

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE
JUSTICE D. S. CRANE

MONDAY, THE 22ND
DAY OF DECEMBER, 2003

B E T W E E N

PAUL MCARTHUR

Plaintiff

and

CANADA POST CORPORATION, CYBERSURF CORP.
and 3WEB CORP.

Defendants

JUDGMENT

THIS MOTION, made by the Plaintiff for a Judgment for approval of a settlement and that the within action be certified as a Class Proceeding, as set out in the Notice of Motion filed herein, was heard this day at Hamilton, Ontario.

ON READING THE Motion Record of the Plaintiff including the Affidavit of Jeffrey C. Teal, sworn November 20, 2003 and Exhibits thereto, the Affidavit of Paul McArthur sworn November 20, 2003 and Exhibits thereto, the Affidavit of Lorraine Klemens, sworn November 24, 2003 and Exhibits thereto, the facta and Briefs of Authorities of the parties filed, and on hearing the submissions of counsel for the Plaintiff and counsel for the Defendants, and upon being advised of the situation in the Province of Quebec and the correspondence forwarded to this Court by Quebec counsel, Francois LeBeau;

1. THIS COURT ORDERS AND ADJUDGES that for purposes of the settlement, as set out in the Settlement Agreement attached as Schedule "A" ("the Settlement Agreement"), the within action is certified as a Class Proceeding pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c.6.

2. THIS COURT ORDERS AND ADJUDGES that, unless otherwise specified, all terms in this Order shall have the meanings set forth in the Settlement Agreement.

3. THIS COURT ORDERS AND ADJUDGES that, as set out in the Settlement Agreement, the group of persons who are members of the Ontario Class be:

"Any person in Canada, not a resident of the Province of British Columbia, who purchased a CD-Rom through any Canada Post outlet at a retail price of \$9.95, exclusive of applicable taxes, the packaging of which displayed the words "free internet for life", on or after September 27, 2000."

4. THIS COURT ORDERS AND ADJUDGES that the claims asserted on behalf of the Class are for breach of contract and misrepresentation and the relief sought is damages, including punitive, aggravated and exemplary damages, interest and costs as set out in the Amended Statement of Claim.

5. THIS COURT ORDERS AND ADJUDGES that the within proceeding is certified as a Class Proceeding on the basis of the following common issues:

BREACH OF STATUTE

- i. Whether the Defendants or any one or more of them sold, imported into Canada or advertised pre-packaged CD-Rom products that had applied to them labels containing false or misleading representations that relate to or may reasonably be regarded to relate to those pre-packaged CD-Rom products, contrary to Section 7 of the *Consumer Packaging and Labeling Act*, R.S.C. 1985, c. C-38;
- ii. Whether the Defendants or any one or more of them sold, imported into Canada or advertised pre-packaged CD-Rom products packaged in containers that have been manufactured, constructed or filled or displayed in such a manner that consumers might reasonably be misled with respect to the quality of the products, contrary to Section 7 of the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38;
- iii. Whether the Defendants or any one or more of them have engaged in conduct for the purpose of promoting, directly or indirectly, the supply or use of a product, involving a representation to the public that is false or misleading in a material respect, or other similar such conduct contrary to Section 74.01 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended.

BREACH OF CONTRACT

- i. Whether the Defendants or any one or more of them are in breach of the contract for sale of the CD-Rom in that the installation software does not provide access to the represented Service (as defined in the Statement of Claim herein);
- ii. Whether the Defendants or any one or more of them are in breach of implied warranties of fitness and merchantability of the CD-Rom pursuant to the *Sale of Goods Act*, R.S.O. 1990, c. S-1, in Ontario, and pursuant to equivalent/similar legislation in provinces and territories outside Ontario;
- iii. Whether the Defendants or any one or more of them have fundamentally breached the contract for sale of the CD-Rom to Class Members.

NEGLIGENCE

- i. Whether Canada Post was negligent in failing to investigate the ability of Cybersurf/3Web to actually provide the Service (as defined in the Statement of Claim herein) to Class Members who purchased the CD-Rom and to satisfy itself that Cybersurf/3Web would in fact provide the Service as represented;
- ii. Whether Cybersurf/3Web were negligent in failing to provide the Service (as defined in the Statement of Claim herein) as advertised

and represented and to ensure that Class Members received value for the CD-Rom, i.e., access to the Service, and would not be left with a CD-Rom that has/had no value.

DAMAGES

- i. Whether the Defendants or any one or more of them are liable to Class Members for reimbursement of all amounts paid for the purchase of the CD-Rom, and additional damages.
6. THIS COURT ORDERS AND ADJUDGES that Paul McArthur be appointed as Representative Plaintiff for the Ontario Class in the within Class Proceeding.
7. THIS COURT DECLARES that the Settlement Agreement is reasonable, fair, adequate and in the best interests of the Ontario Class.
8. THIS COURT ORDERS AND ADJUDGES that the Settlement Agreement is approved, and the terms of the Settlement Agreement are incorporated into this Order.
9. THIS COURT ORDERS AND ADJUDGES that the opt-out period run for a period of 30 days from publication of Notice as provided for in the Settlement Agreement.
10. THIS COURT ORDERS AND ADJUDGES that any Class Member who does not opt-out within the time provided and in the manner described in the Settlement Agreement is bound by the Settlement Agreement and this Order and is hereby enjoined from pursuing any claims covered by the Settlement Agreement against the Defendants.

11. THIS COURT ORDERS AND ADJUDGES that, subject to the terms of the Settlement Agreement, this Order constitutes:
- (a) the full and final resolution and release of all claims and causes of action that have or could have been raised by Class Members in this action.
 - (b) a full and final release by Class Members of the Defendants and each of them and their respective employees, directors, officers, agents and independent contractors (the "Releasees") from any and all liability or damages for representations, omissions or other conduct by any of the Releasees that occurred during or in connection with any Acquisition of the CD-Rom or in connection with the Refund Offer or any other benefits or remedies pursuant to the Settlement Agreement; and
 - (c) a covenant by all Class Members not to make any claim or commence or maintain any action or proceeding against any third party including any person or corporation or the Crown arising from or in connection with any representations, omissions or other conduct by any of the Releasees that occurred during or in connection with any Acquisition of any CD-Rom, or in connection with the offering of the Refund Offer, or any other benefits or remedies pursuant to the Settlement Agreement, in which any claim


could arise against the Releasees, or any of them, for contribution, or indemnity, or any other relief over.

12. THIS COURT ORDERS that the issue of Class Counsel's legal fees and disbursements is adjourned, on consent, to a date to be fixed by the Trial Coordinator at Hamilton.

Signed 25 March, 2004 .



(Signature of judge, officer or registrar)

ENTERED AT HAMILTON
in Book No. 153
as Document No. 461
on March 25/04
by 

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT HAMILTON

JUDGMENT

SCARFONE HAWKINS LLP
Barristers & Solicitors
One James Street South
14th Floor
HAMILTON, Ontario
L8N 3P9

DAVID THOMPSON (28271N)
Tel : (905) 523-1333
Fax: (905) 523-5878

Solicitors for the Plaintiff