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Adam Young		É
Montréal, QUE		

PROPOSED CLASS PROCEEDING

Action No: T-_____ -19

FEDERAL COURT

BETWEEN:

Annick Ward

Plaintiff

AND:

Flair Airlines Ltd.

Defendant

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 a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served

within Canada.

If you are served 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 for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

March _____, 2019

Issued by: _____
(Registry Officer)

Address of local office: 30 McGill Street
Montréal, Quebec
H2Y 3Z7

TO: **Flair Airline Ltd.**
5795 Airport Way
Kelowna, BC
Canada
V1V 1S1

CLAIM

1. The Plaintiff claims, on her own behalf and on behalf of other members of the Class (as defined below):
 - a. an Order pursuant to Rules 334.16(1) and 334.17 of the *Federal Courts Rules* (the “**Rules**”) certifying this action as a class proceeding and providing any ancillary directions;
 - b. an Order pursuant to Rules 334.12(3), 334.16(1)(e) and 334.17(b) appointing the Plaintiff as the representative plaintiff for the Class;
 - c. an interim Order that the Defendant shall not directly or indirectly communicate with any member of the Class unless: (1) counsel for the Plaintiff is provided a copy of such correspondence fourteen days prior to such correspondence, and (2) such correspondence must prominently refer to the fact that there is a pending class action seeking various relief including: compensation for inconvenience and punitive damages;
 - d. a declaration that the Defendant:
 - i. breached section 52 of the *Competition Act*, and that each member of the Class has suffered a loss as a result of the Defendant’s breach;
 - ii. fundamentally breached, or simply breached, the terms of their contract of carriage with each of the members of the Class;
 - iii. breached their duty to perform their contracts with each of the Class Members in good faith; and/or
 - iv. in the alternative, is liable to each of the members of the Class pursuant to Article 19 of the *Montreal Convention* (enacted as Schedule VI to the *Carriage by Air Act*, RSC, 1985, c. C-26);
 - e. an Order that the Defendant pay compensation to each member of the Class for the damages suffered by each member of the Class including compensatory damages, damages for inconvenience, loss of enjoyment, wasted time for rebooking alternative travel, moral damages, and/or punitive damages;
 - f. an Order that the Defendant pays the full costs of investigation and prosecution of this proceeding pursuant to section 36 of the *Competition Act*;

- g. an Order pursuant to Rule 334.28(1) and (2) for the aggregate assessment of monetary relief of punitive damages, damages for inconvenience, moral damages, wasted time for rebooking alternative travel, loss of enjoyment, and such distribution to the Plaintiff and members of the Class;
- h. an Order pursuant to Rule 334.26-334.27 and 334.28(3) for individual assessment of compensatory damages to members of the Class and the appointment of a special referee for assessing each individual case using special modes of proof as directed by the Court;
- i. pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the *Federal Courts Act*, RSC 1985, c. F-7; and
- j. such further and other relief as this Honourable Court deems just.

THE PARTIES

- 2. The Plaintiff, Annick Ward, is an individual residing in the province of Alberta.
- 3. The Defendant, Flair Airline Ltd., is a company incorporated pursuant to the laws of British Columbia, with a registered and records office at 3200 – 650 West Georgia Street, Vancouver, BC V6B 4P7 (hereinafter “**Flair Air**”).
- 4. Flair Air is a commercial airline headquartered in Edmonton, Alberta that operates scheduled domestic passenger flights connecting various cities in Canada including Vancouver, Edmonton, Winnipeg and Toronto and also transborder flights to certain cities in United States such as Tampa Bay, Miami et Palm Springs.

THE CLASS

- 5. On or about February 20, 2019, Flair Air announced suspension/cancellation or limiting of various routes between Edmonton, Winnipeg and Toronto to destinations including Miami, Tampa Bay and Palm Springs, California, commencing February 28, 2019, including, but not limited to, the following routes:
 - a. Kelowna, British Columbia and Las Vegas, Nevada
 - b. Edmonton, Alberta and Las Vegas, Nevada
 - c. Edmonton, Alberta and Phoenix, Arizona
 - d. Edmonton, Alberta and Miami, Florida
 - e. Winnipeg, Manitoba and Las Vegas, Nevada

- f. Winnipeg, Manitoba and Phoenix, Arizona
- g. Winnipeg, Manitoba and Orlando, Florida
- h. Toronto, Ontario and Las Vegas, Nevada
- i. Toronto, Ontario and Phoenix, Arizona

(hereinafter the “**Cancelled Routes**”)

- 6. This Action is brought on behalf of members of a class consisting of the Plaintiff and all individuals anywhere in the world who held a booking for travel on the Cancelled Routes on or after February 28, 2019, and had their booking unilaterally cancelled by the Defendant (the “**Class**” or “**Class Member(s)**”).
- 7. It is estimated that the Class includes thousands (if not tens of thousands) of affected passengers, considering each scheduled flight on the Cancelled Routes would have at least hundreds of passengers and the scheduled flights over an extended timeframe.

