

SUPERIOR COURT
(Class Actions Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000919-189

DATE : November 29, 2019

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

EMILIE SAMSON
Applicant

v.

BUSBUD INC.
and
BUSBUD USA INC.
and
BUSBUD EUROPE LIMITED
and
BUSBUD BRASIL RESERVA DE PASSAGENS LTDA
Respondents

JUDGMENT
(Approval of settlement and class counsel fees)

1- **OVERVIEW**

[1] On April 9, 2018, Plaintiff Emilie Samson filed an *Application for Authorization to Institute a Class Action* ("Application for Authorization") against Defendant Busbud Inc. The Application for Authorization was subsequently amended to include as Defendants

Busbud USA Inc., Busbud Europe Limited and Busbud Brasil Reserva De Passengers LTDA.

[2] Plaintiff alleged that while purchasing a bus ticket on the Busbud website to travel from Montreal to New York City, the initial price shown for the ticket was different from the actual purchase price due to the fact that a previously undisclosed service fee in the amount of \$2.50 USD was added to the final purchase price.

[3] The class is described to be global, including all individuals worldwide who purchased one or more tickets from Busbud from April 4, 2015 onwards.

[4] During the conduct of the case, the parties concluded a settlement. By judgment dated September 20, 2019, the Court authorized the exercise of a class action in the context of the proposed settlement and, further, approved the notices to be communicated as regards the settlement approval hearing.

[5] The parties jointly seek to have the Settlement Agreement, signed June 25, 2019¹, approved.

[6] Class counsel also seek approval of their fees.

2- SETTLEMENT AGREEMENT

[7] The proposed settlement provides for a total recovery value of \$7,258,475, representing an equivalent \$7CDN "voucher credit" for each of the 1,036,925 class members located worldwide.

[8] The said "voucher credits" are to be in electronic form, issued and delivered automatically by Defendants, without the need for class members to submit any claim forms or proof of purchase, or otherwise take any affirmative steps to receive same.

[9] They are also to be fully transferable and valid for a period of twelve months from the date of issuance.

[10] The Court is to only approve a settlement transaction if of the view that it is fair, reasonable and in the best interest of the class members, taking into account the following factors:

- a) the probability of success;
- b) the amount and nature of discovery;
- c) the terms and conditions of the Settlement Agreement;

¹ Appendix « A ».

- d) the attorneys' recommendations and their experience;
- e) the specific approval of Plaintiff;
- f) the likely future expenses and probable length of litigation;
- g) the number and nature of opt-outs and/or objections; and
- h) the good faith of the parties and the absence of collusion.

[11] For the reasons that follow, the court is of the view that the proposed settlement is fair, reasonable and in the best interest of class members. Accordingly, it should be approved.

a) The probability of success

[12] The claim raises interesting legal issues which impact the probability of success. For example, does the *Quebec Consumer Protection Act* apply in all regards in relation to an "intermediary" who is not the ultimate source provider; do compensatory damages and punitive damages apply in relation to a mere intermediary; and, does a presumption of damages apply in such circumstances? Moreover, does the fact that the claim involves a worldwide class alter the responses to these questions?

[13] These issues, amongst others, stand for the premise that the litigation would be lengthy and complex, with no certainty as to ultimate success.

b) The amount and nature of discovery

[14] This is a difficult factor to assess at this stage. Accordingly, it has a neutral impact on the analysis.

c) The terms and conditions of the Settlement Agreement

[15] Courts not only in Quebec but elsewhere which deal with class action litigation have generally become reticent to approve class action settlements involving vouchers, coupons and other non-cash forms of recovery.

[16] Without attempting to provide a complete explanation in this regard, there have been numerous examples where generous counsel fees have been envisaged while class members are to receive low-value vouchers to be used against expensive products or services, sometimes with very limited periods of time to use the vouchers, rapid expiry dates, non-transferability conditions and other such terms and conditions which combine to provide little or no value for the coupon recipient.

[17] In the present matter, the Court considers that even though the proposed vouchers are not the same as gift cards, since the class members will need to use their

own money to purchase additional bus tickets to benefit from the voucher, they nonetheless provide acceptable value to the class members.

[18] The parties have demonstrated that the value, equivalent to \$7CDN, represents slightly more than the average amount of \$6.50CDN paid by each class member in aggregate "service fees" during the relevant period. In other words, the amount has been selected to provide on average a 100% recovery of the service fee that is at the heart of the claim.

[19] In addition, the voucher is fully transferable and can be applied, over the course of 12 months, to any bus travel book through Busbud regardless of the bus transport company or the destination.

