STATEMENT OF DEFENCE

IN THE ARNHEM DISTRICT COURT

SUIT NO. _____ OF 2021

(UNDER THE CODE OF CIVIL PROCEDURE)

BETWEEN

The Star Maker Insurance

Grotestraat 1

Amsterdam

The Netherlands **RESPONDENT**

and

Horatio Munk

Kleinestraat 1

Nijmegen

The Netherlands **CLAIMANT**

The RESPONDENT denies each and every allegation contained in the Writ of Summons filed by the CLAIMANT except those specifically admitted herein. The RESPONDENT requests that the action be dismissed against it, with costs, for the reasons set forth below

1. The chatbot can intuitively and contextually be identified as a chatbot

1.1. The RESPONDENT states that the CLAIMANT was clearly and repeatedly informed of the fact that he was conversing with a chatbot, named "Paulo", and not with a natural person on the RESPONDENT's application.

1.2. The CLAIMANT was provided multiple contextual conversational markers sufficient to enable an adult natural person to identify the non-human nature of their correspondent. The chatbot's introductory line to the CLAIMANT, "I am available 24/7 to answer all of your questions!", attests to the immediate disclosure of the chatbot's nature as a non-human intelligence following from the fact that no human being can rationally be expected to address queries on a mobile application twenty-four hours a day, every day of the week.

1.3. The RESPONDENT states that upon the CLAIMANT's resumption of the chat function after a closure of the app, another introductory prompt reiterating the chatbot's identity was provided to the CLAIMANT. The phrase used, "Paulo never leaves this app!" reaffirmed the chatbot's identity, since human beings cannot be reasonably expected to be ever-present on an application.

2. The chatbot can be characterized as an Artificial Intelligence system solely because of the use of GPT-3 in its development

2.1. The RESPONDENT states that the chatbot itself is a simple software application and the output generated by it can be produced through a design that uses a non-complex coding framework. Therefore, the functions performed by 'Paulo' and the conversations entered into by it, do not in themselves meet the criteria for Artificial Intelligence set out in Annex I of the AI Act.

2.2. The categorization of 'Paulo' as an Artificial Intelligence system under the AI Act is solely effected by the use of an AI text-generation system, GPT-3, in its development. The RESPONDENT states that it has merely configured the GPT-3 system for use in its application and that OpenAI LP is the owner and developer of the GPT-3 Artificial Intelligence system.

2.3. The RESPONDENT states that while its purchase and use of the GPT-3 system makes 'Paulo' the chatbot an Artificial Intelligence system, the chatbot remains falls under the category of a Minimal Risk AI System under the provisions of Title II of the AI Act.

3. The transparency obligation for the chatbot under the AI Act is not applicable to the RESPONDENT

3.1. The RESPONDENT states that it has merely configured the GPT-3 system within the application and that the system was purchased by it from a different Provider. Since it is merely the use of the GPT-3 system that leads to the classification of the chatbot as an AI system, the RESPONDENT is a "User" as given under Article 3(4) of the AI Act.

3.2. The specific transparency obligations under the AI Act fall on Providers and not Users of the Artificial Intelligence system. Since the RESPONDENT is a 'User' of the GPT-3 AI system, the chatbot disclosure requirements that flow from the transparency obligations do not apply to it.

3.3. Furthermore, since the chatbot is a Minimal-Risk AI system, there are no specific transparency obligations for the chat function as given under Article 13 and Article 52 of the AI Act. Therefore, the RESPONDENT states that while, as a "User" and not a "Provider" of the key AI system of the chatbot it is not liable for disclosure requirements, the fact that the chatbot is a Minimal-Risk AI system also exempts the 'Provider' from any specific transparency obligations.

4. The chatbot complies with the transparency requirements under the AI Act regardless of its inapplicability on the RESPONDENT

4.1. The transparency obligations for certain AI systems under Article 52(1) obligate the Providers, and not the Users, to ensure that AI systems intended to interact with natural persons inform such a person that

they are interacting with an AI system. However, the Article exempts such a declaration when it is obvious from the circumstances and the context of use that the interaction is with an AI system. Such contextual clarity has clearly been provided to the CLAIMANT during his conversation with the chatbot.

