Jeffrey L. Fazio (146043) (jlf@fazmiclaw.com)
Dina E. Micheletti (184141) (dem@fazmiclaw.com)
FAZIO | MICHELETTI LLP
2410 Camino Ramon, Suite 315
San Ramon, CA 94583
T: 925-543-2555
F: 925-369-0344

Kimberly A. Kralowec (163158) (kkralowec@kraloweclaw.com)
THE KRALOWEC LAW GROUP
188 The Embarcadero, Suite 800
San Francisco, CA 94105
T: 415-546-6800
F: 415-546-6801

Earl L. Bohachek (55476)
LAW OFFICES OF EARL L. BOHACHEK
One Maritime Plaza
San Francisco, CA 94111
T: 415-434-8100
F: 415-781-1034

Attorneys for Plaintiff, Charlene Gallion,
on behalf of herself and all others
similarly situated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHARLENE GALLION, on behalf of herself and all others similarly situated,

Plaintiff,

v.

APPLE, INC., a California corporation, and DOES 1-100, inclusive,

Defendants.

No. CV 10-01610-RS

JOINT CASE MANAGEMENT CONFERENCE STATEMENT

DATE: July 29, 2010
TIME: 10:00 a.m.
COURTROOM: 3

Hon. Richard Seeborg

Pursuant to Federal Rule of Civil Procedure 26(f), Civil Local Rule 16-3, this Court's Standing Order Re: Initial Case Management, the Standing Order for All Judges of the Northern District of California Re Contents of Joint Case Management Statement, and Reassignment Order dated April 21, 2010 (Docket No. 8), the parties jointly submit this Case Management Conference Statement.

1. JURISDICTION AND SERVICE

***Jurisdiction*:** This Court has diversity jurisdiction over the claims asserted herein on behalf of a proposed nationwide class pursuant to 28 U.S.C. section 1332, as amended in February 2005 by the Class Action Fairness Act. Jurisdiction is proper because **(a)** the amount in controversy in this class action exceeds five million dollars, exclusive of interest and costs; and **(b)** more than two-thirds of the proposed Plaintiff class are citizens of a state different than the Defendant.

***Service of Process*:** All currently named parties have been served.

2. FACTS

a. ***Plaintiff's recitation of relevant facts:*** This action was commenced on April 15, 2010. Plaintiff Charlene Gallion alleges that defendant Apple, Inc., has sold millions of iPhone, iPhone 3G, iPhone 3GS, and iPod touch devices ("Class Devices") in the United States alone, and that Defendant has a policy of wrongfully voiding coverage under the exclusion provisions of two warranties at issue in this lawsuit. One is a one-year standard warranty ("Standard Warranty"), which is included in the purchase price of the Class Device and obligates Defendant to repair or replace defective Class Devices for free during that one-year period, unless the problem about which the consumer complains constitutes "damage caused by . . . ***liquid spill or submersion*** . . . ."[1] The other is the AppleCare Protection Plan (the "Extended Warranty"), which costs an additional $59 for the iPod touch and $69 for the iPhone and obligates Defendant

[1] Plaintiff's warranty contains this language. Other versions of Defendant's Standard Warranty in effect during the class period omit the "liquid spill or submersion" language, stating that they exclude coverage for "damage caused by accident, abuse, misuse, flood, fire, earthquake, or other external causes." Both versions of the damage exclusion are referred to herein collectively as the "Liquid-Damage Exclusion."

to repair or replace Class Devices for free for two years from the date of original purchase, subject to (*inter alia*) the Liquid-Damage Exclusion.

More specifically, Plaintiff alleges that, if a Liquid Submersion Indicator ("LSI") that Defendant installs in the headphone jack and/or the dock connector of all Class Devices turns red or pink, Defendant advises consumers who request that Defendant repair or replace their malfunctioning or nonfunctioning Class Devices that their warranties are void because their Class Device has been damaged by liquid—without making any effort to inspect the Class Devices for signs of actual liquid damage, even though Defendant knows that a triggered LSI is ***not*** a reliable indicator of actual liquid damage. Plaintiff also alleges that, by wrongfully rejecting valid claims for the repair or replacement of Class Devices under warranty, Defendant has saved tens of millions of dollars in warranty expenses and has reaped tens of millions of dollars in revenue by forcing consumers to pay for the repair or replacement of their Class Devices on their own.

Defendant tells consumers that that the purpose of external LSIs is to enable Defendant to determine "whether liquid has entered the device" and has caused damage to a Class Device, and that external LSIs cannot be triggered by humidity and temperature changes that are "within the product's environmental requirements described by Apple[.]" Plaintiff alleges that Defendant knew these representations were false when it made them: Defendant is aware that external LSIs turn red or pink when used within specifications, even when they are not exposed to any moisture at all. Nonetheless, Defendant continues to deny thousands of warranty claims based solely on the color of its external LSIs, without making any effort to determine whether Class Devices have actually been damaged by exposure to liquid, notwithstanding the unambiguous language of the Liquid-Damage Exclusion, which excludes coverage only when a Class Device malfunctions as a result of actual liquid damage—and ***not*** merely because an LSI has been triggered.

b. ***Defendant's recitation of relevant facts:*** Plaintiff's factual and legal contentions are without merit. The Liquid Contact Indicators ("LCIs") in Apple's iPhone and iPod touch devices have been thoroughly tested and are a reliable indicator that the devices have actually

been exposed to liquids. Apple's iPhone and iPod touch contain electronic components that are damaged by exposure to liquids such as water, coffee, juice and soda. Plaintiff seeks to force Apple to repair under warranty products that have been damaged by user abuse. Damage or malfunctions caused by liquid exposure, like other user-caused damage, do not result from any defect in materials or workmanship and, accordingly, are not covered by express or implied warranties. It is beyond dispute that members of the putative class have in fact damaged their iPhones and iPods by liquid exposure; accordingly, plaintiff's putative class cannot be certified.

