

Federal Court



Cour fédérale

**Date: 20250110**

**Docket: T-214-21**

**Citation: 2025 FC 51**

**Ottawa, Ontario, January 10, 2025**

**PRESENT: Mr. Justice Gascon**

***PROPOSED CLASS PROCEEDING***

**BETWEEN:**

**JOHN ZANIN**

**Plaintiff**

**and**

**OOMA, INC.  
OOMA CANADA INC.**

**Defendants**

**ORDER AND REASONS**

**I. Overview**

[1] The plaintiff, John Zanin, is a resident of Ontario who has subscribed to telephone services provided by the defendants, Ooma Inc. and Ooma Canada Inc. [together, Ooma]. Ooma is a home phone company that offers Voice over Internet Protocol [VoIP] telecommunication

services to individual and corporate clients. Such services allow audio interactions at home through an Internet connection rather than a traditional phone line. Ooma Canada Inc. is a British Columbia corporation that is wholly owned by Ooma Inc., a public U.S. corporation headquartered in California.

[2] Mr. Zanin submits that he subscribed to Ooma's Basic Home Phone service [Service] because it was advertised as being "FREE" or costing "\$0," but that he ended up paying monthly fees and applicable taxes of approximately \$5 to \$6 for the Service. Mr. Zanin alleges that Ooma falsely described its Service offered to residential customers as free, and that it wrongfully represented the real cost of its home phone services to customers. He claims that he is owed damages for this misleading representation and brings a motion seeking an order certifying this action as a class proceeding [Certification Motion] under subsection 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [Rules]. Mr. Zanin states that he is requesting relief in order to protect the rights of consumers to be free from false and/or misleading information, and other conduct that is contrary to free and fair competition in the marketplace.

[3] In his proposed consumer protection class action [Action], Mr. Zanin contends that Ooma's Service breaches paragraph 7(d) of the *Trademarks Act*, RSC 1985, c T-13 and, subsidiarily, sections 52 and 54 of the *Competition Act*, RSC 1985, c C-34. Broadly speaking, paragraph 7(d) of the *Trademarks Act* provides that no person shall make use, in association with goods or services, of any description that is false in a material respect and likely to mislead the public as to certain defined characteristics of the goods or services. Section 52 of the *Competition Act* makes it a criminal offence for any person to knowingly or recklessly make a

representation to the public that is false or misleading in a material respect, for the purpose of promoting the supply or use of a product. As for section 54 of the *Competition Act*, a criminal offence known as “double ticketing,” it prohibits a person from supplying a product at a price that exceeds the lowest of two or more clearly expressed prices at the time the product is supplied.

[4] Mr. Zanin seeks relief under section 53.2 of the *Trademarks Act* and section 36 of the *Competition Act*. Pursuant to section 53.2 of the *Trademarks Act*, a court may make an order providing for injunctive relief and the recovery of damages or profits, for punitive damages, and for the destruction or other disposition of any offending goods, packaging, labels, and advertising material, and of any equipment used to produce them. Section 36 of the *Competition Act* grants a statutory right of private action to recover damages for harm suffered as a result of certain criminal conduct prohibited by this legislation, including conduct covered by sections 52 and 54, as well as the cost of investigation and prosecution.

[5] As the proposed representative plaintiff for the class members, Mr. Zanin seeks damages or compensation from Ooma in a yet-undetermined amount on behalf of all individuals in Canada who are or were subscribed to Ooma’s Service between May 8, 2015 and the date this Action is certified as a class action [Class]. Mr. Zanin also asks for injunctive relief enjoining Ooma to cease describing its Service using the word “FREE” or otherwise representing that it costs \$0. As of June 2021, Ooma had 56,287 Canadian customers of the Service and thousands of previous customers.

[6] Mr. Zanin maintains that he satisfies all the required legal elements for certification:

(i) there is a reasonable cause of action; (ii) there is an identifiable class; (iii) there are common questions of law and fact; (iv) a class proceeding is the preferred procedure; and (v) he is an appropriate representative plaintiff for the Class.

[7] Ooma opposes Mr. Zanin's Action on two fronts. First, Ooma argues that this Court lacks jurisdiction to consider the Action and that the matter should be sent to arbitration. To that effect, Ooma filed a motion objecting to the Court's jurisdiction, or alternatively seeking a stay pending arbitration or a summary judgment dismissing the Action on the basis that there is no genuine issue for trial [Jurisdiction Motion]. The Jurisdiction Motion was heard by the Court in conjunction with the Certification Motion.

[8] Secondly, Ooma contends that, in any event, Mr. Zanin has failed to meet his burden of showing that the Action should be certified as a class proceeding. More specifically, Ooma submits that the conduct alleged by Mr. Zanin does not constitute a violation of any provision of the *Trademarks Act* or the *Competition Act*, and does not amount to an actionable conduct under paragraph 7(d) of the *Trademarks Act* or sections 52 or 54 of the *Competition Act*. As a result, Ooma concludes that Mr. Zanin has failed to meet the criteria for certification: (i) the statement of claim does not disclose a reasonable cause of action; (ii) the issues at hand do not qualify as common issues since Mr. Zanin has failed to provide some basis in fact for the existence or commonality of any liability or harm issues; (iii) without liability and harm as certifiable common issues, a class proceeding is not the preferred procedure; and (iv) Mr. Zanin is not an appropriate representative plaintiff.

[9] For the reasons below, I will grant Ooma's motion for a stay in favour of arbitration and I will dismiss Mr. Zanin's Certification Motion.

[10] I agree with Ooma that the Court does not have jurisdiction to hear Mr. Zanin's proposed class proceeding, as there is an arbitration agreement in place covering Mr. Zanin's purchase of Ooma's Service [Arbitration Clause]. In addition, there are valid and enforceable election of forum and class action waiver clauses [respectively, the Forum Selection Clause and the Class Action Waiver Clause]. Mr. Zanin has not put forward any exceptional grounds on the basis of public policy or unconscionability and any challenge to the arbitrator's jurisdiction should be referred to the arbitrator pursuant to the principle of competence-competence.

[11] In any case, regardless of the issue of jurisdiction, this Action fails on each and every statutory cause of action upon which it is based. I conclude that it is plain and obvious that the pleadings disclose no reasonable cause of action based on paragraph 7(d) and section 53.2 of the *Trademarks Act* or on sections 36, 52, and 54 of the *Competition Act*. The allegations of an actionable conduct are not anchored in material facts or law, boil down to bold assertions, and have no reasonable prospect of success. This suffices to deny certification.

## II. Background

### A. *Factual context*

[12] Mr. Zanin subscribed to the Service on January 9, 2020, and continued to be a customer of Ooma's Service as of August 2021. Of note, Mr. Zanin has since subscribed to an "add-on" to

the Service, which costs him an additional \$90.27 on an annual basis. This “add-on” is not the subject of this Action.

[13] Mr. Zanin subscribed to the Service after having seen an advertisement in a Costco magazine that allegedly presented the Service as costing \$0. In December 2019, prior to activating his account, he had bought the Telo — an Ooma hardware device that enables Ooma’s telephone services — from an independent retailer. In order to subscribe and use the Service, Ooma’s customers must purchase the Telo device, as it is specially designed to work with Ooma’s VoIP telephone services for home users.

[14] In January 2020, Mr. Zanin set up and activated his account with Ooma online, and he accepted Ooma’s *Standard Terms and Conditions of Agreement between Customers and Ooma* [Terms & Conditions] at the same time. Mr. Zanin says that, several days after he subscribed to the Service, he received an email that contained the Terms & Conditions. These Terms & Conditions include various clauses, including the Arbitration Clause, the Class Action Waiver Clause, and the Forum Selection Clause [together, the Limitation Clauses].

[15] The Service allows users to place and receive unlimited nationwide calls. The Service also includes several other services such as free “Ooma-to-Ooma” calls to another Ooma customer anywhere in the world, call-waiting and caller ID, 911 service calls, low-cost international calling, voicemail, MyOoma Online Portal, Online Call Log, Advanced Network/Firewall Configuration, and Ooma’s PureVoice HD Technology.

[16] As part of the Service, Ooma charges a monthly “Regulatory Compliance Fee” and “911 Service Fee” to its customers. Ooma admits that these fees form part of its revenues and that they amount to approximately \$5 per month per customer (before sales taxes). Mr. Zanin alleges that he was not aware of these fees, and that he bought and subscribed to the Service thinking it was free. While unlimited nationwide calling, voicemail, and 911 service are free, Ooma’s customers must pay monthly nominal fees and taxes for the whole Service plan.

[17] The amount of such monthly fees and taxes vary depending on the customer’s location and can be verified by entering a postal code at the relevant web page on Ooma’s website.

B. *Procedural history*

[18] The Action was initially launched by Ms. Fiona Chiu on February 3, 2021. By an order dated November 9, 2021, the Court granted the substitution of Mr. Zanin as the plaintiff in this proceeding. The Action was hence deemed to have been validly commenced by Mr. Zanin on November 8, 2021.

[19] Mr. Zanin filed his Amended Statement of Claim on November 9, 2021 [Statement of Claim]. In his Certification Motion, Mr. Zanin seeks the following orders from the Court, on his own behalf and on behalf of the Class members:

- A. a declaration that Ooma made use of one or more description(s) for the Service that is/are false in a material respect and likely to mislead the public as to the character, quality, quantity, or composition of that service, contrary to paragraph 7(d) of the *Trademarks Act*;

- B. an interim, interlocutory, and permanent injunction restraining Ooma from, either directly or indirectly, further making use of any description for the Service that is false in a material respect and likely to mislead the public as to the character, quality, quantity, or composition of the Service;
- C. damages (including nominal damages), accounting of profits, punitive damages, legal costs of this proceeding, or whichever one or more of those that Mr. Zanin or the Class members may elect after due inquiry, pursuant to sections 53.2 and/or 55 of the *Trademarks Act*;
- D. a declaration that Ooma's representations for the Service contravene section 52 of the *Competition Act*;
- E. a declaration that Ooma charged the Class members at a price higher than the lowest of two or more prices clearly expressed by Ooma for the Service, contrary to section 54 of the *Competition Act*;
- F. damages or loss, pursuant to section 36 of the *Competition Act*, for Ooma's violation of sections 52 and 54 of the *Competition Act*;
- G. costs of investigation and prosecution of this action pursuant to section 36 of the *Competition Act*;
- H. an order pursuant to Rules 334.16(1) and 334.17 certifying this Action as a class proceeding and providing any ancillary directions;
- I. an order pursuant to Rules 334.12(3), 334.16(1)(e), and 334.17(b) appointing Mr. Zanin as the representative plaintiff for the Class;
- J. an order pursuant to Rules 334.28(1) and (2) for the aggregate assessment of all monetary awards in favour of the Class members;



- K. prejudgment and post-judgment interest; and
- L. such further and other relief as this Court deems just.

[20] Mr. Zanin supported his Certification Motion with a short 14-paragraph affidavit of his own, affirmed on August 23, 2021, to which two exhibits were attached [Zanin Affidavit]. One exhibit included three screenshots of his billing history from his account that he accessed via Ooma's website. The other exhibit was a screenshot of his latest billing details from Ooma. Mr. Zanin was cross-examined on his affidavit by Ooma's counsel.

[21] On November 12, 2021, Ooma resisted Mr. Zanin's Certification Motion by filing its Amended Defence to the motion [Statement of Defence] as well as its Jurisdiction Motion.

Ooma relied on the following evidentiary record:

- A. The affidavit, dated June 10, 2021, of Roy Calvo, Vice-President of Customer Service at Ooma Inc. [Calvo Affidavit], to which several exhibits were attached;
- B. The affidavit, dated June 3, 2021, of Namrta Sabharwal, Corporate Controller at Ooma Inc. [Sabharwal Affidavit];
- C. The affidavit, dated October 14, 2021, of Kathleen Jensby, Senior Marketing Manager at Ooma Inc. [Jensby Affidavit], to which were attached an advertisement which appeared in the Christmas 2019 issue of the Costco Connection magazine.

[22] Mr. Calvo and Mr. Sabharwal were both cross-examined on their affidavits, and a written examination was sent to Ms. Jensby.

[23] Ooma's Jurisdiction Motion objects to the Court's jurisdiction and seeks, in the alternative, a stay of proceeding pending arbitration under subsection 50(1) of the *Federal Courts Act*, RSC 1985, c F-7 [*FC Act*] or a summary judgment dismissing the Action under Rules 213 and 215(1).

[24] The parties filed a consolidated motion record for Mr. Zanin's Certification Motion and Ooma's Jurisdiction Motion. The hearing of both motions took place in January 2022.

[25] After the hearing, the Court issued numerous directions dealing with the parties' requests to file newly issued decisions and post-hearing submissions on different issues relevant to this proceeding. On July 18, 2022, the Court denied counsel for Mr. Zanin's request to be granted leave to provide additional submissions regarding a post-hearing amendment to section 52 of the *Competition Act*. On October 17, 2022, the Court granted permission to both parties to make additional submissions regarding the Court's decision in *Difederico v Amazon.com, Inc*, 2022 FC 1256 [*Difederico FC*], issued in September 2022.

[26] On November 2, 2022, counsel for Mr. Zanin drew the Court's attention to the British Columbia Court of Appeal [BCCA] decision in *Valeant Canada LP/Valeant Canada SEC v British Columbia*, 2022 BCCA 366 [*Valeant BCCA*], an appeal from the British Columbia Supreme Court [BCSC] decision in *British Columbia v Apotex Inc*, 2022 BCSC 1, which had been cited in the parties' respective submissions. On July 10, 2023, counsel for Mr. Zanin sent to the Court the BCCA decision in *Live Nation Entertainment, Inc v Gornel*, 2023 BCCA 274

[*Gomel*], an appeal from the BCSC decision in *Gomel v Live Nation Entertainment, Inc*, 2021 BCSC 699, also previously cited.

[27] On July 27, 2023, the Court further granted permission to both parties to file additional written submissions with respect to the Federal Court of Appeal [FCA] ruling on *Difederico FC*, *Difederico v Amazon.com, Inc*, 2023 FCA 165 [*Difederico FCA*], issued on July 25, 2023.

[28] On August 8, 2023, the Court again allowed the parties' request to file additional written submissions, this time with respect to the BCCA decisions in *Williams v Amazon.com Inc*, 2023 BCCA 314 [*Williams BCCA*] and *Petty v Niantic Inc*, 2023 BCCA 315 [*Petty BCCA*], two matters on which the parties had made references to the BCSC decisions at the hearing (*Williams v Amazon.com Inc*, 2020 BCSC 300 [*Williams BCSC*] and *Petty v Niantic Inc*, 2022 BCSC 1077 [*Petty BCSC*]).

[29] On August 15, 2023, the Court denied a request made by counsel for Mr. Zanin to provide additional post-hearing submissions regarding a decision of a U.S. District Court dealing with the Judicial Arbitration Mediation Services [JAMS], to which Ooma's Arbitration Clause makes reference.

[30] On January 8, 2024, counsel for Mr. Zanin drew the Court's attention to the *Lochan v Binance Holdings Limited*, 2023 ONSC 6714 [*Lochan*] decision recently released by the Ontario Superior Court of Justice [ONSC] and, on January 22, 2024, they sent to the Court a judgment

issued by the Manitoba Court of Appeal [MBCA] in *Pokornik v SkipTheDishes Restaurant Services Inc*, 2024 MBCA 3 [*Pokornik*].

[31] Most of these additional authorities submitted by the parties post-hearing dealt with motions to stay proposed class proceedings due to the presence of an arbitration provision. I further observe that, on May 16, 2024, the Supreme Court of Canada [SCC] dismissed the applications for leave to appeal that had been filed against each of *Difederico FCA*, *Petty BCCA*, and *Williams BCCA* (SCC case numbers 40927, 40932 and 40935).

[32] On June 25, 2024, counsel for Mr. Zanin sought leave from the Court to provide further submissions regarding the Court's June 24, 2024 decision in *Lin v Uber Canada Inc*, 2024 FC 977 [*Uber*], which was authored by the undersigned. Counsel for Mr. Zanin also indicated that on June 13, 2024, Ooma, Inc. apparently amended its arbitration terms and conditions and that, accordingly, they sought permission to make representations on how these amendments may be relevant to the interpretation of Ooma's Terms & Conditions, and how they may affect claims arising since June 13, 2024. In a direction issued on July 12, 2024, the Court denied Mr. Zanin's request.

[33] Finally, on September 27, 2024, counsel for Mr. Zanin brought to the Court's attention the Ontario Court of Appeal [ONCA] decision in *RH20 North American Inc v Bergman*, 2024 ONCA 445 [*RH20*] on the topic of waiving the right to arbitrate when substantive relief is sought by a defendant.

C. *Summary of the parties' allegations*

[34] Mr. Zanin pleads three causes of action. First, he alleges that Ooma, Inc. breached paragraph 7(d) of the *Trademarks Act*, and consequently seeks remedies under section 53.2 of the same act. Second, he alleges that both Ooma Inc. and Ooma Canada Inc. breached section 54 of the *Competition Act* and thus seeks remedies under section 36 of the same act. Third, he alleges that Ooma, Inc. contravened section 52 of the *Competition Act*, and therefore seeks remedies under section 36 of the same act.

[35] On his first cause of action, Mr. Zanin submits that Ooma Inc. misled the public by describing the Service as “FREE.” He further contends that paragraph 7(d) of the *Trademarks Act* aims to protect consumers, and that any impacted consumer can thus be an “interested person” under section 53.2 of the same act. In support of this cause of action, Mr. Zanin relies on several of the arguments he makes regarding the alleged breach of section 52 of the *Competition Act*. More specifically, Mr. Zanin maintains that detrimental reliance does not need to be invoked when seeking relief under section 53.2 of the *Trademarks Act*.

[36] Ooma responds that Mr. Zanin’s argument is flawed, given that paragraph 7(d) of the *Trademarks Act* does not cover misrepresentation regarding the price of a product or service. Ooma notes that Mr. Zanin has not identified, in his pleadings, the element of paragraph 7(d) underpinning his claim that it misled the public. Relying on case law and doctrinal sources, Ooma further argues that section 7 of the *Trademarks Act* — a federal statute — should receive a restrictive reading in order to avoid encroaching provincial jurisdiction on “property and civil

rights” under subsection 92(13) of the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, App II, No. 5 (see for example *MacDonald et al. v Vapor Canada Ltd*, 1976 CanLII 181 (SCC), [1977] 2 SCR 134 at p 172 [*Vapor Canada*]; *Energizer Brands, LLC v The Gillette Company*, 2018 FC 1003 at para 75 [*Energizer Brands FC*], rev’d in part on other grounds 2020 FCA 49 [*Energizer Brands FCA*]; Tessa Scassa, *Canadian Trademark Law*, 1st ed (Markham: LexisNexis Canada, 2010) at pp 443–444 [*Scassa on Trademarks*]).

[37] In his reply, Mr. Zanin submits that Ooma is building a straw man argument in claiming that his cause of action under paragraph 7(d) of the *Trademarks Act* relies solely on price. He explains that he has provided, in his Statement of Claim, other descriptions of Ooma’s Service that fall within the elements listed under subparagraph 7(d)(i) of the *Trademarks Act*. He specifically identifies the following descriptions, listed at paragraph 25 of the Statement of Claim [together, the Descriptions]:

- A. “FREE home phone service / Service téléphonique à domicile GRATUIT”;
- B. “Get crystal-clear calling for free in Canada / Service téléphonique résidentiel gratuit”;
- C. “Get crystal-clear nationwide calling for free”;
- D. “Free Plan”;
- E. “Phone service - \$0.00 / mo\*”;
- F. “Telo’s Free\* Home Phone Service”;
- G. “How Ooma Telo Delivers Free Home Phone Service”; and
- H. “Free\* Voip.”

[38] Additionally, Mr. Zanin claims that Ooma should have given notice of a constitutional question to support its position on paragraph 7(d) of the *Trademarks Act*, and that its failure to do so means that constitutional arguments cannot be examined by this Court.

[39] Mr. Zanin's second cause of action is section 54 of the *Competition Act*. He submits that he meets the three elements of this provision: (i) the supply of a product by a person (in this case, the Service); (ii) at a price that exceeds the lowest of two or more prices (\$5.41 instead of \$0); (iii) which prices are clearly expressed on the product, on anything attached to or accompanying the product, or on any point-of-purchase display or advertisement (in this case, the monthly invoice).

[40] Mr. Zanin argues that his case is similar in many respects to *Lin v Airbnb, Inc*, 2019 FC 1563 [*Airbnb*], but that the currently alleged breach of section 54 of the *Competition Act* is even more conspicuous given that the two prices are expressed in the same document, rather than being displayed on two sequential web pages. Indeed, Mr. Zanin alleges that his monthly invoice shows the price of \$0 for the Service, as well as \$5.41 for the fees, which to him amounts to double ticketing.

[41] Ooma refutes this conclusion, and argues that none of the three constitutive elements of section 54 of the *Competition Act* is met. The first element is absent since it is unclear which product Mr. Zanin is referring to. Indeed, some of the advertisements filed by Mr. Zanin in support of his Action do not mention the Service, while others advertised different Ooma products. Regarding the second element, the two alleged prices were expressed on the monthly

invoice — after Mr. Zanin had actually subscribed to the Service. This means that the two prices could not have misled Mr. Zanin into purchasing the Service. As to the third element, the two prices were not displayed on the product, on anything attached to or accompanying the product, or on any point-of-purchase display or advertisement (paragraphs 54(1) (a) to (c) of the *Competition Act*). As mentioned above, the prices were expressed on the monthly invoice.

[42] In his reply, Mr. Zanin argues that the monthly invoice for a service is clearly captured under the expression of paragraphs 54(1) (b) or (c) of the *Competition Act*, and that the invoice accompanies the Service. He also maintains that his online Ooma account can be considered as a “point-of purchase display” (paragraph 54(1)(c)). In the end, Mr. Zanin believes that Ooma’s arguments amount to excluding “services” from the application of section 54 as if the sole application of this provision was to physical goods.

[43] Mr. Zanin’s third cause of action is that Ooma Inc. described the Service as “FREE,” which amounts to false or misleading representation to the public pursuant to section 52 of the *Competition Act*. He further argues that he does not need to prove detrimental reliance to seek relief under section 36 for there to be a breach of section 52. In other words, he would not need to prove that he effectively relied on Ooma’s misrepresentation to his own detriment. In support of his position, he notably refers to *Krishnan v Jamieson Laboratories Inc*, 2021 BCSC 1396 at paragraphs 178–190 [*Krishnan*] and *Rebuck v Ford Motor Company*, 2018 ONSC 7405 at paragraphs 32–36 [*Rebuck*]. Simply put, Mr. Zanin contends that detrimental reliance is not a requirement for a claim under section 36 of the *Competition Act*.



[44] Ooma replies that it committed no false or misleading representation, as all fees charged to its customers are expressly disclosed in its materials. In addition, Ooma submits that the law is clear: detrimental reliance is necessary for a claim under sections 36 and 52 of the *Competition Act* to succeed (*Airbnb* at para 71; *Murphy v Compagnie Amway Canada*, 2015 FC 958 at paras 79–85 [*Amway*]). Ooma further underscores the fact that Mr. Zanin is still a customer of its Service as a sign that he did not suffer detriment by relying on Ooma’s representation of the Service.

D. *Relevant provisions*

[45] The relevant provisions of the Rules are reproduced in Annex A to these reasons while the relevant provisions of the *Competition Act* and the *Trademarks Act* are found in Annex B.

III. Contextual Considerations

[46] Certain preliminary remarks are in order before going any further. During the hearing, the Court had difficulty obtaining clarifications from counsel for Mr. Zanin regarding what was actually contained, said, or meant in their pleadings and submissions.

[47] Counsel for Mr. Zanin were given multiple opportunities to explain and clarify their pleadings and submissions but, regrettably, the Court continued to receive vague and convoluted answers that were not particularly helpful. It was a painful and disconcerting process that left the Court wondering what was actually pleaded or submitted by Mr. Zanin in his Action. Counsel for Mr. Zanin were unable, or unwilling, to directly answer the Court’s questions, preferring to

stick to contradictory elements in their own documents and pleadings. More specifically, they were unable to clearly answer very simple questions regarding the following issues: (i) what were Ooma's exact representations and advertisements; (ii) whether "FREE" and \$0 meant the same thing, and whether or not "FREE" referred to a price; and (iii) whether or not Mr. Zanin had accepted Ooma's Terms & Conditions.

[48] Each of these issues will be addressed separately below.

A. *Ooma's representations*

[49] In his submissions, Mr. Zanin stated that Ooma represented to the public that the Service is free. According to Mr. Zanin, Ooma allegedly described its Service as follows: (i) "FREE home phone service / Service téléphonique à domicile GRATUIT"; (ii) "Get crystal-clear calling for free in Canada. / Service téléphonique résidentiel gratuit"; (iii) "Get crystal-clear nationwide calling for free"; (iv) "Free Plan"; (v) "Phone service - \$0.00 / mo\*"; (vi) "Telo's Free\* Home Phone Service"; (vii) "How Ooma Telo Delivers Free Home Phone Service"; and (viii) "Free\* Voip" (Statement of Claim at para 25).

[50] Mr. Zanin further pleaded that these Descriptions were found in the following locations: (a) on the packaging of the Ooma Telo devices; (b) on Ooma's Canadian website; (c) on the Class members' monthly billing details; (d) during the process of subscribing to the Service; and (e) on Ooma's social media pages (Statement of Claim at para 24). In his Statement of Claim, Mr. Zanin repeatedly stated that the Service was free or cost \$0 (Statement of Claim at paras 3,

4, 24, 25, 31b) and d), 36, 41e), 43, 51, and 59). He stated the same at questions 1, 3, 4 and 5 of his list of proposed common issues.

[51] However, a review of the materials before the Court shows that Mr. Zanin offered a partial, selective, and misleading reading of what Ooma's representations truly are.

[52] Further to the Court's request, counsel for Mr. Zanin summarized all of Ooma's representations in a document labelled "Summary of Representations," which was submitted to the Court on the third day of the hearing. One thing stands out from this document: in all of the extracts and references mentioned in the document, there is not a single stand-alone representation or expression where Ooma states that its phone Service is "FREE" or "\$0," without following it with a specific mention or reference to the "applicable taxes and fees" that must be paid.

[53] Contrary to what Mr. Zanin pleaded and his counsel argued, Ooma's representations are never limited to the words "FREE" or "\$0." They are always followed by additional references to applicable taxes and fees or at least by an asterisk referring to such taxes and fees, on the same page, on the same document, or on the same packaging as where the expression "FREE" or "\$0" is mentioned. When Ooma's advertisements refer to "Free phone service" or "FREE home phone service," those words are immediately followed by the words "Pay only applicable taxes and fees" or "Pay only taxes and fees," in the same font or in a slightly smaller one. These words appear on the same page as the "FREE" or "\$0" references, and consumers can click on a link to see the rates or check the back of the packaging for details. Similarly, Ooma's monthly invoices

refer to the “Base Phone Service” at a “subtotal” of “\$0.00,” to which are added various taxes and fees such as the “911 Service Fee” and the “Regulatory Compliance Fee,” for a “total” amount including everything. Billing details refer to the “Base Phone Service” at a “subtotal” price of “\$0.00,” to which are added taxes and fees for a total fee varying between \$5 and \$6. The document “Ooma Billing History” lists the Basic Phone Service at \$5.07.

[54] In other words, while Ooma’s documents state that the Service is free, they always specify, on the same page or on the same document or packaging, that there are applicable taxes and fees, for which the rates can be obtained by clicking on a link.

[55] Moreover, the record shows that the references to applicable taxes and fees are not in the fine print, in a barely legible print, to a footnote, or to somewhere else in the Ooma materials. They are rather in very close proximity to the “FREE” or “\$0” claims, adjacent to them, and intimately part of Ooma’s representations. It is clear from the pleadings and the documents attached to them that Ooma’s representations are not that the Service is “FREE” or “\$0,” without more.

[56] I find it troubling to observe that, throughout his pleadings and submissions, Mr. Zanin presented to the Court what appears to be a misleading, cherry-picking exercise of what Ooma’s representations of its Service actually are. It is somewhat ironic to see such an approach in a proposed class action seeking to sanction allegedly misleading pricing practices.

B. *“FREE or \$0”*

[57] At the hearing, counsel for Mr. Zanin repeatedly attempted to convince the Court that the terms “FREE or \$0” apparently referred to two different realities and concepts, and that “FREE” could somehow be disconnected from a notion of price. I find this argument to be entirely without merit. It is untethered to any evidence or legal precedents, it offends common sense, and it is not even supported by Mr. Zanin’s own pleadings.

[58] First and foremost, Mr. Zanin’s attempt to differentiate the terms “FREE or \$0” is an affront to the common sense shared by all reasonable persons. As revealed by the Merriam-Webster Dictionary — or any other credible dictionary —, the plain meaning of the word “free” in the commercial context is without a doubt “not costing or charging anything” [emphasis added] (Merriam-Webster Dictionary, “Free” (last visited December 18, 2024), online: <<https://www.merriam-webster.com/dictionary/free>>). This necessarily entails that “free” refers to a cost of \$0, and is accordingly a form of price.

[59] In the same vein, Mr. Zanin refers interchangeably to “FREE” or “\$0” throughout his own pleadings and submissions. It is obvious to any reader that Mr. Zanin and his counsel employed these two terms as if they meant the very same thing. In other words, “FREE” is always equated with or assimilated to “\$0,” and is evidently the expression of a price.

[60] The combined words “FREE or \$0” (and slight stylistic variants) are used no less than nine times in Mr. Zanin’s Statement of Claim, and they are repeated in his Reply. Similarly, they appear four times in his list of common issues. Counsel for Mr. Zanin have also used these exact words seven times in Mr. Zanin’s Memorandum of Fact and Law in support of his Certification

Motion, as well as eight times in their representations in reply. Likewise, numerous references to these two notions together were made in each of the pleadings and submissions in the more specific context of the “paragraph 7(d) of the *Trademarks Act*” cause of action: three times in the Statement of Claim (at paras 36, 40e), 59) as well as three times in Mr. Zanin’s Memorandum of Fact and Law (at paras 5, 105, 106).

[61] I further observe that, in one of the Competition Bureau documents provided by counsel for Mr. Zanin as part of their supporting authorities, at subsection 3(6) of the document entitled “False or misleading representations,” the word “Free” is listed as a subsection of the discussions on various forms of “representations on price.”

[62] Even counsel for Mr. Zanin often used the term “pricing” in their oral argument or in their submissions when they meant to refer to “FREE” or “\$0.”

[63] The Court gave ample opportunity to counsel for Mr. Zanin to clarify their position at the hearing, but they were either unable, or unwilling, to do so. Rather, they persisted in their position that “FREE” and “\$0” somehow referred to two different realities, and that “FREE” could apparently be a concept detached from the notion of price.

[64] I wholly reject this argument. In short, to claim that “FREE” is not an expression of a price and is somehow different than \$0 in the commercial context of Ooma’s representations of the Service is preposterous and entirely unsupported by the most basic common sense, by Mr. Zanin’s own pleadings and submissions, and by any precedents.

C. *Acceptance of Ooma's Terms & Conditions*

[65] I finally turn to the issue of Mr. Zanin's acceptance of Ooma's Terms & Conditions.

Again, counsel for Mr. Zanin could not or would not answer the question clearly. They claimed that there was no evidence of acceptance, or at least that it was not clear whether the Terms & Conditions were accepted or not, including the Limitation Clauses they contain.

[66] Mr. Zanin states that he received an email containing the Terms & Conditions after his subscription to the Service, which happened days after he bought the Telo device in December 2019. Based on this, he concludes that there is a strong case to believe that he did not accept the Terms & Conditions when he subscribed to the Service, and that the contract binding him to Ooma was actually formed when he purchased the Telo device.

[67] With respect, I do not agree with the above position. Upon review of the materials before me, I am satisfied that Mr. Zanin accepted Ooma's Terms & Conditions when he created his account with Ooma, and that the Limitation Clauses are valid in law and contractually binding.

[68] The Terms & Conditions — referred to as the "Terms of Use" by Mr. Zanin — were first mentioned and invoked by Mr. Zanin in the Statement of Claim at paragraphs 21, 22, 60, and 61. Mr. Zanin's Action is indeed founded on the Terms & Conditions.

[69] In reality, the following evidentiary record before the Court confirms that Mr. Zanin agreed to the Terms & Conditions.

[70] During cross-examination, Mr. Zanin was asked whether he had accepted Ooma's Terms & Conditions when creating an account after purchasing the Telo device, and he answered "I would imagine that is a part of it, yes" (Cross-Examination of Mr. Zanin at p 26). When asked at what moment he accepted the Terms & Conditions, Mr. Zanin responded that it "was in December 2019," though he could not recall a more specific date (Cross-Examination of Mr. Zanin at p 26).

[71] Moreover, Mr. Calvo confirmed that Ms. Chiu — the plaintiff at the time he filed his evidence — had created her account and accepted the Terms & Conditions at the same time (Calvo Affidavit at paras 19, 32). No contrary evidence was filed by Mr. Zanin on this point. Mr. Calvo further added that Ms. Chiu relied on and sent two versions of the Terms & Conditions to Ooma's counsel (Calvo Affidavit at para 32). In addition, in a request to admit, counsel for Ms. Chiu requested that Ooma admit the authenticity of the Terms & Conditions.

[72] Mr. Zanin argues that it was Ooma's obligation to prove that the Arbitration and Class Action Waiver Clauses were effectively brought to Mr. Zanin's attention at the time the contract was entered into. In support of his position, Mr. Zanin relies on *Tilden Rent-A-Car v Clendenning*, 1978 CanLII 1446 (ONCA), 18 OR (2d) 601 [*Tilden*] and *Thornton v Shoe Lane Parking Ltd*, [1970] EWCA Civ 2 [*Thornton*], an English case. Mr. Zanin claims that Ooma failed to do so.



[73] It is not disputed that a party invoking the terms of an arbitration clause bears the burden to prove that the clause was entered into and was in force and enforceable at the time it was contracted (*Stella Jones Inc v Mariana (The)*, 2001 FCT 1148 at paras 8–9, *aff'd* 2002 FCA 215; see also: *Brentwood Plastics Inc v Topsyflex Flexible Packaging Ltd*, 2014 MBQB 97 at para 20). Indeed, “[i]f there is no arbitration provision contracted for at the relevant time, that ends the matter [of arbitration]” (*Secure Solutions Inc v Smiths Detection Toronto Ltd*, 2011 ONCA 337 at para 4 *in fine*). However, I am not persuaded by Mr. Zanin’s arguments and, in light of the above evidence, I am satisfied that the disputed clauses were brought to Mr. Zanin’s attention.

