Federal Court  Cour fédérale

Date: 20210415

Docket: T-445-20

Citation: 2021 FC 311

Toronto, Ontario, April 15, 2021

PRESENT: Chief Justice Paul Crampton

PROPOSED CLASS PROCEEDING

BETWEEN:

STEPHANIE DIFEDERICO AND JAMESON EDMUND CASEY

Plaintiffs

and

AMAZON.COM, INC., AMAZON.COM.CA, INC., AMAZON.COM SERVICES LLC, AMAZON SERVICES INTERNATIONAL, INC., AND AMAZON SERVICES CONTRACTS, INC.

Defendants

PUBLIC ORDER AND REASONS

(Confidential Order and Reasons issued April 9, 2021)

I. Introduction

[1] The plaintiffs in this class action proceeding claim $12 billion in damages on behalf of three classes of consumers [**Class Members**]. In support of their claim, they have alleged breaches of the criminal prohibitions on price-fixing agreements set forth in sections 45 and 46

of the *Competition Act*, RSC, 1985, c C-34. They assert that this is the largest known class action ever filed in Canada for breaches of that legislation.

[2] To fund their action, the plaintiffs entered into a litigation funding agreement [**LFA**] that provides for an amount of funding they suggest is unprecedented in Canadian litigation. Among other things, the plaintiffs consider such funding necessary to enable them to retain an expert who can understand the issues in this proceeding and who will be capable of dealing with the "vast quantities of data that are anticipated to be produced and analyzed in this case."

[3] In this Motion, the plaintiffs seek the Court's approval of the LFA as well as an order to protect the confidentiality of certain terms in that document. The defendants have not made any representations in respect of the Motion.

[4] Pursuant to the LFA, the return to which the funder, Therium Litigation Finance Atlas AP IC [**Therium**], would be entitled is quite large – the greater of five times the committed funds [the **Multiplier**] and 10% of the claim proceeds, subject to a cap of US$100,000,000 [the **Funding Fee**]. This would be in addition to a reimbursement of the committed funds.

[5] For the reasons that follow, I have concluded that it would be in the best interests of justice to approve the LFA. Among other things, the LFA is necessary to facilitate access to justice by the Class Members, it is fair and reasonable to current and prospective Class Members, it will make a meaningful contribution to deterring wrongdoing, and it will protect the interests of the defendants.

[6] In addition, I will grant the plaintiffs' request to protect the confidentiality of various terms in the LFA, except for the terms identified in paragraph 4 above.

II. Background

[7] In their Fresh as Amended Statement of Claim, the plaintiffs allege that the defendants [collectively **Amazon**] entered into two separate anti-competitive agreements [the **Allegedly Anti-competitive Agreements**] to fix retail e-commerce prices. Those "agreements" consist of two provisions in Amazon's agreements with third parties who sell on its online platform [**Third Party Sellers**].

[8] The first such provision requires Third Party Sellers to refrain from selling products to consumers on any other e-commerce website for a price that is lower than the price they charge on Amazon's platform. This is referred to as an "MFN" provision, because it resembles a most-favoured-nation clause.

[9] The second allegedly anti-competitive provision is a so-called "fair pricing" clause, which imposes costly penalties on Third Party Sellers if they sell products to consumers on any other e-commerce website for a price that is lower than the price charged on Amazon's platform.

[10] Among other things, the plaintiffs allege that the Allegedly Anti-competitive Agreements permit Amazon to shelter its online business from price competition. More specifically, they assert that by limiting price competition in relation to products sold by Third Party Sellers on other e-commerce websites, Amazon can ensure that the prices of products sold by Third Party

Sellers on its platform and on competing e-commerce websites never drop below a particular level. The plaintiffs maintain that this ensures that Amazon can set anti-competitive fees and creates a floor price under which the products in question cannot be offered for sale on any e-commerce website. The plaintiffs state that this has inflated the prices of products sold on Amazon's platform as well as on other e-commerce websites used by Third Party Sellers. They estimate this inflationary impact on prices paid by Canadian consumers to be "upwards of $12 billion."

[11] This proceeding is one of three of which the Court is aware that have been initiated in Canada against Amazon in relation to the Alleged Anti-competitive Agreements. The other two were filed before the Ontario Superior Court of Justice [**OSCJ**] (*Sweet v Amazon.com, Inc*, File No. CV-20-00640850-00CP [the **Ontario Proceeding**], and the Quebec Superior Court (*Wells v Amazon.com, Inc*, File No. 500-06-001055-207 [the **Quebec Proceeding**]), respectively.

[12] Counsel to the plaintiffs have agreed with their counterparts in the Quebec Proceeding to pursue their respective actions as a national consortium [**National Consortium**].

[13] Earlier this year, the plaintiffs attempted to persuade the three courts to hear a joint motion to stay the Ontario Proceeding and the Quebec Proceeding in favour of this proceeding. Given that the plaintiffs in the Ontario Proceeding opposed that motion, it was unsuccessful. In brief, following a short teleconference among the judges seized of the three proceedings, namely Justice Edward Morgan in Ontario, Justice Sylvain Lussier in Quebec and the undersigned, the plaintiffs in the National Consortium were informed that a joint hearing should only be

considered if all parties in all three proceedings consent to such a hearing. They were also informed that in the absence of such consent, any motion in any of the three actions should be brought in the relevant jurisdiction, to be considered in the usual course.

III. The Parties, Therium and the *Amicus Curiae*

A. *The Representative Plaintiffs and the Classes They Represent*

[14] The plaintiffs assert that three classes of consumers have suffered damages as a result of the Allegedly Anti-competitive Agreements. The representative plaintiff Stephanie Difederico seeks to represent a class of consumers characterized as the "Amazon E-Commerce Class", which is defined as follows:

> All persons or entities in Canada who, from 1 June 2010 to the present (the "Class Period"), purchased products on Amazon.ca or Amazon.com. Excluded from the Amazon E-Commerce Class are the defendants and their parent companies, subsidiaries, and affiliates.

[15] The representative plaintiff Jameson Edmond Casey seeks to represent two additional classes of consumers, namely, the "Other E-Commerce Class" and the "Umbrella Class".

[16] The "Other E-Commerce Class" is defined as follows:

> All persons or entities in Canada who, from 1 June 2010 to the present (the "Class Period"), purchased Amazon Products on any website other than Amazon.ca or Amazon.com. Excluded from the Other E-Commerce Class are the defendants and their parent companies, subsidiaries, and affiliates.

[17] The "Umbrella Class" is characterized in the following terms:

> All persons or entities in Canada who, from 1 June 2010 to the present (the "Class Period"), purchased products from any website

> other than Amazon.ca or Amazon.com which products are not Amazon Products. Excluded from the Umbrella Class are the defendants and their parent companies, subsidiaries, and affiliates.

