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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ARAM HOVSEPIAN, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

APPLE, INC.,

Defendant.

Case No. C08-05788 JF

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Honorable Judge Jeremy Fogel
Courtroom 3, 5th Floor
Hearing Date: December 4, 2009
Time: 9:00 a.m.

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Apple's Motion to Dismiss Plaintiff's Second Amended Complaint (the "SAC") ignores critical nuances in the SAC and relies almost entirely on federal courts interpreting California law while sitting in diversity. A federal court -- as this court must, under the law -- attempting to divine how the California Supreme Court would address the issue, would not conclude that the duty to disclose under the UCL and CLRA is limited solely to when a safety issue is implicated. As this Court observed at the last hearing, the California Supreme Court "always have [erred on the side of expansiveness] with regard to the UCL." Aug. 14, 2009 Tr. at 19:25-20:1 (attached as Exhibit 1 hereto). The Court's comment at the August hearing is particularly apt in light of the expansive interpretation of the scope of the UCL provided by the California Supreme Court in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009). *Tobacco II* was decided after all of the federal cases cited in Apple's brief, and therefore those courts did not have available to them the mot most recent holdings and views of the California Supreme Court.

Further, and a critical point of emphasis, Plaintiff challenges Apple's conduct under California common law fraud, and the law could not be clearer that the scope of common law fraud is broader than that which is actionable under the UCL and CLRA. Under common law fraud, the duty to disclose exists "whether the product is a mechanical heart valve or frozen yogurt." *Kahn v. Shiley*, 217 Cal. App. 3d 848, 858 (1990).

Because Plaintiff's complaint sets forth facts establishing (1) a material defect, (2) of which Apple has exclusive knowledge and of which (3) Apply has actively concealed, Plaintiffs have stated a claim under the UCL, CLRA and common law fraud. Accordingly, the motion to dismiss should be denied.

I. PLAINTIFF'S COMPLAINT PREDICATED ON APPLE'S FRAUDULENT OMISSION COMPLIES WITH FRCP 9(b).

Plaintiff's First Amended Complaint was dismissed for failure to comply with the requirements of FRCP 9(b). It must be noted that Plaintiff has *never* argued that Rule 9(b) does not apply to Plaintiff's claim. Rather, Plaintiff merely notes that 9(b) imposes a *lower* particularity standard on fraudulent omission claims than exists for fraudulent misrepresentation claims. This lower standard does not exist because California courts do not require heightened fraud pleading for

UCL and CLRA claims. Rather this lower standard exists because, by their nature, omission claims are predicated on information *concealed* from the Plaintiff and the public. Apple's characterization of the heightened pleading standard for fraud claims under Rule 9(b) ignores this distinction and the clear law supporting it.

A. RULE 9(b) IMPOSES A LOWER PARTICULARITY STANDARD ON FRAUDULENT OMISSION CLAIMS, WHICH PLAINTIFF HAS MET.

Apple ignores that this case is based on Apple's fraudulent *omission* of material facts. *See* SAC ¶¶ 3, 11, 21, 26, 34-35. Under circumstances such as these, federal courts do not require the same specificity in pleading fraud claims that would be applied to an affirmative misrepresentation case because "a plaintiff in a fraud by omission suit will not be able to specify the time, place, and specific content of an omission as precisely as would a plaintiff in a false representation claim. Another judge in this district has recognized that 'a fraud by omission claim can succeed without the same level of specificity required by a normal fraud claim.'" *Falk v. General Motors Corp.*, 496 F.Supp.2d 1088, 1098-99 (N.D. Cal. 2007). *See also Washington v. Baenziger*, 673 F.Supp. 1478, 1482 (N.D. Cal.1987) ("Where the fraud consists of omissions on the part of the defendants, the plaintiff may find alternative ways to plead the particular circumstances of the fraud. [F]or example, a plaintiff cannot plead either the specific time of the omission or the place, as he is not alleging an act, but a failure to act.") (internal citations and quotations omitted); *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, Case No. 1:08-wp-65000, at 28 (N.D. Ohio Nov. 3, 2009) ("Courts have also recognized, however, that Rule 9(b) does not require fraud-by-omission claims to 'specify the time, place, and specific content of an omission as precisely as would a . . . false representation claim.' Requiring a plaintiff to identify (or suffer dismissal) the precise time, place, and content of an event that (by definition) did not occur would effectively gut state laws prohibiting fraud-by-omission."); *Zwicker v. General Motors Corp*., 2007 WL 5309204 at *4 (W.D.Wash. July 26, 2007) (defendant "overstates Rule 9(b)'s requirements in fraudulent omission cases. . . . This Court finds the reasoning of *Falk* on the exact issue before this Court persuasive and holds that the heightened pleading requirement is relaxed in cases of fraudulent omissions.").

