

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**3000AD, INC.**

Plaintiff

- and -

**DREAMCATCHER INTERACTIVE INC.**

Defendant

**FACTUM OF THE PLAINTIFF**  
(Motion Returnable: February 3, 2004)

**Cassels Brock & Blackwell LLP**  
Barristers & Solicitors  
Scotia Plaza, Suite 2100  
40 King Street West  
Toronto, Ontario, M5H 3C2

Timothy Pinos LSUC#: 20027U  
Tel: (416) 869-5784  
Fax: (416) 350-6903

Robyn E. Campbell LSUC#: 45609K  
Tel: (416) 860-6509  
Fax: (416) 640-3208

Solicitors for the Plaintiff

**ONTARIO  
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B E T W E E N:

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**FACTUM OF THE PLAINTIFF  
(Motion Returnable: February 3, 2004)**

**PART I - NATURE OF THE MOTION**

1. This is a motion for an interim, interlocutory and permanent injunction restraining the defendant, DreamCatcher Interactive Inc. ("DreamCatcher"), from releasing, marketing, selling, directly or indirectly a computer game title "Universal Combat" for a Manufacturer's Suggested Retail Price ("MSRP") of less than US\$39.99 per game.

**PART II - THE FACTS**

2. 3000AD Inc. ("3000AD") is a computer game design company, incorporated in 1992, which creates and designs computer games for a particular market of consumers interested in action/flight simulation games.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Tab 3, of the Plaintiff's Motion Record, para. 1.

3. In or about November 2002, DreamCatcher approached 3000AD about entering into a publishing relationship in respect of two computer games which 3000AD was developing – Battlecruiser Millennium Gold (“BCMG”) and Battlecruiser Generations (“BCG”), later renamed Universal Combat. This arrangement involved 3000AD granting a licence to DreamCatcher to market and distribute the games, while 3000AD maintained ownership of the intellectual property involved.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff’s Motion Record, Tab 3, para. 4, 5, 6, 9, and Exhibit C.

4. 3000AD and DreamCatcher eventually entered into an agreement which provided, among other things, that the MSRP for BCG was \$39.99, and the MSRP for BCMG at \$29.99.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff’s Motion Record, Tab 3, para. 7.

5. DreamCatcher subsequently issued a press release on December 19, 2002, which included a statement that the MSRP of BCG would be US\$39.99 and BCMG would be US\$29.99.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff’s Motion Record, Tab 3, para. 14.

6. Approximately two years and US\$1,000,000 were invested in the creation of BCG/Universal Combat. Approximately US\$750,000 was invested by 3000AD, with the remaining amount funded by advance royalty payments.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff’s Motion Record, Tab 3, para. 22, 23.

7. On the basis of the monetary investment and development time, it would be unheard of in the computer game industry for a game such as Universal Combat to be released for less than US\$39.99, and certainly not at a budget price of US\$19.99.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 24.

### **Royalty Reporting Problems**

8. BCMG was released by DreamCatcher in or about March 31, 2003 and pursuant to the agreement, DreamCatcher was obliged to provide 3000AD Royalty Statements each quarter setting out sales and the calculation of royalties owing to 3000AD.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 26.

9. In or about October and November, 2003, it became apparent to 3000AD that there were significant omissions in the Royalty Statements provided by DreamCatcher, which it promptly brought to DreamCatcher's attention.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 27.

10. DreamCatcher has failed to provide revised Royalty Statements despite repeated demands, but has indicated that it would provide a reconciliation with the Royalty Statement due in the first quarter of 2004.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 29.

11. Due to DreamCatcher's failure to accurately report gross revenues, 3000AD negotiated with DreamCatcher for an amendment to their earlier agreement to provide 3000AD with greater rights of termination in the event of default by DreamCatcher in royalty payment obligations, and loosening the rights of DreamCatcher in respect of any program derivations.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 31, 32.

### **Attempted Release of Unfinished Game by DreamCatcher**

12. On or about December 12, 2003, a draft (or a "build") of Universal Combat was sent to DreamCatcher for testing. It was not for distribution and was copy protected. Despite this, less than one week later DreamCatcher advised 3000AD that the build was being sent out for replication.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 35-38.

