

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DANIEL BENNETT

Plaintiff

- and -

LENOVO (CANADA) INC. and SUPERFISH INC.

Defendants

Proceeding under the Class Proceedings Act, 1992

STATEMENT OF DEFENCE AND CROSSCLAIM

1. The defendant Lenovo (Canada) Inc. ("**Lenovo**") admits the allegations contained in paragraphs 49, 50 and 52 to 55 of the Amended Fresh as Amended Statement of Claim (the "**Statement of Claim**").
2. The defendant Lenovo denies the allegations contained in paragraphs 2 to 3, 5 to 11, 19 to 48, 51 and 56 to 68 of the Statement of Claim and disputes that the plaintiff is entitled to any of the relief claimed in paragraph 1 of the Statement of Claim.
3. The defendant Lenovo has no knowledge in respect of the allegations contained in paragraphs 4 and 12 to 18 of the Statement of Claim.

Lenovo (Canada) Inc.

4. The defendant Lenovo is a Canadian corporation with a registered office in Markham, Ontario. Lenovo sells laptop computers which are designed and manufactured by its affiliated entities.

Superfish Inc.

5. Superfish is (or was at one time) a Delaware corporation with a principal place of business in Palo Alto, California. Superfish developed and sold computer programs. Lenovo has no knowledge or information as to the current status of the Superfish corporate entity.

Visual Discovery Software

6. Superfish developed a software program called Visual Discovery (the “**Software**”) based on image-to-image search technology that enables consumers to search for items based on the appearance of the item, rather than a text-based description. For example, when a user’s mouse pointer hovered over an image of a mixer on a shopping website, the Software would produce images of similar mixers on other websites.

7. In or around June 2014, Superfish and a Lenovo affiliate entered into an agreement (the “**Agreement**”) pursuant to which Superfish would offer its Software which could be preloaded or downloaded on certain Lenovo products.

8. Beginning in or around August 2014, Superfish’s Software was preloaded onto certain models of Lenovo’s laptops. The Software was intended to enhance the user experience.

Lenovo Sales Agreement

9. When a customer purchased such a laptop from Lenovo’s website, the customer entered into a Sales Agreement with Lenovo. Among other things, the Sales Agreement provided:

Unless there is an agreement in place between Lenovo and Customer, this agreement, including associated warranty statements, license agreements, and any applicable attachments, is the sole and complete agreement between Customer and Lenovo regarding the Products or Services purchased hereunder. ...

...

5.2 LENOVO MAKES NO WARRANTIES FOR SOFTWARE, SERVICE, SUPPORT OR THIRD PARTY PRODUCTS. SUCH SOFTWARE, SERVICE, SUPPORT AND PRODUCT ARE PROVIDED "AS IS" WITHOUT WARRANTIES OR CONDITIONS OF ANY KIND

...

7.2 LIMITATION OF LIABILITY. IN ANY ACTION UNDER OR RELATED TO THIS AGREEMENT, LENOVO SHALL NOT BE LIABLE TO CUSTOMER FOR ANY OF THE FOLLOWING EVEN IF INFORMED OF THEIR POSSIBILITY OR NOT AND WHETHER ARISING IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE: 1) THIRD-PARTY CLAIMS FOR DAMAGES; 2) LOSS OF, OR DAMAGE TO, DATA; 3) SPECIAL, INCIDENTAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES; OR 4) LOSS OF PROFITS, BUSINESS, REVENUE, GOODWILL OR ANTICIPATED SAVINGS. AS SOME PROVINCES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF SOME DAMAGES, THE ABOVE EXCLUSION OR LIMITATION MAY NOT APPLY TO THIS AGREEMENT. EXCEPT FOR BODILY INJURY (INCLUDING DEATH) AND DAMAGE TO REAL PROPERTY OR TANGIBLE PERSONAL PROPERTY, LENOVO SHALL NOT BE LIABLE FOR MORE THAN THE AMOUNT OF ACTUAL DIRECT DAMAGES SUFFERED BY CUSTOMER, UP TO THE AMOUNT CUSTOMER PAID FOR THE PRODUCT OR SERVICE.

Visual Discovery Software on Lenovo Laptops

10. After purchasing a laptop with the Software installed, and then visiting a shopping website, the user would be presented with an "opt out" opportunity. If the user opted out, the Software would then be inoperable on that computer. Users also had the option to uninstall the Software at any time.

11. The Software did not collect, store or retain any personal information from users' computers. Furthermore, Lenovo did not receive any user personal information or any other information via the Software. All information relating to the Software was sent to or received from Superfish's servers. Such information did not include any personally identifying information – users remained anonymous.

12. In mid-September 2014, about one month after Lenovo began to ship laptops with Software, Superfish disabled at its servers all Software functionality involving HTTPS (secure) websites.

13. After the servers were turned off for HTTPS, Superfish designed a new version of the Software (the “**Updated Version**”). The Updated Version was placed onto some Lenovo computers beginning in November 2014. The Updated Version did not operate on HTTPS websites and did not contain a self-signed root certificate. In other words, computers shipped with the Updated Versions did not contain what was later learned to be a potential vulnerability that the original version contained.

Lenovo Stops Using Visual Discovery

14. By January 2015, Lenovo, directly or through its affiliates, had Superfish disable the Software (original and Updated Versions) at its servers and halted preloads of the Software for reasons unrelated to the potential vulnerability.

15. Thus, since January 2015, the Superfish servers have been completely disabled – and the Software has been inoperable – on all Lenovo computer models on which the Software was ever installed.