In the SAC, plaintiff has notified Apple of the time, place and circumstances of the omission

in conformance with 9(b). See SAC ¶¶ 25-38. The manner of pleading the omission claims utilized in the SAC was explicitly adopted from the style of pleading used in *In re Whirlpool Corp.* In *In re Whirlpool Corp.*, the plaintiffs alleged a defective product design and brought, among others, a fraud by omission claim. There, the district court held that these virtually identical in style and content pleading statements "are sufficient to meet Rule 9(b)'s particularity requirement." *Id.* at 29. (*Compare* ¶¶ 25-38 of Plaintiff's SAC here to ¶¶ 26-55 of Plaintiff's Second Amended Master Complaint in *Whirlpool*, attached hereto as Exhibit 2) The *Whirlpool* court noted specifically that

> Plaintiffs' fraud-by-omission claims notify Whirlpool of the time (never), place (nowhere), and content (nothing) of the alleged misrepresentations, the Plaintiffs' alleged reliance (materiality), the fraudulent scheme (Whirlpool's knowledge of the supposed defects and problems), its fraudulent intent (failure to disclose them), and the resulting injury (overpayment). Rule 9(b) does not require more.

Id. (citations omitted). Under this well-established law, plaintiff here has satisfied FRCP 9(b).

B. THE COURT'S PRIOR 9(b) RULING WAS PREDICATED ON A FAILURE TO PLEAD FACTS THAT WOULD COMPLY WITH THE *DAUGHERTY/ OESTREICHER* LINE OF CASES, THE HOLDINGS OF WHICH DO NOT APPLY IN LIGHT OF *TOBACCO II*.

A fair reading of the Court's opinion dismissing Plaintiff's First Amended Complaint on FRCP 9(b) grounds is that the Court was not concerned with the specificity in Plaintiff's complaint as much as the Court instead felt that Plaintiff had not plead that a product safety issue was implicated by the vertical lines defect as *Daugherty* and *Oestreicher* might require. For the reasons discussed *infra*, Plaintiff need not plead product safety issues in order to state a claim for fraudulent omission under the UCL, CLRA or common law fraud.

Indeed, Plaintiff's allegations here meet the requirements of *Iqbal* and *Twombley*. As a Court in this District recently observed:

> In *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam), decided two weeks after *Twombly*, the Court clarified that *Twombly* did not signal a switch to fact-pleading in the federal courts. . . . the Court notes the parties' respective arguments about the proper standard for a motion to dismiss after the Supreme Court's opinion in *Twombly*. *In spite of arguments to the contrary, the pleading standard under the Federal Rules of Civil Procedure is*

unchanged and, so too, the 12(b)(6) standard.

Villegas v. J.P. Morgan Chase & Co., 2009 WL 605833 at *2-3 (N.D.Cal. March 09, 2009) (emphasis added). Thus, it remains the case that a complaint passes Rule 12 muster when it puts the defendant on notice of the claims against it and includes some plausible factual averments beyond mere recitation of legal elements. *Id.* at *3 ("By requiring plausibility on the face of the complaint, the Supreme Court was not re-writing Rule 8's requirement of a short and plain statement. . . . Rule 8(a) requires a claimant to provide 'fair notice' of the nature of the claim and the 'grounds upon which it rests.'"). It is also still the case that, "[f]or purposes of such a motion, the complaint is construed in the light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true" and that "all reasonable inferences are to be drawn in favor of the plaintiff." *Stoehr v. UBS Securities, LLC*, 2008 WL 2705575 at *2 (N.D.Cal. July 10, 2008).