4.2. Furthermore, since 'Paulo' falls under a minimal-risk AI system under Title II of the AI Act, the strict disclosure requirements on Providers given under Article 52(1) and Article 13 of the AI Act and as applicable on Providers of High-Risk AI systems, shall not be applicable on it.

4.3. The RESPONDENT, therefore, states that it has not violated any legal disclosure obligations to inform the CLAIMANT of the use of an AI system within the chat function of its application. On the contrary, despite the inapplicability of disclosure requirements on itself or the Provider of GPT-3 due to the Minimal-Risk nature of the chatbot, the RESPONDENT has ensured enough contextual clarity in the chat function so as to disclose the chatbot's identity to the CLAIMANT.

5. Claimant was aware of the fact that he was conversing with a Chatbot and concluded a contract while conversing with it

5.1. Claimant was immediately informed that "Paulo" was available twenty-four seven hours a day, every day of the week, something which indicates it's chatbot's nature. Furthermore, each consumer's personal characteristics are of major importance, in order to conclude that the they are aware of the fact that they are conversing with an Artificial Intelligence system. More specifically, the Claimant was a 2nd year economics student, which means that his age and his educational status enabled him to have a proper understanding of new technologies, as during the last years Chatbot software technologies have permeated customer service sector, as well as a great number of popular applications, such as Skype and Messenger.

5.2. As it results from the case facts, Respondent offered the insurance to the Claimant, while setting a time limit of fifteen minutes for him to accept the insurance package. However, this cannot be considered a means of manipulation, since setting a time limit with regards to the acceptance of an offer by the consumer is an acceptable and popular marketing and advertisement strategy, deriving from the fundamental principle of Freedom to Provide Services.

6. RESPONDENT did not engage in unfair commercial practices

6.1. According to 2005/29 Directive regarding Unfair Commercial Practices, consumers are protected against misleading and aggressive practices. One of the most common ones is the False use of limited offers, which is defined as a technique where sellers try to pressure the client, in order to buy, by stating that an offer is available for a very short period of time. It is thus unfair to claim that an offer is limited in time when that is not in fact the case. It is thus unfair to set a time limit, when in reality the consumer could proceed to the purchase of the product or service anytime, with the same conditions (financial and non-financial). Consequently, the prohibition of the use of limited offers is interpreted strictly and

is restricted only to the cases when such time limit does not actually exist, as a general prohibition of limited offers would be extremely strict, since sellers would not be able to take advantage of a successful advertisement competition technique.

6.2. Given the facts of the case, there is no indication that the time limit that was set by the Chatbot was false, so said statement could not be considered an unfair commercial practice.

6.3. Moreover, the subjective element of the provision, and more specifically "pressure" also did not take place. As pressure is defined a the use of persuasion or intimidation to make someone do something. However, there is no indication that the Chatbot tried to pressure the Claimant to accept the offer. On the contrary, it informed him that after the expiration of said time frame, a new chat would open, but it was not guaranteed that the same contractual conditions would be available. As a result, the Claimant was not given the impression that after the time limit expired, the offer would no longer be available to him or it would be more expensive. He was just informed that it was possible that new contractual conditions could be different and he was able to accept or reject the offer without considering that a possible rejection would result in an important financial or non-financial damage. As a result, his decision-making was not an outcome of manipulation, as the Chatbot only assisted him making up his mind by providing all information required concerning the insurance package. In any case, the Claimant constituted the average consumer, and was not especially vulnerable to the abovementioned commercial practice, due to mental infirmity, that would result in him feeling pressured or obliged to accept the offer as his only solution.

7. CLAIMANT suffered no damage and is entitled to no compensation

7.1. CLAIMANT has not suffered any damage, and is therefore not entitled to receive compensation. First, the notion of damage within Dutch law will be examined. Subsequently, we establish that EU law (and in particular the GDPR) has not been breached.

Establishing the type of damage

7.2. First of all, CLAIMANT has not suffered any material damage. The international insurance CLAIMANT bought has been used on his holiday, and there were no flaws or inaccuracies in the insurance policy. Thus, it would not make sense to reimburse CLAIMANT for the insurance that he utilised on his skiing trip.