[74] The Arbitration and Class Action Waiver Clauses were directly part of the Terms & Conditions, and capitalized letters were used in section 16 of the contract to introduce them and draw the customer’s attention to their importance. In previous cases, similarly structured arbitration clauses were found to provide adequate notice to consumers (*Difederico FC* at para 78, citing *Kanitz v Rogers Cable Inc*, 2002 CanLII 49415 (ONSC), 58 OR (3d) 299 at paras 30–33). Mr. Zanin was directed to the Terms & Conditions by clicking on them. Evidence on the record, including captures from Ooma’s website as well as the affidavit and cross-examination of Mr. Calvo, establishes that the Terms & Conditions for the Service were accessible to Mr. Zanin via a hyperlink when he subscribed to the Service.

[75] It is now well recognized that Mr. Zanin accepted the Limitation Clauses by clicking on and accepting the Terms & Conditions: the presence of a hyperlink to terms and conditions in an electronic consumer contract suffices to bind consumers to those terms, even if they did not click on the link or read the terms (*Uber* at para 181, citing *Hazell v Doordash Technologies Canada*

*Inc*, 2022 BCSC 2497 at para 74 [*Doordash*]; see also: *Tahmasebpour v Freedom Mobile Inc*, 2024 BCSC 726 at para 26 [*Tahmasebpour*], citing *Doordash* at para 74).

[76] In *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 [*Dell*], the SCC made the following remarks on hyperlinked terms and conditions within electronic consumer contracts:

[100] The evidence in the record shows that the consumer could access the page of Dell’s Web site containing the arbitration clause directly by clicking on the highlighted hyperlink entitled “Terms and Conditions of Sale.” This link reappeared on every page the consumer accessed. When the consumer clicked on the link, a page containing the terms and conditions of sale, including the arbitration clause, appeared on the screen. From this point of view, the clause was no more difficult for the consumer to access than would have been the case had he or she been given a paper copy of the entire contract on which the terms and conditions of sale appeared on the back of the first page.

[101] In my view, the consumer’s access to the arbitration clause was not impeded by the configuration of the clause; to read it, he or she needed only to click once on the hyperlink to the terms and conditions of sale. The clause is therefore not an external one within the meaning of the *Civil Code of Québec*.

[Emphasis added.]

[77] As for *Tilden* and *Thornton*, these cases can easily be distinguished from the present matter. In *Tilden*, the ONCA ruled that the defendant could not rely on unusual and onerous provisions in a standard form contract to exclude its own liability when it was aware that the plaintiff had not contracted them knowingly. The court deemed it reasonable to expect from a party intending to rely on stringent or onerous provisions contained in a standard form contract to have to alert the other party of their presence. I am satisfied that, in the circumstances of this case, Ooma has taken reasonable measures to draw the Arbitration and Class Action Waiver

Clauses, as well as the Forum Selection Clause, to the attention of its customers at the time of subscription to the Service.

[78] In *Thornton*, the England and Wales Court of Appeal found that the onerous conditions at issue were not part of the contract, as they were not available to the customer of the parking lot at the time of buying his ticket for the lot. In that case, the disputed condition was posted in a separate place and was an external clause to the contract. Mr. Zanin references this case in support of his argument that Ooma's Terms & Conditions were allegedly sent only after he had already subscribed to the Service. However, this case is distinguishable from Mr. Zanin's situation as the clauses at issue here were not outside the main contractual agreement — namely, the Terms & Conditions — and were brought to Mr. Zanin's attention at the time of the contract.

[79] In sum, I am satisfied that the Terms & Conditions, including the Limitation Clauses, have been entered into between the parties.

[80] In any event, Mr. Zanin's argument that he somehow had not accepted Ooma's Terms & Conditions is unhelpful, as he is essentially self-sabotaging the success of his own Action. Indeed, if I were to accept this argument, it would lead to an immediate dismissal of his Certification Motion. As was pointed out during the hearing, Mr. Zanin must demonstrate that he is an appropriate representative of the Class to continue his Action. If Mr. Zanin was not bound by the Terms & Conditions, he would have no contractual relationship with Ooma and no standing to challenge the Limitation Clauses and take action against Ooma. Consequently, he would not meet the requirements to be a representative plaintiff and the Action would fail.

#### IV. Preliminary Issues

[81] Before addressing the substantive issues raised by the parties, I must first rule on five preliminary matters. These matters pertain to the limitation period in class actions, the rule of fairness as prescribed by *Browne v Dunn*, 1893 CanLII 65 (FOREP), 6 R 67 (HL (Eng)) [*Browne*], attornment to jurisdiction, the need for a notice of constitutional question, and Ooma's alternative motion for summary judgment.

##### A. *Limitation period*

[82] Ooma submits that the calculation of the limitation period applicable to this Action should be computed from the date on which the Court renders its decision on certification, as it is the certification of the Action as a class action that interrupts the limitation period. Ooma comes to this conclusion by noticing that the Rules make no mention of the possibility of staying the limitation period, as opposed to provincial statutes that are explicit on this point.

[83] Mr. Zanin responds that Ooma's position on the calculation of the limitation period is not supported by the law and that it defies common sense. He explains that adopting such an argument would create a situation where many class actions would be defeated right away, as the certification process, in addition to the reserve period for drafting the judgment, may take a long time. At the hearing, Mr. Zanin identified *Airbnb* as an example of a certification decision of this Court where the limitation period was based on the filing date of the statement of claim, instead of on the date on which the Court granted certification.

[84] I agree with Mr. Zanin that the calculation of the limitation period applicable to claims by Class members starts from the filing of the proposed class action, not from the Court's decision on certification. This has been the long-standing practice of the Court, and Ooma has not provided any convincing arguments to depart from this approach.

B. *The Browne rule*

[85] Mr. Zanin submits that, contrary to Ooma's allegations, he does not base his claim on the Costco advertisement and that he has not included it in his filing for this very reason. The Costco advertisement was filed by Ooma following Mr. Zanin's cross-examination.

[86] In response to Ooma's alternative motion for summary judgment, Mr. Zanin argues that Ooma should not be allowed to use the Costco advertisement in order to contradict him and attack his credibility. Mr. Zanin maintains that he was never shown the advertisement since it was only brought up by Ooma after his cross-examination. Therefore, he was never given the opportunity to explain any alleged discrepancy between his testimony and the information provided in the Costco advertisement. This, says Mr. Zanin, amounts to contradicting the fundamental rule of fairness set out in *Browne*.

[87] *Browne*, a seminal British House of Lords criminal case, establishes that contradictory evidence should be presented to witnesses so that they may address and explain any alleged discrepancy that could "impeach" their credibility (*Browne* at pp 70–71). Lord Herschell has described this rule as "essential to fair play and fair dealing with witnesses" (*Browne* at p 71). The rule reflects a confrontation principle in the context of the cross-examination of witnesses

where the parties are opposed in interest on disputed factual issues (*R v Megill*, 2021 ONCA 253 at para 110; *R v Quansah*, 2015 ONCA 237 at para 76 [*Quansah*]).

[88] The *Browne* rule is a principle of general application in Canadian law (*R v Lyttle*, 2004 SCC 5 at para 65 [*Lyttle*]) and has since been codified as section 11 of the *Canada Evidence Act*, RSC 1985, c C-5 (*JD Irving, Limited v Siemens Canada Limited*), 2016 FC 69 at para 43 [*JD Irving*]). It is not a fixed rule, and the extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case at hand (*Lyttle* at para 65; *R v Lambert*, 2024 ONCA 391 at para 17; *Quansah* at para 101).

[89] The two governing principles of the *Browne* rule are best summarized in *Quansah*. Although decided in the criminal law context, *Quansah* has since been referenced in numerous civil and commercial law matters (see for example: *Trillium Motor World Ltd v Cassels Brock & Blackwell LLP*, 2017 ONCA 544 at para 316; *Yan v Nadarajah*, 2017 ONCA 196 at para 15; *JD Irving* at para 43; *2287913 Ontario Inc v ERSP International Enterprises Ltd*, 2021 ONSC 3927 at para 12). First, the *Browne* rule is rooted in considerations of fairness, and “its application lies within the sound discretion of the trial judge and depends on the circumstances of each case” (*Quansah* at para 80). This means that the trial judge enjoys broad discretion in choosing an appropriate remedy for a breach of the rule, and can weigh several competing factors in doing so, including the seriousness and context of the breach as well as the timing of the objection to the impugned piece of evidence (*Quansah* at para 117). Second, the rule can still be respected in contexts where not every piece of evidence has been presented to the witness, as its application is confined to matters of substance: the evidence must confront the witness with substantive issues

on which the party seeks to impeach the witness's credibility and on which the witness was denied the opportunity to explain, as there was no suggestion whatsoever that the witness's story was not accepted (*Quansah* at para 81).

[90] In the present case, Ooma submits that Mr. Zanin provided no factual basis for his claim and that this alone should suffice to dismiss his Action. Mr. Zanin provided no information apart from the fact that he had first heard about the Service in a Costco magazine around Christmas 2019, and that the Service was allegedly advertised as a “zero dollar (\$0.00) home phone” (Cross-examination of Mr. Zanin at pp 14–15).

[91] At the hearing, counsel for Ooma explained that they added the Costco advertisement in order to complete the record following Mr. Zanin's cross-examination, and that this was done late in the proceeding as a result of Mr. Zanin's late substitution as the plaintiff in this case. In its written submissions before this Court, Ooma argued that the Costco advertisement is unequivocal on the fact that customers of the Service must pay monthly applicable taxes and fees, and that the claim that a customer would have sincerely understood that he or she could benefit from free phone service for life is simply not consistent with the relevant text, nor with the general impression of the advertisement. Ooma submits that Mr. Zanin's thesis is based on a truncated reading of the Costco advertisement, and questions Mr. Zanin's credibility.

[92] I recognize that Mr. Zanin did not have the opportunity to address the alleged discrepancy between his testimony and the actual text of the Costco advertisement. I also find that this advertisement is material to this case as it is — in Ooma's own words — a “key

element” of Mr. Zanin’s claim. I further note that Ooma directly raised the question of Mr. Zanin’s credibility in its written submissions. However, in this case, I am satisfied that I can use my broad discretion to determine that Ooma’s reliance on the Costco advertisement did not breach the *Browne* rule.

[93] In my view, the filing of the Costco advertisement occurred in a very specific set of circumstances that I have not seen replicated in the case law applying *Browne*. Ooma filed the Costco advertisement in order to complete the record following Mr. Zanin’s cross-examination and Mr. Zanin’s own omission to provide it. The only reason this was done late in the proceeding is due to the late substitution of Mr. Zanin as plaintiff. Moreover, Mr. Zanin could have sought permission to file additional affidavit evidence to address the discrepancy, but never did.

### C. *Attornment to jurisdiction*

[94] Mr. Zanin submits that Ooma’s Jurisdiction Motion, filed on the record pursuant to an order issued by the Court on March 22, 2021 [March 2021 Order], constitutes attornment to the Court’s jurisdiction, as its contents allegedly exceeded the scope of the March 2021 Order (*Stuart Budd & Sons Limited v IFS Vehicle Distributors*, 2014 ONCA 546 at para 33 [*Stuart Budd*]; *Re: HarperCollins*, 2017 CACT 14 at para 79 [*HarperCollins*]). Given Ooma’s alleged attornment to the Court’s jurisdiction (*Stuart Budd* at para 33; *Van Damme v Gelber*, 2013 ONCA 388 at paras 21–24 [*Van Damme*]), says Mr. Zanin, the Court should not consider Ooma’s Limitation Clauses any further.



[95] Mr. Zanin takes particular issue with the fact that Ooma's Jurisdiction Motion mentioned merits issues for summary determination and that these were allegedly not contemplated by the March 2021 Order. The first issue refers to paragraphs 27–30 of Ooma's Jurisdiction Motion filed on November 12, 2021. Mr. Zanin submits that, in these paragraphs, Ooma is inviting the Court to make factual determinations on Ooma Canada Inc.'s operations, and that this amounts to inviting the Court to make a merits determination. The second issue refers to paragraphs 16–18 of Ooma's amended notice of motion, filed pursuant to another order issued by the Court on November 9, 2021 [November 2021 Order]. Mr. Zanin argues that Ooma attorned to the Court's jurisdiction by advancing that no genuine issue for trial existed in this case by reason of Mr. Zanin's failure to disclose the Costco advertisement.

[96] Mr. Zanin submits that Ooma's strategy amounts to speaking from both sides of its mouth: Ooma cannot argue that the Court has no jurisdiction while, at the same time, invite the Court to decide certain issues on the merits via its Jurisdiction Motion. Rule 208 lists situations where a party can bring a motion to the Court without attorning to its jurisdiction, but summary judgment motions are not listed therein. Additionally, Mr. Zanin argued at the hearing that Ooma has not addressed the true problem found in its proceedings, namely, the fact that it stepped outside of the bounds of the March 2021 Order by dealing with merits issues. Finally, in his last post-hearing submissions made in late September 2024, Mr. Zanin relied on *RH20* to contend that Ooma breached their negative obligation not to seek the resolution of disputes subject to an arbitration agreement in domestic courts (*RH20* at para 41).

[97] I am not persuaded by Mr. Zanin's arguments on this issue and I find that Ooma has not attorned to the Court's jurisdiction.

[98] In principle, I recognize that presenting arguments on the merits of a case may constitute attornment. However, there is no attornment to jurisdiction when a party has made an express reservation of rights before defending to a certification motion, let alone when said reservation has been twice confirmed by the Court.

[99] In *Van Damme*, the ONCA found that a party had attorned to the jurisdiction of the New York Supreme Court by litigating the merits of the claim in that jurisdiction. In that case, the court found that the respondent's conduct in advancing a motion for summary judgment went far beyond his jurisdictional challenge, as he chose to advance substantive defences on the merits. Importantly, this motion was not precipitated by any court order. By pursuing his motion, the respondent implicitly accepted that the New York Supreme Court had jurisdiction to decide the issues he himself brought before the ONSC (*Van Damme* at para 24).

[100] In *Stuart Budd*, the ONCA referred to the reasons in *Van Damme* and found that "advancing a motion for summary judgment, a motion that went beyond a jurisdictional challenge and was not further to any court order[,] was attornment" (*Stuart Budd* at para 33). Likewise, in *HarperCollins*, the Competition Tribunal [CT] observed that "if a party goes further than a simple appearance and engages in steps other than challenging jurisdiction, such actions will be regarded as voluntary acceptance of the court's jurisdiction" (*HarperCollins* at para 79).

[101] Mr. Zanin relied on the above paragraph from *HarperCollins* in his submissions.

However, Mr. Zanin has done a selective reading of the decision — which was in fact drafted by the undersigned —, as I expressly distinguished the situations where a defendant had made no express reservation of rights from those where they did (*HarperCollins* at paras 80–82). Indeed, the respondents were careful in their response to the Commissioner of Competition’s application and in their motions, and purposely prefaced their submissions with an express reservation of their rights to challenge the CT’s jurisdiction (*HarperCollins* at para 82). The explicit wording used for the reservation of rights was also not innocuous “boilerplate” language having no effect whatsoever on the issue of attornment (*HarperCollins* at para 82).

[102] More recently, and in the same vein as the warning against “boilerplate” reservations of rights in *HarperCollins*, this Court also emphasized the importance of examining the actual substance of a statement of defence when deciding if a party attorns to a court’s jurisdiction by engaging on the merits of a claim. In *Davy Global Fund Management Limited v Michele Bottiglieri Armatore SpA*, 2021 FC 789 [Davy], Justice Elizabeth Heneghan followed the ONCA’s reasoning in *Van Damme* and dismissed the defendants’ objection to the Court’s jurisdiction (*Davy* at paras 94–95). In her view, the defendants’ reservation of rights in the preamble of their statement of defence was insufficient to establish a genuine reservation on the Court’s jurisdiction: the body of the defence did not clearly challenge the jurisdiction of the Court, the defendants did not specifically plead a jurisdiction clause, and the preamble to the defence was the closest they came to challenging jurisdiction (*Davy* at paras 92–93, 96).

[103] In the present matter, Ooma genuinely reserved and exercised its rights to challenge the Court's jurisdiction from the very start of this proceeding. This was made in its Statement of Defence and then in its Jurisdiction Motion (Statement of Defence at paras 1, 31; Jurisdiction Motion at paras 5–14). Importantly, the body of the Statement of Defence clearly challenges the Court's jurisdiction and Ooma specifically pleads that the Action is covered by the Arbitration Clause (Statement of Defence at para 31). In consequence, unlike in *Davy*, Ooma's reservation of rights is genuine and carefully tailored to the circumstances at hand, meaning that it is far from being a mere boilerplate formula (see, *a contrario*, *Davy* at para 96).

[104] Moreover, contrary to the respondent in *Van Damme*, Ooma's procedural initiatives were precipitated by Court orders (see, *a contrario*, *Van Damme* at para 24). Indeed, the Court twice confirmed in specific procedural orders that the filing of Ooma's Statement of Defence and Jurisdiction Motion did not establish attornment to the Court's jurisdiction.

[105] First, in the March 2021 Order — which set out the steps leading up to the hearing of Mr. Zanin's Certification Motion —, I expressly specified that “the various steps, filings and examinations mentioned [in the Order], including the filing of a Statement of Defence by [Ooma], can be made under strict reserve of [Ooma's] arguments concerning the lack of jurisdiction of the Canadian courts and will in no way constitute any attornment to the Court's jurisdiction” (March 2021 Order at para 1). These steps expressly included “the Notice(s) of Motion for [Ooma's] contemplated motion(s) in respect of jurisdiction and/or limitation periods [...], including any affidavits in support of these motions” (March 2021 Order at para 4(b)). All parties consented to the terms of the March 2021 Order.

[106] The March 2021 Order further provided that Mr. Zanin’s Certification Motion and Ooma’s contemplated Jurisdiction Motion — including the alternative motion for summary judgment — would be heard together at the same time. Ooma’s Jurisdiction Motion was accordingly filed in response to the March 2021 Order.

[107] Second, on November 9, 2021, I issued the November 2021 Order where I reiterated that Ooma’s motion to amend its June 11, 2021 motion on jurisdiction [Amendment Motion] was granted and that the Amendment Motion itself did not constitute attornment to the Court’s jurisdiction (November 2021 Order at para 3(d)). Mr. Zanin suggests that the insertion of the word “itself” in this order was meant to strictly limit Ooma’s challenge to the Court’s jurisdiction. This is without foundation and inaccurate, as the language used by the Court in the November 2021 Order simply echoed the specific wording proposed by the parties themselves. At no point was there any express statement or implied inference that Ooma’s desire to amend its Jurisdiction Motion could reflect an intention to restrict its reservation of rights to challenge the Court’s jurisdiction.

[108] It is therefore clear that Ooma’s approach in this case was to file its Jurisdiction Motion while strictly reserving its arguments concerning the Court’s lack of jurisdiction, and that I expressly confirmed this in the March and November 2021 Orders. I am not convinced that, in acting as it did, Ooma proceeded beyond the terms of these procedural orders.

[109] Finally, I am of the view that the *RH20* decision relied on by Mr. Zanin is distinguishable from the matter at hand. In that case, the ONCA found that, by joining a motion filed by other

defendants seeking an order to strike out certain parts of the plaintiff's claim, a defendant took a step to invoke the ONSC's jurisdiction equivalent to waiving that defendant's agreement to arbitrate. By taking a procedural step other than solely challenging the court's jurisdiction, the defendant waived its right to arbitrate (*RH20* at para 58). However, like in *Van Damme*, there were no court orders allowing the defendant to proceed as it did.

[110] Here, Ooma did not invite the Court to decide the merits of a dispute nor did it violate any negative obligation of parties to an arbitration agreement. Ooma simply acted within the boundaries of the March and November 2021 Orders allowing it to respond to Mr. Zanin's Certification Motion and to file its own motion for a stay of Mr. Zanin's motion in favour of arbitration. All of Ooma's arguments and actions fell within the limits of the procedural orders issued by the Court, and were a reflection of the parties' agreement to deal with Mr. Zanin's Certification Motion and Ooma's Jurisdiction Motion at the same time.

D. *Constitutional issue*

[111] The fourth preliminary matter relates to notices of constitutional questions pursuant to section 57 of the *FC Act*. This provision states that, where a party seeks to have an Act of Parliament or regulations made under such an Act "judged to be invalid, inapplicable or inoperable," notice must be served on the Attorney General of Canada and the attorney general of each province at least ten days before the constitutional question is to be argued.

[112] Mr. Zanin contends that Ooma has omitted to file a notice of constitutional question, as required by section 57 of the *FC Act*, in the context of its arguments questioning the

constitutionality of provisions of the *Trademarks Act*. In his view, Ooma's failure to do so would thus require the Court to disregard Ooma's constitutional arguments.

[113] With respect, Mr. Zanin's argument is without any merit.

[114] It is not disputed that the objective of section 57 of the *FC Act* is to preclude a court from ruling that a statute or regulation is invalid, inapplicable, or inoperable on constitutional grounds without a prior notice of constitutional question. However, it is axiomatic that there is no need for a section 57 notice in a case where the judicial remedy sought is something other than a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds (*Canada (Canadian Heritage) v Mikisew Cree First Nation*, 2004 FCA 66 at paras 76–79, rev'd on other grounds 2005 SCC 69). In other words, the need for a notice of constitutional question is linked to the remedy sought by a party (*Canada v Mozajko*, 2021 FCA 25 at para 8; *Thomson v Canada (National Revenue)*, 2013 FCA 197 at para 67).

[115] Here, Ooma is not asking the Court to declare any Act or regulation invalid, inapplicable, or inoperable. Ooma only submits that, in its interpretation of paragraph 7(d) of the *Trademarks Act*, it relies upon the presumption that Parliament intends to legislate within its constitutional competence, in order to resolve an ambiguity in the statutory text (*Reference re Impact Assessment Act*, 2023 SCC 23 at paras 69–72). Accordingly, since it is simply asking the Court to read down the disputed provision in order to avoid an unconstitutional application, section 57 of the *FC Act* does not apply and a notice of a constitutional question is not required (*Najafi v*

*Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 at paras 94–96; *Canada (Fisheries and Ocean) v MiningWatch Canada*, 2008 FCA 166 at paras 4, 10).

[116] Mr. Zanin has not cited any case law, nor am I aware of any, where a notice of constitutional question was required in circumstances where a party uses constitutional cases in support of its proposed interpretation of legislative provisions.

E. *Summary judgment*

[117] Given my conclusions, as discussed below, on the Court’s lack of jurisdiction to entertain the Action and on the absence of any reasonable cause of action to support the Mr. Zanin’s Certification Motion, it is not necessary to directly address the suitability of Ooma’s alternative motion for summary judgment and whether Ooma meets the requirements for obtaining a summary judgment in this case. These conclusions alone are sufficient to dismiss Mr. Zanin’s Action in its entirety.

V. Jurisdictional Issues

[118] This matter raises two sets of substantive questions: jurisdictional issues and certification issues.

[119] On the jurisdictional front, Ooma submits that, since Mr. Zanin’s Action is covered by the mandatory Arbitration Clause, the Forum Selection Clause, and the Class Action Waiver Clause, this Court has no jurisdiction to hear it. These Limitation Clauses are contained in the



Terms & Conditions, which Mr. Zanin duly accepted around January 9, 2020. Consequently, says Ooma in its Jurisdiction Motion, this litigation is within the exclusive jurisdiction of an arbitrator and should be dismissed. Alternatively, the Action should be stayed in favour of arbitration, pursuant to subsection 50(1) of the *FC Act*.

[120] Ooma further maintains that, in order to certify Mr. Zanin's Action, the Court would need to reject its arguments on all three Limitation Clauses. As soon as one of those clauses is valid, the matter shall be referred to the arbitrator or to a different forum.

[121] The Arbitration and Class Action Waiver Clauses are contained in section 16 of the Terms & Conditions, whereas the Forum Selection Clause is described at subsection 19(c).

These provisions read as follows:

#### **16. Arbitration**

READ THIS SECTION CAREFULLY BECAUSE IT REQUIRES THE PARTIES TO ARBITRATE THEIR DISPUTES AND LIMITS THE MANNER IN WHICH YOU CAN SEEK RELIEF FROM OOMA. In the unlikely event that Ooma is not able to resolve a dispute it has with you, any member of your household, or any of your guests or any user of your Equipment or Services arising out of or relating to the use of the Equipment or Services after 60 days, to the extent permitted by applicable law, we each agree to resolve any claim, dispute, or controversy (excluding any Ooma claims for injunctive or other equitable relief) arising out of or in connection with or relating to these Terms and Conditions, the Privacy Policy, the Ooma Mobile HD End User License Agreement (if applicable), including any future modifications of those agreements by Ooma, the charges for Equipment and Services, or the breach or alleged breach thereof (collectively, "Claims"), by binding arbitration by the Judicial Mediation and Arbitration Services ("JAMS") under the Optional Expedited Arbitration Procedures then in effect for JAMS, except as provided herein. The arbitration will be conducted in Santa Clara County, California, United States, unless you and Ooma agree otherwise. Each party will be responsible for paying any JAMS filing,

administrative and arbitrator fees in accordance with JAMS rules. The award rendered by the arbitrator shall include costs of arbitration, reasonable attorneys' fees and reasonable costs for expert and other witnesses, and any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. Nothing in this Section shall be deemed as preventing Ooma from seeking injunctive or other equitable relief from the courts as necessary to protect any of Ooma's proprietary interests. TO THE EXTENT PERMITTED BY APPLICABLE LAW, ALL CLAIMS MUST BE BROUGHT IN THE PARTIES' INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS ACTION, COLLECTIVE ACTION, PRIVATE ATTORNEY GENERAL ACTION OR OTHER REPRESENTATIVE PROCEEDING. THIS WAIVER APPLIES TO CLASS ARBITRATION, AND, UNLESS WE AGREE OTHERWISE, THE ARBITRATOR MAY NOT CONSOLIDATE MORE THAN ONE PERSON'S CLAIMS. TO THE EXTENT PERMITTED BY APPLICABLE LAW, YOU AGREE THAT, BY ENTERING INTO THIS TERMS OF SERVICE, YOU AND OOMA ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION, COLLECTIVE ACTION, PRIVATE ATTORNEY GENERAL ACTION, OR OTHER REPRESENTATIVE PROCEEDING OF ANY KIND.

[...]

## **19. Miscellaneous**

[...] (c) Governing Law: Subject to applicable law, this Agreement and the relationship between you and us are governed by the laws of California in the United States without regard to its conflict of law provisions. To the extent court action is initiated to enforce an arbitration award or for any other reason consistent with Section 16 or if Section 16 or some part thereof is unenforceable pursuant to applicable law, such action shall only be brought in a court of competent jurisdiction in Santa Clara County and you shall submit to the personal and exclusive jurisdiction of the courts located within the State of California, United States and waive any objection as to venue or inconvenient forum. You further acknowledge and agree that this Agreement and any related Agreements shall be concluded in the State of California at the time and place Ooma receives communication in California from you of your acceptance of these terms and conditions, regardless of the means by which you communicate your acceptance to Ooma.

[122] I pause to note that a “choice of law” clause, a “forum selection” clause, a “class action waiver” clause, and an arbitration clause are not interchangeable stipulations. A choice of law clause specifies which jurisdiction’s law governs the contract, a forum selection clause ousts the jurisdiction of otherwise competent local courts in favour of a foreign jurisdiction, a class action waiver prevents a class proceeding while allowing individual court cases to proceed, and an arbitration clause binds the parties to an agreed-upon dispute resolution mechanism.

[123] Each of the three Limitation Clauses invoked by Ooma to deny the Court’s jurisdiction will be addressed in turn.

A. *The Arbitration Clause*

[124] Section 16 of the Terms & Conditions highlights the dispute resolution framework of the contract — and more specifically the arbitration requirement, which is the only form of recourse available to the contracting parties. It stipulates that all disputes arising from the Terms & Conditions, and notably regarding Ooma’s Service, must be finally adjudicated and resolved under the JAMS’ arbitration rules, entitled the “JAMS Comprehensive Arbitration Rules & Procedures” [JAMS Rules]. Furthermore, the provision states that each party will be “responsible for paying any JAMS filing, administrative and arbitrator fees in accordance with JAMS rules.” It also specifies that the “award rendered by the arbitrator shall include costs of arbitration, reasonable attorneys’ fees and reasonable costs for expert and other witnesses.” However, the Arbitration Clause does not explicitly specify those fees or costs.

[125] The Arbitration Clause further indicates that an arbitration would proceed “under the Optional Expedited Arbitration Procedures then in effect for JAMS” and that the arbitration will be conducted in Santa Clara County, California, “unless you and Ooma agree otherwise.”

(1) The parties’ submissions

[126] Ooma submits that Mr. Zanin’s Action should be dismissed, given that section 16 of the Terms & Conditions provides for mandatory arbitration should a dispute arise between Ooma and its customers.

[127] Ooma argues that the Arbitration Clause is enforceable due to its content and the fact that it is materially different from the arbitration clause that was deemed invalid by the SCC in *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Heller*]. Ooma further maintains that it meets the technical prerequisites for the approval of a stay in favour of arbitration, that no statutory exceptions apply, that no federal or provincial laws invalidate the Arbitration Clause, and that recent jurisprudence concerning the invalidity of certain arbitration clauses, such as *Heller* and *Douez v Facebook, Inc*, 2017 SCC 33 [*Douez*], does not apply to the present case.

[128] More specifically, Ooma submits that Mr. Zanin’s unconscionability argument rests on a mistaken reading of *Heller*. In that case, the SCC actually carved out an exception to the general rule that arbitration clauses are not unconscionable: in *Heller*, the clause was deemed unconscionable because it made it “impossible for one party to arbitrate” (*Heller* at para 4). Here, Ooma argues, the Arbitration Clause does not make it impossible for customers to arbitrate, as its terms are more favourable towards them than in *Heller*.

[129] Furthermore, Ooma maintains that its position is at least arguable — the standard it deems necessary to prove that its request for a stay in favour of arbitration is well founded, and that the stay should consequently be granted to allow an arbitrator to address any jurisdictional issues under the competence-competence principle. In other words, the Court should refrain from hearing Mr. Zanin’s Action as the competence-competence principle posits that an arbitrator generally has first jurisdiction to assess the validity and applicability of an arbitration clause (*Dell* at para 11).

[130] Ooma also rejects Mr. Zanin’s argument on the application of the provincial consumer protection laws to this case. Mr. Zanin’s claims pertain to federal statutory provisions, and neither the *Trademarks Act* nor the *Competition Act* contain any restriction on a party’s ability to insert an arbitration clause as part of a consumer contract. Whereas, after *Dell* and *Rogers Wireless Inc v Muroff*, 2007 SCC 35 [*Rogers*], certain provinces have adopted laws prohibiting arbitration clauses in the consumer context, this is not the case at the federal level.

[131] According to Ooma, this Court and the FCA have now repeatedly confirmed that claims made under the *Competition Act* are arbitrable. To this effect, Ooma notably cites *Murphy v Amway Canada Corporation*, 2013 FCA 38 [*Murphy FCA*] and *Difederico FCA*, which expressly determined that claims made under the *Competition Act* can be referred to arbitration (*Murphy FCA* at para 64; *Difederico FC* at para 127, *aff’d Difederico FCA* at para 77). Ooma observes that *Murphy FCA* makes it clear that provincial consumer protection legislation (in that case, British Columbia’s) and the *Competition Act* cannot be equated with each another (*Murphy FCA* at paras 61–63). Ooma also refers to *Williams BCCA* and *Petty BCCA*.

[132] Ooma finally claims that stays in favour of arbitration when the parties have a mandatory arbitration clause are inherently in the interests of justice (*Difederico FCA* at para 52). Indeed, the SCC in *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 [*Peace River*] stated that valid arbitration clauses must be enforced and that arbitrators should generally decide if they have jurisdiction under the competence-competence principle (*Peace River* at paras 39–41).

[133] In response, Mr. Zanin raises four main arguments to support his position that the Court has jurisdiction over his Action.

[134] First, Mr. Zanin claims that the Arbitration Clause is invalid under California law, relying notably on the California Supreme Court decision in *McGill v Citibank, NA*, 393 P 3d 85, 2 Cal 5th 945 [*McGill*]. He also submits that, in any event, the Arbitration Clause cannot shield Ooma Canada Inc., given that this entity claims not to have any contract with any customers of Ooma. This means, according to Mr. Zanin, that Ooma Canada Inc. agrees that it is not bound by the Terms & Conditions, including the Arbitration Clause.

[135] Second, Mr. Zanin says that the Arbitration Clause is invalid under federal law. On this front, he contends that Ooma cannot evade provincial consumer protection laws by simply requiring its customers to waive their rights to access the courts. Mr. Zanin references the following provincial statutes in support of his argument: Ontario's *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A at sections 7–8 [*Ontario CPA*]; Quebec's *Consumer Protection Act*, CQLR c P-40.1 at section 11.1 [*Quebec CPA*]; British Columbia's *Business Practices and Consumer Protection Act*, SBC 2004, c 2 at sections 3, 172; Alberta's *Consumer Protection Act*,

RSA 2000, c C-26.3 at section 16; and Saskatchewan's *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2 at section 101. Mr. Zanin further argues that appellate courts across Canada have determined that arbitration clauses cannot be invoked against consumers covered by provincial consumer protection laws (*TELUS Communications Inc v Wellman*, 2019 SCC 19 at paras 4, 97 [*TELUS*]; *Difederico FCA* at para 80; *Williams BCCA* at para 174). Alternatively, says Mr. Zanin, section 25 of the *FC Act* would ensure that this Court retains jurisdiction to adjudicate cases relating to federal laws.

[136] Third, Mr. Zanin maintains that the Arbitration Clause is invalid because it is unconscionable. He submits that, further to *Heller*, arbitration provisions in standard form contracts drafted by the stronger party are unconscionable in common law.

[137] Finally, Mr. Zanin claims that the Arbitration Clause cannot be enforced as its terms do not follow the JAMS's own Consumer Arbitration Minimum Standards Policy [JAMS Minimum Standards]. Mr. Zanin thus suggests that this creates an apparent physical impediment to applying the Arbitration Clause. In other words, the JAMS would not be able to hear claims from consumers under the Terms & Conditions and the Arbitration Clause, even if found to be valid, would therefore be "incapable of being performed."