II. THE DUTY TO DISCLOSE UNDER THE UCL AND CLRA IS NOT LIMITED TO SITUATIONS INVOLVING PRODUCT SAFETY.

Plaintiff here has asserted three causes of action, all arising under California substantive law. The case is before the Court on the basis of diversity jurisdiction under the requirements of the Class Action Fairness Act. The duty of this Court sitting in diversity is to apply state substantive law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). This burden is easy to carry out if the state's highest court has directly addressed the legal issue that governs the question the Court has to decide. However, that is frequently not the case, and here the California Supreme Court has not directly addressed the question of whether the duty to disclose a defect under the CLRA or UCL is limited to situations where safety could be at issue if the defect were not disclosed.

If, as is the case here, the California Supreme Court has yet to decide the issue at hand, "the Court must conduct a thorough analysis of all relevant sources of law and *attempt to approximate the decision of the California Supreme Court*." *Wolpin v. Philip Morris Inc.*, 189 F.R.D. 418, 430 (C.D. Cal. 1999) (emphasis added). *See also Nidds v. Schindler Elevator Corp.*, 1994 WL 675719, *4 (N.D. Cal. Nov. 17, 1994) ("If the state's highest court has yet to decide the issue, the district court must attempt to predict how the state supreme court would rule.").

In carrying out its duty sitting in diversity here, Plaintiff submits that the Court cannot point

to any evidence suggesting that the California Supreme Court would limit the CLRA and UCL in the manner Apple urges. Indeed, the Court in its comments at the last hearing answered the question at issue here when it noted that the California Supreme Court "always have [erred on the side of expansiveness] with regard to the UCL." (8/14/09 Tr. at 19:25-20:1)

A. IN CALIFORNIA, A DUTY TO DISCLOSE IS ESTABLISHED IF APPLE IS SHOWN TO HAVE HAD EXCLUSIVE KNOWEDGE OF MATERIAL FACTS NOT KNOWN TO PLAINTIFF *OR* WHERE APPLE HAS ACTIVELY CONCEALED A MATERIAL FACT FROM PLAINTIFF.

It is black letter law in California that a Plaintiff states a claim for fraudulent omission by alleging that a defendant has a duty to disclose by establishing one or more of the following circumstances:

> (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material fact.

LiMandri v. Judkins, 52 Cal. App. 4th 326, 337 (1997). The *LiMandri* factors have been cited without controversy by California courts over 80 times. As stated in the SAC, Apple has a duty to disclose by virtue of the second and third circumstances.[1]

B. IN LIGHT OF *TOBACCO II*, THE CALIFORNIA SUPREME COURT CLEARLY WOULD NOT LIMIT THE DUTY TO DISCLOSE TO SITUATIONS INVOLVING PRODUCT SAFETY.

A handful of lower state courts and federal courts sitting in diversity have reached the conclusion that the *LiMandri* factors do not mean what they say unless product safety is implicated. *Daugherty*; *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964 (N.D. Cal. 2008); *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255 (2006); *Long v. Hewlett-Packard Co.*, 2007 WL 2994812 (N.D. Cal. July 27, 2007); *Hoey v. Sony Elecs. Inc.*, 515 F. Supp. 2d 1099 (N.D. Cal. 2007).

[1] The existence of a duty to disclose establishes not only a violation of the CLRA but also the unlawful and unfair prongs of the UCL. Apple's argument that the unlawful and unfair prongs have not been met is entirely predicated on a lack of a duty to disclose. (See Apple Motion to Dismiss, at 7-9)

Notably, *LiMandri* itself does not provide this safety qualification, and the facts of *LiMandri* did not lend themselves to such a limitation. Plaintiff respectfully submits that, in addition to a raft of other defects/distinctions discussed below, each of these product safety-limited decisions fail to predict what the California Supreme Court would do if confronted with the issue, and each such case was decided before the California Supreme Court's latest decision involving the UCL -- *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009) – a decision that leaves little room to doubt where the California Supreme Court would come down on the scope of the duty to disclose.

