

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

LEONID KAPLAN

Plaintiff

- and -

**PAYPAL CA LIMITED, PAYPAL CANADA CO.
and PAYPAL HOLDINGS INC.**

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

O. Soriano and P. Davis, for the plaintiff

C. Lonsdale, A. Ship, and A. Goldenberg, for the defendants

ENDORSEMENT

Nature of motion and overview

1. The plaintiff brings this motion, on consent to (i) amend the Fresh as Amended Statement of Claim and add a defendant, (ii) certify this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the *CPA*) for the purpose of settlement and fix the date of a settlement approval motion, (iii) approve the Notice Plan (including form, content and method of dissemination) for class action settlement approval and counsel fee approval, and (iv) grant ancillary relief including appointing a claims administrator and setting an opt-out deadline.

2. For the reasons that follow, I grant the relief sought.

Facts

3. The defendants and their affiliates operate a global mass payments processing platform known as “PayPal”, which processes online payment transactions across international borders and in different currencies.

4. The claims in this action arise from (i) alleged overcharges on foreign exchange transactions between January 14, 2017 and August 8, 2018 and (ii) currency conversions allegedly conducted by PayPal without authorization for certain types of transactions and certain time periods between 2006 and August 8, 2018. The defendants deny any liability on either claim.

5. The proposed class is comprised of individuals resident in Canada (outside of Quebec) who used PayPal during the proposed class period and who transacted in currencies other than Canadian dollars. There are millions of total proposed class members in this action and in the companion Quebec action. The claims of the proposed class are anchored in standard-form user agreements which were modified from time to time (although only some of those modifications related to the provisions addressing currency conversions).

6. As a result of mediation in August 2020, the parties agreed in principle on a proposed settlement of both this action and the Quebec action. The parties subsequently negotiated a comprehensive settlement agreement which was signed on December 3-4, 2020. Under the proposed settlement, the defendants will pay an all-inclusive amount of \$10 million in exchange for a full and final release of the claims in the actions, relating to their currency conversion practices (for which the defendants do not admit liability, as

noted above). Under the proposed settlement, proposed class members who receive money will not need to take any action to obtain a payment. The money will be deposited in their PayPal accounts with a note that the funds are provided as part of a class action settlement.

Notice Plan

7. Given the millions of members in the proposed class, the cost of direct email to all such class members would likely be upwards of \$300,000. A direct mail process would be considerably more expensive. Even if direct notice were attempted, it is unlikely to be successful since PayPal has less reliable contact information for many millions of the proposed class members.

8. Consequently, the proposed notice will primarily be provided by creating a dedicated website for the action and settlement. The website will contain the narrative descriptions of the claim, the settlement, and the opt-out procedure in plain language (in English and French). A press release will be published directing interested individuals to the website, which will be maintained by the claims administrator. Digital and print advertisements will be made in English and French newspapers. Putative class members who have already contacted counsel (only approximately 50 to date) will receive direct email notice from class counsel.

Analysis

9. I now address the issues on this motion.

Issue 1: Amending the Fresh as Amended Statement of Claim

10. The amendments are only to add PayPal, Inc. as a defendant and to correct the name of PayPal Holdings, Inc. (as there was no comma included in the Fresh as Amended Statement of Claim). The amendments are necessary to properly name the defendants and the defendants consent to the amendments. Consequently, I grant leave to amend the Fresh as Amended Statement of Claim in the form attached as Appendix 4 to the order attached to this endorsement.

Issue 2: Certification of the action on consent

11. I am satisfied that the requirements under s. 5(1) of the *CPA* have been met, particularly on the basis of the settled law that certification requirements need not be as rigorously applied in the settlement context (*Haikola v. The Personal Insurance Company*, 2019 ONSC 5982 at para. 46; *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (S.C.) at para. 21).