THE PLAINTIFF AND CLASS MEMBERS’ CIRCUMSTANCES

- 8. On or about August 2018, the Plaintiff planned to visit Miami, Florida with her family (consisting of four members) and also her friends (consisting of two other families) for the March 2019 spring break.
- 9. On or about August 22, 2018, the Plaintiff made a fully-paid confirmed booking with Flair Air for the members of her own family for roundtrip travel on Flair Air departing on March 23, 2019 and returning on March 30, 2019 (the “**Booking**”).
- 10. At or around the time of making the Booking, the Plaintiff also made other reservations including hotel and car rentals in Miami, and also began planning activities for the trip.
- 11. On or about February 19, 2019, more than six months after the Booking was confirmed and just thirty days prior to commencement of the trip, the Plaintiff receives an unexpected e-mail from Flair Air notifying her that her booking for March 23, 2019 and March 30, 2019 will be cancelled and that the Plaintiff will receive a refund in short order (the “**Unilateral Cancellation**”).
- 12. Flair Air did not offer to arrange alternative transportation for the Plaintiff or her family members and Flair Air further refused to make any such arrangements despite immediate demand from the Plaintiff.

13. Within about two days after the Unilateral Cancellation, the Plaintiff (and her family) arranged for alternative transportation with Westjet and suffered damages and/or loss of \$4,628.59, consisting of:
 - a. the additional fare difference between the Booking and the new reservation with Westjet;
 - b. the lost value of a companion voucher that the Plaintiff had to apply to the new reservation with Westjet; and
 - c. costs for one-night of hotel in Toronto due to an overnight layover.
14. On or about February 24, 2019, the Plaintiff demanded that within fourteen days Flair Air compensate the Plaintiff for damages suffered as a result of the Unilateral Cancellation.
15. Flair Air refused or neglected to compensate the Plaintiff for her damages or loss.
16. On or about March 15, 2019, Flair Air sent a standardized e-mail to the Plaintiff offering a \$50 coupon (applicable only for the base fare, but not applicable to taxes, fuel surcharge or additional fees) for travel on or before June 30, 2019.

THE CLASS MEMBERS' CIRCUMSTANCES

17. The Class Members are in the same or similar situation as the Plaintiff in that all of the Class Members:
 - a. held confirmed bookings/reservations for travel on Flair Air on the cancelled routes after February 28, 2019;
 - b. have already paid for their bookings/reservations and air tickets have been issued, and for some Class Members many months in advance;
 - c. each had their confirmed, and paid for, bookings unilaterally cancelled by Flair Air;
 - d. experienced the same Unilateral Cancellations with as little as eight days advance notice for bookings/reservations that have been made many months in advance;
 - e. received the same \$50 coupon (for base fare only) usable for travel within

approximately three months only; and

- f. was not offered alternative mode of transportation on Flair Air, or any other airlines.

18. Class Members also suffered some or all of the following damages and/or losses:

- a. additional costs for rebooking imminent travel, including any additional hotel or similar expenses;
- b. wasted time and additional stress for rebooking alternative travel on short notice;
- c. loss of vacation times, for alternative travels that involved longer travel times or unexpected layovers;
- d. inconvenience;
- e. loss of other prepaid or confirmed travel arrangements (such as hotel bookings, etc.) when reasonable alternative travel could not be arranged; and
- f. loss of enjoyment, when reasonable alternative travel could not be arranged.

19. At the material times, including at the time of each Class Member making their respective booking/reservation, Flair Air, whether through its own booking website (www.flairair.ca) or portals or third-party websites, made the following representations to the Class Members:

- a. the Cancelled Routes were available for travel beyond February 28, 2019 and will (or is being) serviced by Flair Air;
- b. Flair Air had sufficient aircrafts to service the Cancelled Routes beyond February 28, 2019;
- c. the Cancelled Routes will be/are being regularly serviced by Flair Air.

(the “**Representation(s)**”)

THE CLASS MEMBERS' BASIS FOR CLAIM

20. The *Montreal Convention* (enacted as Schedule VI to the *Carriage by Air Act*, RSC, 1985, c. C-26) limits the liability of an air carrier in the course of providing the air carriage services.
21. The *Montreal Convention* has no application in this instance as no "carriage" occurred at all, nor was any "carriage" commenced.