B. *Amazon*

[18] The plaintiffs allege that Amazon is the world's largest online retailer, accounting for almost 50% of e-commerce retail purchases in Canada. Approximately 40-66% of the sales on its websites are of products in respect of which Amazon is the seller of record. The remaining sales are made by Third Party Sellers, who pay certain fees to Amazon to be able to market and sell their products on its platform. The plaintiffs assert that Amazon and Third Party Sellers are competitors because Amazon sells products as the seller of record that Third Party Sellers also sell, either on Amazon's platform, on their own e-commerce websites, or on other e-commerce websites, including other retail e-commerce platforms.

[19] The plaintiffs add that Amazon and Third Party Sellers are also potential competitors in respect of other products, in relation to which they do not currently compete. These products include products that are included within the same product categories (for example "Home and Kitchen"), in which Amazon and Third Parties already participate.

C. *Therium*

[20] Therium is a well-known and well-financed litigation funding provider based in the United Kingdom.

D. *Amicus Curiae*

[21] Given the nature of certain issues raised by the LFA, the Court appointed Mr. Tom Curry as *amicus curiae*. Mr. Curry is a partner in Lenczner Slaght Royce Smith Griffin LLP, Toronto. Among other things, the Order appointing him *amicus curiae* states as follows:

> The Amicus shall provide written and oral submissions that are in his opinion objective, appropriate, and helpful to the Court in determining whether the Litigation Funding Agreement: is fair and reasonable to the class; does not overcompensate the funder; and protects the interests of the Defendants. Such submissions shall include, but shall not be limited to, representations as to whether the funding amounts and funding fees proposed in the Litigation Funding Agreement are fair and reasonable.

[22] Mr. Curry was joined at the hearing of this motion by his partner, Jonathan Chen [together, the **Amici**].

IV. The LFA

[23] The LFA was executed in late December 2020 by Therium, the representative plaintiffs in this proceeding, their legal counsel, Audrey Wells (the representative plaintiff in the Quebec Proceeding), and her legal counsel. Before entering into the LFA, the representative plaintiffs sought and received independent legal advice from Mr. Jonathan Foreman, who specializes in class actions and mass tort litigation.

[24] In broad terms, the LFA provides that Therium will fund the following:

i. Disbursements in tranches up to a maximum of USD$[redacted];

ii. Any adverse cost awards in tranches up to USD$[redacted]; and

iii. Security for costs, if required.

[25] In exchange for its funding commitment and in the event of a recovery of any proceeds, Therium will be (i) reimbursed for all payments advanced for disbursements, adverse costs and security for costs, (ii) paid the Funding Fee, subject to a cap of US$100,000,000, which equates to approximately 1% of the total damages claimed in this proceeding (after conversion to Canadian currency), and (iii) paid a separate fee for any tranches of adverse cost award amount that it has advanced, up to a specified limit.

[26] Pursuant to article 13.1 of the version of the LFA that was filed prior to the hearing of this Motion, any proceeds from any judgment, award order, settlement or compromise in this proceeding [the **Claim Proceeds**] were required to be distributed in the following order of priority:

i. To reimburse Therium for any and all of the funds advanced (see paragraph 24 above);

ii. To reimburse legal counsel for any and all disbursements that they have funded in the proceeding;

iii. To pay legal counsel their contingency fee, up to a cap of 25% of the claim – this corresponds to the 25% contingency fee to which the representative plaintiffs agreed in paragraph 6 of their respective Contingency Fee Retainer Agreements with class counsel;

iv. To pay Therium the Funding Fee and any fee to which it may be entitled for having advanced funds in connection with any adverse cost award that may have been made; and

v. To distribute the residual proceeds to Class Members.

[27] As further discussed below, Article 13.1 of the LFA was amended after I raised a concern during the hearing regarding the possibility that Class Members would not participate in any settlement, judgment or award in certain scenarios.

V. Issues

[28] This Motion raises two principal issues for the Court's determination: (i) whether to approve the LFA, and (ii) whether to maintain the confidentiality of all of the terms and figures that have been redacted from the Redacted Version of the LFA.

VI. Assessment

A. *Initial Observations*

[29] The Court has a supervisory role in class proceedings that requires it to be mindful of the best interests of class members as a whole: *Frame v Riddle*, 2018 FCA 204 at para 24; *Ottawa v McLean*, 2019 FCA 309 at para 13. This includes the best interests of prospective class members, whose interests may not be entirely aligned with those of the representative plaintiffs, class counsel, or third parties who are prepared to fund all or part of the proceeding: see, e.g., *Houle v St Jude Medical Inc*, 2018 ONSC 6352 at paras 22 and 41 (Ont Div Ct) [***Houle 2***]. Accordingly, as with legal fees to be paid from the proceeds recovered in a class proceeding (see Rule 334.4,

Federal Courts Rules, SOR/98-106), LFAs entered into in relation to proceedings before the Court must be approved by the Court. This is so even where they have been executed by the representative plaintiffs after having received the advice of independent legal counsel. I note that other courts have reached a similar conclusion: see e.g., *Houle v St Jude Medical Inc*, 2017 ONSC 5129 at paras 63-70 [***Houle 1***], aff'd *Houle 2*, above, at paras 68-70.

[30] In my view, such prior approval and the Court's powers in this regard are necessary for several reasons. These include ensuring that the Court is able to (i) fulfill its supervisory role in class proceedings falling within its jurisdiction, (ii) manage and control such proceedings, and (iii) protect the administration of justice from abuse: *R v Cunningham*, 2010 SCC 10 at paras 19-20; *Lee v Canada (Correctional Services)*, 2017 FCA 228 at para 12; *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at para 36; *Houle 2*, above, at paras 6 and 38; *Dugal v Manulife Financial Corporation*, 2011 ONSC 1785 at para 16 [***Dugal***]; *Stanway v Wyeth Canada Inc*, 2013 BCSC 1585 at para 37 [***Stanway***]; *Seedling Life Science Ventures LLC v Pfizer Canada Inc*, 2017 FC 826 at para 15; Rule 53(2).

[31] For greater certainty, this Court has the jurisdiction to consider this Motion notwithstanding that an LFA might be said to concern matters of contract law, which ordinarily fall within the jurisdiction of the provincial courts: *Apotex Inc v Allergan, Inc*, 2016 FCA 155 at para 13; *Jensen v Samsung*, (Court File T-809-18, February 7, 2019) [***Jensen***].

