

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

(Class Actions Division)
S U P E R I O R C O U R T

N° 500-06-000809-166

NAOMI ZOUZOUT

Applicant

v.

WAYFAIR LLC

Defendant

SETTLEMENT AGREEMENT

- A. **WHEREAS** on or around September 12, 2016, the Applicant, Naomi Zouzout, filed an *Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff* (the "**Application for Authorization**"), seeking permission to institute a class action on behalf of the following group:

All persons in Canada (subsidiarily Quebec) who, since September 12th, 2013 (the "Class Period"), ordered or purchased any goods from Wayfair LLC and/or its affiliated brands, including Wayfair.com, Wayfair.ca, Joss & Main, DwellStudio, AllModern, Birch Lane and Wayfair Supply (hereinafter "Wayfair"), and who, after receiving a confirmation of their purchase from Wayfair at the price which Wayfair initially advertised, subsequently had their purchase cancelled by Wayfair, who did not respect the price it initially advertised;

- B. **WHEREAS** the Applicant alleges that the Defendant, Wayfair LLC, acted in violation of the Quebec *Consumer Protection Act* when it cancelled orders due to a pricing error;
- C. **WHEREAS** the Applicant also alleges that the Defendant violated section 52 of the *Competition Act* by listing incorrect prices;
- D. **WHEREAS** on September 27, 2016, the Defendant filed an *Answer to Summons* stating its intention to defend against the Application for Authorization;

- E. **WHEREAS** on December 21, 2016, the Defendant filed an *Application for Permission to Examine the Petitioner and Leave to File Relevant Evidence at the Authorization Hearing*;
- F. **WHEREAS** on May 3, 2017, the Applicant filed an *Amended Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff* (the "**Amended Application for Authorization**") in which the proposed class is defined as follows:

All persons in Quebec who, since January 4th, 2016 (the "Class Period"), ordered one of the following goods from the Wayfair.ca website (hereinafter "Wayfair") and had their purchase cancelled by Wayfair as a result of a pricing error in the advertised price:

- i) Montgomery Loveseat listed on January 12th, 2016;*
- ii) Laguna 8-piece seating group listed on July 15th, 2016;*
- iii) Milano 5-piece deep seating group listed on September 6th, 2016.*

Or any other class to be determined by the Court.

(the "**Class**");

- G. **WHEREAS** the Parties wish to settle this Litigation without prejudice or admission whatsoever, by way of mutual concessions, pursuant to the terms hereof;

1. Definitions

The following terms are defined for the purposes of this Settlement Agreement only, including the Recitals:

- a) "**Applicant**" means Naomi Zouzout;
- b) "**Approval Notice**" means the notice that will be approved by the Court as part of the Approval Order;
- c) "**Approval Order**" means the order of the Court approving this Settlement Agreement;
- d) "**Class Counsel**" means the law firm LPC Avocat Inc.;
- e) "**Class Member**" means a member of the Class that did not exclude himself, herself or itself in accordance with the provisions of article 580 of the *Code of Civil Procedure*;

- f) “**Class Period**” refers to the period from January 4, 2016 to June 15, 2017;
- g) “**Court**” means the Superior Court of Quebec;
- h) “**Defendant**” means Wayfair LLC;
- i) “**Delivery Deadline**” means one hundred and eighty (180) days from entry of the Approval Order;
- j) “**Final**” means, when used in relation to a judgment or order, the time at which said judgment or order has been entered and all rights of appeal therefrom have been exhausted, such that the judgment or order has acquired the status of *res judicata*;
- k) “**Laguna Sub-Class**” refers to the Class Members that purchased a Laguna 8-piece seating group for the price listed on July 15, 2016 from the wayfair.ca website during the Class Period;
- l) “**Litigation**” means the legal proceedings in *Naomi Zouzout v. Wayfair LLC* (Court File: 500-06-000809-166), pending in the Superior Court of Quebec, district of Montreal;
- m) “**Montgomery Sub-Class**” refers to the Class Members that purchased a Montgomery Loveseat for the price listed on January 12, 2016 from the wayfair.ca website during the Class Period;
- n) “**Milano Sub-Class**” refers to the Class Members that purchased a Milano 5-piece deep seating group for the price listed on September 6, 2016 from the wayfair.ca website during the Class Period;
- o) “**Option Deadline**” means one hundred and twenty (120) days from entry of the Approval Order;
- p) “**Parties**” means, collectively, the Applicant and Wayfair;
- q) “**Pre-Approval Notice**” means the notice that will be a) substantially in the form of Appendix A hereto and b) approved by the Court;
- r) “**Pre-Approval Order**” means the order of the Court approving the Pre-Approval Notice and authorizing the class action proposed in the Amended Application for Authorization for the sole purpose of settlement;
- s) “**Released Claims**” means any and all claims, demands, rights, liabilities, and causes of action of any nature whatsoever, known or unknown, matured or un-matured, at law, whether in delict, contract or under any other right at law, existing under federal or provincial law, that either of the Applicant, or any Class

Member, has or may have against the Released Persons arising out of or in any way related to the claims asserted in the Litigation;

- t) **"Released Persons"** means Wayfair LLC and its past and present partners, affiliates and predecessors, successors, assigns, parents, subsidiaries, insurers, officers, directors and employees;
- u) **"Store Credit"** means a redeemable credit that can be exchanged for goods on wayfair.ca, subject to the terms detailed at paragraph 14;
- v) **"Settling Parties"** means, collectively, the Released Persons, the Applicant and all Class Members;
- w) **"Wayfair"** means Wayfair LLC.

