

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JAMES WILLIAMS

KATHLEEN SCHATZ and RAFAEL LIPNER

Plaintiffs

-and-

CANON CANADA INC. and CANON INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED AMENDED AMENDED

FRESH AS AMENDED 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:

Issued by:.....

Local Registrar

Address of court office:

393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO:

Canon Canada Inc.
6390 Dixie Road
Mississauga, Ontario
L5T 1P7

Canon Inc.
30-2 Shimoraku 3-chome, Ohta-ku
Tokyo, 146-8501
Japan

CLAIM

I. DEFINITIONS

1. The following definitions apply for the purposes of this statement of claim:
 - a) “**Act**” means the *Class Proceedings Act*, 1991 S.O. 1992, c. 6, as amended;
 - b) “**Authorized Dealer**” means any individual or business that has been licensed or approved by Defendants to promote and sell, to consumers, products manufactured by Canon.
 - c) “**Cameras**” mean any one or all of the following Cameras:
 - i. Canon A60
 - ii. Canon A70
 - iii. Canon A75
 - iv. Canon A80
 - v. Canon A85
 - vi. Canon A95
 - vii. Canon 510
 - viii. Canon S30
 - ix. Canon S40
 - x. Canon S100
 - xi. Canon S110
 - xii. Canon SD200
 - xiii. Canon SD300
 - xiv. Canon S400
 - xv. Canon SD450
 - xvi. Canon S410
 - xvii. Canon SD500
 - xviii. Canon S2 IS
 - xix. Canon S500

xx. Canon SX100 IS

- d) “**Canon**” means the Defendants, Canon Inc. and Canon Canada Inc.;
- e) “**Class**” or “**Class Members**” means: All persons in Canada who, either: (i) purchased one (1) or more of the Cameras, for their own use and/or received the Camera(s) as a gift from someone who purchased the Camera(s), during the Class Period, or, (ii) purchased one (1) or more of the Cameras, for their own use and/or received the Camera(s) as a gift from someone who purchased the Camera(s) and had their Cameras manifest the Error during the Class Period;
- f) “**Class Period**” means the period from July 30, 2005 to the date of certification;
- g) “**Courts of Justice Act**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- h) “**Defect**” means a design deficiency that renders the Cameras prone to the unexpected manifestation of the E18 error message (shown as “Lens Error Restart” in the case of SX 100 IS);
- i) “**Plaintiffs**” mean the named representatives, Kathleen Schatz, James Williams and Rafael Lipner.

II. RELIEF SOUGHT

- 2. The Plaintiffs, on their own behalf, and on behalf of the Class Members, seek:
 - a) an Order certifying this action as a class proceeding and appointing Plaintiffs Kathleen Schatz and Rafael Lipner as representative plaintiffs;
 - b) a declaration that Canon breached the Warranty-Contract with the Class,

- c) a declaration that those exclusions in the Warranty-Contract enumerated below be struck;
- d) a declaration that Canon breached the implied warranties of merchantability and fitness for intended purpose;
- e) a declaration that Canon misrepresented the Cameras both under the *Consumer Protection Act* and under s.52(1) of the *Competition Act*;
- f) general damages in the sum of \$20,000,000.00 or such other amount as may be proved in this Court;
- g) in the alternative, an Order that the Defendants be required to account and disgorge, or make restitution, of all monies received directly or indirectly from the sale of the Cameras;
- h) an Order that Canon reimburse the Plaintiffs and Class Members for their out of pocket expenses incurred as a result of the Camera failures described herein;
- i) punitive damages of \$2,000,000.00;
- j) an Order directing a reference or such other procedure as may be necessary to determine issues not determined at the trial of the common issues;
- k) prejudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- l) in the alternative to sub-paragraphs f and g (above), a full refund of the purchase price paid for the cameras pursuant to the *Consumer Protection Act*, Section 98(3) and 100, as amended.

- m) an interlocutory and final mandatory order that Canon comply with the *Competition Act* and the *Consumer Protection Act*;
- n) the costs of this action on a partial indemnity basis and GST thereon; and,
- o) such further and other relief that this Honourable Court deems just.

