



ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

D [REDACTED] H [REDACTED]

Plaintiff

and

**AEROPLAN INC.
THE TORONTO-DOMINION BANK
CANADIAN IMPERIAL BANK OF COMMERCE**

Defendants

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, C. 6

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: November 13, 2024

Issued by

Local registrar

Address of Court office: Ontario Superior Court of Justice
161 Elgin St., 2nd Floor
Ottawa, ON K2P 2K1

TO: **AEROPLAN INC.**
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CANADIAN IMPERIAL BANK OF COMMERCE
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A. OVERVIEW

1. The present class action concerns the Defendants Aeroplan Inc. (“Aeroplan”), The Toronto-Dominion Bank (“TD”), and Canadian Imperial Bank of Commerce (“CIBC”) engaging in conduct amounting to fraudulent or negligent misrepresentation, negligence, predominant purpose conspiracy, civil fraud, unjust enrichment and violations of the *Competition Act*, R.S.C., 1985, c-36, the *Consumer Protection Act, 2002*, S.O. 2002, and Other Consumer Protection Legislation in intentionally operating a profit-generating scheme involving the signing up of Plaintiff and Class Members to Aeroplan credit cards and subsequently rescinding / clawing back Welcome Bonus Points on the asserted basis that Plaintiff and Class Members were never eligible to receive them. In addition, the Plaintiff and Class Members specifically pleading the defense of promissory estoppel and estoppel by representation, as against the Defendants.

2. The Aeroplan program is a loyalty rewards and recognition program operated by Aeroplan that allows members to accumulate Aeroplan points through the purchase of products and services from participating retailers and suppliers. The points can be redeemed for various travel, gift card, merchandise and other rewards provided directly by said retailers and suppliers or via Aeroplan’s intermediary suppliers. Aeroplan has partnered with TD and CIBC to offer Aeroplan credit cards and entice individuals to become cardholders by offering them points upon signing up (known as Welcome Bonus Points) and by enabling them to accumulate Aeroplan points for subsequent purchases using their Aeroplan credit cards. Individuals can sign up for more than one Aeroplan credit card (e.g., a TD Aeroplan credit card and a CIBC Aeroplan card).¹

¹ Aeroplan has also partnered with American Express for American Express Aeroplan credit cards in Canada and JPMorgan Chase & Co. for Chase Aeroplan credit cards in the U.S., but Welcome Bonus Points do not appear to have been clawed back from their cardholders.

3. In October 2024, Aeroplan notified Plaintiff and an estimated 17,000 other Class Members that Welcome Bonus Points given to them upon signing up for a second Aeroplan credit card with TD or CIBC were being rescinded or clawed back. In the Plaintiff's case, the Welcome Bonus Points were clawed back on October 28, 2024, after almost one and a half years after having signed up for a CIBC Aeroplan Visa Infinite credit card (May 4, 2023) and approximately one year after having signed up for a TD Aeroplan Visa Infinite credit card (October 10, 2023).

4. However, Defendants TD and CIBC signed up Plaintiff and Class Members to Aeroplan credit cards without ever notifying them that they may not be eligible for Welcome Bonus Points despite collecting their Aeroplan account numbers as part of the application process. In collecting Aeroplan account numbers from Plaintiff and Class Members, TD and CIBC could have – but apparently did not – verify whether Plaintiff and Class Members already held Aeroplan credit cards, disentitling them from receiving additional Welcome Bonus Points. Plaintiff and Class Members therefore signed up for new Aeroplan credit cards with TD or CIBC on the assumption that they were entitled to Welcome Bonus Points advertised to entice them to acquire said cards. TD and CIBC collected merchant interchange fees, annual fees, interest, and other fees due to Plaintiff and Class Members having signed up for Aeroplan credit cards. Aeroplan collected some of those fees from TD and CIBC. Had Plaintiff and Class Members been told by Aeroplan, TD or CIBC that they were not eligible for Welcome Bonus Points upon applying for a second Aeroplan credit card, they would not have signed up for said credit cards and the Defendants would not have made significant revenue from merchant interchange fees, annual fees, interest, and other fees.

5. As well, as TD and CIBC collected Aeroplan account numbers from prospective cardholders in the application forms and used them to link the new credit card with applicants' other Aeroplan credit cards, Aeroplan knew or ought to have known from the date of sign up (or

as reasonably close as possible thereto) whether a new cardholder was or was not eligible for Welcome Bonus Points. Aeroplan did not, however, take any steps to notify or otherwise inform TD or CIBC or new cardholders that they were not eligible for Welcome Bonus Points at the time of application. In the Plaintiff's case, Aeroplan knew from the date of his signing up for a second Aeroplan credit card that he was ineligible for Welcome Bonus Points, but waited before notifying him that he was ineligible and clawing back the Points he had been given. This is after the Plaintiff had already paid annual fees and made purchases on his second Aeroplan credit card and the Defendants profited from in some measure.

6. As a result of TD, CIBC, and Aeroplan's scheme, Plaintiff and Class Members signed up for credit cards, incurred expenditures, and paid annual fees they would not have if they had been made aware that they were not eligible for Welcome Bonus Points on their second Aeroplan credit cards. Plaintiff and Class Members incurred monetary loss in the amount of annual credit card fees charged by TD and CIBC in relation to their second Aeroplan Visa credit card, as well as 10,000 or more Aeroplan points – which is equal to the Welcome Bonus Points clawed back – and which has an estimated monetary value ranging between \$100-\$150.

7. The motive underlying the Defendants' conduct is to entice individuals to sign up for their Aeroplan credit cards, to encourage them to make purchases on said credit cards to meet spending milestones entitling them to additional Bonus Points, to earn merchant interchange fees, and to extract annual fees, interest and other fees, thereby maximizing their corporate profits.

8. The Defendants were either actually aware or should reasonably be aware from day one whether or not the Plaintiff and Class Members were eligible for incentive or bonus Aeroplan points (including Welcome Bonus Points) – this is especially true as the bank application forms ask for a prospective client's existing Aeroplan number. Had the Defendants informed the Plaintiff

and Class Members that they would be accepted for a new Aeroplan credit card, but that they were ineligible to receive incentive or bonus Aeroplan points (including Welcome Bonus Points), prospective client's would have refused the offer; it is not coincidental that the Defendants' "negligence" (if it was indeed negligence and not purposeful or willful blindness) earned them a significant amount of money through collecting merchant interchange fees, annual fees, interest, and other fees from the purchases and other uses of the Aeroplan credit cards.