[138] In his reply, Mr. Zanin also asserts that the competence-competence principle does not apply in this Court, as this Court has not fully adopted by way of enabling legislation the *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17, Ann I, June 21, 1985, which codifies the competence-competence principle (*Dell* at para 74). Indeed, Mr.

Zanin claims that this principle has only been adopted in federal law for actions involving the federal crown (*Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp) at subsection 5(2)). If the competence-competence principle were nonetheless applied by this Court, Mr. Zanin believes that it should only defer to an arbitrator in situations where the arbitration process has already begun (*Canada (The Attorney General) v Aéroports de Montréal*, 2016 FC 775 at paras 34–37 [*Aéroports de Montréal*]), which is not the case here.

(2) The approach to stays in favour of arbitration

[139] In *Uber*, I recently summarized the principles governing the approach for assessing a request for a stay in favour of arbitration (*Uber* at paras 38–47). I can do no better than repeat those paragraphs which, in my view, continue to reflect the state of the law:

[38] In *Peace River SCC*, the SCC reaffirmed the “legislative and judicial preference for holding parties to arbitration agreements” (*Peace River SCC* at para 10). It is now well accepted that stays in favour of arbitration where the parties have a mandatory arbitration clause are inherently in the interest of justice, and that Canadian courts will only consider challenges to the jurisdiction of an arbitrator or the enforceability of an arbitration agreement in exceptional circumstances. The SCC has repeatedly confirmed that valid arbitration clauses must be enforced and that, under the competence-competence principle, arbitrators should generally decide if they have jurisdiction (*Peace River SCC* at paras 39–41; *TELUS SCC* at paras 46, 54; *Seidel v TELUS Communications Inc*, 2011 SCC 15 at paras 2, 23, 42 [*Seidel SCC*]). This was expressly endorsed by the FCA with respect to federal matters brought before this Court (*Difederico FCA* at paras 34–35, 52).

[39] The competence-competence principle gives precedence to the arbitration process (*Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 70 [*Dell SCC*]). It mandates that jurisdictional challenges to arbitration or to the scope of arbitration agreements are to be resolved in the first instance by the arbitrator, and not by courts, unless certain exceptions apply (*Peace River SCC* at para 39).



[40] I pause to emphasize that the outcome in *Peace River SCC* — where the SCC refused the stay in favour of arbitration — is an exception to the fundamental principle of competence-competence which directs the courts to allow arbitrators to rule first on their own jurisdiction. In *Peace River SCC*, the SCC emphasized that it was only the particular policy objectives of the insolvency legislation at stake in that case that justified sidestepping the arbitration agreements at issue (*Peace River SCC* at paras 9–10).

[41] In other words, the general approach in cases where the validity of an arbitration agreement or the jurisdiction of the arbitrator is challenged is to refer the issue to the arbitrator, subject to limited exceptions (*Dell SCC* at paras 84–86; *Difederico FC* at para 96). The courts will only consider adjudicating challenges to arbitration agreements when such challenges raise either: 1) a pure question of law; or 2) a question of mixed fact and law that only requires a superficial consideration of the record (*Dell SCC* at paras 84–86; *Difederico FCA* at para 35; *Spark Event Rentals Ltd v Google LLC*, 2024 BCCA 148 at paras 15–18, 41 [*Spark BCCA*]). In *Heller SCC*, the SCC set out a third competence-competence exception, stating that a court should not refer a *bona fide* challenge to the validity of an arbitration agreement or to an arbitrator’s jurisdiction to the arbitrator if doing so would make it impossible for one party to arbitrate or for the challenge to be resolved (*Heller SCC* at paras 38–46; *Difederico FC* at paras 96–97).

[42] Outside of those situations, the competence-competence principle requires that the matter be referred to the arbitrator.

[43] In *Peace River SCC*, echoing these general principles, the SCC articulated a two-part process to determine whether a proceeding should be stayed in favour of arbitration (*Peace River SCC* at paras 76–84; *General Entertainment and Music Inc v Gold Line Telemanagement Inc*, 2023 FCA 148 at para 30 [*Gold Line FCA*]). These two interrelated, though distinct, components for a mandatory stay of proceedings are known as the “technical prerequisites” and the “statutory exceptions.”

[44] Under the first component, the Court must be satisfied that four technical prerequisites exist in order to invoke an arbitration clause. They are: (i) an arbitration agreement must exist; (ii) the court proceeding must have been commenced by a party to the arbitration agreement; (iii) the court proceedings must be in respect of a matter the parties agreed to submit to arbitration in the arbitration agreement; and (iv) the party seeking the stay must apply before taking any step in the court proceeding (*Peace River*

*SCC* at paras 81–86; *Gold Line FCA* at paras 30, 31, 39; *Difederico FC* at para 68).

[45] The party seeking the stay does not need to establish these technical prerequisites on the usual balance of probabilities standard. It must simply establish an “arguable case” that the prerequisites are met. If there is an arguable case, the Court must stay the action and let the arbitrator decide the jurisdictional issue, subject to statutory exceptions (*Peace River SCC* at paras 84–85). When all the technical prerequisites are met, the mandatory stay provision is engaged and the Court should then move on to the second component of the analysis.

[46] Turning to the second component of the two-part process, the Court must determine whether there are any statutory exceptions that would prevent staying the proceeding in favour of arbitration. These statutory exceptions encompass more substantive reasons to object to or invalidate an arbitration clause, including the arbitration agreement being “null, void, inoperative, or incapable of performance,” other legislative interventions, or instances where the subject matter of the dispute is incapable of being the subject of arbitration (*Peace River SCC* at paras 86–87). If there are no statutory exceptions, the Court must grant a stay and cede jurisdiction to the arbitrator (*Peace River SCC* at para 79).

[47] At this second stage of the analysis, the party resisting arbitration [...] bears the onus of proof and the usual balance of probabilities standard applies. If the party resisting arbitration does not meet that burden, a stay in favour of arbitration is mandatory. Moreover, the competence-competence principle requires that where “the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator” (*Peace River SCC* at paras 88–89; see also *Spark BCCA* at paras 13–18). Stated differently, it must be clear on the record that deferral to arbitration raises a real prospect that there would be a denial of access to justice, and a mere possibility is not enough to overcome the competence-competence principle (*Difederico FC* at para 112). As mentioned above, since arbitration clauses are presumptively valid, a clear case is needed to reverse this presumption (*Peace River SCC* at para 89).

[140] The Canadian courts have therefore established a clear policy choice favouring the enforcement of arbitration agreements. Essentially, the competence-competence principle grants

arbitrators the jurisdiction to rule on their own jurisdiction. Thus, where the parties have an agreement with an arbitration clause, any challenge to the jurisdiction of the arbitrator or the enforceability of an arbitration agreement must first be referred to the arbitrator, unless the arbitrator's jurisdiction or agreement's enforceability is challenged on the basis of one of three exceptions: a pure question of law, a question of mixed fact and law that only requires a superficial consideration of the record, or if it would be impossible for a party to arbitrate or to resolve its challenge before the arbitrator (*Heller* at paras 32, 38–46; *Dell* at paras 84–86).

[141] As stated by Justice Angela Furlanetto, “it must be clear on the record that deferral to arbitration raises a real prospect that there would be a denial of access to justice” (*Difederico FC* at para 112). As such, even where the issue involves the jurisdiction of an arbitrator to hear a dispute, the courts will normally refer the matter to the arbitrator when determining jurisdiction requires consideration of factual proof or questions of mixed law and fact.

### (3) The competence-competence principle

[142] Relying on *Seidel v TELUS Communications Inc*, 2011 SCC 15 [*Seidel*] and other cases, Mr. Zanin claims that the competence-competence principle would only have a limited application in federal law, meaning that arbitrators should not be able to determine the extent of their own jurisdiction for claims arising from the *Trademarks Act* or the *Competition Act*.

[143] I do not agree. On the contrary, the federal courts have now repeatedly endorsed the competence-competence principle (see for example: *Difederico FCA* at paras 34–35, 52; *RS Marine Ltd v M/V Terre Neuvas (Ship)*, 2024 FC 1825 at para 43; *General Entertainment and*

*Music Inc v Gold Line Telemanagement Inc*, 2022 FC 418 at paras 5, 40, 43 [*Gold Line*], aff'd 2023 FCA 148; *Aéroports de Montréal* at paras 34–35).

[144] The role of the competence-competence principle has been recently reinforced by this Court in a commercial context: “[t]he burden on a plaintiff seeking to escape an arbitration clause is high. It is not enough for the plaintiff to show that the arbitration clause may not apply, or even that it likely does not apply. So long as the dispute potentially falls within the arbitration clause, it must be referred to arbitration” (*Gold Line* at para 43). The Court has further acknowledged that it should certainly defer to an arbitrator in situations where the arbitration process had already begun (*Aéroports de Montréal* at para 37). However, contrary to what Mr. Zanin argues, nowhere did the Court conclude that this was a necessary condition for recognizing the arbitrator’s jurisdiction.

[145] Additionally, it is now well established that clear and express legislative language in a statute is required before the courts will refuse to give effect to the terms of an arbitration agreement (*Seidel* at para 29; *Dell* at para 85; *Difederico FCA* at para 52). In the absence of such legislative intent, *Seidel*, *Rogers*, and *Dell* set out that any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator, except where the challenge is based solely on a question of law or on a question of mixed fact and law that requires a superficial consideration of the evidence (*Seidel* at para 29; *Rogers* at para 11; *Dell* at paras 84–86). *Heller* simply carved out an exception to the rule as formulated by the SCC in *Dell*, *Seidel*, and *Rogers*, i.e. where deferring a *bona fide* jurisdictional challenge to the arbitrator would make it impossible for a

party to arbitrate or to resolve its challenge before the arbitrator (*Heller* at paras 32, 38–46; *Difederico FC* at paras 96–97).

[146] There is therefore no doubt that the competence-competence principle applies in this case. Indeed, the alleged unfairness or abusive nature of the Arbitration Clause in the Terms & Conditions is a mixed question of fact and law that requires far more than a superficial examination of the record (*Rogers* at paras 15–17). In consequence, the Court should follow the teachings of the SCC and defer this question to the arbitrator.

(4) The technical prerequisites

[147] I now turn to the two-part analysis set out in *Peace River* to determine whether Mr. Zanin’s Action should be stayed in favour of arbitration.

[148] In the present matter, I am satisfied that the four technical prerequisites (i.e. the first part of the *Peace River* test) are met. As mentioned above, Ooma must simply establish an “arguable case” that these prerequisites are met. If there is an arguable case, the Court must stay the Action and let the arbitrator decide the jurisdictional issue, subject to statutory exceptions (*Peace River* at paras 84–85).

[149] First, an arbitration agreement obviously exists as the Arbitration Clause is clearly part of the Terms & Conditions. Second, Mr. Zanin, as a party bound by the Terms & Conditions, commenced this class action proceeding. As discussed above, there is no doubt that Ooma has made at least an arguable case that a contract exists with Mr. Zanin and that Mr. Zanin has

agreed to the Terms & Conditions, including the Arbitration Clause. Third, the Action relates to Ooma's Service and covers a matter subject to the Arbitration Clause. Finally, for the reasons discussed above, Ooma has not taken any steps in this proceeding, and it has thus not attorned to the Court's jurisdiction.

[150] I pause to note that the question of whether the Arbitration Clause is valid under California law is a question of fact that the Court cannot take judicial notice of, as it cannot inquire *proprio motu* as to the content of foreign law. As a result, it well settled that this issue must be pleaded and proven, which is generally done by way of expert evidence (*International Air Transport Association v Canada (Transportation Agency)*, 2024 SCC 30 at para 65 [IATA]; *International Air Transport Association v Canadian Transportation Agency*, 2022 FCA 211 at para 45, aff'd IATA; *JPMorgan Chase Bank v Lanner (The)*, 2008 FCA 399 at para 18; *Backman v Canada*, 1999 CanLII 9371 (FCA), [2000] 1 FC 555 at para 38, aff'd 2001 SCC 10; *The Mercury Bell v Amosin*, 1986 CanLII 6832 (FCA), [1986] 3 FC 454 at p 460; *Nordion Inc v Life Technologies Inc*, 2015 ONSC 99 at para 70).

[151] In this matter, each of Mr. Zanin and Ooma have submitted U.S. cases supporting or infirming the validity of arbitration provisions under California law (*McGill* for Mr. Zanin and *DiCarlo v MoneyLion, Inc*, 988 F 3d 1148 for Ooma). However, neither Mr. Zanin nor Ooma has presented any expert evidence on California law, and this is a question of fact that would have to be decided by the arbitrator on the basis of the competence-competence principle.

(5) The statutory exceptions

[152] I will now assess the applicability of any statutory exceptions preventing the Court from referring the matter to an arbitrator. Under this second component of the two-part test articulated in *Peace River*, Mr. Zanin offers three main reasons why a stay in favour of arbitration should not be granted even if the technical prerequisites are satisfied : (i) provincial consumer protection laws and the *FC Act* override any enforcement of the Arbitration Clause; (ii) the Arbitration Clause is “void” in the sense that it is unconscionable; and (iii) the Arbitration Clause does not follow the JAMS Minimum Standards and is thus “incapable of being performed,” in the sense that the JAMS — the chosen arbitration institution — would refuse to adjudicate disputes of the type raised by Mr. Zanin.

[153] For the reasons that follow, I find that, in light of the state of the law and the circumstances of this case, these three arguments are all without merit.

(a) *The legislative overrides*

[154] In this instance, Mr. Zanin submits that there are two clear legislative overrides to the Arbitration Clause, the provincial consumer protection laws and section 25 of the *FC Act*.

(i) The provincial consumer protection laws

[155] Mr. Zanin claims that the provisions of several provincial consumer protection laws ban arbitration altogether and guarantee the access of aggrieved consumers to the courts. As such, he submits that provincial consumer protection laws have restrained the reach of arbitration clauses in consumer contracts, and that such restraint should expand to federal statutes like the

*Competition Act* and the *Trademarks Act*. In support of his position, Mr. Zanin relies on the text of the provincial legislation, the remedial objective of these provisions, and court precedents.

[156] With respect, Mr. Zanin's argument has been systematically rejected by recent jurisprudence confirming the validity of arbitration clauses in the federal law context, as opposed to provincial contexts. It is not disputed that an arbitration clause might be rendered invalid to the extent that it amounts to contracting out of statutory rights granted to consumers, provided that it is prohibited by the specific consumer protection law. However, this is simply not the case under the *Competition Act* or the *Trademarks Act*. In sum, while some provinces have legislated to prohibit or severely restrict arbitration clauses in the consumer context, the federal Parliament has not.

[157] Provincial consumer protection laws such as the *Ontario CPA* do not invalidate contracts or mandatory arbitration clauses as such. They simply preserve the jurisdiction of provincial courts for consumer contracts, and confine recourses to certain channels, such as the Ontario courts. Moreover, provincial consumer protection laws cannot oust the jurisdiction of this Court (*Murphy FCA* at paras 31–32). The statutes underlying Mr. Zanin's claims, namely, the *Trademarks Act* and the *Competition Act*, are federal statutes, and they cannot be conflated with provincial consumer protection laws.

[158] In *Uber*, I dealt in detail with a similar argument based more specifically on sections 7 and 8 of the *Ontario CPA*, and found that the wording of the *Ontario CPA* did not support the type of interpretation put forward by Mr. Zanin (*Uber* at paras 54–85).



[159] Section 7 of the *Ontario CPA* and the precedents having interpreted it clearly establish that this legislative override is limited in scope. Indeed, subsection 7(2) invalidates an arbitration clause in a consumer agreement or related agreement only “insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under the [Ontario CPA]” [emphasis added]. Its language is crystal clear: it does not protect consumers from arbitration in every transaction they enter. Nor does consumer protection legislation invalidate an arbitration clause for all purposes (*TELUS* at para 97; *Seidel* at paras 31–32, 40, 50). Subsection 7(2) of the *Ontario CPA* protects only some statutory causes of action commenced before the ONSC under the *Ontario CPA*. The references to “Superior Court of Justice” and “*Class Proceedings Act, 1992*” in sections 7 and 8 of the *Ontario CPA* indicate that the Ontario legislature merely intended to protect access to Ontario courts, but not to other courts of coordinate jurisdiction, such as this Court or a superior court of another province.

[160] The same is true for the other provincial consumer protection legislations referred to by Mr. Zanin. They invalidate arbitration terms in consumer contracts for recourses before certain specific courts under certain specific laws. But it is incorrect to claim that these provincial statutes ban mandatory arbitration clauses at the contract level. They only do so at varying levels, for specific remedies before the provincial courts.

[161] I must also underline that there are now several appellate decisions expressly recognizing that *Competition Act* claims such as Mr. Zanin’s are arbitrable (*Difederico FCA* at paras 52, 71–72, 77–81; *Murphy FCA* at para 60; *Williams BCCA* at para 156; *Petty BCCA* at para 30). This Court, the FCA, the BCSC, and the BCCA all agree that *Competition Act* claims can be stayed in

favour of arbitration. They have clearly acknowledged the absence of any language in the *Competition Act* denoting a legislative intent to override the terms of arbitration clauses validly agreed upon by the parties. In short, the issue of whether damages claimed under section 36 of the *Competition Act* can be subject to arbitration has now been clearly disposed of.

[162] In *Murphy FCA*, the FCA found that the *Competition Act* lacked the express legislative language required for courts to refuse to give effect to the terms of an arbitration agreement (*Murphy FCA* at para 60; see also: *Williams BCCA* at para 156). It consequently found that there was no basis to the argument that claims brought under section 36 of the *Competition Act* could not be determined by arbitration. At paragraph 65, the FCA stated the following:

[65] In my view, there is no basis to conclude, as the appellant argues, that claims brought under section 36 of the *Competition Act* cannot be determined by arbitration. As the Supreme Court made clear in *Seidel*, and as it had done previously in *Dell* and in *Rogers Wireless*, it is only where the statute can be interpreted or read as excluding or prohibiting arbitration, as is the case of section 172 of the [*Business Practices and Consumer Protection Act*], that the courts will refuse to give effect to valid arbitration agreements.

[163] In *Difederico FCA*, the FCA expressly noted that Parliament could make a policy choice in the context of the *Competition Act* and enact a provision comparable to subsection 7(2) of the *Ontario CPA*. However, it has not yet done so. And until it does so, “mandatory arbitration clauses in consumer adhesion contracts will be enforced, subject to the limited exceptions developed by the Supreme Court of Canada and addressed in these reasons” (*Difederico FCA* at para 81). Only the federal Parliament, not the provincial legislatures, can decide whether *Competition Act* claims are arbitrable.

[164] I further observe that, on May 16, 2024, the SCC dismissed the applications for leave to appeal that had been filed against each of *Difederico FCA*, *Williams BCCA*, and *Petty BCCA*. This means that these appellate decisions represent the current and undisputed state of the law on arbitration clauses in *Competition Act* matters, such as the present case.

[165] In short, the state of the law is unambiguous: in the absence of clear legislative intent to limit the application of mandatory arbitration clauses to competition law claims, such clauses will be enforceable — even when inserted in standard form contracts, provided they are not unconscionable and the arbitration process is a viable and accessible dispute resolution mechanism.

[166] The same can be said about the *Trademarks Act* (*Gold Line* at para 49).

[167] Accordingly, Mr. Zanin’s argument on provincial consumer protection laws cannot be accepted. The two federal statutes underlying his Action do not have a similar effect on arbitration clauses as the consumer protection legislation of certain provinces.

[168] Contrary to Mr. Zanin’s suggestion, no precedent has ever said otherwise.

[169] In *TELUS*, the type of proceeding at issue was a class action brought before the ONSC and under the *Ontario CPA*, regarding mobile phone services. In discussing the scope of section 7 of said act, the SCC concluded as follows: “[r]ead together, these two provisions [of the *Ontario CPA*] render the arbitration agreements entered into by the consumers invalid to the

extent that they would otherwise prevent the consumers from commencing or joining a class action of the kind commended by Mr. Wellman. To this extent, the provision of the [*Ontario CPA*] constitute a ‘legislative override’ of the consumer arbitration agreements” [emphasis added] (*TELUS* at para 97, citing *Seidel* at para 40). A plain reading of this excerpt reveals that the SCC expressly limited its remarks to “a class action of the kind commenced by Mr. Wellman,” i.e. a class action based on the *Ontario CPA*. Nothing in *TELUS* could be reasonably read as implying that the discussed “legislative override” extends to all consumer arbitration agreements beyond those covered by subsection 7(2) of the *Ontario CPA*.

[170] In *Williams BCCA*, the BCCA observed that Ontario, Quebec, and Saskatchewan have expressly prohibited mandatory arbitration agreements and class waivers in their respective consumer protection laws, but that British Columbia has chosen not to do so (*Williams BCCA* at paras 174–175). These laws indeed happen to form part of the provincial consumer protection laws referred to by Mr. Zanin in his submissions. However, nowhere did the BCCA state or imply that parties could never insert mandatory arbitration clauses in their contracts, that the express prohibition on mandatory arbitration agreements was at the contract level, or that arbitration clauses were prohibited in all agreements governed by Ontario law.

[171] Finally, in *Difederico FCA*, the FCA made an *obiter dictum* on provincial consumer protection legislation at paragraph 80 of its reasons, which reads as follows:

[80] [...] Some provinces have reacted to this reality [i.e. the inclusion of mandatory arbitration agreements in online consumer transactions completed through digital adhesion contracts] by adopting legislation protecting consumers from the potential unfairness of such adhesion contracts. For example, in Ontario, section 7 of the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sch. A, declares mandatory arbitration clauses invalid while

section 8 renders invalid any clause that would operate to prevent a consumer class action. Similarly, section 11.1 of Quebec's *Consumer Protection Act*, chapter P-40.1, prohibits any stipulation that obliges a consumer to refer a dispute to arbitration as well as any stipulation that attempts to prevent a class action. By virtue of the same section, consumers have the option of agreeing to arbitration after a dispute has arisen. In contrast, section 172 of British Columbia's *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, has been interpreted to oust mandatory arbitration clauses but only in relation to claims brought under that particular section. In adopting these provisions, each provincial legislature made a policy choice to shield consumers from arbitration clauses to varying degrees.

[Emphasis added.]

[172] The important words here are “to varying degrees.” Contrary to what Mr. Zanin says in relying on *Difederico FCA*, the FCA never found that the provincial legislatures had declared that mandatory arbitration clauses were absolutely invalid in all circumstances. The court rather took the express precaution of clarifying that other provincial legislatures had only done so to a certain degree. The FCA thus contrasted the situation in those provinces to the lack of similar provisions at the federal level and in the *Competition Act*, acknowledging that parliamentary action would be required for an analogous regime to exist in the federal context (*Difederico FCA* at para 81). So far, Parliament has chosen not to exercise its authority in this respect.

[173] I also observe that the *Union des consommateurs c Bell Canada*, 2018 QCCS 1927 [*Bell*] case mentioned by Mr. Zanin can be distinguished for the same reason. In that case, the Quebec Superior Court rejected a strict interpretation of a provincial statute as it would only serve to defeat the legislative intent to ensure that limitation periods are tolled, and the flexible and generous interpretation of class action legislation (*Bell* at paras 2, 23). The issue in that case was whether a section of the Ontario class proceedings legislation that suspended limitation periods

with reference to a “class proceeding” referred to class proceedings in any province or only in Ontario. In that case, there were no limits whatsoever in the language of the legislative provision suspending the limitation periods, and the statement made by the Quebec Superior Court regarding the wide-ranging scope of the prohibition simply echoed the specific wording contained in the provincial provision at stake.

[174] Finally, I point out that this would not be the first time where this Court has enforced an arbitration clause that fell outside the purview of the *Commercial Arbitration Act*. For example, the Court previously stayed a proposed class action asserting a claim under the *Competition Act* on behalf of Amway distributors because of an arbitration clause (*Murphy v Compagnie Amway Canada*, 2011 FC 1341 [*Murphy FC*]). The Court also seems to have accepted that Ontario’s *Arbitration Act, 1991*, SO 1991, c 17 could apply because the parties had incorporated it into their contract. The FCA later upheld the decision to stay the action in *Murphy FCA*.

[175] For all the above reasons, I conclude that the provincial consumer protection laws do not amount to a legislative override of the Arbitration Clause before this Court.

(ii) Section 25 of the *FC Act*

[176] Mr. Zanin also submits that section 25 of the *FC Act* is under the part “Jurisdiction of the Federal Court” of that legislation, and is akin to a “catch-all” for Parliament to ensure that Canadian federal laws are to be decided by a Canadian court, and that jurisprudence for Canadian federal laws is to be honed and developed by the Canadian judiciary, whether a provincial court or this Court. As such, Mr. Zanin argues that section 25 of the *FC Act* would

constitute another legislative override preventing a stay in favour of arbitration. Mr. Zanin contends that the text of this provision would be devoid of any meaning if a foreign merchant could, by the stroke of a pen in an adhesion contract, force Canadian consumers to adjudicate their Canadian federal law claims at a foreign arbitration outside of Canada.

[177] With respect, and for the reasons I elaborated in *Uber*, Mr. Zanin’s argument is without merit (*Uber* at paras 86–103).

[178] Section 25 of the *FC Act* provides that this Court “has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy.”

[179] Relying on cases such as *Creighton v Franco*, 1998 CanLII 8155 (FC) [*Creighton*], Mr. Zanin argues that, where no other court has jurisdiction, this Court must have it further to section 25 of the *FC Act*. In *Creighton*, this Court stated that “[s]ection 25 of the *Federal Courts Act* applies where no other court constituted under any of the *Constitution Acts* has jurisdiction in respect to a claim or remedy” (*Creighton* at para 25). According to Mr. Zanin, Ooma’s position, if accepted, would effectively mean that no other Canadian court has subject-matter jurisdiction to adjudicate the *Competition Act* or *Trademarks Act* claims due to the Arbitration Clause. He submits that this alleged void of venues with subject-matter jurisdiction triggers the application

of section 25, which is a residual savings clause ensuring that federal laws are adjudicated by a Canadian court.

[180] I do not dispute that, as submitted by Mr. Zanin, none of the parties in *Difederico FCA* raised the issue of section 25 of the *FC Act* in their submissions to the FCA, and that this decision does not address the impact of section 25 on a motion like Ooma’s Jurisdiction Motion seeking a stay in favour of arbitration in a federal matter.

[181] However, section 25 of the *FC Act* grants the Court original jurisdiction in limited circumstances, and has no application here. It applies “only when jurisdiction, in the sense of jurisdiction over a subject matter (or in some cases over persons), has not been conferred upon any ‘other court’ by legislation, inherent powers or by some other recognized means” (*Winmill v Winmill*, 1974 CanLII 2554 (FC) [1974] 1 FC 539 at p 543, aff’d [1974] 1 FC 686 (FCA)). Section 25 prevents a jurisdictional gap in the rare circumstances where a provincial superior court cannot hear a claim arising under federal legislation. It does not invalidate other forms of mandatory dispute resolution, including arbitration, in favour of this Court’s jurisdiction.

[182] If Mr. Zanin’s interpretation of section 25 of the *FC Act* were correct, then all federal laws conferring exclusive jurisdiction on any arbitrator would be pointless, and this Court would still have jurisdiction under section 25 because no “other court” does. This would mean that arbitration would be impossible in matters involving federal laws due to section 25, which is not only preposterous, but evidently not the case in light of the jurisprudence discussed above.



[183] Moreover, the SCC decision in *Desputeaux v Editions Chouette (1987) Inc*, 2003 SCC 17 [*Desputeaux*] responds completely to Mr. Zanin’s argument on section 25 of the *FC Act*. In *Desputeaux*, the SCC dealt with section 37 of the *Copyright Act*, RSC 1985, c C-42 (as the provision was then known), which provided that this Court had concurrent jurisdiction with provincial courts to hear and determine all proceedings under that legislation.

[184] It is worth reproducing paragraphs 42 and 46 of Justice Louis LeBel’s reasons in *Desputeaux*. They read as follows:

[42] The purpose of enacting a provision like section 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers.

[...]

[46] Section 37 of the *Copyright Act* gives the Federal Court concurrent jurisdiction in respect of the enforcement of the Act, by assigning shared jurisdiction *ratione materiae* in respect of copyright to the Federal Court and “provincial courts.” That provision is sufficiently general, in my view, to include arbitration procedures created by a provincial statute. If Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so.

[Emphasis added.]

[185] The same reasoning applies, by analogy, to section 25 of the *FC Act* with respect to the *Competition Act* or the *Trademarks Act*. In fact, this reasoning should apply all the more in the current context: unlike when *Desputeaux* was rendered, arbitration is nowadays an undisputed

method of dispute resolution in Canada, whose legitimacy is fully recognized by the federal and provincial legislatures, as well as by the courts. For instance, in *TELUS*, the SCC endorsed “the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts” (*TELUS* at para 56, citing *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642 at para 14). If Parliament had intended to exclude arbitration in federal matters, it would have clearly done so.

[186] Like section 41.25 of the *Copyright Act* — the modern equivalent of the provision examined in *Desputeaux*, section 25 of the *FC Act* does not prevent an arbitrator from ruling on matters of federal law, such as questions concerning the *Competition Act* or the *Trademarks Act*. The provision was not, and is not, intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It is sufficiently general to include arbitration procedures.

[187] I further note that *Desputeaux* was subsequently followed by the federal courts in *Difederico FCA* at paragraph 77, in *Murphy FC* at paragraphs 61–63, *aff’d Murphy FCA*, and in *Gold Line* at paragraphs 48–49.

[188] In *Murphy FC*, the Court agreed that, as in the case of *Desputeaux*, subsection 36(3) of the *Competition Act* did not confer exclusive jurisdiction to the Court, but merely identified the Court as a court of competent jurisdiction to hear section 36 claims: “[p]ut in other words, section 36 merely provides for the *ratione materiae* jurisdiction of the Federal Court and in no

way excludes arbitration as a valid forum” (*Murphy FC* at para 63). In *Gold Line*, the Court reaffirmed that section 41.25 of the *Copyright Act* was not intended to exclude arbitration. Its sole purpose is to identify the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. The Court reiterated that it cannot be assumed to exclude arbitral jurisdiction unless it expressly so states (*Gold Line* at paras 48–49).

[189] In addition, Mr. Zanin’s argument on section 25 of the *FC Act* fails for another reason. As the FCA expressly stated in *Moudgill v Canada*, 2014 FCA 90 at paragraph 9, “[s]ection 25 of the *Federal Courts Act* is of no assistance to the appellant as it has no application where the superior Court of a province has jurisdiction to grant the relief sought such as is the case here.” Indeed, section 25 does not constitute a valid statutory grant of jurisdiction where a claimant could seek relief in the superior court of any province (*Fetr v Kazerani*, 2024 FC 1429 at para 10; *Kelly Lake Cree Nation v Canada*, 2017 FC 791 at para 38; *Creighton* at para 25). Here, Mr. Zanin would have a recourse before the provincial superior courts under section 36 of the *Competition Act* and section 53.2 of the *Trademarks Act*, as this Court and the superior courts of each province have concurrent jurisdiction to hear claims brought under those provisions.

[190] In sum, section 25 of the *FC Act* cannot be interpreted as preventing arbitration as a form of dispute resolution and may not act as a legislative override of the Arbitration Clause.

### (iii) Conclusion on legislative overrides

[191] For all of those reasons, Mr. Zanin has not demonstrated, on a balance of probabilities, that there is any legislative override of the Arbitration Clause at issue, whether by virtue of provincial consumer protection legislation or section 25 of the *FC Act*.

(b) *Unconscionability*

[192] The second statutory exception raised by Mr. Zanin to invalidate the Arbitration Clause is his claim that the arbitration agreement is void for reasons of unconscionability and public policy. The concepts of unconscionability and public policy are separate but doctrinal cousins. Unconscionability focuses on the vulnerability of and unfairness to the party who is seeking to void the contract, while public policy focuses on the harm to society that would flow from upholding a particular contract (*Pearce v 4 Pillars Consulting Group Inc*, 2021 BCCA 198 at para 192 [*Pearce BCCA*]; see also: *Petty BCSC* at para 41).

[193] Mr. Zanin relies on *Heller* to submit that the common law considers arbitration clauses within standard form contracts drafted by stronger parties to be unconscionable. In *Heller*, the SCC recognized that standard form contracts have a particularly clear potential to create an inequality of bargaining power between the parties (*Heller* at para 89). In his written submissions, Mr. Zanin also focuses on the common law governing unconscionability, as developed in *Pearce BCCA*. He maintains that, unlike those cases where the courts did not find the arbitration clauses unconscionable pursuant to the *Heller* test, the Arbitration Clause imposed by Ooma contains various features similar to Mr. Heller's situation.

[194] Further to my detailed review of the circumstances of this case and the parameters established by the jurisprudence — both in *Competition Act* matters and other cases involving arbitration clauses, I am not persuaded by Mr. Zanin’s arguments and assessment of the Arbitration Clause. In my view, Mr. Zanin has failed to demonstrate, on a balance of probabilities, that the Arbitration Clause is unconscionable.

(i) Principles governing unconscionability

[195] I take the liberty to once again cite an extract from my decision in *Uber*, where I summarized the principles governing unconscionability in requests for a stay in favour of arbitration (*Uber* at paras 122–132). This summary, which continues to reflect the state of the law, reads as follows:

[122] In *Heller SCC*, the SCC set out the principles governing unconscionable arbitration agreements. The SCC explained that two elements are necessary to prove unconscionability: 1) proof of inequality in the positions of the parties; and 2) proof of a resultant improvident bargain (*Heller SCC* at para 64 citing *Norberg v Wynrib*, [1992] 2 SCR 226 at 256; *Douez SCC* at para 115; *Williams BCCA* at paras 71, 129). Both inequality of bargaining power and improvidence are needed to render an arbitration agreement unconscionable, and thus invalid (*Heller SCC* at para 74).

[123] In essence, the doctrine of unconscionability provides relief from improvident contracts where there is an inequality of bargaining power between the parties arising from some weakness or vulnerability affecting the claimant. An improvident contract is one that unduly advantages the stronger party or unduly disadvantages the weaker (*Heller SCC* at para 74). Improvidence is assessed at the time the contract is made with reference to the surrounding circumstances.

(i) Inequality of bargaining power

[124] For inequality of bargaining power to exist, one party must be in a position where they “cannot adequately protect their

interests in the contracting process” (*Heller SCC* at para 66) and there must be “no ‘rigid limitations’ on the types of inequality that fit this description” (*Heller SCC* at para 67). Examples of what might constitute inequality include “[d]ifferences in wealth, knowledge, or experience,” but “inequality encompasses more than just those attributes” (*Heller SCC* at para 67).