III. NATURE OF THIS ACTION

- 3. This action alleges that the Cameras contain a design defect that causes them to be prone to developing a lens error that renders the cameras useless. This is commonly known as the E18 Error.
- 4. The E18 error defect is so common and widespread, there is an entire website dedicated to the issue www.e18error.com.
- 5. The Plaintiffs allege that due to the design Defect, the Cameras are not of merchantable quality and not fit for their intended purpose or use.

IV. THE PARTIES

The Plaintiffs

- 6. The Plaintiff, Kathleen Schatz (“Schatz”), resides in Masset, British Columbia. On or about May 17, 2005, she purchased a Canon S500 Digital Elph camera from McBain Camera LTD. in the West Edmonton Mall via telephone order. Her camera was then shipped to her. The camera included a **one year** warranty and cost approximately \$440. Schatz’s camera manifested the defect on or about November 2006.

7. The Plaintiff, James Williams (“Williams”), resides in Belleville, Ontario. On or about September 30, 2004, he purchased a Canon PowerShot A75 Digital camera from Quinte Photo. The camera similar, to plaintiff above, included a **one year** limited warranty and cost \$451.33. Williams’ camera manifested the defect in the fall of 2005 or 2006.
8. The Plaintiff, Rafael Lipner, resides in Toronto, Ontario. He purchased a Canon SX100 IS on or about June 2008 at a Staples retail store. Mr. Lipner experienced the lens error several times, before and after repair. The first time the error occurred, Mr. Lipner had it repaired by a Canon certified repair centre at his own expense (for \$100). Then when the error occurred after it had been fixed a second time (this time for \$82), Mr. Lipner returned it to the Canon repair centre to be fixed again under the repair warranty. The repair centre informed him that it was a common error.
9. Both Williams and Schatz have been unable to use their respective Canon cameras at all since the manifestation of the defect. The cameras refuse to reboot despite changing the memory card, and simply display a blank screen when turned on. Both Schatz and Williams attempted to have their cameras repaired as both their cameras manifested the defect outside the one-year warranty period, but the cost to do so did not make practical sense given the prices of repair versus new, unused cameras.
10. Lipner’s camera manifested the lens error several times, which he repaired each time. His camera currently does not function properly despite the numerous repairs performed on it at the Plaintiff’s expense.

The Defendants

11. Canon Canada Inc. is a Canadian company, a wholly owned subsidiary of Canon USA Inc., and maintains its head office in Mississauga, Ontario. Canon Canada was founded in 1973 to sell and promote the Canon line of optical and camera products.

The Canon group of companies is an integrated group that designs, manufactures and distributes Canon products worldwide.

12. Canon Inc., headquartered in Tokyo, Japan, manufactures products for several different markets, including the document reproduction market, office equipment and cameras. The company makes printers and other computer peripherals for home and office use. Its other well-known lines include copiers, fax machines, and scanners. Canon's optical segment features products used in such diverse applications as semiconductor manufacturing equipment, TV broadcast lenses, and devices used for eye examinations. Canon still operates its original camera business, which makes digital cameras, camcorders, LCD projectors, lenses, and binoculars. The company, which generates about three-quarters of its revenues outside of Japan, emphasizes its product development and marketing efforts in Europe and North America.

13. The plaintiffs' Cameras were designed, tested and manufactured by Canon.

V. MATERIAL FACTS

Background

14. Canon has been engaged in the business of developing, designing, testing, manufacturing, distributing, marketing and selling of Cameras and related products in Canada since 1973.

15. At all material times, Canon developed, designed, tested, manufactured, distributed, marketed and sold the Cameras in Ontario and elsewhere in Canada and also licensed, authorized retailers and distributors to market and sell the Cameras on their behalf.

16. The Plaintiffs plead that the Cameras contain a latent design Defect, which renders the Cameras prone to unexpectedly develop the E18 Error and that no examination

that the buyer would have made at the time of purchase could have revealed this Defect.

17. The Plaintiffs plead that the Defect is that the optical lens cannot withstand typical use and is prone to malfunction.