In *Tobacco II*, the Court reached a conclusion concerning class certification requirements applicable to the UCL that exist in no other state nor under federal law: that only named class representatives need to show reliance, and thus that reliance cannot create individual issues which could serve as a bar to class certification:

> Notably, the references in section 17203 to one who wishes to pursue UCL claims on behalf others are in the singular; that is, the "person" and the "claimant" who pursues such claims must meet the standing requirements of section 17204 and comply with Code of Civil Procedure section 382. *The conclusion that must be drawn from these words is that only this individual – the representative plaintiff – is required to meet the standing requirements.* Thus, the plain language of the statute lends no support to the trial court's conclusion that all unnamed class members in a UCL class action must demonstrate section 17204 standing.

Id. at 315-16 (emphasis added). The California Supreme Court's holding in *Tobacco II* has justifiably been characterized as breathtakingly expansive by legal commentators. *See California Supreme Court Issues Opinion in Tobacco II Cases Re: Applicability of Standing Requirements for Unnamed Class Members*, Cal Insurance Regulation, May 18, 2009 (noting the decision is "An apparent victory for the plaintiff's bar and the removal of a bar to putative UCL class actions brought on behalf of individuals who have questionably suffered any injury-in-fact.") (attached as Exhibit 3 hereto[2]); Luanne Sacks et. al., *In re Tobacco II*: California Supreme Court clarified standing and reliance, DLA Piper, May 21, 2009 ("The decision may, in certain circumstances, reinvigorate filing of class actions under the UCL….The standing hurdle for absent class members

[2]available at www.calinsuranceregulation.com/home/2009/5/18/California-supreme-curt-issues-opinion-in-tobacco-ii-cases.html

has been set aside by California courts for such actions.") (attached as Exhibit 4 hereto[3]). Given this recent decision, it is clear that the California Supreme Court would not limit the UCL as previous cases have.

C. THE SAC PROPERLY STATES A CLAIM FOR MISREPRESENTATION BY OMISSION AS A RESULT OF APPLE'S DUTY TO DISCLOSE UNDER THE *LIMANDRI* FACTORS.

1. APPLE HAS A DUTY TO DISCLOSE THE VERTICAL LINE DEFECT BECAUSE IT HAS EXCLUSIVE KNOWLEDGE OF MATERIALS FACTS NOT KNOWN TO PLAINTIFF

The SAC sets forth several specific facts, which taken as true as they must be at this stage, establish Apple's duty to disclose as a result of its exclusive knowledge of material facts. These facts include:

- Apple knows that a very high percentage of iMac display screens will develop the vertical line problem within 2-3 years of first use. Apple is exclusively aware of this because only Apple has all the data that reveals the depth of the problem. (SAC, at ¶23)
- Apple does not make public the number of complaints it receives, nor does it disclose the number of warranty claims or repair orders it receives, let alone reveal that information by part repaired or replaced or the problem with those parts repaired or replaced. (SAC, at ¶23)
- Apple, the designer of the screen and the components that interact with the screen, has exclusive knowledge of the design or equipment characteristics that cause the defect. (SAC, at ¶27)
- The Defect, while obvious to an expert engineer, is latent and not something that a Plaintiff or Class members could, in the exercise of reasonable diligence, have discovered independently prior to purchase. (SAC, at ¶ 86)

The facts set forth above are of the type that courts have found adequate to state a claim. For example, the court in *Falk* found a duty to disclose and thus fraudulent concealment on the part of

[3] available at www.dlapiper.com/california-supreme-court-clarifies-standing-and-reliance-requirements/

GM because of its exclusive knowledge of a speedometer failure defect:

> Plaintiffs allege that GM had exclusive knowledge of the putative defect in their speedometers. Plaintiffs claim that "[o]nly GM had access to the aggregate data from its dealers[,] only GM had access to pre-release testing data[, and] only GM had access to the numerous complaints from its customers." When accepted as true for the purposes of this Rule 12(b)(6) motion, plaintiffs' material allegations suffice to state a claim that GM had exclusive knowledge of the alleged defect in their speedometers. The record of complaints to GM between 2003 and 2007 show that GM was clearly aware of a problem with its speedometers; the record makes it equally clear that customers only became aware of the problem if they actually experienced it first-hand. Since, as plaintiffs argue, GM "was in a superior position to know" that its speedometers might fail, plaintiffs successfully state a CLRA claim for omission of a material fact which lay within GM's exclusive knowledge. This alone defeats GM's 12(b)(6) motion to dismiss for failure to state a claim.