Fundamental Breach of Contract

22. The relationship between each of the Class Members and Flair Air is governed by a "contract of carriage" (also known as a tariff), which is a contract of adhesion drafted by Flair Air (or its agents) that is governed by s. 110(4) of the *Air Transportation Regulations*, SOR/88-58.
23. Flair Air's unilateral cancellation of the Cancelled Routes from February 28, 2019 onwards and failure to render the services contracted for by the Class Members was a fundamental breach of the contract of carriage, a breach so fundamental that the "Schedule Irregularities" and/or "Involuntary Refunds" provisions cannot exempt Flair Air from liability.
24. Flair Air's contract of carriage only deals with Flair Air being *unable* to transport the Class Members, but does not govern in the situation where Flair Air is *unwilling* to transport the Class Members.
25. Flair Air's conduct of failure to honour its own contractual obligations and misinterpreting its contract of carriage demonstrates a marked departure from the ordinary standard of decent behavior. It further demonstrates that Flair Air is lax, passive or ignorant with respect to the Class Members' rights.
26. The Class Members are, therefore, entitled to damages including punitive damages.

Simple Breach of Contract

27. Flair Air's unilateral cancellations of the Cancelled Routes from February 28, 2019 onwards are not "schedule irregularities" as defined in the contract of carriage.

28. Even if the unilateral cancellations are to be considered “schedule irregularities”, Flair Air breached the terms of their own contract of carriage in that they failed to offer alternative transportation to the Class Members but, rather, simply cancelled the air tickets and refunded.

29. Under Rule 20(C)(2)(c) of the contract of carriage, it clearly provides that even if alternative transportation was offered, the Class Members’ right to claim damages is preserved:

Nothing in the above shall limit the passenger's right, if any, to claim damages, if any, under the applicable convention, provided that any expenditures may be offset against any additional liability which such convention may impose upon the carrier to the passenger.

30. Flair Air has breached their contracts with the Class Members and the Class Members are, therefore, entitled to damages including punitive damages.

Breach of the Duty of Good Faith

31. Flair Air’s unilateral cancellations of the Cancelled Routes from February 28, 2019 onwards on short notice is a breach of the duty to perform contractual obligations in good faith including, but not limited to:

- a. their duty to properly inform the co-contracting party that no airplanes were available to service some the Cancelled Routes;
- b. their duty to properly inform the co-contracting party that service for some of the Cancelled Routes were contingent on Flair Air’s own determination of profitability, despite the Class Members having already paid for the bookings;
- c. the reasonable expectation of the Class Members that a fully paid reservation made months ago would be performed regardless of profitability or otherwise; and/or
- d. being contrary to the community standards of honesty, reasonableness, or fairness.

Breach of the Competition Act

32. Flair Air’s Representations were made knowingly or recklessly to the Class Members to advance Flair Air’s own business interest in selling air tickets.

33. The Representations were false or misleading in a material respect, in that:

- a. Flair Air has **not** yet secured suitable third-party “wet-leased” aircrafts to service the Cancelled Routes for the required times; and
- b. the operation (or continued operation) of the Cancelled Routes were, in fact, subject to Flair Air’s determination of profitability.

34. Flair Air’s Representations caused the Class Members not to receive the services as agreed and, therefore, suffered a damage or a loss.

Damages Owed Under the Montreal Convention

35. In the alternative, should the *Montreal Convention* apply, Flair Air is liable to pay damages for any and all delays caused to the Class Members’ travel.

JURISDICTION

36. Subsection 36(3) of the *Competition Act* provides that the Federal Court is a court of competent jurisdiction.

37. This Action also concerns works and undertakings extending beyond the limits of a province and aeronautics, with a subsisting body of federal laws including:

- a. *Carriage by Air Act*, R.S.C., 1985, c. C-26
- b. *Canada Transportation Act*, S.C. 1996, c. 10
- c. *Air Transportation Regulations*, SOR/88-58
- d. Federal common law, including the law relating to breach of contracts, restitution, tort, unjust enrichment, and waiver of tort

38. Subsections 23(b) and 23(c) of the *Federal Courts Act* provides that the Federal Court has jurisdiction.

39. The members of the Class are within the territorial jurisdiction of this Court as the respective flights originate from Canada or have Canada as its destination and there is a “real and substantial connection” with Canada.

Location of Trial

The Plaintiff proposes that this action be tried at Montreal, QC.

Dated: March 28, 2019

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