

CITATION: Lawrence v. Symantec Corporation, 2024 ONSC 2621
COURT FILE NO.: CV-16-562278-00CP
DATE: 20240506

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RYAN LAWRENCE AND FLORENCE FAZARI, Plaintiffs

– and –

SYMANTEC CORPORATION, Defendant

BEFORE: Justice E.M. Morgan

COUNSEL: *John Archibald*, for the Plaintiffs

Andrew McCoomb and Ted Brook, for the Defendant

HEARD: May 6, 2024

CLASS ACTION SETTLEMENT MOTION

[1] The Plaintiffs move for approval of a proposed settlement of this class action under section 29 of the *Class Proceedings Act, 1992*, SO 1992, c. 6, as amended (“CPA”).

I. The proposed settlement

[2] The Defendant manufactured and sold certain Norton™-branded security software whose purpose is to scan file attachments for malicious code. This class action alleges that between July 24, 2010 and June 27, 2016 the software contained serious design defects in a critical component called the “decomposer”.

[3] After 7 years of active litigation through certification, discovery, and two mediations, the parties engaged in extensive, arm’s length negotiations. That process has culminated in a proposed Settlement Agreement, subject to court approval. The Settlement Agreement, if approved, will fully and finally resolve the claims advanced on behalf of the Ontario class and a related action in Quebec.

[4] The Settlement Agreement has an estimated value of approximately \$21,700,000, including the following benefits for the 640,000 Ontario class members:

(a) Each Class Member will be entitled to choose one of the two following options by submitting a Claim (per Settlement Agreement, para. 10). Option 1 is a \$5 cash payment plus either a 90-day Free License of Norton AntiVirus Plus valued at \$7.50 or a Discount Code valued at \$7.50 to be applied toward the purchase of another Norton brand product sold by Symantec's successor, Gen Digital. Option 2 is Class Members can choose to receive a Free License or Discount Code as follows:

i. Class Members who had a license for less than three years during the Class Period: either a 180-day Free License valued at \$15 or a Discount Code valued at \$15.

ii. Class Members who had a license for three years or more during the Class Period: either a 365-day Free License valued at \$30 or a Discount Code valued at \$30.

(b) Free Licenses can be activated at any time by Class Members who opt to receive them and Discount Codes do not have any expiration date;

(c) Gen Digital will pay \$6,000,000 to establish a Settlement Fund that will be used to make the \$5 payments to Class Members who choose Option 1;

(d) Class Members who are current customers of Gen Digital and who do not submit a Claim will be deemed to have chosen Option 2 and will automatically be given a Discount Code without having to make a Claim;

(e) If a portion of the Settlement Fund remains unclaimed and undistributed by the Claims Deadline, Class Members who chose Option 1 and who held licenses of the Norton Products for two years or more during the Class Period will receive additional cash payments pro rata up to a maximum of \$5 for each full year license purchased during the Class Period;

(f) Gen Digital will pay Ontario class counsel and Quebec class counsel legal fees totaling \$5,040,000 plus applicable taxes, subject to court approval;

(g) Gen Digital will pay disbursements (inclusive of taxes) of \$364,393.92, of which \$172,000 is in respect of this action; and

(h) Gen Digital will pay the costs of notice and settlement administration estimated at \$250,000.

[5] The Settlement Agreement is supported by the representative Plaintiffs and recommended by experienced class counsel. That recommendation, while not conclusive, is to be given considerable weight: *Dabbs v. Sun Life Assurance Co.*, [1998] OJ No 2811, at para. 32 (Gen Div).

[6] Class counsel advise that there are four Ontario Class Members who have communicated their objection to the Settlement Agreement. Those individuals, along with all other class members, received notice of the settlement approval hearing, but they did not attend to voice their objections to the court. The fact that a small number of individual class members consider the Settlement Agreement less than ideal does not constitute a bar to the settlement's approval: *Parsons v. Canadian Red Cross Society*, [1999] OJ No 3572, at para. 79 (SCJ).