18. Specifically, the Plaintiffs plead that the Defendants did not design the Cameras to withstand prototypical consumer use, nor do the Cameras meet the minimum thresholds of quality, durability, and tolerance for normal consumer use.

19. Furthermore, the Plaintiffs plead that the Defendants' testing standards and protocols were not designed to ready the Cameras for common consumer usage and fell below the minimal threshold consistent with the Class Members' intended application of the Cameras' use as a functional consumer product.

20. The Plaintiffs plead that, at all relevant times, the Class Members reasonably expected that the Cameras would be of merchantable quality and that the Cameras would be fit for its intended use: as a functional consumer product.

21. The E18 Error manifests itself as follows:

- a) During use, the lens of the Cameras tends to get stuck in an extended position and not retract;
- b) The Camera then beeps a number of times and displays an "E18" (or "Lens Error Restart" in the case of SX 100 IS) in the lower left corner of the LCD screen;
- c) The lens remains in the extended position and refuses to move either to focus the lens or to retract when powered off.

- d) Alternatively, the Camera lens does not extend when the Camera is powered on.
- e) The Camera, then, becomes inoperable.

22. The Plaintiffs further plead that the Defendants were aware of this at all relevant times.

23. Due to the widespread nature of the E18 Error, as a result of the Defect, it is likely that Canon knew or should have known of the Defect at the time it sold or distributed the Cameras to the unsuspecting public.

24. Notwithstanding the Defect in the Cameras, Canon sold and continues to sell the defective Camera models to Class Members.

25. Furthermore, Canon knew or ought to have known that the Defect could and would manifest itself outside of the “standard” one-year warranty period, and despite knowing of the potential for the Cameras to suffer from the E18 Error outside of the warranty period and selling same, Canon refused to fix the E18 Error for consumers that bought the Cameras and whose warranties expired prior to the Camera suffering from the E18 Error.

The Canon Warranty

26. The Plaintiffs plead that the Defendants provided the same, standard one-year warranty with all Cameras.

The Plaintiffs' Cameras

27. In the fall of 2005 or 2006, Mr. Williams and his wife flew from Toronto to Calgary for vacation, planning to go see the Rocky Mountains and then visit Banff and Lake Louise. The camera displayed the E18 error message when they arrived in Alberta, without having dropped or misused the camera, and could not take pictures of their vacation.
28. Mr. Williams took the camera for repair in Toronto and after leaving it with the repair shop, he was subsequently told that it would cost over \$100.00 to repair it. He elected to not spend that much money to repair his camera and instead chose to purchase a new camera.
29. Ms. Schatz purchased a Canon PowerShot S500 Digital Elph Camera from McBain Camera Ltd. in Edmonton Alberta by telephone May 2005. The camera worked without issue until approximately November 2006, when she tried to turn the camera on to take a picture, the E18 error message was displayed.
30. Ms. Schatz's camera did not work from that point on. Any attempt to use the camera was met with the same message and the camera would not work. Ms. Schatz asserts that she did not do anything and/or does not recall any circumstance that would have caused the camera to stop working. When she had a camera shop inspect the camera, she was advised that it would probably cost more to attempt repairing the camera than to replace the camera at a purchase price of approximately \$450.
31. Mr. Lipner purchased a Canon PowerShot SX 100 IS for approximately \$300 on or about June 2008. Shortly after the one-year warranty expired, Mr. Lipner's camera manifested the defect when he tried to turn the camera on. He had the camera repaired at a Canon certified repair centre for \$100. The camera functioned properly for a period of short time before displaying the error again. Mr. Lipner had it repaired a second time by the Canon certified repair centre at a cost of \$82. It was repaired a

third time on or about April 2010 for no charge as the camera was under the repair centre's warranty. When the camera malfunctioned again, Mr. Lipner opted to purchase a new camera.

32. Furthermore, the Defendants state in its advertisements for PowerShot Cameras that you "always get your shot" when using PowerShot brand Canon Cameras, which suggests to the reasonable consumer a substantially high level of reliability when using the camera to take pictures.

