

**Court file no. 500-06-001195-227 – *Bitton v. Wayfair LLC et al.***

## **MODIFIED SETTLEMENT AGREEMENT**

Made as of February 26, 2024

**Between:**

**Eva Bitton**

(Plaintiff)

-and-

**Wayfair LLC**

(Defendant)

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## **RECITALS**

- A. WHEREAS the Plaintiff Eva Bitton (**Plaintiff**) commenced a proposed class action in the Quebec Superior Court on July 26, 2022, bearing Court file no. 500-06-001195-227 against Amazon.com.ca Inc., Amazon Canada fulfillment services Inc., Amazon.com Inc., Amazon.com LLC, Wayfair LLC and Home Depot of Canada Inc. (**Class Action**);
- B. WHEREAS the Class Action asserts claims on behalf of the Class in relation to the purchase of extended warranties on goods sold by Defendants on their websites without providing notice of Québec's legal warranty;
- C. WHEREAS the Plaintiff maintains that the claims in the Class Action are valid; the Defendant Wayfair LLC (the "**Defendant**") denies all of the allegations asserted by the Plaintiff in the Class Action, and maintains that it has good and valid defences to the claims asserted therein;
- D. WHEREAS by judgment rendered on August 10, 2023, the Superior Court of Quebec authorized the Class Action against the Defendant for a class comprised of "*All consumers residing or domiciled in Quebec at the time of the purchase and who purchased an extended warranty on goods purchased from the Wayfair mobile application(s) and/or website(s) between February 7, 2019 and October 31, 2022*";
- E. WHEREAS the interests of the parties and the public interest, including the administration of justice, and the economy of judicial resources, favour a settlement of the Class Action;
- F. WHEREAS the Parties, further to having reached a first Settlement Agreement which was ultimately not submitted to the Court for approval due to a significant error outside of the control of the Parties which is rectified herein, and therefore never approved by the Court, have agreed to enter into this Modified Settlement Agreement in order to achieve an early, full and final resolution of the Class Action and to avoid further expense, inconvenience and burdens of protracted litigation, subject to approval by the Superior Court of Québec;
- G. WHEREAS the Parties have reviewed and fully understand the terms of this Modified Settlement Agreement and, based on their respective analyses of the facts and law applicable to the Plaintiff's claims asserted in the Class Action, and having regard to the burdens and expense of prosecuting the Class Action, including, in particular, the risks and uncertainties associated with trials and appeals, and taking into account the maximum recovery for the Class weighed against those costs, risks, uncertainties and delays, the Parties have concluded that this Modified Settlement Agreement is fair, reasonable and in the best interest of the Class;

- H. WHEREAS the Plaintiff and Class Counsel agree that neither this Modified Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by, or evidence against the Defendant, or evidence of the truth of any of the Plaintiff's allegations against the Defendant; and the Defendant and Defence Counsel agree that neither this Modified Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by, or evidence against the Plaintiff or the Class, or evidence of the truth or validity of any of the Defendant's defences or arguments against the Plaintiff's claims, or admission of liability by the Defendant;
- I. WHEREAS this Modified Settlement Agreement is entered into without any admission of fault or liability;
- J. WHEREAS, according to the Defendant, the Wayfair Class Members have been identified by the Defendant and the Parties agree that the most effective method to notify the Class Members is on an individual basis via e-mail;
- K. WHEREAS the Parties therefore wish to, and hereby do, fully and finally resolve the Class Action and all Released Claims, as defined below, subject to the approval of this Modified Settlement Agreement by the Superior Court of Québec;

NOW THEREFORE, in consideration of the covenants, agreements and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Class Action shall be settled on the following terms and conditions:

## **ARTICLE I - DEFINITIONS**

### **1.1 Definitions**

The following terms, as used in this Agreement, including the Recitals, mean:

- (a) **Administration Expenses** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred by or payable by the Defendant for the implementation and operation of this Modified Settlement Agreement including the costs of claims administration, distribution of notices and the costs of translating the relevant Settlement documents. For clarity, the Administration Expenses are to be paid by the Defendant, and are not included in the Settlement Amount.
- (b) **Class Action** means the class proceeding commenced by the Plaintiff in the Superior Court of Quebec bearing Court File No. 500-06-001195-227.
- (c) **Class Counsel** means LPC Avocats.
- (d) **Class Counsel Fees and Disbursements** means the amount payable to Class Counsel in fees, disbursements, costs, interest, GST, QST, and other

applicable taxes or charges of Class Counsel in respect of the prosecution of the Class Action, as approved by the Court.

