para. 61.

(v) "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, the use of its Sync data, and the use of its primary and secondary sales databases to detect whether the Terms of Use and Purchase Policy had been complied with by Resellers": at para. 62.

(vi) "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, through its Sync data, and through its primary and secondary sales databases, Ticketmaster Canada knew Resellers acquired Live Event tickets in excess of stated limits, contrary to the Terms of Use and the Purchase Policy": at para. 65.

(vii) "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": at para. 66.

(viii) "Ticketmaster deliberately decide[d] 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": at para. 27.[15]

[105] There are allegations in the Claim that plead a broader contractual allegation on Ticketmaster to "[prohibit] any purchasers, including Resellers, violating the Terms of Use and

[15] This allegation is not stated in the breach of contract section of the Claim but is a general allegation relevant to all causes of action.

Purchase Policy": at para. 60. The plaintiffs acknowledge that the TOU and PP cannot be read as a warranty of a "bot-free paradise" where no buyer could ever purchase a Primary Ticket in excess of ticket limits.

[106] However, the core of the alleged breach of contractual duties arises from the Media Investigation. The plaintiffs assert a contractual obligation on Ticketmaster to verify ticket limits with every transaction as set out in the PP (which the plaintiffs plead is incorporated into the TOU). The plaintiffs assert a breach of that contractual obligation based on the Media Investigation. The plaintiffs allege that Ticketmaster turned a blind eye, favoured professional resellers, or facilitated breaches of the primary sale market by not using available TradeDesk data which could have been linked to the professional resellers to determine whether they had used bots or multiple accounts to exceed posted ticket limits.

[107] With respect to the disgorgement relief sought for breach of contract, the plaintiffs plead in the Claim that:

(i) "Class Members have a legitimate contract interest in the defendant complying with its contractual obligations to prevent violations of the Terms of Use and Purchase Policy. The nature of the Class Members [sic] contract interest is such that it cannot be vindicated by other forms of contractual relief and cannot possibly be quantified in monetary terms such that the Class Members' interest in performance of the contract is not reflected by a pure economic measure": at para. 71.

(ii) "In all the circumstances, other remedies would not adequately protect or vindicate the Class Members [sic] contractual rights to good faith performance of the contract and enforcement of the Terms of Use and Purchase Policy.

a) Conventional contract damages alone would fail to deter the wrongdoer who was prepared to ignore its own stated policies in order to gain market share.

b) The Class Members [sic] relationship with Ticketmaster engages trust, confidence and vulnerability. Ticketmaster told Class Members that it would enforce stated ticket limits and provided a long list of banned methods. This imparted a sense of confidence in Ticketmaster by representing to Class Members that they were participating in a fair market for secondary tickets. Class Members had no control over how Ticketmaster actually enforced its policies, leaving them entirely vulnerable to Ticketmaster's decision not to enforce them": at para. 72.

(iii) "It would be unconscionable for Ticketmaster to retain the revenues generated by the conduct set out herein. Furthermore, the plaintiffs and Class Members have a legitimate interest in preventing Ticketmasters' [sic] profit-making activities, particularly where such activities relate to and incentivize Ticketmasters's [sic]

> breach of the Class Members' rights under the contracts and any other wrongdoing as set out herein": at para. 74.

[108] Consequently, the issue before the court is whether it is plain and obvious or beyond doubt that the TOU and PP cannot support the plaintiffs' claims that (i) Ticketmaster had an express or implied contractual obligation under the TOU and PP, (ii) Ticketmaster breached those duties (or breached its duty to act honestly and in good faith in the performance of its contractual obligations), and (iii) disgorgement is available if the breaches are established.

[109] I address the issues of (i) express contractual terms, (ii) implied contractual terms, (iii) good faith performance of a contract, (iv) effect of the limitation of liability clause, and (v) disgorgement below.

Is there a cause of action for breach of express contractual terms?

[110] Ticketmaster submits that it is plain and obvious that it has no express obligation to verify transactions under the TOU or PP or to not acquiesce to the violation of Primary Ticket purchase limits by professional resellers.

[111] Ticketmaster relies on the many statements in the TOU and PP about the obligations of users of the Ticketmaster.ca site. As reviewed at paras. 43-46 above, Ticketmaster advises users in the TOU and PP that they cannot:

> (i) use automated software or computer systems to reserve, buy or otherwise obtain tickets,
>
> (ii) order tickets above the ticket limit,
>
> (iii) use multiple IP addresses or email addresses to conduct transactions on Ticketmaster.ca, or
>
> (iv) use Ticketmaster.ca for commercial purposes.

[112] Ticketmaster submits that the TOU cannot be read as imposing any contractual obligation on it. Ticketmaster submits that the TOU and PP are, in effect, a "one-way street" imposing obligations on users but not on Ticketmaster.

[113] However, under the PP, Ticketmaster represents that ticket limits are "verified with every transaction". Ticketmaster does not advise ticket buyers that it has data available for such verification from the secondary market but will not use this data to verify primary market purchases.

[114] Further, under the TOU, Ticketmaster advises users that the ticket limits are intended "to discourage unfair ticket buying practices" and that Ticketmaster reserves the right to "[prevent] the user from accessing the site" if the user does not comply with the ticket limits.

[115] Consequently, it is not beyond doubt that the TOU and PP do not contain express terms that Ticketmaster will enforce ticket limits to ensure fair "ticket buying practices" (and not acquiesce with professional resellers to the violation of ticket limits for the purchase of Primary Tickets), so that all users have an equal opportunity to purchase tickets.

[116] In *Live Nation*, Marchand J.A. considered the scope of the same representations made in the TOU and PP, in the context of a claim for deceptive practices under the *BPCPA*. No breach of contract claim was pursued in the BC action. However, the comments of Marchand J.A. apply equally to a contractual analysis, as they set out what terms could be understood from the TOU and PP. Marchand J.A. held, at para. 69:

> Although the Terms of Use and Purchase Policy establish the terms of an agreement between Ticketmaster and a user of its website, both documents are publicly available. In my view, it is arguable that:
>
> • When the Purchase Policy says that ticket limits are in effect "to discourage unfair ticket buying practices," the public might reasonably understand Ticketmaster to be saying that it would not work with professional ticket resellers to circumvent such limits.
>
> • When the Purchase Policy says that "[m]ultiple accounts may not be used to circumvent or exceed published ticket limits," the public might reasonably understand Ticketmaster to be saying that it would not facilitate or turn a blind eye to professional ticket resellers doing that very thing.
>
> • When the Terms of Use prohibit the use of the Ticketmaster website for commercial purposes, the public might reasonably understand Ticketmaster to be saying that it would not actively work with professional ticket resellers to advance their commercial interests or turn a blind eye to such conduct.
>
> • When the Terms of Use and Purchase Policy contain various remedies for any breaches of them, the public might reasonably understand Ticketmaster to be saying that it would fight rather than facilitate such breaches.

[117] Ticketmaster submits that the plaintiffs' position effectively constitutes a contractual obligation to ensure that no bots or multiple accounts are used to acquire tickets. I do not agree. The plaintiffs do not seek to impose such a contractual obligation.

[118] Rather, the plaintiffs submit that the TOU and PP can support a contractual obligation on Ticketmaster to enforce ticket limits. Consequently, the plaintiffs submit that a decision by Ticketmaster to ignore available data to establish such breaches – so that professional resellers can use TradeDesk – constitutes a breach of its express contractual obligation.

[119] The NYAG (i) raised the concern of the improper use of multiple accounts and bots by professional resellers and (ii) referred to its discussions with Ticketmaster about that concern. The core findings of the NYAG Report are pleaded at para. 32 of the Claim and support

knowledge by Ticketmaster that "investigating sellers regularly offering numbers of tickets to popular shows" would detect unscrupulous professional resellers.

[120] The Media Investigation is also pleaded in detail in the Claim. It provides further support for a claim that Ticketmaster breached an express obligation to verify ticket limits and to not acquiesce to breaches of the ticket limit policy for Primary Tickets. The questions posed by the undercover reporters demonstrated their purported concern that Ticketmaster might discover breaches of the TOU or PP if Ticketmaster used TradeDesk data to review Primary Ticket purchases by professional resellers.

[121] For example, the reporter asked for "the straight goods" on whether Ticketmaster would be "policing our multiple accounts". That question is not of the nature which would be raised by a legitimate professional reseller who complied with the TOU and PP.

[122] The responses of the TradeDesk representatives were intended to resolve the concerns of what appeared to be unscrupulous professional resellers. The TradeDesk representatives answered that:

(i) There would be "no" policing of multiple accounts through TradeDesk.

(ii) "We don't share reports, we don't share names, we don't share account information with the primary side period."

(iii) "[T]he last thing we want to do is, you know, get brokers caught up where they can't sell inventory with us."

(iv) "[W]e're not trying to build a better mousetrap."

(v) "We don't spend any time looking at your Ticketmaster.com account. I don't care what you buy. It doesn't matter to me."

(vi) "There's total separation between Ticketmaster and our division. It's church and state ... We don't monitor that at all."

(vii) "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 […]."

[123] The material facts from the Media Investigation are pleaded at para. 34 of the Claim and support the allegation that Ticketmaster was knowingly contravening or turning a blind eye to professional resellers exceeding posted ticket limits for Primary Tickets.

[124] Further, Jared Smith's comments set out at para. 60 above reflect a similar understanding of the Media Investigation, i.e., that Ticketmaster had data from TradeDesk which it should have used to enforce ticket limits in the primary market. While those specific comments are not pleaded, they provide an additional basis of fact to support the plaintiffs' allegations.

[125] The plaintiffs also rely on principles of contractual interpretation relevant to consumer contracts and contracts of adhesion to support a cause of action for breach of express contractual terms.

[126] At a common issues trial, the court may have to consider questions of contractual interpretation under consumer protection legislation, such as s. 11 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A,[16] which provides that "[a]ny ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer." The TOU and PP are pleaded to be a "consumer agreement" under s. 1 (an allegation which is not challenged under s. 5(1)(a) by Ticketmaster).

[127] Further, common law principles involving interpretation of contracts of adhesion may apply and require that any ambiguities be construed against the drafter: *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 at paras. 7-9 & 15.

[128] For the above reasons, I apply the approach of Marchand J.A. in *Live Nation* at para. 66 and find that I cannot conclude that "the Terms of Use and Purchase Policy were patently incapable" of supporting a claim for breach of an express term of the contract.

[129] Consequently, there is a cause of action based on an express term requiring Ticketmaster to verify ticket limits with every transaction or that it would not acquiesce to the violation of Primary Ticket purchase limits by professional resellers.

Is there a cause of action for breach of implied contractual terms?

[130] As set out at para. 104 above, the plaintiffs allege in the Claim that:

> (i) "[I]t 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": at para. 60.
>
> (ii) "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": at para. 61.

[131] I first address the applicable law and then apply the law to the present case.

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[16] In these reasons, I refer to the Ontario *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A as the "*CPA*". As I note at footnote 7, all references to "s. 5" and its subsections refer to the *Class Proceedings Act*.

(i) The applicable law

[132] The law as to implied terms in a contract is settled. In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 ("*MJB*") at para. 27, Iacobucci J. adopted the analysis of Le Dain J. in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 where Le Dain J. held that:

> [T]erms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed."

[133] In *MJB*, the court noted that when a term is implied, "the implication of the term must have a certain degree of obviousness to it, and … if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis": at para. 29.

[134] The court must focus on the actual intentions of the parties and not the intentions of reasonable parties: *MJB*, at para. 29.

[135] Ticketmaster relies on two decisions in which implied terms were not certified. In *Matoni v. C.B.S. Interactive Multimedia Inc. (Canadian Business College)*, 163 A.C.W.S. (3d) 701 (Ont. S.C.), Hoy J. (as she then was), considered whether a claim for an implied term could be found on the second branch of the *MJB* test, i.e., that it was required by the nature of the contract. Hoy J. commented on the third branch of the test in *obiter*, stating at para. 115 that:

> Generally, it seems a term might be implied on either of the first two bases on a class-wide basis, depending on the nature of the term. The third basis, namely presumed intention, which focuses on the actual intentions of the parties, does not, however, appear in any event susceptible to determination on a class-wide basis.

[136] In *Matoni*, Hoy J. noted that different class members would have received or reviewed different information at different times. She held that if an implied term depends on "a determination of what was disclosed to each class member, orally and in writing", it cannot be certified as a common issue: at para. 119.

[137] Similarly, in *Lewis v. Uber Canada Inc. et al.*, 2023 ONSC 6190, Akbarali J. denied certification of a proposed common issue of an implied term that goods and services tax should have been calculated on the post-discounted amount of the order rather than on the pre-discount amount: at para. 1. Akbarali J. held that individual inquiries were necessary to determine the past purchasing history of the class members, at para. 88:

> With respect to the breach of contract claims, to the extent that the alleged breached term is contained in an individual Uber promotion, the issue is not common to all class members. To the extent the claim relies on implied terms,

> those are often inappropriate for certification because they require individual assessment: *Fairview Donut v. TDL Group*, 2012 ONSC 1252, at paras. 281, 285, aff'd 2012 ONCA 867. Here, the evidence suggests that to the extent the plaintiff or other class members believe that there was an implied term that GST be calculated in a certain manner, that expectation arose from their past purchasing history. The assessment of any implied term in this case would require individual examination of each class member's circumstances.

[138] The plaintiffs rely on cases in which an implied term was certified as a common issue. In *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, [2012] 3 C.T.C. 132, Justice Strathy (as he then was) certified common issues regarding implied terms of contract. He held, at paras. 291-92:

> In this case, the plaintiff pleads that it was an express or implied term of the contract between the plaintiffs and Donations Canada Trust that the charitable tax receipts received by Class members "would be accepted by C.R.A. as valid and legitimate claims for charitable donation tax credits" and that Class members "would receive the tax savings as stated in the promotional materials and the contract."
>
> In my view, the existence of such an implied term is an appropriate common issue. The case is not unlike *Hickey-Button v. Loyalist College of Applies Arts & Technology* (2006), 2006 CanLII 20079 (ON CA), 211 O.A.C. 301, [2006] O.J. No. 2393 at para. 47 and *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019, [2010] O.J. No. 1411 (S.C.J.), in which implied terms of a contract arising out of a university calendar were certified to be determined on a common basis.