9. On information and belief, the current form of Section 10 of the Aeroplan program general terms and conditions was amended on October 22, 2022 and further modified on November 29, 2023. It is based on this provision that the Defendants justify their actions of clawing back the Plaintiff and Class Members' Welcome Bonus Points. However, there is no reason why this clause was not acted upon for the last two years; no new information was learned by the Defendants that they did not know on day one. when prospective clients applied for their Aeroplan credit cards. There is no explanation as to why the Plaintiff and Class Members were awarded Welcome Bonus Points and then after a period of time of up to two years later, saw those same Aeroplan plan points clawed back. The Defendants must be estopped from doing something that is unfair to the Plaintiff and Class Members upon application of the doctrines of promissory estoppel and estoppel by representation, in addition to the duty of honest contractual performance.

10. The Defendants also cannot selectively apply Section 10 of the Aeroplan program general terms and conditions; nor can they apply it in an unreasonable or arbitrary way, lest they fail in their obligations of acting in good faith, by:

- a) choosing to apply it whenever they want, up to two years after the relevant time period (i.e. before a prospective client accepts the Aeroplan credit card);

- b) choosing to apply it only to Welcome Bonus Points, but not to any other incentive or bonus Aeroplan points (such as Additional Bonus Points and Anniversary Bonus Points);
- c) choosing to apply it to TD and CIBC Aeroplan credit cards, but not to American Express or Chase Aeroplan credit cards.

11. The Defendants' conduct earned themselves significant sums of money and, at the same time, caused direct, proximate, and significant legally-cognizable compensable injuries incurred by the Plaintiff and Class Members, for which remedies are being sought in the present class proceeding.

12. The remedies sought are not limited to the payment of money in the form of compensatory and punitive damages, restitution, or disgorgement of profits, but extend to injunctive relief enjoining Aeroplan to restore to the Plaintiff and Class Members the rescinded Welcome Bonus Points, to implement measures to instantly become apprised of any new application for Aeroplan credit cards via TD and CIBC, and for TD and CIBC to verify and inform prospective Aeroplan credit card applicants whether they are eligible for Welcome Bonus Points at the application stage.

B. DEFINED TERMS

13. In this Statement of Claim, the following terms have the following meanings:
- a. “**Class**” and “**Class Members**” means all persons resident in Canada who are holders of a CIBC or TD Aeroplan credit card and who had Welcome Bonus Points clawed back based on having been issued a second Aeroplan credit card;

- b. “**Class Period**” means the period beginning two years prior to the date the present statement of claim is filed and ending on the day notice is given or six months after the date of certification of the present proposed class action, whichever comes first;²
- c. “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, S.O. 2002, c. 30;³
- d. “**Other Consumer Protection Legislation**” means *The Consumer Protection Act*, CCSM c. 200; the *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10 (British Columbia); the *Consumer Protection Act*, RSA 2000, c C-26.3, as amended, including ss. 5-9 & 13 (Alberta); *The Consumer Protection and Business Practices Act*, SS 2013, c. C-30.2, as amended, including ss. 5-9, 16, 18-23, 26, & 36 (Saskatchewan); *The Business Practices Act*, CCSM, c B120, as amended, including ss. 2-9 & 23 (Manitoba); the *Consumer Protection Act*, CQLR c P-40.1 at ss. 41, 215, 216, 218, 219, 220(a), 221(c), (d), & (g), 228, 239 (a), 253, 270 & 272 (Quebec); the *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, including ss. 7-10, and the *Trade Practices Act*, RSNL 1990, c T-7, as amended, including ss. 5-7 & 14 (Newfoundland); the *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1 at ss. 4, 13, 15, & 23 (New Brunswick); the *Consumer Protection Act*, RSNS 1989, c 92, including ss. 26-29 (Nova Scotia); the *Business Practices Act*, RSPEI 1988, c B-7, as amended, including ss. 2-4 (Prince Edward Island); the *Consumers Protection Act*, RSY 2002, c 40, as amended, including ss. 58 & 86 (Yukon); the *Consumer Protection Act*, RSNWT 1988, c C-17, as amended, including ss. 70 & 71 (Northwest Territories); and the *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, as amended, including ss. 70 & 71 (Nunavut).

² See e.g., *Bozsik v. Livingston International Inc.*, [2017 ONSC 1409](#), at paras. 4-6.

³ Note that the *Consumer Protection Act, 2002* is scheduled to be “repealed on a day to be named by proclamation of the Lieutenant Governor” and replaced by the *Consumer Protection Act, 2023*, S.O. 2023, which “comes in to force on a day to be named by proclamation of the Lieutenant Governor.” It is expected that both proclamations will be made on the same day, or that a single proclamation will effect the simultaneous repeal and replacement of the *Consumer Protection Act, 2002*. In the event that the proclamation is made on a day falling between the day this statement of claim is filed and the day any settlement is achieved in the present proposed class action, the Plaintiff relies on the *Consumer Protection Act, 2002* in relation to any conduct occurring before the date of its repeal, and the *Consumer Protection Act, 2023* in respect of conduct occurring as of the date of said proclamation.

C. RELIEF SOUGHT

14. The Plaintiff claims against the Defendants on his own behalf and on behalf of the Class, of which he is a member:

- a. an Order certifying this action as a class proceeding and appointing the Plaintiff as the Representative Plaintiff of the Class;
- b. a Declaration that Defendants TD and CIBC fraudulently or negligently misrepresented Plaintiff and Class Members' entitlement to Welcome Bonus Points by omitting or otherwise failing to disclose that Aeroplan credit card applicants who already hold a TD or CIBC Aeroplan credit card may be ineligible to receive Welcome Bonus Points upon signing up for a second Aeroplan credit card;
- c. a Declaration that Defendants TD and CIBC violated the *Consumer Protection Act* and Other Consumer Protection Legislation by omitting or otherwise failing to disclose to Plaintiff and Class Members that Aeroplan credit card applicants who already hold a TD or CIBC Aeroplan credit card may be ineligible to receive Welcome Bonus Points upon signing up for a second Aeroplan credit card;
- d. a Declaration that the Defendants TD, CIBC, and Aeroplan unjustly enriched themselves at Plaintiff and Class Members' expense by enticing them to sign up for Aeroplan credit cards on the basis of Welcome Bonus Points and collecting merchant interchange fees, annual fees, interest, and other fees as a result;
- e. a Declaration that Defendants TD and CIBC were negligent in failing to have a system or other mechanism in place to instantly verify whether Plaintiff and Class Members were eligible for Welcome Bonus Points upon collecting Plaintiff and Class Members' Aeroplan account numbers at the time they applied for their second Aeroplan credit cards;
- f. a Declaration that Defendant Aeroplan was negligent in failing to verify whether Aeroplan account holders who applied for a second Aeroplan credit card with TD or CIBC were eligible for Welcome Bonus Points and/or in failing to have a system or

mechanism in place to ensure that TD and CIBC are apprised that applicants for a second Aeroplan credit card are ineligible for Welcome Bonus Points from the moment they collect applicants' Aeroplan account numbers;