496 F. Supp.2d at 1096-97. These facts, found sufficient to state a claim on a Rule 12 motion, are almost identical to the facts alleged in the instant complaint.

Apple's reliance on *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824 (2006) is entirely misplaced because in *Daugherty*, Honda had *admitted* the existence of the defect and promised to remedy it through a special extended warranty program. The plaintiffs in *Daugherty* were trying to extend the warranty program or include earlier model years in the program, claiming that certain people were left out of the notification program because they owned vehicles that were manufactured before 1994, and that Honda had not provided adequate notice of the program to those who were included in it. *Id.* at 827. It is difficult to argue that Honda had exclusive knowledge of the defect after Honda had admitted the existence of the defect and offered to have it remedied. Here, Apple has recalled nothing, has made no notification to any part of the class, and in facts has continued to deny the existence of the defect. This case is thus nothing like *Daugherty.*

Further, *Daugherty* actually supports the ability of Plaintiffs to proceed on a fraudulent omission basis so long as the factual predicate of such a claim is established. As the *Falk* court noted in discussing *Daugherty* and *Bardin v. DaimlerChrysler Corp.*, 136 Cal.App.4th 1255, 39 Cal.Rptr.3d 634 (2006), another case upon which Apple relies,

> In both of these cases, the court's decision to dismiss a claim for unlawful omission rested on the lack of a duty to disclose. *Both Bardin and Daugherty allow CLRA claims for certain omissions*, however, when the "omission [is] . . . of a fact the defendant was obliged to disclose."....Plaintiffs can therefore successfully pursue a CLRA claim, despite *Daugherty* and *Bardin*, if GM was "obliged to disclose" the potential for problems with the speedometers in certain vehicles....

496 F. Supp.2d at 1096-97 (quoting *Daugherty*, 144 Cal.App.4th at 824, 51).

Apple tries to argue that it is absolved of a duty to disclose as a result of the complaints on the Internet. (Apple Motion at 8) But this is a silly argument, as it ignores (1) the averment that only Apple knows the complete universe of complaints and warranty claims (a consumer who spent hours searching the Internet might know of those complaints where the iMac owner decided to post their complaint on the internet, which is presumably a small part of the whole); and (2) the complaints at most establish that others are having a similar problem, but not the existence of or cause of the defect, which only Apple knows because of its proprietary knowledge of the design and component testing and overall level of complaints and claims.

Indeed, the sheer number of publicly available complaints was a factor in *Plaintiff's favor* in *Falk*, as the court noted that

> In support of their claim, plaintiffs present several pages of quotations containing Internet complaints about GM speedometers, all for vehicles sold between 2003 and 2007. The amassed weight of these complaints suggests that plaintiffs' speedometer failures were not isolated cases. Instead, when viewed in the light most favorably to the plaintiffs, these collected complaints suggest strongly that there was a defect in the design of certain GM speedometers in the years from 2003 to 2007, which caused the speedometers to fail unexpectedly and without warning.

Id. at 196.