16. On or around February 19, 2015, Lenovo learned that Superfish had, without Lenovo's knowledge or consent, included a password in the self-signed root certificate in the original version of the Software that created a potential vulnerability. The Updated Version did not have this potential vulnerability.

17. When Lenovo discovered the potential vulnerability in February 2015, it acted swiftly and decisively to publicize the issue and work with users to eliminate the potential vulnerability. In addition to its prior actions – eliminating HTTPS functionality, switching to the Updated Version, disabling the Superfish servers, and stopping preloads of the Software – Lenovo directly or through its affiliates took the following steps:

- (a) Issued public statements and website notices, gave media interviews, and issued informational links on social media;
- (b) Developed and provided a “removal tool” – a free program to remove the Software;
- (c) Worked with leading anti-virus providers vendors to remove the Software completely; and
- (d) Issued an “Important Security Message” to users whose computers still contained any version of the Software directly via the Lenovo Messenger advisory tool, including instructions and links to manually or automatically remove the Software.

18. Lenovo's actions eliminated the potential vulnerability.

19. No third party exploited the potential vulnerability in respect of the Software during the short time it existed.

No breach of contract

20. On February 17, 2017, the plaintiff's breach of contract claim was struck without leave to amend for failing to disclose a reasonable cause of action.

No breach of the *Consumer Protection Act*

21. Lenovo denies that it breached the *Sale of Goods Act*, R.S.O. 1990. All laptops sold by Lenovo to the plaintiff and the putative class members were of merchantable quality.

22. Lenovo's laptops computers are normally used for several purposes, including word processing, taking notes, storing and reviewing electronic information, viewing media (music, videos, etc.), browsing the internet, banking and sending and receiving electronic communications. The laptops purchased by the plaintiff and the putative class members were reasonably capable of being used for all of these purposes.

23. Lenovo denies that the laptops purchased by the plaintiff and the putative class members suffered any performance issues or decrease in value as a result of the Software.

24. Additionally, users were presented with opportunities to opt out, uninstall, or disable the Software.

25. In the alternative, any negative effect on the performance and/or value of the laptops purchased by the plaintiff and the putative class members was temporary and immaterial. As set out above, the Software was ultimately removed and any diminution in value or decrease in performance was therefore restored after the removal of the Software.

No breach of Provincial Privacy Acts

26. Lenovo denies that it breached the *Privacy Act*, R.S.B.C. 1996, c. 373, *The Privacy Act*, C.C.S.M. c. P125, *The Privacy Act*, R.S.S. 1987, c. P-24, or the *Privacy Act*, R.S.N.L. 1990, c. P-22 (the “**Provincial Privacy Acts**”).

27. Lenovo did not violate the privacy of the plaintiff or any putative class members.

28. Lenovo did not intercept anything. It sold computers and shipped them to customers. As set out above, no information was sent to Lenovo’s servers when Superfish’s Software operated. Lenovo did not receive or collect any information belonging to the plaintiff or putative class members as a result of the Software.

No negligence

29. The plaintiff has withdrawn his negligence claim.

No intrusion upon seclusion

30. Lenovo denies intruding on the seclusion of the plaintiff or any putative class member.

31. Lenovo did not invade or intrude on the private affairs of the plaintiff or any putative class member. Additionally, as set out above, no personal or financial information of the plaintiff or any putative class member was in fact accessed or misused by anyone.

32. Furthermore and in the alternative, the nature of any information captured by the Software did not reasonably cause any distress, humiliation or anguish.

No damages

33. There is no basis in law or fact for claiming any damages or the other relief set out in the statement of claim against Lenovo.

34. Lenovo further denies that the plaintiff or any putative class member has sustained any damages as a result of Lenovo's acts or omissions.

35. To the extent that the plaintiff or any putative class member has suffered any damages, which is not admitted but expressly denied, Lenovo pleads that the damages are excessive, remote and the result of the plaintiff or putative class member's failure to take reasonable steps to avoid a loss and as such are not recoverable.

36. Lenovo asks that this action be dismissed with costs.

CROSSCLAIM

37. The defendant Lenovo claims against the defendant Superfish Inc. ("**Superfish**");

- (a) contribution and indemnity for any amounts which the defendant Lenovo may be found to be responsible to the plaintiff;
- (b) pre-judgment interest in accordance with the *Courts of Justice Act*;
- (c) the costs of the main action, plus all applicable taxes;
- (d) the costs of this Crossclaim, plus all applicable taxes; and,
- (e) such further and other Relief as this Honourable Court may deem just.

38. The defendant, Lenovo (Canada) Inc., repeats and relies upon the allegations contained in the Statement of Defence in support of the Crossclaim.

39. If Lenovo is found liable to the plaintiff, Lenovo seeks contribution and indemnity from Superfish for damages caused by Superfish's fault or neglect.
40. Lenovo pleads and relies on the terms of the Agreement.
41. Lenovo pleads and relies upon the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1, as amended, and comparable legislation in other provinces and territories.
42. Lenovo requests that this crossclaim be heard together with or immediately after the main action.
43. Lenovo is entitled to serve this statement of defence and crossclaim outside Ontario pursuant to Rule 17.02(q) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as the claim is properly the subject matter of a crossclaim under the Rules.

March 9, 2017

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Defendant

DANIEL BENNETT -and- LENOVO (CANADA) INC. et al.
Plaintiff Defendants

Court File No. CV-15-523714-00CP

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Proceeding commenced at Toronto

STATEMENT OF DEFENCE AND CROSSCLAIM

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