- g. a Declaration that Defendants TD and Aeroplan, and Defendants CIBC and Aeroplan, committed the tort of predominant purpose conspiracy or unlawful purpose conspiracy by enticing the Plaintiff and Class Members to sign up for a second Aeroplan credit card; neglecting to verify whether Plaintiff and Class Members were eligible for Welcome Bonus Points; failing to disclose that Plaintiff and Class Members were not eligible; collecting merchant interchange fees, annual fees, interest, and other fees; and clawing back the Welcome Bonus Points given to Plaintiff and Class Members after being approved for their second Aeroplan credit card;
- h. a Declaration that Aeroplan Inc. is estopped from relying on Section 10 of the Aeroplan general Terms and Conditions to justify the retroactive clawing back of Welcome Bonus Points, by virtue of the doctrine of promissory estoppel or representation by estoppel and/or the duty of honest contractual performance;
- i. Injunctive relief enjoining the Defendant Aeroplan to restore to the Plaintiff and Class Members the Welcome Bonus Points that were clawed back from them on the asserted rationale that Plaintiff and Class Members were ineligible to receive them;
- j. Injunctive relief enjoining the Defendant Aeroplan to implement measures to instantly become apprised of any new application for Aeroplan credit cards via TD and CIBC and to instantly notify TD and CIBC whether an applicant for a second Aeroplan credit card is ineligible for Welcome Bonus Points;
- k. Injunctive relief enjoining the Defendants TD and CIBC to verify and inform prospective Aeroplan credit card applicants at the application stage whether they are eligible for Welcome Bonus Points;
- l. special damages for annual credit card fees and the value of Welcome Bonus Aeroplan points, which are valued at approximately \$100-\$150 for 10,000 points;

- m. punitive and exemplary damages;
- n. disgorgement of any and all profits obtained by the Defendants as a result of their conduct;
- o. a reference to decide any issues not decided at the trial of the common issues;
- p. costs of this action on a substantial indemnity basis or in an amount that provides full indemnity plus the costs of distribution of an award under ss. 24 or 25 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”);
- q. costs of administration and notice, plus taxes, associated with the distribution and the fees payable to a person administering the distribution pursuant to s. 26(9) of the CPA;
- r. pre-judgment compounded and post-judgment interest pursuant to ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. 43; and
- s. Such further and other relief as this Honourable Court deems just.

D. THE PARTIES

The Plaintiff and Class

15. The Plaintiff is an individual who resides in London, Ontario and is the holder of both a CIBC Aeroplan Visa Infinite credit card and a TD Aeroplan Visa Infinite credit card.

16. On May 4, 2023, the Plaintiff became a customer of a CIBC Aeroplan Visa Infinite credit card and was awarded 10,000 Welcome Bonus Aeroplan points. On September 1, 2023, the Plaintiff was awarded 35,000 Goodwill Aeroplan points. On September 4, 2024, the Plaintiff was awarded 10,000 Sign Up Bonus Aeroplan points.

17. On October 10, 2023, the Plaintiff became a customer of a TD Aeroplan Visa Infinite credit card and was awarded 10,000 Welcome Bonus Aeroplan points. On January 8, 2024, the Plaintiff was awarded 25,000 New Card Spend Bonus Aeroplan points.

18. On October 28, 2024, the Plaintiff saw his 10,000 Aeroplan points clawed back from his account in relation to his CIBC Aeroplan Visa Infinite credit card and 10,000 Aeroplan points clawed back from his account in relation to his TD Aeroplan Visa Infinite credit card. The notation on his Aeroplan account read as “Aeroplan Welcome Bonus Adjustments”.

19. On November 1, 2024, the Plaintiff communicated with TD’s customer service to obtain details. In response, the Plaintiff received an email whose relevant parts read as follows:

I can confirm if you are seeing a debit with a description of “Aeroplan Welcome Bonus Adjustments,” this is due to customers identified by Aeroplan as having received additional Aeroplan Welcome Bonuses for which they did not qualify in accordance with the Terms and Conditions of the Aeroplan program. Impacted customers will receive an email from Aeroplan informing them of the update.

As this is from Aeroplan directly, we do ask that you reach out to Aeroplan for more information. Contact information for Aeroplan can be found on their site here:

20. The Plaintiff received the following email from Aeroplan:

Thank you for being an Aeroplan Credit Cardholder. As you know, Section 10 of the [Aeroplan Terms and Conditions](#) states that Welcome Bonuses along with other bonuses, incentives and accelerators may be offered by Aeroplan and its financial institution partners as an incentive for a Member to become a holder of an Aeroplan Credit Card where that Member is neither currently, nor was previously, a holder of that type of Aeroplan Credit Card, regardless of issuing bank. In addition, the provisions provide that Aeroplan may, in its sole discretion, choose to limit the number of New Card Bonuses (including Welcome Bonuses) that a Member may receive in any period, and describes the remedies available to Aeroplan if a Member violates these terms.

As you have received more than the permitted number of New Card Bonuses for the same type of Aeroplan Credit Card, you are in violation of these provisions. As a gesture of goodwill, we will permit you to retain the additional bonus points earned as a result of the use of your Aeroplan Credit Card but will not permit you to retain the Welcome Bonus of the Aeroplan Credit Card. Accordingly, we have, pursuant to the [Aeroplan Terms and Conditions](#), revoked the Aeroplan Points received by you in your Account from the excess Welcome Bonuses.

We remind you that as a member of the Aeroplan Program, you are obliged to comply with the [Aeroplan Program Terms and Conditions](#) and to maintain your account in

good standing. Please review these carefully and ensure that you comply with these Terms and Conditions at all times.

21. The Plaintiff provided his Aeroplan account number at the time he applied for both the CIBC and TD Aeroplan Visa credit card. However, neither CIBC nor TD ever notified the Plaintiff that he was or may be ineligible for Welcome Bonus Points upon qualifying for the Aeroplan Visa credit cards due to his having been given Welcome Bonus Points after previously applying and qualifying for an Aeroplan credit card.

22. Had the Plaintiff been made aware that he was not eligible for Welcome Bonus Points, he would not have applied for the CIBC or TD Aeroplan Visa credit cards, nor accepted them, let alone made successive purchases or paid the annual credit card fees.