[20] Of course, cash settlements or their equivalent are favoured, but that does not exclude other recovery options. The reasonableness of such other options depends on the circumstances which exist in a given case.

[21] In the present matter, Busbud Inc., a company headquartered and domiciled in Quebec, and its related companies, require serious equity financing in order to continue operations. The CEO of Busbud testified before the Court in this regard.

[22] The present class action, due to its scope, has been described as a serious impediment to such financing. The Defendants have permitted class counsel to inspect, on a confidential basis, their financial records.

[23] As a result, the parties agree that prolonged litigation would likely lead to Defendants ceasing all operations, leaving class members with no recovery whatsoever. The ability of a Defendant to continue as a "viable concern" is a factor which is reasonable to consider.²

[24] Moreover, there has been certain behavioural modification resulting from the class action. On the Busbud website, Canadian users now see the estimated final purchase price from at the initial search result phase. Modifications are also to be made to the company's mobile application for Canadian users. The entire process is to be finalized within 90 days of the present judgment, as per the October 31, 2019 *Addendum* to the Settlement Agreement.

[25] In addition to the foregoing, the voucher amount will not be reduced in order to compensate class counsel, as a separate payment to them of \$150,000 is envisaged. This will be further addressed later in the present judgment.

² *Mortillaro v. Cash Money Cheque Cashing Inc.*, 2009 CanLII 35600 (ON SC).

[26] In the Court's view, the proposed settlement is in keeping with the objectives of class actions, being access to justice, judicial economy and behavioural modification.

d) Attorneys' recommendations and experience

[27] Class counsel fully support the Settlement Agreement given the foregoing and recommend its approval as being fair and equitable. They are experienced litigation counsel with class action experience.

e) Representative Plaintiff's approval

[28] Representative Plaintiff, who presently resides in New York, has submitted an Affidavit confirming her support for the Settlement Agreement.

f) The likely future expenses and probable length of litigation

[29] As mentioned above, the litigation will likely be lengthy and complex due to certain relatively novel legal issues which would be debated. Those issues could very well give rise to various levels of appeal proceedings. This speaks to higher future expenses and more prolonged litigation absent a settlement.

g) The number and nature of opt-outs and objections

[30] Due to the nature of the business, including the fact that all class members purchased bus tickets from Busbud through its website or mobile application, the Court authorized notices to worldwide class members to be given electronically at their IP addresses used at the time of purchase.

[31] The CEO of Busbud testified that the bounce-back rate, being the rate of delivery refused by the class members' mail servers, for all 1,036,925 electronic notices sent by Busbud was only 2.59%. Accordingly, the Court is of the view that the vast majority of class members were duly notified of the settlement approval hearing and of their right to either opt-out of the class action or object to the proposed settlement.

[32] The Court has been provided with the Affidavit of attorney Simon Lin, one of the class counsel, regarding both opt-outs and objections.

[33] According to his affidavit, only four (4) opt-outs have been received, being:

- Marius van der Sluijs;
- Ulrich Gerber;
- MP.L;
- Peter Vieting.

[34] The Court recognizes these four (4) opt-outs from the class action.

[35] As regards objections to the settlement, two (2) have been identified. One relates to a complaint about having been left "*stranded due to bus delay in the middle of the night in road*". That is completely unrelated to the service fee class action before the Court.

[36] The other is an objection based on a preference for a cash settlement given that the class member wants the right not to do future business with Busbud.

[37] One serious objection from over one million class members speaks loudly as to the perceived fairness and reasonability of the Settlement Agreement.

h) The good faith of the parties and the absence of collusion

[38] The Court is of the view that this factor is satisfied in the present matter.

3- CLASS COUNSEL FEES

[39] As mentioned, Defendants agreed to pay in all-inclusive amount of \$150,000 (plus taxes) for Class Counsels' extrajudicial fees, disbursements and honorarium.

[40] The factor to be considered are those set forth in Section 102 of the *Code of Professional Conduct of Lawyers*.³

[41] In the present matter, the lawyers have a contingency fee agreement for twenty-five percent (25%) of the recovery. But that is clearly not what they are seeking. The requested fee of \$150,000 is equivalent to only 2.1% of the recovery value and is less than what would result from using a 2.5 multiplier of a reasonable hourly rate.

[42] Moreover, Class Counsel have agreed to reimburse Plaintiff from their own fees an amount of \$343.53, which represents expenses related to her travel, ex New York, to and from Montreal, for an in-person meeting with Class Counsel. The Court considers that this payment would not contravene the prohibition against class counsel "sharing" their fees. The reimbursement of expenses reasonably incurred by the Representative, as opposed to a payment for time and effort, has been recognized as a justifiable payment even when made directly by a settling defendant. Accordingly, the proposed payment in reimbursement of expenses in the amount of \$343.53 is viewed favorably by the Court.

