



**PROPOSED CLASS PROCEEDING
FEDERAL COURT**

FIONA CHIU

Plaintiff

and

OOMA, INC.

OOMA CANADA INC.

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT:

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 a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served 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 for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: February 3, 2021

Original Signed by
Wayne Sawtell
Issued by: _____

(Registry Officer)
Thomas D'Arcy McGee Building
90 Sparks Street, 5th floor
Ottawa, Ontario
K1A 0H9

TO: **OOMA, INC.**
c/o INCORP SERVICES, INC.
919 NORTH MARKET STREET, SUITE 950
Wilmington, New Castle
Delaware, USA 19801

and

OOMA CANADA INC.
SUITE 200 - 1250 HOMER STREET
VANCOUVER, BC V6B 1C6

Overview


1. This is a consumer protection class action against the Defendants for violating Canada's federal *Trademarks Act* and, subsidiarily, the federal *Competition Act*.
2. The Plaintiff seeks to enforce the consumer protection measures enshrined in subsection 7(d) of the *Trademarks Act*.
3. The Plaintiff alleges that the Defendants described its Basic Home Phone (defined below) as a free service or costing \$0, when in fact the Defendants charges fees for that service.
4. The Plaintiff, on behalf of the Class (as defined further below), seeks damages, accounting of profits, punitive damages, investigation costs, legal costs on a full-indemnity basis, and/or injunctive relief enjoining the Defendants to cease describing its Basic Home Phone using the word FREE or otherwise representing that it costs \$0.
5. The Plaintiff is not seeking to prevent the Defendants from offering a low-cost voice-over-IP service for residential users. Rather, the Plaintiff are requesting the relief above in order to protect the rights of consumers to be free from false and/or misleading information, and other conduct that is contrary to free and fair competition in the marketplace.

Claim

6. The Plaintiff claims, on her own behalf and on behalf of the Class Members (as defined below):
 - a. a declaration that the Defendants made use of one or more description(s) for their Basic Home Phone that is false in a material respect and likely to mislead the public as to the character, quality, quantity or composition of that service, contrary to section 7(d) of the *Trademarks Act*, R.S.C., 1985, c. T-13 (the "***Trademarks Act***");
 - b. an interim, interlocutory and permanent injunction restraining the Defendant from, either directly or indirectly, further making use of any description for their Basic Home Phone that is false in a material respect and likely to mislead the public as to the character, quality, quantity or composition of that service;
 - c. pursuant to ss. 53.2 and/or 55 of the *Trademarks Act*, damages (including nominal damages), accounting of profits, punitive damages, legal costs of this proceeding, or whichever one or more of those that the Plaintiff or the Class Members may elect after due inquiry;

- d. a declaration that the Defendants' representations for its Basic Home Phone contravenes section 52 of the *Competition Act*, R.S.C., 1985, c. C-34 (the "**Competition Act**");
- e. a declaration that the Defendants charged the Class Members a price higher than the lowest of two or more prices clearly expressed by the Defendants for the Basic Home Phone, contrary to section 54 of the *Competition Act*;
- f. damages or loss, pursuant to s. 36 of the *Competition Act*, for the Defendants' contravention of ss. 52 and 54 of the *Competition Act*;
- g. costs of investigation and prosecution of this action pursuant to s. 36 of the *Competition Act*;
- h. an Order pursuant to Rules 334.16(1) and 334.17 of the *Federal Courts Rules* (the "**Rules**") certifying this action as a class proceeding and providing any ancillary directions;
- i. an Order pursuant to Rules 334.12(3), 334.16(1)(e) and 334.17(b) appointing the Plaintiff as the representative plaintiff for the Class;
- j. an Order pursuant to Rule 334.28(1) and (2) for the aggregate assessment of all monetary awards in favour of the Class Members;
- k. pre-judgment and post-judgment interest; and
- l. such further and other relief as this Honourable Court deems just.

The Parties

7. The representative plaintiff, Fiona Chiu, is a resident of the province of Ontario.
 8. The Defendant, OOMA, INC., is a company incorporated under the laws of the state of Delaware, USA, with a registered agent at c/o Incorp Services, INC., 919 North Market Street, Suite 950, Wilmington, New Castle, Delaware, USA 19801.
 9. The Defendant, OOMA CANADA INC., is a company incorporated under the laws of the province of British Columbia, Canada, with a registered and records office at SUITE 200 - 1250 Homer Street, Vancouver, BC, V6B 1C6.
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10. The corporate relationships between the Defendants OOMA, INC. and OOMA CANADA INC. (collectively "Ooma") are within the exclusive knowledge of the Defendants themselves.
11. OOMA, INC. is headquartered in California and conducts business activities in Canada through, or with the assistance of OOMA CANADA INC.