[32] LFAs are a relatively recent phenomenon in Canada: *Houle 2*, above, at para 3. Although they are increasingly common in the OSCJ, I am only aware of one other case in which an LFA

has been considered in the context of a class proceeding in this Court, namely, *Jensen*, above. There, the Court dealt with the motion in writing and issued a short Order approving the agreement, following a series of preceding recitals. Among other things, those recitals described affirmative findings made by the Court in respect of several assessment factors that have been considered in this context by other courts, and that will be addressed below: see, for example, *Houle 1*, above, at paras 63-70; *Marriott v General Motors of Canada Company*, 2018 ONSC 2535 at para 9(i)-(v) [***Marriott***]. Some of these factors were included in recent amendments to Ontario's *Class Proceedings Act*, SO 1992, c 6, s 33.1(9) [***CPA Ontario***].

B. *The test for approval of an LFA*

(1) The general test

[33] In *Jensen*, the Court did not articulate an overarching test applicable to the assessment of LFAs. However, it observed that approving an LFA in the context of a class action proceeding "is not merely a matter of ensuring that the Agreement is not contrary to public policy as champertous, but also a matter of ensuring the protection of the interests of class members against unreasonable agreements, as well as protecting courts against potential abuses specific to [a] class proceeding": *Jensen*, above, at page 6.

[34] To a large degree, this draws upon the general test that has been articulated by the OSCJ, which has stated that an LFA "should not be champertous or illegal and it must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants": *Houle 1*, above, at para 71; *JB & M Walker Ltd v TDL Group Corp*, 2019 ONSC 999 at para 5 [***TDL***]; *Drynan v Bausch Health Companies Inc*, 2020 ONSC 4379 at para 18

[***Drynan***]; *Flying E Ranche Ltd v Canada (Attorney General)*, 2020 ONSC 8076 at para 27 [***Flying E***]. While the passage from *Jensen* quoted immediately above does not make reference to the interests of the defendants, that was a factor identified in an earlier recital of the Court's Order.

[35] In my view, the considerations identified in *Jensen* and in the general test that has been embraced in Ontario can be subsumed into a simpler and more straightforward test of whether it is in the interests of justice to approve the LFA.

[36] In considering whether that test is met, it is appropriate to consider the following factors:

i. Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?

ii. Is third party funding necessary to facilitate meaningful access to justice?

iii. Is the LFA champertous?

iv. Is the LFA fair and reasonable to current and prospective class members as a group?

v. Will the LFA make a meaningful contribution to deterring wrongdoing?

vi. Does the LFA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?

vii. Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?

viii. Does the LFA protect the legitimate interests of the defendants?

Jensen, above; *Houle 1*, above, at paras 73-88; *Flying E*, above, at paras 28-34; *TDL*, above, at para 6; *Drynan*, above, at para 17; *Dugal*, above, at para 33; *Stanway*, above, at para 15; *David v Loblaw*, 2018 ONSC 6469 at para 12 [***Loblaw***].

[37] A negative response to any of the questions listed above can be fatal to an LFA. I will address each of them below. I will then address an issue that arises on the particular facts of this case with respect to the Quebec Proceeding.

(2) Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?

[38] The basic procedural and evidentiary requirements that should be met before the Court's consideration of an LFA consist of: (i) the plaintiffs obtaining independent legal advice prior to entering into the LFA; (ii) prompt disclosure of the LFA and any relevant legal retainer agreement to the Court; (iii) a prompt request for approval of the LFA; (iv) the provision of reasonable notice to the other parties of the motion requesting approval of the LFA; (v) the provision of a copy of the LFA to the other parties, subject to appropriate redactions; and (vi) the provision to the Court of evidence of the relevant background circumstances pertaining to the LFA: *Houle 1*, above, at para 74.

[39] I am satisfied that each of these requirements have been met. I will simply add for the record that this was also the position of the Amici. Moreover, Amazon was provided with an opportunity to make submissions regarding the LFA and declined to do so.

[40] Accordingly, this factor weighs in favour of approving the LFA.

(3) Is third party funding necessary to facilitate meaningful access to justice?

[41] The plaintiffs submit that several factors make this action uniquely difficult to prosecute effectively without funding. In this regard, they note that as one of the world's largest

companies, Amazon has significant resources that cannot plausibly be matched by individual representative plaintiffs. In addition, they assert that Amazon can be expected to defend this action vigorously because the Allegedly Anti-competitive Agreements were instrumental in its accumulation of wealth. The plaintiffs maintain that an extraordinary level of expert participation will be required, given the complexity and scale of the data that will inevitably need to be obtained and analyzed to assess anti-competitive effects and damages. Without the funding necessary to retain an expert such as Dr. Farrell, who will be backed by a team at the economic consulting firm Bates White LLP, the plaintiffs state that this proceeding would not pose a credible threat, and their ability to obtain an adequate recovery for the proposed classes would be impaired.

[42] The representative plaintiffs have each stated in sworn affidavits that they would not have been willing to assume their respective roles in this proceeding if they were required to pay the expenses required to move it forward. They explained that they do not have the means to do so. They were also advised by their independent counsel, Mr. Foreman, that this action could not be prosecuted without Therium's financial support.

[43] The Amici agree and add that "Amazon has significant resources that cannot plausibly be matched by individual representative plaintiffs." The Amici note that "without access to any public funding, the proposed representative plaintiffs must rely on private litigation funders." Funding apparently would not be available from Ontario's Class Proceedings Fund [**CPF**] because the CPF only funds proceedings commenced under the *Class Proceedings Act*: *Law Society Act*, RSO 1990, c L.8, s 59.3. Funding apparently would not be available in Quebec,

because more than 50% of the class members are not Quebec residents: *Act Respecting the Fonds d'Aide aux Actions Collectives*, CQLR, c F-3.2.0.1.1, s 37.1. The Court is not aware of any public funding available for class proceedings initiated in this Court.

[44] Given the need for private funding, the Amici maintain that the necessity factor is at the heart of this Motion. In the Amici's view, Amazon is a type of Goliath that will spare no resources to protect what lies at the heart of its business model. In this context, the LFA would "level the playing field" and provide the plaintiffs with the opportunity to advance their claim. This is essentially because significant expert assistance will be required to establish the anti-competitive effects of the Alleged Anti-competitive Agreements, including through significant data extraction, analysis and "but-for world modelling".

[45] I accept the foregoing submissions. Indeed, I am also inclined to agree with the Amici that if third party funding is not necessary in a particular proceeding, it should not be approved.

[46] The plaintiffs further maintain that the LFA represents the best arrangement they are likely to be able to obtain, because they spent three months "hotly" negotiating it and it is unlikely that they would be able to find another funder. In this regard, they explained that another potential funder declined to provide funding after spending a significant period of time in discussion with the plaintiffs, and some other internationally-recognized litigation funders declined their approach. Having regard to this experience, the Amici agree that the plaintiffs are unlikely to be able to find another funder who is likely to assume the risk associated with the proceeding on better terms than what are reflected in the LFA.