[125] In the context of contractual relations, the SCC notes that in many of the cases where an inequality of bargaining power has been demonstrated, “the relevant disadvantages impaired a party’s ability to freely enter or negotiate a contract, compromised a party’s ability to understand or appreciate the meaning and significance of the contractual terms, or both” (*Heller SCC* at para 68). This is particularly true in cases of necessity, where the weaker party is so dependent on the stronger party that serious consequences would flow from not agreeing to a contract. “When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party’s unfortunate situation” (*Heller SCC* at para 69). In this respect, the SCC references the “rescue at sea” scenario as a classic example of cases of necessity (*Heller SCC* at para 70). Inequity in bargaining power may thus exist in cases of necessity, where a party is vulnerable due to financial circumstances, or where there is a special relationship of trust.

[126] The SCC also mentions a second form of inequality in contractual relations, namely, a “cognitive asymmetry” (*Heller SCC* at para 71). Such a situation occurs when “only one party could understand and appreciate the full import of the contractual terms” (*Heller SCC* at para 71). The SCC indicates that in such a situation, the weaker party becomes particularly vulnerable and “the law’s assumption about self-interested bargaining loses much of its force” (*Heller SCC* at para 71).

[127] Ultimately, in order to establish inequality of bargaining power to the point of unconscionability, one must be at a point “where the law’s normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied” (*Heller SCC* at para 72).

[128] In *Heller SCC*, the SCC retained the following elements in its inequality of bargaining power analysis:

- A. The arbitration agreement was part of a standard form contract;

- B. Mr. Heller was powerless to negotiate any of its terms and only had two contractual options: to accept the arbitration agreement or to reject it;
- C. There was a significant gap between Mr. Heller's sophistication (a food delivery man in Toronto) and Uber (a large multinational corporation);
- D. The arbitration agreement contained no information about the costs of mediation and arbitration which was to take place in the Netherlands;
- E. A person in Mr. Heller's position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under the applicable rules or under Dutch law;
- F. Even assuming that Mr. Heller was the rare fellow who would have read through the contract in its entirety before signing it, he would have had no reason to suspect that behind an innocuous reference to mandatory mediation, there lay a \$14,500 USD hurdle to relief; and
- G. The arbitration rules were not attached to the contract, and so Mr. Heller would have had to search them out himself.

(ii) Improvident bargain

[129] Turning to the resultant improvident bargain dimension, the SCC first establishes that, as a general rule, “a bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable party, and that improvidence is measured at the time the contract is formed and must be measured contextually” (*Heller SCC* at paras 74–75). Thus, says the SCC, “the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched” (*Heller SCC* at para 76). This can take many forms.

[130] In the instance of cognitive asymmetry, the SCC notes that the focus should be on whether the weaker party has been unduly disadvantaged by the terms they did not understand or appreciate. The terms will be considered unfair when, taken in context, “they flout the ‘reasonable expectation’ of the weaker party ... or cause an ‘unfair surprise’” (*Heller SCC* at para 77).

[131] Finally, the SCC determined that unconscionability involves both inequality and improvidence, and that “proof of a manifestly unfair bargain may support an inference that one party was unable adequately to protect their interests [... as] it is a matter of

common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power” (*Heller SCC* at para 79).

[132] In *Heller SCC*, the SCC retained the following elements in its improvident bargain analysis:

- A. The mediation and arbitration processes required \$14,500 USD in up-front administrative fees, an amount close to Mr. Heller’s annual income, and it did not include the potential costs of travel, accommodation, legal representation or lost wages;
- B. The costs were disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into;
- C. The arbitration agreement designated the law of the Netherlands as the governing law and Amsterdam as the “place” of the arbitration;
- D. The arbitration agreement left the clear impression that Uber drivers had little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber;
- E. Any representations to the arbitrator, including about the location of the hearing, could only be made after the fees had been paid;
- F. The arbitration clause, in effect, modified every other substantive right in the contract such that all rights that Mr. Heller enjoyed were subject to the apparent precondition that he travel to Amsterdam, initiate an arbitration by paying the required fees and receive an arbitral award that establishes a violation of this right. It is only once these preconditions were met that Mr. Heller could get a court order to enforce his substantive rights under the contract. The arbitration clause thus made the substantive rights given by the contract unenforceable by a driver against Uber; and
- G. No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.

[196] In short, unconscionability requires that a party establish both an inequality of bargaining power and a resulting improvident bargain (*Heller* at paras 64–65). Inequality of bargaining



power “exists when one party cannot adequately protect their interests in the contracting process” (*Heller* at para 66). An improvident bargain is one that “unduly advantages the stronger party or unduly disadvantages the more vulnerable” party (*Heller* at para 74). Both elements must be proven and, as soon as one fails, an arbitration clause will not be found unconscionable.

[197] In *Uber*, at paragraphs 133–152, I also provided a detailed review of several precedents involving arbitration agreements in *Competition Act* claims where the *Heller* principles were applied. These include *Difederico FCA*, *Williams BCCA*, *Petty BCCA*, *Spark Event Rentals Ltd v Google LLC*, 2024 BCCA 148 [*Spark*], and *Tahmasebpour*. In these cases, the FCA, the BCCA, and the BCSC all found that the arbitration clauses respectively at issue were not unconscionable. I further considered two additional cases (also brought to the Court’s attention by Mr. Zanin in this matter) which did not involve *Competition Act* matters, but where the courts found an arbitration clause unconscionable (*Uber* at paras 153–162). These precedents are *Lochan*, aff’d 2024 ONCA 784, and *Pokornik*.

(ii) Inequality of bargaining power

[198] As noted above, inequality of bargaining power exists where one party is in a position where they “cannot adequately protect their interests in the contracting process” (*Heller* at para 66). There are “no ‘rigid limitations’ on the types of inequality that fit this description” (*Heller* at para 67). In *Heller*, the SCC provided some examples of what might constitute inequality: “[d]ifferences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes” (*Heller* at para 67).

[199] Ultimately, the SCC describes two primary situations where the inequality of bargaining power dimension would arise in contractual relationships: (i) where the consequences of the inequality are so dire that equity must intervene to prevent a party from having too great of an advantage over the weaker party; and (ii) when a “cognitive asymmetry” prevents one of the contracting parties from fully understanding the terms of the agreement, therefore rendering them vulnerable in the contracting process. For the inequality to amount to unconscionability, one must be at a point “where the law’s normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied” (*Heller* at para 72).

[200] In this case, no such vulnerability or unfairness exists, and I am not satisfied that there is an inequality of bargaining power justifying the Arbitration Clause’s alleged unconscionability.

[201] First, there is no evidence that the residential home phone service offered by Ooma is an essential service for Mr. Zanin, or that Mr. Zanin is dependent on the Service, to the point where the consequences of any inequality would be “dire.”

[202] It is clear that Mr. Zanin is not reliant on the Service in the same way as, for example, Ms. Pokornik depended on Skip in *Pokornik*, or Mr. Heller was reliant on Uber in *Heller*, where both individuals had an employment contract with the other contracting party. In other words, Mr. Zanin is clearly not in a situation of necessity, vulnerability, or dependence with respect to his purchase of home phone services.

[203] In reality, Mr. Zanin's situation is much more similar to the factual matrices in *Difederico FCA* (Amazon products), *Williams BCCA* (Amazon products), *Petty BCCA* (video games), *Uber* (food delivery services), or *Tahmasebpour* (cellphone services), where the courts found no element of necessity or dependence. The present matter is indeed more appropriately akin to this abundant jurisprudence on arbitration clauses in the consumer context, which establishes that consumers do not generally need or depend on these services to the point of being vulnerable or of suffering "dire" consequences.

[204] I pause to underline that even mobile phone services were found not to be essential elements of everyday life. In *Tahmasebpour*, the BCSC accepted that "a cell phone is a necessity for almost everyone" and that, in this respect, the cell phone contract at issue had more significance to the plaintiffs than the contracts in *DoorDash*, *Williams BCCA*, and *Petty BCCA*, but was not on par with those in *Heller* or *Pearce BCCA* (*Tahmasebpour* at para 55). If, in this digital age, mobile phone services are not essential, it is difficult to contemplate how home phone services could be. Moreover, there are several real alternatives for residential home phone service, both for fixed lines and for the mobile option, contrary to the situation in *Douez* where there was no social network alternatives to Facebook at the time (see, *a contrario*, *Douez* at para 56). There is no reason to believe that Mr. Zanin or any typical customer would have been affected by declining to agree to the Terms & Conditions, as they could have used another home phone service company, or even mobile phone services providers.

[205] In sum, accessing Ooma's Service is a standard retail transaction which does not imply any dependence, vulnerability, imbalance, or necessity, similarly to previous findings made by this Court and the BCSC (*Difederico FC* at para 124; *Petty BCSC* at para 60).

[206] Mr. Zanin's situation is far from the "rescue at sea" circumstances referred to in *Heller*. Nor is it one where a special relationship of trust exists between Mr. Zanin and Ooma, contrary to, for example, an employer-employee agreement as in *Heller* or *Pokornik*, or an agreement involving the provision of financial services as in *Lochan*. I do not agree that the nature of the Service offered by Ooma would put the facts of this case on par with the situations considered in the aforementioned cases, and I see no reason to stray from the established jurisprudence in the case at bar. In consumer contexts where the relationship between the consumer and the corporation is not one of necessity, but rather of convenience, the courts have been reticent to find arbitration clauses unconscionable.

[207] Furthermore, as was the case in *Difederico FCA*, *Williams BCCA*, or *Petty BCCA*, there is no evidence that Mr. Zanin — or any typical consumer — depends on Ooma's Service. Mr. Zanin offered no evidence showing that he was dependent or vulnerable in terms of his need to access Ooma's Service, or that a special relationship of trust existed between the parties. Mr. Zanin did not provide evidence demonstrating that he relies on Ooma to the point where his "livelihood or financial well-being are somehow dependent on access" to the Service (*Williams BCCA* at para 126). This is fatal to his claim of unconscionability.

[208] Second, I am not persuaded that this is a situation where Mr. Zanin was unable to understand the Arbitration Clause when he agreed to it, or where there was a “gulf in sophistication” between the parties (see, *a contrario*, *Heller* at para 93).

[209] It is true that Mr. Zanin had no possibility to negotiate the stipulations contained in the Terms & Conditions when registering to Ooma’s Service. Such is the nature of standard form contracts, where “the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition” (*Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 28, citing *MacDonald v Chicago Title Insurance Company of Canada*, 2015 ONCA 842 at para 33). It is equally true that the Terms & Conditions are made up of 38 pages that only briefly refer to the JAMS Rules, without giving much detail on their content. However, the Arbitration Clause was available and understandable, and the JAMS materials were accessible. There is no indication that a material information deficit exists between Mr. Zanin and Ooma, or evidence of any “cognitive asymmetry.” It is not enough to simply assert that a standard form contract was used and to claim that it is unconscionable.

[210] In *Pokornik*, the MBCA noted that “the presence of a standard form contract, an arbitration clause and a class proceeding waiver by themselves are not determinative” (*Pokornik* at para 85; see also: *Williams BCCA* at para 171). Indeed, a standard form contract between a consumer and a corporation, whether national or multinational, does not inherently create an inequality of bargaining power within the meaning of the test for unconscionability.

[211] The SCC also took great care in clarifying the lack of inherent inequality in standard form contracts at paragraph 88 of *Heller*, which reads as follows:

[88] We do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power (Waddams (2017), at p. 240). Standard form contracts are in many instances both necessary and useful. Sophisticated commercial parties, for example, may be familiar with contracts of adhesion commonly used within an industry. Sufficient explanations or advice may offset uncertainty about the terms of a standard form agreement. Some standard form contracts may clearly and effectively communicate the meaning of clauses with unusual or onerous effects (Benson, at p. 234).

[212] Here, I am not convinced that there was any misunderstanding of the Terms & Conditions between the parties as Mr. Zanin had access to the JAMS Rules and the relevant information. The arbitration procedure, process, and features are sufficiently and adequately described in the Arbitration Clause and the JAMS Rules attached to it by reference.

[213] Furthermore, there is — once again — no evidence that Mr. Zanin was unable to understand the Arbitration Clause or the JAMS Rules, and none of the hallmarks of unequal bargaining power in cases such as *Heller*, *Pokornik*, or *Lochan* are present. For example, the arbitration clause in *Lochan* — a consumer arbitration clause found unconscionable and referred to by Mr. Zanin — had many of the hallmarks of unequal bargaining power that the SCC found unconscionable in *Heller*: the arbitration took place abroad in Hong Kong under the laws of a foreign jurisdiction, the cost of arbitration exceeded \$35,000 (notwithstanding travel costs), not a single detail about the arbitration parameters and costs was included in the arbitration clause, claimants had to post security for costs before the arbitration body, and there was a significant information deficit (*Lochan* at paras 16, 28–29, 51).

[214] In the case at bar, none of these factors are at play.

[215] I therefore find no inequality of bargaining power in the present matter. This is sufficient to conclude that the Arbitration Clause is not void for reasons of unconscionability.

(iii) Improvident bargain

[216] Turning to the improvident bargain criterion, even if I were to assume that an inequality of bargaining power existed here (which is not the case), I also am not persuaded that the Arbitration Clause either unduly advantages Ooma or unduly disadvantages Mr. Zanin. In my view, the terms and conditions of the Arbitration Clause are not such as to create an “undue” advantage or disadvantage, or to effectively preclude access to justice for Mr. Zanin or a typical consumer in a similar situation.

[217] The SCC establishes that improvidence is measured at the time the contract is formed and must be considered contextually (*Heller* at paras 74–75). For example, in a situation where a weaker party is in desperate circumstances, almost any agreement will be improvident. Thus, the SCC notes that “the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched” (*Heller* at para 76). As mentioned above, Mr. Zanin is not in any such desperate circumstances here.

[218] Where a party alleges that an arbitration agreement is unconscionable because it is uneconomic and only a class proceeding is viable, the relevant consideration for the Court on a stay application is whether it is clear that the costs of arbitration will prevent an arbitrator from resolving the unconscionability challenge under the competence-competence principle. The costs of the entire arbitration are irrelevant to the court’s analysis. In these circumstances, only the

costs of the threshold unconscionability challenge matter. If an arbitrator can resolve the unconscionability challenge, the Court should grant the stay (*Spark* at paras 57–63).

[219] In *Spark*, the BCCA examined the plaintiffs’ capacity to pay the fees for the arbitrator’s adjudication of the threshold jurisdictional challenge — not the arbitration of the merits of their claim (*Spark* at para 61). The court determined that the plaintiffs had provided no evidence of their financial circumstances and did not even testify to their inability to afford the initial filing fees (*Spark* at paras 59–62). Consequently, the jurisdictional issues at play could appropriately be referred to arbitration under the competence-competence principle (*Spark* at para 63). The BCCA made this determination despite the fact that the plaintiffs in that case had submitted expert evidence about the proposed arbitral procedure and costs.

[220] I am not persuaded that, in the present matter, any improvidence resulted from an assumed inequality of bargaining power. In *Heller*, the high fees required for initiating arbitration — a total amount of US\$14,500 to be paid up-front — were deemed to “impose a brick wall between Mr. Heller and the resolutions of any of the claims he has levelled against Uber” (*Heller* at para 47). Improvidence resulted from this “brick wall” that would not even let Mr. Heller make any representations to the arbitrator without having to pay this astounding sum of money. A similar situation existed in *Pokornik* and *Lochan*.

[221] Here, Mr. Zanin failed to establish any significant undue advantage or disadvantage arising from the Arbitration Clause. As indicated by Ooma, the JAMS Rules are indeed much more favourable than the terms in *Heller*. A review of the JAMS Rules and the “Arbitration



Schedule of Fees and Costs” [JAMS Fees] demonstrate that the JAMS procedure is no more burdensome than the procedural rules and obligations in the traditional court system: (i) filing fees are relatively low and are even lower when arbitration involves consumers; (ii) parties need not be physically in California for the proceedings, as documents can be filed electronically and hearings can be conducted via telephone or videoconference (JAMS Rules 8 and 22(g)); (iii) the “Optional Expedited Arbitral Procedures” referred to in the Arbitration Clause provide for an expedited procedure and limited discovery (JAMS Rules 16.1 and 16.2); and (iv) unless the parties convene otherwise, each party shall pay its proportional part of fees and expenses (JAMS Rule 31(a)), but the fees for consumers are limited to \$250 pursuant to the JAMS Fees.

[222] In *Williams BCCA*, the BCCA ruled that it was not unreasonable for the BCSC to have found that the arbitration clause at issue was not unconscionable due to, among other things, the low cost of the upfront administrative fee and the possibility of conducting the arbitration remotely (*Williams BCCA* at paras 122–125). As a result, despite finding that the BCSC’s analysis did not go into as much depth as the SCC did in *Heller*, the court was “satisfied the [trial] judge’s overall assessment of unconscionability and public policy in the context of this particular case warrant[ed] deference and should be affirmed” (*Williams BCCA* at para 117).

[223] In my view, the general validity analysis in *Heller* supports the Arbitration Clause. The clause at issue is materially different from the arbitration agreement held invalid in *Heller* and is more similar to the one held valid in *Williams BCCA*. In particular, unlike the exorbitant US\$14,500 in commencement fees in *Heller*, the JAMS Fees are a modest \$250 for consumers like Mr. Zanin. There is thus a small difference between the JAMS Fees for consumers and the

\$200 initial fees that were described as “modest” in *Williams BCCA* at paragraph 122. What is more, like in *Williams BCCA*, the arbitration hearings and meetings may be held in any location the arbitrator considers convenient or necessary (JAMS Rule 19(c)), and not necessarily abroad and in person as in *Heller*. JAMS Rule 22(g) further states that JAMS arbitration hearings may be conducted by telephone, email, the Internet, videoconferencing, or other communication methods, if the parties agree or the arbitrator so directs.

[224] I acknowledge that the Arbitration Clause does not have all of the features mentioned in *Difederico FCA*, *Williams BCCA*, *Petty BCCA*, or *Murphy FCA*. For example, it does not provide for an access to small claims courts, the precise costs for retaining the arbitrator are not specified, and there is no provision stating that the consumer’s fees could be refundable in certain cases. Similarly, nothing prevents a possible costs award against the consumer, though the arbitrator has broad discretion on costs and can apportion costs between the parties.

[225] However, these differences are not sufficient to push the Arbitration Clause outside the limits of what the courts have considered conscionable. I consider that the particular missing features singled out by Mr. Zanin are more peripheral than other key conditions to arbitration agreements, such as the availability of a remote hearing — instead of an in-person hearing abroad — and the low amount of the commencement fees. In the present Arbitration Clause, these key conditions are certainly in line with the jurisprudence. In fact, they are a far cry from the problematic features identified in *Heller*, *Pokornik*, and *Lochan*, where the arbitration agreements were found to be unconscionable.

[226] In *Tahmasebpour*, the BCSC recognized that the arbitration clause did not contain the kind of concessions to the consumer that helped save the arbitration clauses in *Williams BCCA*, *Petty BCCA*, and *DoorDash*. There was no carve-out for small claims, no provision for an arbitration to be by telephone or video, and no provision for Freedom Mobile to pay the up front costs if the plaintiffs could not afford them. Despite this, the court found that the key condition of the arbitration clause was the “up-front costs” of the arbitration, but there was no evidence on this point (*Tahmasebpour* at para 58). Thus, it was “impossible to determine if the clause potentially deprives the plaintiffs of a meaningful remedy under their contract,” and the plaintiffs had not met their onus of clearly showing unconscionability (*Tahmasebpour* at para 58).

[227] Furthermore, Mr. Zanin had the onus of proving a “clear” — rather than simply “arguable” — case of unconscionability (*Peace River* at paras 88–89; see also: *Difederico FC* at para 112). However, Mr. Zanin has offered no evidence of that nature. He has not deposed as to whether he read the Arbitration Clause and could not understand it. He has not provided financial information that would allow the Court to understand the significance of the cost of arbitration to him, or whether those costs impeded his access to justice at the time he entered into his contract with Ooma. As was the case in *Uber* or *Tahmasebpour*, it is unclear from the evidentiary record before this Court whether the Arbitration Clause truly deprives Mr. Zanin of a meaningful remedy under his contract with Ooma.

[228] In light of the foregoing, I find that there is no improvident bargain in this case.

[229] I observe that the SCC explicitly distinguished *Heller* from *Dell* by noting that, in the latter, the issue of “accessibility” had not been raised on the facts, and that this distinction justified departing from the general rule of arbitral referral (*Heller* at para 37). The exception carved out in *Heller* thus seeks to avoid situations where a potential plaintiff would not be able to have recourse to the arbitration clause and be denied access to justice and independent dispute resolution in the first place. This could be due to purely factual and contextual reasons, such as the disparity between the cost of arbitration and the small amount of the claim, or the physical inaccessibility of the location of the arbitration, and would create a situation where the party relying on the arbitration clause would be insulated from meaningful challenge (*Heller* at para 39). Here, I do not find such a denial of access to dispute resolution for Mr. Zanin.

[230] Finally, I find that Mr. Zanin’s reliance on *Pearce BCCA* is misplaced. While it helpfully distinguishes the general concepts of unconscionability and public policy, this case is of limited assistance in the actual application of the unconscionability doctrine to arbitration clauses. It had nothing to do with arbitration clauses or stays in favour of arbitration, as the concepts of unconscionability and public policy were applied to a class action waiver clause. In *Pearce BCCA*, the BCCA found that the class action waiver clause at hand would have the practical effect of precluding access to justice for the class members, and deemed it invalid and unenforceable as being unconscionable and contrary to public policy (*Pearce BCCA* at paras 245, 248).

[231] In fact, the BCSC recognized that the result would have been different if an arbitration clause had been at stake (*Pearce v 4 Pillars Consulting Group Inc*, 2019 BCSC 1851 at paras

170–172 [*Pearce BCSC*], aff’d *Pearce BCCA*). Indeed, the court observed that there is a public policy argument in favour of arbitration clauses, as “[a]rbitrations are intended to be faster, more cost effective and often involve specialized tribunals familiar with the subject matter at hand” (*Pearce BCSC* at para 172). On the other hand, it found it “difficult to construe a similar public policy argument that would justify preventing a consumer from advancing a class action proceeding for claims under consumer protection legislation” (*Pearce BCSC* at para 172). On appeal, the BCCA equally found that arbitration clause cases were of little assistance to the matter at hand because, among other reasons, “a valid arbitration agreement may provide a comparable measure of justice to the superior courts” (*Pearce BCSC* at para 278, citing *Heller* at para 120, Brown J, concurring). While these remarks were seemingly made in the context of the public policy doctrine, I find them to hold equally true in the context of unconscionability, since both doctrines address access to justice considerations. In fact, the relevance of these remarks is evident from the BCCA’s finding that the class action waiver clause at issue was both unconscionable and contrary to public policy by preventing class members from seeking justice through a dispute resolution procedure (*Pearce BCCA* at paras 245, 248).

(iv) Conclusion on unconscionability

[232] In light of the above, I find that the Arbitration Clause therefore fails to meet the test for unconscionability. As was the case in *Difederico FCA*, *Williams BCCA*, and *Petty BCCA*, there is no particular dependence on access to the home phone services at stake here. The FCA and the BCCA have firmly distinguished arbitration clauses in consumer cases like this one, where the consumer is not in a situation of necessity, from the problematic clauses in *Heller* or *Pokornik*, which were grounded on employment relationships.

[233] In any event, Mr. Zanin’s unconscionability challenge in this matter raises mixed questions of fact and law that would clearly require the Court to conduct more than a “superficial examination” of the matter. At a bare minimum, the issues raised by Mr. Zanin on the unconscionability front are thus something that would rather have to be decided by the arbitrator in the arbitration process, as per the competence-competence principle (*Dell* at para 85).

[234] I do not dispute that, in some cases, the unfortunate empirical reality is that mandatory arbitration clauses in consumer contracts may have the effect of severely limiting access to justice in the context of low-value claims. However, I do not read *Heller* as opening the door to conclude that the potentially low value of a claim is sufficient, in and of itself, to render an arbitration agreement unconscionable. This may form part of the policy reasons which led many provincial legislatures to amend their consumer protection legislation in order to limit or ban arbitration agreements to varying degrees for consumer contracts. However, as the FCA rightly observed in *Difederico FCA*, nothing in that respect has yet been done at the federal level (*Difederico FCA* at para 81). Only Parliament — not this Court — could make such a policy choice in the context of the *Competition Act*, the *Trademarks Act*, or any other federal law.

(c) *Incapacity of performance*

[235] As a last argument against a stay in favour of arbitration, Mr. Zanin submits that the Arbitration Clause is “incapable of being performed.” He claims that the Arbitration Clause is incapable of performance since it does not comply with the JAMS Minimum Standards, with the consequence that, under its own terms, the JAMS would not administer the arbitration because of the Arbitration Clause’s failure to follow the JAMS’ fairness policy.

[236] According to the JAMS Minimum Standards, the JAMS will only arbitrate consumer claims when the arbitration clause at issue meets those standards. Mr. Zanin argues that, on its face, Ooma's Arbitration Clause does not comply with many of the JAMS Minimum Standards: (i) the clause restricts access to the courts in all circumstances, and contains no exceptions for small claims, contrary to article 1; (ii) the clause mandates that the arbitration be held in Santa Clara County, California unless all parties agree, contrary to article 5 providing that the consumer's access to arbitration must not be precluded by the location of the arbitration; (iii) the clause provides that both parties are responsible for all JAMS filing fees, administrative fees, and arbitrator professional fees, whereas article 7 requires the company to bear all costs over the \$250 commencement fee paid by the consumer; (iv) the clause stipulates that attorney's fees can be awarded to Ooma, contrary to article 8 providing that, in California (where Ooma, Inc. is headquartered), a consumer cannot be required to pay the fees and costs incurred by the opposing party, even if he or she does not prevail.

[237] Mr. Zanin submits that, in light of the foregoing, there is no reason to believe that the JAMS will accept to conduct any arbitration proceeding under Ooma's Arbitration Clause. Indeed, Mr. Zanin says that Ooma has never attempted such consumer arbitrations under the Arbitration Clause. He adds that, after this Action was filed, Ooma has not even attempted to contact the JAMS to confirm if they would even take the case.

[238] In *Peace River*, the SCC noted that "an arbitration agreement is considered 'incapable of being performed' where 'the arbitral process cannot effectively be set in motion' because of a physical or legal impediment beyond the parties' control" (*Peace River* at para 144). More

specifically, the “non-availability of the arbitrator specified in the agreement” is sufficient to demonstrate a physical impediment rendering the agreement incapable of being performed (*Peace River* at para 145).

[239] I am not persuaded by Mr. Zanin’s argument and am not convinced that he has demonstrated, on a balance of probabilities, that the Arbitration Clause meets this last statutory exception identified in *Peace River*.

[240] The Arbitration Clause specifies that the arbitration will be held in Santa Clara County, California unless the parties agree otherwise. That said, the parties are not required to be physically in California for the proceedings, given that documents can be filed electronically and hearings can be conducted via telephone or videoconference (JAMS Rules 8 and 22(g)). JAMS Rule 24(g) also states that the arbitrator can attribute attorneys’ fees and expenses as he or she sees fit. It is therefore not a situation where the arbitration agreement is clearly incapable of being performed.

[241] Moreover, the question of the Arbitration Clause’s conformity with the JAMS Minimum Standards is a highly factually infused determination to make. At the very least, determining whether the Arbitration Clause is incapable of being performed because of the alleged limits in the JAMS Minimum Standards is an issue that should be referred to the arbitrator on the basis of the competence-competence principle. If there is one issue that falls squarely within an arbitrator’s jurisdiction, it is certainly determining whether the procedural rules applicable to the arbitration are actually being followed. Indeed, unlike this Court, the JAMS has an intricate knowledge of the JAMS Minimum Standards and JAMS Rules, and is consequently in a much



better position of determining whether or not the Arbitration Clause is actually in contravention with the JAMS' procedure.

[242] As mentioned above, the competence-competence principle requires that where “the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator” [emphasis added] (*Peace River* at para 89). A mere possibility is not enough to overcome the competence-competence principle (*Difederico FC* at para 112). Here, the objection raised by Mr. Zanin is a question of mixed fact and law that obviously requires more than a superficial review of the record, meaning that it must be resolved by the arbitrator (*Dell* at para 85).

[243] Mr. Zanin has therefore not demonstrated, on a balance of probabilities, that the Arbitration Clause is incapable of being performed and that the requested stay in favour of arbitration ought to be denied on this basis.

(6) Conclusion on the Arbitration Clause

[244] For all of the above reasons, I find that the Arbitration Clause is not subject to any legislative override, is not void for reasons of unconscionability, and is not incapable of being performed. There are no statutory exceptions, as established in *Dell*, *Heller*, and *Peace River*, that would justify an exception to the competence-competence principle. Any *bona fide* challenge to the jurisdiction of the arbitrator to address Mr. Zanin's *Competition Act* or *Trademarks Act* claims or to the validity of the Arbitration Clause should thus be determined by the arbitrator.

[245] This conclusion is sufficient to grant Ooma’s Jurisdiction Motion and to stay Mr. Zanin’s Action in favour of arbitration. For the sake of completeness, I will nonetheless exercise my discretion to briefly deal with the two other contractual clauses raised by Ooma to deny the Court’s jurisdiction, namely, the Forum Selection and Class Action Waiver Clauses.

B. *The Forum Selection Clause*

[246] Pursuant to subsection 19(c) of the Terms & Conditions, Ooma requires that its customers litigate their claims before California courts under California law. According to Ooma, this Forum Selection Clause is a further ground to deny this Court’s jurisdiction.

[247] Ooma submits that forum selection clauses are usually valid, unless it is determined that there are public policy considerations that must be taken into account. When faced with such clauses, the Court must apply the “strong cause” test developed in *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 at paragraphs 20, 39, 47 [*Pompey*] and *Douez* at paragraphs 28–29, 38–39.

[248] In *Pompey*, in the commercial context, the SCC ruled that a forum selection clause contained in a bill of lading binding two maritime shipping companies was enforceable. Both companies should be “held to their bargain,” as they were sophisticated parties well aware of industry practices and there was no evidence that the forum selection clause was the result of a grossly uneven bargaining power that would render it invalid (*Pompey* at para 29). In its reasons, the court adopted the “strong cause” test from the English court’s decision in *The “Eleftheria,”* [1969] 1 Lloyd’s Rep 237 (Adm Div) (*Pompey* at para 19). In *Douez*, in the consumer context,

the SCC refused to enforce a forum selection clause in a standard form agreement requiring the consumers to litigate in California (*Douez* at para 76).

[249] The two-step “strong cause” test first requires that Ooma — the party seeking a stay of proceeding — establish that the forum selection clause is “valid, clear and enforceable and that it applies to the cause of action before the court” (*Douez* at para 28, citing *Preymann v Ayus Technology Corp*, 2012 BCCA 30 at para 43). As this step of the test, the Court must apply the principles of contract law to determine the validity of the clause, such as unconscionability, undue influence, and fraud (*Douez* at para 28). If the enforceability of the clause is established under the principles of contract law, the second part of the test shifts the onus to the other party — in this case, Mr. Zanin — to demonstrate that there are “strong” reasons why the Court should not enforce the clause (*Douez* at para 29; *Pompey* at para 39). At this step of the test, the Court must consider “all the circumstances” of the particular case, including — but not limited to — the convenience of the parties, fairness between the parties, the interests of justice, and public policy (*Douez* at para 29; *Pompey* at para 31). There is no strict or comprehensive list of factors governing the discretion of the Court in this inquiry. However, the Court need not be concerned with the “substantive legal issues underlying the dispute” (*Pompey* at para 31).

[250] Focusing on the second step of the test, Ooma argues that there is no reason, let alone a strong one, that would lead to conclude that the Forum Selection Clause should not be enforced.

[251] Mr. Zanin opposes this Forum Selection Clause and states that his arguments against the Arbitration Clause similarly apply to this provision of the Terms & Conditions. Relying on

*Douez*, Mr. Zanin argues that this Court can refuse to enforce a forum selection clause in a standard form contract, and also submits that sections 53.2 and 55 of the *Trademarks Act* as well as section 36 of the *Competition Act* expressly confer jurisdiction to this Court. Furthermore, he once again relies on the fact that section 25 of the *FC Act* guarantees this Court's jurisdiction to try claims based on federal laws.

[252] Mr. Zanin maintains that the “strong cause” test does not apply to actions under the *Trademarks Act* or the *Competition Act*, given that both acts explicitly confer jurisdiction to this Court. There is therefore no “absence of applicable legislation” (*Pompey* at para 39). In such a situation, Mr. Zanin contends that the *Pompey* test can be modified (*Canstar Restorations Limited Partnership v DKI Canada Ltd*, 2021 BCSC 951 at para 74; *Douez v Facebook, Inc*, 2014 BCSC 953 at paras 86–90), given that the specific statutory conferral denotes that Parliament recognizes the extensive subject-matter expertise of a given court on the topic. This, in his view, supports his position that the Forum Selection Clause should be rendered unenforceable.

[253] Mr. Zanin also submits that *Douez* is particularly relevant to the present case, as it also involved a California company, an online situation, statutory causes of action, as well as a clause that identified California as the forum where claims were to be litigated. More specifically, he contends that *Douez* is indicative of the SCC's willingness to protect weaker parties in the consumer context by favouring local courts and domestic law, even when a forum selection clause is invoked.

[254] With respect, I do not agree that *Douez* leads to such a drastic conclusion, or that Mr. Zanin has demonstrated the presence of a “strong cause” against the Forum Selection Clause.

[255] In *Douez*, the SCC reminded that forum selection clauses serve a valuable purpose as a critical component of private international law, but that it should be kept in mind that they may divert public adjudication of Canadian matters to other jurisdictions and thus affect the nature of the court adjudication process as a “public good” in Canada (*Douez* at paras 24–25). Indeed, because they “encroach on the public sphere of adjudication,” these clauses should not be enforced like any other clause within a typical contract (*Douez* at para 27).