[43] As regards objections to Class Counsel fees, none were identified as having been received.

³ CQLR, c. B-1, r. 3.1.

[44] In view of the foregoing, the Court considers that, in the present matter, the applicable criteria justify the proposed payment to Class Counsel of an all-inclusive amount of \$150,000, plus taxes, for all fees, disbursements and honorarium, and accordingly authorizes same.

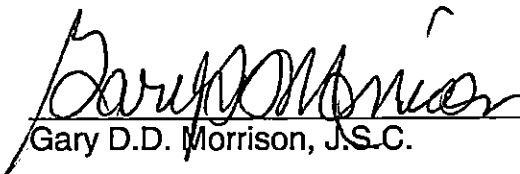
4- FONDS D'AIDE AUX ACTION COLLECTIVES

[45] By way of letter dated November 20, 2019, an attorney for the Fonds confirmed that no financial aid had been provided in relation to the present class action.

[46] The parties confirmed that they would provide the Fonds with a copy of their report on settlement.

PAR CES MOTIFS, LE TRIBUNAL :	FOR THESE REASONS, THE COURT :
[1] ACCUEILLE la demande de la Représentante en approbation de l'Entente de Règlement intervenu entre les parties;	[1] GRANTS Representative Plaintiff's Application to Approve the Settlement Agreement with the Defendants;
[2] DÉCLARE que les définitions contenues dans l'Entente de Règlement s'appliquent et sont incorporées au présent jugement, et en conséquence en font partie intégrante, étant entendu que les définitions lient les parties à l'Entente de Règlement;	[2] DECLARES that the definitions set forth in the Settlement Agreement apply to and are incorporated into this judgment, and as a consequence shall form an integral part thereof, being understood that the definitions are binding on the parties to the Settlement Agreement;
[3] APPROUVE l'Entente de Règlement («Settlement Agreement») conformément à l'article 590 du Code de procédure civile du Québec, et ORDONNE aux parties de s'y conformer;	[3] APPROVES the Settlement Agreement as a transaction pursuant to article 590 of the Code of Civil Procedure, and ORDERS the parties to abide by it;
[4] DÉCLARE que l'Entente de Règlement (incluant son préambule et ses annexes) est juste, raisonnable et qu'elle est dans le meilleur intérêt des Membres du Groupe et qu'elle constitue une transaction en vertu de l'article 2631 du Code civil du Québec, qui lie toutes les parties et tous les Membres du Groupe tel	[4] DECLARES that the Settlement Agreement, (including its Preamble and its Schedules) is fair, reasonable and in the best interest of the Class Members and constitutes a transaction pursuant to article 2631 of the <i>Civil Code of Quebec</i> , which is binding upon all parties and all Class Members at set forth herein;

qu'énoncé aux présentes;	
[5] ORDONNE ET DÉCLARE que le présent jugement, incluant l'Entente de Règlement, lie chaque Membre du Groupe Visé par le Règlement, sauf en ce qui concerne les quatre (4) individus qui se sont exclus de l'action collective;	[5] ORDERS and DECLARES that this judgment, including the Settlement Agreement, shall be binding on every Class Member, save and except as regards the four (4) individuals who have opted-out of the class action;
[6] APPROUVE le paiement aux Avocats du Groupe de leurs honoraires extrajudiciaires et débours tel que prévu aux paragraphes 6.1-6.4 de l'Entente de Règlement modifiée;	[6] APPROVES the payment to Class Counsel of its extrajudicial fees and disbursements as provided for at clauses 6.1-6.4 of the Settlement Agreement;
[7] APPROUVE que les procureurs de la demanderesse lui remboursent ses débours au montant de 343,53\$;	[7] APPROVES Class Counsel to reimburse the Plaintiff's expenses totalling \$343.53;
[8] ORDONNE aux parties de faire rapport à la Cour de l'exécution du jugement à l'expiration du délai prévu au paragraphe 1.1.12 de l'Entente de Règlement modifiée;	[8] ORDERS the Parties, upon the expiry of the time specified at paragraph 1.1.12 of the Settlement Agreement, to render account to the Court of the execution of the judgment;
[9] LE TOUT , sans frais de justice.	[9] THE WHOLE , without legal costs.


 Gary D.D. Morrison, J.S.C.

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Date of Hearing : November 22, 2019