- (e) **Court** means the Superior Court of Québec.
- (f) **Defence Counsel** means Stikeman Elliott LLP.
- (g) **Defendant** or **Wayfair** means Wayfair LLC.
- (h) **Direct Credit Reimbursements** means the credit payments to Class Members in the form of e-store credits, with a value of \$22.50 each, subject to an additional amount according to the percentage of bounce back emails generated at the time of sending the Notice of Hearing and Opt-out, to be used on Wayfair's website or mobile application which will not expire and can be used for multiple transactions, pursuant to the terms of the Distribution Protocol (**Schedule D**).
- (i) **Distribution Protocol** means the plan for distributing the Settlement Amount, as defined herein, to the Class as approved by the Court, in the form of **Schedule D** hereto.
- (j) **Effective Date** means (i) the date upon which the ability to appeal from the last-rendered anticipated Second Order expires; or (ii) if any appeal is taken from the Second Order, then the Effective Date shall be the date upon which any such appeal is concluded by way of a Final order.
- (k) **Final** when used in relation to a Court order means all rights of appeal from such order or judgment have expired or have been exhausted and that the ultimate court of appeal (or court of last resort) to which an appeal (if any) was taken has upheld such order.
- (l) **First Order** means the proposed order of the Court providing the Court's approval of the Notice of Hearing and Opt-Out which will be substantially in the form of **Schedule A** hereto or as modified by the Court.
- (m) **Fonds d'aide** means the *Fonds d'aide aux actions collective* created pursuant to the *Act respecting the Fonds d'aide aux actions collectives* (CQLR c F-3.2.0.1.1).

- (n) **Wayfair Class** means all consumers in Quebec who, from February 7, 2019 to October 31, 2022, purchased an extended warranty on goods from the Defendant's mobile application(s) and/or website(s), and **Class Member** means any one thereof.
- (o) **Notice of Court Order** means (as applicable) the various iterations of the notices of the order approving the settlement and Class Counsel Fees and Disbursements, as approved by the Court, to inform the Class Members of *inter alia*: (1) the approval of this Modified Settlement Agreement and (2) the process by which Class Members will be compensated, which shall be substantially in the form of **Schedule C** hereto, or as modified by the Court.
- (p) **Notice of Hearing and Opt-Out** means (as applicable) the French and English short and long form notices of the hearing for approval of the Modified Settlement Agreement, approved by the Court, to inform the Class of *inter alia*: (1) the date of the hearing to approve this Modified Settlement Agreement; (2) the key terms of this Modified Settlement Agreement; and (3) the Opt-Out Procedure and Opt-Out Deadline, as well the manner in which Class Members may object, which will be substantially in the form of **Schedule B** hereto, or as modified by the Court.
- (q) **Opt-Out Deadline** means the date which is thirty (30) days from the last date that the Notice of Hearing and Opt-Out is emailed to Class Members by the Defendant.
- (r) **Opt-Out Procedure** means the procedure by which any Class Member(s) who wish(es) to do so may opt out of the Class Action as described in Section 3.1 herein, subject to Court approval.
- (s) **Parties**, when capitalized, means the Plaintiff and Defendant, and **Party** means any one thereof.
- (t) **Released Claims** means any and all manner of claims, complaints, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, damages of any kind whenever incurred, declaratory relief, liabilities of any nature whatsoever, including assigned claims, claims for injunction, contribution, indemnity, interest, costs, expenses, class administration costs (including Administration Expenses), and lawyers' fees (excluding Class Counsel Fees and Disbursements, which are addressed at Article 11.1 of the present Modified Settlement Agreement), known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity, that the Releasers, or any of them ever had, could have had, or now have related to the subject matter of allegations in the Class Action, or related to the facts alleged in the Class Action.