13. As a result of this dispute, legal counsel for both 3000AD and DreamCatcher were involved and DreamCatcher agreed that it would not ship the build and that it would destroy the 30,000 copies it made. In exchange, 3000AD agreed to provide DreamCatcher with a newly revised build of Universal Combat.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 39 and 40.

## **Computer Game Pricing**

14. The MSRP for a computer game has to be at the appropriate level for a creator to be able to recoup its expenses and earn a profit, without being inflated beyond the quality of the game. Furthermore, the pricing of the game signals the quality of the game and is essential to establishing and maintaining the reputation of the game and its software developer. 3000AD has strived to establish and maintain its reputation as a developer of quality mid-range games.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 46, 47 and 48.

15. From the outset, DreamCatcher was aware of the nature and cost of the creation of Universal Combat, and it was a factor taken into consideration in determining the appropriate MRSP.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 52.

16. In the computer game industry, the MSRP is not usually included in a licensing agreement but is part of the larger agreement between game designers and publishers.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 49.

17. 3000AD and DreamCatcher expressly agreed that the MSRP of Universal Combat would be US\$39.99 per game. That price was reflected on the website on computer game retailers up until just recently.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 51.

### **Breach of Contract & Urgent Need for Injunctive Relief**

18. Despite this agreement, on January 28, 2004, 3000AD learned that Universal Combat was being advertised at US\$19.99.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 57.

19. Dreamcatcher has set a release date for Universal Combat of February 7, 2004. The game will have to be shipped to retailers at least a few days before then.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 60, 61.

20. It is impossible to adequately estimate how many units of the game would have been sold if it was released at \$39.99. The decrease in price will not likely result in a significant increase in sales. 3000AD will suffer a precipitous, but impossible to calculate, reduction in revenues.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 66, 67.

21. If Universal Combat is released at US\$19.99, consumers will assume it is a low quality, budget product. This will adversely affect the reputation of both Universal Combat and 3000AD in the marketplace.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 71.

22. As a result of the unilateral and significant decrease in the MSRP by DreamCatcher, it is unlikely that 3000AD will ever be able to cover its expenses of creating Universal Combat.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 72.

### **PART III - ISSUES AND THE LAW**

23. The issues on this motion are:

- (i) Is there a serious question to be tried with respect to the Defendant's breach of contract and/or misrepresentation in respect of the Manufacturer's Suggested Retail Price of Universal Combat?;
- (ii) Will 3000AD suffer irreparable harm if the injunction is refused?; and
- (iii) As between 3000AD and the Defendant, who will suffer greater harm from the granting or refusal of the injunction pending a decision on the merits?

24. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, the Supreme Court approved of a three-stage test to determine whether or not to grant injunctive relief:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

*RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (QL) at ¶43, Plaintiffs' Brief of Authorities, Tab 1



**(1) There is a Serious Question to be Tried**

25. In *RJR - MacDonald Inc. v. Canada (Attorney General)*, the Supreme Court described the “serious question to be tried” requirement as follows:

What then are the indicators of “a serious question to be tried”? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case.

...

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. (emphasis added)

*RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (QL) at ¶49  
Plaintiffs’ Brief of Authorities, Tab 1

26. 3000AD’s action against DreamCatcher is rooted in breach of contract and misrepresentation relating to the agreement in respect of the MSRP of Universal Combat.

*Reference:* Notice of Action issued February 2, 2004, Plaintiffs’ Motion Record (Motion returnable February 3, 2004), Tab 2

27. As noted above, in or around the end of 2002, there were negotiations and subsequent agreements between 3000AD and DreamCatcher regarding the publishing of Universal Combat and Battlecruiser Millennium Gold, which included agreements about the royalty structure and the MSRP.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff’s Motion Record, Tab 3, para.4-7.

28. As a result of these agreements, DreamCatcher issued a press release with the MSRP of US\$39.99 and that MSRP appeared on the websites of several online retailers.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 13 .