23. After having had the Welcome Bonus Points associated with his CIBC and TD Aeroplan Visa credit cards clawed back, the Plaintiff conducted research on this issue and discovered that upwards of 17,000 other Aeroplan credit cardholders are likely to have been similarly impacted and had Welcome Bonus Points clawed back from their Aeroplan account.

24. The Plaintiff is seeking certification of the following class (collectively referred to as the “Class” or “Class Members”):

All persons resident in Canada who are holders of a CIBC or TD Aeroplan credit card and who had Welcome Bonus Points clawed back based on having been issued a second Aeroplan credit card.

The Defendants

25. Defendants TD and CIBC are both federally incorporated banks with their headquarters and principal place of business situated in Toronto, Ontario. They both offer a variety of financial and credit services, including retail banking and consumer credit cards such as TD Aeroplan Visa credit cards.

26. Defendant Aeroplan is a federally incorporated company with a head office located in Montreal, Quebec. At all relevant times, Aeroplan carried on business in Ontario and across Canada as a provider of the Aeroplan program having entered into partnerships with Defendants TD and CIBC for Aeroplan credit card services, as well as non-Defendant American Express.

CAUSES OF ACTION

Fraudulent or Negligent Misrepresentation

27. The Plaintiff asserts that the Defendants TD and CIBC committed the tort of fraudulent misrepresentation and, alternatively, that the Defendants instead committed the tort of negligent misrepresentation.

28. The Defendants TD and CIBC made misrepresentations by omitting or otherwise failing to disclose to Plaintiff and Class Members that holders of existing Aeroplan accounts may not be eligible for Welcome Bonus Points for signing up and qualifying for a second TD or CIBC Aeroplan Visa credit card.

(a) Fraudulent Misrepresentation

29. The elements of the tort of fraudulent misrepresentation are established as:

- i. TD and CIBC made representations that were untrue, inaccurate and/or misleading by representing to Plaintiff and Class Members that they were eligible for Welcome Bonus Points and omitting or otherwise failing to disclose to Plaintiff and Class Members that holders of existing Aeroplan accounts may not be eligible for Welcome Bonus Points for signing up and qualifying for a second TD or CIBC Aeroplan Visa credit card;
- ii. TD and CIBC knew that their representations as to Plaintiff and Class Members being eligible for Welcome Bonus Points were untrue or were reckless as to their truthfulness;

- iii. TD and CIBC intended for their representations to deceive Plaintiff and Class Members or acted with reckless disregard for the truth knowing that the Plaintiff and Class Members would rely on TD and CIBC's representations in entering into TD or CIBC Aeroplan Visa credit cards;
- iv. The Plaintiff and Class Members actually did rely on TD and CIBC's representations concerning their eligibility for Welcome Bonus Points upon being approved for a second Aeroplan Visa credit card, leading them to enter into a credit agreement for a TD or CIBC Aeroplan Visa credit card; and
- v. The Plaintiff and Class Members sustained pure economic loss as a result of their reliance on TD and CIBC's representations, in the form of annual fees, interests, and other fees and amounts respectively charged by TD and CIBC for the second Aeroplan Visa credit cards issued to the Plaintiff and Class Members.

(b) Negligent Misrepresentation

30. Alternatively, the elements of the tort of negligent misrepresentation are established as:

- i. TD and CIBC owed a duty of care to the Plaintiff and Class Members based on the special relationship between TD and CIBC as representor inviting the representees Plaintiff and Class Members to enter into credit agreements for TD or CIBC Aeroplan Visa credit cards;
- ii. TD and CIBC's representations concerning the eligibility of Plaintiff and Class Members for Welcome Bonus Points were untrue, inaccurate and/or misleading, including in omitting or otherwise failing to disclose that holders of existing Aeroplan accounts may not be eligible for Welcome Bonus Points for signing up and qualifying for a second TD or CIBC Aeroplan Visa credit card;
- iii. TD and CIBC acted negligently in making said representations. A reasonable issuer of credit cards featuring a rewards points program would have satisfied their duty to exercise such reasonable care to ensure that the representations made to consumers are

accurate and not misleading, including by expressly identifying eligibility requirements in advertising, marketing, instructional, and other materials disseminated to the public;

- iv. As representees, Plaintiff and Class Members reasonably relied on TD and CIBC's negligent misrepresentations, especially as, but not exclusively based on the fact that, TD and CIBC are the issuers of TD and CIBC Aeroplan Visa credit cards, respectively, and are therefore in the best position and expected to provide the most accurate description and representation of their Aeroplan Visa credit cards' eligibility requirements;
- v. Plaintiff and Class Members' reasonable reliance on TD and CIBC's representations were detrimental in leading them to incur economic loss in the form of the amounts paid for annual fees, interest, and other fees they would not have incurred but for having acquired second TD or CIBC Aeroplan Visa credit cards due to TD and CIBC's misrepresentations.

31. Plaintiff and Class Members suffered significant legally-cognizable and compensable injuries as the direct and proximate result of TD and CIBC's fraudulent or negligent misrepresentations.

32. TD and CIBC are therefore liable to compensate Plaintiff and Class Members.

Civil Fraud

33. TD and CIBC committed civil fraud by omitting or otherwise failing to disclose the eligibility requirements for Welcome Bonus Points to Plaintiff and Class Members and by failing to disclose in their advertising, marketing, packaging, instructional and other materials that holders of existing Aeroplan Visa credit cards may not be eligible for Welcome Bonus Points for signing up and qualifying for a second TD or CIBC Aeroplan Visa credit card.

34. The elements of the tort of civil fraud are satisfied:

- i. TD and CIBC failed to disclose to Plaintiff and Class Members that they were not eligible for Welcome Bonus Points upon signing up for a second TD or CIBC Aeroplan Visa credit card;
- ii. TD and CIBC knew or was otherwise reckless or wilfully blind as to the misleading and/or deceptive nature of their representations by omission or failures to disclose;
- iii. TD and CIBC's false representations caused the Plaintiff and Class Members to act by entering into credit card agreements for Aeroplan Visa credit cards they would not have entered into but for TD and CIBC's misrepresentations;
- iv. The Plaintiff and Class Members suffered economic loss and injury by incurring annual fees, interest, and other fees they would not have incurred but for TD and CIBC's misrepresentations;

35. Although TD and CIBC's were clearly motivated by profit, TD and CIBC's motive is immaterial in concluding that they respectively committed civil fraud. Also irrelevant is any contention that TD and CIBC did not intend to injure the Plaintiff and Class Members.

36. The Plaintiff and Class Members suffered significant legally-cognizable and compensable injuries as the direct and proximate result of TD and CIBC's civil fraud.

