

Court File No.: 179/17CP

AMENDED THIS 5 DAY OF March 2018
PURSUANT TO RULE 26.02(a) NSL ONTARIO
LOCAL REGISTRAR, SUPERIOR COURT OF JUSTICE

LOCAL REGISTRAR,
SUPERIOR COURT OF JUSTICE
BETWEEN

MODIFIÉ DE 200
CONFORMÉMENT À LA REGLE

TINA MAYER

Plaintiff

GREFFIER LOCAL
COUR SUPÉRIEURE DE JUSTICE

and

STARWOOD HOTELS & RESORTS WORLDWIDE, LLC

Defendant

Proceeding under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT

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

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

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

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

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

Date January 26, 2017

Issued by "T. Abdelsamed"
Local registrar

Address of court office London Court House
80 Dundas Street
London ON N6A 6K1

TO: STARWOOD HOTELS & RESORTS WORLDWIDE, LLC

BENNETT JONES LLP
3400 One First Canadian Place, PO BOC 130
Toronto ON M5X 1A4

Ranjan K. Agarwal

Tel: 416-777-6503
Fax: 416-863-1716

Lawyers for the Defendant

CLAIM

1. The Plaintiff, on her own behalf and on behalf of all Plaintiff Class Members, seeks:
 - (a) an order certifying this action as a class proceeding and appointing the Plaintiff as the representative plaintiff of the proposed Plaintiff Class pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
 - (b) a declaration that the Defendant's actions (as hereinafter described) and the Defendant's collection of a Destination Marketing Fee (as hereinafter defined) is contrary to Part III of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A;
 - (c) a declaration that it is in the interests of justice to disregard the requirement to give notice pursuant to section 18(5) and section 101 of the *Consumer Protection Act, 2002*;
 - (d) damages pursuant to section 18(2) of the *Consumer Protection Act, 2002* in an amount to be determined;
 - (e) a declaration that the Defendant's actions (as hereinafter described) were false and misleading contrary to section 52 of the *Competition Act*, R.S.C. 1985, c. C-34;
 - (f) exemplary, punitive, and aggravated damages in the amount of \$20,000,000;
 - (g) in the alternative to the claim for damages, an accounting or other such restitutionary remedy disgorging the revenues realized by the Defendant from their collection of a Destination Marketing Fee (as hereinafter defined);

- (h) a declaration that any funds received by the Defendant through their collection of a Destination Marketing Fee (as hereinafter defined) are held in trust for the benefit of the Plaintiff and Plaintiff Class Members;
- (i) a reference to decide any issues not decided at the trial of the common issues;
- (j) costs of administration and notice, plus applicable taxes, pursuant to section 26(9) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- (k) costs of this action pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;
- (l) prejudgment interest and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
- (m) such further and other relief as to this Honourable Court seems just.

THE PARTIES & THE CLASSES

Plaintiff

2. The Plaintiff, Tina Mayer, is a resident of London, Ontario. On or about February 26, 2016, the Plaintiff stayed at the Four Points Niagara Falls Fallsview in Niagara Falls, Ontario, a hotel owned and/or operated by Starwood Hotels & Resorts Worldwide, LLC. The Plaintiff was charged a “TIF” fee or “tourism improvement fee” which was included as a percentage of the daily room rate and daily parking rate. A “TIF” is an alternative name for a destination marketing fee (“DMF”) which is further defined below. This charge was included on the invoice provided at the time of checking out of the hotel.

3. At the time of checking out of the Four Points Niagara Falls Fallsview, the Plaintiff was not advised that the TIF/DMF was voluntary. However, had the Plaintiff been aware that the TIF/DMF was a voluntary fee, the details of which are described below, the Plaintiff would not have paid the TIF/DMF.

Plaintiff Class

4. The Plaintiff seeks to represent the following class (the “Plaintiff Class”) of which Tina Mayer is a Class member:

All persons, corporations, and other entities resident in Canada who have paid a Destination Marketing Fee to a hotel or other business in Niagara Falls, Ontario branded, owned, operated, or managed by the Defendant.