7.3. CLAIMANT argues that he suffered stress and psychological discomfort, and requests RESPONDENT to compensate this damage in the amount of 5,000 euro. CLAIMANT's alleges that he suffered immaterial damage, as a result of stress and psychological discomfort. This allegation does not hold true, as an analysis of the Dutch legal framework will demonstrate.

Legal basis under Dutch law

7.4. In the Netherlands, in order to award compensation. there must be a wrongful act, as stated in art. 6:162 BW. The duty to pay damages does not arise until five criteria are met.

1. A wrongful act (act or omission) art. 6:162 lid 2 BW.
2. Accountability of the act to the perpetrator art. 6:162 lid 3 BW.
3. Damage art. 6:95 BW.
4. Causal link between the act and the damage art. 6:162 BW.
5. Relativity art. 6:163 BW.

This section will focus on whether there is any (immaterial) damage as stated in art. 6:95 BW.

7.5. The Dutch legislator is reluctant to award immaterial damages. The legislator wants to prevent that everything that effects a person psychologically or emotionally gives a right to compensation. So, the starting point is: there is only an entitlement to immaterial damages if the law gives a right to compensation for this (art. 6:95 BW).

7.6. To illustrate how high the bar for awarding immaterial damage is, it is useful to summarize the facts of the first case where immaterial damage was awarded to a person in the Netherlands. In this case, a little girl was run over by a taxi bus while she was playing. When the mother ran to her daughter and wanted to pick up her head, the mother's hand disappeared in the daughter's skull. That was when she realised it was not vomit lying on the street, but the substance of her daughter's brains. This was the first case where compensation was awarded for immaterial damage, namely shock damage (schokschade). It is hard to argue that CLAIMANT's position falls anywhere near the dramatic situation of this case.

7.7. Art. 6:95 BW ensures that damage will be compensated. It can consist of financial loss or other disadvantage, the latter insofar as the law entitles the holder to compensation. CLAIMANT would fall under the scope of 'other disadvantage' with his 'suffered stress and psychological discomfort.' This is elaborated in art. 6:106 sub b BW. There is a right to immaterial damages if an injured party 'has been affected in his person'. The article specifically mentions cases where the injured party has suffered physical injury or where his honour and reputation have been affected. CLAIMANT did not suffer any physical injury or got affected in his honour and/or reputation by RESPONDENT.

7.8. Pursuant to art. 6:106 sub b BW, it is also possible that an injured party 'has been affected in another way in his person'. Case law specifies this by requiring the injured party to have demonstrable mental injuries. This is not applicable to CLAIMANT, who suffered no such injury.

7.9. Case law also made room for a secondary category of 'impairment of the person in another way', without the requirement of mental injury. This is elaborated in two judgements: EBI and Groningse aardbevingsschade. These judgements clarified that there can be an 'impairment of a person in another way' within the meaning of art. 6:106 sub b BW, if a special, serious violation of the norm leads to relevant disadvantageous consequences.

7.10. The disadvantageous consequences need to be proven by the person who believes he or she is entitled to compensation for immaterial damage. Thus, the burden of proof of the suffered stress and

psychological discomfort lies with CLAIMANT. A personal statement about the experience is in any case insufficient. Objective evidence and concrete data are required to establish if there is a real case of 'impairment of the person' in the wording of art. 6:106 sub b BW, and not only psychological discomfort.

7.11. CLAIMANT argues that an alleged violation of his privacy rights would be an 'impairment of the person'; however, in the above mentioned EBI judgement, the Hoge Raad (Dutch Supreme Court) concluded that the mere violation of a fundamental right does not per se constitute an impairment of the person as referred to in art. 6:106 lid 1 sub b BW.

7.12. As the wording of art. 6:106 sub b shows, there is only room for compensation if the party is genuinely affected in his person. CLAIMANT does not meet any of the above-mentioned requirements. He only 'felt' manipulated and suffered stress because he was (for his own fault) late in checking the requirements of the French law requiring skiers to be insured. Checking requirements for a booked ski trip is up to CLAIMANT's own responsibility.