37. TD and CIBC are therefore legally liable to compensate Plaintiff and Class Members.

Negligence

38. TD, CIBC, and Aeroplan respectively committed the tort of negligence.

39. TD and CIBC respectively committed the tort of negligence in failing to have a system or other mechanism in place to instantly verify whether the Plaintiff and Class Members were eligible for Welcome Bonus Points upon collecting Plaintiff and Class Members' Aeroplan account numbers at the time they applied for their second Aeroplan credit cards.

40. Aeroplan committed the tort of negligence in failing to verify whether Aeroplan account holders who applied for a second Aeroplan credit card with TD or CIBC were eligible for Welcome Bonus Points and/or in failing to have a system or mechanism in place to ensure that TD and CIBC are apprised that applicants for a second Aeroplan credit card are ineligible for Welcome Bonus Points from the moment they collect applicants' Aeroplan account numbers.

41. TD, CIBC, and Aeroplan respectively owed a duty of care to Plaintiff and Class Members.

42. TD, CIBC, and Aeroplan's conduct breached the standard of care they were bound to respect in their dealings with Plaintiff and Class Members.

43. The Plaintiff and Class Members sustained legally cognizable compensable injury in the form of pure economic loss which is the direct and proximate result of Defendants TD, CIBC, and Aeroplan's conduct.

44. The economic loss corresponds to the amount of annual credit card fees charged to Plaintiff and Class Members by TD and CIBC in relation to their second Aeroplan Visa credit card, as well as 10,000 or more Aeroplan points, which has an estimated monetary value ranging between \$100-\$150, that Aeroplan clawed back.

45. These are economic injuries that the Plaintiffs and Class Members would not have incurred if they had been informed that they were not eligible for Welcome Bonus Points, as they would not have signed up for their second TD or CIBC Aeroplan Visa credit card.

46. TD, CIBC, and Aeroplan are therefore legally required to compensate the Plaintiff and Class Members.

Predominant Purpose Conspiracy

47. TD and Aeroplan, and CIBC and Aeroplan are respectively guilty of distinct but interlinked forms of conduct crystallizing the tort of predominant purpose conspiracy or unlawful means conspiracy:

- Defendants TD and Aeroplan, and Defendants CIBC and Aeroplan, enticed the Plaintiff and Class Members to sign up for a Aeroplan credit card by offering Welcome Bonus Points upon qualifying;
- Aeroplan did not have a system or mechanism in place to ensure that TD and CIBC are apprised that applicants for a second Aeroplan credit card are ineligible for Welcome Bonus Points from the moment they collect applicants' Aeroplan account numbers;
- TD and CIBC did not have a system or other mechanism in place to verify whether Plaintiff and Class Members were eligible for Welcome Bonus Points upon collecting Plaintiff and Class Members' Aeroplan account numbers at the time they applied for their second Aeroplan credit cards;
- TD and CIBC did not inform Plaintiff and Class Members that they were ineligible for Welcome Bonus Points upon signing up for a second TD or CIBC Aeroplan Visa credit card;
- Aeroplan did not verify whether Aeroplan account holders who applied for a second Aeroplan credit card with TD or CIBC were eligible for Welcome Bonus Points;
- TD and CIBC collected annual fees, interest, and other fees from Plaintiff and Class Members related to their second Aeroplan Visa credit card, as well as merchant interchange fees from their purchases;
- Aeroplan derived profits from percentages of annual fees, interest, and other amounts charged to Plaintiff and Class Members by TD and CIBC in relation to their second Aeroplan Visa credit card, as well as merchant interchange fees from their purchases;

- Without warning, and under its sole and unfettered discretion, Aeroplan clawed back the Welcome Bonus Points given to Plaintiff and Class Members up to two years after being approved for their second Aeroplan credit card.

48. First, TD and Aeroplan's – and CIBC and Aeroplan's – predominant purpose in engaging in the above conduct was to increase their profits and cause injury to Plaintiff and Class Members. The Plaintiff and Class Members were injured as a result of the Defendants' conduct.

49. Second, the Defendants used unlawful means to operationalize its predominant purpose of increase their profits and causing injury to the Plaintiff and Class Members, namely, violating the *Consumer Protection Act* and Other Consumer Protection Legislation and the federal *Competition Act*.

50. Alternatively, if the means used by the Defendants were lawful, their predominant purpose and intention of increase their profits and causing injury to the Plaintiff and Class Members renders the lawful conduct unlawful so as to crystallize the second element of the tort of predominant purpose conspiracy.

51. Finally, the Plaintiff and Class Members suffered pure economic loss as a result of the Defendants' intentionally injurious unlawful conduct.

52. The economic loss corresponds to the amount of annual credit card fees charged to Plaintiff and Class Members by TD and CIBC in relation to their second Aeroplan Visa credit card, as well as 10,000 or more Aeroplan points, which has an estimated monetary value ranging between \$100-\$150, that Aeroplan clawed back.

53. These are economic injuries that the Plaintiffs and Class Members would not have incurred if they had been informed that they were not eligible for Welcome Bonus Points, as they would not have signed up for their second TD or CIBC Aeroplan Visa credit card.

Unlawful Means Conspiracy

54. Alternatively, the Defendants' abovementioned conduct crystallizes the tort of unlawful means conspiracy.

55. First, the Defendants' conduct was unlawful in violating the Competition Act, the Consumer Protection Act, 2002, and Other Consumer Protection Legislation.

56. Second, the Defendants' unlawful conduct was directed at Plaintiff and Class Members, who suffered pure economic loss in the form of annual credit card fees charged to Plaintiff and Class Members by TD and CIBC in relation to their second Aeroplan Visa credit card, as well as 10,000 or more Aeroplan points, which has an estimated monetary value ranging between \$100-\$150, that Aeroplan clawed back.

57. Third, the Defendants knew or ought to have known that injury to Plaintiff and Class Members was likely to result from their unlawful conduct.

58. In particular, the Defendants knew or ought to have known that enticing Plaintiff and Class Members to sign up for second Aeroplan Visa credit cards without any mechanisms for determining whether they were actually eligible for Welcome Bonus Points and failing to disclose to Plaintiff and Class Members that they were not so eligible would lead them to sign up for second Aeroplan Visa credit cards and suffering economic injury.

Unjust Enrichment

59. In essence, TD and CIBC enriched themselves by enticing Plaintiff and Class Members to sign up for second Aeroplan Visa credit cards, and by collecting merchant interchange fees, annual fees, interest, and other fees associated with the use of said credit cards. Aeroplan enriched itself by collecting from TD and CIBC certain percentages of merchant interchange fees, annual fees,

and other amounts of monies generated by Plaintiff and Class Members using their second Aeroplan Visa credit cards to make purchases and other transactions.