VI. CAUSES OF ACTION

Consumer Protection Act

33. The Plaintiffs incorporate by reference paragraphs 1 - 32 as though completely reproduced herein.

34. Canon provides each of its Camera purchases with a standard warranty (the "Warranty-Contract") which is inserted in the sealed camera box directly by Canon. As a result, the Class Members did not have a chance to see the Warranty or its exclusions until after the purchase of the Cameras.

35. The standard language states: "The limited warranty set forth below is given by Canon U.S.A. Inc. (Canon U.S.A.) in the United States or *Canon Canada Inc. (Canon Canada) in Canada* with respect to the Canon-brand PowerShot Digital Camera...".

36. Section 2(1) of the *Consumer Protection Act* ("C.P.A.") provides that the C.P.A. applies to all "Consumer Transactions" when the consumer or the person engaging in the transaction is situated in Ontario.

37. A consumer transaction is defined in the *Consumer Protection Act*, in Section 1, as any dealings with a consumer, including a consumer agreement.

38. The Plaintiffs plead that the Warranty-Contract constitutes a consumer transaction with Canon, as Canon has dealings with the Consumer through the provision of the Warranty-Contract.
39. Accordingly, the Plaintiffs plead that the Ontario *Consumer Protection Act* applies to Class Members outside the province of Ontario, as Canon Canada Inc., the counterparty to the Warranty-Contract (Canon Canada, Inc.) was always situated in Ontario.
40. The Plaintiffs further plead that Defendants are “suppliers” for purposes of the definition of a “consumer agreement” in s.1 of the *Consumer Protection Act* by virtue of the fact that Defendants engage in the sale of goods, namely Cameras and the provision of services under a warranty.
41. The Plaintiffs further plead that the Warranty-Contract is a “consumer agreement” as defined under the *Consumer Protection Act*. Although a consumer agreement requires a “payment” under Section 1 of the *Consumer Protection Act*, “payment” is defined as “consideration of any kind”.
42. Additionally, the Plaintiffs plead that for purposes of the “payment” required for a consumer agreement, “payment” also includes remuneration paid by the Plaintiffs to Defendants’ authorized retailers or licensed agents, and/or any remuneration paid by said agents or retailers directly to the Defendants.
43. Furthermore, the Plaintiffs plead that consideration received by Canon, for the Warranty-Contract to be binding, is sufficient consideration for purposes for “payment” under the *Consumer Protection Act*.
44. The Plaintiffs also plead that the purchases of the Cameras, by the Class Members, is “consideration” and payment for these purposes.

45. The Plaintiffs further plead that a portion of the purchase price of the camera is allocable to the provision of the Warranty-Contract and its benefits.
46. Section 3 of the *Consumer Protection Act*, provides in relevant part that “[i]n determining whether this Act applies to an entity or transaction, a court or other tribunal shall consider the real substance of the entity or transaction and in so doing may disregard the outward form.” Accordingly, Plaintiffs plead that the substance of the purchase and sale of the Cameras render Defendants as ”suppliers” that supplied the Cameras to Class Members.
47. In the alternative, the Plaintiffs plead that the substance of the purchase and sale relationship between the Class Members and the Defendants is that of supplier, on the part of the Defendants, and that of Consumer, on the part of the Class Members. Therefore, the Defendants are deemed to be supplying the Cameras to the Class Members, through the intervening Authorized Retailers, which are acting as agents for Canon.

The Defendants’ Breaches of the *Consumer Protection Act*

48. Sections 14(1) and 14(2)(14) of the *Consumer Protection Act* provide in relevant part, “[i]t is an unfair practice for a person to make a false, misleading or deceptive representation”, and “[w]ithout limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations: . . . [a] representation using exaggeration, innuendo or ambiguity as to a material fact *or failing to state a material fact if such use or failure deceives or tends to deceive.*” [Emphasis added]
49. S. 14(2)(14) provides that it is an unfair practice not to disclose all material facts if such failure to disclose the material facts deceives or tends to deceive.

50. The Plaintiffs plead that the Cameras' possession of the latent Defect was a material fact, which the Defendants had a duty to disclose to the Plaintiffs, in accordance with the above cited provisions of the *Consumer Protection Act*.