29. Despite this, and without any consultation with 3000AD, DreamCatcher dropped the MSRP to US\$19.99. This significantly lower MSRP is now appearing on the same retailers' websites.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, Plaintiff's Motion Record, Tab 3, para. 54.

30. 3000AD submits that this preliminary assessment of the merits of its action for breach of contract against the Defendant demonstrates that it has a strong *prima facie* case that DreamCatcher is in breach of contract. This clearly meets the much lower "serious question to be tried" threshold set out by the Supreme Court in *RJR - MacDonald Inc. v. Canada (Attorney General)*.

## **(2) 3000AD Will Suffer Irreparable Harm if the Injunction Is Refused**

31. In *RJR - MacDonald Inc. v. Canada (Attorney General)*, the Supreme Court described the "irreparable harm" requirement as follows:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

“Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

*RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (QL) ¶58 and 59, Plaintiffs’ Brief of Authorities, Tab 1.

32. Courts may draw reasonable inferences from the evidence to conclude that irreparable harm exists.

*Popsicle Industries Ltd. v. Ault Foods Ltd.*, [1987] F.C.J. No. 817 at p. 4 (T.D.)(Q.L.), Plaintiff’s Brief of Authorities, Tab 2

33. In his text, *Injunctions and Specific Performance*, the Honourable Justice Robert Sharpe comments that the courts should avoid taking a narrow view of irreparable harm and that the concept should not be restricted to only market loss or damage to business reputation.

R. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora,ON: Canada Law Books Inc., 2003) at 2-29, Plaintiff’s Brief of Authorities, Tab 3

34. In determining whether damages would adequately compensate a party, a court should consider whether there is a possibility of irrevocable damage to business reputation and permanent market loss. In circumstances where a party is particularly vulnerable to competition by more powerful companies with higher profile, and where product/brand identification are particularly important, it will be impossible to measure the impact of the loss of exposure in that market.

*Rothmans, Benson & Hedges v. Hard Rock Café*, [2002] O.J. No. 3117 (QL) at para 21, Plaintiffs’ Brief of Authorities, Tab 4

35. 3000AD submits that it will suffer irreparable harm if the injunction is denied and the Defendant is permitted to release and sell Universal Combat at one third of the agreed to MSRP. The damage to the reputation and business goodwill associated with releasing a discounted budget priced game are incalculable and could not be easily recovered by 3000AD, if ever.

36. An inference of irreparable harm may be drawn from the evidence regarding the importance of pricing in the computer game industry and the associate harm to reputation that 3000AD will suffer if Universal Combat is sold at an MSRP of US\$19.99.

37. Since Universal Combat is a computer game which caters to and appeals to a particular market segment within the computer game buying public, it will be impossible to determine how many games would have been sold at an MSRP of US\$39.99, if they are allowed to be marketed at US\$19.99.

*Reference:* Affidavit of Derek Smart, sworn February 2, 2004, paras. 4 and 66,  
Plaintiff's Motion Record (Motion returnable June 19, 2003), Tab 3

### **(3) The Balance of Convenience Favours 3000AD**

38. In determining the balance of convenience, a court will consider interference with ongoing business goodwill, as well as the loss in future business.

*Metro-Pacific Cellular Inc. v. Rogers Cantel Inc. et. al.*, 57 C.P.R. (3d) 538 at pgs 538, 550-551,  
Plaintiff's Brief of Authorities, Tab 5

39. Further, where the parties' interests are relatively evenly balanced, and the only effect of an injunction is to postpone the date upon which a person is able to

embark on a course of action not previously open to him, it is a counsel of prudence to preserve the status quo.

*British Columbia (Attorney General) v. Gitanmaxx Band et. al.*, [1986] B.C.J. No. 1395 at para 49 and 50, (B.C.C.A.), *aff'd* [1991] 1 S.C.R. 62, Plaintiffs' Brief of Authorities, Tab 6.