- (u) **Releasees** means the Defendant and each of its respective predecessors, assigns, parents, subsidiaries, affiliates, divisions, partners, agents, mandataries, insurers and each of their past and current officers, directors, employees, agents, shareholders and beneficiaries of any kind including their respective successors.
- (v) **Releasors** means, individually and collectively, the Plaintiff and the Class Members, and their respective successors, heirs, executors, administrators, trustees, assigns, devisees, agents, subrogees, insurers, partners, mandataries or representatives of any kind (excluding Class Counsel, whose release is addressed at Article 11.1 of the present Modified Settlement Agreement).
- (w) **Second Order** means the anticipated order of the Court approving the terms of this Modified Settlement Agreement and approving Class Counsel Fees and Disbursements, which will be substantially in the form of **Schedule E** hereto or as modified by the Court.
- (x) Modified **Settlement Agreement** means this agreement, including the recitals and Schedules.
- (y) **Settlement Amount** means the CAD \$665,000.00 (representing 50% of Wayfair's value of commerce for the sale of the extended warranties during the Class period) available to satisfy the Direct Credit Reimbursements to Class Members under the Distribution Protocol (in the form of **Schedule D** hereto), which excludes the payment of Class Counsel Fees and Disbursements that Defendant has agreed to pay separately and on top of the Settlement Amount.

## **ARTICLE II - BEST EFFORTS TO SECURE COURT APPROVAL**

### **2.1 Best Efforts**

The Parties shall use their best efforts to effectuate this Modified Settlement Agreement and shall cooperate to seek and obtain the Court's approval of this Modified Settlement Agreement and all other matters addressed herein.

If Defendant intends to seek a sealing order in respect of commercially-sensitive information to be included in the materials submitted on any of the applications contemplated under this Modified Settlement Agreement, they will notify Class Counsel in advance. The Plaintiff will not object to any such Application for a sealing order.

Defendant will cooperate to provide information to the Court that is reasonable and necessary to obtain Court approval of this Modified Settlement Agreement, including the total number of extended warranty purchases in the Class and the total value of those purchases.



## 2.2 Court Approval Required for Enforceable Agreement

With the exception of those Articles expressly stated to survive termination of this Modified Settlement Agreement, this Modified Settlement Agreement shall be of no force or effect unless approved by the Court.

## **ARTICLE III – OPT-OUT PROCEDURE**

### 3.1 Court Approval of Opt-Out Process and Deadlines

- (a) Class Counsel shall seek the Court's approval of the following opt-out procedure as part of the Applications for Approval of Notice of Hearing and Opt-Out outlined in Article 4.1 below:
- (i) Class Members seeking to opt out of the Class Action must do so within thirty (30) days from the last date that the Modified Notice of Hearing and Opt-Out is sent to Class Members via email by the Defendant, by sending a complete and validly executed notice of opt out to the Clerk of the Superior Court of Quebec on or before the Opt-Out Deadline, at the following address:

Clerk of the Superior Court of Quebec  
Palais de Justice de Montréal  
(*Bitton v. Wayfair LLC*, CSM no 500-06-001195-227)  
1 Notre-Dame Street East, Room 1.120  
Montréal, Québec, H2Y 1B5

A copy may also be sent to Class Counsel at the email address [izukran@lpclex.com](mailto:izukran@lpclex.com). The notice of opt out must be sent by the Class Member or the Class Member's designee and must include the following information:

- A heading referring to this proceeding (*Bitton v. Wayfair LLC*, case no. 500-06-001195-227).
- The Class Member's full name, current address, telephone number and email address and, if represented by counsel, the name and contact information of their counsel;
- A statement that the Class Member purchased an extended warranty on goods from the Wayfair website or mobile application between February 7, 2019 and October 31, 2022;
- A statement to the effect that the Class Member wishes to be excluded from the Class Action; and
- The Class Member's signature.