[47] Having regard to all of the foregoing, I am satisfied that third party funding is necessary to facilitate meaningful access to the Court by the plaintiffs so that they can seek redress for the anti-competitive harm they claim to have suffered due to the Alleged Anti-competitive Agreements. This weighs in favour of approving the LFA.

(4) Is the LFA champertous?

[48] Champerty is a form of maintenance. In *McIntyre Estate v Ontario (Attorney General)* (2002), 61 OR (3d) 257, 218 DLR (4th) 193 (Ont CA) at para 26 [***McIntyre***], these concepts were defined as follows:

> Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation.

[49] At paragraph 32 of its decision, the Court in *McIntyre* further observed that "[t]he fundamental aim of the law of champerty and maintenance has always been to protect the administration of justice from abuse." This includes "protecting vulnerable litigants from abuse": *McIntyre*, above, at para 47.

[50] The Court added that while contingency fee arrangements between lawyers and their clients were once deemed to be champertous *per se*, such an approach is no longer necessary or desirable. Accordingly, "[n]either the contingent nature of a fee agreement, nor the fact that the

lawyer's fees may be paid from the recovery in an action, without more, ought to constitute an improper motive or officious intermeddling for the purposes of the law of champerty": *McIntyre*, above, at para 72. Instead, the courts should focus upon whether a contingency fee agreement "so over-compensates a lawyer such that it is unreasonable or unfair to the client … i.e., tak[es] advantage of the client": *McIntyre*, above, at para 76. In other words, the courts should ensure that a contingency fee arrangement does not provide for a recovery that is disproportionate: *Houle 1*, above, at para 84. Such agreements are deemed to have an improper purpose: *McIntyre*, above, at para 76.

[51] In conducting this assessment, the courts should keep in mind that counsel should be rewarded for assuming the risks and costs associated with the litigation: *McIntyre*, above, at para 76.

[52] In my view, the courts should take a similar approach in considering whether an LFA providing for the payment of a contingency fee to the funder is champertous.

[53] The assessment of whether an LFA contemplates an unreasonable, unfair or disproportionate recovery for the funder is at the heart of the next factor addressed below.

[54] Accordingly, I will confine the present step in the analysis to two considerations. The first is whether there is any evidence of any actual improper motive, as opposed to one that may be deemed to be improper based on the quantum of the return contemplated by the LFA. There is

no such evidence in this case. Indeed, the Amici maintained that there is no reason to believe that Therium is acting opportunistically or in bad faith.

[55] The second consideration that is relevant to assess at this step in the analysis is whether fees set forth in the LFA exceed the outer limit of what might *possibly* be considered reasonable, fair or proportionate. Once again, there is no evidence to suggest that may be so and I have no reason to be concerned in this regard. To the contrary, in response to questioning on this point, the Amici assured the Court that "disproportionality is not an issue in this case": Transcript, at 41. Put differently, "there is no reason to believe that this is … the litigation funding equivalent of a loan shark" agreement: Transcript, at 43. Among other things, this is because the LFA provides for what appears to be one of the largest advances of funding ever in a Canadian case and involves one of the largest risks to a litigation funder.[1] In addition, the Funding Fee contemplated by the LFA is within the range of those that have been approved by Canadian courts for the vast majority of the possible scenarios between complete victory ($12 billion award) and complete failure (zero return). Moreover, the Funding Fee is subject to a cap of 10% as well as the further cap of US$100,000,000 that will ensure that Therium's return is below the 10% levy generally imposed by the CPF, for over 90% of the possible scenarios mentioned immediately above. This will be further discussed below. For the present purposes it suffices to observe that these caps preclude the LFA from being champertous: *Houle 1*, above, at para 83; *Flying E*, above, at para 34.

[56] Based on the foregoing, this factor weighs in favour of approving the LFA.

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[1] Plaintiffs counsel state that the LFA "contains the most sizeable funding commitment in Canadian litigation known to counsel."

(5) Is the LFA fair and reasonable to current and prospective class members as a group?

[57] The determination of what is fair and reasonable is highly contextual: *Houle 1*, above, at para 81.

[58] The plaintiffs make two principal arguments in support of their submission that the LFA is fair and reasonable to the Class Members, and will not overcompensate Therium. First, they assert that the level of the Funding Fee reflects the very high risk that will be incurred by Therium and the long period of time that it may have to wait before being reimbursed the funds it advances and receiving any return on its investment. Second, they state that the Funding Fee will be reasonable having regard to other LFAs that have been approved by the courts, as well as to the return received by the CPF when it funds litigation proceedings.

[59] As regards the high level of risk being incurred by Therium, the plaintiffs reiterate that the level of funding to be advanced under the LFA is "unprecedented". In addition, pursuant to paragraph 17.4 of the LFA, Therium will be required to seek the approval of the Court before it can suspend or terminate the LFA. Moreover, the complexity of the economic analysis that underlies this action is reflected in a recent U.K. decision, which exceeded 400 pages, with another 300 pages in annexes: *Price Comparison Website: use of most favoured nation clauses*, Competition and Markets Authority (Case 50505, 19 November 2020). As a result, the risk of failure is elevated and can occur at multiple stages, including the certification stage, trial and appeal, for reasons related to the legal theory as well as the damages methodology. In each of those scenarios, Therium may not receive any return on its investment, or even a return of the

funding it will advance. In short, at this point in time, the level of return that Therium will receive is highly uncertain, and Therium will have to wait for an indefinite period before receiving any fee or even a reimbursement of the funds that it has advanced.

[60] The plaintiffs underscore that this uncertainty is increased because no court has issued a decision finding that the Allegedly Anti-competitive Agreements are in fact anti-competitive. Indeed, the Competition Bureau has not taken a position on this issue. Accordingly, in contrast to many private actions pursued under s. 36 of the *Competition Act*, the plaintiffs will not be able to avail themselves of the findings of any court, the fruits of the Competition Bureau's investigation, or any admissions made by the defendant, e.g., as in *Loblaw*, above. More broadly, there is very little history of Canadian courts making the types of determinations at trial that will need to be made in this proceeding.

[61] Regarding the reasonableness of the LFA in comparison with other litigation funding agreements, the plaintiffs begin by noting that the terms of the LFA are more favourable to the Class Members than the terms applicable when a proceeding is funded by the CPF. This is because Therium's Funding Fees are subject to limits that will prevent them from exceeding the 10% levy generally obtained by the CPF, in over 90% of the possible scenarios between complete victory ($12 billion recovery) and complete failure (zero recovery).[2] This is so despite the fact that the LFA provides for an amount of funding that far exceeds what could possibly be available from the CPF.