60. The Plaintiff and Class Members were correlatively deprived and impoverished in amounts corresponding to the annual credit card fees charged to Plaintiff and Class Members by TD and CIBC in relation to their second Aeroplan Visa credit card, as well as 10,000 or more Aeroplan points, which has an estimated monetary value ranging between \$100-\$150, that Aeroplan clawed back.

61. As the enrichment violated the *Consumer Protection Act*, Other Consumer Protection Legislation, and the *Competition Act*, and instantiated the torts of negligent or fraudulent misrepresentation and/or unlawful or predominant purpose conspiracy, and in the absence of any legal justification or authority for the enrichment, there was no juristic reason for the Defendants enriching themselves at Class Members' expense.

Breach of Implied Covenant of Good Faith and Honest Contractual Performance

62. It is a well-established tenet of contract law that there is an implied covenant of good faith, fair dealing, and a duty of honest performance in every contract.

63. As alleged herein, the Defendants cannot selectively apply Section 10 of the Aeroplan program general terms and conditions; nor can they apply it in an unreasonable or arbitrary way by:

- a) choosing to apply it whenever they want, up to two years after the relevant time period (i.e.. before a prospective client accepts the Aeroplan credit card);

- b) choosing to apply it only to Welcome Bonus Points, but not to any other incentive or bonus Aeroplan points (such as Additional Bonus Points and Anniversary Bonus Points);
- c) choosing to apply it to TD and CIBC Aeroplan credit cards by not to Amex or Chase Aeroplan credit cards.

64. This runs contrary to the concepts of good faith and the duty of honest contractual performance flowing from it. The Defendants had a duty to take reasonable efforts to inform the Plaintiff and Class Members that they would be accepted for a new Aeroplan credit card, but that they were ineligible to receive incentive or bonus Aeroplan points (including Welcome Bonus Points).

65. In addition, Aeroplan breached the duty of contractual good faith by exercising its discretion in an arbitrary, and therefore unreasonable manner, by retroactively clawing back Welcome Bonus Points and only selectively doing so for TD and CIBC Aeroplan Visa credit card holders but not Amex Aeroplan Visa card holders.

66. The Defendants' conduct earned them a significant amount of money through collecting merchant interchange fees, annual fees, interest, and other fees from the purchases and other uses of the Aeroplan credit cards.

67. As a direct and proximate result of the Defendants' breach of its implied covenants, the Plaintiffs and the Class Members have been damaged in an amount to be determined at trial.

STATUTORY REMEDIES

Violations of the Competition Act

68. The Defendants TD and CIBC violated section 52(1) of the *Competition Act* by making false and/or misleading representations in the form of both positive representations and omissions.

69. Section 52(1) provides as follows:

False or misleading representations 52 (1) No person shall, 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, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.	Indications fausses ou trompeuses 52 (1) Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.
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70. Importantly, para. 52(1.1)(a) provides as follows:

Proof of certain matters not required (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that (a) any person was deceived or misled;	Preuve non nécessaire (1.1) Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction au paragraphe (1), de prouver : a) qu'une personne a été trompée ou induite en erreur;
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71. Representations are also defined under para. 52(2)(e) as including those “contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public...”

72. This provision applies to misrepresentations made by the Defendants and included on, *inter alia*, the various websites and webpages used by TD and CIBC to promote Aeroplan Visa credit cards and solicit and process applications, and any other document, video, or other media accessible on said websites, webpages, and applications and that pertain to the Aeroplan Visa credit cards at issue in the present proposed class action.

73. Paragraph 36(1)(a) of the *Competition Act* provides for the remedy of recovery of damages to “Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI...” Section 52 is a provision contained in Part VI.

74. Paragraph 36 identifies the damages that may be recovered by a person referred to in paragraph (a) as follows:

<p>Recovery of damages 36 (1) Any person who has suffered loss or damage as a result of</p> <p>(a) conduct that is contrary to any provision of Part VI, [...]</p> <p>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.</p>	<p>Recouvrement de dommages-intérêts 36 (1) Toute personne qui a subi une perte ou des dommages par suite :</p> <p>a) soit d’un comportement allant à l’encontre d’une disposition de la partie VI;</p> <p>peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n’a pas obtempéré à l’ordonnance une somme égale au montant de la perte ou des dommages qu’elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n’excède pas le coût total, pour elle, de toute enquête relativement à l’affaire et des procédures engagées en vertu du présent article.</p>
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75. In sum, the Plaintiff and Class Members are entitled to damages and the costs of investigation of their losses pursuant to s. 36(1) of the *Competition Act* for the Defendants’ violation of s. 52(1) thereof.

Violations of the Consumer Protection Act, 2002

76. The Defendants TD and CIBC violated the *Consumer Protection Act, 2002* and Other Consumer Protection Legislation and by making false and/or misleading representations in the form of both positive representations and omissions. TD and CIBC omitted or otherwise failed to disclose to Plaintiff and Class Members that Aeroplan credit card applicants who already hold a

TD or CIBC Aeroplan credit card may be ineligible to receive Welcome Bonus Points upon signing up for a second Aeroplan credit card.

77. At all times relevant to this action, the Plaintiff and Class Members were “consumers” within the meaning of that term as defined in s. 1 of the *Consumer Protection Act, 2002* and provisions of Other Consumer Protection Legislation.

78. At all times relevant to this action, the Defendants were “supplier[s]” as defined in s. 1 of the *Consumer Protection Act, 2002* and provisions of Other Consumer Protection Legislation.

79. The contractual agreements respectively entered into between the Plaintiff and Class Members and the Defendants and pursuant to which the Plaintiff and Class Members were issued a second Aeroplan Visa credit card and Welcome Bonus Points fall within the definition of “consumer agreement” and “credit agreement” in ss. 1 and 66 of the *Consumer Protection Act, 2002*, respectively, and provisions of Other Consumer Protection Legislation. For greater certainty, a “credit agreement” is defined in s. 66 as a type of “consumer agreement”. As well, Aeroplan points are a type of “rewards points” as defined in s. 1 of the *Consumer Protection Act, 2002*.

80. The representations made by and contained in advertising, marketing, and/or other materials prepared, authored, and made public by the Defendants fall within the definition of “representation” codified in the *Consumer Protection Act, 2002* and in provisions of Other Consumer Protection Legislation.