- (b) Class Members who opt out of the Class Action shall not be members of the Wayfair Class, and shall have no further right to participate in the Class Action or to share in the distribution of funds as a result of the Modified Settlement Agreement.
- (c) Upon expiry of the Opt-Out Deadline, Class Counsel shall provide a report to the Court containing the names of each person who has validly and timely opted out of the Class Action.
- (d) The Defendant shall not be required to pay any part of the Settlement Amount in respect of any Class Member who validly opted out of the Class Action.
- (e) Under article 580 of the *Code of Civil Procedure* of Québec, a Class Member eligible to opt out pursuant to this section who does not discontinue an originating application having the same subject matter as the Class Action before the Opt-Out Deadline has expired, is deemed to have opted out.

#### **ARTICLE IV – SETTLEMENT APPROVAL**

Subject to the discretion of the Court regarding the approval process, the Parties propose to seek the orders contemplated in this Modified Settlement Agreement as follows. The Parties agree that the applications contemplated in this article may be conducted in-person, by videoconference, or by teleconference, as directed by the Court.

##### **4.1 Applications for Approval of Notice of Hearing and Opt-Out**

- (a) As soon as practicable after this Modified Settlement Agreement is executed, Plaintiff shall bring an application for the Court's approval of an order substantially in the form of the draft First Order at **Schedule A** (being the draft order approving the Modified Notice of Hearing and Opt-Out). Defendant will consent to this application, subject to their prior approval of the draft application.
- (b) Until the application for the Court's approval of an order substantially in the form of the draft First Order at **Schedule A** is brought, the Parties shall keep all of the terms of the Modified Settlement Agreement confidential and shall not disclose them without prior written consent of the Parties, except as required for the purposes of financial reporting, communications with insurers and auditors, and/or the preparation of financial records (including tax returns and financial statements), as necessary to give effect to its terms or as otherwise required by law.

#### **4.2 Application for Approval of Modified Settlement Agreement and Class Counsel Fees and Disbursements**

- (a) As soon as practicable after an order substantially in the form of the First Order is made, and the Notice of Hearing and Opt-Out is published as detailed in the Notice Plan (**Schedule C**), the Plaintiff shall bring an application for the Court's issuance of the Second Order. Subject to what is stated in the next sentence, Defendant will support this application, and the Fonds d'aide will be served with the application. Defendant will defer to the Court on the aspects of such application that concern Class Counsel Fees and Disbursements, other than that Defendant has agreed to pay up to \$236,470.00 in fees, disbursements and expenses (plus GST & QST) as part of the negotiated Settlement.
- (b) Defendant will have the opportunity to review and approve all application materials before they are filed.
- (c) If the Plaintiff, Class Counsel, the Defendant, or Defence Counsel become aware that a Class Member or other person intends to object to those applications, they will advise the Parties (through their counsel) in writing as soon as practicable and in any event no later than two (2) business days before the hearing of the application in Article 4.2 (a).
- (d) Within thirty (30) days of the Effective Date, or the receipt of an invoice issued to Defense Counsel to make payment, whichever is longer, the Defendant shall make payment to Class Counsel in the amount of the Class Counsel Fees and Disbursements approved by the Court, in full satisfaction of any claims for fees, costs and disbursements related to the Class Action (as described more fully at Article 11.1 of the present Modified Settlement Agreement).

### **ARTICLE V - SETTLEMENT CLAIMS**

#### **5.1 Composition of the Settlement Funds**

- (a) This Modified Settlement Agreement provides for a process by which the Defendant will issue a Direct Credit Reimbursement, in the form of e-store credits to all Class Members who purchased an extended warranty on the Defendant's mobile application and/or website, wayfair.ca. All amounts expressed in this Modified Settlement Agreement are in Canadian Dollars (CAD). In no event shall the total value of the Direct Credit Reimbursements and Class Counsel Fees and Disbursements payable by the Defendant exceed CAD \$936,881.38.
- (b) The Settlement Amount will be used to pay Class Members pursuant to the Distribution Protocol (**Schedule D**).