2. APPLE HAS A DUTY TO DISCLOSE THE VERTICAL LINE DEFECT BECAUSE IT HAS ACTIVELY CONCEALED THE EXISTENCE OF THIS DEFECT FROM PLAINTIFF

Apple also ignores the averments of the complaint that establish Apple's active concealment of the defect:

- Apple has failed to take corrective action with regard to the Defect. Instead, Apple has

responded by uniformly denying, on its website and in its retail stores, customer complaints and has sought to "run out the clock" on the warranties that accompanied the iMac. (SAC, at ¶31)

- There is nothing in Apple's advertising or marketing materials that discloses the truth about the Defect, despite ample evidence that Apple is aware of the problem by virtue of, nothing else, thousands and thousands of consumer complaints on the Internet and on Apple's own web site. Apple has at all times denied the existence of any Defect in the iMac. (SAC, at ¶59)

These factual averments establish that Apple has *actively* concealed the problem from consumers. It has not anywhere acknowledged that there is a vertical line screen defect and it continues to deny it in the apparent face of an avalanche of consumer complaints. Indeed, it continues to deny the defect even in this litigation.

This easily meets the legal standard, which is that "active concealment occurs when a defendant prevents the discovery of material facts." *Am-Mark Label, Inc. v. Chiang*, 2007 WL 4424952 at *9 (Cal. App. 2 Dist. December 19, 2007) (citing 5 Witkin, Summary of Cal. Law, Torts §798 at 1155 (10th Ed. 2005)). *Compare Stickrath v. Globalstar, Inc.*, 527 F. Supp.2d 992, 1000-01 (N.D. Cal. 2007) (finding that, after complaint was replead to state materiality of the omission, the following allegation likely sufficed to satisfy a duty to disclose based on active concealment: "Upon information and belief, Defendant has known of the degradation of the communications satellites and associated satellite telephone service since at least 2003, if not earlier, and has concealed from purchasers of the satellite telephone service and/or failed to alert the purchasers of the degradation of the communications satellites and associated satellite telephone service."). Here, consumers who complained to Apple have not been told of Apple's knowledge of the defect.

III. COMMON LAW FRAUD HAS A BROADER DUTY TO DISCLOSE IN CALIFORNIA THAN THAT WHICH EXISTS FOR CAUSES OF ACTION UNDER THE UCL.

Plaintiff has also set forth a claim for common law fraud, and that claim is evaluated under different legal standards that those which are applied to UCL and CLRA claims. It is well-recognized that common law fraud encompasses a broader duty to disclose in California than is

called for by the UCL. In a common law fraud claim in California, "a manufacturer of a product may be liable for fraud when it conceals material product information from potential users. *This is true whether the product is a mechanical heart valve or frozen yogurt.*" *Kahn v. Shiley,* 217 Cal. App. 3d 848, 858 (1990) (emphasis added). Therefore, a claim under common law fraud encompasses a duty to disclose for a broad variety of scenarios, including the one that Plaintiff has alleged.

Indeed, the *Oestreicher* district court noted and emphasized this distinction its opinion, stating that the CLRA "does not codify all instances of common law fraud." 544 F. Supp.2d 964, 970 (N.D. Cal. 2008). The *Oestreicher* district court then rejected the Plaintiff's reliance on *Khan v. Shiley* to support their CLRA claim by stating as follows:

> [P]laintiff argues that California law has no requirement of a safety hazard before a duty to disclose material facts about a product arises. Though *this is correct with respect to common law*, it does not demonstrate why the CLRA must be expanded from its present scope . . . . [P]laintiff's proposed expansion [of the CLRA] . . . is also wholly unnecessary because *material product defects that are knowingly kept secret are also already actionable under common law fraud.* The court finds unpersuasive plaintiff's rationale for making the CLRA co-extensive with common law fraud.

Id. (emphasis added).

Thus regardless of the duty to disclose under the CLRA, the California courts, as recognized even by the *Oestreicher* district court, have noted that common law fraud is broader than statutory fraud and that a safety hazard is not required in order to trigger a duty to disclose.

Plaintiff here has properly alleged a claim for common law fraud. The duty to disclose factors are discussed above, and the Court itself noted the material nature of the vertical screen defect at the August 4 hearing when it stated that "you're talking about a type of failure that goes to the very heart of what you buy a computer for." (Tr. At 19:14-16. Attached as Exhibit 1)

IV. CONCLUSION

Judged against these standards, it is clear that Plaintiff's complaint adequately states claims against Apple that should be tested in discovery.

Dated: November 13, 2009

Respectfully Submitted,

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