[256] The SCC also took the opportunity to slightly adjust the “strong cause” test established in *Pompey*. At the second step of the test, the court stated that although no comprehensive list of factors exist, the examined factors should be “interpreted and applied restrictively in the commercial context,” as forum selection clauses provide stability and foreseeability in international commercial relations (*Douez* at para 31, citing *GreCon Dimter inc v JR Normand inc*, 2005 SCC 46 at para 22). On the other hand, the court noted that commercial and consumer relationships are very different, and that a consumer relationship may provide strong reasons not to enforce forum selection clauses given the unequal bargaining power that characterizes this relationship (*Douez* at para 33). In applying the “strong cause” test in the consumer context, courts must thus account for different considerations that are of relevance to this context, notably public policy considerations (*Douez* at paras 35, 38).

[257] I pause to observe that the majority's reasons in *Douez* also hint that, in the consumer context, public policy is nowadays the dominant factor in the "strong reasons" analysis and may alone justify a refusal to enforce a forum selection clause, whereas the other factors — namely the convenience of the parties, fairness between the parties, and the interests of justice — are relegated to a secondary role (*Douez* at paras 63–64, 75). Unlike public policy considerations, these secondary factors likely cannot by themselves ground a finding of strong cause, and rather merely serve to support such a conclusion (*Douez* at para 75).

[258] The SCC then distinguished two sets of public policy considerations that can bring courts to restrict freedom of contract in applying the "strong cause" test: (i) those intended to protect a weaker party, such as consumers exposed to glaringly unequal bargaining power under standard form contracts; and (ii) those intended to protect the social, economic, or political policies of the enacting state, such as constitutional or quasi-constitutional rights (*Douez* at para 52). In applying these principles to the facts in *Douez*, the court observed that the gap in bargaining power between the parties was large and that Ms. Douez's right to privacy had quasi-constitutional status (*Douez* at paras 54–59). Indeed, the SCC put great emphasis in its analysis of the "strong reasons" on the fact that privacy laws enjoy quasi-constitutional status (*Douez* at para 59, citing *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at paras 24–25). The court ended its analysis of the public policy factors by stating that "[g]iven the importance of constitutional and quasi-constitutional rights, it is even more important that reverence to freedom of contract and party autonomy does not mean that such rights routinely go without remedy" (*Douez* at para 62).

[259] In the present case, there are not any sufficiently important public policy considerations that would justify a refusal to enforce the Forum Selection Clause.

[260] First, Mr. Zanin has not pleaded that his constitutional or quasi-constitutional rights were at play in his case. In any case, it is obvious that no such rights are at stake here, unlike Facebook's alleged violation of the right to privacy raised in *Douez*. Mr. Zanin's claims are brought under the *Trademarks Act* and the *Competition Act* and do not concern quasi-constitutional rights which Canadian courts would have a public interest in adjudicating (*Williams BCCA* at para 151; see also: *Difederico FCA* at para 79).

[261] Second, I am not convinced that Mr. Zanin qualifies as a "weaker party" to anywhere near the degree that was discussed in *Douez* (*Douez* at para 52). While the Forum Selection Clause at issue is indeed part of a standard form contract, as mentioned earlier in the context of this Court's unconscionability analysis, the inequality of bargaining power between Mr. Zanin and Ooma is far from that between Ms. Douez and Facebook. For instance, Mr. Zanin had several plausible alternatives to the Service, both for fixed lines and for the mobile option, contrary to the situation in *Douez* where there were no real alternatives to Facebook at the time of the decision (see, *a contrario*, *Douez* at para 56). If Mr. Zanin disagreed with the Terms & Conditions, he could have easily selected another provider of home or mobile phone services.

[262] I rather agree with Ooma that, in his interpretation of the "strong cause" test developed in *Pompey* and *Douez*, Mr. Zanin is attempting to elevate ordinary contextual considerations, namely, contractual factors, to the status of public policy considerations.

[263] In *Schuppener v Pioneer Steel Manufacturers Limited*, 2020 BCCA 19 [*Schuppener*], the BCCA allowed an appeal on the basis that the motion judge had confused ordinary contextual considerations for public policy considerations (*Schuppener* at para 12). In that case, an action for negligence and breach of contract had been started in British Columbia. In response, the defendant applied for a stay of proceedings due to the existence of a forum selection clause in its contract of purchase and sale which required all claims to be brought in Ontario. At paragraph 14, the BCCA stated the following:

[14] In my view, *Douez* does not support the proposition that inclusion of a forum selection clause in a non-negotiable standard form consumer contract always raises a public policy concern sufficient to offset the public policy interest in holding parties to the terms of their bargain. Neither standard form contracts nor forum selection clauses raise public policy interests per se. Courts generally give effect to the terms of standard form consumer contracts absent legislative intervention: *Seidel v. Telus Communications Inc.*, 2011 SCC 15 at para. 2. Forum selection clauses have also been recognized as valid and beneficial: *Douez* at para. 24. They do away with confusion about where suits are to be brought and defended, and consumers may benefit from reduced prices if defendants can limit the jurisdictions in which they may be sued. In *Douez* it was not the standard form nature of the contract that was of concern, but rather the gross inequality of bargaining power between the parties. That is not to say that the form of the contract cannot be a contextual factor in assessing inequality of bargaining power, but rather that the standardized form of the contract itself does not raise a public policy concern.

[Emphasis added.]

[264] I agree with this statement. *Douez* does not stand for the proposition that contractual features like standard form contracts necessarily engage public policy concerns. In reality, the SCC's reasons in *Douez* are clear on this matter: the problem at issue was not standard form contracts *per se*, but rather the existence of unequal bargaining power within the specific context of standard form contracts, as this contractual form exacerbated an already significant gap in



bargaining power (*Douez* at para 52 *in fine*). In other words, standard form contracts are merely a tool at the disposal of contracting parties. It is not the “tool” that is the issue, but rather its individual users, when the bargaining power between these users is excessively unequal.

[265] In addition, in *Shuppener*, the BCCA reminded that, in conducting the strong cause analysis, courts should bear in mind that they do not have “discretion to refuse to enforce valid contracts unless there is some paramount consideration of public policy sufficient to override the public interest in freedom of contract” (*Schuppener* at para 23). The court further stated that the “power to refuse enforcement on the ground of public policy should ‘rarely be exercised’ and only in ‘clear cases, in which the harm to the public is substantially incontestable’” (*Schuppener* at para 23, citing *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 at para 117, Binnie J dissenting in the result, but analytical approach agreed to by the majority). Here, there is no such evidence or suggestion of harm to the public or to society.

[266] I also take note that, in *Douez*, the SCC considered that the “interests of justice” were among the “secondary factors” to be analyzed as part of the second step of the “strong cause” test (*Douez* at paras 64–72). In assessing the interests of justice, courts may look at which forum is best positioned to hear the case on the merits, whether the courts in the selected forum would be unable or unwilling to litigate the plaintiff’s claim if the forum selection clause were to be enforced, and whether the laws of the jurisdiction in which the case arises intended there to be mandatory rules that supersede the party’s choice of law (*Douez* at paras 65–67, 71–72).

[267] In this case, the selection of California reflects a natural choice for Ooma. It is the U.S. state where Ooma, Inc. is based, as well as a respected forum offering procedural and substantive legal guarantees. There is also no evidence that the California courts could not handle a recourse similar to Mr. Zanin's, or that there is no equivalence to the impugned provisions of the *Trademarks Act* or the *Competition Act* in California.

[268] Finally, and for the same reasons as for the Arbitration Clause, Mr. Zanin's arguments regarding the provincial consumer protection laws and section 25 of the *FC Act* have no more merit with respect to the Forum Selection Clause. If the Court can deny its jurisdiction in favour of arbitration, it can also do so in favour of another forum identified in a forum selection clause. Section 36 of the *Competition Act* does not declare the Court to be the only competent forum and does not prevent parties from contracting out of that jurisdiction (*Difederico FCA* at paras 75–76; *Murphy FCA* at paras 17, 41–42). Instead of this Court, parties may, and often do, pursue claims for damages under section 36 of the *Competition Act* by arbitration or before the provincial superior courts. This is not a situation where there is a constraining statutory conferral of jurisdiction. The same is true for section 53.2 of the *Trademarks Act*.

[269] In light of the foregoing, I find that Mr. Zanin has not demonstrated the existence of a “strong cause” against the enforcement of the Forum Selection Clause, and that this clause also supports Ooma's conclusion in its Jurisdiction Motion.

[270] In any event, given the competence-competence principle and the validity of the Arbitration Clause, it will be up to an arbitrator to determine whether the Forum Selection Clause is valid and enforceable, and not this Court.

C. *The Class Action Waiver Clause*

[271] Ooma finally relies on the last part of section 16 of the Terms & Conditions — the Class Action Waiver Clause — to assert that its customers have waived their rights to bring claims as part of a class proceeding, and to deny the Court's jurisdiction on Mr. Zanin's Action.

[272] Ooma submits that the Class Action Waiver Clause is valid and enforceable, and that the Court should thus not hear this Action. Additionally, Ooma advances that nothing in the *Trademarks Act* or the *Competition Act* forbids the use of class action waiver clauses in consumer contracts (*Murphy FCA* at para 60).

[273] Mr. Zanin's arguments against the Class Action Waiver Clause are similar to those he formulated against the Arbitration Clause. He maintains that the clause infringes on provincial consumer protection laws and section 25 of the *FC Act*. Relying on *Pearce BCCA*, he also claims that the clause is unconscionable and contrary to public policy. He says that the analysis in *Heller*, which centred on the issue of the validity of arbitration clauses in standard form contracts, equally applies to render the Class Action Waiver Clause unconscionable. According to Mr. Zanin, the *Pearce BCCA* case is relevant as it applies the concept of unconscionability described in *Heller* to a class action waiver clause. Mr. Zanin states that the Class Action Waiver Clause is similarly unconscionable to the one in *Pearce BCCA*, as its application would

constitute a denial of justice due to the low monetary amount of each individual customer's claim (*Pearce BCCA* at paras 244–245). The only viable way to access justice would therefore be via a class action, where the individual claims would be aggregated.

[274] Mr. Zanin also contends that the present case resembles the circumstances in *Seidel*, where a class action waiver clause was deemed invalid because it was not severable as a whole from an otherwise invalid arbitration clause.

[275] Ooma responds that Mr. Zanin's reliance on *Seidel* is misguided, as there are clear distinctions that must be made between that decision and the present case. For instance, Ooma notes that, even though the Arbitration and Class Action Waiver Clauses are regrouped under the same section 16 entitled "Arbitration," the Class Action Waiver Clause is preceded by a distinct "TO THE EXTENT PERMITTED BY APPLICABLE LAW," indicating that it must be read, understood, and applied distinctly from the Arbitration Clause. In addition, *Seidel* concerned a provincial consumer protection legislation, not a federal law such as the *Trademarks Act* or the *Competition Act*, and there is no provision in these federal laws barring the use of class action waiver clauses.

[276] I agree with Ooma.

[277] Ooma's Arbitration and Class Action Waiver Clauses are two separate and distinct provisions. I find it clear from the wording of section 16 that the Class Action Waiver Clause does not exist or apply only because of arbitration. Moreover, *Seidel* only stands for the

proposition that, if an arbitration clause falls, a class action waiver clause closely tied to it may fall as well. That said, *Seidel* does not imply the reverse, and cannot be interpreted as suggesting that the invalidity of a class waiver clause would carry with it the invalidity of an otherwise distinct arbitration clause. I also observe that, in *Pearce BCCA*, the class action waiver clause was substantially different from that of the parties'. Indeed, the BCCA was dealing with a relatively vague and unclear contractual provision in the context of strict bankruptcy laws.

[278] Furthermore, the FCA's ruling in *Murphy FCA* makes it clear that the reasoning in *Seidel* cannot apply to claims made pursuant to the *Competition Act*. In *Murphy FCA*, the appellant had signed a registration agreement in order to become part of the distribution network of the respondent Amway. The registration agreement contained an arbitration agreement which provided for a limited class action waiver. In its decision, the FCA found that there was "no language in the Competition Act that would prohibit class action waivers so as to prevent the determination of a claim by way of arbitration" (*Murphy FCA* at para 60). In the words of Justice Richard Boivin in *Difederico FCA* — in the context of arbitration clauses, Parliament would be perfectly within its rights to make a policy choice in the context of the *Competition Act* and bar class action waivers, insofar as they prevent consumers from initiating class actions based on the *Competition Act*. However, it has yet to do so (*Difederico FCA* at para 81).

[279] I am further satisfied that the reasoning in *Murphy FCA* applies to claims made pursuant to the *Trademarks Act*, as this act equally lacks the specific language prohibiting arbitration agreements or class action waiver clauses (*Gold Line* at para 49).

[280] I also point out that, in *Dell*, the SCC impliedly rejected the argument that including a class waiver clause in an arbitration agreement offends public policy (*Dell* at paras 105–110, 224–226; see also: *Williams BCCA* at para 176 *in fine*). The parties can agree to waive class action proceedings as part of an arbitration agreement, and it is up to Parliament or the provincial legislatures, not the courts, to create exceptions to this (*Williams BCCA* at para 172).

[281] In sum, I am not persuaded that the Class Action Waiver Clause is invalid or unenforceable, and this clause also supports Ooma’s conclusion in its Jurisdiction Motion.

[282] Once again and in any event, considering the competence-competence principle and the validity of the Arbitration Clause, an arbitrator, and not the Court, should determine the question of whether the Class Action Waiver Clause is valid and enforceable.

D. *Conclusion on jurisdictional issues*

[283] For all the reasons discussed above, Ooma’s Jurisdiction Motion is granted and Mr. Zanin’s Action must consequently be stayed in favour of arbitration.

VI. Certification Issues

[284] For completeness and in the event, I were wrong on the jurisdictional issues, I now turn to the second substantive question raised in this matter, namely, whether Mr. Zanin’s Certification Motion should be granted.

[285] Assuming the Court has jurisdiction to consider the Certification Motion, I conclude that the Action would fail on each of the three statutory causes of action upon which it is based, as it is plain and obvious that the pleadings disclose no reasonable cause of action based on paragraph 7(d) and section 53.2 of the *Trademarks Act* or on sections 36, 52, and 54 of the *Competition Act*.

A. *Legislative framework*

[286] Part 5.1 of the Rules sets out the framework for establishing and managing class proceedings before this Court. Rules 334.16(1), 334.16(2), and 334.18 are the main provisions governing the certification of class proceedings. They are reproduced in their entirety in Annex A of these reasons.

[287] Rule 334.16(1) prescribes that a class action shall be certified if the following five conditions are met: (i) the pleadings disclose a reasonable cause of action; (ii) there is an identifiable class of two or more persons; (iii) the claims raise common questions of law or fact; (iv) a class proceeding is the preferable procedure for the just and efficient resolution of those common questions; and (v) there is an appropriate representative plaintiff. While the first condition echoes a requirement applicable to all actions brought by a plaintiff, the other four are more specific to class proceedings.

[288] Rule 334.16(1) uses mandatory language, meaning that the Court shall grant certification where all five elements of the test are satisfied. Since the test is conjunctive, as soon as a plaintiff fails to meet any of the five listed criteria, the Certification Motion must fail (*Brink v Canada*, 2024 FCA 43 at para 138 [*Brink*]; *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 at para

51 [*Jensen FC*], aff'd 2023 FCA 89 [*Jensen FCA*], leave to appeal to SCC refused, 40807 (11 January 2024); *Airbnb* at para 21; *Buffalo v Samson First Nation*, 2008 FC 1308 at para 35 [*Buffalo*], aff'd 2010 FCA 165 at para 3). Conversely, the Court has no discretion to deny certification if all the criteria are met (*Jensen FC* at para 51; *Airbnb* at para 21).

[289] Rule 334.16(2) lists matters to be considered in assessing the certification criteria whereas Rule 334.18 describes factors which cannot by themselves, either alone or combined with the other factors listed, provide a sufficient basis to decline certification (*Jensen FC* at para 52; *Airbnb* at para 22; *Kenney v Canada (Attorney General)*, 2016 FC 367 at para 17; *Buffalo* at para 37). However, by using the word “solely,” Rule 334.18 suggests that its factors may still be relevant considerations on a motion for certification, provided the overall conclusion underlying a potential refusal is based on other concerns as well (*Jensen FC* at para 52; *Airbnb* at para 22).

[290] The certification criteria established in Rule 334.16(1) are akin to those applied by the courts in Ontario and British Columbia (*Canada (Attorney General) v Jost*, 2020 FCA 212 at para 23 [*Jost*]; *Canada v John Doe*, 2016 FCA 191 at para 22 [*John Doe*]; *Buffalo v Samson Cree National*, 2010 FCA 165 at para 8; *Jensen FC* at para 53; *Airbnb* at para 23). It is therefore not uncommon to see this Court and the FCA refer to precedents arising from these provinces in matters relating to class actions, as such case law is instructive in this Court.

## B. *General principles*

[291] In *L'Oratoire Saint-Joseph du Mont-Royal v JJ*, 2019 SCC 35 [*Oratoire*], the SCC reminded that the procedural vehicle of class actions serves several purposes, “namely to



facilitate access to justice, to modify harmful behaviour and to conserve judicial resources”

(*Oratoire* at para 6, citing *Hollick v Toronto (City)*, 2001 SCC 68 at para 15 [*Hollick*], *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 27–29 [*Dutton*], and *Vivendi Canada Inc v Dell’Aniello*, 2014 SCC 1 at para 1 [*Vivendi*]).

[292] First, foremost consideration should be given to the fact that class actions serve judicial economy as this specific procedural method avoids unnecessary duplication of fact-finding and legal analysis (*Hollick* at para 15). Actions brought individually can indeed be less practical and less efficient than class proceedings (*Rumley v British Columbia*, 2001 SCC 69 at para 38). Second, class actions improve access to justice by making it more economical to prosecute claims that any one class member would find too costly to initiate and bring forward on his or her own (*Hollick* at para 15). They may also enable claimants to overcome psychological and social barriers thanks to representative plaintiff handling of the action on their behalf (*AIC Limited v Fischer*, 2013 SCC 69 at para 29 [*Fischer*]). Third, class actions serve efficiency and justice by ensuring that wrongdoers modify their behaviour by taking full account of the harm that they have caused or might cause (*Hollick* at para 15). By doing so, class actions serve important policy objectives such as the deterrence of wrongful conduct.

[293] The certification criteria should always be assessed while keeping in mind these three overarching purposes of class proceedings (*Difederico v Amazon.com, Inc*, 2023 FC 1156 at para 26 [*Difederico FC 2*], citing *Jensen FC* at para 54; *Airbnb* at para 25). Therefore, when interpreting class action legislation in the context of a motion for certification, it is “essential [...] that courts [do] not take an overly restrictive approach to the [class action] legislation, but

rather interpret [it] in a way that gives full effect to the benefits foreseen by the drafters” and to the purposes underpinning class actions (*Hollick* at para 15; *Dutton* at paras 27–29; *Condon v Canada*, 2015 FCA 159 at para 10 [*Condon*]).

[294] The main objective of a motion for certification is to determine whether a class action is the appropriate procedural means for the action to proceed (*Hollick* at para 16; *Jost* at para 27). As the SCC noted in *Hollick*, the certification stage focuses on the form of the action, not on its actual merits: the question “is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action” (*Hollick* at para 16; see also: *Vivendi* at para 37; *Infineon Technologies AG v Option consommateurs AG*, 2013 SCC 59 at para 65).

(1) The applicable test

[295] The requirements vary depending on the criterion for certification.

[296] The test to be applied on the first criterion — namely, that the pleadings disclose a reasonable cause of action — is the same as that applicable on a motion to strike or dismiss (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 63 [*Pro-Sys*]; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 20 [*Alberta Elder*]; *Jensen FCA* at para 15). The test is whether it is “plain and obvious,” assuming the facts pleaded to be true that the pleadings disclose no reasonable cause of action and that no claim exists (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 14 [*Atlantic Lottery*]; *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 27 [*Godfrey*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]; *Alberta Elder* at para 20; *Hollick* at para 25; *Hunt v Carey Canada Inc*, [1990] 2 SCR

959 at p 980; *Jensen FCA* at para 15; *Canada v Greenwood*, 2021 FCA 186 at para 91 [*Greenwood*]; *Jost* at para 29). Stated otherwise, a claim must be so clearly improper as to be “bereft of any possibility of success” (*Jensen FCA* at para 15; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33 [*Wenham*], citing *JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 47 [*JP Morgan*]; *Jensen FC* at para 58; *Airbnb* at para 28). The test is best expressed in the negative: the courts must be convinced that the contemplated action has no reasonable chance of success and is doomed to fail (*Wenham* at para 22).

[297] For the remaining four certification criteria, the plaintiffs have the burden of adducing evidence to show “some basis in fact” that the requirements have been met (*Hollick* at para 25; *Pro-Sys* at para 99). This standard means that, for all certification criteria except the cause of action, some evidentiary foundation is needed to support the certification requirements. However, the use of the word “some” implies that the evidentiary record need not be exhaustive or be a record on which the merits will be argued (*Fischer* at para 41, citing *McCracken v Canadian National Railway Co*, 2012 ONCA 445 at paras 75–76; *Greenwood* at para 94; *Jensen FC* at para 59; *Airbnb* at para 30). Given the courts’ limited scope of factual inquiry and their inability to “engage in the finely calibrated assessments of evidentiary weight” at the certification stage, this is a low threshold that falls below the balance of probabilities (*Fischer* at para 40; *Pro-Sys* at paras 102, 104; *John Doe* at para 24). Additionally, it bears noting that the Court must adopt a two-step approach to assessing commonality: the Court must first decide whether there is some basis in fact for the very existence of each common issue and then determine whether the claims of the class members raise common questions of law or fact (*Jensen FCA* at paras 77–81, affirming *Jensen FC* at paras 211–214).

[298] The onus on a party seeking certification is not an onerous one, and the threshold for certification has generally been described as low. That said, a plaintiff must nonetheless come forward with sufficient pleadings and with a sufficient evidentiary basis to support certification. While certification remains a low hurdle, it is nonetheless a hurdle (*Jensen FC* at para 57, citing *Simpson v Facebook*, 2021 ONSC 968 at para 50). It is important to emphasize that, even though the threshold is a low one, there are still requirements to be met at the certification stage. Certification will therefore be denied when there is no viable cause of action or where there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.

[299] While a motion for certification is not a merits-based screening intended to determine the actual viability or strength of the contemplated class action, it must nevertheless operate as a “meaningful screening device” (*Pro-Sys* at para 103). In *Pro-Sys*, the SCC stressed that the certification analysis cannot be so superficial that it would “amount to nothing more than symbolic scrutiny” of the evidence (*Pro-Sys* at para 103). There must be sufficient facts to satisfy the certification judge that the conditions for certification have been met “to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage,” by reason of the requirements not having been met (*Pro-Sys* at para 104).

[300] In the same vein, in the context of motions for authorization brought under the Quebec class action regime and the application of the “arguable case” standard under Quebec law, the SCC said that the authorization process “must not be reduced to ‘a mere formality’” (*Desjardins Financial Services Firm Inc v Asselin*, 2020 SCC 30 at para 74 [*Desjardins*]; *Oratoire* at para 62). This principle was also reaffirmed in *Jensen FC* (and later confirmed by the FCA), where

this Court emphasized that courts are expected to apply a degree of scrutiny sufficient so as to prevent the certification process from boiling down to a mere “rubber-stamping” (*Jensen FC* at para 292, aff’d *Jensen FCA* at para 49).

[301] The courts therefore play an important screening role and gatekeeping function at the certification stage (*Pro-Sys* at para 103; *Jensen FCA* at paras 49, 70; *Mohr v National Hockey League*, 2022 FCA 145 at paras 49, 53 [*Mohr*], leave to appeal to SCC refused, 40426 (20 April 2023)). That role includes assessing whether the pleadings are “sufficient to put the defendant on notice of the essence of the plaintiff’s claim” (*Atlantic Lottery* at para 89), adequately address the constituent elements of each cause of action, and provide enough facts or particulars to ensure that the trial proceedings will be “both manageable and fair” (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 18–19 [*Mancuso*]).

[302] In short, the Court must conduct “a rigorous review of a plaintiff’s certification motion and [...] scrutinize with care the allegations, the material facts and the evidence” put forward in support of the motion (*Jensen FC* at para 292, aff’d *Jensen FCA* at para 49). The Court is thus tasked with filtering out unfounded and frivolous claims and ensuring that parties are not being forced to defend themselves against untenable claims and devote substantial resources to it (*Desjardins* at para 27; *Oratoire* at paras 7, 56, 61; *Vivendi* at para 37; *Jensen FC* at para 61; *Airbnb* at para 25).

## (2) Statutory interpretation and novel claims

[303] Considering the issues raised by Mr. Zanin’s Certification Motion, it is important to discuss the case law on statutory interpretation and novel claims.

[304] In determining whether the certification requirements are met, courts are frequently called upon to engage in statutory interpretation, particularly when the plaintiff pleads a statutory cause of action — as is the case here. However, certification judges should be wary of treading into territory reserved for the trial judge, which can include coming to final conclusions about the correct interpretation of a statute. This is especially the case when the questions of statutory interpretation are complex or would finally determine the outcome of the case on the merits. That said, this does not mean that certification judges should shy away from engaging in statutory interpretation or give a statute only cursory treatment in their reasons if it is central to the claim being advanced.

[305] It is true that courts have often been hesitant to conclude that it is plain and obvious that the pleadings disclose no reasonable cause of action where such a finding requires a conclusion on a complex issue of statutory interpretation (see for example: *Salna v Voltage Pictures, LLC*, 2021 FCA 176 at para 131; *Airbnb* at para 56; *Committee for Monetary and Economic Reform v Canada*, 2014 FC 380 at paras 72–73). Where the certification judge is of the view that the evidence could unfold in ways affecting the statutory interpretation, the proper course is to defer the issues to trial (*Pearce BCCA* at para 71; *Williams v Audible*, 2022 BCSC 834 at para 55). To do otherwise would eliminate common issues on these complex questions, and could prevent the trial judge from considering them with the benefit of a complete evidentiary record (*Airbnb* at para 56, citing *Jiang v Peoples Trust Company*, 2017 BCCA 119 at paras 64, 67 [*Jiang*]).

[306] Given that the test applied on the issue of a reasonable cause of action is the same as that for motions to strike, motion to strike jurisprudence provides useful guidance delimiting the appropriate statutory interpretation exercise at the certification stage. Again, courts will generally refrain from striking pleadings where the situation involves complex questions of statutory interpretation (see for example: *Haida Tourism Partnership (West Coast Resorts) v Canada (Ship-Source Oil Pollution Fund)*, 2024 FC 439 at para 104; *Canada (Ship-Source Oil Pollution Fund) v British Columbia (Finance)*, 2012 FC 725 at para 27; *Safilo Canada Inc v Contour Optik Inc*, 2004 FC 1534 at paras 11–12; *Apotex Inc v Eli Lilly and Co*, 2001 FCT 636 at paras 13–14).

[307] In *Apotex Inc v Laboratoires Servier*, 2007 FCA 350 [*Servier*], the FCA found that it was an error for a motions judge to decide that the meaning of a disputed provision was a foregone conclusion, in light of an alternative interpretation advanced by the plaintiff (*Servier* at paras 31, 33). In its analysis, the FCA determined that the motions judge failed to consider whether the proposed interpretation had any chance of success, and that she instead “reached her own conclusion on the disputed point of statutory interpretation” (*Servier* at para 34). The FCA went on to consider the alternative interpretation advanced by the plaintiff, ultimately concluding it was neither “tenuous” nor “devoid of any merit” and that, in the absence of any reported decisions interpreting the provision at issue, none of the cases pointed to the conclusion reached by the motions judge (*Servier* at para 46).

[308] The FCA recently restated the above principle in *Mohr* and confirmed that the low bar for determining whether a claim has a reasonable prospect of success applies equally where a question of statutory interpretation is at the heart of a motion to strike (*Mohr* at para 52, citing

*Servier* at para 34). Where the applicable legislation is capable of more than one interpretation, the motions judge should not conclude to an absence of reasonable cause of action: “[o]nce a judge finds that legislation is capable of being interpreted in at least two different ways, it is not open to the judge to conclude that it is plain and obvious that the action has no reasonable chance of success” (*Mohr* at paras 47, 52; see also: *Jiang* at paras 55–57).

[309] Relying on the decision in *Arsenault v Canada*, 2008 FC 299 at paragraph 27 [*Arsenault*], aff’d 2009 FCA 242, this Court has sometimes said that, in order to find that it is “plain and obvious” that no claim exists, there must be “a decided case directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected” (*Jacques v Canada*, 2024 FC 851 at para 35 [*Jacques*]; *Doan v Canada*, 2023 FC 968 at para 132; *Sweet v Canada*, 2022 FC 1228 at para 123; *Airbnb* at para 59). However, in *Mohr*, the FCA tempered this statement and rejected the proposition that, whenever the interpretive questions before the courts have not been previously considered, they could not be conclusively bereft of success (*Mohr* at paras 51, 54). In other words, to succeed on a motion to strike, the moving party need not always rely on a binding decision which has definitively determined the point of law.

[310] The gatekeeping role of the certification judge dictates that judicial resources not be squandered when it is clear that the correct statutory interpretation would leave the pleadings bound to fail (*Trotman v WestJet Airlines Ltd*, 2022 BCCA 22 at para 46 [*Trotman*]). This is the situation not only in the presence of previous binding case law squarely on point, but also where the interpretive exercise is so straightforward that the answer is plain and obvious, despite a lack



of previous case authority (*Campbell v Capital One Financial Corporation*, 2024 BCCA 253 at paras 18, 81; *Sharifi v WestJet Airlines Ltd*, 2022 BCCA 149 at paras 38, 48–51 [*Sharifi*]; *Trotman* at para 46). For instance, the BCCA recently found that a proposed class action involving WestJet travel credits did not disclose a reasonable cause of action, as it was plain and obvious that the credits did not meet the definition of “prepaid purchase card” or “gift card” in British Columbia’s consumer protection law or in that of other provinces (*Sharifi* at paras 51, 54–61, 65–66).

[311] When they do not require an evidentiary basis and can be assessed based on the pleadings alone, pure questions of legal interpretation — even novel or disputed ones — can be decided and resolved at the certification stage, just as they can be on motions to strike or on motions for summary judgments (*Energizer Brands FCA* at para 55; *Pearson v Boliden Ltd*, 2002 BCCA 624 at paras 39–42). For example, in *Koubi v Mazda Canada Inc*, 2012 BCCA 310 [*Koubi*], the BCCA concluded that, further to its analysis, it was “plain and obvious Ms. Koubi’s restitutionary claims against the dealers for breach of warranty under the SGA cannot succeed because they are inconsistent with the express provisions in the Act” (*Koubi* at para 69).

[312] Similarly, the sole fact that a claim is novel is not an inherently sufficient reason to strike it (*Darmar Farms Inc v Syngenta Canada Inc*, 2019 ONCA 789 at para 51 [*Darmar Farms*]). On certification motions, statements of claim are to be read generously with a view to accommodating any inadequacies in the allegations. The fact that the law has not yet recognized a particular claim, interpretation, or cause of action is not determinative of the outcome of the motion. Novel but arguable claims must be allowed to proceed to trial since new developments

in the law often find their provenance in surviving motions to strike (*Imperial Tobacco* at para 21; *Mohr* at para 48).

[313] However, novelty by itself is not a reason to allow a cause of action to proceed to trial. A novel claim must also be arguable, have the required elements of a cause of action recognized in law, and be a reasonably logical and tenable extension of established law. Simply put, there must be a reasonable prospect that the claim will succeed (*Imperial Tobacco* at paras 17, 21; *Darmar Farms* at para 51; *Das v George Weston Limited*, 2018 ONCA 1053 at para 75 [*Das ONCA*]; *Stolove v Waypoint Centre for Mental Health Care*, 2024 ONSC 3639 at para 272).

[314] In *Atlantic Lottery*, the SCC held that a claim will not survive a motion to strike simply because it is novel, and that courts should resolve legal disputes promptly, rather than referring them to a trial: “[i]t is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present ‘no legal justification for a protracted and expensive trial’” [italics in original] (*Atlantic Lottery* at para 19, citing *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 at para 19).

[315] In *Mohr*, the appellants had argued that the “reasonable cause of action” requirement was met simply because the plaintiffs put a novel interpretation of the statute at issue and that, accordingly, there was no binding precedent to preclude the action from proceeding at this early stage (*Mohr* at para 51). The FCA did not accept this position. Had the appellants succeeded on this point, the absence of a definitive precedent on the meaning of any particular statute would

have meant that every case raising a point of interpretation for the first time, no matter how futile the argument, would survive a motion to strike or a certification motion, simply because there would never be a precedent, let alone a binding precedent (*Mohr* at para 54). This is not the state of the law: “[a] cause of action is not presumptively ‘reasonable’ simply because it has no antecedence in jurisprudence (*Mohr* at para 53).

[316] It is only where there are “competing, credible interpretations” that, as a general proposition, definitive legal pronouncements on the meaning of legislation should not be made on a motion to strike or a motion for certification (*Mohr* at para 52). At the certification stage, the courts’ task thus includes determining “whether there is a conflicting interpretation worth considering or that has a reasonable prospect of success,” which may require “[s]ome legal analysis” (*Mohr* at paras 52–53).

[317] In sum, when, on a certification motion, the determination of a strictly legal issue does not require evidence and remains solely based on the pleaded facts taken to be true, courts can and should adjudicate the issue at this early stage.

C. *Reasonable cause of action*

[318] I now turn to the first criterion for certification, the requirement for a reasonable cause of action. For the reasons detailed below, I find that Mr. Zanin’s Certification Motion fails on this criterion. The pleadings of the alleged wrongful acts are not supported by material facts or the law, and therefore do not disclose a reasonable cause of action.

## (1) The test

(a) *General principles*

[319] As mentioned above, whether the pleadings disclose a reasonable cause of action is assessed on the same standard that applies to a motion to strike out a pleading (*Pro-Sys* at para 63). In *Brink*, the FCA summarized as follows the general principles governing a motion to strike out a statement of claim under Rule 221(1)(a) on the basis that it does not disclose a reasonable cause of action (see also: *McMillan v Canada* 2024 FCA 199 at paras 74–78 [*McMillan*]; *Jensen FCA* at paras 15–18; *Difederico FC* 2 at paras 27–33):

[43] [A] statement of claim should not be struck unless it is plain and obvious that the action cannot succeed, assuming the facts pleaded in the statement of claim to be true: *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at 980; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63. In other words, the claim must have no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

[44] The onus is on the party who seeks to establish that a pleading fails to disclose a reasonable cause of action: *La Rose v. Canada*, 2023 FCA 241 at para. 19; *Edell v. Canada*, 2010 FCA 26 at para. 5. The threshold that a plaintiff must meet to establish that a claim discloses a reasonable cause of action is a low one: *Brake v. Canada (Attorney General)*, 2019 FCA 274 at para. 70.