2. Recitals and Definitions Included

The Recitals and Definitions form an integral part of this Settlement Agreement.

3. Nullity If Not Approved

If this Settlement Agreement is not approved by the Court or the Settlement Agreement is terminated, it will become null and void, with the exception of paragraphs 4(1), 21(1) and 22, and will not generate any other rights or obligations either for the Parties or the Class Members; the Settling Parties will be restored to their respective positions in the Litigation before the Settlement Agreement was executed.

4. No Admission of Liability

(1) The Defendant denies the material factual allegations and legal claims asserted in the Amended Application for Authorization, including any and all charges of wrongdoing or liability arising out of any of the conduct, statements, acts or omissions alleged in the Amended Application for Authorization. Neither the Settlement Agreement, nor anything contained herein, shall be interpreted as a concession or admission of wrongdoing or liability by the Defendant.

(2) Nonetheless, the Defendant has concluded that further conduct of the Litigation and associated costs would be disproportionate with the amount of the claims at issue and that it is desirable that the Litigation be fully and finally settled in the manner and upon the terms and conditions set forth in this Settlement Agreement.

5. Application for Pre-Approval Order

Within twenty (20) days after execution of this Settlement Agreement, the Defendant will apply to the Court for the Pre-Approval Order.

6. Communication of the Pre-Approval Notice

Within twenty (20) days after the Pre-Approval Order is entered, the Defendant will email a copy of the Pre-Approval Notice to each Class Member.

7. Application for Approval Order

Following entry of the Pre-Approval Order and within thirty (30) days after communication of the Pre-Approval Notices to Class Members, the Defendant will apply to the Court for the Approval Order and request that the Court:

- a) declare that this Settlement Agreement is fair, reasonable and in the best interests of the Class Members;
- b) approve this Settlement Agreement and order the Parties and the Class Members to comply with it;
- c) order that the Approval Notice be communicated to the Class Members by email to their last known email address;
- d) declare that the Litigation is settled out of Court; and
- e) order any other measure it should deem required to facilitate the approval, implementation or administration of this Settlement Agreement.

8. Communication of the Approval Notice

Within ten (10) days after the Approval Order is entered, the Defendant will email a copy of the Approval Notice to each Class Member.

9. Releases

Upon the Approval Order becoming Final, the Applicant and each of the Class Members will be deemed to have, and by operation of the Approval Order will have, fully, finally, and forever released, relinquished, and discharged the Released Persons from all Released Claims.

10. Compensation to the Montgomery Sub-Class

As full and final compensation for the Released Claims, each Montgomery Sub-Class member will have the option to receive one of the following two compensation choices:

- a) one (1) Montgomery Loveseat, provided that the product is still available;

or

- b) a Store Credit in the amount of \$542.87.

11. Compensation to the Laguna Sub-Class

As full and final compensation for the Released Claims, each Laguna Sub-Class member will have the option to receive one of the following two compensation choices:

- a) one (1) Laguna 8-piece seating group, provided that the product is still available;
- or
- b) a Store Credit in the amount of \$3,038.00.

12. Compensation to the Milano Sub-Class

As full and final compensation for the Released Claims, each Milano Sub-Class member will have the option to receive one of the following two compensation choices:

- a) one (1) Milano 5-piece deep seating group, provided that the product is still available;
- or
- b) a Store Credit in the amount of \$2,823.00.

13. Individual Recovery and Choice of Compensation Option

The parties agree that the present settlement provides for the individual recovery of the Class Members' alleged claims.

Each Class Member will have until the Option Deadline to communicate, via email, his, her or its chosen option for compensation to the Defendant; otherwise, said Class Member will be deemed to have chosen the Store Credit option.

14. Store Credit Terms

Store Credits will be subject to the following terms:

- a) they will be usable on the wayfair.ca website only;
- b) they will be non-transferable;
- c) they will expire one (1) year after being issued.

15. Delivery of Compensation

No later than the Delivery Deadline, the Defendant will deliver to each Class Member the compensation chosen. Shipping costs for the delivery of either the furniture or the Store Credit will be paid by the Defendant.

16. Indemnity for Applicant

In addition to the compensation set out in paragraphs 10 to 12 above, the Defendant will pay an indemnity in the amount of five hundred dollars (\$500.00) to the Applicant, Naomi Zouzout. Payment of this indemnity shall be remitted to Class Counsel within thirty (30) days after the Approval Order becomes Final.