- (c) The issuance of the Direct Credit Reimbursements will be in full satisfaction of the Released Claims against the Releasees.
- (d) Defendant shall not have any obligation to pay to the Class any amount in addition to the Direct Credit Reimbursements, unless otherwise expressly provided for in this Agreement.

## **5.2 Taxes and Interest**

- (a) The Parties agree that the Plaintiff, Defendant, Class Counsel, and Defence Counsel are in no way liable for any taxes any Class Members may be required to pay as a result of receiving any benefits under this Modified Settlement Agreement. No opinion concerning the tax consequences of this Modified Settlement Agreement to any Class Member is given or will be given by the Parties or their respective counsel, nor is any Party or their counsel providing any representation or guarantee respecting the tax consequences of this Modified Settlement Agreement as to any Class Member. Each Class Member is responsible for their tax reporting and other obligations respecting this Modified Settlement Agreement, if any.

## **ARTICLE VI - DISTRIBUTION OF FUNDS**

### **6.1 Distribution Protocol**

The Distribution Protocol is part of this Modified Settlement Agreement and will be subject to approval by the Court, as part of the application seeking Court approval of this Modified Settlement Agreement (the Second Order). The Distribution Protocol is set out at **Schedule D** hereto.

## **ARTICLE VII - TERMINATION OF MODIFIED SETTLEMENT AGREEMENT**

### **7.1 Right of Termination**

- (a) Defendant shall have the option to terminate this Modified Settlement Agreement in the event that:
  - (i) The Plaintiff or Class Counsel breach any material term of this Modified Settlement Agreement;
  - (ii) The Court declines to issue an order substantially in the form of the Second Order, or to approve any material part of the Modified Settlement Agreement (which does not include Class Counsel Fees and Disbursements), or requires a material change to the Modified Settlement Agreement as a pre-condition to approval; or
  - (iii) The Court issues an order substantially in the form of the Second Order, but it does not become Final or is materially altered on appeal.

- (b) The Plaintiff shall have the option to terminate the Modified Settlement Agreement in the event that:
- (i) Defendant or Defence Counsel breach any payment terms of this Modified Settlement Agreement;
  - (ii) The Court declines to issue an order substantially in the form of the Second Order, or to approve of any material part of the Modified Settlement Agreement (which does not include Class Counsel Fees and Disbursements) or requires a material change to the Modified Settlement Agreement as a pre-condition to approval; or
  - (iii) The Court issues an order substantially in the form of the Second Order, but it does not become Final or is materially altered on appeal.
- (c) If Defendant elects to terminate the Modified Settlement Agreement pursuant to Article 7.1(a), or the Plaintiff elects to terminate the Settlement Agreement pursuant to Article 7.1(b), a written notice of termination shall be provided by the terminating Party(s) to the other Party(s) forthwith, and, in any event, no later than ten (10) business days after the event upon which the terminating Party relies. Upon delivery of such written notice, this Modified Settlement Agreement shall be terminated and, except as provided for in Article 7.2, and the related Definitions in Article I, it shall be null and void and have no further force or effect, shall not be binding on the Parties, and shall not be used as evidence or otherwise in any Released Claims, including but not limited to any trial on the merits, except with the written consent of all Parties or as otherwise required by a Court.
- (d) Any order, ruling or determination made by the Court with respect to the Class Counsel Fees and Disbursements shall not be a material modification of this Modified Settlement Agreement and shall not constitute a basis for the termination of this Modified Settlement Agreement.