81. The definition of “representation” contained in s. 1 of the *Consumer Protection Act, 2002* is as follows:

“representation” means a representation, claim, statement, offer, request or proposal that is or purports to be

(a) made respecting or with a view to the supplying of goods or services to consumers,
or

(b) made for the purpose of receiving payment for goods or services supplied or
purporting to be supplied to consumers”

82. The “representations” encompassed within the *Consumer Protection Act, 2002* and Other Provincial Legislation are not limited to active statements but also extend to omissions and the failure to disclose information that a reasonable consumer would consider material.

83. As noted, the misrepresentations at issue in the present class action concern the Defendants’ repeated, deliberate, intentional, continuous, flagrant, ongoing omissions and failure to disclose that Aeroplan credit card applicants who already hold a TD or CIBC Aeroplan credit card may be ineligible to receive Welcome Bonus Points upon signing up for a second Aeroplan credit card.

84. The abovementioned active and passive misrepresentations by omission constitute “Unfair Practices” within the meaning of Part III of the *Consumer Protection Act, 2002* and analogous provisions of Other Consumer Protection Legislation.

85. Section 14(1) of the *Consumer Protection Act, 2002* provides that “It is an unfair practice for a person to make a false, misleading or deceptive representation,” which s. 14(2) in turn identifies as including, but not being limited to:

- “A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.” (1)
- “A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.” (8)
- “A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.” (13)

- “A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceive or tends to deceive.” (14)

86. As “[i]t is an unfair practice for a person to make a false, misleading or deceptive representation” and as “No person shall engage in an unfair practice” under ss. 14(1) and 17(1) of the *Consumer Protection Act, 2002*, the Plaintiff and Class Members located in Ontario at the time the consumer transactions were made are entitled to remedies under s. 18(1) and/or (2).

87. Class Members who were situated in provinces other than Ontario are also entitled to remedies equivalent or analogous to those contemplated under s. 18(1) and/or (2) pursuant to the Other Consumer Protection Legislation respectively applicable to them.

88. Consistent with s. 2(1) of the *Consumer Protection Act, 2002*, the Plaintiff and Class Members rely upon the said Act in respect of all transactions at issue in the present proposed class action in which the consumer was located in Ontario when the transaction took place, and on the Other Consumer Protection Legislation respectively applicable in each of the provinces and territories in which the non-Ontario Class Members were located at the time their respective transactions took place.

Affirmative Defence – Promissory Estoppel or Representation by Estoppel

89. Estoppel is an equitable doctrine that allows the court to prevent or “estop” a contracting party from relying on the terms of a contract where, by its words or conduct, it evidenced an intention not to rely on the strict terms of the contract and has led the counter-party to believe that certain provisions in the contract will not be relied on.

90. In the present case, Aeroplan Inc. is estopped from relying on Section 10 of the Aeroplan program general Terms and Conditions to justify the retroactive clawing back of Welcome Bonus Points, by virtue of the doctrine of promissory estoppel or representation by estoppel.

91. There was a manifest representation of a shared assumption arising from the Defendants silence for up to two years that Section 10 of the Aeroplan program general Terms and Conditions would not be relied upon.

92. The Plaintiff and Class Members conducted itself in reasonable reliance on that shared assumption, thereby resulting in a change of its legal position, by applying for and accepting a second Aeroplan credit card and using it to make purchases, as well as paying an annual fee when it became due.

93. The Plaintiff and Class Members will suffer a detriment if the strict terms of the Aeroplan program general Terms and Conditions are enforced. The economic loss corresponds to the amount of annual credit card fees charged to Plaintiff and Class Members by TD and CIBC in relation to their second Aeroplan Visa credit card, as well as 10,000 or more Aeroplan points, which has an estimated monetary value ranging between \$100-\$150, that Aeroplan clawed back.

94. These are economic injuries that the Plaintiffs and Class Members would not have incurred if they had been informed that they were not eligible for Welcome Bonus Points, as they would not have signed up for their second TD or CIBC Aeroplan Visa credit card.

Common Issues

95. The present proposed class action raises the following common issues:

- i. Did the Defendant Aeroplan claw back Welcome Bonus Points from Plaintiff and Class Members?
- ii. Did the Defendants Aeroplan, TD, and CIBC entice Plaintiff and Class Members to apply for Aeroplan credit cards under the promise of Welcome Bonus Points being given to them simply for signing up and being approved for the relevant card?

- iii. Did the Defendants TD and CIBC omit or otherwise fail to disclose to Plaintiff and Class Members that they may be ineligible for Welcome Bonus Points upon signing up for a second TD or CIBC Aeroplan credit card?
- iv. Is the fact that Aeroplan credit card holders may be ineligible for Welcome Bonus Points upon applying for a second TD or CIBC Aeroplan card material to reasonable consumers?
- v. Were the Defendants TD and CIBC's omissions to disclose to Plaintiff and Class Members that they may be ineligible for Welcome Bonus Points upon applying for a second TD or CIBC Aeroplan credit card deceptive to reasonable consumers?
- vi. Do the Defendants TD and CIBC's omissions or failure to disclose to Plaintiff and Class Members that they may be ineligible for Welcome Bonus Points upon applying for a second TD or CIBC Aeroplan credit card constitute negligent or fraudulent misrepresentation?
- vii. Did the Defendants TD and CIBC violate the *Consumer Protection Act* and Other Consumer Protection Legislation in omitting or failing to disclose to Plaintiff and Class Members that they may be ineligible for Welcome Bonus Points upon applying for a second TD or CIBC Aeroplan credit card?
- viii. Did the Defendants TD and CIBC violate the *Competition Act* and Other Consumer Protection Legislation in omitting or failing to disclose to Plaintiff and Class Members that they may be ineligible for Welcome Bonus Points upon applying for a second TD or CIBC Aeroplan credit card?
- ix. Were the Defendants TD and CIBC negligent in failing to have a system or other mechanism in place to instantly verify whether Plaintiff and Class Members were eligible for Welcome Bonus Points upon collecting Plaintiff and Class Members' Aeroplan account numbers at the time they applied for their second Aeroplan credit cards?