[139] Similarly, in *Lee v. Ocean Pacific Hotels Ltd.*, 2023 BCSC 1650, the court certified a common issue of an implied term to continue to provide extended health benefits. The defendant employer in that case relied on *Matoni* and *Fairview Donut* to submit that an implied term would necessarily require a consideration of individual intentions: at paras. 126-28.

[140] However, the court in *Lee* rejected the argument. Since all employees received the same "Casual Agreement", the court held that there was a basis to certify the proposed common issue of an implied term in the contract: at para. 130.

(ii) Application of the law to the present case

[141] In the present case, the implied term is based on the third branch of the *MJB* test –a presumed intention based on the obviousness of Ticketmaster being contractually obliged to enforce ticket limits and not to turn a blind eye to those professional resellers who were breaching the limits.

[142] Based on the above case law, I cannot find that it is plain and obvious that the claims for breach of implied terms would fail. All of the class rely on the same TOU and PP – there are no

individual issues of what a class member received. In that sense, it is not beyond doubt that the analysis in *Cannon* and *Lee* could apply to permit an implied term to be found from the TOU and PP, unlike the individual features of the proposed implied terms in *Matoni* and *Lewis*.

[143] The TOU stated that users could be removed from the primary market for failure to comply with rules prohibiting the purchase of multiple tickets. It is not beyond doubt that it may be "necessary" or "obviously assumed" that (i) purchasers "would be treated fairly and equally, including enforcement of the Terms of Use and Purchase Policy" and (ii) Ticketmaster "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."

[144] The role of the court on a certification motion is not to conduct a summary judgment or trial. A contract claim fails to disclose a cause of action under s. 5(1)(a) only when the court finds that it is beyond doubt that the interpretation of the plaintiff cannot be supported. Contractual interpretation on a certification motion must stay within the plain and obvious test.

[145] I apply the test set out by Marchand J.A. in *Live Nation.* I cannot conclude that "the Terms of Use and Purchase Policy were patently incapable" of supporting a claim for breach of an implied term of the contract.

[146] For the above reasons, I find that the claim for breach of implied contractual terms discloses a cause of action.

<u>Is there a cause of action for breach of the duty to act honestly and in good faith in the performance of the contract?</u>

[147] As noted above, the plaintiffs plead in the Claim that:

(i) "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, the use of its Sync data, and the use of its primary and secondary sales databases to detect whether the Terms of Use and Purchase Policy had been complied with by Resellers": at para. 62.

(ii) "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": at para. 66.

[148] The plaintiffs further plead in the Claim that Ticketmaster "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": at para. 67.

[149] In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the court held that "there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": at para. 73.

[150] The court in *Bhasin* further held that it is a "general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance": at para. 74. The duty "does not require that the defendant intend that his or her representation be relied on": at para. 88. The court concluded that discretionary powers cannot be exercised in a manner that is "capricious" or "arbitrary": at para. 89.

[151] In *Jordan v. CIBC Mortgages Inc.*, 2019 ONSC 1178, a certification motion in a case that challenged mortgage prepayment penalties charged to a bank's customers, the court concluded that the pleading disclosed a valid cause of action under s. 5(1)(a) regarding whether a failure to disclose information about the penalties was "a breach of the defendants' duty to act honestly and in a commercially reasonable manner": at para. 180.

[152] I find that a claim for good faith in the performance of the contract is disclosed on the pleadings. The principle of good faith involves "a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations" *Bhasin*, at para. 93. The plaintiffs allege that Ticketmaster Canada "knowingly misled the plaintiffs and the Class Members" and breached the duty of good faith. There are several references in the Claim to Ticketmaster knowingly contravening or turning a blind eye to breaches of ticket limits.

[153] Ticketmaster disputes the claim for good faith in the performance of the contract, stating that "there is no basis to conclude that Ticketmaster misled the plaintiffs about any matters directly linked to the performance of the contract." These are merits issues.

[154] Given the pleading of the Media Investigation and the NYAG Report, a court could find that Ticketmaster acted "selectively or arbitrarily to favour Resellers to the detriment of consumers" (as pleaded at para. 62 of the Claim) and as such, breached the duty of honest performance.

[155] Consequently, I find that there is a cause of action pleaded for the breach of the duty to act honestly and in good faith in the performance of the contract.

<u>The effect of the limitation of liability clause on the contractual claims</u>

[156] Ticketmaster relies on the limitation of liability provision under which Ticketmaster has "no liability or responsibility whatsoever for … any failure of another user of the site to conform to the Codes of Conduct". Ticketmaster submits that it is beyond doubt that no contractual liability for any breach of an alleged obligation to verify transactions can arise given that clause.

[157] I do not agree.

[158] The limitation of liability clause must be considered under the plain and obvious test. It is not beyond doubt that the scope of the limitation clause protects against Ticketmaster's alleged breach of contract. While the clause protects Ticketmaster from liability for "any failure of another user of the site to conform to the Codes of Conduct", it does not necessarily protect Ticketmaster from its own alleged conduct of turning a blind eye to, or working with, professional resellers to allow them to continue using bots and improper multiple accounts to purchase Primary Tickets outside of posted ticket limits.

[159] Further, an analysis of whether the limitation of liability clause could apply would require consideration of evidence relevant to whether the clause is vague and ambiguous, or unenforceable based on principles of unconscionability if it permits Ticketmaster to conspire, agree or arrange with professional resellers to violate the TOU and PP (as alleged). I am not satisfied that it is beyond doubt that the doctrines of ambiguity or unconscionability would not apply.

[160] A merits analysis would also involve consideration of relevant principles of interpretation applicable to consumer agreements, standard form agreements, and principles of good faith. By way of example, one of the certified common issues in the BC claim is whether "the Class Members' claims [are] limited, waived, or released by the Limitation of Liability clause in the Terms of Use on www.ticketmaster.ca": *Live Nation*, at para. 55.

[161] Consequently, I do not find that it is plain and obvious that the limitation of liability clause would preclude the contractual claims under the TOU or PP.

Is it plain and obvious that the plaintiffs' claim for disgorgement cannot succeed?

[162] I do not find that it is plain and obvious that the claim for disgorgement cannot succeed.

[163] I set out the pleadings for disgorgement as a remedy for the contractual breach at para. 107 above. Disgorgement is sought only for the contractual and unjust enrichment causes of action.

[164] The court in *Atlantic Lottery*, under the heading "Disgorgement for Breach of Contract", summarized the relevant principles for a disgorgement claim.

[165] The court held that "disgorgement may be available for breach of contract in certain exceptional circumstances": at para. 51, citing *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.). Such a claim is available "where other remedies are inadequate and only where the circumstances warrant such an award": at para. 53.

[166] While not an exhaustive basis, exceptional circumstances can be established if "the plaintiff [has] a legitimate interest in preventing the defendant's profit-making activity": *Atlantic Lottery*, at paras. 52-53.

[167] In brief, "the key to developing principles for gain-based recovery in breach of contract is to consider what legitimate interest a gain-based award serves to vindicate": *Atlantic Lottery*, at para. 57.

[168] The court in *Atlantic Lottery* held that "[a]s to what circumstances *will* create a legitimate interest in the defendant's profit-making activity, I agree with Lord Nicholls that the boundaries of this remedy are 'best hammered out on the anvil of concrete cases'": at para. 55, citing *Blake*, at p. 291 [Italics in original].

[169] Even if a party with a legitimate interest in preventing the defendant's profit-making activity has a compensatory element to their claim, they may be entitled to disgorgement if a monetary award is appropriate that goes beyond the economic position the plaintiff would have been put in if the contract had been performed: *Atlantic Lottery*, at para. 58.

[170] In the present case, the plaintiffs plead the required elements for disgorgement. Ticketmaster submits that the plaintiffs suffered no loss because they cannot establish that they would have been able to buy the same ticket in the primary market at face value, and that they cannot establish that they would have been able to buy any ticket in the primary market given that demand exceeds supply for many live events.

[171] In particular, class members may be able to establish the pleaded claim that:

(i) They "have a legitimate contract interest in the defendant complying with its contractual obligations to prevent violations of the Terms of Use and Purchase Policy": at para. 71 of the Claim.

(ii) "The nature of the Class Members [sic] contract interest is such that it cannot be vindicated by other forms of contractual relief and cannot possibly be quantified in monetary terms such that the Class Members' interest in performance of the contract is not reflected by a pure economic measure": at para. 71 of the Claim.

(iii) "The Class Members [sic] relationship with Ticketmaster engages trust, confidence and vulnerability" since Ticketmaster "imparted a sense of confidence in Ticketmaster by representing to Class Members that they were participating in a fair market for secondary tickets", leaving class members "entirely vulnerable to Ticketmaster's decision not to enforce" ticket limits: at para 72 of the Claim.

[172] The above allegations are supported by the material facts pleaded. Purchasers of tickets on Ticketmaster.ca may be able to establish a legitimate contract interest in Ticketmaster enforcing ticket limits. That interest may not be able to be vindicated by contractual relief that can be quantified in monetary terms under a pure economic measure. The class members may be in a position where they are vulnerable to Ticketmaster under a relationship of trust or confidence. Consequently, the plaintiffs may be able to "seek disgorgement of profits or revenues generated from Ticketmaster's unlawful choice to ignore its own contractual provisions": at para. 73 of the Claim.

[173] Based on the above law, the claim for disgorgement discloses a cause of action.

Cause of action objection 2: Competition Act (Objection 2)

[174] The plaintiffs assert a claim under s. 36(1) of the *Competition Act*, for breach of s. 52 of the *Competition Act*.

[175] In this section, I (i) review the pleadings, (ii) summarize the positions of the parties, (iii) discuss the applicable law, and (iv) apply the law to the present case. For the reasons that follow, I find that the pleadings do not disclose a cause of action under the *Competition Act*.

The pleadings

[176] The plaintiffs plead that Ticketmaster breached s. 52 of the *Competition Act*. The plaintiffs allege in the Claim that:

> 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 [because] Ticketmaster knew through its TradeDesk and TradeDesk POS software, through its Sync data, and through its primary and secondary sales databases that Resellers violated the Terms of Use and Purchase Policy to exceed stated ticket-buying limits: at para. 75.

[177] The plaintiffs also plead that the following representations were false or misleading: (i) "ticket limits … will be enforced"; (ii) "[w]e believe it is our job to offer a marketplace that offers a safe and fair place for fans to shop, buy and sell tickets"; and (iii) "the defendants use technology with the aim of 'warding off bots and scalpers'": at para. 21 of the Claim.

[178] The plaintiffs plead the following representations arising from the TOU and PP, at para. 22 of the Claim:

> 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.

[179] The plaintiffs further plead that "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": at para. 77 of the Claim.

[180] The only claim for damages under the *Competition Act* is at para. 78 of the Claim:

> 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*.

[181] The plaintiffs also make a general claim for damages at paras. 101-102 of the Claim, applicable to all causes of action:

> 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.
>
> 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.

<u>The positions of the parties</u>

[182] The plaintiffs submit that the Claim discloses a cause of action that Ticketmaster breached s. 52, which provides that no person shall make a false or misleading representation about a product.

[183] Ticketmaster does not submit that the Claim fails to disclose a cause of action with respect to the breach of s. 52.

[184] Given the nature of the representations as summarized by Marchand J.A. in *Live Nation* (as set out at para. 116 above), the analysis of the TOU and PP in my review of the alleged breach of contract, and additional representations as set out at para. 50 above, I find that the pleadings support a cause of action that:

(i) Ticketmaster represented it would provide a fair market and enforce ticket limits.

(ii) Such representations may be false or misleading if Ticketmaster turned a blind eye to ticket brokers who were using multiple accounts or bots or knowingly facilitated their use.

(iii) Ticketmaster failed to use data from the secondary market to determine whether professional resellers were breaching their obligations under the TOU and PP, thus resulting in an unfair market.

[185] However, the issue before the court is not whether the allegations support a breach of s. 52 of the *Competition Act*.

[186] Rather, Ticketmaster submits that there is no cause of action for damages under s. 36(1) of the *Competition Act*, which provides, under the heading of "Special Remedies":

> Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[187] Ticketmaster makes two submissions in support of its position:

(i) It is plain and obvious that no claim can be brought under s. 36(1) unless there is a pleading that the plaintiff relied on the representation and suffered a loss as a result of that reliance. There is no pleading of detrimental reliance.

(ii) It is plain and obvious that even if detrimental reliance is not required, a causal connection remains a required element under s. 36(1). The plaintiffs have not pleaded any material facts to support such a causal connection.

[188] The plaintiffs submit that it is not beyond doubt that a plaintiff can bring a claim for damages under s. 36(1) without pleading detrimental reliance on the representation impugned under s. 52.

[189] The plaintiffs further submit that they have pleaded the material facts required to establish a causal connection. The plaintiffs acknowledge that their claim for the difference in price or Double Dip Fees cannot be suffered as the loss under s. 36(1), since there is no pleading

(and could not be an allegation) that the plaintiffs would have been able to obtain tickets in the secondary market if Ticketmaster had advised that the market was unfair and that it was turning a blind eye to professional resellers breaching ticket limits. In other words, the plaintiffs do not plead a financial loss from the alleged misrepresentation.

[190] However, the plaintiffs submit that the causal connection required to establish a loss under s. 36(1) is based on the possibility that ticket purchasers could have decided not to participate in Ticketmaster's primary or secondary markets if the purchasers had known that the primary marketplace was not fair.

[191] For the reasons that follow, I find that there is no cause of action under the *Competition Act*.

Application of the law to the present case

[192] I address each of the Ticketmaster submissions (summarized at para. 187 above).

(i) Submission 1: Is it plain and obvious that there is no cause of action because detrimental reliance is required for a claim under s. 36(1)?

[193] In the present case, the plaintiffs do not submit that they relied on a representation of a fair primary market to purchase tickets on the secondary market. Ticketmaster submits that it is beyond doubt that without such a pleading of detrimental reliance, a claim under s. 36(1) of the *Competition Act* cannot succeed.

[194] I do not agree.

[195] There is case law to support the plaintiffs' position that it is not necessary to establish detrimental reliance in order to bring a claim under s. 36(1).