5. The identities of the Plaintiff Class Members are known to the Defendant.

Defendant

6. The Defendant, Starwood Hotels & Resorts Worldwide, LLC, (“Starwood” or the “Defendant”) is a Maryland limited liability corporation.
7. The Defendant operates hotels under a number of different brands, including Sheraton and Four Points by Sheraton. Specifically, Starwood brands, owns, operates, or manages Four Points by Sheraton Niagara Falls Fallsview and Sheraton on the Falls Hotel, both of which are located in Niagara Falls, Ontario and both of which charge a DMF.

THE NATURE OF THE CLAIM

8. This class action concerns the Defendant’s breach of sections 14, 15, and 17 of the *Consumer Protection Act, 2002* regarding the Defendant’s false, misleading, and

deceptive representations and unfair trade practices regarding the collection of a DMF in Niagara Falls, Ontario.

9. Further, the Defendant has unlawfully interfered with the economic interests of the Plaintiff and the Defendant has been unjustly enriched by way of the unlawful collection of a DMF.

DESTINATION MARKETING FEES IN ONTARIO

10. Beginning in or about 2003 or 2004, tourism organizations in Ontario and elsewhere in Canada implemented industry-led approaches to generate additional revenues for the purposes of marketing or other tourism development initiatives. These programs were initially developed as a response to the decrease in tourism following the SARS outbreak in Ontario and included collecting an additional fee from consumers in addition to nightly rates at hotels.
11. The fees are collected under various names including, but not limited to, the following: “destination marketing fee”, “tourism improvement fee”, “attractions and promotions fee”, “tourism marketing fee”, or “destination marketing & development fee” (collectively herein referred to as a “Destination Marketing Fee” or “DMF”).
12. Any individual business collecting a DMF is required to remit the fee collected to a local accommodation industry association and/or a local or regional non-profit tourism organization.
13. The express purpose of the DMF is to promote tourism in the region through the regional non-profit tourism organizations.

14. In several cities in Ontario, including Toronto and Ottawa, hotels collect a DMF from customers and remit the DMF to a local accommodation industry association (i.e. the Greater Toronto Hotel Association and the Ottawa Gatineau Hotel Association). In turn those accommodation industry associations remit the DMF to the regional non-profit tourism organizations (i.e. Tourism Toronto and Ottawa Tourism).
15. The collection of a DMF is not a tax. Businesses collecting a DMF are permitted to do so only on a voluntary basis on the part of the consumer.

MTCS GUIDELINES

16. In Ontario, the Ministry of Tourism, Culture and Sport (the “MTCS”) provides guidelines for the tourism industry with respect to the collection and use of the DMF (the “MTCS Guidelines”).
17. The MTCS Guidelines are posted on the Ontario government’s website. The MTCS Guidelines instruct participating hotels that collect the fees to remit all fees collected to the regional/local accommodation industry association. The accommodation industry association is then required to transfer the funds to a regional/local non-profit marketing organization for marketing activities promoting the city or region.
18. The MTCS Guidelines include the following directives:
 - (a) guidance on how the funds will be used and how decisions will be made regarding use of funds (e.g., advertising, marketing, product development, research);

- (b) that all participating businesses should be prepared to respond to consumer inquiries about the DMF. Staff should be trained to ensure that they understand and can explain the fee, in particular that the fee is not a government tax or levy;
 - (c) that businesses may include fees in the price or make the amount to be charged known in advance to the prospective consumer and must accurately represent/describe its purpose;
 - (d) that businesses participating in the collection of a DMF must also adhere to any applicable provisions of provincial and federal statutes, for example, the provincial *Consumer Protection Act, 2002* and the federal *Competition Act*.
19. The MTCS Guidelines specifically and unequivocally state that businesses collecting the fees are responsible for ensuring that the fees are not misrepresented as taxes.
20. The MTCS Guidelines specifically and unequivocally state that business collecting the fees must adhere to the provisions of the *Consumer Protection Act, 2002* and the *Competition Act*.
21. The Plaintiff pleads and relies on the MTCS Guidelines.

