

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

In the matter of a Claim under the  
*Class Proceedings Act, 1992*, S.O. 1992, c. 6

B E T W E E N:

PAUL MCARTHUR

Plaintiff

and

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

Defendant

**STATEMENT OF CLAIM**

TO THE DEFENDANT(S)

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 plaintiff's 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: March 28, 2002

Issued by \_\_\_\_\_  
Local registrar

Address of court office:  
45 Main Street East  
Hamilton, Ontario  
L8N 2B7

TO: CANADA POST CORPORATION  
2701 Riverside Drive  
Suite N0510  
OTTAWA, Ontario  
K1A 0B1

AND CYBERSURF CORP./3 WEB CORP.  
TO: 1144 29 Avenue NE  
CALGARY, Alberta  
T2E 7P1

## CLAIM

1. The Plaintiff claims on his own behalf and on behalf of all Class Members:
  - a. Damages for breach of contract as set-out below;
  - b. Damages for negligence as set-out below;
  - c. Reimbursement of all amounts paid to the Defendants by the Plaintiff and Class Members for a CD-Rom that contained installation software that was to provide access to an “unlimited free internet service”, particulars of which are as set-out below;
  - d. Punitive, aggravated and exemplary damages;
  - e. Pre and post-judgment interest pursuant to the provisions of the Courts of Justice Act, R.S.O. 1990, c. C43 as amended;
  - f. Costs on a substantial indemnity/solicitor and client basis;
  - g. Such further and other relief as this Honourable Court may deem just and appropriate in the circumstances.

## **THE PARTIES**

2. The Plaintiff is an individual residing in the City of Burlington, in the Regional Municipality of Halton and purchased a CD-Rom which was to provide access to an unlimited free internet service as described below.
  
3. The Defendant, Canada Post Corporation ("Canada Post"), is a Crown Corporation incorporated pursuant to the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10. Canada Post is an agent of Her Majesty in Right of Canada and carries on business with the following objects:
  - a. To establish and operate a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada;
  
  - b. To manufacture and provide such products and to provide such services as are, in the opinion of Canada Post, necessary or incidental to the postal service provided by it; and

- c. To provide to or on behalf of departments and agencies of, and corporations owned, controlled or operated by, the Government of Canada or any provincial, regional or municipal government in Canada or to any person services that, in the opinion of Canada Post, are capable of being conveniently provided in the course of carrying-out other objects of Canada Post.
4. The Defendant, Cybersurf Corp. (“Cybersurf”) is a public company trading on the Canadian Venture Exchange (CDNX) under the symbol “CY”. It carries on business developing software, connectivity and communications solutions for the internet industry and has offices in Calgary, Alberta and Toronto, Ontario.
5. The Defendant, 3Web Corp. (“3Web”) is a wholly-owned subsidiary of Cybersurf and carries on business providing an enhanced internet experience to a subscriber base and has offices in Calgary, Alberta and Toronto, Ontario.

## **THE OFFER**

6. Canada Post partnered with Cybersurf and 3Web to offer for sale a CD-Rom that was to allow Canadians to obtain free e-mail and unlimited free internet access via a network provided by 3Web. The CD-Rom contained installation software that provided access to the free e-mail and unlimited free internet access service.

7. The CD-Rom was sold in approximately 900 Canada Post retail outlets across Canada.
8. The CD-Rom was sold for \$9.95 plus applicable taxes and was custom-tailored for Canada Post customers providing a branded internet home-page that included single click access to Canada Post's available internet-based services including postal code look-up, the "Electronic Post Office", "eParcel" and a shopping directory.
9. The CD-Rom was sold by Canada Post at its retail outlets from approximately October, 2000 to approximately late 2001.
10. The Canada Post retail outlets were an excellent point of distribution for the CD-Rom. The CD-Rom was purchased from Canada Post by more than 140,000 individuals.
11. The Plaintiff purchased a CD-Rom at Canada Post's retail outlet located at the intersection of Appleby Line and New Street in the City of Burlington.
12. The Plaintiff learned about the CD-Rom through a brochure which he earlier obtained from the same retail outlet.
13. The Plaintiff purchased the CD-Rom in or about late 2000/early 2001.

## **REPRESENTATIONS AND MARKETING**

14. The CD-Rom was advertised and represented to provide access to the following ("the Service"):
- a. Free unlimited internet access;
  - b. Free multiple e-mail accounts;
  - c. Free software suite and set-up;
  - d. No connection charges;
  - e. No commitments;
  - f. No requirement to pay for internet access again.
15. The Plaintiff and Class Members purchased the CD-Rom on the basis of the representations above. The Plaintiff and Class Members relied on the said representations.

## **WITHDRAWAL OF FREE INTERNET ACCESS**

16. In or about August, 2001, Cybersurf/3Web withdrew the availability of the Service.
17. Customers who purchased the CD-Rom were no longer able to access the Service.
18. Customers who had purchased the CD-Rom were no longer entitled to free unlimited internet access and free multiple e-mail accounts.
19. Instead, customers who purchased the CD-Rom were offered unlimited internet access at \$9.95 per month along with a "special offer" of one-month of free service.
20. The CD-Rom continued to provide unlimited internet access, however, at a cost of \$9.95 per month instead of at no cost as represented.
21. For those customers who did not and do not want the Cybersurf/3Web replacement offer of \$9.95 per month, the CD-Rom has no value and is useless as its purpose is installation software for accessing the Service.
22. After about August, 2001, the Plaintiff and Class Members were no longer able to access the Service.