[196] In *Rebuck v. Ford Motor Company*, 2018 ONSC 7405, Morgan J. held, at para. 33:

> **Although causation has not been dispensed with, reliance in the usual sense of a common law negligent misrepresentation claim is not a necessary ingredient to establish a civil cause of action under s. 36 of the *Competition Act* for breach of s. 52**: *Magill v Expedia Canada Corp*, 2010 ONSC 5247, at para 107. For example, in *Pro-Sys*, at paras 71, 113, a claim under s. 36 was permitted to proceed and for damages to be calculated on an aggregate rather than an individualized basis. This could not happen under a common law tort claim of negligent misrepresentation with its strict reliance-as-inducement rule: *Hedley Byrne & Co Ltd v Heller & Partners Ltd.* [1964] AC 465, 502-4. [Emphasis added.]

[197] Similarly, the court in *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423 applied the decision in *Rebuck* to find that a cause of action had been pleaded under s. 36(1) of the *Competition Act* when there was a pleading that the purchasers had received less value than what they had paid for the product, as a result of the representation that it was "proven by

science", even though it was not alleged that the plaintiff had relied on the alleged misrepresentation when buying the product: at paras. 180-81.

[198] The British Columbia Court of Appeal in *Live Nation* reversed the motions judge who had concluded that detrimental reliance was required to bring a claim under s. 36(1): at paras. 42, and 110-126. The court held, at para. 125:

> The point of principle is that, **if there is an alternative means of establishing the causal link required to make out a claim under s. 36 of the *Competition Act*, a plaintiff need not plead and prove detrimental reliance**. The outcome will depend on the circumstances and the nature of the claim. [Emphasis added.]

[199] In *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366, the court held that s. 36(1) "**requires causation, but does not stipulate how that may be proven. It does not expressly require reliance**": at para. 232. [Emphasis added.]

[200] Ticketmaster relies on other cases which required detrimental reliance in order to establish causation under s. 36(1): *Magill v. Expedia Canada Corporation*, 2010 ONSC 5247, 1 C.P.C. (7th) 129, at paras. 105-106; *LBI Brands Inc. v. Aquaterra Corporation*, 2016 ONSC 3572 at paras. 20-21; *Murphy v. Compagnie Amway Canada*, 2015 FC 958, 257 A.C.W.S. (3d) 529, at paras. 82-89; *Lin v. Airbnb, Inc.*, 2019 FC 1563, 315 A.C.W.S. (3d) 642, at para. 71; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, 2 B.C.L.R. (6th) 300, at para. 82, citing *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36, 237 A.C.W.S. (3d) 309.

[201] Ticketmaster also relies on a decision of Justice Perell in *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650, at para. 116, in which he concludes that: "[i]t is a debatable proposition whether on a close reading *Drynan v. Bausch Health Companies Inc.*, and *Rebuck v. Ford Motor Company*, (2018) are inconsistent with the authorities that establish that proof of reliance is a requisite for a claim under the *Competition Act*."

[202] It is not the role of the court on a certification motion to resolve contested legal issues unless it is plain and obvious that a cause of action cannot succeed. While the court in *Atlantic Lottery* held that a novel cause of action can be struck if it is plain and obvious that it cannot succeed, the settled law remains that if a cause of action is not "hopeless", then it should be allowed to proceed: see para. 97 above.

[203] In the present case, it is not beyond doubt that detrimental reliance is required under s. 36. The BC Court of Appeal in *Live Nation* followed *Valeant* rather than the *Finkel* and *Wakelam* decisions relied upon by Ticketmaster and held that detrimental reliance is not required. Ontario courts have held the same.

[204] Consequently, I do not accept this submission from Ticketmaster.

(ii) Submission 2: Is it plain and obvious that there is no cause of action because no causal connection has been pleaded for a claim under s. 36(1)?

[205] I first review the relevant law and then apply the law to the present case.

1. The relevant law

[206] Regardless of whether detrimental reliance is required for a claim under s. 36(1), it is settled law that a "causal connection" is required for such a claim.

[207] In *Rebuck*, Justice Morgan relied on s. 36(1), under which a plaintiff "who has suffered damages as a result of" a breach of the provisions of Part VI, may bring an action to "recover … an amount equal to the loss or damage proved to have been suffered". Justice Morgan held, at para. 32:

> The Statement of Claim also alleges that the Defendants knowingly or recklessly made false or misleading representations regarding the fuel consumption of the Vehicles for the purpose of promoting their supply or use contrary to s. 52(1) of the *Competition Act*. As Defendants' counsel point out, **a civil claim under s. 36 of the *Competition Act* requires that the Plaintiff must show both that the Defendants breached s. 52 and that he suffered damages as a result of that breach. This double-barreled requirement "can only be done if there is a causal connection between the breach…and the damages suffered by the plaintiff"**: *Singer v Schering-Plough*, 2010 ONSC 42, at para 107. [Emphasis added.]

[208] In *Matoni*, Hoy J. stated, at para. 40:

> **While, pursuant to section 52 (1.1), it is not necessary to prove that a person was in fact misled or deceived in order to establish a breach of section 52, in order to obtain damages under section 36(1), a causal connection between the alleged breach of section 52 and the damages claimed under section 36 must be proven**: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 2000 CanLII 22704 (ON SC), 51 O.R. (3d) 54, para. 34 (S.C.J.); *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (S.C.J.); and *Hyprescon Inc. v. Ipex Inc.*, 2007 CanLII 11316 (ON SC), [2007] O.J. No. 1327, paras. 65-71 (S.C.J.). [Emphasis added.]

[209] The plaintiffs acknowledge that a causal connection is required. However, they rely on case law which provides that a claim under s. 36(1) can survive even if the causal connection (i) is "weak": *Apotex Inc. v. Hoffman La-Roche Limited* (2000), 195 D.L.R. (4th) 244 (Ont. C.A.), at para. 18, or (ii) raises "a strange proposition at law": *Lin*, at paras. 72-73, citing *Apotex*, at para. 59.

2. Application of the law to the present case

[210] As set out at paras. 180 and 181 above, the plaintiffs only allege the following damages under s. 36(1):

(i) a bald assertion at para. 78 of the Claim that "[t]he 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*", and

(ii) a pleading at para. 102 of the Claim for (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.

[211] Ticketmaster submits that there is no logical or causal link between the representations made in respect of the primary market and the decision to purchase tickets on the secondary market. I agree.

[212] To establish damages the plaintiffs would have to show that in the absence of the representations, they would have been in a better position. However, there is no pleading that the representations have any direct impact on the availability of tickets in the primary market or the secondary market such that the plaintiffs would be in a different position had those representations not been made.

[213] In all of the cases relied upon by the parties in which the *Competition Act* claim survived a certification motion (or a motion to strike), there were pleadings before the court which disclosed an actual loss suffered as a result of the alleged conduct, even if the pleading or evidence was "weak" or was based on a "strange proposition in law". In summary:

(i) In *Matoni*, material facts were pleaded to support a claim that "persons who did not withdraw from the program, and who experienced delay in registration as a Dental Hygienist because the program is not accredited, might possibly prove damages or establish that the amount that they paid for under the agreement for the program exceeded the value to them of the program": at para. 94.

(ii) In *Rebuck*, material facts were pleaded to support a claim that "the price that potential class members paid in purchasing or leasing the Vehicles was in excess of the value that they received due to the discrepancy between the fuel consumption levels of the Vehicles as represented by the Defendants and the actual, expected fuel consumption levels under real world driving conditions." The damages were "based on the excess annual fuel costs incurred, and to be incurred, by class members as a result of this discrepancy": at para. 18.

(iii) In *Drynan*, material facts were pleaded to support a claim that "[t]he defendants' representations caused the class members to purchase COLD-FX® products based on an expected value (i.e., a product 'Proven by Science' to be effective) that was above the value that they actually acquired from the COLD-FX®

products (based on a generic version of North American ginseng not subject to the representations)" such that "the pleadings support a claim that the amount paid was based on a value that exceeded the actual value of a product not 'proven by science'": at paras. 176(iii) and 181.

(iv) In *Apotex*, material facts were pleaded to support a claim for lost sales that allegedly would have occurred if the defendant had not made the impugned representations which permitted it to sell identical products at two price points: at para. 17.

(v) In *Lin*, material facts were pleaded to support a claim for the loss resulting from the double ticketing, based on the difference between two prices (service fees): at para. 70.

[214] However, there is no causal connection pleaded in the present case between the loss claimed (the difference in price or Double Dip Fees) and the alleged misrepresentation that Ticketmaster would provide a fair market and enforce ticket limits. If the plaintiffs had been advised that those representations were false, they would have suffered the same damages.

[215] In *Gomel*, Tammen J. rejected the difference in price theory as a basis for a causal connection, at para. 153:

> As to the plaintiffs' theory that damages can be calculated by subtracting the price paid from the price of the resold ticket, I find that methodology implausible. There is no evidence to support the plaintiffs' assertion that the full difference between the price of a ticket on the primary and secondary market is due to the alleged representations. I agree with Ticketmaster that one cannot assume a class member would have acquired a ticket for a particular event on the primary market absent the representations. The plaintiffs have provided no evidence to show that this method could decide the issue of damages on a class-wide basis. Even assuming that Ticketmaster's representations influenced the price of tickets, on the plaintiffs' own theory, the use of automated ticket bots more directly causes the inability of purchasers to secure tickets in the primary market, not the representations themselves.

[216] That decision was not appealed. The Court of Appeal noted in *Live Nation*, at para. 47:

> The certification judge rejected the plaintiff's theory that damages could be calculated by subtracting the original price of the tickets at issue from the price paid when they were resold. This finding is not at issue on appeal.

[217] The plaintiffs submit that there could be a causal connection between class members who could have decided not to participate in Ticketmaster's primary or secondary markets if they knew that Ticketmaster was not enforcing ticket limits on purchases by professional resellers. However, if such class members did not participate in either market, then they would have suffered no loss. They still would have been required to use other secondary market ticket sales

sites if they wanted to attend live events where Primary Tickets were obtained in excess of ticket limits. The plaintiffs' submission raises the same concerns as in *Gomel* - those purchasers still could not plead that they would have obtained primary tickets if they had participated in the market.

[218] For the above reasons, I find that the Claim does not disclose a cause of action under the *Competition Act.*

Cause of action objection 3: Consumer protection legislation (Objection 3)

[219] The plaintiffs assert a claim under consumer protection legislation. Under the *CPA*, the plaintiffs seek damages under s. 18(2) for breach of ss. 14 and 15 of the *CPA*.

[220] In this section, I (i) review the pleadings, (ii) summarize the positions of the parties, (iii) discuss the applicable law, and (iv) apply the law to the present case. For the reasons that follow, I find that the Claim does not disclose a cause of action under the consumer protection legislation.

The pleadings

[221] At paras. 39-44 of the Claim, the plaintiffs plead the material facts to characterize the secondary ticket purchases as a "consumer agreement" or "consumer transaction" subject to the *CPA* and Ontario law (or in the alternative, that equivalent consumer protection legislation in other provinces applies to class members not resident in Ontario).

[222] At paras. 45-48 of the Claim, the plaintiffs plead the sources of the advertising of the alleged representations.

[223] At para. 49 of the Claim, the plaintiffs rely on the same misrepresentations that support the claim under the *Competition Act*, which are pleaded at paras. 21-22 of the Claim and set out at paras. 177-78 above.

[224] With respect to damages sought under the consumer protection legislation, the claims mirror those under the *Competition Act*: at paras. 50, 52, and 53 of the Claim.

The position of the parties

[225] The plaintiffs rely on the same alleged misrepresentations which support their claim under the *Competition Act*. The core of those representations, taken from the TOU, PP, and public statements, is that Ticketmaster would enforce ticket limits to provide a fair marketplace for fans to buy tickets.

[226] Ticketmaster did not submit that the Claim fails to disclose a cause of action that the contracts were consumer contracts subject to the *CPA*.

[227] Again, given the nature of the representations as summarized by Marchand J.A. at para. 69 in *Live Nation*, the analysis of the TOU, PP, and additional representations as set out at para. 50 above, the pleadings support a core claim that:

(i) Ticketmaster represented it would enforce a fair market.

(ii) Such representations may be false, misleading, or unconscionable if Ticketmaster turned a blind eye to ticket brokers who were using multiple accounts or bots or knowingly facilitated their use.

(iii) Ticketmaster failed to use data from the secondary market to determine whether professional resellers were breaching their obligations under the TOU and PP and thus creating an unfair market.

[228] Consequently, Ticketmaster does not dispute that the Claim discloses a cause of action for breach of ss. 14 and 15 of the *CPA*.

[229] However, just as under the *Competition Act*, the issue before the court is whether there is a causal connection to support a claim. Ticketmaster submits, for the same reasons, that it is plain and obvious that there is no causal connection between the alleged damages and the alleged breaches of the consumer protection legislation. For the reasons that follow, I agree.

The applicable law

[230] Under s. 18(2) of the *CPA*:

> A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,
>
> (a) because the return or restitution of the goods or services is no longer possible; or
>
> (b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

[231] Unlike Ticketmaster's position with respect to the claim under s. 36 of the *Competition Act*, Ticketmaster acknowledges that it is not necessary to plead detrimental reliance in order to establish a causal connection under consumer protection legislation. While some passages in its factum suggest that detrimental reliance is required, Ticketmaster did not pursue such an argument at the hearing.

[232] Both parties agree with the following summary of the law on causal connection set out by Ticketmaster in its factum:

> The plaintiffs cite *Drynan* for the proposition that reliance need not be demonstrated to claim damages under s. 18 of the *Consumer Protection Act*. However, that case itself acknowledges that causality is still required. The necessary causal link to recover damages under the *Consumer Protection Act* is the link between the damages and the agreement: the consumer suffered damages that flowed from entering into an agreement after or while an unfair practice was occurring.

[233] The above summary is consistent with the settled law in the leading case of *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, at para. 90.

[234] However, for the same reasons as under the *Competition Act*, Ticketmaster submits that there is no pleading to support a causal connection that a class member suffered damages that flowed from entering into an agreement after or while an unfair practice was occurring.

Application of the law to the present case

[235] The analysis of the lack of causal connection is the same as for the claims under the *Competition Act*.