7.13. CLAIMANT freely clicked on the hyperlink and downloaded RESPONDENT's app. Afterwards, RESPONDENT offered him a suitable insurance package with chatbot Paulo, clearly stating that the chatbot will never leave the app. As a consequence, CLAIMANT cannot possibly have felt coerced, as he could freely leave the chat and the offer. The chatbot only tried to help CLAIMANT to find a suitable insurance package without using threats or other manipulation techniques. After accepting the offer, CLAIMANT enjoyed the insurance package and went skiing in France carefree, because he knew he was covered by RESPONDENT's policy.

7.14. As a consequence, CLAIMANT's 'psychological discomfort' and 'suffered stress' remain without any proof. There is no objective evidence by a therapist to prove the suffered damage, but only CLAIMANT's personal statement. Therefore, RESPONDENT is not entitled to compensation under Dutch law.

Legal basis under European Law

7.15. CLAIMANT argues RESPONDENT acted unlawful by processing CLAIMANT's data which were not relevant and limited to what is necessary for the conclusion of an insurance contract, in violation of the GDPR. RESPONDENT would not have complied with the 'lawfulness, fairness and transparency', 'purpose limitation' and 'data minimisation' principles. The previous sections of this submission have already illustrated that CLAIMANT's arguments do not hold true. However, even in the event of a violation of the GDPR, the question arises whether any damage should be compensated. Art. 82 GDPR entitles the injured party to compensation for material as well as immaterial damage. But what is meant by immaterial damage in this context is far from clear, and GDPR violations can be minor. In the case of CLAIMANT, even assuming that the GDPR has been violated (which RESPONDENT vehemently denies), no material or immaterial damage has ensued.

7.16. As already mentioned, in art. 82 GDPR, the concept of damage is not very clear. The starting point is that CLAIMANT must prove the suffered damage. The question of what is considered damage cannot be viewed separately from the objectives of the GDPR. The objective is stated in art. 1 GDPR, i.e. to safeguard 'the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data', and to promote the 'remedying' of the breach of the right to personal data protection. There have been preliminary questions by Austria referred to the European Court of Justice to ask whether the processing of data entitles to compensation.

7.17. According to art. 5(1)(a) GDPR, personal data must be processed in a way that is lawful, proper, and transparent. Next to that, processing is bound to what is necessary for specified, explicit and legitimate purposes. Typical personal data breaches would be hacking, phishing or other forms of cybercrime. The person concerned can feel 'spied on', or think that their human freedom to possess their own information has been compromised. This is the typical breach of personal data. However, none of the above has happened to CLAIMANT. CLAIMANT freely downloaded RESPONDENT's app and decided to log in with Google. CLAIMANT gave consent after a request of the app to access CLAIMANT's Google Calendar, where the details of his holiday were registered. Furthermore, by installing the app, CLAIMANT gave RESPONDENT access to certain data concerning his smartphone. Even assuming that this processing of personal data was unlawful (which RESPONDENT objects to), this does not easily result in compensable damage. CLAIMANT has suffered no demonstrable impairment of his person (as it would happen, for instance, in case of identity fraud). A breach of the data minimisation principle rarely results in 'mental injury' to the litigant. Typically, such an unlawful processing of personal data (if any) only has a slight immaterial impact. This concerns psychological discomfort, such as feelings of uncertainty, frustration and annoyance, which cannot lead to compensation.

7.18. For a well-functioning GDPR there must be enforcement of the Regulation. However, does this stretch so far as to require that the minor consequences that CLAIMANT alleges will be awarded compensation. CLAIMANT has failed to establish any damage. If only a feeling of psychological discomfort and suffered stress would open the gates to compensation, the practical consequences would be highly undesirable.

7.19. In conclusion, CLAIMANT did not suffered any damage entitling him to compensation under art. 82 GDPR.

For the reasons set forth above, RESPONDENT puts forth the following

PRAYER FOR RELIEF

1. Declare CLAIMANT's claim unfounded and reject it;
2. Order CLAIMANT to pay the costs of the proceedings, plus the subsequent costs in the amount of _____, all to be paid within fourteen days after the date of the judgment, and - in case payment of the (subsequent) costs is not made within the set term - to be increased by the statutory interest on the (subsequent) costs, to be calculated from the said term of payment.

Signatures _____