## **BREACH OF CONTRACT**

23. The CD-Rom contains installation software for purposes of accessing the Service.
24. Access to the Service was the purpose for which the CD-Rom was purchased from Canada Post by the Plaintiff and Class Members.
25. Once the Service was no longer available, the CD-Rom had and has no value as it now accesses a completely different service, not a free unlimited internet access service, but rather a \$9.95 per month unlimited internet access service.
26. The Cybersurf/3Web replacement offer of \$9.95 per month unlimited access service is fundamentally different from the represented and advertised free unlimited internet access service.
27. The Plaintiff and Class Members state that the Defendants are in breach of the contract for purchase of the CD-Rom in that the said installation software does not provide access to the Service, the CD-Rom was not and is not fit for the purpose intended and is not of merchantable quality.
28. The Representative Plaintiff and Class Members state that there is a fundamental breach of the contract for purchase of the CD-Rom.

## **NEGLIGENCE**

29. The Plaintiff and Class Members state that the Defendants had a duty to them. That duty included:

a. In the case of Canada Post:

- i. To investigate the ability of Cybersurf/3Web to actually provide the Service to customers who purchased the CD-Rom;
- ii. Satisfy itself that Cybersurf/3Web would provide the Service and/or would reimburse customers the cost of the CD-Rom in the event the Service was no longer available;

b. In the case of Cybersurf/3Web:

- i. To provide the Service as advertised and represented;
- ii. To ensure that customers received value for the CD-Rom -- access to the Service and would not be left with a CD-Rom that has/had no value in that it accesses a completely different service as described above.

## **DAMAGES**

30. The Plaintiff and Class Members state that they have suffered damages as a result of the breach of contract and negligence of the Defendants as described above, specifically, at a minimum, the cost of the CD-Rom at \$9.95 plus applicable taxes in each and every case. The Plaintiff and Class Members have also suffered damages in terms of loss of the Service and the expense they will be put to to obtain internet access and e-mail through an alternate provider.
31. The Plaintiff and Class Members state that the Defendants are liable and responsible for that loss and such further and other damages for breach of contract and negligence as the Plaintiff and Class Members will stipulate and provide particulars prior to Trial.
32. The Plaintiff and Class Members state that despite complaints from customers, Canada Post has failed and/or refused to reimburse customers the cost of the CD-Rom.
33. The Plaintiff and Class Members state that this is the case despite the fact that Canada Post withdrew the CD-Rom from its retail postal outlets upon receiving notification from Cybersurf/3Web that it was no longer able to offer the Service.

34. The Plaintiff and Class Members claim entitlement to punitive, aggravated and exemplary damages in the circumstances.

### **THE CLASS**

35. The Plaintiff proposes that the Class herein be defined as follows:

Any person in Canada, outside the Province of Quebec, who purchased from Canada Post, the CD-Rom described above containing installation software for accessing the Service.

### **LEGISLATION**

36. The Plaintiff and Class Members plead and rely upon the provisions of the *Class Proceedings Act 1992*, S.O. 1992, c. C6, the *Business Practices Act*, R.S.O. 1990, c. B18, the *Consumer Protection Act*, R.S.O. 1990, c. C31, the *Unconscionable Transactions Relief Act*, R.S.O. 1990, c. U2, the *Sale of Goods Act*, R.S.O. 1990, c. S1 and equivalent/similar legislation in provinces and territories outside Ontario, and the provisions of the *Competition Act*, R.S.C. 1985, c. C-34 and the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38.

**SERVICE OUTSIDE ONTARIO**

37. The Plaintiff anticipates that it might be necessary to serve this Statement of Claim upon one or more of the Defendants outside the Province of Ontario and in that regard pleads and relies upon the provisions of Rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 as amended, and in particular:

- a. Rule 17.02 (f) - a contract made in Ontario and/or breached in Ontario;
- b. Rule 17.02 (g) - a tort committed in Ontario;
- c. Rule 17.02 (h) - damages sustained in Ontario.

38. The Plaintiff proposes that this action be tried in the City of Toronto, Province of Ontario.

March 28, 2002

**SCARFONE HAWKINS** <sup>LLP</sup>  
Barristers & Solicitors  
120 King Street West  
Suite 1050  
HAMILTON, Ontario  
L8N 3P9

DAVID THOMPSON (28271N)  
MATTHEW G. MOLOCI (40579P)  
Tel : (905) 523-1333  
Fax: (905) 523-5878  
Solicitors for the Plaintiff

PAUL MCARTHUR

and

CANADA POST, CYBERSURF CORP. and 3WEB

Court File No. 02-6522-CP

---

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT HAMILTON

---

**STATEMENT OF CLAIM**

---

**SCARFONE HAWKINS <sup>LLP</sup>**

Barristers & Solicitors

120 King Street West

Suite 1050

HAMILTON, Ontario

L8N 3P9

DAVID THOMPSON (28271N)

MATTHEW G. MOLOCI (40579P)

Tel : (905) 523-1333

Fax: (905) 523-5878

Solicitors for the Plaintiff