The Class

12. The representative plaintiff brings this action on her own behalf and on behalf of all individuals as follows (hereafter the "**Class**" or "**Class Member(s)**"):

All individuals in Canada that are or have been a subscriber of Ooma's Basic Home Phone between August 3, 2014 until the date this action is certified as a class action.

13. The representative Plaintiff is a member of the Class.
14. It is estimated that the Class includes tens of thousands (if not hundreds of thousands) of past and/or present customers of Ooma's Basic Home Phone.

The Defendant's Basic Home Phone

15. Ooma offers voice-over-IP telephone services to customers across Canada, with specific plans for business users and home users.
16. Ooma offers two plans for home users:
 - a. a basic plan, which the Defendants describe as FREE, where the user only pays monthly Fees (defined further below) and taxes.
 - b. a premier plan for \$9.99 per month plus monthly Fees and taxes.
17. The service offering that is subject of the claims in this action is Ooma's basic plan for home users described as FREE (hereafter the "**Basic Home Phone**").
18. Ooma offers, operates, and otherwise provides support for its Basic Home Phone from its headquarters in California.
19. In order to subscribe to and use the Basic Home Phone, Class Members must purchase a hardware device that is designed to work with Ooma's voice-over-IP telephone services for home users (the "**Ooma Telo**").

20. The Ooma Telo is sold in Canada at major retailers such as Staples, Walmart, Costco, and Best Buy, and can also be purchased from Ooma's Canadian website at www.ooma.ca.
21. OOMA, INC. is the party that contracts with the Class Members for the Basic Home Phone under the Defendants' terms of use (the "**Terms of Use**").
22. Although OOMA, INC. is the named entity under the Terms of Use, OOMA CANADA INC. processes the charges for the Fees (defined further below) and associated taxes on the Basic Home Phone.
23. The price of the Ooma Telo devices is approximately \$120 CAD, depending on the features that come with the device, such as wireless capabilities.
24. Ooma describes and/or markets the Basic Home Phone as FREE or \$0 on all its marketing channels, including:
- on the packaging of the Ooma Telo devices;
 - on Ooma's Canadian website;
 - on the Class Members' monthly billing details;
 - during the process of subscribing to the Basic Home Phone; and
 - on its social media pages.
25. Ooma adopts the following phrases or slogans to describe, market, and/or distinguish its Basic Home Phone from other products, including:
- "FREE home phone service / Service téléphonique à domicile GRATUIT"
 - "Get crystal-clear calling for free in Canada. / Service téléphonique résidentiel gratuit."
 - "Get crystal-clear nationwide calling for free."
 - "Free Plan"
 - "Phone service - \$ 0.00 / mo* / "
 - "Telo's Free* Home Phone Service"
 - "How Ooma Telo Delivers Free Home Phone Service"
 - "Free* Voip"
26. Although the Basic Home Phone includes unlimited calling in Canada, the Basic Home Phone is actually not free because Ooma charges the Class Members various fees including, but not limited to, a « 911 Service Fee » and « Regulatory Compliance Fees » (the "**Fees**").

27. The Fees are **not** charges imposed by third-parties or charges imposed directly on the Class Members by regulatory authorities, but are actually fees charged by Ooma, Inc.
28. In addition to the Fees, the Class Members are charged GST, PST, HST, and/or QST on the Fees.

The Plaintiff's and The Class Members' Circumstances

29. In 2013, the Plaintiff subscribed to the Basic Home Phone until on or about December 26, 2020.
30. For the duration of time that the Plaintiff subscribed to the Basic Home Phone, she was initially charged about \$4 per month in Fees and taxes, increased to 2020 \$5.41 per month by December 2020, comprising of:
- a. the « 911 Service Fee » of \$2.54,
 - b. the « Regulatory Compliance Fees » of \$2.43, and
 - c. the associated sales taxes of \$0.65.
31. The Class Members would be situated in the same or similar circumstance as the Plaintiff, including the following:
- a. The Class Members would have purchased an Ooma Telo device.
 - b. The Defendants expressed to the Class Members that the Basic Home Phone was free or costing \$0 on the packaging and marketing materials for the Ooma Telo device, at the time of subscribing to the Basic Home Phone, and upon the issuance of each monthly bill for the Fees and taxes.
 - c. The Class Members paid Fees and taxes each month to the Defendants.
 - d. The monthly bills issued by the Defendants clearly expresses the Basic Home Phone as costing \$0 but then the Defendants proceeds to charge Class Members the Fees and taxes.
 - e. They were all charged the Fees and taxes by OOMA CANADA INC., acting on behalf of OOMA, INC.
32. The amount that the Class Members are charged for the Fees and associated taxes would differ by province of residence, and the precise amounts are within the Defendants' billing and/or business records.