12. I find as follows with respect to the s. 5(1) requirements:

- (i) Section 5(1)(a): The plaintiff pleads that (a) the defendants and proposed class members entered into a contract (the standard-form user agreement) and (b) the defendants breached the contract by the impugned conversion conduct. Consequently, a cause of action for breach of contract is disclosed in the pleading.
- (ii) Section 5(1)(b): The proposed class definition under the settlement agreement incorporates all persons in Canada other than residents of the province of Quebec who (a) purchased goods or services using PayPal's

payment systems in a foreign currency on or before August 8, 2018 or (b) withdrew funds from a PayPal account that were converted to Canadian dollars before being transferred to the person's linked bank account or credit card on or before August 8, 2018.

The above definition is based on objective criteria and is not merit-based. It identifies those who (a) may have a claim, (b) will be bound by the results of the litigation and (c) are entitled to notice. Consequently, the requirement under s. 5(1)(b) is met.

- (iii) Section 5(1)(c): The proposed common issue is "Did the Defendants breach their contracts with Class Members by performing currency conversions in a manner not in accordance with the Defendants' user agreements?" That issue is a "substantial common ingredient" of the claim and avoids duplication of fact-finding or legal analysis. It is anchored in the standard-form user agreement to which every user agreed in order to use PayPal. The issue focuses on the currency conversion practices of the defendants, which were common across the proposed class members at any given point in time.

Consequently, the common issue is suitable for certification.

- (iv) Section 5(1)(d): A class action is preferable where it (a) would be fair, efficient and manageable and (b) is preferable to other reasonably available means of addressing the issues; all having regard to access to justice, behaviour modification, and judicial economy.

Issues of manageability do not arise as this proceeding is being certified for settlement purposes. Further, access to justice is achieved given the modest impugned fees which would render litigation uneconomical for class members. For similar reasons, judicial economy is achieved since it avoids millions of individual actions for small amounts.

Consequently, the preferability requirement under s. 5(1)(d) is met.

- (v) Section 5(1)(e): It is not contested that Mr. Kaplan is a suitable representative plaintiff. He has experienced both conversion claims, brought the issues to class counsel and worked with class counsel to achieve settlement. Mr. Kaplan is capable of “vigorously prosecuting the action” and has previously acted as a proposed representative plaintiff in Ontario. Further, proposed class counsel have substantial class action experience, including in cases involving foreign exchange fees charged by financial institutions.

Consequently, the requirement under s. 5(1)(e) is met.

13. For the above reasons, I certify this action as a class proceeding under the *CPA* for the purpose of settlement.

Issue 3: Notice

14. I am satisfied that the notice plan is meaningful and effective, taking into account the context and situation of class members. The proposed notice provides informative, accurate, balanced and independent information which allows class members to fully

understand how the action affects their rights. It is appropriate given the circumstances of the case (*Haikola*, at para. 103).

15. A primarily digital notice (driven by media coverage) is appropriate. Notice will be provided through (i) the dedicated administrator's website (ii) press release directing class members to the website (iii) updates to class counsel's websites (in Ontario and Quebec) providing the notice (iv) digital and print newspapers providing the notice and (v) direct emails to all class members who have contacted counsel. Such notice is appropriate given the considerable expense of either a direct mail or direct email notice, which would be disproportionate to the benefits of such notice, particularly as the defendants do not have reliable direct contact information for the majority of putative class members.

16. Further, since funds will be paid directly to those proposed class members who receive money under the proposed settlement by direct deposit into PayPal accounts, the notice plan is appropriate. I adopt the approach in *Markson v. MBNA Canada Bank*, 2012 ONSC 5891, which approved a similar notice plan.

Issue 4: Ancillary relief

17. All parties consent to Epiq Class Action Services Canada Inc. being named as Class Administrator and to an opt-out date of February 23, 2021. I approve these terms on consent, as well as the other ancillary relief agreed to by the parties.

Conclusion

18. For the above reasons, I grant the relief sought by the plaintiff on consent. Order to go as per attached.

Filing of material

19. Plaintiff's factum and motion record to be filed electronically in the form attached to the e-mail from defendants' counsel to the court delivered this morning.

DATE: Dec. 16, 2020

"Glustein, J."