DESTINATION MARKETING FEES IN NIAGARA FALLS

22. In Niagara Falls, unlike other cities in Ontario and across Canada, the Defendant collects a DMF and does not remit the fee to any local accommodation industry association and/or local or regional non-profit tourism organization.
23. Therefore, any and all DMFs collected by the Defendant remains in the possession of the Defendant.

24. It is unclear how the Defendant spends this revenue, however, it is clear that the DMFs collected are not remitted to any local accommodation industry association and/or not remitted to a regional non-profit tourism organization in accordance with the MTCS Guidelines.
25. Given that the DMFs collected by the Defendant are not properly remitted, the Defendant is in contravention with the MTCS Guidelines. Further, in many cases, the Defendant misrepresents that the DMF collected is a tax.
26. The Defendant fails to advise the Plaintiff that the DMF is a voluntary fee. The DMF is automatically charged by the Defendant on all invoices.
27. The Defendant's staff and/or employees are unable to adequately explain the purpose of the DMF.
28. The Defendant's actions are inconsistent with the MTCS Guidelines. The Defendant's actions are inconsistent with industry standards and/or industry practices.
29. The DMF collected in Niagara Falls ranges from 3% of a nightly room rate or restaurant/attraction invoice to in excess of 10% of a nightly room rate or restaurant/attraction invoice. The quantum of the DMF is completely arbitrary and the DMF collected in Niagara Falls is purposely confusing. Further, in several instances, HST is charged on the DMF.
30. Due to the confusing nature of DMFs in Niagara Falls, the Plaintiff and Plaintiff Class Members could not reasonably have discovered the wrongdoing of the Defendant and all limitation periods are therefore tolled and/or suspended.

CAUSES OF ACTION

(a) Breach of the Consumer Protection Act, 2002

31. The Defendant's actions are false, misleading or deceptive representations under section 14 of the *Consumer Protection Act, 2002* and an unfair practice under section 17 of the *Consumer Protection Act, 2002*. In particular, without limiting the scope of the Defendant's representations contrary to sections 14 and 17 of the *Consumer Protection Act, 2002* and section 52 of the *Competition Act*, the Defendant falsely, misleadingly or deceptively made:
- (a) representations that misrepresent the purpose of a DMF; and
 - (b) representations using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact regarding the collection, purpose, and/or use of a DMF where such use or failure tended to deceive the Plaintiff and Plaintiff Class Members.
32. The Defendant misrepresents the purpose and ultimate use of the DMF to consumers. The Defendant misrepresents the DMF as though it is an obligatory fee and/or a tax.
33. The Plaintiff pleads and relies upon the provisions of the *Consumer Protection Act, 2002*.

(b) Breach of the Competition Act

34. The Defendant's collection of a DMF from the Plaintiff is a false and misleading representation under section 52 of the *Competition Act* as the Defendant misrepresents the purpose and ultimate use of the DMF to consumers.
35. The Plaintiff repeats and relies upon the allegations made in the preceding paragraphs.

36. The Plaintiff pleads and relies upon the provisions of the *Competition Act*.

(c) Negligence

37. The Defendant is negligent as the Defendant knows or ought to have known that the unlawful acts committed by way of collection of a DMF from the Plaintiff would result in harm to the Plaintiff.

38. At all material times, the Defendant owes a duty of care to the Plaintiff to:

- (a) ensure that a DMF is collected only on a voluntary basis;
- (b) ensure that the Plaintiff is made aware that the DMF is a voluntary fee; and
- (c) ensure that the DMF collected is remitted to a local accommodation industry association and/or a regional tourism industry association.