40. In this circumstance, 3000AD seeks to preserve the status quo in respect of the MSRP of the Universal Combat game. If DreamCatcher is permitted to market this game at US\$19.99, it will be allowed to do what was not previously available to it under the terms of the contract.

41. Where it is impossible to determine with any degree of accuracy why certain purchasers might chose to buy Universal Combat at an MSRP of US\$19.99, it would also be impossible to determine or assess 3000AD's damages with respect to its loss of sales at US\$39.99, goodwill, and the loss in the value of its reputation in the marketplace.

*Popsicle Industries Ltd. v. Ault Foods Ltd.*, [1987] F.C.J. No. 817 at p. 3 (T.D.)(Q.L.), Plaintiffs' Brief of Authorities, Tab 2

42. In contrast to the irreparable harm 3000AD will face if the injunction is denied, the impact of the requirement that the Defendant adhere to the agreed to MRSP will not adversely affect it. It will simply be required to adhere the pricing structure which had been marketed and advertised for more than a year.

43. Based on the above, it is submitted that the balance of convenience favours 3000AD, which will suffer more harm than the Defendant if the injunction is denied. The conduct of the Defendants demonstrates that if the injunction is not granted, the Defendant will continue to act with complete disregard for the terms and conditions of the MSRP agreement.

### **Undertaking of Plaintiffs**

56. On a motion for an interlocutory injunction, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

#### *Rule 40.03, Rules of Civil Procedure*

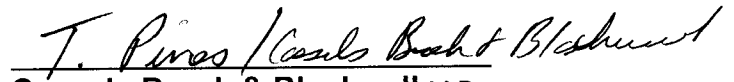
57. The plaintiff has provided the required undertaking as to damages.

### **PART IV - ORDER REQUESTED**

58. Therefore, 3000AD respectfully requests an interim, interlocutory and permanent injunction restraining the defendant, DreamCatcher Interactive Inc., from selling, distributing, advertising, marketing or otherwise dealing with the computer game known as "Universal Combat", for less than a Manufacturer's Suggested Retail Price of \$US 39.99 per game.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

February 3, 2004



**Cassels Brock & Blackwell LLP**

Barristers & Solicitors

Scotia Plaza, Suite 2100

40 King Street West

Toronto, Ontario, M5H 3C2

Timothy Pinos LSUC#: 20027U

Tel: (416) 869-5784

Fax: (416) 350-6903

Robyn E. Campbell LSUC#: 45609K

Tel: (416) 860-6509

Fax: (416) 640-3208

Solicitors for the Plaintiff

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (QL)
2. *Popsicle Industries Ltd. v. Ault Foods Ltd.*, [1987] F.C.J. No. 817 at p. 4 (T.D.)(Q.L.)
3. R. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, ON: Canada Law Books Inc., 2003)
4. *Rothmans, Benson & Hedges v. Hard Rock Café*, [2002] O.J. No. 3117 (QL)
5. *Metro-Pacific Cellular Inc. v. Rogers Cantel Inc. et. al.*, 57 C.P.R. (3d) 538
6. *British Columbia (Attorney General) v. Gitanmaxx Band et. al.*, [1986] B.C.J. No. 1395 at para 49 and 50, (B.C.C.A.), aff'd [1991] 1 S.C.R. 62



**SCHEDULE "B"**  
**LIST OF AUTHORITIES**

1. Rule 40.03, *Rules of Civil Procedure*

**3000AD, INC.**  
Plaintiff and

**DREAMCATCHER**  
Defendant

Court File No: 04-CV-262957 CM2

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF THE PLAINTIFF  
(Motion Returnable: February 3, 2004)**

**Cassels Brock & Blackwell LLP**  
Barristers & Solicitors  
Suite 2100, Scotia Plaza  
40 King Street West  
Toronto, Ontario, M5H 3C2

Timothy Pinos LSUC#: 20027U  
Tel: (416) 869-5784  
Fax: (416) 350-6903

Robyn E. Campbell LSUC#: 45609K  
Tel: 416.860.6509  
Fax: 416.640.3208

Solicitors for the Plaintiff

Served on Fax: (416) 361-1398