[236] The plaintiffs do not plead any "amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer loss." The plaintiffs do not plead that by purchasing a ticket in the secondary market, they suffered damages as a result of the alleged misrepresentations. The plaintiffs do not plead that they would have been able to purchase the same ticket (or any ticket) on the primary market if the representations had not been made.

[237] Instead, the plaintiffs again submit that a loss can be established on the basis that some purchasers could have decided not to participate with Ticketmaster if they had known that the primary marketplace was not fair. For the reasons I discuss in relation to the *Competition Act* claim, I find that such a decision cannot constitute the causal connection for loss under the consumer protection legislation.

[238] Consequently, I find that the Claim does not disclose a cause of action under the consumer protection legislation.

Cause of action objection 4: Breach of Ontario and Quebec ticketing legislation (Objection 4)

[239] The plaintiffs seek damages under the Ontario and Quebec ticketing legislation. The relevant Acts are the *Ticket Sales Act, 2017*, S.O. 2017, c. 33, Sched. 3 ("*TSA*") and s. 236.2 of the Quebec *Consumer Protection Act*, C.C.R.Q. c. P-40.1 ("*QCPA*").

[240] The plaintiffs acknowledge that while there is similar ticket sales legislation in Manitoba and Saskatchewan, there are no equivalent provisions prohibiting a person from facilitating the sale of a ticket obtained through a bot. Consequently, the plaintiffs do not advance a claim pursuant to those statutes.

[241] The plaintiffs also acknowledge that the statutory prohibition against reselling or facilitating the sale of tickets acquired with the use of bots only arose when (i) the *TSA* came into force on July 1, 2018 and did not exist in the prior Ontario legislation (the *Ticket Speculation Act*, R.S.O. 1990, c. T.7), and (ii) s. 236.2 of the *QCPA* came into force on June 6, 2018. Consequently, the plaintiffs acknowledge that subclasses would be required for class members since the proposed class period starts on January 1, 2015.

[242] In this section, I (i) review the pleadings, (ii) summarize the positions of the parties, (iii) discuss the applicable law, and (iv) apply the law to the present case. For the reasons that follow, I find that the Claim discloses a cause of action under the ticketing legislation.

The pleadings

[243] The plaintiffs plead at paras. 88-90 of the Claim:

> 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.
>
> 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*.
>
> 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.

[244] The plaintiffs plead at para. 56 b) of the Claim:

> [Ticketmaster breached] 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".

The position of the parties

[245] The plaintiffs rely on the Media Investigation to plead that Ticketmaster facilitated the purchase of a ticket using a bot, and as such breached s. 4(3) of the *TSA* and s. 236.2 of the *QCPA*. The alleged facilitation is based on the pleadings that Ticketmaster turned a blind eye to or knowingly cooperated with professional resellers who were using multiple accounts or bots to purchase tickets in excess of posted ticket limits.

[246] The plaintiffs further submit that it is not plain and obvious that damages cannot be awarded. The plaintiffs rely on the text of s. 11(3) of the *TSA* which allows the court to make broad orders of restitution and any other order the court considers appropriate, upon finding that the defendant has contravened the provisions.[17]

[247] Ticketmaster submits that it is plain and obvious that the pleadings do not disclose a cause of action for either (i) a breach of the ticketing legislation or (ii) any causal connection of a breach (if it occurred) to damages.

[248] For the reasons that follow, I find that it is not plain and obvious that a claim under the ticketing legislation would fail.

The applicable law

[249] Under the *TSA* and the *QCPA*, a person cannot facilitate the sale of a ticket obtained using a bot.

[250] The relevant statutory prohibitions under the *TSA* are set out at ss. 4(1) and 4(3):

> 4(1) No person shall use or sell software, including automated ticket purchasing software, intended to circumvent any of the following on a website, online service or electronic application of a ticket business:
>
> 1. A security measure that is used to ensure an equitable ticket buying process.
>
> 2. An access control system that is used to ensure an equitable ticket buying process.
>
> 3. Any other control or measure that is used to ensure an equitable ticket buying process.
>
> 4. A prescribed control, measure or system.
>
> 4(3) No person shall knowingly make a ticket available for sale or facilitate the sale of a ticket that was obtained through the use of software described in subsection (1).

[251] The relevant statutory prohibition under the *QCPA* is at s. 236.2:

---

[17] Section 272 of the *QCPA* provides similar relief for any breach of the *QCPA*.

> 236.2. No person may sell or use 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.
>
> No person may resell, or facilitate the resale of, a ticket obtained using software referred to in the first paragraph.

[252] The *TSA* provides a right to (i) claim damages for a ticket business or ticket purchaser who has suffered a loss as a result of a person's contravention of a provision of the *TSA* or the regulations and (ii) commence an action in a court against that person. Sections 11(1) and (3) provide:

> 11(1) Subject to subsection (2), a ticket business or ticket purchaser who has suffered a loss as a result of a person's contravention of a provision of this Act or the regulations may commence an action in a court against that person.
>
> 11(3) If the court finds that the defendant has contravened the provision, the court may,
>
> (a) order restitution of any money or other consideration given or furnished by the plaintiff;
>
> (b) award the plaintiff damages in the amount of any loss suffered because of the contravention, including exemplary or punitive damages;
>
> (c) grant an injunction restraining the person from continuing to contravene the provision;
>
> (d) make an order of specific performance against the person; or
>
> (e) make any other order the court considers appropriate.

[253] The parties advised the court that they had not found any judicial consideration of the *TSA* other than a brief reference by the Saskatchewan court in its analysis of the drip pricing claims against Ticketmaster that is not relevant to this case: *Watch*, at para. 50.

[254] Consequently, the issue before the court is whether it is plain and obvious that no claim can be brought against Ticketmaster under the Ontario and Quebec ticketing legislation.

Application of the law to the present case

[255] Ticketmaster submits that it is plain and obvious that the pleadings do not disclose a cause of action for either (i) a breach of the ticketing legislation or (ii) any causal connection of a breach (if it occurred) to damages.

[256] I address each of these issues below.

(i) Does the Claim disclose a cause of action for breach of the ticketing legislation?

[257] Throughout the Claim, the plaintiffs allege that Ticketmaster turned a blind eye to or knowingly cooperated with professional resellers who were using bots or multiple accounts to purchase tickets in excess of posted limits. Such allegations, when taken as true under the s. 5(1)(a) test, disclose a cause of action under the ticketing legislation.

[258] "Turning a blind eye" to the use of bots or "knowingly cooperating" with those who use bots may constitute "facilitating" the purchase of a ticket by a bot. There is no case law on the point. There is no basis to find that the interpretation of "facilitating" would necessarily exclude the conduct alleged.

[259] Consequently, I find that the Claim discloses a cause of action for the breach of the ticketing legislation.

(ii) Does the Claim disclose any causal connection of a breach (if it occurred) to damages?

[260] The plaintiffs submit that there are broader remedies available under the ticketing legislation than under s. 36(1) of the *Competition Act.* The plaintiffs rely on the availability of restitution under s. 11(3)(a) of the *TSA* (see also s. 272 of the *QCPA*) "if the court finds that the defendant has contravened the provision."

[261] Ticketmaster submits that the requirement under s. 11(1) of the TSA for loss "as a result of a person's contravention of a provision of this Act or the regulations" imports the same causal connection requirement as under the *Competition Act* and consumer protection legislation.

[262] I do not agree. It is not beyond doubt that a damage claim could not be brought under s. 11 of the *TSA* even if it cannot be brought under the *Competition Act* or consumer protection legislation.

[263] Section 11(3)(b) includes exemplary or punitive damages under "loss suffered because of the contravention," as well as other broad remedies available under s. 11(3). Other damages which can be sought include "restitution of any money or other consideration given or furnished by the plaintiff" under s. 11(3)(a) or "any other order the court considers appropriate" under s. 11(3)(e) (see also s. 272 of the *QCPA*). The Claim, at para. 90, requests a damages award pursuant to s. 11(3), including restitution and exemplary and punitive damages.

[264] Further, the causation test proposed by Ticketmaster would apply not only to claims against Ticketmaster, but also to claims against those who use bots to breach ticket limits. It is not plain and obvious that such a statutory interpretation must apply.

[265] The legislature enacted a strong prohibition against the use (or facilitating the use) of bots. It is arguable that such protective statutory intention is inconsistent with Ticketmaster's interpretation which would require an individual purchaser to satisfy the court that they would have been able to purchase the same tickets that they purchased in the secondary market but for the primary price, in order to obtain a damages award under s. 11(3).

[266] However, the legislature has provided for a very wide range of remedies, including "any other order the court considers appropriate," which is arguably more consistent with the purpose and intent of the ticketing legislation.

[267] Consequently, it is possible that the "loss" requirement under s. 11(1) of the *TSA* would be read in conjunction with the remedies for such loss under s. 11(3), to expand a damage claim beyond the narrower confines of the *Competition Act* or the consumer protection legislation.

[268] There has been no judicial consideration of the ticketing legislation generally, or damages payable under the statute specifically. It is not plain and obvious that the claim under the ticketing legislation would fail.

[269] For the above reasons, I find that the ticketing legislation claim discloses a cause of action.

Cause of action objection 5: Unlawful means conspiracy (Objection 5)

[270] The plaintiffs seek damages for unlawful means conspiracy.

[271] Ticketmaster submits that the Claim does not set out the material facts for the cause of action.

The pleadings

[272] The plaintiffs set out their pleading of unlawful means conspiracy at paras. 91-94 of the Claim:

> 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).
>
> 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.
>
> 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.
>
> 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.

[273] In their written submissions and at the hearing, the plaintiffs also relied on the alleged breaches of s. 52 of the *Competition Act* and s. 14 of the *CPA* as a basis for the unlawful means conspiracy claim (in addition to the breach of ticket sales legislation).

The positions of the parties

[274] Ticketmaster submits that the plaintiffs have failed to plead (i) the material facts as to the parties to the conspiracy, (ii) the basis for the alleged unlawful conduct and (iii) the alleged conspiratorial acts with clarity and precision.

[275] The plaintiffs submit that the Claim, read generously, meets the pleading requirements on those issues.

The applicable law

[276] The factors that must be pleaded when alleging conspiracy are set out by the court in *Apotex*, at para. 22, quoting *Pindoff Record Sales Ltd. v. CBS Music Products Ltd.* (1989), 44 C.P.C. (2d) 308 (Ont. H.C.J.):

> Pleading. The statement of claim should describe **who** the several parties are and their relationship with each other. It should allege the **agreement** between the defendants to conspire, and state precisely what **the purpose** or what were **the objects** of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, **the overt acts** which are alleged to have been done by each of the alleged conspirators in furtherance of the conspiracy; and lastly, it must allege **the injury and damage occasioned to the plaintiff thereby**. [Emphasis added.]

[277] In *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646, 320 A.C.W.S. (3d) 547, Justice Perell set out the following principles on the pleading requirements for a conspiracy claim. He held, at paras. 142-43 (references omitted):

> In a conspiracy pleading, it is necessary to set out discretely the particular acts of each co-conspirator so that each defendant can know what he or she is alleged to have done as part of the conspiracy. A recitation of a series of events coupled with an assertion that they were intended to injure the [sic] insufficient, and it is not appropriate to lump some or all of the defendants together into a general allegation that they conspired to injure the plaintiff. If the plaintiff does not, at the time of pleading have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim.
>
> A pleading of conspiracy should specify: (a) who the parties are and their relationship with one another; (b) the agreement between the defendants to conspire and its purpose or object; (c) (d) the overt acts that are alleged to have been done by each of the conspirators in furtherance of the conspiracy and these are to described with clarity and precision; and (e) the damages occasioned to the plaintiff as a result of the conspiracy.

[278] Courts have recognized the difficulty of a plaintiff pleading specific elements of a secretive conspiracy when the details are largely outside their knowledge. In *Mancinelli*, Justice Perell held, at paras. 172-73 (references omitted):

> Rule 25.06 (1) of the *Rules of Civil Procedure* stipulate that every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. The Defendants' submissions impugning the Second Amended Statement of Claim are aimed at disrupting the Plaintiffs' action by demanding that the Plaintiffs plead the evidence to prove the material facts. This Defendants' attack on the pleading is unfair and it misses the target. **A plaintiff is not required to prove its case in its Statement of Claim and need only provide the material facts that support the constituent elements of its claim.** The Plaintiffs have done that.
>
> I appreciate that rule 25.06 stipules that where fraud, like the allegations of conspiracy in the immediate case, is alleged, the pleading shall contain full particulars, **but in the immediate case the full particulars are essentially that the Defendants' traders covertly met in chat rooms and traded information to manipulate for their own benefit FX transactions. The evidence proving those conversations; for example, transcripts of particular chats, if available, would emerge during the discovery stage of the action. The Defendants cannot set a virtually impossible standard for plaintiffs to meet in a price-fixing conspiracy case which are secretive in nature, with the details of the conspiracy largely in the hands of the conspirators.** [Emphasis added.]

[279] Similarly, the court held in *Crosslink v. BASF Canada*, 2014 ONSC 4529 (Div. Ct.) at para. 27:

> Dow submitted that this claim is devoid of particulars; that the description of the alleged conspiracy is completely generic; that the plaintiff does not specify any

> agreement, or actionable acts or omissions, and that the pleading cannot meet the scrutiny which s. 5(1)(a) required the motions judge to apply. Dow appears to seek a detailed description of how the conspiracy operated, where and when the meetings took place, who attended the meetings and so forth. I agree with Crosslink that **this level of particularity would set a virtually impossible standard for plaintiffs to meet in a price-fixing conspiracy case. Price-fixing conspiracies are secretive in nature, with the details of the conspiracy largely in the hands of the conspirators.** [Emphasis added.]