51. Accordingly, the Plaintiffs plead that the Defendants did not disclose said material facts to the Plaintiffs and Class Members, and that such non-disclosure either *deceives or tends to deceive*.

52. The Plaintiffs further plead that such non-disclosure also violates Section 5(1) of the *Consumer Protection Act* which provides in relevant part, "[i]f a supplier is required to disclose information under this Act, the disclosure must be clear, comprehensible and prominent."

53. Accordingly, the Plaintiffs plead that the following Representations or Representations by omissions were false or misleading, and thus, constitute an unfair practice:

- a) Canon's non-disclosure of the Defect to the consumers;
- b) Canon's slogan "you always get your shot" is a misrepresentation in its advertisements as to the quality of the Cameras, warranting a level of reliability which cannot be attained due to the built-in Defect; and
- c) Canon provided a standard one-year limited warranty, which implies that no inherent Defects were presently known by Canon.

54. The Defendants engaged in unfair practices in breach of section 17(1) of the *Consumer Protection Act* in that the representations, listed above, are false, misleading or deceptive as under section 14(1) and (2) of the *Consumer Protection Act* in that they state:

- a) The goods have performance characteristics, uses, benefits and qualities they do not have;
- b) The goods were of a particular standard, quality, grade, style or model, which they were not;
- c) A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

Remedies for breaches of the *Consumer Protection Act*

55. The Plaintiffs bring this action under Section 98(3) of the *Consumer Protection Act* (in accordance with Section 100 of the *Consumer Protection Act*) for a full refund of all payments received by the Defendants in violation of the *Consumer Protection Act*.

56. The Plaintiffs plead that as a result of the breaches of the *Consumer Protection Act*, described above, they are entitled to a refund under Section 98(3) of the *Consumer Protection Act*, which provides:

If a supplier has charged a fee or an amount in contravention of this Act or received a payment in contravention of this Act, the consumer who paid the charge or made the payment may demand a refund by giving notice in accordance with section 92 within one year after paying the charge or making the payment.

57. The Plaintiffs plead that the Defendants received a payment in contravention of the *Consumer Protection Act*, as the retailers were Agents of the Defendants or, the monies paid by the retailers to the Defendants was the payment, for the purposes of this section.

58. The Plaintiffs further plead that they may recover a refund of monies paid by the Consumers to the retailers, under this section, from Canon, because the retailers are the agents of Canon.

59. In the alternative, the Plaintiffs plead that if the retailers are not Agents of the Defendants, then this section contemplates that the Defendants should disgorge their earnings to the Class Members.

60. Plaintiffs plead that they are entitled to damages pursuant to S. 18 of the *C.P.A.*, which provides in relevant part that:

18. (1) Any agreement, whether *written, oral or implied*, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages. [Emphasis Added]

Remedy if rescission not possible

(2) *A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible.* [Emphasis Added]

61. However, should the court determine that the notice by the Plaintiffs was inadequate to satisfy s. 18(3), Plaintiffs request, on behalf of themselves and the Class Members, that in the interests of justice this Court dispense with the requirements of s. 18(3), and related sections of the *Consumer Protection Act* requiring that the Plaintiff notify the Defendants of its intent to seek the remedies requested herein, as provided for in sections 18(15) and 101 of the same *Act*.

The Defendants Also Warranty the Cameras for the Implied Warranties Provided under the *Sale of Goods Act*

62. Section 9(2) of the *Consumer Protection Act* provides that when goods or services are provided under a Consumer Agreement: “[t]he implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with *necessary modifications* to goods that are leased or traded or otherwise supplied under a consumer agreement.” [Emphasis Added]

63. The implied warranties provided by the *Sale of Goods Act* are:

- a) Warranty of Merchantability; and
- b) Warranty of Fitness for Particular Purpose.

64. The Plaintiffs plead that, because the Cameras were delivered in a sealed box, this constitutes a sale by description.

65. Furthermore, the Plaintiffs plead that the expected lifespan of the Cameras is greater than the one-year limited warranty period as stated in the express warranty.