[2] See footnote 5 below.

[62] The limits in question consist of a cap of US$100,000,000 and a second cap that would limit Therium's recovery to a maximum of 10% of any claim proceeds. Based on the average daily Bank of Canada exchange rate (1.2574) for the month of March 2021, the US$100,000,000 cap would apply to any settlement or award above approximately C$1,257,400,000.[3] This latter amount represents approximately 10.5% of the total amount claimed in this proceeding. Accordingly, the US$100,000,000 cap would apply to 89.5% of possible outcomes in this proceeding, between complete success (recovery of C$12 billion) and complete failure (zero recovery). Moreover, as any potential settlement or award increases above C$1,257,400,000 and approaches C$12 billion, the US$100,000,000 amount as a proportion of total recovery would decrease from 10% to approximately 1%.

[63] In addition to the foregoing, the plaintiffs state that the LFA provides for a level of recovery that is below or similar to that which has been approved in recent cases. In this regard, they note that in *Jensen*, above, this Court approved a level of recovery that was uncapped and could reach as much as 15% of any proceeds recovered by the class. They further note that in *Loblaw*, above, the OSCJ approved a funding agreement that is "comparable" to the LFA in this proceeding, because it provided the funder with a return of 10% of any recovered proceeds, subject to a cap that varied depending on the timing of any settlement or judgment: *Loblaw*, above, at paras 9-10. According to the plaintiffs, the LFA in *Loblaw* contemplated a greater multiplier than in this proceeding (six times the amount advanced, versus five in this proceeding), and the return to the funder was slightly more than the return to Therium would be under the LFA, when expressed as a percentage of the amount of funding advanced. (This may

[3] Using the exchange rate above, US$100,000,000 converts to C$125,740,000. This represents 10% of C$1,257,400,000. Above this amount, the US$100,000,000 cap would prevail over the 10% cap.

be in part because, according to the plaintiffs, the total damages claimed in *Loblaw* are approximately $2 billion less than the $12 billion claimed in this proceeding.[4])

[64] I accept the plaintiffs' submissions regarding the reasonableness of the LFA to Class Members, having regard to the risks they have identified, the uncapped 10% return generally received by the CPA in Ontario proceedings, and the LFAs that were approved in *Jensen* and *Loblaw*. Stated differently, I conclude that the considerations and precedents identified by the plaintiffs weigh in favour of a finding that the LFA, including the Funding Fee, is fair and reasonable to current and prospective Class Members.

[65] I will add for the record that the Amici share this view. In this regard, the Amici observe that although the LFA features the largest, or at least one of the largest, potential returns to a funder that has come before the courts in Canada, this is not unreasonable in light of the fact that Therium is facing "the largest risk" that a funder has undertaken: Transcript, at 47. Regarding jurisprudential precedents, the Amici add that the combined return to Therium and plaintiffs' counsel would come within what has been characterized as the "presumptive range of validity" (up to 30-35% of the claim proceeds) whenever either the US$100,000,000 cap or the 10% cap set forth in the LFA applies – which would occur in over 90% of the possible outcomes in this case:[5] *TDL*, above, at para 25; *Drynan*, above, at paras 91, 98 and 111; *Houle 1*, above, at para 33. See also *Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at paras 7-11.

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[4] Counsel to the plaintiffs apparently are also involved in the proceeding in both *Loblaw* and *Jensen*.

[5] The 10% cap will kick in no later than the point at which 10% of the claim proceeds exceeds five times such committed funding ([redacted]). Applying the 1.2574 rate of exchange mentioned above, the latter figure equates to roughly [redacted]. It follows that 10% of the claim proceeds would exceed this amount when the total value of the claim proceeds exceeds [redacted]. The latter figure represents approximately [redacted] of the total amount claimed in this proceeding (C$12 billion).

[66] I will also note for the record that the representative plaintiffs have both stated, in their sworn affidavits, that they believe the LFA is fair and reasonable to themselves and to the class of people they propose to represent. Although this is relevant, it is "by no means determinative": *Dugal*, above, at para 17.

[67] Notwithstanding the foregoing, during the hearing of this Motion I expressed concerns regarding the level of the Funding Fee in scenarios in which the recovery would be at the very low end of the spectrum between full recovery and zero. I noted a particular concern about the scenario in which the recovery is less than approximately $150 million, which equates to 1.25% of the total damages claimed by the plaintiffs.

[68] In that scenario, the Funding Fee could reach as high as approximately [redacted], after conversion into Canadian currency.[6] This is because the LFA would entitle Therium to a Funding Fee of the greater of five times the amount funded and 10% of the claim proceeds (subject to the aforementioned US$100,000,000 cap). When that [redacted] million is combined with the reimbursement of the full amount of funding provided for in the agreement (approximately [redacted], after currency conversion), plus the 25% contingency fee established in the Contingency Fee Retainer Agreements that the representative plaintiffs and their legal counsel have executed (approximately $37.5 million), the total amount recovered by Therium and plaintiffs' counsel would be [redacted] million, of the total $150 million recovery. This would represent [redacted] of the claim proceeds, leaving only a trivial amount for the Class Members,

[6] This would represent five times the amount of the full amount of funding contemplated by the LFA, converted at 1.2574 (the average daily Bank of Canada exchange rate for the month of March 2021).

assuming there were no disbursements funded by counsel, over and above those funded by Therium.

[69] In response to my concerns, counsel to the plaintiffs maintained that a settlement or damages award in the range of $150 million is “highly unlikely.” In any event, they asserted that such a settlement or award would reflect a view that their claim is not strong. In such a scenario, the Class Members would not be any worse off than if the LFA were not approved, because they would not be entitled to significant compensation. The objective of any settlement would instead be to obtain reimbursement for the costs incurred in bringing the proceeding, and to avoid further outlays.

[70] The plaintiffs’ assessment of the prospects for a settlement or a damages award in the range of $150 million is largely supported by the Amici, who observed that there is no reason to believe that an outcome in the range of $150 million will likely occur. They characterized such an outcome as being not reasonably likely: Transcript, at 56-58. In response to further exchanges on this issue, they observed that the plaintiffs’ claim does not have “the look and feel of something that is going to be settled for an improvident amount”: Transcript, at 63-64. If such an outcome were to present itself, the Amici endorsed the plaintiffs’ position that the Class Members would not have lost anything to which they were entitled, because the merits of the case would have evolved in a manner unfavourable to them. The Amici added that, by virtue of its supervision of any settlement, the Court would be in a position to accept or reject the settlement. At that point in time, one option available to the Court would be to adjust the compensation to the plaintiffs’ counsel, to make more funds available to the Class Members.