[280] The element of unlawful means can be satisfied by the breach of a statute. In *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, the court held, at para. 83:

> All this said, our law had recognized the tort of civil conspiracy based on the breach of a statute long before Parliament legislated a civil right of action in 1975. In *International Brotherhood of Teamsters v. Therien*, 1960 CanLII 33 (SCC), [1960] S.C.R. 265, and *Gagnon v. Foundation Maritime Ltd.*, 1961 CanLII 69 (SCC), [1961] S.C.R. 435, this Court imposed liability on trade unions for unlawful means conspiracy for conduct prohibited by statute (*Therien*, at p. 280; *Gagnon*, at p. 446). And, in *Cement LaFarge v. BC Lightweight Aggregate*, 1983 CanLII 23 (SCC), [1983] 1 S.C.R. 452, which was decided on the basis of the *Combines Investigation Act*, this Court affirmed not only the existence of the tort of civil conspiracy, but also that a breach of the *Combines Investigation Act* could satisfy the "unlawful" element of unlawful means conspiracy (pp. 471-72). **Any question on this point was settled when *LaFarge* was cited in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 64, for the same proposition — that a breach of statute could satisfy the "unlawful means" component of the tort of unlawful means conspiracy.** [Emphasis added,]

[281] Similarly, in *Apotex*, the court held, at para. 21:

> The motions judge held that while allegations of unlawful conduct are made in the amended statement of claim "no factual underpinning is pleaded" to sustain the tort of unlawful interference with economic relations. Similarly, with respect to conspiracy, he held that the pleading is "devoid of facts supporting an allegation of unlawful purpose". With respect, I do not agree. **It is open to the appellant to rely upon breach of s. 52 of the *Competition Act* as supplying the element of unlawful means for both unlawful interference with economic interests and conspiracy.** [Emphasis added.]

[282] In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 SCR 177, the court followed the decision from the House of Lords in *Revenue and Customs Commissioners v. Total Network SL*, [2008] UKHL 19, 1 A.C. 1174, and held that "a more flexible definition of 'unlawful means' was needed in the conspiracy context": at para. 53.

Application of the law to the present case

[283] Ticketmaster submits that the plaintiffs have failed to plead (i) the material facts as to the parties to the conspiracy, (ii) the basis for the alleged unlawful conduct and (iii) the alleged conspiratorial acts with clarity and precision. I do not agree.

[284] The Media Investigation gives rise to the pleadings of conspiracy, which are pleaded with sufficient detail as a basis for the alleged conspiracy.

[285] The parties to the alleged conspiracy are pleaded to be Ticketmaster and unnamed professional resellers: at para. 91 of the Claim. The plaintiffs are not required to plead the identities of any professional reseller alleged to have breached ticket limits when that information would only have been available to Ticketmaster who allegedly chose not to link data from TradeDesk to the primary market.

[286] The agreement to conspire is pleaded at para. 93 of the Claim. The plaintiffs allege that Ticketmaster "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." The alleged breaches of s. 52 of the *Competition Act*, s. 14 of the *CPA* and the ticketing legislation are also pleaded, which can serve as the basis for an unlawful means act.

[287] The pleaded level of particularity is consistent with the case law that requires sufficient pleading of material facts taking into account that any alleged conspirators, basis for the conspiracy, and conspiratorial acts "are secretive in nature, with the details of the conspiracy largely in the hands of the conspirators": *Mancinelli*, at para. 173.

[288] For the above reasons, I find that the claim for unlawful means conspiracy discloses a cause of action.

Cause of action objection 6: Negligence (Objection 6)

[289] Ticketmaster submits that the claim fails as a negligent misrepresentation claim since there is no pleading of detrimental reliance.

[290] The plaintiffs submit that the claim is properly pleaded for negligent performance of a service.

The pleadings

[291] The pleadings in negligence are lengthy (at paras. 79-87 of the Claim). I summarize them as follows:

(i) Ticketmaster "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": para. 79.

(ii) There is proximity between the plaintiffs and Ticketmaster since (a) "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"; (b) "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, its Sync data, and its primary and secondary sales databases"; and (c) "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": paras. 80(c)-(e).

(iii) "[I]t 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, through the analysis of its Sync data, and through analysis of its primary and secondary sales databases, 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": para. 81.

(iv) Ticketmaster breached its duty of care since it (a) "failed to use data in the TradeDesk and TradeDesk POS software, Sync data or their primary and secondary sales databases, to monitor compliance with the Terms of Use and Purchase Policy" and (b) "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": paras. 83(a) and (c).

(v) "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": para. 84.

[292] The plaintiffs also seek disgorgement of "profits and/or revenues" as a remedy for the negligence: at para. 86 of the Claim.

The positions of the parties

[293] Ticketmaster submits that (i) the plaintiffs' claim is for negligent misrepresentation and as such cannot succeed because there is no pleading of detrimental reliance on any representation and (ii) in the alternative that the plaintiffs' claim is for negligent performance of a service, it is plain and obvious that there is no relationship of proximity pleaded.

[294] The plaintiffs submit that their negligence claim is based on the negligent performance of a service, which has been certified in past cases. The plaintiffs further submit that they have pled material facts to establish a relationship of proximity.

The applicable law

[295] In *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, 448 D.L.R. (4th) 328, the court affirmed claims for negligent performance of a service as one of five categories of cases where plaintiffs may recover in negligence for pure economic loss not causally connected to physical or property harm: at paras. 81-82.

[296] In *Wright*, at para. 105, the court set out the first step in the analysis of whether there is a cause of action for negligent performance of a service: do the pleadings establish a "relationship of proximity" between the plaintiff and defendant?

[297] The court in *Wright* held that "read generously", the relevant material facts were pleaded to support a cause of action for negligent performance of a service. The court relied on the pleading that (i) the defendant created the fund for investment; (ii) the defendant earned monies from the promotion and management of the fund; (iii) the defendant undertook to provide a financial product that was suitable for investors; and (iv) investors were not given sufficient information about a design flaw or the nature and extent of the risk and possible rewards: at paras. 104-107.

[298] In the alternative, the court in *Wright* concluded there was a valid novel claim for breach of the duty of care. It cited the defendant's undertaking "to act honestly, in good faith and in the best interests of the investment fund and exercise the degree of care and diligence that a prudent person would exercise in the circumstances": at para. 113. The court held that "[t]he failure to provide full disclosure of the risks and/or the fact that the product was doomed to fail […] might constitute a breach of a *prima facie* duty of care": at para. 115.

[299] The court in *Wright* cautioned that "on a certification motion, as on a motion to strike, the certification judge is not to assess whether the claim can withstand summary judgment or a trial on the basis of the material adduced on the motion, but only whether the pleadings contain some radical defect such that there is no reasonable prospect of success": at para. 117.

[300] Regardless of whether a claim is classified as one for pure economic loss for negligent misrepresentation or negligent performance of a service, the considerations that affect proximity are the same: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, [2020] 3 S.C.R. 504, at para. 20.

[301] In *Maple Leaf Foods*, the court held that "[i]n cases of negligent misrepresentation or performance of a service, two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance": at para. 32 [Italics in original]. The court held that no such proximity could exist between Maple Leaf Foods and franchisees of Mr. Sub stores that the "ready-to-eat" ("RTE") meats provided by Maple Leaf Foods were safe, since that relationship arose with consumers of the food rather than franchisees operating the franchise businesses: at paras. 37-39.

[302] However, just because the proximity requirement is the same for both a negligent misrepresentation claim and a negligent performance of service claim does not mean that

detrimental reliance on a representation must be established for the latter in order to plead the cause of action.

[303] By way of example, in *Maple Leaf Foods*, the court did not require evidence of reliance by customers on the public undertaking of food safety in order to establish a relationship of proximity. A relationship of proximity could arise because the customers consumed those RTE meats manufactured by the defendant who gave the undertaking that the RTE meat was safe.

Application of the law to the present case

[304] I apply the framework in *Maple Leaf Foods* and *Wright* and find that the pleadings of negligence disclose a cause of action.

[305] In the PP, Ticketmaster represented that "[o]ur goal is to make your purchasing experience easy, efficient and equitable". Ticketmaster arguably undertook to provide such a service, and if the allegations are taken as true, turned a blind eye to professional resellers in circumstances where it knew that the professional resellers were using bots and multiple accounts which did not provide the "equitable" service promised.

[306] The plaintiffs allege that they were users of the defendants' ticketing services and that the defendants agreed to provide standard terms applicable to all users regarding ticket limits. The plaintiffs further allege that (i) it was reasonable for Class Members to expect that the defendants would monitor and enforce compliance with ticket limit rules, and (ii) they were entirely vulnerable to the defendants' practices in choosing to enforce or not enforce. It is not beyond doubt that those pleadings could establish a relationship of proximity required under *Wright* and *Maple Leaf Foods*.

[307] For the above reasons, I find that the negligence claim discloses a cause of action.

A note on the claim for unjust enrichment

[308] Ticketmaster did not submit that the Claim failed to disclose a cause of action for unjust enrichment. It was not included in Ticketmaster's list of "Problematic Causes of Action" set out in its factum. Consequently, I do not address the cause of action for unjust enrichment in these reasons.

Identifiable class objection under s. 5(1)(b) (Objection 7)

The positions of the parties

[309] Ticketmaster submits that the proposed class is overbroad. Ticketmaster submits that the court should not certify the action, or in the alternative only certify a class of purchasers who acquired tickets from professional resellers.

[310] The plaintiffs acknowledge that some members of the class may not be entitled to damages under the proposed class definition, since (i) not all purchasers in the secondary market

acquired tickets from professional resellers and (ii) not all purchases from professional resellers were of tickets that were initially acquired in violation of ticket limits.

[311] However, the plaintiffs submit that on the evidence before the court, there is some basis in fact that the class cannot be limited only to those purchases indicated on Ticketmaster records to be from professional resellers.

[312] For the reasons that follow, I agree with the plaintiffs. While damages will be limited to those purchasers of Secondary Tickets which were purchased beyond ticket limits in the primary market, I cannot find at this time that class members should be limited only to purchases from professional resellers.

The class definition

[313] The class is defined as all purchasers of secondary tickets from Ticketmaster when the Primary Tickets were acquired on Ticketmaster:

> "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: para 1(d) of the Claim.

[314] Secondary Tickets are defined as:

> Live Events tickets which were purchased through Ticketmaster or one of its affiliates and subsequently sold through Ticketmaster or one of its affiliates including tickets labelled as "Verified Tickets by Ticketmaster", "Ticketmaster Verified", "TM Resale", "TM+", "TicketExchange", "Tickets Now", and/or "Fan-to-Fan": para. 1(u) of the Claim.

[315] Live Events are defined as "live performance events, including concerts and sporting events in Canada": para. 1(l) of the Claim.

[316] The Class Period is defined as "the period from January 1, 2015, or the date on which Ticketmaster launched TradeDesk for events in Canada, and ongoing": para. 1(e) of the Claim.

[317] BC residents are not included in the class definition.

[318] Consequently, the proposed class consists of all purchasers of live event tickets on the secondary market from Ticketmaster or its affiliates which were purchased in the primary market from Ticketmaster or its affiliates, from January 1, 2015 or the date on which Ticketmaster launched TradeDesk for events in Canada and ongoing, except for BC residents.

[319] There is no dispute that the proposed class is identifiable. By letter dated November 14, 2023, Ticketmaster's counsel advised class counsel:

> Ticketmaster confirms that based upon the latest definition of the class proposed by plaintiffs, with the appropriate time and resources, it could identify purchasers of tickets that were originally sold on Ticketmaster.ca in the primary market and later resold on Ticketmaster Canada's resale platform. It could take weeks to perform this analysis.
>
> Ticketmaster estimates that the result of such an exercise would result in the identification of a class of between 700,000 and 900,000 unique purchasers of tickets on the secondary market during the proposed class period.

The size of the proposed class

[320] The exact size of the proposed class is not known at this time. In the November 14, 2023 letter from Ticketmaster's counsel, Ticketmaster advised there would be a range of 700,000 to 900,000 individual purchasers in the proposed class definition.

[321] However, the analysis of the number of class members who may have a claim for damages is more complicated.

[322] The plaintiffs acknowledge that only those class members who purchased Secondary Tickets when the Primary Ticket was acquired above ticket limits through the use of multiple accounts or bots will have a claim for damages. That number cannot be known until discovery, likely with the assistance of expert reports.

[323] There are 700,000 to 900,000 individual purchasers in the proposed class definition, but as noted in the Ontario Report, 90% of those surveyed attended at least two events per year and 15% of those attended more than ten events per year. Consequently, over the nine-year period from 2015, millions of Secondary Tickets would have been sold to the prospective class members.

[324] Many of those 700,000 to 900,000 individuals may have purchased at least one ticket when the Primary Ticket was acquired above ticket limits through multiple accounts or bots. Consequently, while 30%-40% of the annual resale gross transaction value is derived from sales by professional resellers, the percentage of individual class members who purchased Secondary Tickets subject to the Claim would likely be much higher (perhaps approaching the 700,000 to 900,000 unique purchasers).

[325] Finally, as noted in the example from the NYAG Report discussed at para. 53 above, class members who purchased Secondary Tickets from individual employee accounts controlled by a professional reseller could also be part of the class seeking damages, even if the tickets were not purchased directly from a professional reseller in the secondary market.

[326] For those reasons, it is not possible to precisely define the size of the class who may have a damage claim.

The applicable law

[327] The principles on class definition are not in dispute between the parties.

[328] Section 5(1)(b) requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff. The class definition serves the purpose of (i) identifying those persons who have a potential claim for relief against the defendants, (ii) defining the parameters of the lawsuit so as to identify those persons who are bound by its result, and (iii) describing who is entitled to notice of the action. The class definition should allow for class members to "self-identify" – to determine if they are in fact a member of the class: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company,* 2013 SCC 58, [2013] 3 S.C.R. 545, at paras. 57-58.

[329] The class should not be defined more widely than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: *Mancinelli,* at para. 190.

[330] A class is over-inclusive when it "binds persons who ought not to be bound by the judgement": *Carter v. Ford Motor Co. of Canada, Ltd.*, 2021 ONSC 4138 at para. 75.

[331] In *Drynan*, the court summarized the applicable principles that the class definition (i) "should state objective criteria by which members of the class can be identified", (ii) must "bear a rational relationship to the common issues asserted by all class members", and (iii) "must be defined as narrowly as possible without excluding some people who share the same interest in the resolution of the common issues": at paras. 212-13.

[332] A "proposed class will not be overbroad simply because it may include persons who ultimately will not have a claim against the defendants": *Silver v Imax Corporation* (2009), 184 ACWS (3d) 28 at paras. 103-107 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035.