66. In light of the above, the Plaintiffs plead that as a result of the Defect contained in the Cameras, the Defendants have supplied goods to the Class that were not of merchantable quality, nor were fit for their intended purpose, thus, in contravention to section 9(2).

67. The Plaintiffs further plead that the disclaimer in the limited Warranty-Contract, which purports to disclaim the warranties, be void, as section 9(3) of the *Consumer Protection Act*, provides:

Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under

the Sale of Goods Act or any deemed condition or warranty under this Act is void.

68. The Plaintiffs plead that the doctrine of fundamental breach applies to the breach of the express and implied warranties of merchantability and fitness for intended purpose, and appurtenant exculpatory clauses in the Warranty Contract.
69. Accordingly, the Plaintiffs plead that they are entitled to reject the goods supplied by Canon, and return same to Canon for a full refund of the purchase price as a consequence of the breach of the above-stated warranties.
70. In the alternative, the Class Members that have paid to have their Camera repaired are entitled to have such expenses reimbursed.
71. In the further alternative, the Class Members are entitled to damages for breach of the implied warranties, and such amounts will be determined at trial.

Breach of Contract

72. The Plaintiffs incorporate by reference paragraphs 1 - 71 as though completely reproduced herein.
73. The Plaintiffs plead that the standard one-year limited warranty included with the Cameras constitutes a contract between Defendants' and each of the Plaintiffs and Class Members ("Warranty-Contracts"), which contains both standard express and implied terms.
74. The Warranty-Contracts between the Plaintiffs and the Defendants are limited to one year following the purchase of the Cameras. The expressed terms standard in all the Warranty-Contracts attempts to waive the implied warranties of merchantability and fitness for particular purpose on behalf of the purchaser using the following language:

“NO IMPLIED WARRANTY, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, APPLIES TO THE POWERSHOT CAMERA AFTER THE APPLICABLE PERIOD OF THE EXPRESS LIMITED WARRANTY STATED ABOVE, AND NO OTHER EXPRESS WARRANTY OR GUARANTY, EXCEPT AS MENTIONED ABOVE, GIVEN BY ANY PERSON OR ENITITY WITH RESPECT TO THE POWERSHOT DIGITAL CAMERA SHALL BIND CANON U.S.A OR CANON CANADA. ***(SOME STATES AND PROVINCES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO, THE ABOVE LIMITATION MAY NOT APPLY TO YOU).***” [Emphasis Added]

75. Additionally, the standard express terms of the Warranty-Contracts relieve the Defendants from the obligations under the Warranty-Contracts in the event of:

* * * Without limiting the foregoing, water damage, sand/corrosion damage, battery leakage, dropping the PowerShot Digital Camera, scratches, abrasions or damage to the PowerShot Digital Camera body, lenses or LCD display, or damage to accessories mentioned in the first paragraph above, will be presumed to have resulted from misuse, abuse or failure to operate the PowerShot Digital Camera as set forth in the operating instructions.

76. The Plaintiffs plead that the Defendants’ owe the Plaintiffs a duty of good faith in performance of the Warranty-Contracts.

77. The Plaintiffs plead that the Defendants’ breached their duty of good faith to the Plaintiffs and Class Members by failing to act honestly and reasonably in the exercise of their Warranty-Contracts with the Plaintiffs because the Defendants knew or had reason to know of the Defect, that the Cameras were and are susceptible to the Defect, and the Defendants did not disclose same to the Plaintiffs.

78. Additionally, the Plaintiffs plead that because the Class Members did not have a chance to see the Warranty or the exclusions prior to purchase of the Cameras, the Defendants cannot rely on the exclusions in the Warranty.

79. Accordingly, because the Warranty-Contracts between the Defendants and the Plaintiffs are contracts of adhesion which contain terms that are highly unfair to the Plaintiffs and the Defendants have breached their duty of good faith to the Plaintiffs, and the Class Members did not have a chance to view the exclusions prior to purchase of the Cameras, the Plaintiffs plead that the following unfair terms of the Warranty Contract be struck:

- a) Waiver of the implied warranties of merchantability and fitness for particular purpose;
- b) Loss of protection under the warranty in the event of misuse (such as dropping the camera); and
- c) Limiting the Warranty-Contract for the Cameras to one year.