39. The Defendant breached their duty of care. The Plaintiff states that her damages were caused by the negligence of the Defendant. Such negligence includes, but is not limited to, the following:

- (a) by unilaterally charging the Plaintiff a DMF as though it were an obligatory fee and/or a tax;
- (b) by misrepresenting that a DMF is a tax;
- (c) by failing to advise the Plaintiff that the DMF is paid only on a voluntary basis;
- (d) by failing to ensure that employees are aware of the true nature of the DMF pursuant to the MTCS Guidelines; and

(e) by failing to remit the DMF to a local accommodation industry association and/or a regional tourism industry association.

40. As a result of the Defendant breaching its duty of care owed to the Plaintiff, the Plaintiff suffered damages.

41. The Plaintiff pleads and relies on the provisions of the *Negligence Act*, R.S.O. 1990, c. N-1.

(d) Unjust Enrichment

42. Through the Defendant's receipt of a DMF, the Defendant was unjustly enriched and the Plaintiff was correspondingly deprived. There is no established juristic reason for the enrichment. In particular, there was no valid and enforceable contractual clauses between the Defendant and the Plaintiff which permitted the Defendant to lawfully collect the fee. The Plaintiff and the Defendant were not *ad idem* with respect to the collection of the DMF.

43. Revenue generated from the DMF was an additional revenue kept by the Defendant. The DMF was an additional charge by the Defendant and revenue collected by the Defendant without additional consideration. The Defendant has been unjustly enriched at the expense of the Plaintiff and must be required to disgorge all of the revenues received thereby.

DAMAGES

44. Rescission of the agreement between the Plaintiff and the Defendant pursuant to section 18(1) of the *Consumer Protection Act, 2002* is not possible in the circumstances. The Plaintiff is therefore entitled to recover damages pursuant to section 18(2) of the *Consumer Protection Act, 2002*.
45. The Plaintiff claims punitive damages for the unlawful conduct of the Defendant. The Defendant's acts, wrongdoings, and breaches of duties constitute unlawful business practices, the effects of which were and are borne by the Plaintiff.

WAIVER OF TORT

46. In the alternative to damages, in all of the circumstances, the Plaintiff pleads an entitlement to "waive the tort" and claim an accounting or other such restitutionary remedy for disgorgement of the revenues generated by the Defendant as a result of its unlawful collection of a DMF.
47. As a direct, proximate, and foreseeable result of the Defendant's acts and otherwise wrongful conduct, the Plaintiff was economically harmed by paying a DMF that was unlawfully charged. The Defendant profited and benefited economically from the collection of a DMF and the Plaintiff suffered corresponding harm. As a result, the Defendant was unjustly enriched by the monies it received through collection of a DMF.
48. The Defendant voluntarily charged, accepted, and retained these profits and benefits with full knowledge and awareness that, as a result of their wrongdoing, the Plaintiff was wrongfully charged.

49. It would be unreasonable for the Defendant to retain the profits or money received from the collection of a DMF because the Plaintiff was deceived.
50. The Plaintiff pleads waiver of tort and requests that an accounting be made of all DMFs collected by the Defendant and that all revenues thereof be disgorged and distributed to the Plaintiff Class Members on an aggregate basis regardless of reliance or harm suffered.

PLACE OF TRIAL

51. The Plaintiff proposes that this action be tried in the City of London.

January 26, 2017

MCKENZIE LAKE LAWYERS LLP
140 Fullarton Street, Suite 1800
London ON N6A 5P2

Michael J. Peerless (LSUC #34127P)
Matthew D. Baer (LSUC #48227K)
Emily Assini (LSUC #59137J)

Tel: 519.662.5666
Fax: 519.672.2674

Lawyers for the Plaintiff

TINA MAYER
Plaintiff

v.

STARWOOD HOTELS & RESORTS WORLD WIDE, LLC.
Defendant

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ONTARIO
SUPERIOR COURT OF JUSTICE
Proceedings commenced in LONDON

FRESH AS AMENDED STATEMENT OF CLAIM

MCKENZIE LAKE LAWYERS LLP
140 Fullarton Street, Suite 1800
London ON N6A 5P2

Michael J. Peerless (LSUC #34127P)
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Lawyers for the Plaintiff