[45] Pleadings must, moreover, be read generously, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: see *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22 at 451.

[46] Motions judges should not delve into the merits of a plaintiff's argument, but should, rather, consider whether the plaintiff should be precluded from advancing the argument at all: *Salna v. Voltage Pictures, LLC*, 2021 FCA 176 at para. 77. Recognizing that the law is not static, motions judges must also err on the side of permitting

novel, but arguable claims to proceed to trial: *R. v. Imperial Tobacco*, above at paras. 19-25; *Mohr v. National Hockey League*, 2022 FCA 145 at para. 48, leave to appeal to SCC refused, 40426 (20 April 2023).

[47] That said, it must also be recognized that there is a cost to access to justice in allowing cases that have no substance to proceed. The diversion of scarce judicial resources to such cases diverts time away from potentially meritorious cases that require attention: *Mohr*, above at para. 50; *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 13.

[320] A claim will therefore fail to disclose a reasonable cause of action if it contains a “radical defect,” is “doomed to fail,” or is “bereft of any possibility of success” (*Atlantic Lottery* at paras 89–90; *Wenham* at para 33, citing *JP Morgan* at para 47; *Jensen FC* at para 58; *Airbnb* at para 28).

[321] In applying this test, the Court’s task “is not to resolve conflicting facts and evidence and assess the strength of the case” (*Wenham* at para 28). The Court’s analysis must rather focus on the pleadings, not on the evidence (*Imperial Tobacco* at paras 22–23; *Jensen FCA*, at para 52; *John Doe* at para 23; *Condon* at para 13; *Amway* at para 39). Those pleadings must be read generously, holistically, and practically, with a view to “err[ing] on the side of permitting a novel but arguable claim to proceed” (*Imperial Tobacco* at para 21; see also: *Mohr* at para 48).

[322] As is the case with motions to strike, there is a heavy burden on a defendant trying to defeat a certification motion on the ground that the statement of claim fails to disclose a reasonable cause of action. Indeed, the FCA has repeatedly described the burden resting on a defendant in such cases as being “onerous” (*Brink* at para 50; *Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 at para 19; *Greenwood* at para 144).

(b) *The pleadings*

[323] Even if no evidence can be considered at the certification stage, the party seeking certification must nonetheless plead facts sufficient to support a legally recognized cause of action. In that respect, Rules 174 and 181 establish that parties must plead material facts and provide particulars of every allegation.

[324] In *McMillan*, the FCA aptly summarized the principles of pleadings to be followed on certification, at paragraphs 63–71:

[63] Rule 174 of the *Federal Courts Rules* provides that “[e]very pleading shall contain a concise statement of the material facts on which the party relies...”. Rule 181(1) further requires that pleadings “contain particulars of every allegation contained therein ...”.

[64] As this Court observed in *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, leave to appeal to SCC refused, 36889 (23 June 2016), “[i]t is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought.” This is because pleadings play an important role in providing notice, and in defining the issues to be tried: at para. 16.

[65] Not only is the proper pleading of a statement of claim necessary for a defendant to prepare a statement of defence, the material facts will also establish the parameters of relevancy of evidence at discovery and trial: *Mancuso*, above at para. 17. In addition, the nature of the facts pleaded allows counsel to advise their clients, prepare their case and map a trial strategy. Consequently, the Court and the opposing parties should not be left to speculate as to how the facts might be arranged to support various causes of action: *Brink*, above at para. 54.

[66] A statement of claim must thus plead each constituent element of every cause of action with sufficient particularity, and material facts must be pleaded to support each allegation. The bald assertion of conclusions does not constitute the pleading of material facts: *Mancuso*, above at para. 27; *Canadian Olympic*

*Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Indeed, if the Court were to “[allow] parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues”: *Mancuso*, above at para. 17.

[67] What will constitute a material fact in a statement of claim in a given case is to be determined in light of the causes of action asserted and the damages sought. Plaintiffs must plead—in summary form but with sufficient detail—the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant the “who, when, where, how and what” of the actions that allegedly give rise to its liability: *Mancuso*, above at para. 19.

[68] An assessment of the sufficiency of the material facts pleaded in a statement of claim is contextual and fact-driven. There is no bright line between material facts and bald allegations, nor is there a bright line between the pleading of material facts and the prohibition on the pleading of evidence. They are, rather, points on a continuum. It is the responsibility of a motions judge, “looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair”: *Mancuso*, above at para. 18.

[69] Plaintiffs cannot file inadequate pleadings and rely on defendants to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars: *Mancuso*, above at para. 20; *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112.

[70] Moreover, in assessing whether a statement of claim should be struck, the Court must look at the claim as it has been drafted, not how it might be drafted: *Brink*, above at para. 72; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, at para. 40.

[71] The normal rules of pleading apply with equal force to proposed class proceedings. Indeed, the launching of a proposed class action is a serious matter as it potentially affects the rights of many class members as well as the interests of defendants. Compliance with the requirements of the *Federal Courts Rules* is consequently not a trifling or optional matter; it is both mandatory and essential: *Brink*, above at para. 60; *Merchant Law Group*, above at para. 40.

[325] In light of the general principles set out above in *McMillan* and considering the particular context of Mr. Zanin's claims, five remarks on the nature of pleadings on certification are in order.

[326] First, for allegations in pleadings to be deemed material facts, they must be supported by sufficient particularization (*Jensen FCA* at para 52(a), affirming *Jensen FC* at paras 75, 79).

While the conditions for certification must be applied broadly and flexibly, "the Court cannot go so far as to presume the existence of an element that is essential to the establishment of a cause of action" (*Jensen FC* at para 76). It is therefore incumbent to the party seeking certification to plead facts that are sufficient to support a legally recognized cause of action and upon which he or she intends to rely on in advancing his or her claim (*Atlantic Lottery* at para 89; *Pro-Sys* at para 63; *Imperial Tobacco* at para 22; *Mancuso* at paras 19–20). A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The facts pleaded are instead the firm basis upon which the possibility of success of the claim must be evaluated by the Court (*Imperial Tobacco* at para 22; *Jensen FC* at para 71).

[327] Second, allegations of fact are only presumed to be true when the facts alleged are sufficiently precise and tangible to ensure that they truly support the existence of the right claimed (*Jensen FC* at para 81; see also: *Oratoire* at para 59). The presumption of truth that applies to pleaded facts "does not extend to matters which are manifestly incapable of being proven, to matters inconsistent with common sense, vague generalization[s], opinion[s], conjecture[s], bare allegations, bald conclusory legal statements or speculation that is unsupported by material facts" (*Jensen FCA* at para 52(b), affirming *Jensen FC* at paras 81–82;



see also: *Oratoire* at paras 59–60). Bare allegations and conclusory legal statements based on assumption or speculation are incapable of proof and cannot be assumed to be true. Nor is the Court obliged to accept allegations of fact that are inconsistent with incontrovertible evidence proffered by both sides on the certification motion (*Jensen FC* at para 82; *Das v George Weston Limited*, 2017 ONSC 4129 at para 27, *aff’d Das ONCA*).

[328] Third, in assessing the sufficiency of the pleadings, documents referred to or quoted in the pleadings — whether through direct quotes, summaries, or paraphrases of documents — are incorporated by reference and will be considered part of the pleadings “if they are central enough to the claim to form an essential element or integral part of the claim itself or its factual matrix” (*Jensen FCA* at para 52(c), affirming *Jensen FC* at paras 85, 87; *McCreight v Canada (Attorney General)*, 2013 ONCA 483 at para 32). Indeed, it is trite law that documents referred to in the pleadings are generally incorporated by reference since, by referring to them, the parties are asserting their contents as facts (*McLarty v Canada*, 2002 FCA 206 at para 10; *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2022 FC 841 at para 9; *Bouchard v Canada*, 2016 FC 983 at para 18; *Paul v Canada (Attorney General)*, 2001 FCT 1280 at para 23; *Del Giudice v Thompson*, 2024 ONCA 70 at para 18 [*Del Giudice*]; *Das ONCA* at para 74). However, the mere mention of a document in a pleading — without attaching it — is not enough for it to form part of the pleading (*Jensen FC* at para 85; *Nicholson v CWS Industries Ltd*, 2002 FCT 1225 at paras 13, 16–17).

[329] Fourth, if the pleadings incorporate documents by reference, the Court’s role at the certification stage is not to determine whether the moving party has correctly interpreted them, as

this would amount to weighing evidence, something the Court cannot do at the certification stage. Its role is solely to ascertain whether, on a plain reading, the documents referred to or relied on in the pleading actually say what the moving party alleges they say (*Jensen FCA* at para 52(d), affirming *Jensen FC* at paras 86–87; *Del Giudice* at para 18). In those circumstances, it is therefore appropriate for the certification judge to review the quotes and paraphrases contained in the pleadings in their context, by referring to their originating documents. If a plaintiff has ascribed a meaning to those quotes and paraphrases that is not consistent, on a plain reading, with the documents from which they originate, and if the documents referred to in the pleadings do not actually say what the plaintiff alleges, the Court cannot consider these allegations as material facts, as they would be incapable of proof (*Jensen FC* at para 86). In short, the Court should disregard or give no weight to allegations that contain statements, paraphrases, or facts that happen to be false or incorrect when compared to what the underlying documents effectively contain.

[330] In the present case, Mr. Zanin’s Statement of Claim contains multiple allegations referring, directly or indirectly, to Ooma’s promotional and advertising materials. Many of these documents are specifically identified or attached to the Statement of Claim. I am therefore satisfied that the documents referred to by Mr. Zanin in the Statement of Claim, whether it is through direct quotes, summaries, or paraphrases of the documents, form an integral part of his claim. Mr. Zanin indeed relies upon excerpts, paraphrased or directly quoted, from Ooma’s advertisements. These documents will accordingly be considered as incorporated by reference to the pleadings (*Jensen FCA* at para 52(d), affirming *Jensen FC* at paras 86–87).

[331] Finally, as alluded in my first remark, a failure to establish a cause of action will arise when the allegations in a statement of claim do not adequately plead all the constituent elements of a recognized cause of action, or when they do not fall within a recognized cause of action (*Jensen FC* at para 73; *Fernandez Leon v Bayer Inc*, 2023 ONCA 629 at para 8 [*Fernandez*]; *Yan v Hutchinson*, 2023 ONCA 97 at para 12). For instance, where a cause of action is advanced under paragraph 36(1)(a) of the *Competition Act*, the Court will assess the sufficiency of the pleadings with respect to the following elements: (i) the commission of a criminal offence under Part VI of the *Competition Act*; (ii) the alleged loss or damage suffered; and (iii) the causal link between the alleged loss or damage and the impugned criminal offence (*Jensen FC* at para 93).

(2) First cause of action: paragraph 7(d) of the *Trademarks Act*

[332] In support of his cause of action based on paragraph 7(d) and section 53.2 of the *Trademarks Act*, Mr. Zanin pleads that the “free” aspect of Ooma’s Service constitutes a false and deceitful description of its “character, quality, quantity or composition,” in breach of subparagraph 7(d)(i). His entire pleadings and arguments on this first cause of action revolve around the “FREE or \$0” representations allegedly made by Ooma.

[333] Mr. Zanin alleges that the description of the Service as being a free home phone service is false in a material respect and is “likely to mislead the public as to the character, quality, quantity, or composition of [Ooma’s] service,” because the Service is not actually free (Statement of Claim at para 38).

[334] He claims that, when a product is represented as “free,” it is a different character than one that is being represented as costing a price. At the hearing, counsel for Mr. Zanin argued that the word “FREE” has “a very, very special meaning to it.” According to them, it means that no money needs to be paid and that there is no price for the offered product. Mr. Zanin adds that the character of the Service is that it is “gratuitous.”

[335] Regarding the notion of “interested person” at section 53.2 of the *Trademarks Act*, Mr. Zanin states that this provision is broad and remedial, and that the purpose of the legislation is both to facilitate effective branding and to protect consumers. He submits that he is covered by that provision as a consumer, and that its wording is not limited to the improper use of trademarks or a passing off, but applies to any violation of the *Trademarks Act*. Mr. Zanin adds that, to his knowledge, there is no case law foreclosing consumers from accessing the *Trademarks Act*.

[336] Based on these arguments, Mr. Zanin submits that, at a minimum, he has an arguable case and that it is not plain and obvious that he has no claim under paragraph 7(d) and section 53.2 of the *Trademarks Act*.

[337] I do not agree.

[338] True, Mr. Zanin’s claim under the *Trademarks Act* could be described as novel. The problem with his allegations, however, is not that they are novel; it is that they are not and cannot possibly be supported by any reasonable interpretation of paragraph 7(d) and section 53.2 of the

*Trademarks Act*. Neither Mr. Zanin nor his counsel were able to explain or develop how the alleged “very, very special meaning” of the word “FREE” or the notion of “gratuitous” could mean anything other than the customer pays nothing or zero dollars for the Service.

(a) *Elements of paragraph 7(d) and section 53.2*

[339] Subparagraph 7(d)(i) of the *Trademarks Act* provides that “[n]o person shall [...] make use, in association with goods or services, of any description that is false in a material respect and likely to mislead the public as to [...] (i) the character, quality, quantity or composition, [...] of the goods and services.” For its part, section 53.2 requires that the Court be satisfied, “on application of any interested person,” that an act has been done contrary to the *Trademarks Act*.

[340] In order to have a reasonable cause of action under subparagraph 7(d)(i) and section 53.2 of the *Trademarks Act*, Mr. Zanin must therefore allege material facts showing that Ooma used a false “description” that misled the public as to the “character, quality, quantity or composition” of the Service, and that he qualifies as an “interested person.”

[341] Following the modern principle of statutory interpretation, “it is well settled that the words of an Act must be read ‘in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’” (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para 23, citing *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21 and *Bell ExpressVu Limited*

*Partnership v Rex*, 2002 SCC 42 at para 26, both quoting Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87).

[342] In the present case, I find that neither the language, nor the intent, nor the purpose of the *Trademarks Act* offer any support whatsoever to Mr. Zanin’s allegations regarding his cause of action under paragraph 7(d) and section 53.2 of the legislation.

[343] In my view, there are no material facts and no legal basis sufficient to establish a claim under paragraph 7(d) and section 53.2 of the *Trademarks Act* in this case. First, price is not included in the “character, quality, quantity or composition” of a product and, apart from pricing elements, Mr. Zanin has not identified any false or misleading description relating to an attribute of the Service. Second, no trademark or other intellectual property right is invoked by Mr. Zanin in support of his claim. Third, Mr. Zanin is not an “interested person” covered by section 53.2, as this term does not include consumers with no intellectual property right.

(b) *Representations made by Ooma*

[344] Before turning to the analysis, I pause to repeat the factual findings made above in Section III.A of these reasons, with respect to Ooma’s representations.

[345] A review of the pleading materials showed that, in the Statement of Claim and in their written and oral submissions, Mr. Zanin and his counsel offered a partial, selective, and misleading reading of what Ooma’s representations truly are, as well as an inaccurate, truncated, and incomplete description of Ooma’s Service.

[346] Contrary to what Mr. Zanin alleges in the Statement of Claim, when the pleadings are read in conjunction with Ooma's documents that are incorporated by reference, there is not a single stand-alone representation by Ooma of a "FREE or \$0" phone service being offered, without a specific mention of or reference to "applicable taxes and fees." Moreover, the materials on the record show that the references to applicable taxes and fees are not in the fine print, in a barely legible print, to a footnote, or to somewhere else in the Ooma materials. They are rather in very close proximity to the "FREE" or "\$0" claims, adjacent to them, and intimately part of Ooma's representations.

[347] It is therefore clear from the pleadings that Ooma's representations are not that the Service is "FREE" or "\$0," without more. There are also no descriptions solely limited to so-called "non-price" dimensions of the Service.

[348] I underline that the foregoing review of Ooma's representations and of Mr. Zanin's allegations relating to them is not an exercise of interpreting or weighing the merits of the evidence relied on by Mr. Zanin in his Statement of Claim. It is rather observing that, on a plain reading of the pleadings before the Court, Mr. Zanin's allegations clearly misrepresent or incorrectly paraphrase what is effectively contained in Ooma's representations and on which the cause of action pursuant to paragraph 7(d) of the *Trademarks Act* is specifically built (*Jensen FCA* at para 52(d), affirming *Jensen FC* at paras 86–87; *Del Giudice* at para 18).

[349] Being generous with the pleadings does not mean being blind to what they do or do not contain, or that the Court can be complacent and insert the constituent elements of an alleged

wrongful act when it is manifestly not there in the pleadings. While plaintiffs are not required to prove their case in the statement of claim, they must nonetheless provide the material facts supporting the constituent elements of the claims being made (*Jensen FC* at para 164, aff'd *Jensen FCA* at para 69). Here, Mr. Zanin has failed to do so. The test for a reasonable cause of action is low, "but it cannot be so low as to be devoid of any meaning" (*Jensen FCA* at para 69).

(c) "FREE or \$0"

[350] In addition, even assuming that Ooma's representations are limited to the words "FREE or \$0" (which is not the case), they refer clearly to a price-related notion.

[351] In support of his cause of action under paragraph 7(d) of the *Trademarks Act*, Mr. Zanin takes issue with the word "FREE" used by Ooma and argues that "FREE" has a very special meaning, which would somehow be distinct from \$0. As discussed above in Section III.B of these reasons, nothing in Mr. Zanin's materials supports this. Throughout the Statement of Claim and in the written and oral submissions made by his counsel, Mr. Zanin consistently equates "FREE" and "\$0" and refers interchangeably to the two concepts. He does that generally in his pleadings, and more specifically in the context of his cause of action under paragraph 7(d) (see for example: Statement of Claim at paras 25, 36, 40). Any reader can plainly see that Mr. Zanin and his counsel employed these two terms as if they meant the very same thing. In other words, "FREE" is always equated with or assimilated to "\$0," and is evidently the expression of a price. Even on a most generous reading of the pleadings, it is plain and obvious that Mr. Zanin repeatedly states that "FREE" and "\$0" refer to the same and unique reality.



[352] Contrary to what Mr. Zanin argues, the references in paragraph 25 of the Statement of Claim do not include “non-price descriptions” of the Service. They are all price-related descriptions.

[353] Mr. Zanin has been unable to demonstrate that, in the commercial context, the word “FREE” is not a pricing feature or could be unrelated to price. A free product is a good or service that costs nothing or \$0, and “FREE” is always and solely associated with the price and the value of a good or service. In his pleadings, Mr. Zanin does not allege any false or misleading representation other than Ooma’s pricing.

[354] In sum, I find that the material facts pleaded by Mr. Zanin in support of his cause of action under paragraph 7(d) of the *Trademarks Act* are strictly confined to the price of the Service.

(d) “*Character, quality, quantity or composition*” do not include price

[355] In order to have a cause of action pursuant to sub-paragraph 7(d)(i) of the *Trademarks Act*, Mr. Zanin acknowledged that he must plead a false or misleading description as to “the character, quality, quantity or composition” of the Service.

[356] There is no question that “FREE” or “\$0” is not a description of the character, quality, quantity or composition of a good or service, and that price and price-related elements do not fall within this description of a product contemplated in the *Trademarks Act*. Simply put, price is not captured by any of the descriptive elements contained at paragraph 7(d)(i).

[357] Indeed, in response to a question from the Court, counsel for Mr. Zanin recognized that, if a product is advertised at a price of \$5, but sold at \$10, such situation “likely will not fall into the character” of a product because a numerical price does not have a special meaning like “FREE or \$0.” With respect, I fail to see how a numerical price figure higher than \$0 would not be a “character” of a product but that a price figure of \$0 or free would be.

[358] The courts and other authorities have systematically affirmed that the word “character” used in paragraph 7(d) of the *Trademarks Act* refers to an intrinsic and prominent quality, attribute, feature, or characteristic of the goods and services, or to elements linked to the material composition of such goods or services. To breach paragraph 7(d), “the statements made by the defendant must obviously be likely to mislead the public with respect to some key quality or characteristic of the goods” [emphasis added] (*Scassa on Trademarks* at § 7.199). This means that there must be a distinguishing or special feature of the product that relates to an “innate” key quality or characteristic of the goods or services (*Fox on Canadian Law of Trade-marks and Unfair Competition*, vol 2, 4th ed (loose-leaf) at p 4-18 [*Fox on Trademarks*]). In other words, the *Trademarks Act* is concerned with elements belonging to the product itself, rather than external considerations such as the price.

[359] As the SCC stated in *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 [*Kirkbi SCC*], “[t]rade-marks seek to indicate the source of a particular product, process or service in a distinctive manner, so that, ideally, consumers know what they are buying and from whom” (*Kirkbi SCC* at para 39). The price of a product is of no assistance to consumers in understanding its intrinsic characteristics or material composition.

[360] In *Alliance Laundry Systems LLC v Whirlpool Canada LP*, 2019 FC 724 [*Alliance Laundry*], this Court held that in order to satisfy the test under paragraph 7(d) of the *Trademarks Act*, a plaintiff must first establish, as a prerequisite, that its mark has garnered goodwill in the Canadian market, and that the plaintiff in that case had failed to do so (*Alliance Laundry* at para 73). Associate Chief Justice Jocelyne Gagné (as she then was) nevertheless went on to note that the plaintiff had also failed to provide evidence showing that the defendant had used a false description regarding the character, quality, quantity, or condition of its products, since the plaintiff's evidence merely revealed that the products were sold at a lesser price than advertised, not that they were of a lesser quality (*Alliance Laundry* at para 74). This was not sufficient to meet the requirements under paragraph 7(d), as “it is speculative to assume that lower cost equates to lower quality” (*Alliance Laundry* at para 74). Stated differently, a product's price is not *per se* indicative of its quality and can only be so when there is specific evidence to that effect.

[361] Similarly, the federal courts have affirmed that the description contemplated in paragraph 12(1)(b) of the *Trademarks Act* refers to “a feature, trait or characteristic belonging to the wares or services” (*Ontario Teachers Pension Plan Board v Canada (Attorney General)*, 2012 FCA 60 at para 29 [*Ontario Teachers FCA*]; *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at para 60). It is now well established that the descriptive character of a good or service “must go to the material composition of the goods or services or refer to an obvious intrinsic quality of the goods or services which are the subject of the trade mark, such as a feature, trait or characteristic belonging to the product in itself” (*ITV Technologies Inc v WIC Television Ltd*, 2003 FC 1056 at para 67, citing *Provenzano v Registrar of Trade-marks* (1977),

37 CPR (2d) 189 (FC) at para 2, aff'd 2005 FCA 96; see also: *Bodum USA, Inc v Meyer Housewares Canada Inc*, 2012 FC 1450 at para 150; *Ontario Teachers' Pension Board v Canada (Attorney General)*, 2011 FC 58 at paras 46–47, aff'd *Ontario Teachers FCA*; *Tradition Fine Foods Ltd v Group Tradition'l Inc*, 2006 FC 858 at para 20).

[362] It is plain and obvious that a price is not an innate feature of a product, whether it is \$10, \$5, or \$0. A price is tied not to the product itself, but to the seller of the product, who determines the price level. A price is an extrinsic quality of a product that is dictated by the seller's decision to sell at a certain price point — a decision that is influenced by a multitude of external factors, such as the costs of production, the demand for the product, and the presence of competitors. This reality is reflected in the definition of the word “price” in the commercial context: “the amount of money given or set as consideration for the sale of a specified thing” (Merriam-Webster Dictionary, “Price” (last visited January 4, 2025), online: <<https://www.merriam-webster.com/dictionary/price>>). Price is not an intrinsic quality of a good or service, but instead an external valuation of said good or service fixed for the purposes of its sale.

[363] At the hearing, counsel for Mr. Zanin referred to additional cases in their reply argument, notably two administrative decisions in *Imperial Tobacco Co of Canada v Philip Morris Inc*, 1976 CarswellNat 601, 27 CPR (2d) 205 (TM Registrar) and *Pizza Pizza Limited v 241 Pizza Limited*, 1995 CanLII 10163 (CA TMOB). None of these rulings provides much assistance to Mr. Zanin, as they simply confirm that the term “character” refers to distinctive characteristics of a product or trademark. Nowhere do they suggest that the character or distinctive feature of a product or trademark could extend to its price.

[364] Mr. Zanin has been unable to direct the Court to any precedent saying that a “character, quality, quantity or composition” of a product under subparagraph 7(d)(i) of the *Trademarks Act* does or could include the price of a good or service. I acknowledge that there is no binding precedent or authority having definitely determined that the words used at subparagraph 7(d)(i) do not include price. However, that does not make the proposition that they could include as an arguable one. The absence of a precedent on this point does not mean that Mr. Zanin has an arguable case for his cause of action under paragraph 7(d) (*Mohr* at para 53). He must still convince the Court that he proposes an interpretation that is consistent with the express provision of the *Trademarks Act* and that is capable of being supported by the applicable legislation.

[365] Here, Mr. Zanin’s proposed statutory interpretation is totally inconsistent with the language of the provision and the purpose of the *Trademarks Act*, and there is no logical or tenable ground able to support it.

[366] In other words, I find that Mr. Zanin’s proposed interpretation of subparagraph 7(d)(i) is clearly wrong in law and that the correct interpretation leaves the pleadings “bound to fail” or “bereft of any possibility of success” (*Wenham* at para 33, citing *JP Morgan* at para 47; see also: *Oratoire* at para 55). More specifically, the Court’s current interpretive exercise is so straightforward that it is plain and obvious that price and pricing elements such as “FREE or \$0” do not fall within the ambit of the “character, quality, quantity or composition” of a product (*Trotman* at para 46). This is a situation where there is clearly only one correct interpretation, and not one where the legislation is capable of producing “competing, credible interpretations” on the disputed issue (*Mohr* at para 52). This is also not a situation where the Court requires a

full evidentiary record in order to make the determination that pricing elements fall outside the scope of paragraph 7(d).

[367] I accept that paragraph 7(d) of the *Trademarks Act* is intended to prohibit false or misleading descriptions when a merchant offers goods or services to the public. But subparagraph 7(d)(i) does not cover all types of descriptions. It is limited to descriptions specifically relating to the “character, quality, quantity or composition” of goods or services, and there is no arguable case that the notion of price could be included in any of these elements.

[368] This alone suffices to conclude that Mr. Zanin has no reasonable cause of action under the *Trademarks Act*. Nevertheless, I have identified two additional reasons for rejecting this cause of action.

(e) *There is no intellectual property right at stake*

[369] Another reason for the failure of Mr. Zanin’s cause of action under subparagraph 7(d)(i) of the *Trademarks Act* is the absence of any trademark or other intellectual property right invoked in his Statement of Claim.

[370] It is well accepted that the *Trademarks Act* protects consumers indirectly, by having provisions and measures ensuring a competitive environment for consumers. More precisely, paragraph 7(d) of the *Trademarks Act* “aims to protect consumers from false representations relating to goods or services” (*Scassa on Trademarks* at § 7.198).

[371] In *Vapor Canada*, Chief Justice Bora Laskin, writing for the majority, emphasized the consumer protection dimension of paragraph 7(d) of the *Trademarks Act*, noting that it “appears to be directed to the protection of a purchaser or a consumer of wares or services” (*Vapor Canada* at p 148). He further observed that paragraph 7(d) of the *Trademarks Act* involves “deceit in offering goods or services to the public, deceit in the sense of material false representations likely to mislead in respect of the character, quality, quantity or composition of goods or services, or in respect of their geographic origin or in respect of their mode of manufacture, production or performance” (*Vapor Canada* at p 148).

[372] Since *Vapor Canada*, subsequent appellate decisions have reaffirmed the consumer protection dimension of the *Trademarks Act*. In *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 [*Mattel*], the SCC stated that the *Trademarks Act* constitutes consumer protection legislation in the following sense: “[i]t is a guarantee of origin and inferentially, an assurance to the consumer that the quality will be what he or she has come to associate with a particular trade-mark” (as in the case of the mythical “Maytag” repairman) (*Mattel* at para 2). A few years later, in *BBM Canada v Research in Motion Limited*, 2011 FCA 151 [*BBM Canada*], the FCA similarly articulated the purpose of the *Trademarks Act* as being twofold: to protect consumers and to facilitate the effective branding of goods (*BBM Canada* at para 28, citing *Mattel* at paras 21–23).

[373] However, the fact that paragraph 7(d) is directed to the protection of a purchaser or consumer of goods and services does not mean or allow one to infer that pricing practices are covered by the provision. The *Trademarks Act* is a statute aimed at protecting consumers through the protection of trademarks and the avoidance of confusing signs (*Kirkbi SCC* at para 39). It is

not a law related to price, and price is not a distinguishing feature under the *Trademarks Act*. Parliament instead chose to address pricing issues through the *Competition Act*, notably via provisions sanctioning false and misleading representation and other deceptive marketing practices. In other words, while consumer protection measures are enshrined in the *Trademarks Act*, they do not include price-related ones.

[374] The *Trademarks Act* is, first and foremost, “concerned with the regulation of the use of trade marks and with a scheme of registration and protection therefor” (*Vapor Canada* at p 142). The overall design of the *Trademarks Act* is directed at the “prohibition of misrepresentations through the use of trade indicia” (*Fox on Trademarks* at § 2:15).

[375] More specifically, paragraph 7(d) of the *Trademarks Act* is historically derived from the common law tort of passing off. This tort sought to guarantee consumers of the quality of goods that they had come to rely upon in the course of trade: “[w]hile the rationale for this tort was to protect the public, it was not the consumer who sued, but the owner of the trademark who brought the action, thereby protecting the public as well as its own interest” (*Pink Panther Beauty Corp v United Artists Corp*, 1998 CanLII 9052 (FCA), [1998] 3 FC 534 at para 13). The tort of passing off has been codified at paragraphs 7(b) through 7(d) of the *Trademarks Act*.

[376] It is plain and obvious that, for a claim under the *Trademarks Act* to succeed, “the acts complained of must be alleged to be effected by the use of intellectual property or to affect intellectual property” (*Zoe International Distributing Inc v Smoke Arsenal Inc*, 2024 FC 2087 at para 70 [*Zoe*], citing *CSI Core Specialities Inc v Sonoco Ltd*, 2001 FCT 801 at para 9 [*CSI*]; see



also: *Sa'd v Yew*, 2023 FC 1286 at para 30; *a contrario*, *Living Sky Water Solutions v ICF Pty Ltd*, 2018 FC 876 at paras 21–22 [*Living Sky Water*]; *LBI Brands Inc v Aquaterra Corporation*, 2016 ONSC 3572 at paras 24, 27). Plaintiffs must plead material facts establishing a connection between their claim and an identifiable intellectual property right (*Zoe* at para 71). Simply put, “[p]articulans of the intellectual property connection are required” (*Zoe* at para 70, citing *CSI* at para 9).

[377] In *Vapor Canada*, the SCC struck down paragraph 7(e) of the *Trademarks Act* on the ground that it was unrelated to trade or to trademarks, or any other forms of intellectual property subject to federal legislative authority: “[s]ection 7 is [...] nourished for federal legislative purposes in so far as it may be said to round out regulatory schemes prescribed by Parliament in the exercise of its legislative power in relation to patents, copyrights, trade marks and trade names” (*Vapor Canada* at p 172).

[378] In the same vein, the FCA determined that “[t]he elements of passing off include deception of the public by means of a misrepresentation; in the case of an action under section 7 of the Act, the misrepresentation must be in relation to a trade-mark” [emphasis added] (*WIC TV Amalco Inc v ITV Technologies, Inc*, 2005 FCA 96 at para 60, citing *Kirkbi AG v Ritvik Holdings Inc*, 2003 FCA 297 at para 38, *aff’d* *Kirkbi SCC*).

[379] Furthermore, this Court has also issued similar rulings as the FCA.

[380] In *Energizer Brands FC*, Justice Henry Brown found that “to comply with Vapor [and] to engage the protection of section 7 in the trade-mark context, a party must establish the existence of intellectual property such as a trade-mark, registered or unregistered” (*Energizer Brands FC* at para 76, rev’d in part on other grounds *Energizer Brands FCA*). Likewise, in *Fluid Energy Group Ltd v Exaltexx Inc*, 2020 FC 81 [*Fluid Energy*], Justice Nicholas McHaffie confirmed that, based on *Vapor Canada*, “for subsection 7(a) to be valid, it must be read to pertain to false and misleading statements made about a trademark or other intellectual property” (*Fluid Energy* at para 48, citing *Canadian Copyright Licensing Agency v Business Depot Ltd*, 2008 FC 737 at para 27 [*Business Depot*] and *Riello Canada Inc v Lambert* (1986), 9 CPR (3d) 324 (Fed TD) at para 35).

[381] More recently, in *Zoe*, this Court found that the defendant had pled no material facts in its counterclaim under paragraph 7(a) of the *Trademarks Act* that identified any intellectual property right it owned, nor that the alleged false or misleading statements were made in association with any of its intellectual property (*Zoe* at para 71). As a result, Associate Judge Kathleen Ring concluded that the failure to establish the requisite nexus between the alleged false or misleading statements and an intellectual property right was fatal to the existence of a reasonable cause of action under paragraph 7(a), and she accordingly struck out the claim (*Zoe* at para 75).

[382] To reach her conclusion in *Zoe*, Associate Judge Ring reiterated that, for it to be valid, paragraph 7(a) must be read down so as to limit its scope to causes of action relating to false and misleading statements made about a trademark or other intellectual property owned by the claimant (*Zoe* at para 69, citing *Business Depot* at para 27 and *Vapor Canada* at pp 172–173).

Due to this constitutional limitation, “the acts complained of must be alleged to be effected by the use of intellectual property or to affect intellectual property,” meaning that “[p]articulars of the intellectual property connection are required” (*Zoe* at para 70, citing *CSI* at para 9). Such a nexus to intellectual property must also specifically relate to intellectual property rights held by the claimant, and not those of another party (*Zoe* at paras 72–73).

[383] In my view, *Energizer Brands FC*, *Fluid Energy*, and *Zoe* make it clear that a claim under paragraph 7(d) of the *Trademarks Act* requires the plaintiff to allege an applicable intellectual property right in his or her pleadings. In short, the provision is intended to prohibit false or misleading descriptions of goods and services protected by intellectual property rights, and the correct statutory interpretation of the provision thus imposes the need for particulars establishing an intellectual property connection in the pleadings.