17. Class Counsel Fees and Expenses

(1) The Defendant agrees to pay Class Counsel, in full and final compensation for its fees, the amount of fifteen thousand dollars (\$15,000.00) plus applicable taxes and the amount of two thousand five hundred dollars (\$2,500.00) plus applicable taxes as full and final compensation for Class Counsel's disbursements and judicial costs, or any lesser amount approved by the Court, payment of which shall be remitted to Class Counsel within thirty (30) days after the judgment of the Court approving such fees, disbursements and judicial costs has become Final.

(2) Class Counsel will be responsible for filing and presenting an application before the Court requesting payment of its fees and expenses.

(3) This Settlement Agreement is in no way conditional upon the approval of Class Counsel's fees by the Court. Any order or proceeding relating to Class Counsel's fees and expenses, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel the Settlement Agreement.

18. Consent to Authorization and Common Issue

The Defendant consents to authorization of the class action proposed in the Amended Application for Authorization, for settlement purposes only. The parties agree that the authorized class action, subject to the Court's approval, will be based solely on the following common issue:

Are the Class members entitled to compensation for their orders being cancelled by Wayfair LLC due to a pricing error?

19. Other Costs

The Defendant will not be liable to pay any other costs or fees to the Applicant, to Class Members or to Class Counsel, other than the compensation as provided for at paragraphs 10, 11 and 12 herein, the indemnity as provided for at paragraph 16 herein, Class Counsel's fees and expenses as provided for at section 17 herein.

20. Cooperation and Best Efforts

The Parties agree to cooperate to the extent reasonably necessary to give effect to and implement all terms and conditions of this Settlement Agreement and to exercise best efforts to fulfil the foregoing terms and conditions of this Settlement Agreement.

21. Negotiated Agreement

The Parties intend the Settlement Agreement to be a final and complete resolution of all disputes between them with respect to the Litigation. The Parties agree that the consideration provided to the Class Members and the other terms of the Settlement Agreement were negotiated at arm's length and in good faith by the Parties, and reflect a settlement that was reached voluntarily after consultation with competent legal counsel.

22. Not Admissible As Evidence

(1) Neither the Settlement Agreement, nor anything contained herein, nor any of the negotiations or proceedings connected with it, nor any related document, nor any other action taken to carry out the Settlement Agreement shall be referred to, offered as evidence or received in evidence in any pending or future civil, criminal, regulatory or administrative action or proceeding against the Released Persons.

(2) Notwithstanding the above, the Settlement Agreement may be referred to or offered as evidence in a proceeding to approve or enforce the Settlement Agreement, to defend against the assertion of Released Claims, and as otherwise required by law.

23. No Press Release

The Parties agree that they will not issue any press release, whether joint or individual, concerning this Settlement Agreement or anything related thereto. The Parties further agree that they will not otherwise seek to obtain media coverage in relation to the Settlement Agreement, with the exception that Class Counsel will post this Settlement Agreement on its website and will have the right to comment on the settlement if solicited by the press.

24. Notices

Any notification, request, instruction or other document to be given by one Party to the other (other than class-wide notification) shall be in writing (including email) and transmitted to:

If to the Defendant: c/o M^e Catherine McKenzie
Irving Mitchell Kalichman LLP
Place Alexis Nihon | Tower 2
3500 De Maisonneuve Boulevard West, Suite 1400
Montreal, Quebec H3Z 3C1
cmckenzie@imk.ca

If to the Applicant: c/o M^e Joey Zukran
LPC Avocat Inc.
5800 Cavendish blvd., suite 411
Montreal, Quebec, H4W 2T5
jzukran@lpclex.com

25. Jurisdiction of the Superior Court

The Court will retain jurisdiction with respect to implementation and enforcement of the terms of this Settlement Agreement and all Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement Agreement.

26. Governing Law

This Settlement Agreement is a transaction pursuant to sections 2631 and following of the *Quebec Civil Code* and will be construed and enforced in accordance with, and governed by the laws of the Province of Quebec.

27. Miscellaneous Provisions

- a) The plural of any defined term in this Settlement Agreement includes the singular, and the singular of any defined term in this Settlement Agreement includes the plural, as the case may be.
- b) All of the Appendices to this Settlement Agreement are material and integral parts hereof and are fully incorporated by this reference.
- c) This Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties.
- d) This Settlement Agreement and the Appendices attached hereto constitute the entire agreement among the Parties, and supersedes prior exchanges, oral or in writing, between Defendant's Counsel and Class Counsel.
- e) Each counsel or other person executing this Settlement Agreement or any of its Appendices on behalf of any Party hereby warrants that such person has the full authority to do so.
- f) This Settlement Agreement may be executed in one or more counterparts. All executed counterparts and each of them will be deemed to be one and the same instrument. A complete set of original counterparts will be filed with the Court.
- g) The Parties hereby acknowledge that they have requested that this Settlement Agreement be drawn in English. *Les Parties reconnaissent avoir exigé que la présente transaction soit rédigée en anglais.*

Signed in Montreal on June 28, 2017



NAOMI ZOUZOUT

Signed in Boston, Massachusetts on June 19, 2017



Name: Enrique Colbert
Title: General Counsel and Secretary

Duly authorized representative of WAYFAIR LLC