Application of the law to the present case

[333] Ticketmaster submits that based on the uncontested evidence that from 2015 to mid-2020, sales by professional resellers have accounted for only 30% to 40% of the annual resale gross transaction value on Ticketmaster.ca, the class definition is overbroad because it will include individuals who did not buy Secondary Tickets from professional resellers, let alone from a professional reseller who purchased Primary Tickets in excess of ticket limits.

[334] Consequently, Ticketmaster submits that the action should not be certified or at a minimum, the class definition should be reduced to only those who purchased Secondary Tickets from professional resellers.

[335] However, for the reasons I discuss at paras. 321-326 above, the analysis of the proper class definition is more complex than simply conducting a field search of data for tickets sold by professional resellers.

[336] If Ticketmaster's proposed class definition were applied, no purchaser of Secondary Tickets could self-identify as a class member because it is not possible for any individual to know whether a ticket purchased on the secondary market was sold by a fan or by a professional reseller.

[337] Further, Ticketmaster's proposed class definition would exclude purchasers of Secondary Tickets where the Primary Tickets were purchased through multiple accounts or bots operated by individuals working for professional resellers, such as the example cited in the NYAG Report. Those tickets could appear as individual sales, even though those purchasers should be included in the class definition. Under such an example (and perhaps other examples which would be established through the discovery and expert process), Ticketmaster's proposed class definition would be underinclusive.

[338] The plaintiffs' proposed class definition will include purchasers who did not suffer damage because they did not buy Secondary Tickets from a professional reseller or bought Secondary Tickets from a professional reseller who did not breach ticket limits. However, those class members would not be entitled to a claim for damages.

[339] Under the *Silver* approach, the plaintiffs' proposed class definition is not overbroad only because it includes persons who ultimately will not have a successful claim against Ticketmaster.

[340] Consequently, I maintain the class definition as proposed by the plaintiffs.[18]

Common issue objections under s. 5(1)(c)

[341] Ticketmaster challenges whether numerous PCIs should be certified. The list of PCIs is attached as Schedule A to these reasons.

[342] Given my conclusion that there is no cause of action disclosed under the *Competition Act* or consumer protection legislation, it is not necessary to address the impugned PCIs for those causes of action. Nevertheless, I address them briefly in the event of an appeal from my decision.

[343] I address the impugned PCIs below. I first consider the applicable law on certification of common issues and then review the individual objections raised by Ticketmaster.

The applicable law

[344] The applicable law is not in dispute. In *Price v. H. Lundbeck A/S*. 2020 ONSC 913 (Div. Ct.), the court reversed the decision of the motions court judge but at para. 22 adopted the

[18] As discussed at para. 241 above, the plaintiffs agree with the defendants' submission that the ticketing legislation claims require a subclass because the legislation only came into force in 2018.

thorough summary by the motions court judge of the relevant test in his reasons at 2018 ONSC 4333, at paras. 104-111, which I set out below (references omitted):

> The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim. The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.
>
> All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.
>
> An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member. Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.
>
> Commonality is a substantive fact that exists on the evidentiary record or it does not, and commonality is not to be semantically manufactured by overgeneralizing; i.e., by framing the issue in general terms that will ultimately break down into issues to be resolved by individual inquiries for each class member. In *Rumley v. British Columbia*, Chief Justice McLachlin stated that an issue would not satisfy the common issues test if it was framed in overly broad terms; she stated:
>
> > [….] It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.
>
> However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.

> The common issue criterion presents a low bar. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. Even a significant level of individuality does not preclude a finding of commonality. A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.
>
> As already noted above, in the context of the common issues criterion, the some basis in fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.
>
> Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining such issues on a class-wide basis.

Objections to the PCIs for the breach of contract claim (Objection 8)

[345] Ticketmaster objects to (i) the entirety of the PCIs for the breach of contract claim and (ii) in the alternative, PCIs 2, 3, and 4 of the breach of contract claim. I address each of these objections.

Objection to the entirety of the PCIs for the breach of contract claim

[346] Ticketmaster submits that there is no basis in fact for the existence of any of the breach of contract PCIs based on its position that it is beyond doubt the TOU and PP impose no express or implied obligation on Ticketmaster (i) to enforce ticket limits in the primary market or (ii) not to knowingly turn a blind eye to or cooperate with professional resellers using multiple accounts or bots to breach ticket limits.

[347] I have already concluded that the breach of contract claim discloses a cause of action. The TOU and PP provide a basis in fact for the existence of the contract, and the Media Investigation and comments of Jared Smith provide a basis in fact for the alleged breach. Consequently, I do not accept Ticketmaster's objection to the entirety of the PCIs for the breach of contract claim.

Objections to PCIs 2, 3, and 4 of the breach of contract claims

[348] Ticketmaster objects to PCIs 2, 3, and 4 of the breach of contract claims on the basis that they are "not an essential element of any Class Member's breach of contract claim".

[349] I do not agree.

[350] These PCIs seek a common answer to questions as to whether Ticketmaster (i) knew of breaches of ticket limits by professional resellers (PCI 2), (ii) was wilfully blind to such alleged breaches (PCI 3) or (iii) acquiesced to such breaches (PCI 4). These PCIs advance the litigation

and can be answered in common. They do not require evidence of individual class members. The issues only involve Ticketmaster's conduct.

[351] PCIs 2, 3, and 4 address the question of whether and how Ticketmaster breached the contract and will be useful to the trial judge and the parties in delineating the issues on how the contract was breached.

[352] At the hearing, class counsel advised the court that the plaintiffs proposed some changes to the text of PCIs 2 and 3 under the breach of contract claim, since the claim could extend to professional resellers who breached ticket limits through multiple accounts and/or bots, even if they did not use TradeDesk.

[353] Counsel agreed to work together to revise the wording of PCIs 2 and 3 if certification of the contract claim was ordered by the court. Counsel also agreed to schedule a case conference or brief hearing to set the terms of those PCIs if necessary.

Objections to the PCIs for the consumer protection legislation claims (Objection 9)

[354] Ticketmaster objects to the entirety of the PCIs for the consumer protection legislation claims because the claim discloses no cause of action.

[355] In the alternative, Ticketmaster objects to the certification of PCIs 4-8 and PCI 10 for the consumer protection legislation claims.[19]

[356] I address each of these objections below.

Objection to the entirety of the PCIs for the consumer protection legislation claims

[357] For the reasons I discuss above, I find that the consumer protection legislation claims disclose no cause of action. Consequently, there is no basis to certify any of the PCIs related to those claims. Nevertheless, I review the objections to the particular PCIs for the consumer protection legislation claims in the event of an appeal.

Objections to PCIs 4-8 and PCI for the consumer protection claims

[358] I have found at paras. 227-28 above that the Claim satisfies the requirement under the consumer protection legislation that false and misleading representations were made.

[359] Further, the TOU, PP, public statements, and comments of Jared Smith provide some basis in fact for those alleged misrepresentations.

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[19] The consumer protection legislation PCIs are set out by the plaintiffs in Schedule A as "Misrepresentations" PCIs.

[360] PCIs 1-3 address the core issue of whether such representations were actionable under the consumer protection legislation. Ticketmaster does not challenge certification of these PCIs if a cause of action is found.

[361] PCI 4 relates to the timing of the alleged representations and does not depend on the evidence of class members. Under consumer protection law and the principles in *Ramdath*, knowledge or reliance on any representations is not required.

[362] PCI 5 seeks a common answer as to which representations were made and how they were conveyed to the class members. This PCI does not require individual evidence, and the knowledge by any class member of any particular representation is not relevant for a claim.

[363] Ticketmaster submits that PCI 6, which asks if rescission is available, cannot be a common issue because the class definition will include some purchasers who did not purchase tickets from professional resellers outside the ticket limit. I do not agree.

[364] The answer will be common for all class members who are entitled to damages, with no individual inquiry required. An issue does not lose its commonality because some class members may not be entitled to claim those damages. It only loses commonality if individual inquiries are necessary, which is not the case for PCI 6.

[365] If a claim for damages could be made under the consumer protection legislation for overpayment of a ticket in the secondary market (which I do not find for the reasons discussed above), PCI 7 asks whether the class members are entitled to such relief. That issue is common to all class members, does not require the evidence of individual class members, and would sufficiently advance each class member's claim.

[366] PCIs 8 and 10 are variants on PCI 7. They specify different types of potential claims for damages. If damages are not awarded under PCI 7, PCI 8 asks if class members are entitled to recover fees levied by Ticketmaster. PCI 10 is a general question asking if class members are entitled to recover damages. These issues are common to all class members, do not require the evidence of individual class members, and would sufficiently advance each class member's claim.

[367] Consequently, if the plaintiffs can bring a claim under the consumer protection legislation, I would dismiss Ticketmaster's objections and certify all PCIs for the consumer protection claims.

Objections to the PCIs for the Competition Act claims (Objection 10)

[368] Ticketmaster objects to the entirety of the PCIs for the *Competition Act* claims.

[369] In the alternative, Ticketmaster also objects to the certification of PCIs 2 and 3 for the *Competition Act* claims.

[370] I address each of these objections below.

Objection to the entirety of the PCIs for the *Competition Act* claims

[371] For the reasons I discuss above, I find that the *Competition Act* claims do not disclose a cause of action. Consequently, there is no basis to certify any of the PCIs related to those claims. Nevertheless, I review the objections to the particular PCIs for the *Competition Act* claims in the event of an appeal.

Objections to PCIs 2 and 3 for the *Competition Act* claims

[372] I have found at para 184 above, there is a cause of action under s. 52 of the *Competition Act* that Ticketmaster made false and misleading representations.

[373] The TOU, PP, public statements and comments of Jared Smith provide some basis in fact for those alleged misrepresentations.

[374] PCI 2 asks "what are the representations and how were they conveyed to class members?"

[375] Ticketmaster submits that PCI 2 "will require individual examination of the state of each Class Member's knowledge at the relevant time". I do not agree.

[376] Whether a representation is false or misleading "is based on an objective standard – it does not depend on the individual perceptions of the class members as to the meaning of the statements": *Drynan*, at para 260.

[377] As I discuss at para. 362 with respect to PCI 5 for the consumer protection claims, PCI 2 seeks a common answer as to which representations were made and how they were conveyed to the class members. This PCI does not require individual evidence, and the knowledge by any class member of any particular representation is not relevant for a claim.

[378] PCI 3 is similar to PCI 10 under the consumer protection legislation. PCI 3 asks if class members are entitled to loss and damages and full costs under s. 36(1) of the *Competition Act*.

[379] If a claim for damages could be made under the *Competition Act* for damages (which I do not find for the reasons discussed above), PCI 3 asks whether the class members are entitled to such relief. That issue is common to all class members, does not require the evidence of individual class members, and would sufficiently advance each class member's claim.

[380] Consequently, if the plaintiffs can bring a claim under the *Competition Act*, I would dismiss Ticketmaster's objections and certify all PCIs for the *Competition Act* claims.

Objections to the PCIs for the ticketing legislation claims (Objection 11)

[381] Ticketmaster only objects to PCI 2 which asks what remedies, if any, the court should order pursuant to s. 11 of the *TSA*.

[382] Ticketmaster relies solely on its position that there is no common issue because there is no cause of action under the ticketing legislation. I have held above that the Claim discloses a cause of action under the *TSA* and the *QCPA*. Further, the Media Investigation provides a basis in fact for the breach of the "facilitating" provisions under the ticketing legislation, with damages sought under s. 11(3) of the *TSA* and s. 272 of the *QCPA*. Consequently, I reject Ticketmaster's submission.

Objections to the PCIs for the unlawful means conspiracy claims (Objection 12)

[383] Ticketmaster opposes all of the PCIs on the basis that "[t]here is no basis in fact to conclude that these proposed common issues exist". Ticketmaster does not take issue with the commonality of the PCIs related to the unlawful means conspiracy claim.

[384] Ticketmaster submits that the plaintiffs led no evidence of investigations or charges by competition authorities or any evidence of an alleged conspirator who admitted to portions of the conduct alleged in the Claim, nor any evidence of any guilty plea, settlement, or any charges laid in any jurisdiction.

[385] I find that there is a basis in fact for the alleged conspiracy. The NYAG Report specifically referred to discussions with Ticketmaster about the importance of conducting reviews of secondary market data to determine if professional resellers were breaching the TOU and PP by using multiple accounts and bots to ignore ticket limits.

[386] The Media Investigation provides a basis in fact to find that instead of heeding that advice, Ticketmaster chose to proceed with a program which ignored the concerns raised by the NYAG and instead attracted professional resellers and increased Ticketmaster's share of the secondary market which had been dominated by competitors such as StubHub and Vivid Seats.

[387] The Media Investigation further provides a basis in fact that Ticketmaster agreed with professional resellers not to use the data it had available to enforce the primary market.

[388] The above evidence meets the low threshold of the some basis in fact test.

Objections to the PCIs for the unjust enrichment claim (Objection 13)

[389] Ticketmaster submits that all of the PCIs relating to the unjust enrichment claim cannot be certified because "the fees that were received and retained by Ticketmaster will be different for each event, based on the price of the ticket and the amount of the fee that would be shared with Ticketmaster's clients" and because the only class members who would have claims would be those who purchased tickets in violation of ticket limits.

[390] I do not agree.

[391] The PCIs for the unjust enrichment claim only seek a determination whether the elements of a claim for unjust enrichment have been met, and whether restitution or disgorgement is appropriate. None of these PCIs raise individual issues.

Objection to the PCI related to aggregate damages (Objection 14)

[392] The plaintiffs set out a PCI related to aggregate damages which asks whether such an award should be made.

[393] Ticketmaster submits that the PCI should not be certified because there is no basis in fact that aggregate damages are available.

[394] I first review the applicable law and then apply the law to the present case.

The applicable law

[395] Section 24(1) of the *Class Proceedings Act* sets out the criteria for an award of aggregate damages:

> 24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[396] In *Good v. Toronto Police Services Board*, 2016 ONCA 250, 130 O.R. (3d) 241, the court held that in order to certify an aggregate assessment of damages, there must only be a reasonable possibility that an aggregate assessment may be made with respect to at least part of the compensatory damages claimed: at paras. 81-82.

[397] These principles were applied by the court in *Rebuck* to certify a claim for aggregate damages, at para. 55-59.

