IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

LEAH THOMPSON and
PATRICIA HARP **PLAINTIFFS**

VS. **NO.** 11-3009

APPLE INC. **DEFENDANT**

NOTICE OF REMOVAL

TO: W.H. Taylor
William B. Putnam
Taylor Law Partners
303 E. Millsap Road
P.O. Box 8310
Fayetteville, AR 72703

1. You are notified that the case of *Leah Thompson and Patricia Harp v. Apple, Inc.* formerly pending in the Circuit Court of Carroll County, Arkansas, Case No. CV-2011-2, is hereby removed to the United States District Court for the Western District of Arkansas, Harrison Division.

2. You are notified that this Notice of Removal is filed on February 3, 2011 in the United States District Court for the Western District of Arkansas, Harrison Division, all as provided by law.

3. You are also notified that a copy of this Notice of Removal is being submitted for filing with the Clerk of the Circuit Court of Carroll County, Arkansas, in accordance with

28 U.S.C. § 1446(d). These papers are being served on you as attorney for the putative lead plaintiffs, Leah Thompson and Patricia Harp, in this putative class action.

4. This Notice of Removal is filed within thirty (30) days (or the first filing day thereafter) of the first delivery of summons and complaint to defendant Apple, Inc. ("Apple"). Copies of the summons and the complaint are attached to the Notice as Exhibit A, these constituting all the process and pleadings that have been delivered to defendant.

5. Plaintiffs instituted this action by filing a complaint in the Circuit Court of Carroll County on January 4, 2011. A Summons dated January 4, 2011 was served at the Little Rock, Arkansas address of Apple's registered agent, CT Corporation, by registered mail received on January 11, 2011.

6. This is a civil action of which this Court has original jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. §1332(d)(2)(A), because this is a putative class action in which the named plaintiffs are residents of the State of Arkansas and defendant Apple is a California Corporation with its principal place of business in Cupertino, California. Therefore, this is an action in which a member of a putative class of plaintiffs is a citizen of a State different from the sole defendant, Apple. Plaintiffs concede that Apple "is not an Arkansas citizen for purposes of federal court diversity analysis." (Class Action Complaint at ¶3.)

7. Apple disputes Plaintiffs' claims, believes the Complaint lacks merit, and denies that Plaintiffs or the putative class members have been harmed in any way. Nonetheless, and despite Plaintiffs' attempts by "stipulation" to unilaterally and arbitrarily cap the aggregate recovery on behalf of an entire putative class of unknown persons, the amount in controversy

in this case exceeds $5 million. The defendant's burden in establishing the amount in controversy is not high. The relevant jurisdictional fact "is not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are." *Kopp v. Kopp*, 280 F.3d 828, 885 (8th Cir 2005) (emphasis supplied). If a fact finder could legally conclude that the class damages and other recoverable items (including attorney's fees and punitive damages) exceed $5 million upon finding the Defendant liable for the asserted claims, remand is inappropriate. Rather, remand is allowed only if Plaintiffs "can establish that it is legally impossible to recover in excess of the jurisdictional minimum." *Bell v. Hershey*, 557 F.3d 953, 959 (8th Cir. 2009).

8. In this case, Plaintiffs attempt to evade federal jurisdiction by purporting to stipulate that they will not seek damages or a total recovery of more than $5 million on behalf of the entire class that they claim to represent. Although Plaintiffs may have the right to limit their own recovery by stipulation, they have no such right with respect to unknown members of a currently uncertified class. As Judge Smith in the Western District of Missouri observed in this same context, "Plaintiff is not merely asserting her claims: she is also asserting the claims of a class. Plaintiff has no right to limit or compromise the recovery of the class without Court approval, particularly before she has been approved as a representative of the class." *Bass v. CarMax*, No. 07-0883, 2008 WL 441962, at *2 (W.D. Mo. 2008)

9. Apple contests liability and Plaintiffs' damage claim in every particular. However, it is not *legally impossible* that a fact finder could award more than the jurisdictional amount were Plaintiffs to prevail. Plaintiffs purport to assert claims on behalf of a proposed statewide class potentially comprised of all people who have owned an Apple iPhone in the

three years prior to the filing of Plaintiffs' lawsuit and have represented that "the Class is comprised of thousands of persons located across Arkansas." (Class Action Complaint at ¶19.)

10. Plaintiffs allege that "Defendant has designed all versions of its iPhones and their operating systems to freely permit and disseminate information without the knowledge and consent of Plaintiffs and Class Members," (Class Action Complaint at ¶8) and seek compensation in order "to prevent Defendant Apple from receiving unjust enrichment" (Class Action Complaint at ¶45) from such alleged activities. Plaintiffs also allege that Apple "should be held jointly and severally liable for Plaintiffs' and Class Members' damages sustained as a result of the unlawful conspiracy with unnamed co-conspirators." (Class Action Complaint at ¶44). Further, punitive damages are a possible remedy for their asserted claim for civil conspiracy.

11. According to Apple's records, in excess of 250,000 iPhones have been registered by customers in the State of Arkansas. Apple's retail prices for iPhones in the United States have generally ranged from $199 to $599 or more, depending on carrier subsidies and storage capacity, for the then-current models of iPhone (with some models priced at $99 for some period following the introduction of newer models). Under Plaintiffs' own allegations, theories and prayers for relief, if proven, potential damages and attorneys' fees for the putative class plainly would not be constitutionality or otherwise legally limited to less than $5 million in the aggregate.

12. The United States District Court for the Western District of Arkansas, Harrison Division, embraces the county in which the state court action is now pending, and thus, this

Court is a proper venue for this action pursuant to 28 U.S.C. § 83. This action may be removed to this Court pursuant to 28 U.S.C. § 1441.

13. The undersigned states that this removal is well grounded in fact and is warranted by existing law, and is not interposed for improper purpose.

WHEREFORE, defendant Apple, Inc. removes this action from the Circuit Court of Carroll County, Arkansas, to the United States District Court for the Western District of Arkansas, Harrison Division, and seeks resolution by this Court of all issues raised herein.

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By _____
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Attorneys for Defendant Apple, Inc.

CERTIFICATE OF SERVICE

On February 3, 2011, a copy of the foregoing was served by U.S. mail on:

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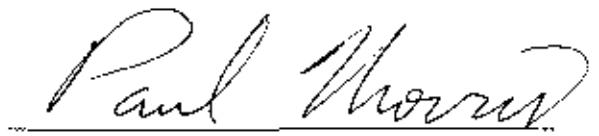

Paul D. Morris