## **7.2 If the Modified Settlement Agreement is Terminated**

If this Modified Settlement Agreement is terminated:

- (a) The Parties will be restored to their respective positions prior to the execution of this Modified Settlement Agreement, except as expressly provided for herein;
- (b) Any step taken by Defendant or the Plaintiff in relation to this Modified Settlement Agreement shall be without prejudice to any position that the Parties may later take in respect of any procedural or substantive issues in the Class Action;
- (c) Any order or judgment rendered by the Court pursuant to this Modified Settlement Agreement shall be set aside or vacated. The Parties consent

and will cooperate in seeking to have all prior orders or judgments sought from and rendered by the Court, in accordance with this Modified Settlement Agreement, set aside and declared null and void and of no force or effect, and any Party shall be estopped from asserting otherwise; and

- (d) All documents and information exchanged by the Parties during the settlement process are subject to settlement privilege, except to the extent that the documents or information were, are, or become publicly available or properly obtained in the course of discovery. Within thirty (30) days of such termination having occurred, Class Counsel shall, upon written request, destroy all documents and other materials provided by Defendant or containing or reflecting information derived from such documents for the purposes of implementing this Settlement. Class Counsel shall provide Defence Counsel with a written certification by Class Counsel of such destruction upon request.

## **ARTICLE VIII - RELEASES AND DISMISSALS**

### **8.1 Release of Releasees**

Except in the case of the termination of this Modified Settlement Agreement, and conditional upon the approval of this Modified Settlement Agreement by the Court, as at the Effective Date, the Releasors immediately, forever and absolutely release the Releasees from the Released Claims. The Plaintiff acknowledges that she may thereafter discover facts in addition to, or different from, the facts which she knows or believes to be true regarding the Released Claims, and it is her intention to release fully, finally and forever all Released Claims and, in furtherance of such intention, this release by all of the Releasors shall be and shall remain in effect notwithstanding the discovery or existence of new or different facts.

### **8.2 No Further Claims**

The Releasors shall not now, nor hereafter institute, continue, maintain, or assert, either directly or indirectly, on their own behalf or on behalf of any class or any other person, any Released Claim against any Releasee or any other person who may claim contribution or indemnity from any Releasee in respect of any Released Claim.

## **ARTICLE IX - EFFECT OF SETTLEMENT**

### **9.1 No Admission of Liability**

Whether or not this Modified Settlement Agreement is approved or terminated, this Modified Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions, and proceedings associated with this Modified Settlement Agreement, and any action taken to carry out this Modified Settlement Agreement, shall not be deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any fault, wrongdoing or liability by any of the

Releasees, or of the truth of any claims or allegations contained in the Class Action or any other allegation made by the Plaintiff or the Class in any forum or context. The Releasees deny any liability and deny the truth of the allegations made against them. If the Modified Settlement Agreement is not approved, they will defend the Class Action at trial.

The Defendant reserves their rights and defences with respect to anyone who validly opted out of the Class Action, and no term of this Modified Settlement Agreement shall be tendered as evidence in any subsequent litigation by any such person against the Defendant.

## **9.2 This Agreement Not Evidence**

The Parties agree that, whether or not it is approved or terminated, this Modified Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions, and proceedings associated with this Modified Settlement Agreement, and any action taken to carry out this Modified Settlement Agreement, shall not be referred to, offered as evidence, or received in evidence in any pending or future civil, criminal, or administrative action or other proceeding, in this or any other jurisdiction, except in a proceeding to approve or enforce this Modified Settlement Agreement or in connection with the other applications contemplated in this Modified Settlement Agreement, or to defend against the assertion of Released Claims, or as otherwise required by law, or with the written consent of all Parties.

## **ARTICLE X - NOTICE TO CLASS**

### **10.1 Notice Required**

The Class shall be given the following notices, subject to approval by the Court:

- (a) Notices of Hearing and Opt-Out (**Schedule B**);
- (b) Notices of Court Order, in a form to be agreed upon by the parties and approved by the Court;
- (c) Notice of termination of this Modified Settlement Agreement if it is terminated pursuant to this Modified Settlement Agreement, or as otherwise ordered by a Court, in a form to be agreed upon by the Parties and approved by the Court or, if the Parties cannot agree on the form of the notice of termination of the Modified Settlement Agreement, then in the form ordered by the Court.