[398] In *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, the court required only a plausible or credible methodology to establish loss on a class-wide basis. The court held, at para. 118:

> [T]he expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in

> question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[399] In *Drynan*, it was sufficient for the plaintiffs to have provided an opinion which explained that the expert could calculate revenues received by the defendant, the profit earned by the defendant, the amount paid by consumers, or the difference between the amount paid by the consumer and that paid for a comparable product: at para. 328.

Application of the law to the present case

[400] Ticketmaster submits that the plaintiffs cannot seek aggregate damages because damages depend on individual proof that "in every case, in the absence of the alleged breach of misrepresentation, the Class Members would have been able to purchase the same ticket they bought in the secondary market in the primary market."

[401] I do not agree.

[402] Boedeker explains that he can use Ticketmaster's data to calculate (i) the difference between the Secondary Ticket price and the Primary Ticket price and (ii) Ticketmaster's profits. Boedeker relies on data Ticketmaster retains on a ticket's price on the resale platform of Ticketmaster.ca and the original face value.

[403] It is not the role of the court to determine which methodology of the competing experts is correct. The court must only consider if the methodology is "credible or plausible".

[404] Ticketmaster criticizes Boedeker's analysis on the basis that he "did not have access to Ticketmaster's systems" and "[h]is conclusions are all based on secondhand information regarding Ticketmaster's systems and what data is available on them."

[405] However, as the court held in *R v Lavallee*, [1990] 1 S.C.R. 852, at p. 893 (i) expert opinion is "admissible if relevant, even if it is based on second-hand evidence"; and (ii) "[t]his second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based."

[406] Furthermore, while Ticketmaster submits that "Mr. Plawsky's views on the difficulties of manipulating the data that Ticketmaster has should be preferred to Mr. Boedeker's", Plawsky submitted no evidence to criticize Boedeker's description of the data in Ticketmaster's systems.

[407] Consequently, as the plaintiff's expert proposed in *Drynan*, Boedeker presents a plausible and credible analysis to "be able to calculate an aggregate loss based on […] possible damage orders made by the court, if provided with the required information": *Drynan*, at para. 331.

[408] Further, as in *Drynan*, it is not necessary for Boedeker to lead evidence as to "any difference in value". That issue goes to the merits of the appropriate methodology which may be applied at a common issues trial. The question on a certification motion is whether damages are

ascertainable without the necessity of proof from individual class members. If so, the plaintiff meets the "low threshold on the evidence before the court": *Drynan*, at paras. 336-37.

[409] For the above reasons, I certify aggregate damages as a common issue.

Objection to the PCI related to the punitive damages claim (Objection 15)

[410] Ticketmaster submits that the court should not certify the PCI related to the punitive damages because "there is little 'beyond the pleadings that establish a basis in fact'", citing *MacKinnon v. Pfizer Canada Inc.*, 2022 BCCA 151 at para. 7 (see also *Rorison v. Insurance Corporation of British Columbia*, 2023 BCCA 474 at para. 153).

[411] However, in the present case, the plaintiffs allege that Ticketmaster facilitated or turned a blind eye to professional resellers circumventing ticket limits imposed by Ticketmaster. As I discuss above, the Media Investigation provides some basis in fact for those allegations.

[412] If Ticketmaster was facilitating or turning a blind eye to professional resellers routinely circumventing ticket limits imposed by Ticketmaster, so that Ticketmaster could earn Double Dip Fees and advance its own position in the secondary market industry at the expense of consumer ticket buyers, while at the same time assuring ticket buyers that the market was fair and that ticket limits would be enforced, a court could conclude that such conduct was egregious or high handed.

[413] Consequently, I certify the PCI related to punitive damages.

Preferable procedure objection under s. 5(1)(d) (Objection 16)

[414] Ticketmaster submits that a class action is not the preferable procedure. I do not agree.

[415] Ticketmaster submits that each assessment of damages would require an individual inquiry. Ticketmaster relies on the evidence of the representative plaintiffs as to the reasons they purchased Secondary Tickets, which Ticketmaster submits would prevent them from making any damage claim.

[416] However, the claims for damages under the causes of action do not require individual evidence. To the extent that aggregate damages are available, they can be determined based on disgorgement and restitution principles which do not depend on the reasons any individual class member would have purchased a Secondary Ticket. Any class member has a claim if they purchased a Secondary Ticket which was initially purchased by professional resellers or those under their control who used multiple accounts or bots to purchase that Primary Ticket in violation of ticket limits.

[417] Consequently, the goal of judicial economy is achieved by certification.

[418] With respect to behaviour modification, Plawsky's evidence is that Ticketmaster does not use data from the secondary market through TradeDesk to determine if professional resellers are flouting the ticket limits under the TOU and PP by using multiple accounts and bots. Behaviour

modification would be served if the plaintiffs succeed on the class action based on Ticketmaster's conduct.

[419] With respect to access to justice, the small amount of damages on individual trials makes litigation prohibitive against Ticketmaster. The costs to review all the evidence by (i) counsel and (ii) experts on statistical and economic analysis would raise a significant barrier to any individual claim.

[420] Finally, Ticketmaster submits that judicial economy would not be achieved since "the claims for negligence and unjust enrichment are redundant". Ticketmaster relies on earlier decisions where the court struck out causes of action that it considered to be "redundant": *Magill v. Expedia, Inc.*, 2013 ONSC 683, 36 C.P.C. (7th) 74, at paras. 152, 155.

[421] However, in *Berg et al. v. Canadian Hockey League et al.*, 2019 ONSC 2106, the Divisional Court held that the motions judge erred when he held that the negligence claim should not be certified because it was redundant to the breach of contract claim. The Divisional Court stated, at para. 47:

> **[I]n making the decision as to which causes of action are "needed" at the certification stage (when pleadings may not yet been closed and the merits of the action are not the focus), there is a real concern that it is the judge, rather than plaintiffs' counsel, who is making the call as to how the action should be litigated.** Is this appropriate when the motion judge's knowledge of the litigation is limited by the legislatively prescribed nature of certification, in accordance with s. 5(5) of the *CPA*, as a preliminary, procedural motion that is not to determine the merits of the proceeding? [Emphasis added.]

[422] The Divisional Court held, at para. 55:

> There is no issue that a plaintiff is entitled to sue in both negligence and breach of contract […] **the plaintiffs have the right to assert a cause of action that appears to be most advantageous to them in respect of any particular legal consequence.** [Emphasis added.]

[423] Similarly. in *Tocco v. Bell Mobility Inc.*, 2019 ONSC 2916, Justice Morgan relied on *Berg* and refused to strike claims which were alleged to be redundant. After a thorough review of the case law at paras. 50-56, Justice Morgan concluded, at paras. 57-58:

> Under the circumstances, **it is not my role to interfere with the way the Plaintiffs have pleaded their case.** The discretion that I enjoy under s. 12 of the *CPA* to decide the conduct of the case is not an unrestricted discretion; it must be exercised in accordance with the nature of certification as a preliminary, procedural motion: *CPA*, s. (5).
>
> As Plaintiffs' counsel submit in argument, **a decision to eliminate one or more causes of action would not be a procedural decision, but rather would be a substantive one**: see *Hryniak v Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87,

> at paras 27-29, 33. At the certification stage there is no oral discovery, *Mancinelli v Royal Bank of Canada*, 2017 ONSC 87, at para 41, and the argument is limited to the court's gatekeeping function in assessing commonality: *Pro-Sys*, at para 103. **This is not the appropriate motion in which to second guess counsel's strategy in bringing multiple causes of action to address the same allegations.** [Emphasis added.]

[424] In the Alberta decision in the companion certification motion to *Berg*, *Walter v. Western Hockey League*, 2017 ABQB 382, 67 Alta L.R. (6th) 85, affirmed 2018 ABCA 188, the court certified all causes of action, and did not follow the decision of the motions judge in *Berg*. Hall J. held, at para. 46:

> Justice Perell chose not to certify various causes of action for reasons of efficiency and judicial economy. I am not prepared to follow his lead. **If the pleadings disclose causes of action, then I consider that those causes of action should be permitted to proceed**. While I recognize that the Court is to look at the preferable procedure question through the lens of access of justice, behaviour modification and judicial economy, and that redundant causes of action do not promote either access to justice or judicial economy, nevertheless, **I am not prepared to strike causes of action which have been properly pleaded. I cannot do so in actions brought by a single plaintiff. Similarly I do not believe I can dispose of properly pleaded causes of action in a class action certification application.** It may be that the Plaintiffs would be well advised to simplify their claims. It may be that some of these claims might be summarily dismissed upon proper application. However, I will not rule out such claims at this stage in the proceedings. [Emphasis added.]

[425] I follow the Divisional Court decision in *Berg* and the decisions in *Tocco* and *Walker* and find that the claims for negligence and unjust enrichment should proceed.

[426] For the above reasons, I dismiss Ticketmaster's objections under s. 5(1)(d).

Admissibility of the Boedeker Reports/Motion to strike

[427] Ticketmaster brings a motion to strike the Boedker Reports. Ticketmaster sought to have the motion to strike heard before the certification motion. The plaintiffs opposed the proposed scheduling of the motion to strike and asked that it be heard with the certification motion.

[428] By endorsement dated August 10, 2022, I ordered that the motion to strike be heard with the certification motion.

[429] In this section, I (i) review the evidence relevant to the changing class definition and the proposed class, (ii) set out the positions of the parties, (iii) consider the relevant law, and (iv) apply the law to the present motion.

Evidence relevant to changing class definition and the proposed class

[430] The proposed class definition has changed several times as a result of evidence filed by Ticketmaster.

[431] In the original Fresh as Consolidated Statement of Claim from 2019, the proposed class was purchasers of secondary market tickets through Ticketmaster "for family or household purposes" sold by "Resellers" who had "the intention of reselling them to consumers as Secondary Tickets".

[432] On February 28, 2020, Ticketmaster delivered an affidavit from Plawsky who stated that Ticketmaster Canada "did not have records that would allow it to estimate the size of the class, based on the Plaintiffs' proposed class definition." Plawsky provided no explanation as to why the class size could not be estimated.

[433] On September 11, 2020, the plaintiffs amended the proposed class to (i) remove the reference to intent in the resellers definition, (ii) limit resellers to those who used TradeDesk, but also to (iii) expand secondary tickets to include those purchased from resellers on any secondary market sales site (including StubHub or Vivid Seats), provided that the tickets were initially purchased on Ticketmaster.

[434] There were no cross-examinations. No further evidence was filed after the amendment.

[435] In its factum delivered prior to the hearing, Ticketmaster submitted that the amended class definition was not identifiable. Ticketmaster indicated that it was prepared to rely on its affidavit material but would file additional evidence if required. The plaintiffs submitted that the court could infer that the class was identifiable since no further responding affidavit had been filed by Ticketmaster.

[436] Shortly before the certification hearing, this court identified the unsatisfactory record on class identification issues. The court held that the issue should be addressed with proper evidence and cross-examinations if required. The original certification hearing was adjourned.

[437] In the Adjournment Endorsement, the court adjourned the certification hearing to April 13, 2021 to permit the filing of supplemental evidence from Ticketmaster and reply evidence from the plaintiffs related "only to the issue of identification of class members", with '[a]ll other issues [to be] addressed on the basis of the current materials before the court on this motion."

[438] The Adjournment Endorsement provided a timetable for the filing of the additional evidence, cross-examinations, and the delivery of supplemental factums on the class identification issues.

[439] Following the adjournment, Plawsky submitted a supplementary affidavit dated January 21, 2021 (the "Supplementary Plawsky Affidavit") in which he provided further information about the revised class definition. Plawsky's evidence was that Ticketmaster did not have the data to determine class membership based on sales through TradeDesk.

[440] Plawsky's evidence about the TradeDesk data included new facts that were not in Plawsky's initial affidavit. Two months after Ticketmaster delivered the Supplementary Plawsky Affidavit, the plaintiffs sought an adjournment of the previously revised hearing date in order to instruct an expert. The defendants did not object to the adjournment but reiterated that such adjournment only allowed for class identification issues to be addressed.

[441] In January 2022, the plaintiffs delivered an expert report from Boedeker and an amended claim with an amended class definition (the current claim that is before the court). The amended definition specifies all persons who purchased Secondary Tickets through Ticketmaster. The amended definition includes sales through TradeDesk, but it is not limited to that group, unlike in the previous definition.

[442] As set out at para. 319 above, in a letter dated November 14, 2023 from its counsel, Ticketmaster acknowledged that the size of the class now can be determined and that the class can be identified, albeit with some effort.

The positions of the parties

[443] Ticketmaster submits that the Boedeker Reports (i) cannot be filed based on the Adjournment Endorsement and (ii) in any event, are inadmissible under the principles in *White Burgess*.

[444] The plaintiffs submit that:

(i) The Boedeker Reports can be produced because the Adjournment Endorsement permitted evidence to be filed by Ticketmaster which led to the damage calculation issues addressed in the Boedeker Reports.

(ii) The Boedeker Reports meet the criterion for admissibility under *White Burgess*.

[445] For the reasons that follow, I agree with the plaintiffs and allow the Boedeker Reports to be filed.

The applicable law

[446] Both parties rely on the decision in *White Burgess*. As summarized by Ticketmaster in its factum on the motion to strike:

> [The test for admissibility of an expert report] is comprised of two steps. First, the evidence must meet the four threshold requirements for admissibility: relevance, necessity, absence of an exclusionary rule and a properly qualified expert. Second, only if the evidence meets all four of these requirements, the judge must balance the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks.

Analysis

[447] Ticketmaster makes four submissions:

(i) The Boedeker Reports cannot be admitted based on the Adjournment Endorsement.

(ii) The amendment of the class definition renders the Boedeker Reports irrelevant.

(iii) The Boedeker Reports exceed the scope of Boedker's expertise.

(iv) Other topics addressed in the Boedeker Reports are not relevant or are inappropriate for certification.

[448] I address each of these submissions below.

The effect of the Adjournment Endorsement

[449] Ticketmaster relies on the passage in the Adjournment Endorsement that limits any evidence to class identification issues. Ticketmaster submits that the Boedeker Reports cannot be admitted since they do not address class identification.

[450] I do not agree.