33. The Defendants require the Class Members to register their Ooma Telo devices with the Defendants in order to use the Basic Home Phone. The Defendants would have records of the serial numbers for each Class Members Ooma Telo device(s).

The Class Members' Basis For Claim

34. The Plaintiff relies on three statutory causes of action under the following two federal legislation, namely:

- a. **Subsection 7(d) of the *Trademarks Act*** – the prohibition on using descriptions that are materially false and likely to mislead the public.
- b. **Section 52 of the *Competition Act*** – the prohibition against false or misleading representations.
- c. **Section 54 of the *Competition Act*** – the prohibition against charging the higher of two or more prices clearly expressed by the seller.

Subsection 7(d) of the *Trademarks Act*

35. The *Trademarks Act* is consumer protection legislation and section 7 codifies the laws of passing off and unfair competition, further reinforcing the consumer protection measures across Canada.

36. The Defendants' use of the word FREE or "\$0" to describe their Basic Home Phone is false in a material respect because the Defendants' Basic Home Phone is, in fact, not free.

37. The Defendants charge the Fees and the associated taxes, and the Fees are not directly imposed by third-parties or regulatory authorities.

38. Describing the Basic Home Phone as being FREE is likely to mislead the public as to the character, quality, quantity, or composition of the Defendants' service. Consumers will likely believe that the Basic Home Phone is free, and that the Fees are imposed by third-parties or regulatory authorities.

39. The Defendants' conduct creates an unlevel playing field as between other phone service providers, directly harming marketing competition and consumer interest. Consumers are also made to believe that they are receiving a free service, when that is in fact not true.

40. The Defendants' conduct is in breach of section 7(d) of the *Trademarks Act*, which would entitle the Class Members to a remedy under section 53.2(1) of the *Trademarks Act* including:
- a. account of all profits received by the Defendants, including any profits arising from the premier plan for home users;
 - b. alternatively, actual damages equivalent to all of the Fees and associated taxes paid, and the cost of purchasing the Ooma Telo devices;
 - c. alternatively, nominal damages for each Class Member in an amount equivalent to the average Fees and taxes paid during the class period and the manufacturer suggested retail price of the Ooma Telo devices;
 - d. punitive damages of \$500 per Class Member, or in an amount that this Honourable Court deems just; and/or
 - e. interim or permanent injunctive relief restraining the Defendants from describing or marketing the Basic Home Phone as FREE or \$0.
41. Class Members are entitled to elect their remedy under section 53.2(1) of the *Trademarks Act* prior to judgment of the common issues trial.

Section 54 of the Competition Act

42. The Defendants' Basic Home Phone is a "product" within the meaning of section 2 of the *Competition Act*.
43. The Defendants clearly express a price of \$0 or free for their Basic Home Phone in various manners described in paragraph 24 above (the "**First Price**").
44. The Defendants also clearly express a price equivalent to the Fees and the associated taxes in the monthly bills (the "**Second Price**").
45. The Second Price is higher than the First Price, and the Defendants charge the Class Members the Second Price.
46. The Class Members were entitled to pay the Defendants only the First Price (\$0) in accordance with section 54 of the *Competition Act*.

47. The Class members having paid the Second Price have suffered loss or damage equivalent to the monetary difference between the Second Price and First Price.
48. The Defendants' conduct in charging the Class Members the Second Price, instead of the First Price caused the Class Members to suffer loss and/or damage.
49. The Class Members have suffered damage or loss as a result of the Defendants' breach of section 54 of the *Competition Act* and as a result seek damages pursuant to section 36 of the *Competition Act*, specifically:
 - a. the monetary difference between the Second Price and the First Price for each month;
 - b. the costs for purchasing the Ooma Telo devices; and
 - c. the costs of investigation and prosecuting of this action.