[384] In the present case, Mr. Zanin has made no allegation whatsoever that the alleged misrepresentations relating to Ooma’s Service are in relation to any trademark or intellectual property right. Indeed, in his pleadings and his submissions, there are no claims of any trademarks or intellectual property rights being affected by Ooma’s alleged false or misleading representations. As there are now decided cases “directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected,” Mr. Zanin’s claim under paragraph 7(d) is bound to fail and is bereft of any possibility of success (*Jacques* at para 35; *Arsenault* at para 27; see also: *Trotman* at para 46).

(f) “Interested person” does not include a consumer

[385] The final reason for the failure of Mr. Zanin’s claim under paragraph 7(d) of the *Trademarks Act* is the fact that Mr. Zanin is not an “interested person” entitled to bring an action pursuant to section 53.2 of the *Trademarks Act*.

[386] A “person interested” (or “personne intéressée” in French) within the meaning of section 2 of the *Trademarks Act* “includes any person who is affected or reasonably apprehends that he may be affected by any entry in the register, or by any act or omission or contemplated act or omission under or contrary to [the Trademarks Act], and includes the Attorney General of Canada.” The “interested person” in section 53.2 is the “person interested” in the definition at section 2 (*Victoria’s Secret Stores Brand Management, Inc v Thomas Pink Limited*, 2014 FC 76 at para 19 [*Victoria’s Secret*]). Section 53.2 must therefore be “broadly construed to be directed to any other act or omission done by another person, as may be contemplated by the [Trademarks Act]” (*Victoria’s Secret* at para 21).

[387] A determination of who is an “interested person” depends on the facts of each case and must be done on a case-by-case basis. The threshold for finding that a person is a “person interested” is low (*Victoria’s Secret* at para 28; *McCallum Industries Limited v HJ Heinz Company Australia Ltd*, 2011 FC 1216 at para 28 [*McCallum*]; *Fairmont Resort Properties Ltd v Fairmont Hotel Management, LP*, 2008 FC 876 at para 57 [*Fairmont Resort*]). It is a *de minimis* threshold which exists to defeat nuisance applications, and an applicant “need neither show ‘great and serious damage’ nor be engaged in competition with the owner of the mark but does need to be in the same trade” [citation omitted, emphasis added] (*Unitel Communications Inc v Bell Canada* (1995), 61 CPR (3d) 12 at 23 (FC), 1995 CarswellNat 1004 at para 27; see also:

*Travel Leaders Group, LLC v 2042923 Ontario Inc (Travel Leaders)*, 2023 FC 319 at para 57 [*Travel Leaders*]; *Beijing Jingdong 360 du E-commerce Ltd v Zhang*, 2019 FC 1293 at para 11 [*Beijing Jingdong*]; *CIBC World Markets Inc v Stenner*, 2010 FC 397 at paras 19–20).

[388] This Court has recently provided further clarity on the types of persons who may qualify as a “person interested.” In *Travel Leaders*, Justice Elizabeth Walker (as she then was), found that “[t]he term is to be interpreted broadly and includes a party whose rights may be restricted by a trademark registration or who has a reasonable apprehension of prejudice, or whose business is likely to be hampered by a trademark registration” (*Travel Leaders* at para 57, citing *Beijing Jingdong* at paras 11–13, *TLG Canada Corp v Product Source International LLC*, 2014 FC 924 at paras 38–39, and *Apotex Inc v Canada (Registrar of Trade-marks)*, 2010 FC 291 at para 7 [*Apotex FC*]).

[389] The Court is unaware of any precedent — and the parties have not cited any — having recognized a right to sue under the *Trademarks Act* for a consumer who does not rely on an intellectual property right. However, once again, it is plain and obvious that this interpretation is incapable of being supported by the *Trademarks Act*.

[390] It is not because the *Trademarks Act* offers some protection to the consumers that it vests a consumer with a direct right of action. Contrary to provincial consumer protection laws or the *Competition Act*, the *Trademarks Act* does not directly give recourses to consumers. As discussed earlier and again below, multiple precedents from this Court clearly establish that a

person must rely on a trademark or an intellectual property right in order to have a recourse under the *Trademarks Act*.

[391] In *Fairmont Resort*, the applicant operated a timeshare resort business and the respondent operated hotels, both under the name “Fairmont.” The applicant sought to expunge some of the hotel’s registrations but did not do so until almost five years after the registrations had been made. After five years, registrations become “incontestable” in many circumstances, as provided by section 11.19 of the *Trademarks Act*. Justice Frederick Gibson found that, notwithstanding the low threshold, the applicant was not a “person interested” pursuant to section 57 of the *Trademarks Act* because it lacked a reasonably apprehended harm and waited nearly five years before commencing its expungement proceeding (*Fairmont Resort* at paras 54–56).

[392] In *Apotex FC*, the applicant, a generic drug company, wished to market pharmaceutical inhalers with a colour combination similar to that appearing in a registered trademark owned by the defendant. Justice Robert Barnes held that the applicant had been standing as a “person interested” pursuant to section 57 of the *Trademarks Act*, as the defendant’s mark restricted the applicant’s interest in marketing closely resembling products (*Apotex FC* at para 7).

[393] In *Beijing Jingdong*, Justice Brown determined that the applicant met the definition of a “person interested” under section 57 of the *Trademarks Act*, as the applicant’s mark was considered by the Canadian Intellectual Property Office to be confusing with the respondent’s mark, and the latter’s mark was an obstacle to the pending trademark applications filed by the applicant (*Beijing Jingdong* at paras 12–13).

[394] In *McCallum*, Justice Yvon Pinard held that the applicant was not a “person interested” as per section 57 of the *Trademarks Act*, because they had not demonstrated a reasonable apprehension that they would be affected by the presence of the respondent’s mark on the register (*McCallum* at paras 26–27). There was no evidence that the registration of the respondent’s mark stood in the way of the applicant; no evidence of any instances of confusion between the applicant’s and respondent’s marks; and no evidence that the applicant had suffered any damage (*McCallum* at para 24). Moreover, the applicant’s nearly five-year delay to commence the expungement proceedings was found to be “inconsistent with the behaviour of a party that perceives itself to be a ‘person affected’, or who reasonably apprehends that it may be affected by the existence on the registry” of the respondent’s trademark (*McCallum* at para 25).

[395] In sum, section 53.2 of the *Trademarks Act* does not recognize a right of action to a consumer affected by a false or misleading representation covered by this provision when no trademark or intellectual property right is concerned. It restricts the recourse to those interested persons holding a trademark or an intellectual property right. Here, given the absence of any trademark or intellectual property right claimed by Mr. Zanin, it is plain and obvious that the correct interpretation of section 53.2 deprives Mr. Zanin of any prospect of qualifying as an “interested person” within the meaning of the provision.

(g) *Conclusion on paragraph 7(d) of the Trademarks Act*

[396] For the reasons detailed above, the allegations made in the Statement of Claim with respect to a cause of action based on paragraph 7(d) of the *Trademarks Act* are not supported by

material facts and have no legal basis. Mr. Zanin's claims with respect to Ooma's alleged misleading price representations have no connection whatsoever with the *Trademarks Act*.

[397] It is plain and obvious, assuming the facts pleaded to be true, that the claims made by Mr. Zanin under the *Trademarks Act* have no realistic prospect of success and are bound to fail. This is a situation where there is no reasonable or plausible interpretation of paragraph 7(d) and section 53.2 of the *Trademarks Act* that could support Mr. Zanin's cause of action.

(3) Second cause of action: section 54 of the *Competition Act*

[398] As a second cause of action, Mr. Zanin pleads that, in providing its Service to him and other Class members, Ooma displayed an initial first price of "FREE or \$0" and a final, higher second price including applicable fees and associated taxes. According to Mr. Zanin, Ooma thus charged the Class members the higher of two displayed prices, in contravention of section 54 of the *Competition Act*. Section 54 makes it a criminal offence for a merchant to express two or more prices to a customer at the time of purchase and to charge the higher price. This breach of section 54, says Mr. Zanin, renders Ooma liable, under section 36 of the *Competition Act*, for damages equal to the difference between the two prices and for the costs of investigation.

[399] In his Statement of Claim, at paragraph 31b), Mr. Zanin alleges that "[t]he Defendants expressed to the Class Members that the Basic Home Phone was free or costing \$0 on the packaging and marketing materials for the Ooma Telo device, at the time of subscribing to the Basic Home Phone, and upon the issuance of each monthly bill for the Fees and taxes," thereby suggesting that there was a first price of "FREE or \$0" expressed at different places by Ooma.



[400] Then, at paragraph 31d) of the Statement of Claim, Mr. Zanin alleges that “[t]he monthly bills issued by the Defendants clearly expresses the Basic Home Phone as costing \$0 but then the Defendants proceeds to charge Class Members the Fees and taxes.” In other words, he claims that the second and higher price appears on the monthly invoices. Mr. Zanin does not plead that the alleged second price is expressed anywhere else.

[401] At paragraphs 43 and 44 of the Statement of Claim, Mr. Zanin reiterates that the first price expressed by Ooma is a price of “\$0 or free,” expressed in the manners described at paragraph 24, namely “a. on the packaging of the Ooma Telo devices; b. on Ooma’s Canadian website; c. on the Class Members’ monthly billing details; d. during the process of subscribing to the Basic Home Phone; and e. on its social media pages.” And he repeats that the second price equivalent to the applicable fees and associated taxes is expressed on the monthly bills.

[402] Ooma responds that Mr. Zanin’s Statement of Claim does not disclose a reasonable cause of action since section 54 of the *Competition Act* cannot apply to the pleaded facts.

[403] Further to my review of the pleadings, I am not convinced by Mr. Zanin’s arguments and instead find that the Statement of Claim falls well short of containing the main constituent elements to plead a reasonable cause of action under section 36 of the *Competition Act* for a breach of section 54. Even if the facts alleged in the pleadings and in the documents incorporated by reference are accepted as true, it is plain and obvious that Mr. Zanin’s claim of an alleged double ticketing offence is doomed to fail.

[404] Again, I do not dispute that Mr. Zanin's claim pursuant to section 54 of the *Competition Act* could perhaps be qualified as novel. However, with respect, the material facts pleaded by Mr. Zanin are incapable of meeting the requirements of a section 54 criminal offence. Mr. Zanin proposes an incorrect and absurd interpretation of the provision, which would result in a prohibition of segmented pricing and criminalize the presentation of monthly invoices offering more detailed pricing information to customers. Mr. Zanin's cause of action based on section 54 is clearly wrong and frivolous, and it is bereft of any possibility of success. It must be stopped in its tracks at the certification stage to avoid squandering judicial resources.

(a) *Structure of the Competition Act*

[405] The *Competition Act* is a federal statute of general application which targets anti-competitive commercial behaviour in Canada. Like most competition or antitrust law regimes around the globe, the legislation deals with three broad areas: coordinated conduct between competitors, unilateral conduct by firms with market power, and mergers. The *Competition Act* also contains a number of specific "reviewable" practices as well as a variety of deceptive marketing practices, such as misleading advertising or double ticketing (*Jensen FC* at para 89). In this respect, it overlaps with the provincial consumer protection laws.

[406] The *Competition Act* adopts a bifurcated approach to anti-competitive behaviour. On one hand, there are certain types of conduct that are considered sufficiently egregious to competition to warrant criminal sanctions. On the other hand, other types of conduct are considered only potentially anti-competitive and are not treated as crimes. These conducts are instead subject to civil review and potential forward-looking prohibition and monetary penalties once the

impugned conduct has been established to have had, have, or be likely to have anti-competitive effects (*Jensen FC* at para 90).

[407] Section 36 of the *Competition Act* confers a right of private action to any person who has suffered loss or damage as a result of conduct in breach of a criminal provision of the *Competition Act*, or as a result of a failure to comply with an order of the CT or another court under the *Competition Act*. Conversely, non-criminal anti-competitive conduct, even one having serious anti-competitive effects, does not give rise to a recourse in damages for private plaintiffs (*Jensen FC* at para 91).

[408] To establish a claim under paragraph 36(1)(a) of the *Competition Act*, a plaintiff must plead that the defendants breached a provision of Part VI of the legislation (which addresses “Offences in Relation to Competition”) and that the plaintiff suffered actual loss or damage as a result of the impugned criminal conduct. The right to pursue an action in damages and to seek recovery of certain investigation costs is subject to important restrictions, including a limit to pursuing compensatory damages — i.e., no punitive damages or injunctive relief — (*Jensen FC* at para 93).

[409] Section 36 is the provision effectively creating Mr. Zanin’s causes of action under the *Competition Act* in this case (*Godfrey* at para 76; *Amway* at paras 83–85; *Singer v Shering-Plough Canada Inc*, 2010 ONSC 42 at paras 107–108). To succeed, Mr. Zanin must therefore prove that: (i) Ooma’s alleged misconduct satisfies all constituent elements of the underlying criminal offence (in this case, section 54 or section 52); (ii) he suffered loss or damage; and (iii)

the loss or damage resulted from the violation of the criminal prohibition (see for example: *Jensen FC* at para 94; *Airbnb* at para 69).

(b) *Elements of section 54*

[410] Turning to section 54 of the *Competition Act*, it creates the criminal offence of “double ticketing” and is part of the deceptive marketing practices offences contained in Part VI of the Act. The required constituent elements of the section 54 offence are: (i) the supply of a product by a person; (ii) at a price that exceeds the lowest of two or more prices; (iii) the two prices are clearly expressed on the product, on anything attached to or accompanying the product, or on any point-of-purchase display or advertisement; and (iv) the two prices are expressed at the time the product is supplied. There are no other requirements (*Airbnb* at para 36). At its core, the provision is meant to prevent the display of two prices on a single product.

[411] The language of section 54 clearly indicates that it relates strictly to the supplier’s conduct, more specifically on what the supplier expresses and the price at which the product is supplied. It only applies to situations where different prices are expressed in respect of the same product in terms of quantity and time of supply (*Airbnb* at para 36; see also: *Bergen v WestJet Airlines Ltd*, 2021 BCSC 12 at para 24 [*Bergen*], aff’d *Trotman*). Subsection 2(1) of the *Competition Act* defines “product” as including an “article” and a “service,” so section 54 may apply to both. The word “supply” also has a broad meaning, being defined by subsection 2(1) as “in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service.”

[412] Section 54 thus establishes a strict liability offence, pursuant to which charging a price higher than the lowest of two or more expressed prices constitutes a violation of the *Competition Act*. It directly states that, if the supplier expresses two prices for a product, the supplier cannot charge the higher price. This arguably implies that the customer is entitled to have the benefit of the lower price (*Airbnb* at para 80).

[413] I pause to observe that the double-ticketing offence came into force at the same time as the “sale above advertised price” criminal offence, a separate and distinct provision which prohibited the supply of a product at a price higher than the price advertised. This criminal provision was repealed in 1999 and replaced by the civilly reviewable conduct of “sale above advertised price” at section 74.05 of the *Competition Act* (*Airbnb* at para 37).

[414] Even though the double-ticketing provision has been part of the *Competition Act* and its predecessors for close to 50 years, there is limited jurisprudence on this provision.

[415] In *The Consumers’ Association of Canada et al. v Coca-Cola Bottling Company et al.*, 2006 BCSC 863 [*Coca-Cola*], aff’d 2007 BCCA 356, recycling fees for bottled drinks were excluded in the price displayed on the shelf for these products, but were added at the cashier and charged to the consumer in the final price. The BCSC found that charging recycling fees for bottled drinks on the invoice to consumers was not in breach of the double-ticketing provision, even though the fees were not included in the price displayed on the shelf (*Coca-Cola* at paras 69, 93).

[416] In *Airbnb*, I concluded that it was not plain and obvious that Airbnb did not engage in double ticketing by adding “service fees” to the final price it charges for its accommodation booking services (*Airbnb* at para 60).

[417] In *Bergen*, the BCSC found that, by charging baggage fees in addition to its own tariffs indicating that no such fees would be imposed on the first checked bag, it was arguable that WestJet clearly expressed two prices at the time of supply, which extended “from the time of booking to the time of travel” (*Bergen* at para 42). On appeal, the BCCA confirmed that the plaintiff’s pleadings on section 54 of the *Competition Act* were not bound to fail and that it was not plain and obvious that the manner of expressing the two prices pleaded fell outside the scope of the provision (*Trotman* at para 47). The court agreed that, in that case, “the pleadings [could] be generously read to include an assertion that the second price is expressed in the tariffs” and that such tariffs were expressed “‘immediately prior to payment’ via a point-of-sale display” (*Trotman* at para 49).

[418] In the present case, I am not satisfied that Mr. Zanin pleaded all the required elements of a section 54 offence, namely, the existence of a first and second price for the Service, the fact that the Service was supplied at the higher price, and the fact that the prices were clearly expressed by Ooma at the time of supply and at a point-of-purchase display. Even if the pleaded facts are assumed to be true and are read generously, the factual matrix of this case does not support a cause of action under sections 36 and 54 of the *Competition Act*. Segmented pricing or the detailed ventilation of prices on a customer invoice are not a criminal conduct.

[419] Contrary to what Mr. Zanin alleges, the present case is quite different from *Airbnb*, the only other precedent of this Court on section 54 of the *Competition Act*.

[420] I note that Mr. Zanin has not expressly pleaded the *mens rea* element of the section 54 criminal offence. However, some required elements of a cause of action, such as *mens rea*, may be implied from the alleged facts by common sense and do not always need to be specifically pleaded (*Airbnb* at para 55, citing *Watson v Bank of America Corporation*, 2015 BCCA 532 at para 101; see also: *Pass Herald Ltd v Google LLC*, 2024 FC 1623 at para 154 [*Pass Herald*]). In this case, I do not need to address whether the required mental element of Ooma's conduct is implied in Mr. Zanin's pleadings, as Ooma has not raised any objection on this point and Mr. Zanin's cause of action falls short of a reasonable cause of action for other reasons.

[421] In the same vein, in light of my conclusions on the absence of a first and second prices clearly expressed at the time of supply, I do not have to address the issue of causation and whether Mr. Zanin has properly pled that his alleged damages equal to the applicable fees and associated taxes are the result of a violation of section 54.

(c) *There are no first and second prices clearly expressed*

[422] In essence, Mr. Zanin pleads that Ooma offers the Service at a first price of "FREE or \$0" and then charges a second price equivalent to the applicable fees and associated taxes, which is higher than the first price.

[423] With respect, the material facts alleged by Mr. Zanin do not support this position. There are simply no first and second prices clearly expressed by Ooma for the Service.

[424] At paragraph 31b) of the Statement of Claim, Mr. Zanin pleads that Ooma expressed a first price of “free or costing \$0” on its packaging and marketing materials, at the time of subscribing to the Service, and upon the issuance of the monthly invoices. He then states at paragraph 43 that the “price of \$0 or free” for the Service is the first price for the purpose of his section 54 cause of action and that it is expressed in the various manners described at paragraph 24. In his pleadings, Mr. Zanin thus suggests that there is a first price of “FREE or \$0” expressed at different places in Ooma’s promotional, advertising, and billing materials.

[425] This is patently false. The Ooma materials are considered part of the pleadings and are incorporated by reference as they evidently form an integral part of Mr. Zanin’s claim and factual matrix (*Jensen FCA* at para 52(c), affirming *Jensen FC* at paras 85, 87). It is clear that by referring to the various conduits through which Ooma allegedly conveyed its pricing representations, Mr. Zanin was asserting their contents as facts. However, as discussed in Section III.A of these reasons, the pleadings stating that Ooma offered a first price of “FREE or \$0” are inaccurate. The allegations in the Statement of Claim are entirely inconsistent, on a plain reading, with the documents from which they claim to originate, as they provide a truncated and incomplete summary of Ooma’s pricing representations. When the documents referred to in the pleadings do not actually say what the plaintiff alleges, the Court cannot consider these allegations as material facts, as they would be incapable of proof (*Jensen FC* at para 86).



[426] Here, Ooma never expressed a first price limited to “FREE or \$0,” without more. “FREE or \$0,” is always followed by a mention of applicable fees and associated taxes. There is never a first price expressed at \$0, without an immediate reference to the applicable monthly fees and taxes. Mr. Zanin was indeed unable to point to any situation, document, representation, or advertisement where Ooma expressed a first price solely limited to \$0 or “free.”

[427] In short, the “first price” alleged by Mr. Zanin simply does not exist.

[428] With respect to the second price, Mr. Zanin alleges, at paragraphs 31d) and 44 of the Statement of Claim, that Ooma expresses a second price equivalent to the applicable fees and associated taxes on the monthly invoices sent to its customers. In his written submissions, Mr. Zanin says that the monthly invoices are “the medium for the higher price” (Memorandum of Fact and Law at fn 105). Indeed, Mr. Zanin affirms that Ooma’s monthly invoices are “the crux of the double-ticketing claim” (Memorandum of Fact and Law at para 71).

[429] Mr. Zanin goes even as far as stating that he “limited the [section] 54 claim to the monthly invoices that are delivered to customers” (Memorandum of Fact and Law in Reply at para 76). Mr. Zanin thus claims and argues that, in any event, the alleged two prices are expressed by Ooma in its monthly invoices.

[430] With respect, this is not a case of double ticketing.

[431] Ooma's monthly invoices refer to the "Base Phone Service" at a "subtotal" of "\$0.00," to which are added various taxes and fees such as the "911 Service Fee" and the "Regulatory Compliance Fee," for a "total" amount including everything (Joint Motion Record at p 920). Billing details refer to the "Base Phone Service" at a "subtotal" price of "\$0.00," to which are added taxes and fees for a total price varying between \$5 and \$6.

[432] On their face, the monthly invoices represent a single posting of the total price for the Service, breaking down and itemizing its various components, with crystal clear references to sub-totals and a total. This is not double ticketing but rather single ticketing with segmented pricing information for a single product, with the references to the total price and to all its elements appearing in plain sight on the monthly invoice. Ooma's pricing components are expressed all at once on the same invoice, not at different places or stages during the sale and purchasing process. With respect, on any plausible and reasonable interpretation, this cannot fit the definition of double ticketing set out at section 54 of the *Competition Act*.

[433] What is more, Ooma's monthly invoices are not even a situation of drip pricing, as Ooma is not adding elements as the sale process unfolds. There is nothing dripping in Ooma's monthly invoices. The price is not provided to the customer drop by drop, but it appears in a one-time splash on a single page, with all components of the final total price described on the monthly invoice itself.

[434] In short, considering that Mr. Zanin's claim under section 54 of the *Competition Act* is limited, as he says, to the monthly invoices, his pleadings and materials do not support the

existence of a first price distinct from a second price. The pricing components of Ooma's Service are all expressed on the monthly invoices, with one sub-total at \$0 and a total reflecting the final price charged to the customers. Segmenting a supplier's price in such a way or providing detailed pricing information to a customer is clearly not a criminal conduct contemplated by section 54 and thus does not give rise to a right of action under section 36.

[435] Even assuming that all facts pleaded by Mr. Zanin are true, there is no violation of section 54. This is not a situation of two different prices clearly expressed for the same product where the advertised second price is higher than the advertised first price. At all relevant times, Ooma has always used the same single price. The difference between the displays on Ooma's promotional and advertising materials and the monthly invoices is that the monthly invoices actually specify the exact amounts of the applicable fees and associated taxes.

[436] It is plain and obvious that the ways in which Mr. Zanin has pleaded the alleged existence of two clearly-expressed prices cannot meet the requirements of section 54. No matter how generously they are read, the pleadings do not include material facts supporting an assertion that Ooma has expressed two prices. Indeed, being generous with the pleadings does not entitle the Court to turn a blind eye to what they do or do not contain (*Jensen FC* at para 164, aff'd *Jensen FCA* at para 69).

[437] I admit that there is no binding case law squarely on point, demonstrating that the very issue has been dealt with and rejected (*Airbnb* at para 59, citing *Arsenault* at para 27). That said, I again remind that the FCA recently clarified that the absence of a precedent on point does not

categorically mean that a cause of action has a reasonable prospect of success (*Mohr* at para 53). When the interpretive exercise is so straightforward that it is plain and obvious that a claim would fail even without previous case authority, the Court should exercise its gatekeeping role and conclude to an absence of reasonable cause of action (*Trotman* at para 46; see also: *Mohr* at paras 53–54). This is the case here, just like Mr. Zanin’s interpretation of subparagraph 7(d)(i) of the *Trademarks Act* as to the inclusion of price in the provision.

[438] The interpretation of section 54 of the *Competition Act* put forward by Mr. Zanin cannot be supported by any material facts or the language of section 54. The facts as alleged by Mr. Zanin are entirely inconsistent with the express requirements of a double-ticketing offence as Ooma did not display separate first and second prices. A failure to establish a cause of action will arise when the allegations in a statement of claim do not adequately plead all the constituent elements of a recognized cause of action (*Jensen FC* at para 73; *Fernandez* at para 8). As its name suggests, the offence of double ticketing serves to prevent the display of two prices on a single product (*Airbnb* at para 38). Throughout its advertisement, promotion, and sale of the Service, Ooma always expresses one single price with different components, never two prices.

(d) *Two prices are not displayed at the time of supply*

[439] Moreover, if I were to accept that the first and second prices are expressed by Ooma on the monthly invoices, it is plain and obvious that they are not expressed on the Service at the time of supply. A monthly invoice is not a point-of-purchase display.

[440] Section 54 of the *Competition Act* sanctions a form of deceptive marketing practices prohibiting incorrect pricing information provided to the customers. It refers to the “supply” of a product “at the time at which it is so supplied.” The provision also specifies that it exclusively concerns prices clearly expressed “(a) on the product, its wrapper or container; (b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or (c) on an in-store or other point-of-purchase display or advertisement” (subsection 54(1)).

[441] It is clear and obvious that this criminal provision relates to the posting of prices before the actual purchase and sale of the product are completed. The two alleged conflicting prices must be expressed to the customer at the time of supply, before the customer makes a final choice on the purchase of the product. This temporal requirement is a “necessary requirement” of section 54 (*Bergen* at para 44, *aff’d Trotman* at para 3; see also *Airbnb* at para 36).

[442] However, an invoice is not the display or advertising of a good or service. An invoice does not arise at the time of supply of a product. It is issued after the purchase and sale of a product. This is confirmed by the use of the past tense in the definition of an “invoice” or “bill” in the commercial context, which is “an itemized account of the separate cost of goods sold, services performed, or work done” [emphasis added] (Merriam-Webster Dictionary, “Bill” (last visited January 4, 2025), online: <<https://www.merriam-webster.com/dictionary/bill>>).

[443] Mr. Zanin alleges that he receives the monthly invoices and is billed at the time or within the time the Service is offered to him by Ooma. With respect, I disagree. I am not convinced that,

as claimed by Mr. Zanin, the invoice accompanies the Service and that the Service is supplied on a monthly basis through the invoice. This is not supported by the material facts pleaded by Mr. Zanin.

[444] Mr. Zanin bought the Telo device on December 30, 2019 and activated his account on January 9, 2020. A first monthly invoice was then issued on January 11, 2020, and Mr. Zanin took knowledge of such invoice when he read his credit card account. Based on the pleadings, no “second price” was expressed to him at the time he purchased the Service.

[445] Ooma’s monthly invoices are issued after the sale of the Service. They are not mounted on display at the time of the sale. They may be issued continuously during the execution of the contract, but they are clearly issued and expressed after Mr. Zanin — or any of Ooma’s customers — has made the decision to purchase the Service.

[446] There is no ambiguity here and the conduct described by Mr. Zanin in his Statement of Claim falls squarely outside of the scope of section 54. Posting a segmented total price or even two prices on a monthly invoice is not an expression of two prices before the purchase of the Service. This is not a situation similar to *Bergen*, where the BCSC determined that, due to the special nature of the tariffs posted by WestJet, it was not plainly and obviously wrong to argue that they were continuously expressed from the time of booking to the time of travel — i.e., before the time the customer began using the travel service — (*Bergen* at para 42). In that case, the court found that it was possible, with recourse to evidence about the tariffs and the steps

WestJet took to publish them and make passengers aware of them, that the plaintiff could establish a clear expression of the tariffs at the time of booking and travel.

[447] What Mr. Zanin describes and complains of in his Statement of Claim is simply not double ticketing. Posting or charging a higher price on an invoice provided to a customer after the purchase of a service might perhaps amount to a sale above advertised price, which is covered at section 74.05 of the *Competition Act*, now a civil provision which does not open a right to claim damages under section 36. But, without a doubt, it does not fall within the scope of the criminal conduct prohibited by section 54.

(e) *Conclusion on section 54 of the Competition Act*

[448] For the above reasons, the allegations made in the Statement of Claim with respect to the cause of action based on section 54 of the *Competition Act* are not supported by sufficient material facts and have no legal basis. It is plain and obvious, assuming the facts pleaded to be true, that the claims made with respect to these matters have no realistic prospect of success and are bound to fail. There are no material facts supporting the existence of a first and second prices or the expression of such two prices at a point of display or purchase of the Service. As such, the facts as alleged by Mr. Zanin do not fit with the requirements of section 54.

(4) *Third cause of action: section 52 of the Competition Act*

[449] As his third and last cause of action, Mr. Zanin pleads that Ooma's representations on the Service contravene section 52 of the *Competition Act*, which prohibits false or misleading

representations to the public. As was the case for his double-ticketing cause of action, Mr. Zanin claims that this breach of section 52 renders Ooma liable, under section 36 of the *Competition Act*, for damages and the costs of investigation.

[450] Mr. Zanin's pleadings on this cause of action are more succinct. In the Statement of Claim, Mr. Zanin alleges that Ooma has "deliberately represented [the Service] as being free in order to promote that service to the public, including its current and prospective customers" and that "[r]epresenting the [Service] as free is false or misleading in a material respect because the service is, in fact, not free or \$0" (Statement of Claim at paras 50–51). He further maintains that, because of such representations, "consumers will likely believe that the [Service] is indeed free" and that Ooma's conduct has caused him and the Class members "to spend more money that they were expecting, or otherwise acquiring less value" (Statement of Claim at paras 53–54). In support of these allegations, Mr. Zanin refers to Ooma's promotional Descriptions listed at paragraph 25 of the Statement of Claim.

[451] Ooma responds that it did not misrepresent or hide the total costs of the Service and that it always accurately divulged the applicable fees and taxes associated with the Service.

[452] Mr. Zanin replies that determining whether the fees were disclosed and whether there could therefore be no false or misleading representations to the public constitute "merits defenses that are to be assessed at trial, not at certification" (Memorandum of Fact and Law at para 76). In his submissions, Mr. Zanin also argues that "Ooma expressly states \$0 for the [Service] in the monthly billing and invoices, and its pricing sheet says the service is Free without any asterisk,"



referring to Exhibits D and E of the transcripts of Mr. Calvo's cross-examination (Memorandum of Fact and Law in Reply at para 70). These two exhibits are, respectively, Ooma's one-page monthly invoice and two-page pricing sheet.

[453] With respect, I do not agree with Mr. Zanin.

[454] Whether or not a false or misleading representation effectively took place is not automatically an issue for trial. On certification, the Court's role is to determine if an allegation is supported by material facts and contains the basic elements required to anchor a cause of action. Mr. Zanin indeed acknowledges that his claim of false or misleading representation is not based on a failure to disclose the existence of the additional fees and charges.

[455] As demonstrated throughout these reasons, the exact nature of Ooma's representations lies at the very heart of this proposed class action. Contrary to what Mr. Zanin argues, the main issue is not whether it is "proper to describe a product as 'FREE' or '\$0' when that merchant actually charges money for the product" (Memorandum of Fact and Law in Reply at para 59b)). It is rather whether the statements made by Mr. Zanin and his counsel correctly reflect what Ooma's representations actually are. Similarly, the question for the Court is not whether it is "fair and healthy marketplace competition" for merchants to represent their products in the ways Ooma does it — i.e., describing its Service as "Free or \$0" and specifying an amount for applicable fees and associated taxes separately — (Memorandum of Fact and Law in Reply at para 72). The Court must rather determine whether such representations are prohibited as a

criminal conduct and amount to false or misleading representations covered by section 52 of the *Competition Act*.

[456] As discussed above, the Service is never advertised, promoted, presented, labelled, or invoiced by Ooma as “Free or \$0,” without more. The Service is never described strictly in what Mr. Zanin qualifies as a “highly uniform fashion.” The false or misleading misrepresentations, as they are alleged by Mr. Zanin in his pleadings, simply do not exist.

[457] Further to my review of the pleadings, I again find that the Statement of Claim falls well short of containing the main constituent elements to plead a reasonable cause of action under section 36 for a breach of section 52 of the *Competition Act*. When the facts alleged in the pleadings are read in conjunction with the documents that are incorporated by reference and Ooma’s actual representations, it is plain and obvious that Mr. Zanin’s claim under section 52 is not supported by material facts and is doomed to fail.

[458] I am well aware of the fact that, at this certification stage, my task is not to assess the merits of the evidence. Yet, I cannot accept at face value Mr. Zanin’s allegations when a mere cursory review of the materials he relies on suffices to reveal that such allegations are not a fair and accurate rendering of what was actually said by Ooma in its promotional, advertising, or billing materials. Once stripped of their misquotes, selective quotes, mischaracterizations, distortions, and misrepresentations, Mr. Zanin’s references amounts to no more than allegations of pricing practices that are a far cry from a criminal false or misleading representation.

[459] I would fail to fulfill my gatekeeping function at the certification stage (*Pro-Sys* at para 103; *Jensen FCA* at paras 49, 70; *Mohr* at paras 49, 53) if I were to defer the issue of false or misleading representations to the trial stage when, on their face, Mr. Zanin's allegations and pleadings clearly do not depict anything false or misleading.

(a) *Elements of section 52*

[460] Like section 54, section 52 creates a criminal offence and is part of the deceptive marketing practices offences contained in Part VI of the *Competition Act*. Subsection 52(1) provides that a person commits an offence when he or she: (i) makes "a representation to the public that is false or misleading in a material respect;" (ii) does so "knowingly or recklessly;" and (iii) does so "for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest."

[461] Subsection 52(2) provides that the following representations accompanying the products are deemed to be made to the public: those that are "(a) expressed on an article offered or displayed for sale or its wrapper or container; (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale; (c) expressed on an in-store or other point-of-purchase display; (d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user; or (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public."

[462] Subsection 52(4) further provides that, in a prosecution for a contravention of the false or misleading representation provision, “the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.”