### **10.2 Costs of Disseminating Notice**

The costs of disseminating each Notice shall be paid by Defendant from the Administration Expenses, regardless of whether the Settlement is approved by the Court or the Modified Settlement Agreement is terminated. The Plaintiff, the Class and the Class Counsel are not liable to pay for such costs.



### **10.3 Method of Disseminating Notices**

The Notices required under Article 10.1 shall be disseminated pursuant to the Notice Plan attached as **Schedule C** as approved by the Court or in a manner otherwise ordered by the Court.

## **ARTICLE XI - CLASS COUNSEL FEES AND DISBURSEMENTS**

### **11.1 Class Counsel Fees and Disbursements and Release**

- (a) As part of the application for approval detailed at Article 4.2(a), Class Counsel will seek the Court's approval of Class Counsel Fees and Disbursements in the amount of \$236,470.00 in fees, disbursements and expenses (all plus GST & QST), and an order that the Class Counsel Fees and Disbursements shall be paid. The Defendant shall take no position on this request, other than that they have agreed to pay these amounts as part of this negotiated agreement.
- (b) Upon full payment to Class Counsel of the Class Counsel Fees and Disbursements approved by the Court pursuant to the order to be rendered by the Court, Class Counsel forever releases the Releasees of and from any and all claims or demands for fees, costs, expenses and/or disbursements, known or unknown, that Class Counsel ever had, could have had, or now has, related to the Class Action.
- (c) For clarity, Plaintiff and Class Counsel cannot seek to terminate the Modified Settlement Agreement if the Court approves the Modified Settlement Agreement, but decreases or does not approve Class Counsel Fees and Disbursements.

## **ARTICLE XII - MISCELLANEOUS**

### **12.1 Applications for Directions**

- (a) The Plaintiff or Defendant may bring applications to the Court for directions in respect of the implementation and administration of this Modified Settlement Agreement at any time.
- (b) All applications contemplated by this Modified Settlement Agreement shall be on reasonable notice to the Parties.

### **12.2 Headings, etc.**

In this Modified Settlement Agreement:

- (a) The division of the Modified Settlement Agreement into articles and the insertion of headings are for convenience of reference only and shall not



affect the construction or interpretation of this Modified Settlement Agreement; and

- (b) The terms “this Modified Settlement Agreement”, “hereof”, “hereunder”, “herein”, and similar expressions refer to this Modified Settlement Agreement and not to any particular article or other portion of this Modified Settlement Agreement.

### **12.3 Computation of Time**

In the computation of time in this Modified Settlement Agreement, except where a contrary intention appears:

- (a) Where there is a reference to a number of days between two events, the number of days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and
- (b) Only in the case where the time for doing an act expires on a holiday (including Canadian and US holidays) or a weekend, the act may be done on the next day that is a business day.

### **12.4 Governing Law**

This Modified Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Québec and Canada.

### **12.5 Entire Agreement**

This Modified Settlement Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements (including the First Settlement Agreement that the parties did not present to the Court due to a significant error outside of their control), agreements in principle and memoranda of understanding or agreement in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of this Modified Settlement Agreement, unless expressly incorporated herein.

### **12.6 Amendments**

This Modified Settlement Agreement may not be modified or amended except in writing and on consent of the Plaintiff and Defendant, subject to approval by the Court where required.

## **12.7 No Waiver**

No waiver of any provision of this Modified Settlement Agreement will be binding unless consented to in writing by the Parties. No waiver of any provision of this Modified Settlement Agreement will constitute a waiver of any other provision.

## **12.8 Binding Effect**

This Modified Settlement Agreement shall be binding upon and inure to the benefit of the Plaintiff, the Class Members, the Defendant, the Releasors, and the Releasees once it is approved by a Final order of the Court, except to the extent that the Parties have obligations under this Modified Settlement Agreement prior to its approval, the Parties are required to perform those obligations under this Modified Settlement Agreement prior to settlement approval.

Without limiting the generality of the foregoing, each and every covenant and agreement made by the Plaintiff shall be binding upon all Releasors, once it is approved by Final order of the Court.