The Competition Act - Breach of Section 52

80. Plaintiffs incorporate by reference paragraphs 1 - 79 as though completely reproduced herein.

81. Section 52 of the Competition Act provides in relevant part that:

False or misleading representations

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of

promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Proof of certain matters not required

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that
any person was deceived or misled;

any member of the public to whom the representation was made was within Canada; or the representation was made in a place to which the public had access.

82. The Plaintiffs plead that the false and/or misleading representations listed in paragraph 53 constituted, each alone and in conjunction with one another, material and misleading representations for the purposes of section 52 of the *Competition Act*, in addition to Sections 5, 9, 14, 15, and 17 of the *Consumer Protection Act*.

83. In addition, the Plaintiffs rely upon Section 52(1.1) of the *Competition Act* and plead that it is unnecessary for any Class Member to show actual reliance on the misleading statements of the Defendants for the purposes of establishing a breach of Section 52 of the *Competition Act*.

Unjust Enrichment

84. Plaintiffs incorporate by reference paragraphs 1 - 83 as though completely reproduced herein.

85. By its wrongful acts and omissions as set forth herein, Canon was unjustly enriched at the expense of the Plaintiffs and Class Members, as follows:

- a) Enrichment: Through its Agents, Canon was enriched in the form of increased revenue, resulting from the sale of the Cameras to the Class Members, in that had the Defendants disclosed the Defect in the Cameras, Defendants would have sold fewer Cameras and/or consumers would have purchased their cameras for less than the asked for market price the Cameras were actually sold for.
- b) Corresponding Deprivation: Class Members purchased Cameras that Canon knew or ought to have known were defective, or were prone to suffer the Defect, and as result such Class Members suffered damages, arising either out of their applicable Cameras suffering the Defect, or as a result of the Cameras purchased by the Class Members being purchased at a price which exceeds their true value as a result of the Cameras being prone to suffer the Defect.
- c) Absence of Juristic Reason for the Enrichment: There can be no juristic reason for Canon's enrichment and the Class Members' corresponding deprivations to be maintained.

86. It would be inequitable for Canon to retain any revenues, or other compensation it obtained from its wrongful conduct related to the Cameras, accordingly, the Plaintiffs request an accounting and disgorgement on behalf of themselves and the Class Members of all revenues derived by Canon as a result of the sale of the Cameras.

Waiver of Tort/Restitution

87. Plaintiffs incorporate by reference paragraphs 1 - 86 as though completely reproduced herein.

88. As a result of the Defendants' conduct and breach of the aforementioned statutory provisions, the Plaintiffs reserve to themselves the right to elect at the trial of the

common issues to waive all relevant pleaded torts, and to have damages assessed in an amount equal to the gross revenues earned by the Defendants, or the net income received by the Defendants from the sale of the Cameras.

Damages

89. As a result of the Defendants' breach of the Warranty Contract, breach of the implied warranties of merchantability and fitness for intended purpose, and breaches of the particularized statutes above, the Plaintiffs and Class Members have suffered the following damages:

- a) They did not get what they paid for;
- b) they have suffered expenses associated with troubleshooting and attempting to repair the Defect, and will continue to do so;
- c) they own a Camera for which they overpaid.

Legislation

90. The Plaintiffs plead and rely upon the *Class Proceedings Act*, 1992, 5.0. 1992, c. 6; the *Competition Act*, R.S.C. 1985, c. C-34, as amended; and the *Consumer Protection Act*, 2002, c. 30, Sched. A, as amended.

91. The Plaintiffs propose that this action be tried in the City of Toronto.

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Solicitors for the Plaintiffs

WILLIAMS et al.

v.

CANON CANADA INC. and CANON INC.

Court File No: **07-CV-335257CP**

Plaintiffs

Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

AMENDED AMENDED
AMENDED FRESH AS AMENDED
STATEMENT OF CLAIM

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