Section 52 of the Competition Act

50. The Defendants have deliberately represented their Basic Home Phone as being free in order to promote that service to the public, including its current and prospective customers.
51. Representing the Basic Home Phone as free is false or misleading in a material respect because the service is, in fact, not free.
52. The Defendants' conduct is in breach of section 52 of the *Competition Act*.
53. Because of the Defendants' representation that the Basic Home Phone is free, when it was and is in fact not free, consumers will likely believe that the Basic Home Phone is indeed free, and that the Fees are imposed by third-parties or regulatory authorities.
54. The Defendants' conduct has caused the Class Members to spend more money than they were expecting, or otherwise acquiring less value than the Class Members expected to acquire.
55. The Class Members have thus suffered damage or loss as a result of the Defendants' breach of section 52 of the *Competition Act* and as a result seek damages pursuant to section 36 of the *Competition Act*, specifically:
 - a. All the Fees and associated taxes that have been paid by the Class Members;

- b. the costs for purchasing the Ooma Telo devices; and
- c. the costs of investigation and prosecuting of this action.

Punitive Damages

56. The Plaintiff pleads that the Defendants' conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, willful, in disregard of the laws of competition and public order in Canada, in disregard of the Plaintiff's rights and the rights of each Class Member, indifferent to the consequences and, as such, renders the Defendants liable to pay punitive damages.

Applicable Limitation Period

57. The Plaintiff pleads and relies upon subsection 39(2) of the *Federal Courts Act* of which provides that a limitation period of six-years applies because the cause of action under the *Trademarks Act* arises otherwise than in a province:

- a. Ooma provides the Basic Home Phone from its headquarters in California;
- b. OOMA, INC. (incorporated in Delaware and headquartered in California) is the party that entered into a contract with the Class Members for the Basic Home Phone;
- c. The Basic Home Phone is a telephone service that connects a province with other provinces or extends beyond the limits of a province; and
- d. The Basic Home Phone is marketed as a phone service that provides free unlimited national calling within Canada.

58. The Plaintiff further pleads and relies upon the suspension of time limits from March 13, 2020 to September 13, 2020 under the *Time Limits and Other Periods Act (COVID-19)*, SC 2020, c 11, s 11.

59. When describing the Basic Home Phone as FREE or \$0, the Defendants do not inform the Class Members that the Fees are not charged by third-parties but are actually fees charged by the Defendants. The Defendants' representation on Fees gives readers the impression that they are charged by third-parties or regulatory authorities, and is unconscionable.

Ooma's Arbitration Clause Invalid

60. The Defendants' Terms of Use includes an arbitration provision, that is to be interpreted under the laws of California.

61. Moreover, according to the guidance of the Supreme Court of the State of California, USA, such arbitration provision is invalid under the laws of California and is deemed to be severed from the Terms of Use.

McGill v. CITIBANK, NA, 393 P. 3d 85 - Cal: Supreme Court 2017

62. The arbitration provision is also unconscionable under the laws of Canada and unenforceable.

Uber Technologies Inc. v. Heller, 2020 SCC 16

63. The Plaintiff further pleads and relies upon the consumer protection legislation in Canada that restricts arbitration for claims made by consumers.

British Columbia: *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s. 3 and 172

Alberta: *Consumer Protection Act*, RSA 2000, c C-26.3, s. 16

Saskatchewan: *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s. 101

Ontario: *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A, s. 7-8

Quebec: *Consumer Protection Act*, CQLR c P-40.1, art. 11.1

Subject-Matter Jurisdiction of the Federal Court

64. This action concerns breaches of the *Trademarks Act* and ss. 52 and 55 of the *Trademarks Act* provide that the Federal Court has jurisdiction to entertain any action for the enforcement of any of the provisions of the *Trademarks Act* or of any right or remedy conferred or defined by the *Trademarks Act*.

65. This action also concerns breaches of the *Competition Act* and s. 36(3) of the *Competition Act* provides that the Federal Court is a court of competent jurisdiction.

Location of Trial

66. The Plaintiff proposes that this action be tried at Montreal, Quebec.

Dated: February 3, 2021

Champlain Avocats

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I HEREBY CERTIFY that the above document is a true copy of the original filed in the Court./

JE CERTIFIE que le document ci-dessus est une copie conforme à l'original déposé au dossier de la Cour fédérale.

Filing date

Date de dépôt

FEB 04 2021

FEB 03 2021

Dated
 Fait le

AS

**WAYNE SAWTELL
 REGISTRY OFFICER
 AGENT DU GREFFE**