[451] The purpose of the Adjournment Endorsement was to obtain more information on the issue of class identification, which the court had raised given the evidentiary record on certification and the positions of the parties in their factums prior to the initial scheduled hearing. In that context, the court ordered in the Adjournment Endorsement:

> All of the above steps are related only to the issue of identification of class members, as it relates to the issues before the court on the certification motion, including the issues of class definition/identifiable class. All other issues are to be addressed on the basis of the current materials before the court on this motion.

[452] The identifiable class issue was flagged by the court, and the Adjournment Endorsement set out an expeditious process for additional evidence on that issue, with an anticipated prompt return date for the certification hearing.

[453] Ticketmaster submits that the issue of class identification was resolved following the receipt of the Supplementary Plawsky Affidavit and the amendment of the class definition by the plaintiffs.

[454] However, the Adjournment Endorsement did not, and could not, permanently set all evidence in the case regardless of what supplemental evidence Ticketmaster might lead following the Adjournment Endorsement. Ticketmaster's interpretation of the Adjournment Endorsement would lead to fundamental unfairness to the plaintiffs, who had been advised by Plawsky, in his initial affidavit, that Ticketmaster "did not have records that would allow it to

estimate the size of the class, based on the Plaintiffs' proposed class definition." No further explanation was provided.

[455] In the Supplementary Plawsky Affidavit delivered after the Adjournment Endorsement, Plawsky provided detail about the data available to Ticketmaster. It was on that basis that the plaintiffs were not only able to determine a class definition that was identifiable, but also have evidence before it which would permit an expert to address damage calculation issues which could be relevant to the court.

[456] The Boedker Reports addressed calculation issues based on Plawsky's supplemental evidence and the research Boedker conducted on other sources of data that he could use along with Ticketmaster's data to address calculation issues. Boedker reached the conclusions summarized at paras. 64-65, 67, and 69 above based on that new evidence.

[457] To preclude the plaintiffs from filing an expert report on the basis of new evidence supplied by Plawsky after the Adjournment Endorsement would not be a just interpretation of the scope of that endorsement, which was not intended to create unfairness to the plaintiffs if the new evidence was also relevant to issues other than class definition or identification (such as expert damages methodology).

[458] Finally, I note there is no prejudice to Ticketmaster arising out of the Boedeker Reports. Ticketmaster filed a report from Dr. Snail to respond to the initial Boedeker report. Dr. Snail also relies on the information contained in the Supplementary Plawsky Affidavit. Boedeker was cross-examined on his reports.

[459] The defendants rely on *Mount Royal Painting Inc. v. Lomax Management Inc.*, 2019 ONSC 7071, 5 C.L.R. (5th) 156, in which the court excluded parts of an expert report which went beyond a mid-trial order for further expert evidence limited to only one issue: at para. 51. However, in the present case, the plaintiffs responded to new evidence from Plawsky which they were entitled to do.

[460] For the above reasons, I do not accept Ticketmaster's submission that the Boedeker Reports cannot be filed because of the Adjournment Endorsement.

<u>Does the amendment of the class definition render the Boedeker Reports irrelevant?</u>

[461] Ticketmaster submits that the amendment of the class definition renders the Boedeker Reports irrelevant. I do not agree.

[462] The Boedeker Reports address certification requirements to prove loss on a common basis. The Boedeker Reports provide a credible or plausible methodology for determining liability and calculating loss. Boedeker states:

> [T]here are valid methodologies to analyze and determine, on a class-wide basis, whether Primary Tickets were purchased by resellers in amounts that exceeded prescribed ticket limits; these Primary Tickets were resold in Secondary Markets;

> and the consequential overcharges stemming from the above sales and resales can be established by the use of existing economic concepts.

[463] Boedeker also explains the sources of data he would use to carry out the methodology. Boedeker cites extensively to the Supplementary Plawsky Affidavit as to the availability of data, and cites academic papers and regulatory body investigations that have reviewed and analyzed Ticketmaster's ticketing data.

[464] For the above reasons, I find that the Boedeker Reports are relevant to methodology issues on certification.

Do the Boedeker Reports exceed the scope of Boedker's expertise?

[465] Ticketmaster submits that Boedeker opines on the merits of the case. However, the transcript passage on which Ticketmaster relies sets out a triple question:

> Q: Okay, the first step in your methodology for customer-specific damages is to identify which ticket sales were made in violation of ticket quantity limits.
>
> A: That is correct.
>
> Q: Okay, and you agree with me that that goes to the merits of the case here. You have been asked to assume that in fact people did commit that misconduct, and you have been asked whether you can establish a methodology for identifying that; is that right?
>
> A: That is correct.

[466] Consequently, if Boedeker was answering the last of the three questions, i.e., whether he could establish a methodology for identifying which ticket sales were made in violation of ticket quantity limits, he did not opine on the merits. A reading of the transcript leads to that interpretation as the most reasonable one, rather than an admission by Boedeker that he was providing an opinion on the merits of the case.

[467] I note that in his report, Dr. Snail challenged Boedeker's methodology as being inappropriate, which could also be viewed as opining on the merits.

[468] Even if some passages from either Boedeker or Dr. Snail's reports were to be considered as opinions on the merits, I would not strike either report and instead leave those issues to the common issues judge determining the weight to give to the evidence of either Boedeker or Dr. Snail.

[469] Ticketmaster also submits that Boedeker is "not qualified or equipped to opine on what data Ticketmaster collects and retains" and that Plawsky is "best suited" to give such evidence. Ticketmaster submits that "Mr. Boedeker's conclusions regarding Ticketmaster's available data are unnecessary and should be struck, or in the alternative, given no weight."

[470] However, there is no support for the proposition that only the party who holds the data is entitled to express views on that data and the uses that can be made of it. Boedeker bases his views on the availability of data from academic and government reports that have analyzed Ticketmaster's data in other contexts, as well as Canadian court filings on the extensive data that Ticketmaster holds.

[471] Consequently, the Boedeker Reports meet the *Pro-Sys* standard of establishing "some evidence of the availability of the data."

[472] For the above reasons, I find that the Boedeker Reports do not exceed the scope of Boedker's expertise.

Other topics addressed in the Boedeker Reports

[473] Ticketmaster submits that "[t]o the extent the Boedeker Report addresses methodological issues, those are not relevant to any proposed common issues. The plaintiffs are not seeking to certify any common issues related to the quantum of class-wide damages. The report is therefore unnecessary". I do not agree.

[474] As I have discussed above, the plaintiffs seek to certify a common issue of aggregate damages. To do so, they have provided the Boedeker Reports to address the concern raised in *Pro-Sys* that the court may require an "expert methodology" which is "sufficiently credible or plausible to establish some basis in fact for the commonality requirement". The Boedeker Reports provide a methodology with "a realistic prospect of establishing loss on a class-wide basis": *Pro-Sys*, at para. 118.

[475] Consequently, I reject this submission of Ticketmaster.

Conclusion on the admissibility of the Boedeker Reports/Motion to Strike

[476] For the above reasons, I dismiss the motion to strike the Boedeker Reports.

A note on the *Watch* litigation

[477] Saskatchewan class counsel in the *Watch* action attended by videoconference throughout the hearing of this certification motion. They made brief submissions to address any concerns of overlap between the present action and the *Watch* litigation. I address these issues below.

[478] It is not the role of the court to determine on a certification motion whether there will be any overlap of damage awards between the present class action and another proposed or certified class action. That issue can only be resolved after settlement or a decision on the merits.

[479] Saskatchewan class counsel submitted that such overlap could occur if (i) the drip-pricing allegations in the *Watch* action were found to apply to secondary market purchases or (ii) Watch was successful in her appeal related to secondary market purchasers.

[480] Ticketmaster takes no position other than to ensure that it is not subject to double recovery, should any of the class actions result in awards of damages.

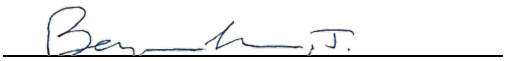
[481] At the hearing, class counsel in the present action and class counsel in the *Watch* litigation agreed to comply with the existing national class action protocol of the Canadian Bar Association and provide each other with notice of any settlement or judgment arising in their respective actions, so that any issues of overlap may be addressed at that time.

ORDER AND COSTS

[482] I grant the certification motion and certify the class action, subject to the restrictions set out in these reasons.

[483] At the outset of the hearing, counsel agreed that the present motion, along with the motion to strike and the sequencing motion, would all proceed on a without costs basis. Consequently, I order no costs of those motions.

[484] I thank counsel for their extensive and thorough written and oral submissions which were of great assistance to the court. I also appreciate the courtesy and cooperation of counsel in the steps leading to the certification motion and at the hearing itself.



GLUSTEIN J.

Date: 20240419

SCHEDULE "A" - PROPOSED COMMON ISSUES

Breach of Contract

1. Did the Terms of Use and Purchase Policy in effect between Ticketmaster Canada and the class members contain express or implied terms or duties regarding the following:

    a. the defendants' obligation to verify compliance with ticket limits "with every transaction" on Ticketmaster's sites?

    b. the defendants' obligation to enforce compliance with ticket limits?

2. If so, did the defendants obtain knowledge through TradeDesk and TradeDesk POS of breaches of ticket limits by professional resellers? How?

3. In the alternative, were the defendants wilfully blind through TradeDesk and TradeDesk POS to breaches of ticket limits by professional resellers? How?

4. Did the defendants acquiesce to breaches of ticket limits by professional resellers? How?

5. Did Ticketmaster Canada breach the contract, as pleaded?

6. For the Quebec Merchant Subclass, did the defendants breach art. 1458 of the *Code Civil du Quebec*? If so, what remedies, if any, should the Court make?

Misrepresentations

1. Did the defendants (or any of them) make, representations which constituted an unfair practice under the *Consumer Protection Act*, 2002?

2. Did the defendants (or any of them) make, approve, and/or authorize false, misleading or deceptive representations within the meaning of the *Consumer Protection Act, 2002* or the Equivalent Consumer Protection Statutes (as defined in the Statement of Claim)?

3. If so, were any such representations unconscionable?

4. Were any of the representations in 1 – 3, above, made before the Class Members entered into agreements to purchase tickets?

5. If the answer to any of 1 – 3, above is yes, what are the representations and how were they conveyed to Class Members?

6. If the answer to any of 1 – 3, above is yes, are Class Members entitled to rescission of the purchase agreements and any other remedy available at law for rescission, including damages?

7. If the answer to 6, above, is no, then are Class Members entitled to recover the amount by which the Class Members overpaid for the tickets or damages, or both?

8. If the answers to 6 and 7, above, are no, then are Class Members entitled to recover the fees levied by the Defendants (or any of them) on the tickets?

9. Is in the interests of justice to disregard the requirement to give notice under the *Consumer Protection Act, 2002,* or the Equivalent Consumer Protection Statutes?

10. Are the Class Members, or any of them, entitled to damages under the *Consumer Protection Act, 2000,* or the Equivalent Consumer Protection Statutes?

Breach of the Competition Act

1. Did the Defendants or either of them knowingly or recklessly make Representations, as pleaded, to the public that were false or misleading in a material respect for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest contrary to s. 52 of the *Competition Act*? If so, which defendant(s)?

2. If the answer to common issue #1 is Yes, what are the Representations and how were they conveyed to Class Members?

3. If the answer to common issue #1 is yes, are Class Members entitled to loss and damage and full costs under s. 36(1) of the *Competition Act*?

Breach of Ticketing Legislation

1. Did the defendants breach s. 4(3) of the *Ticket Sales Act, 2017,* S.O. 2017, c. 33, Sch. 3 ("*TSA 2017*")?

2. If so, what remedies, if any, should the Court make pursuant to s. 11 of the *TSA 2017*?

3. For the Quebec Merchant Subclass, did the defendants breach ss. 236.1 and/or 236.2 of the Quebec *Consumer Protection Act,* CQLR c. P-40.1? If so, what remedies, if any, should the Court make?

Unlawful Means Conspiracy

1. Did the defendants voluntarily enter into agreements with professional Resellers to violate Applicable Ticket Sales Legislation or s. 52 of the *Competition Act*?

2. Did the defendants know, or ought they to have known, in the circumstances, that their actions would facilitate Resellers' unlawful conduct which was contrary to the Applicable Ticket Sales Legislation, and that injury to the plaintiffs and Class Members was likely to result?

3. Was the defendants' unlawful conduct directed toward the plaintiffs and Class Members?

4. Did the plaintiffs and Class Members suffer injury?

5. Are the defendants jointly and severally liable to the plaintiffs?

Negligence

1. Did the defendants or either of them owe the Class Members a duty of care to ensure that Resellers complied with the Terms of Use and Privacy Policy and particularly, the posted ticket limits? If so, which defendant(s)?

2. What was the standard of care reasonably expected of the defendants in the circumstances?

3. Did the defendants, or either of them, breach their duty of care to the Class? If so, which defendant(s) and how?

4. For the Quebec Merchant Subclass, did the defendants breach art.1457 of the *Code Civil du Quebec*? If so, what remedies, if any, should the Court make?

Unjust Enrichment

1. Were the defendants unjustly enriched by the payment or overpayment by the Class Members?

2. Did the Class Members suffer a deprivation corresponding to the defendants' enrichment?

3. Was there no juristic reason for the defendants' enrichment and the Class Members' corresponding deprivation?

4. If the answers to 1 – 3, above, are yes, then are the Class Members entitled to restitution for the defendants' unjust enrichment?

5. Is this an appropriate case for any or all of the defendants to disgorge profits?

Aggregate Damages

1. Should an award of aggregate damages pursuant to s. 24(1) of the *Class Proceedings Act, 1992* be made?

Punitive Damages

1. Are the defendants, or either of them, liable to pay punitive or exemplary damages to the Class Members, having regard to the nature of their conduct?

Damages

1. Should the defendants pay prejudgment and postjudgment interest and at what annual rate?

2. Should the defendants pay the cost of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, who should pay what costs, why, and in what amount?

CITATION: Thompson-Marcial v. Ticketmaster Canada LP, 2024 ONSC 2305
COURT FILE NO.: CV-00605906-00CP
DATE: 20240419

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

STACEY THOMPSON-MARCIAL and BRIAN SMITH

Plaintiffs

AND:

TICKETMASTER CANADA LP and TICEKTMASTER LLC

Defendants

REASONS FOR DECISION

Glustein J.

Released: April 19, 2024