[71] The Amici also noted that "class members are typically the last to collect" in class action cases: Transcript, at 69. As a result, where there is a settlement at the low end of the spectrum, relative to what was claimed, they may not receive much of the settlement, if anything at all.

[72] Despite the plaintiffs' and the Amici's assessments of the low prospects for Class Members to wind up with very little, I encouraged the plaintiffs to discuss my concerns with Therium and try to alleviate them. The following week, the plaintiffs wrote to inform me that the parties to the LFA had agreed to a proposed amendment to the LFA [the **Amendment**].

[73] The Amendment contains an important change to paragraph 13.1 of the LFA. In brief, it would provide Class Members with an entitlement to US$15 million in claim proceeds, immediately after the reimbursement of any funds advanced by Therium and disbursements funded by class counsel. Based on the above-mentioned exchange rate of 1.2574, US$15 million would equate to approximately C$19 million. For greater certainty, this entitlement would have priority over class counsel's contingency fee and Therium's Funding Fee. After the Amici wrote to convey their view that the Amendment alleviates any concern that Therium would be overcompensated in the "low settlement/damages award" scenario that I identified during the hearing of this Motion, I communicated this same view to the plaintiffs and the Amendment was executed.

[74] In summary, for the various reasons identified by the plaintiffs and echoed by the Amici, I find that the LFA, as amended, is fair and reasonable to current and prospective Class Members as a group. I have reached this finding based on (i) the high risk being incurred by Therium, (ii)

the high level of uncertainty that Therium will face regarding the timing and extent of any recovery (including for the amounts it advances under the LFA), (iii) the returns to litigation funders (or litigation funders and class counsel combined) that have been approved by the courts in Canada, and (iv) the uncapped 10% levy to which the CPF is entitled in proceedings that it funds in Ontario.

[75] Moreover, the cap of US$100,000,000 will ensure that the Funding Fee will not exceed 10% of the claim proceeds for any settlement above approximately C$1.27 billion, which represents 89.5% of the possible outcome scenarios between complete success (C$12 billion) and complete failure. The second cap of 10%, which will be triggered when 10% of the claim proceeds becomes greater than the Multiplier cap, will ensure that the Funding Fee does not exceed the 10% threshold in an additional range of the possible outcomes. Finally, the Amendment will ensure that the Class Members participate in any settlement or damages award that may arise in respect of the remaining, apparently unlikely, range of outcomes – assuming that it exceeds the amount of funds advanced by Therium and disbursements paid by class counsel.

[76] I will simply add in passing that any Class Member who is unhappy with the LFA will be entitled to opt out of the proceeding within the time and in the manner specified in any Order certifying the proceeding as a class action: Rule 334.21(1).

[77] Having regard to all of the foregoing, this factor weighs in favour of approving the LFA.

(6) Will the LFA make a meaningful contribution to deterring wrongdoing?

[78] The plaintiffs maintain that if they are successful in this action, in which they are seeking $12 billion in damages, other firms will be deterred from engaging in behaviour that is similar to the Alleged Anti-competitive Agreements in the future. The Amici agree.

[79] I agree that the LFA will greatly assist the plaintiffs to advance their claim against Amazon. To the extent that they are successful, either by obtaining a favourable judgment or award, or by reaching a settlement that reflects a sound claim, other firms will likely be deterred from engaging in conduct similar to the Allegedly Anti-competitive Agreements. In that scenario, the LFA would make a meaningful contribution to deterring wrongdoing.

[80] Accordingly, this factor weighs in favour of approving the LFA.

(7) Does the LFA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?

[81] An LFA must "not interfere with the lawyer-client relationship, the lawyer's duties of loyalty and confidentiality, or the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or class members": *Houle 1*, above, at para 88.

[82] The plaintiffs maintain that the LFA in this proceeding ensures that there will be no such interference. I agree.

[83] Paragraph 10.1 of the LFA confirms that class counsel "must at all times comply with their professional duties to act independently and in the best interests of the Representative

Plaintiffs and the members of the Total Class and in accordance with their other professional duties."

[84] Moreover, paragraph 10.2 of the LFA stipulates that "the Representative Plaintiffs will have the sole and exclusive right to direct the conduct of the Claim and the Proceedings, including the sole and exclusive right to settle the proceedings." That paragraph adds that nothing in the LFA "entitles Therium to interfere in the conduct of the Claim and/or the Proceedings."

[85] Although paragraph 11.1 imposes certain obligations on class counsel towards Therium, those obligations are explicitly subject to paragraphs 10.1, 10.2 and 16 (discussed immediately below) of the LFA.

[86] In addition, paragraph 10.6 of the LFA confirms that "nothing in this Agreement shall permit Therium to override any advice given by the Solicitors to the Representative Plaintiffs."

[87] Finally, as previously mentioned, Therium can only suspend or terminate the LFA with the prior approval of the Court: LFA, paragraphs 17.4 and 17.5.3.

[88] Having regard to the foregoing, this factor weighs in favour of approving the LFA.

(8) Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?

[89] An LFA must ensure that the third party funder will be bound by the deemed undertaking rule, and will be bound not to disclose confidential or privileged information: *Houle 1*, above, at para 65.

[90] Once again, the plaintiffs maintain that the LFA sufficiently addresses these considerations. I agree.

[91] Pursuant to paragraph 15.2, Therium has agreed that any privileged information and documents disclosed to it at any time have been or will be disclosed on the additional basis that Therium has, or will have, a common interest in the pursuit and success of this action. That same provision adds that Therium "will at all times take all reasonable steps to maintain that privilege."

[92] Furthermore, pursuant to paragraph 16.1, the parties to the LFA have acknowledged that "Therium will be subject to an implied undertaking of confidentiality imposed upon the parties to the Proceedings with respect to any documents or information about the Claim and the Proceedings and the parties to the Proceedings that Therium may receive as a result of its rights under this Agreement." Paragraph 16.2 further stipulates, without prejudice to paragraphs 15 and 16.1, that the parties to the LFA "agree to keep confidential and, where appropriate, maintain any privilege in all documents and information" that they exchange, subject to certain reasonable and ordinary exceptions.

[93] In view of the foregoing, this factor weighs in favour of approving the LFA.

(9) Does the LFA protect legitimate interests of the defendants?