- x. Was the Defendant Aeroplan negligent in failing to verify whether Aeroplan account holders who applied for a second Aeroplan credit card with TD or CIBC were eligible for Welcome Bonus Points and/or in failing to have a system or mechanism in place to ensure that TD and CIBC are apprised that applicants for a second Aeroplan credit card are ineligible for Welcome Bonus Points from the moment they collect applicants' Aeroplan account numbers;
- xi. Is the Defendant Aeroplan estopped from relying on Article 10 of the Aeroplan program general Terms and Conditions in seeking to justify clawing back the Welcome Bonus Points from Plaintiff and Class Members?
- xii. Did Defendant Aeroplan breach the duty of honest contractual performance and/or exercise its contractual discretion unreasonably and in bad faith in invoking Article 10 to retroactively claw back the Welcome Bonus Points
- xiii. Did TD, CIBC, and Aeroplan's conduct crystallize in the tort of predominant purpose conspiracy?
- xiv. Did TD, CIBC, and Aeroplan's conduct crystallize in the tort of unlawful means conspiracy;
- xv. Did Plaintiff and Class Members incur economic loss?
- xvi. Did Defendants TD, CIBC, and Aeroplan become unjustly enriched at Plaintiff and Class Members' expense as a result of the above-listed conduct?
- xvii. What is the nature of the relief to which Plaintiff and Class Members are entitled?
- xviii. Should the Defendants be disgorged of their profits in favour of the Plaintiffs?
- xix. Should injunctive relief be issued against the Defendant Aeroplan enjoining it to restore to the Plaintiff and Class Members the Welcome Bonus Points that were clawed back from them on the asserted rationale that Plaintiff and Class Members were ineligible to receive them;

- xx. Should injunctive relief be issued against the Defendant Aeroplan enjoining it to implement measures to instantly become apprised of any new application for Aeroplan credit cards via TD and CIBC and to instantly notify TD and CIBC whether an applicant for a second Aeroplan credit card is ineligible for Welcome Bonus Points;
- xxi. Should injunctive relief be issued against the Defendant TD and CIBC enjoining them to verify and inform prospective Aeroplan credit card applicants at the application stage whether they are eligible for Welcome Bonus Points?
- xxii. Should the Defendants be condemned to pay punitive or exemplary damages?

G. REMEDIES

Compensatory Damages

96. The Plaintiff and each Class Member has suffered legally-cognizable and compensable injuries and loss as a direct and proximate result of TD, CIBC, and Aeroplan's unlawful, tortious, and inequitable conduct.

97. The fundamental purpose of the law of compensatory damages is that the Plaintiff is to be compensated to the extent of the harm or loss suffered as a result of the Defendant's conduct (*restitutio in integrum*).

98. The Plaintiff claims on his own behalf and of that of Class Members the recovery of the entirety of annual fees charged by TD and CIBC for the second Aeroplan Visa credit cards, as well as 10,000 or more Aeroplan points, which has an estimated monetary value ranging between \$100-\$150, that Aeroplan clawed back.

Punitive Damages

99. The Plaintiff seeks on his own behalf, and of that of Class Members, punitive or exemplary damages for the Defendants' conduct at issue in the present class action.

100. First, the Plaintiff seeks punitive or exemplary damages for Defendants' flagrant and undeniable violations of the prohibitions of false, misleading or deceptive representations under Part III of the *Consumer Protection Act, 2002* and equivalent prohibitions and provisions under Other Consumer Protection Legislation.

101. In particular, ss. 18(11) of the *Consumer Protection Act, 2002* expressly provides that "A court may award exemplary or punitive damages in addition to any other remedy in an action commenced" under the said *Act*. Equivalent or analogous provisions in Other Consumer Protection Legislation also provide for punitive or exemplary damages.

102. In addition, or alternatively, the Plaintiff also seeks punitive or exemplary damages on their own behalf and that of Class Members in respect of the Defendants' conduct falling beyond the scope of the *Consumer Protection Act, 2002* and Other Consumer Protection Legislation.

103. The said conduct displayed serious negligence, carelessness, and ignorance, and was oppressive, callous, high-handed, wilful, outrageous, deliberate, wanton, reckless, and in total disregard for the rights and interests of Plaintiff and Class Members.

104. The Plaintiff asserts that an award of punitive damages is required to denounce and condemn the Defendants' shocking and outrageous conduct and to deter further breaches by the Defendant and/or others.

Disgorgement

105. Alternatively, the Plaintiff seeks on his own behalf, and of that of Class Members, an order requiring the Defendants to disgorge all profits generated as a result of their breaches of the

Competition Act, the *Consumer Protection Act* and Other Consumer Protection Legislation, and the common law torts of fraudulent or negligent misrepresentation, negligence, and predominant purpose conspiracy.

106. As disgorgement is a gains-based remedy, the amount of profits requested to be disgorged corresponds to the merchant interchange fees, annual fees, interest, and other fees charged by TD and CIBC for the second Aeroplan Visa credit cards as well as any interest or other capital gains accrued from said amounts. As well, the amount of profits to be disgorged from Aeroplan corresponds to the percentage of any merchant interchange fees, annual fees, interest, or other fees paid to Aeroplan by TD and CIBC as part of their agreement to issue and administer the second Aeroplan Visa credit cards issued to Plaintiff and Class Members.

107. The Plaintiff only seeks a disgorgement remedy if the amount to be disgorged exceeds the amount of damages or restitution that this Honourable Court is amenable to order. If the amount to be disgorged is lower than the amount that may be ordered in damages or in restitution, the Plaintiff and Class Members only seek said amount of damages or restitution.

JURISDICTION

108. The Plaintiff contends that there is a real and substantial connection between the province of Ontario and the out-of-province Class Members and Defendant Aeroplan by virtue of the Defendants Aeroplan carrying on business and having committed torts in Ontario, and by virtue of contracts connected with the dispute having been made in the Province within the meaning of the Supreme Court of Canada's judgments in *Club Resorts Ltd. v. Van Breda*, [2012 SCC 17](#) and *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, [2016 SCC 30](#).

109. Defendants TD and CIBC have their head offices located in the province of Ontario.

Section 18 of the Aeroplan program general Terms and Conditions states as follows:

18. Governing Law and Dispute Resolution

The Aeroplan Program, including these Terms and Conditions, is governed by the provincial laws of the province of Ontario and the federal laws applicable therein, without reference to conflict of laws provisions. Any disputes relating in any way to these Terms and Conditions, the Aeroplan Program or Aeroplan Membership shall be submitted to the courts of the Province of Ontario which shall have exclusive jurisdiction over such disputes. However, in respect of residents of the Province of Quebec, these Terms and Conditions are governed by the provincial laws of the Province of Quebec and the federal laws applicable therein. For certainty, enrollment in the Aeroplan Program occurs in the Province of Ontario upon confirmation by Aeroplan to you of your Aeroplan Membership.

110. The Plaintiff further contends that Ontario is a convenient forum for the class action to be adjudicated, also in accordance with the above-mentioned Supreme Court precedents.

VENUE

111. The Plaintiff proposes that the present class action be tried in Ottawa, Ontario.

112. The Plaintiff pleads and relies upon the relevant provisions of the *Competition Act*, the *Consumer Protection Act, 2002* and Other Consumer Protection Legislation.

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