[463] Similarly to other deceptive marketing practices provisions contained in the *Competition Act* (such as section 54), section 52 focuses on the conduct of the merchant. It aims to improve the quality and accuracy of marketplace information and “to protect consumers from purchasing goods or services based on inaccurate information” (*Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5, 2024 CanLII 93716 at para 233 [*Cineplex*]).

[464] Finally, in order to establish a claim under section 36 of the *Competition Act*, Mr. Zanin must not only plead that Ooma meets the constituent elements for a breach of section 52 on a balance of probabilities, but also that he suffered actual loss or damage as a result of the impugned criminal conduct (*Toyota Jidosha Kabushiki Kaisha (Toyota Motor Corporation) v Marrand Auto Inc*, 2024 FC 1776 at para 15). Damages do not automatically flow from a violation of the criminal provisions in the *Competition Act* and, in order to have a reasonable cause of action under section 36, a plaintiff must suffer a loss resulting from the violation and allege damages resulting from said violation (*Airbnb* at para 69, citing, *inter alia*, *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 at paras 74–75).

[465] On the interpretation of section 52, two cases are worth mentioning: *Richard v Time Inc*, 2012 SCC 8 [*Richard*] and *Cineplex*.

[466] In *Richard*, the SCC interpreted section 218 of the *Quebec CPA* which relates to the prohibited practice of making a false or misleading representation to a consumer by any means whatsoever (section 219 of the *Quebec CPA*). Section 218 sets out the approach for determining whether a representation is a prohibited practice under the *Quebec CPA*, and its wording is “based to a large extent on” subsection 52(4) of the *Competition Act as it then read* (*Richard* at para 45). Both provisions provide that the literal meaning and the general impression of the alleged false or misleading representation must be taken into account.

[467] The SCC affirmed that, when dealing with a written advertisement, courts must make an objective determination of the overall impression conveyed by the entire advertisement (rather than portions of it). Courts should not make a “minute dissection of the text,” but should instead read it over entirely once in order to determine the general impression conveyed (*Richard* at para 56). The SCC further observed that the general impression “is not the impression formed as a result of a rushed or partial reading of an advertisement” (*Richard* at para 56). The analysis “must take account of the entire advertisement rather than merely of portions of its content” and “[r]eading over the entire text once should be sufficient to assess the general impression conveyed by a written advertisement” (*Richard* at para 56; see also: *Pass Herald* at para 262; *TELUS Communications Inc v Shaw Communications Inc*, 2020 BCSC 1354 at para 65). The general impression left by the representation must be “true to reality” to avoid becoming a prohibited practice (*Richard* at para 78).

[468] The SCC also recognized the connection between the proper approach for general impression and the test used to determine confusion under the *Trademarks Act* (*Richard* at para

57, citing *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 20 [*Veuve Clicquot*] and *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 41). This latter test is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees a name (allegedly confusing with a trademark) at a time when he or she has no more than an imperfect recollection of the trademark in question. Importantly, the test does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks (*Veuve Clicquot* at para 20).

[469] The SCC then went on to coin the term “credulous and inexperienced” to describe the average consumer and the legal standard to use when assessing the literal meaning and general impression conveyed by a representation: “[t]he word ‘credulous’ reflects the fact that the average consumer is prepared to trust merchants on the basis of the general impression conveyed to him or her by their advertisements. However, it does not suggest that the average consumer is incapable of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible” (*Richard* at para 72). The average consumers who are credulous and inexperienced “take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement” (*Richard* at para 67; see also: *Mattel* at para 58, cited in *Richard* at para 66).

[470] Turning to *Cineplex*, it is a case where the CT considered an application brought by the Commissioner of Competition under the civil deceptive marketing provisions of the *Competition Act*, alleging false or misleading representations made by Cineplex on the price of movie tickets on its website and its mobile application. I pause to mention that, just as subsection 52(4),

subsection 74.03(5) of the *Competition Act* requires the CT, in proceedings under section 74.01 — the civil false and misleading representation provision, to take into account both the literal meaning and the general impression conveyed by a representation.

[471] In its decision, the CT stated that, “consistent with the directions in *Richard*, the proper consumer perspective in the general impression test for section 74.01 and subsection 73.03(5) should reflect the overall objectives of the *Competition Act*, the purposes of the deceptive marketing provisions, the breadth of section 74.01, and the diversity of circumstances in which representations to the public may arise under section 74.01” (*Cineplex* at para 268). The CT then concluded as follows:

[278] Against all of this background, I conclude that that the Tribunal should not adopt the “credulous and inexperienced” consumer in *Richard* as the legal standard for the general impression test under section 74.01 and subsection 74.03(5) of the *Competition Act*. Instead, as *Richard* contemplates, the legal standard should be appropriate for the objectives of the *Competition Act* and the purposes of the deceptive marketing provisions in it. The legal perspective for the general impression test should remain that of the ordinary consumer of the product or service, which may be refined according to the nature of the representation at issue, the characteristics of the members of the public to whom the representation was made, directed or targeted, the nature of the product or service involved, and the particular circumstances of the case.

[472] The legal standard for the general impression test under section 52 of the *Competition Act* has therefore yet to be definitely determined (*Pass Herald* at para 263). It is either the “credulous and inexperienced” consumer as set out in *Richard*, or the “ordinary consumer of the product or service” according to *Cineplex*. Regardless, it is unnecessary to decide this issue. In both *Richard* and *Cineplex*, the *standard to determine whether an advertising claim is false or misleading is an*

*objective one. It represents the attributes of the “credulous and inexperienced” or “ordinary” consumer to whom the representation is made, directed, or targeted.*

[473] In *Energizer Brands, LLC v Gillette Company*, 2023 FC 804 [*Gillette*], Justice Janet Fuhrer reminded that the determination of the general impression of an advertisement included consideration of the nature of the particular portion of the public to whom it is directed (*Gillette* at para 176(1), citing, *inter alia*, *Maritime Travel Inc v Go Travel Direct.Com Inc*, 2008 NSSC 163 at para 39, aff’d 2009 NSCA 42 [*Go Travel Direct*]). She added that the general impression is to be assessed from the perspective of a consumer to whom the representation is targeted, which, in that case, was a “credulous and technically inexperienced consumer of batteries in the sense that their lack of experience relates to the technical information in the comparative performance claims” (*Gillette* at para 178). Justice Fuhrer thus found that the relevant perspective for general impression is the ordinary hurried customer “who take[s] no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement” and not the perspective of a “careful and diligent consumer” (*Gillette* at para 180, citing *Richard* at paras 66–67; see also: *Pass Herald* at para 262).

[474] In *Brault & Martineau c Riendeau* 2010 QCCA 366 [*Riendeau*] and *Vidéotron, senc c Bell Canada*, 2015 QCCS 1663 [*Videotron*] — two class action proceedings referred to by Ooma and involving a recourse under the false or misleading representation provisions, the Quebec courts resorted to the “general impression” analytical framework to conclude that, in light of the literal meaning of the terms used in the advertisements, a credulous and inexperienced consumer



would not be misled by the impugned representation (*Riendeau* at paras 27, 29, 33; *Videotron* at paras 48–54).

[475] For its part, the “literal meaning” of a representation within the meaning of subsection 52(4) is conceptually uncontroversial: it is what it says on its face, interpreted in its ordinary sense (*Pass Herald* at para 261; *Cineplex* at para 242, citing *Richard* at para 47).

[476] In the present case, it is plain and obvious that Mr. Zanin’s claim under section 52 of the *Competition Act* does not satisfy the main constituent element of the provision — i.e., the requirement that the impugned representations are actually false or misleading. This claim is consequently doomed to fail, and cannot be certified.

(b) *Ooma’s representations are not false or misleading*

[477] Looking at the general impression and literal meaning of Ooma’s representations, I conclude that, on their face, they do not amount to false or misleading representations. As discussed in Section III.A of these reasons, and at the risk of repeating myself, a review of the pleading materials reveals that, in the Statement of Claim and in their written and oral submissions, Mr. Zanin and his counsel presented an inaccurate and truncated description of Ooma’s promotional, advertising, and billing materials.

[478] Contrary to what Mr. Zanin alleges in the Statement of Claim, when the pleadings are read in conjunction with Ooma’s documents that are incorporated by reference (as they should),

there is no stand-alone representation of a “FREE or \$0” phone service being offered by Ooma, without a specific mention of or reference to “applicable taxes and fees.”

[479] On a plain reading of Ooma’s materials, its representations are not that the Service is “FREE” or “\$0,” without more. More specifically, this is true for all the Descriptions listed at paragraph 25 of the Statement of Claim, and to which Mr. Zanin refers in support of his cause of action under section 52 of the *Competition Act*. This is also the case for the Costco advertising which prompted Mr. Zanin to purchase Ooma’s Service: this advertisement expressly contains the two following lines, in the same font and displayed right in the middle of the page: “[b]asic service including nationwide calling, voicemail and 911 is free. You pay only monthly applicable taxes and fees” (Joint Motion Record at pp 1098, 1124).

[480] Turning to Ooma’s monthly invoices, they list all components of the total price billed for the Service, referring to the “Base Phone Service” at a “subtotal” of “\$0.00,” to which are added various taxes and fees such as the “911 Service Fee” and the “Regulatory Compliance Fee,” for a “total” amount including everything (Joint Motion Record at pp 599, 920). For their part, the billing sheets mention, on the same page, the “Basic Service” as being “Free” immediately followed, on the very next line, by “Applicable Taxes and Fees” as “Varies by locale,” with the actual rates being immediately accessible by a simple click (Joint Motion Record at p 602).

[481] Throughout Ooma’s representations, all of the pricing information is detailed and in plain sight, staring in the face of the customers.

[482] In short, Mr. Zanin's allegations emanating from Ooma's advertisements and materials misrepresent what the documents effectively say and twist the facts to fit an appearance of false or misleading advertising. The documents referred to or paraphrased in the pleadings do not say what Mr. Zanin claims they say in the Statement of Claim, and the allegations of false or misleading representations flowing from them cannot therefore be accepted as true.

[483] For the purposes of the general impression of the "ordinary" consumer, or the "credulous and inexperienced" consumer, the information provided by Ooma falls within the "four corners" of the advertisement, and the customer can see it without having to change the page or scrolling down (*Cineplex* at para 299; *Bell Mobility Inc v Telus Communications Company*, 2006 BCCA 578 at para 20).

[484] What is visible and what the customers can actually read is crystal clear on the Ooma's materials, and it is written in a similar or slightly smaller font size. Nothing is hidden, concealed, or shielded from view. All of the price components are disclosed to the customers, who are always made aware and informed of the existence of the applicable fees and associated taxes.

[485] It is plain and obvious that the general impression conveyed to the credulous and inexperienced (or ordinary) consumers of Ooma's Service is consistent with the literal meaning of the displayed prices. On a brief and single reading of the entirety of Ooma's materials, no consumer could objectively miss the express references to the applicable fees and taxes to be paid. The raw information provided by Ooma, when read in its entirety, is anything but false or misleading.

[486] A plain reading of Ooma's representations does not allow any credulous and inexperienced consumer, or any ordinary consumer, to conclude that the Service is "Free or \$0," unless the consumers would willfully blind themselves and choose to ignore the specific mention of "you only pay applicable taxes and fees." A credulous and inexperienced consumer (or an ordinary one) is not one who ignores half of a short advertising message not exceeding 20 words, or only partially reads what is expressly written. Unless a person decides to act with utmost bad faith, no one could seriously read Ooma's representations, as a whole and in their entirety, as suggesting or implying that the Service is, in reality, "FREE or \$0."

[487] Breaking down the total price of a product by itemizing its components in the buying process is not prohibited by section 52 or any other provision of the *Competition Act*. Even aggressive advertising is not circumscribed by the *Competition Act* unless it is an "untruthful and clearly unfair disparagement" of the goods and services (*Go Travel Direct* at para 5). On its face, this is not a situation where consumers need to be protected from purchasing goods or services based on inaccurate and untruthful information. On any reasonable interpretation of the material facts before the Court, it cannot be said that representing prices in the ways Ooma does it for its Service is either false or misleading to Mr. Zanin or to the Class members.

[488] Were I to accept Mr. Zanin's claim, the express words used by Ooma in its promotional, advertising, and billing materials would need to be emptied of their clear and ordinary meaning, thus lowering the objective standard for consumers to an unacceptable level. Even if the average consumer is qualified as "credulous and inexperienced," he or she is not blind.

[489] I underline that, in the present case, it is not even a situation where the information on the applicable fees takes the form of an asterisk referring to a footnote at the bottom of the page, which was found not to constitute false or misleading advertising in *Riendeau*, as it was not hidden from the consumers (*Riendeau* at paras 33, 37). Here, Mr. Zanin and Ooma's customers obtain all the information in one single posting, and can click to have the details on applicable fees and associated taxes through a hyperlink.

[490] I further point out that the applicable fees mentioned by Ooma cannot be mistaken for taxes or other government-levied fees (*Ileman v Rogers Communications Inc*, 2015 BCCA 260 at para 42; *Coca-Cola* at para 57, aff'd 2007 BCCA 356; *Prince c Avis Budget Group Inc*, 2016 QCCS 3770 at paras 86–87, 98). In fact, there is no pleading to support that, viewed objectively, the consumer could reasonably draw the inference that Ooma's fees are or could be government levies or taxes, or otherwise deceptive.

[491] Finally, I add that, as far as monthly invoices are concerned, they fail to meet another constituent element of section 52 of the *Competition Act*, namely, that the impugned representation be “for the purpose of promoting, directly or indirectly, the supply or use of a product or any business.” Monthly invoices and billing details are not accompanying a product at the time of its promotion or supply but are instead issued after the purchase. They do not fall within the ambit of section 52.

[492] In sum, I conclude that, on the pleadings before me, it is plain and obvious that there is no false or misleading representations made to any Class member that contravenes section 52 of

the *Competition Act*. The test to determine the general impression and literal meaning of an alleged false and misleading representation is an objective one, and there is no need for a thorough review of the evidence to rule on this. This alone suffices to conclude that Mr. Zanin has no reasonable cause of action under section 52 of the *Competition Act*.

(c) *Detrimental reliance*

[493] In light of my conclusions on the absence of any false or misleading representations, I do not need to address the issue of causation and determine whether Mr. Zanin has properly pled that his alleged damages equal to the applicable fees and associated taxes are the result of a violation of section 52, and more specifically, whether he needed to plead “detrimental reliance.”

[494] That said, given the extensive submissions made by both parties in their written materials and at the hearing on this issue, I will make the following remarks.

[495] Mr. Zanin submits that he is not pleading detrimental reliance for both of his claims under the *Competition Act*. He maintains that he does not need to make such pleading, since detrimental reliance is simply not required when making a section 36 claim based on section 52 or 54. He admits that some case law has found that pleading detrimental reliance was necessary but contends that those cases are not binding on this Court and merely serve to invite a legal debate.

[496] Mr. Zanin relies mainly on the superior courts' decisions in *Rebuck* and *Krishnan* to argue that pleading detrimental reliance is not always required when making a section 36 claim based on section 52 of the *Competition Act*.

[497] In *Rebuck*, the ONSC found that reliance was not a necessary component of a civil cause of action under section 36 of the *Competition Act*, though it would be for a claim of negligent misrepresentation at common law (*Rebuck* at paras 33–36). In its view, the plaintiff did not need to plead that the misrepresentations at issue induced him to buy his car, but rather that said misrepresentations caused him to acquire less value than he expected to acquire, i.e., to spend more on gas than he thought he would spend when he purchased the vehicle (*Rebuck* at para 35).

[498] In *Krishnan*, the BCSC, while relying on *Rebuck*, noted that a distinction exists between “reliance” and “causation,” and that the language of causation had been favoured by the BCCA in *Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*, 2014 BCCA 36 [*Wakelam*] in speaking of claims under section 52 of the *Competition Act* (*Krishnan* at paras 181–189). “Causation” would represent a lower bar to reach for plaintiffs in sections 36 and 52 claims, as it would be sufficient to plead that a defendant’s misrepresentation caused plaintiffs to suffer a loss, while “reliance” would also require plaintiffs to plead that they were deceived or misled by relying on the representation. On appeal, the BCCA ruled that the BCSC did not err in rejecting the argument that proof of detrimental reliance was essential (*WN Pharmaceuticals Ltd v Krishnan*, 2023 BCCA 72 at paras 114–116).

[499] Since *Rebuck* and *Krishnan*, other cases have similarly determined that pleading detrimental reliance is not always necessary to have a valid section 36 claim based on section 52 of the *Competition Act*, provided that a plaintiff pleads another way to establish a causal link between the alleged breach and any loss suffered (see for example: *Gomel BCCA* at paras 120–125; *Valeant BCCA* at paras 228–236; *Drynan v Bausch Health Companies Inc*, 2021 ONSC 7423 at paras 180–183, 237–239 [*Drynan*]). For instance, in *Drynan*, the ONSC concluded that the claim under sections 36 and 52 does not require reliance on an unfair practice but rather “a causal connection to damages by acquiring a product which has less value than advertised” (*Drynan* at para 237, citing *Rebuck* at para 35). The court then determined that the loss requirement under section 36 could be satisfied by calculating the difference in price between the products that were being misrepresented with generic versions of the products (*Drynan* at para 394).

[500] For its part, Ooma submits that the jurisprudence of the federal courts and of many other courts across the country has long established that detrimental reliance is in fact required for a claim under sections 36 and 52 of the *Competition Act* to succeed. It relies notably on *Living Sky Water, Airbnb, Amway, Finkel v Coast Capital Savings Credit Union*, 2017 BCCA 361 [*Finkel*], *Wakelam*, and *Singer v Schering-Plough Canada Inc*, 2010 ONSC 42 [*Singer*].

[501] The precedents cited by Ooma stand for the proposition that not only must there be a causal connection between the alleged breach and damages, but that the plaintiffs must further plead that they relied on the alleged misrepresentation to their detriment. Without reliance, a misleading representation made to the public in breach of section 52 of the *Competition Act*



cannot be linked to a loss suffered by a particular individual (*Finkel* at paras 82, 84; *Wakelam* at paras 91–92; *Singer* at para 107–108).

[502] In *Living Sky Water*, *Airbnb*, and *Amway*, this Court agreed that pleading detrimental reliance was necessary in order to have a successful section 36 claim based on section 52 of the *Competition Act*. In *Amway*, Justice René LeBlanc (as he then was) relied on the reasoning in *Singer* to conclude that reliance to the plaintiff's detriment was a necessary component of a claim under section 36 for a breach of section 52 (*Amway* at para 82). *Amway* was then relied upon in *Airbnb*, where I observed that "[t]he courts repeatedly affirmed that, when the impugned criminal conduct takes the form of a misleading representation under section 52, a claimant must demonstrate, in order to sustain a claim under section 36 for a breach of that provision, that he or she relied on the misrepresentation to his or her detriment" (*Airbnb* at para 71). *Amway* was further cited approvingly by Associate Judge Ring in *Living Sky Water* at paragraphs 33–35.

[503] The two jurisprudential trends relied on by Mr. Zanin and Ooma appear difficult to reconcile, and the debate needs not be resolved in the present case.

[504] That said, I accept that reliance on a misrepresentation is not always required to obtain damages under section 36 of the *Competition Act*. Simply put, it depends on the underlying criminal offence. In *Amway*, the Court noted that not all section 36 claims require proof of reliance and misrepresentation (*Amway* at paras 83, 91). Similarly, the ONCA wrote that misrepresentation is irrelevant in price-fixing cases because "where price fixing is alleged to have occurred, all purchasers suffered damages" (*Shah v LG Chem Ltd*, 2018 ONCA 819 at para

77). In the same vein, I observed in *Airbnb* that the double-ticketing conduct could not be simply assimilated to instances of misleading representations and that the issue of causation might differ for such a pricing conduct (*Airbnb* at paras 71, 82–83). Since a supplier is prohibited from clearly expressing two different prices for a product and charging the higher price, it is arguable that, as a result of a double-ticketing conduct, the customer suffers loss or damage equal to the difference between the two prices (*Airbnb* at para 81; see also *Bergen* at para 52).

[505] In light of the new developments in the jurisprudence, a remaining outstanding question is whether a causal connection taking the form of reliance is always needed to establish a claim under sections 36 and 52 of the *Competition Act* that alleges a false or misleading representation.

[506] Arguably, the causation requirement of section 36 could vary depending on the type of alleged misrepresentation, and more specifically on whether it is a “non-price” or a “pure price” misrepresentation. If the alleged misrepresentation is solely related to price and the damages alleged to be suffered are strictly linked to a price differential, an argument could be made that such a representation could be inherently abusive with no need for detrimental reliance to establish causation, as is arguably the case for strict liability pricing provisions like sections 45 and 54 of the *Competition Act*. In such situations, the alleged misrepresentations cause the plaintiffs to spend more money than they would have if the false or misleading representations had not been made.

[507] In my view, it may therefore not be plainly or obviously wrong to plead and argue that, in order to prove loss or damage resulting from an alleged false or misleading representation

relating purely to prices (as opposed to non-price misrepresentations), a plaintiff does not necessarily need to establish causation through detrimental reliance, as long as the alleged damages are solely linked to a price differential. In such a case, unlike an offence of false or misleading non-price representation, the loss suffered by anyone who purchases a product for the higher of two prices would arguably be embedded in the offence. Stated differently, in order to support a claim of loss or damage further to a “pure price” misrepresentation, it could arguably be sufficient for plaintiffs to plead and demonstrate that they were entitled to pay a lower price and that they would not have paid the higher price had they been aware of the lower one.

[508] Given that resolving this question is not necessary to rule on Mr. Zanin’s third cause of action, it is better left for another day.

(d) *Conclusion on section 52 of the Competition Act*

[509] For the above reasons, Mr. Zanin’s allegations with respect to the cause of action based on section 52 of the *Competition Act* are not supported by sufficient material facts and have no legal basis. It is plain and obvious, assuming the facts pleaded to be true, that this claim has no realistic prospect of success and is bound to fail. There are no material facts supporting the existence of any false or misleading representation and, as such, the facts as alleged by Mr. Zanin do not meet the requirements of section 52.

(5) *Conclusion on reasonable cause of action*

[510] In light of the foregoing, I conclude that Mr. Zanin has not demonstrated the existence of a reasonable cause of action under any of his three causes of action, as the pleadings are deficient on the main constituent elements of the alleged wrongful conducts.

[511] I am mindful of the fact that the test for a reasonable cause of action is low. But it cannot be as low as Mr. Zanin would want it to be. It “cannot be so low as to be devoid of any meaning,” and it will not be satisfied when a cause of action’s main constituent elements are absent (*Jensen FCA* at para 69). Being generous in reading the pleadings does not mean that the Court should magically insert the main constituent elements of alleged wrongful acts when they are manifestly not there. The Court cannot connect the dots when there are no dots on the page. Here, it is not an issue of imperfection or lack of clarity in the pleadings. It is rather a situation where material facts supporting Mr. Zanin’s allegations are absent.

[512] When pleadings suffer from drafting deficiencies, do not meet the requirements of a reasonable cause of action, and fail to provide the required particulars to support a cause of action, it is well established that leave to amend will generally be granted unless it is plain and obvious that the defect cannot be cured by an amendment (*Canada v Preston*, 2023 FCA 178 at para 51; *Canada (National Revenue) v Sharp*, 2022 FCA 138 at para 88 [*Sharp*]; *Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215 at para 27 [*Enercorp*]; *Collins v Canada*, 2011 FCA 140 at para 26; *Simon v Canada*, 2011 FCA 6 at para 8). Leave to amend is consequently a “low bar” for the requesting party (*Sharp* at para 88)).

[513] A claim will therefore only be struck without leave to amend when it is considered “beyond redemption” and where “amendments are simply not possible” (*Baird v Canada*, 2007 FCA 48 at para 3; *Allabadi v Lahaie*, 2024 FC 1814 at para 40). For example, if a pleading, once amended, would still result in another successful motion to strike for lack of legal foundation, the amendment should be refused (*Pelletier v Canada*, 2020 FC 1019 at para 62, citing *Carom v Bre-X Minerals Ltd*, 1998 CanLII 14705 (ONSC), [1998] OJ No 4496 (QL)).

[514] In *Jost*, the FCA reminded that, in light of the generous approach to the application of class action certification laws, “leave to amend a pleading in a proposed class proceeding will only be denied in the clearest cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment” (*Jost* at para 49; see also: *McMillan* at para 107; *Brink* at para 133; *Enercorp* at para 27).

[515] Moreover, in *Pass Herald*, Chief Justice Paul Crampton, after citing the above principles as set out in *Jensen FC* at paragraphs 181–182, recently found that “[a]nother important principle is that the fact that a Statement of Claim has previously been amended is a relevant consideration in deciding whether to grant leave to amend” (*Pass Herald* at para 314, citing *Incognito v Skyservice Business Aviation Inc*, 2022 ONSC 1795 at para 14). This also is of particular importance when the amendments were made in the face of a motion to strike (*Pass Herald* at para 314, citing *Horfil Holding Corp v Queens Walk Inc*, 2019 ONSC 1381 at para 34).

[516] In the present case, it is plain and obvious that Mr. Zanin has no tenable causes of action in light of the actual contents and nature of Ooma's representations, and there is no reason to conclude that he could improve his case by an amendment. No purpose would be served by granting him leave to amend his pleadings to reapply for certification.

D. *Other certification requirements*

[517] Given my conclusion that Mr. Zanin's allegations do not disclose any reasonable cause of action, it is unnecessary to address the other issues raised in the Certification Motion, since all of the certification requirements had to be satisfied before the Action could be certified. The absence of a reasonable cause of action suffices to deny certification. Stated differently, the existence of important common questions of law or of a strong litigation plan cannot make up for the lack of a reasonable cause of action in the certification process (*Brink* at para 141, citing *Bou Malhab v Diffusion Métromédia CMR inc*, 2011 SCC 9 at para 52).

VII. Conclusion

[518] For the reasons detailed above, Ooma's Jurisdiction Motion for a stay in favour of arbitration is granted and Mr. Zanin's Certification Motion is dismissed.

[519] Pursuant to Rule 334.39, no costs are typically awarded on a motion for certification. Given that the Jurisdiction Motion and the Certification Motion were intimately linked, there is no basis to depart from the principle established by Rule 334.39 and to award costs in the present matter.

**ORDER in T-214-21**

**THIS COURT'S ORDERS that:**

1. The Defendants' motion for a stay in favour of arbitration is granted.
2. The Plaintiff's motion for certification is dismissed.
3. No costs are awarded.

"Denis Gascon"

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Judge

## **ANNEX A**

Rules 334.16(1) and (2), and 334.18 read as follows:

### **Certification**

#### **Conditions**

**334.16 (1)** Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

- (a)** the pleadings disclose a reasonable cause of action;
- (b)** there is an identifiable class of two or more persons;
- (c)** the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
- (d)** a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
- (e)** there is a representative plaintiff or applicant who
  - (i)** would fairly and adequately represent the interests of the class,
  - (ii)** has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to

### **Autorisation**

#### **Conditions**

**334.16 (1)** Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

- a)** les actes de procédure révèlent une cause d'action valable;
- b)** il existe un groupe identifiable formé d'au moins deux personnes;
- c)** les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
- d)** le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
- e)** il existe un représentant demandeur qui :
  - (i)** représenterait de façon équitable et adéquate les intérêts du groupe,
  - (ii)** a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,



how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

#### **Matters to be considered**

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

#### **Facteurs pris en compte**

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[...]

**Grounds that may not be relied on**

**334.18** A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:

(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;

(b) the relief claimed relates to separate contracts involving different class members;

(c) different remedies are sought for different class members;

(d) the precise number of class members or the identity of each class member is not known; or

(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[...]

**Motifs ne pouvant être invoqués**

**334.18** Le juge ne peut invoquer uniquement un ou plusieurs des motifs ci-après pour refuser d'autoriser une instance comme recours collectif:

a) les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les points de droit ou de fait communs tranchés, une évaluation individuelle;

b) les réparations demandées portent sur des contrats distincts concernant différents membres du groupe;

c) les réparations demandées ne sont pas les mêmes pour tous les membres du groupe;

d) le nombre exact de membres du groupe ou l'identité de chacun est inconnu;

e) il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe.

## **ANNEX B**

The relevant portions of the *Competition Act* and the *Trademarks Act* read as follows:

### *Competition Act*

#### **Recovery of damages**

**36 (1)** Any person who has suffered loss or damage as a result of  
**(a)** conduct that is contrary to any provision of Part VI, or

[...]

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.

[...]

#### **PART VI**

Offences in Relation to Competition

[...]

#### **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,

#### **Recouvrement de dommages-intérêts**

**36 (1)** Toute personne qui a subi une perte ou des dommages par suite :

**a)** soit d'un comportement allant à l'encontre d'une disposition de la partie VI;

[...]

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.

[...]

#### **PARTIE VI**

Infractions relatives à la concurrence

[...]

#### **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,

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.

**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;
- (b) any member of the public to whom the representation was made was within Canada; or
- (c) the representation was made in a place to which the public had access.

**Permitted representations**

(1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.

**Representations accompanying products**

(2) For the purposes of this section, a representation that is

soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important

**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;
- b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;
- c) que les indications ont été données à un endroit auquel le public avait accès.

**Indications**

(1.2) Il est entendu que, pour l'application du présent article et des articles 52.01, 52.1, 74.01, 74.011 et 74.02, le fait de permettre que des indications soient données ou envoyées est assimilé au fait de donner ou d'envoyer des indications.

**Indications accompagnant un produit**

(2) Pour l'application du présent article, sauf le paragraphe (2.1), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public, is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

#### **Representations from outside Canada**

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par communication orale faite par tout moyen de télécommunication, à un usager éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

#### **Indications provenant de l'étranger**

(2.1) Dans le cas où la personne visée au paragraphe (2) est à l'étranger, les indications visées aux alinéas (2)a), b), c) ou e) sont réputées, pour l'application du paragraphe (1), être données au public par la personne qui importe au Canada l'article, la

article, thing or display referred to in that paragraph.

**Deemed representation to public**

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

**General impression to be considered**

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

**Offence and punishment**

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

chose ou l'instrument d'étalage visé à l'alinéa correspondant.

**Idem**

(3) Sous réserve du paragraphe (2), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné au paragraphe (1) est réputé avoir donné ces indications au public.

**Il faut tenir compte de l'impression générale**

(4) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

**Infraction et peine**

(5) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines;

**(b)** on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

#### **Reviewable conduct**

**(6)** Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.

#### **Duplication of proceedings**

**(7)** No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

[...]

#### **Double ticketing**

**54 (1)** No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,

**(a)** on the product, its wrapper or container;

**(b)** on anything attached to, inserted in or accompanying the product, its wrapper or

**b)** par procédure sommaire, une amende maximale de 200 000 \$ et un emprisonnement maximal d'un an, ou l'une de ces peines.

#### **Comportement susceptible d'examen**

**(6)** Le présent article s'applique au fait de donner des indications constituant, au sens de la partie VII.1, un comportement susceptible d'examen.

#### **Une seule poursuite**

**(7)** Il ne peut être intenté de poursuite en vertu du présent article contre une personne contre laquelle une ordonnance est demandée aux termes de la partie VII.1, si les faits qui seraient allégués au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux qui l'ont été au soutien de la demande.

[...]

#### **Double étiquetage**

**54 (1)** Nul ne peut fournir un produit à un prix qui dépasse le plus bas de deux ou plusieurs prix clairement exprimés, par lui ou pour lui, pour ce produit, pour la quantité dans laquelle celui-ci est ainsi fourni et au moment où il l'est :

**a)** soit sur le produit ou sur son emballage;

**b)** soit sur quelque chose qui est fixé au produit, à son emballage ou à quelque chose

container or anything on which the product is mounted for display or sale; or

(c) on an in-store or other point-of-purchase display or advertisement.

### **Offence and punishment**

(2) Any person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding one year or to both.

qui sert de support au produit pour l'étalage ou la vente, ou sur quelque chose qui y est inséré ou joint;

c) soit dans un étalage ou la réclame d'un magasin ou d'un autre point de vente.

### **Infraction et peine**

(2) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de dix mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines.

## *Trademarks Act*

### **Prohibitions**

7 No person shall

(a) make a false or misleading statement tending to discredit the business, goods or services of a competitor;

(b) direct public attention to his goods, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his goods, services or business and the goods, services or business of another;

(c) pass off other goods or services as and for those ordered or requested; or

### **Interdictions**

7 Nul ne peut :

a) faire une déclaration fausse ou trompeuse tendant à discréditer l'entreprise, les produits ou les services d'un concurrent;

b) appeler l'attention du public sur ses produits, ses services ou son entreprise de manière à causer ou à vraisemblablement causer de la confusion au Canada, lorsqu'il a commencé à y appeler ainsi l'attention, entre ses produits, ses services ou son entreprise et ceux d'un autre;

c) faire passer d'autres produits ou services pour ceux qui sont commandés ou demandés;



(d) make use, in association with goods or services, of any description that is false in a material respect and likely to mislead the public as to	d) employer, en liaison avec des produits ou services, une désignation qui est fausse sous un rapport essentiel et de nature à tromper le public en ce qui regarde :
(i) the character, quality, quantity or composition,	(i) soit leurs caractéristiques, leur qualité, quantité ou composition,
(ii) the geographical origin, or	(ii) soit leur origine géographique,
(iii) the mode of the manufacture, production or performance of the goods or services.	(iii) soit leur mode de fabrication, de production ou d'exécution.
(e) [Repealed, 2014, c. 32, s. 10]	e) [Abrogé, 2014, ch. 32, art. 10]
[...]	[...]
<b>53.2 (1)</b> If a court is satisfied, on application of any interested person, that any act has been done contrary to this Act, the court may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits, for punitive damages and for the destruction or other disposition of any offending goods, packaging, labels and advertising material and of any equipment used to produce the goods, packaging, labels or advertising material.	<b>53.2 (1)</b> Lorsqu'il est convaincu, sur demande de toute personne intéressée, qu'un acte a été accompli contrairement à la présente loi, le tribunal peut rendre les ordonnances qu'il juge indiquées, notamment pour réparation par voie d'injonction ou par recouvrement de dommages-intérêts ou de profits, pour l'imposition de dommages punitifs, ou encore pour la disposition par destruction ou autrement des produits, emballages, étiquettes et matériel publicitaire contrevenant à la présente loi et de tout équipement employé pour produire ceux-ci.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-214-21

**STYLE OF CAUSE:** JOHN ZANIN v OOMA, INC. et al.

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** JANUARY 17-20, 2022

**ORDER AND REASONS:** GASCON J.

**DATED:** JANUARY 10, 2025

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