[94] The plaintiffs assert that Amazon does not have any good faith interest in the LFA. This position is based on the fact that class proceedings in this Court are conducted on a "no costs" basis, absent very limited circumstances: Rule 334.39; *Campbell v Canada (Attorney General)*, 2012 FCA 45 at para 45; *CPA Ontario*, s 31. In any event, the plaintiffs note that the LFA requires Therium to indemnify the representative plaintiffs in respect of any adverse cost order that might be made against them, up to a stipulated maximum: LFA, paragraphs 8.1-8.3. Beyond that limit, Therium has agreed to fund legal expense insurance sufficient to meet any additional risk that the representative plaintiffs or class counsel may identify. Therium is also entitled to obtain such insurance against any similar risk that it might identify.

[95] In addition, at the request of the representative plaintiffs or class counsel, and for the benefit of each defendant, Therium is required to sign an undertaking to comply with any adverse costs award, up to the above-mentioned limit: LFA, paragraph 8.5; LFA, Appendix 2, paragraph 2.1.1. That undertaking also requires Therium to attorn to the jurisdiction of the court in relation to any adverse cost order the Court may make, up to that limit: LFA, Appendix 2, paragraph 2.1.2.

[96] Having regard to the foregoing, and to the fact that Amazon chose not to make any submissions to the Court in connection with this motion, I consider that the LFA appears to protect any legitimate interest that Amazon may have in relation to the funding of this action: *TDL*, above, at para 20. This is particularly so in light of the fact that Therium has agreed to be bound by the deemed undertaking of confidentiality, as discussed above.

[97] Accordingly, this factor weighs in favour of approving the LFA.

C. *The Quebec issue*

[98] The LFA encompasses funding for both the present proceeding and the Quebec Proceeding. With that in mind, the Amici raised two questions. The first question is whether this Court can approve an LFA that affects the interests of class members and the conduct of a class action in a different jurisdiction. The second question is whether a separate approval of the LFA must be provided by the Quebec Superior Court. The Amici submitted that neither of those questions should play a role in this Court's approval of the LFA. They were only being identified because they might arise later in this proceeding.

[99] The plaintiffs reply that the present proceeding is a national class action. This is confirmed by the definitions of the three asserted classes, which are reproduced at paragraphs 14-17 above. Accordingly, I agree with the plaintiffs and the Amici that this Court *can* proceed to approve the LFA at this stage, without knowing whether the Superior Court of Quebec will ultimately do the same for the portion of the LFA that pertains to the funding of the Quebec Proceeding.

[100] The question that remains is whether it would *be prudent* for this Court to approve the LFA without knowing whether it will also be approved by the Superior Court of Quebec. If the latter Court ultimately does not approve the LFA, this could well expose Class Members who are not part of the Quebec Proceeding to a real risk of having to subsidize that proceeding.

[101] Unfortunately, the Quebec Superior Court may not deal with this issue for a considerable period of time. According to the plaintiffs' counsel, the practice in Quebec is to defer the approval of LFAs until the settlement or final judgment stage of the proceedings. However, they maintain that the possibility of the Quebec Superior Court not approving the payment of the proportion of the expenses that will be required to advance the Quebec Proceeding is not "a practical reality": Transcript, at 32. The Amici agreed that this "is not a realistic concern": Transcript, at 67. Plaintiffs' counsel added that they are not aware of any precedents where a court in Quebec refused to agree to approve a contribution to the costs required to bring separate proceedings in that province and in one or more other jurisdictions in Canada.

[102] As a further practical matter, plaintiffs' counsel and the Amici both noted that this Court will maintain an ability to refuse to approve any settlement if it perceives that the Class Members in this proceeding are not being treated fairly.

[103] An additional practical consideration that is relevant for the present purposes pertains to the plaintiffs' intentions to endeavour to stay the Quebec Proceeding in favour of the action in this Court. If they are unsuccessful in doing so, plaintiffs' counsel stated that they intend to remove from the claim in this Court any claim for damages suffered by persons who are within the purview of the Quebec Proceeding.

[104] Having regard to all of the foregoing, I do not consider that the uncertainty relating to when and how the LFA may be treated by the Quebec Superior Court is a reason for refraining from approving the LFA at this time.

[105] I will pause to observe that I am sympathetic to class counsel's position that it is prudent to coordinate the funding of present proceeding and the Quebec Proceeding, so as to avoid "duplication of effort, costs, and most importantly, different economic or factual evidence that could undermine the action in each jurisdiction." It is readily apparent that, by coordinating the two actions in parallel and retaining only one team of economic experts, the costs required to advance them can be reduced, with consequent benefits to the class members in both proceedings.

D. *Conclusion regarding the approval of the LFA*

[106] Given the findings I have reached in relation to each of the factors addressed above, I will approve the LFA.

[107] For the record, I considered the possibility of providing a preliminary approval, subject to revisiting the LFA at the time any settlement that may be reached or any final judgment on the merits of this action may be made. However, after considering the representations made by class counsel and the Amici on this point, I decided against doing so. In brief, class counsel submitted that "capital likes certainty" and "nobody is going to advance money" to fund litigation absent a degree of certainty regarding the return on their investment. The Amici observed that this would not likely be a workable option for this proceeding. I am inclined to agree, particularly given that the cap of US$100,000,000 provides certainty to the Court regarding the maximum recovery to which Therium will be entitled. The other caps (the greater of five times the funding advanced and 10% of the claim proceeds), provide further certainty to the Court regarding Therium's eventual recovery, and the fact that it will be in the range that has been approved in other cases.

[108] I will observe in passing that, according to class counsel, the only precedents where approval of litigation funding was postponed to the end of the proceeding involved LFAs that also included the funding of legal fees, which typically are approved at the end of class proceedings: *Houle 1*, above, at paras 28 and 87, aff'd *Houle 2*, at paras 7 and 44; *Flying E*, above, at paras 24 and 35; *Drynan*, above, at paras 14-15 and 81-89; *TDL*, above, at paras 4, 25 and 26. The Amici did not suggest otherwise.

VII. Confidentiality issue

[109] In their Notice of Motion and request for relief, the plaintiffs requested an order permitting them "to serve and file the Motion Record with the terms relating to the maximum amount of litigation funding that Therium will provide under the [LFA] redacted, and to file with the Court an unredacted copy of the [LFA] under seal." The plaintiffs now wish to maintain the redactions in the version of the LFA that is publicly available.

[110] In support of this request, the plaintiffs state that Therium does not want its competitors to see how it prices cases and how it protects against downside risk. In addition, they maintain that disclosure of the sensitive information in the LFA, including the caps established therein, would not serve an access to justice purpose.

[111] I readily accept that information pertaining to the maximum amount of funding provided under the LFA is competitively sensitive. This includes the maximum amounts of the tranches in which funding will be advanced. In addition to being competitively sensitive, this information is sensitive in the sense that its disclosure to Amazon could well affect how Amazon conducts itself

in this proceeding. I also accept that the other, very limited, terms of the LFA that have been redacted are commercially sensitive and ought not to be disclosed to the defendants.