## **12.9 Counterparts**

This Modified Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile or PDF signature shall be deemed an original signature for purposes of executing this Modified Settlement Agreement.

## **12.10 Negotiated Agreement**

This Modified Settlement Agreement has been the subject of negotiations and discussions among the Parties, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Modified Settlement Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of this Modified Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Modified Settlement Agreement.

## **12.11 Language**

The Parties acknowledge that they have required and consented that this Modified Settlement Agreement and all related documents be prepared in English; *les parties reconnaissent avoir exigé que la présente convention de règlement modifiée et tous les documents connexes soient rédigés en anglais*. Nevertheless, a French translation of this Modified Settlement Agreement, the Distribution Protocol and the Notices shall be prepared, the cost of which shall be paid by the Defendant.

## 12.12 Transaction

The present Modified Settlement Agreement constitutes a transaction in accordance with Articles 2631 and following of the *Civil Code of Quebec*.

## 12.13 Recitals

The Recitals to this Modified Settlement Agreement are true and form part of the Modified Settlement Agreement.

## 12.14 Schedules

The Schedules annexed hereto form part of this Modified Settlement Agreement and are:

- (a) **Schedule A** – Draft First Order (the draft order approving the Notice of Hearing and Opt-Out).
- (b) **Schedule B** – Notice of Hearing and Opt-Out.
- (c) **Schedule C** - Notice Plan.
- (d) **Schedule D** – Distribution Protocol.

## 12.15 Acknowledgements

Each of the Parties hereby affirms and acknowledges that:

- (a) He, she, or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood the Modified Settlement Agreement;
- (b) The terms of this Modified Settlement Agreement and the effects thereof have been fully explained to him, her, or the Party's representative by his, her or its counsel;
- (c) He, she, or the Party's representative fully understands each term of the Modified Settlement Agreement and its effect; and
- (d) No Party has relied upon any inducement of any other Party with respect to the first Party's decision to execute this Modified Settlement Agreement.

## 12.16 Authorized Signatures

Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Modified Settlement Agreement.

## 12.17 Notice

Where this Modified Settlement Agreement requires a Party to provide notice or any other communication or document to another, such notice, communication or document shall be provided by email, facsimile or letter by overnight delivery to the representatives for the Party to whom notice is being provided, as identified below:

For the Plaintiff and for Class Counsel:

**Mtre Joey Zukran**

**Mtre Léa Bruyère**

**LPC Avocats**

276 Saint-Jacques Street, Suite 801

Montreal, QC, H2Y 1N3

Telephone: 514-379-1572

Fax: 514-221-4441

Email: [izukran@lpclex.com](mailto:izukran@lpclex.com)

For the Defendant and Defence Counsel:

**Stikeman Elliott LLP**

1155 Boul. René-Lévesque Ouest, suite 4100

Montreal, QC H3B 3V2

**Mtre Yves Martineau**

Telephone: 514-397-3380

Fax: 514-397-3222

Email: [ymartineau@stikeman.com](mailto:ymartineau@stikeman.com)

**Mtre Marianne Bastille-Parent**

Telephone: 514-397-3388

Fax: 514-397-3222

Email: [mbastilleparent@stikeman.com](mailto:mbastilleparent@stikeman.com)

**Date of Execution**

The Parties have executed this Modified Settlement Agreement effective as of the date on the cover page.

Dated at Montreal, Quebec, Canada, this 26 day of February, 2024

  
\_\_\_\_\_

**EVA BITTON**

Plaintiff

Dated at Montreal, Quebec, Canada, this 26 day of February, 2024

  
\_\_\_\_\_

**LPC AVOCATS**

Per: Joey Zukran

Lawyers for the Plaintiff and the Class,

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Dated at Montreal, Quebec, Canada, this 26<sup>th</sup> day of February, 2024

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**WAYFAIR LLC**

**Per:** \_\_\_\_\_

(Defendant)

DocuSigned by:  
*Enrique Colbert*  
8AF195546AA74AE

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General Counsel, Wayfair LLC