[7] Two of the objectors apparently were of the view that the Settlement Agreement should have given the class members more than it does, while another two expressed disappointment at the in-kind nature of the compensation paid by the Defendant and would have preferred a cash payment. In my view, those four objections, out of a class of 640,000 persons, does not make the Settlement Agreement unreasonable. While I respect the objectors and take their views seriously, the small number of them indicates that the vast majority of class members are satisfied that this is likely the best result that the class could realistically have hoped to achieve.

[8] To the extent that the Settlement Agreement contains a voucher type of arrangement, I view this as helpful to the class. As in other approved settlements, these are "but one of several forms of compensation and a useful way of increasing the value of the settlement": *Mortillaro v. Cash Money Cheque Cashing Inc.*, [2009] OJ No 2904, at para. 16 (SCJ).

[9] In assessing the merits of any settlement, it must always be kept in mind that fairness is not a matter of perfection and that "[r]easonableness allows for a range of possible resolutions": *Dabbs, supra*, at para. 9. In this respect, generalizations are to be avoided since "every case turns on its own facts": *David v. Canada Bread Co.*, 2018 ONSC 198, at para. 22.

[10] The Settlement Agreement provides timely recovery and substantial benefits to Class Members. It will avoid risky, complex litigation whose outcome is uncertain and that could take several more years to finally resolve through a trial and any appeals. Like all settlements, it is the product of compromise and give-and-take: *Dabbs*, at para. 9.

[11] Overall, the Settlement Agreement meets the test of being fair, reasonable and in the best interests of the Class: *Parsons, supra*, at para. 69 (SCJ).

II. Class counsel fees

[12] In addition, class counsel seek approval of their counsel fees in the amount of \$3,270,000, plus HST of \$425,880, and disbursements of \$190,249.94 (\$172,000 to be paid directly by Gen Digital and \$18,249.94 for mediator's fees to be repaid out of the Settlement Fund).

[13] The requested fee is consistent with the fee contemplated by class counsel's retainer agreements with the Plaintiffs. It represents 15% of the estimated settlement value for the Ontario class.

[14] A 33% contingency fee is often considered the benchmark for class counsel fees: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2005] OJ No 1117, at paras. 59-61 (SCJ). That figure is typically reduced to 20% where a “coupon settlement” is being approved: *JB & M Walker Ltd. v. The TDL Group Inc.*, 2019 ONSC 2813, at para. 18. The proposed fee here is well within the acceptable range.

[15] Class counsel’s fee and disbursement requests meet the test of being fair and reasonable: *Lavier v. MyTravel Holidays Inc.*, 2013 ONCA 92, at paras. 26-27. They reflect the results achieved, the time spent, and, in particular, the risks undertaken in the prosecution of this action over seven and a half years: *Romeo v. Ford Motor Co.*, 2019 ONSC 1831, at para. 24. 11.

[16] Furthermore, the legal fees are within the expectations of the representative Plaintiffs and the class: *Smith v. National Money Mart Co.*, 2011 ONCA 233, at para. 80. The 15% contingency fee is certainly a fair reflection of the risks and rewards of this class action: *Abdulrahim v. Air France*, 2011 ONSC 512, at para. 13.

[17] The representative Plaintiffs support class counsel’s request for fees and disbursements, and there have been no objections to those requests. In my view, the fee request, in view of the positive terms of the Settlement Agreement and the performance of class counsel in achieving those terms, fosters access to justice in the way envisioned by the CPA, providing with a fair process for airing their claims and an acceptable result to the litigation: *AIC Limited v. Fischer*, [2013] 3 SCR 949, at para. 24.

III. Disposition

[18] The Settlement Agreement is hereby approved, as are the ancillary heads of relief sought by the Plaintiffs as set out in the Notice of Motion and above in these reasons for decision.

[19] Class counsel’s fees and disbursements are approved as requested.

[20] There will be an Order to go as submitted by class counsel. Counsel are requested to send a draft Order in Word format to my assistant.

Date: May 6, 2024

Morgan J.