[112] However, I reject the plaintiffs' position that the information regarding the fee caps in the LFA ought to be kept confidential. For greater certainty, those caps will entitle Therium to the greater of the Multiplier (five times the committed funds) and 10% of the claim proceeds, subject to a cap of US$100,000,000. In my view, the Class Members have a strong interest in knowing those caps. To the extent that members of the media or the general public have any interest in this Motion, it would be difficult for them to fully appreciate the issues that have been raised without knowing those caps.

[113] Moreover, I accept the Amici's advice that I ought to be guided by the approach that has been taken in other cases, where information regarding caps and "multipliers" has not been kept confidential: see e.g., *Jensen*, above, at Exhibit "A", paragraph 5.1; *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974 (CanLII), 117 O.R. (3d) 150, above, at para 15; *Loblaw*, above, at paras 9-10; *Drynan*, above, at paras 14 and 109; *Flying E*, above, at para 25; *Houle 2*, above, at para 17; *TDL*, above, at para 24; *Schenk*, above, at para 15; *Stanway*, above, at para 8.

[114] Accordingly, I will grant the plaintiffs' request to maintain the confidentiality of the redacted terms relating to (i) the maximum amount of funding that Therium will provide under the LFA, including the maximum amount to be provided in tranches, (ii) certain circumstances under which it can apply to suspend or terminate the LFA, and (iii) the Project Plan included in

Appendix 1 to the LFA. However, I will not grant the plaintiffs' request to maintain the confidentiality of the above-mentioned caps.

VIII. Conclusion

[115] For the reasons set forth above, I will approve the LFA and grant the plaintiffs' request to maintain the confidentiality of the provisions that the plaintiffs have requested be redacted from the LFA, except for the amounts of the caps discussed immediately above.

[116] In closing, I consider it appropriate to address a troublesome aspect of this Motion. In brief, the Court was essentially presented with a "take it or leave it" proposition. According to class counsel, any attempt by the Court to modify the terms of the proposed LFA would raise a very real prospect of Therium backing away from this proceeding, thereby depriving the Class Members of their only realistic chance of advancing their case. Counsel suggested that the likelihood of finding another funder was low and that their prospects for persuading Therium to revisit the LFA, after having spent approximately three months negotiating it, were dim. Class counsel further suggested that it could take months to renegotiate the LFA, that the plaintiffs "will be prejudiced if the funding is not approved and made available immediately," and that the terms of the LFA are the "best" that could be obtained from Therium.

[117] It is unseemly to put the Court in this position. The Court is not a "rubber stamp." It exercises oversight of class proceedings for a reason. Despite the duty of loyalty and the responsibilities that class counsel have to their clients, it cannot be assumed that they will always put the interests of class members first when such agreements or arrangements are negotiated.

This is one important reason why the Court's approval of LFAs and contingency fee arrangements is necessary.

[118] Having regard to the foregoing, it is not prudent to expect that the Court will approve a proposed LFA without requiring certain modifications. This is especially so when the LFA contemplates the possibility of class members receiving nothing, or a relatively small share of claim proceeds, in scenarios that could reasonably be expected to raise legitimate questions among class members and the public at large. To the extent that such scenarios could have the potential to undermine public confidence in the Court and in the administration of justice, they may well need to be revisited and addressed.

[119] The better way in which to proceed would be for class counsel and litigation funders to be prepared for the possibility that modifications to a proposed LFA may need to be made to obtain the Court's approval. In other words, the parties to a proposed LFA should have a "plan B", in case the Court expresses concerns regarding one or more aspects of the LFA. They should also anticipate that the Court may well want to test assertions made by class counsel, by sending them back to discuss potential modifications with the litigation funder. It bears underscoring that this is particularly so where the proposed LFA contemplates the possibility described in the immediately preceding paragraph above. I pause to observe that the Amici agreed that this is an entirely reasonable manner for the Court to proceed in such circumstances. Indeed, after I requested that class counsel discuss the concerns I raised with respect to the initial version of the LFA that was filed with the Court, class counsel wrote the following week to advise that the

parties to the LFA had agreed to a proposed Amendment, which sufficiently addressed my concerns. (See discussion at paragraphs 68-77.)

[120] An even better way in which to proceed would be to structure proposed LFAs in a manner that more fairly calibrates and balances the returns to the litigation funder, class counsel and class members along the continuum of possible outcomes. I recognize and accept that it may be entirely appropriate to ensure that a litigation funder and class counsel are reimbursed for their out-of-pocket expenses and that they receive at least some reasonable return on their investment, in priority to any distribution being made to class members. However, it is not immediately apparent why the level of funding fees and legal fees should be invariable beyond the point at which their out-of-pocket expenses are reimbursed. A fairer approach, and one that would be better aligned with the interests of justice, would be to structure a proposed LFA in a manner that provides for a sliding scale of returns, so that the class members can begin to share in the claim proceeds after the out-of-pocket expenses of the litigation funder and class counsel have been reimbursed.

ORDER in T-445-20

THIS COURT ORDERS that:

1. The litigation funding agreement [**LFA**], dated December 29, 2020, between Therium Litigation Finance Atlas AP IC, Stephanie Difederico, Jameson Casey, Audrey Wells, Strosberg Sasso Sutts LLP, Orr Taylor LLP and IMK S.E.N.C.R.L./LLP, as amended on March 15, 2021, is approved.

2. The plaintiffs' request that certain redactions be made to the version of the LFA that will be made available to the public is granted, except for the redactions under the column entitled "Funding Fee", in the Schedule to the LFA. For greater certainty, the description of the fee caps (the greater of five times the committed funds for the various funding tranches and 10% of the claim proceeds, subject to a cap of US$100,000,000) shall not be redacted.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-445-20
STYLE OF CAUSE:	STEPHANIE DIFEDERICO v. AMAZON.COM, INC. ET AL.
PLACE OF HEARING	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND TORONTO, ONTARIO
DATE OF HEARING:	MARCH 5, 2021
ORDER AND REASONS:	CRAMPTON C.J.
CONFIDENTIAL ORDER AND REASONS ISSUED:	APRIL 9, 2021
PUBLIC ORDER AND REASONS ISSUED:	APRIL 15, 2021

WRITTEN SUBMISSIONS BY:

Mr. James Orr Ms. Annie Tayyab	FOR THE PLAINTIFF
Mr. Jay Strosberg Mr. David Wingfield	FOR THE PLAINTIFF
Mr. Tom Curry Mr. Jonathan Chen	AS AMICUS CURIAE

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