3. LEGAL ISSUES

The nature and basis of the parties' claims and defenses, including the principal disputed points of law, are as follows:

a. whether the representations Defendant has allegedly made about the nature, purpose, and accuracy of the external LSIs are false;

b. whether Defendant was, and is, under a duty to disclose information about the true nature and purpose of the external LSIs;

c. whether Defendant intentionally withheld, failed to disclose, and/or intentionally concealed information about the external LSIs;

d. whether the validity of Defendant's alleged invocation of the Liquid-Damage Exclusion based on one or more triggered LSIs depends on its ability to establish that the Class Device actually was damaged by liquid;

e. whether relying on the external LSIs to treat the Standard Warranty and the Extended Warranty as void is unconscionable under the circumstances alleged in the Complaint;

f. whether Defendant has breached its Standard and Extended Warranties by allegedly denying coverage when an external LSIs is triggered without verifying that Class Devices have actually been damaged by submersion or immersion in liquid;

g. whether Defendant is subject to liability for common-law fraud;

h. whether Defendant is subject to liability for violating the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750-1784;

i. whether Defendant's alleged conduct has violated the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17209;

j. whether Defendant's alleged conduct has violated the False Advertising Law, Cal. Bus. & Prof. Code §§ 17500-17536;

k. whether Defendant's alleged conduct has violated the Song-Beverly Warranty Act, Cal. Civ. Code §§ 1790-1793.2;

l. whether Defendant has been unjustly enriched as a result of its allegedly fraudulent conduct, such that it would be inequitable for Defendant to retain the benefits allegedly conferred upon it by Plaintiff and the class;

m. whether Plaintiff's claims satisfy the criteria for class certification under Federal Rule of Civil Procedure 23 and/or California Civil Code section 1781;

n. whether compensatory or consequential damages should be awarded to Plaintiff and members of the proposed class;

o. whether punitive damages should be awarded to Plaintiff and members of the proposed class;

p. whether restitution should be awarded to Plaintiff and members of the proposed class; and

q. whether other, additional relief is appropriate, and what that relief should be.

4. MOTIONS

There are no pending motions.

Plaintiff's Statement. Plaintiff originally anticipated filing a motion for class certification in approximately October 2010 (barring unforeseen difficulties that would delay its preparation and filing). Defendant has recently announced, however, that its document production will be "agonizingly slow," "frustrating," and will cause Plaintiff's counsel to want to "tear their hair out." And although Defendant's counsel have stated that many of the difficulties they foresee in responding to document requests stem from Defendant's use of computers that are on a "non-Windows platform," there are two basic reasons no such problem should exist.

First, the parties have agreed that documents will be produced in TIFF or PDF format (which are readable by all computers) for use in Summation databases, which should resolve any issues pertaining to "non-Windows platforms." Second, even if documents such as email were produced in native (*e.g.,* Apple Mail) format, that would not be a problem in any event because Plaintiff's counsel (Fazio | Micheletti LLP) use Apple software and hardware—from their network server to their desktop and laptop computers.

In addition to seeking class certification, Plaintiff expects to file a motion for "partial" summary judgment of the aspect of Plaintiff's claim for declaratory judgment that pertains to Defendant's burden of establishing that it was entitled to deny coverage based on the terms of the Liquid-Damage Exclusion provisions of the Standard Warranty and the Extended Warranty.

Defendant's Statement. As required by Rule 26, defense counsel was candid with Plaintiff's counsel respecting the challenges of electronic discovery on a non-Windows platform. Plaintiff's mischaracterization of the Parties' discovery conferences does not promote the effective and efficient prosecution of this litigation.

Defendant anticipates filing a motion for summary judgment. Plaintiff's proposed "partial summary judgment" motion seeking to alter the Parties' burden of proof is procedurally improper and legally incorrect.

5. AMENDMENT OF PLEADINGS

Plaintiff anticipates that she may amend her complaint within the next 90 days to add named Plaintiffs/proposed class representatives. Plaintiff reserves the right to seek leave to amend as may be warranted in the future.

Defendant proposes that a September 30, 2010, deadline should be set for all amendments to the complaint.

6. EVIDENCE PRESERVATION

Defendant has advised Plaintiff that it has initiated a litigation hold to preserve evidence relating to this lawsuit and other, related claims

7. DISCLOSURES

The parties will exchange the initial disclosures required by Federal Rule of Civil

Procedure 26(a)(1) no later than July 23, 2010.

8. DISCOVERY

Plaintiff's Statement. Plaintiff served Defendant with a First Request for Production of Documents pursuant to Rule 34 shortly after the parties completed their Rule 26(f) conference on June 23, 2010. Plaintiff also anticipates propounding at least one set of interrogatories and requests for admissions, and to engage in targeted follow-up discovery, which includes taking the depositions of **(a)** persons identified in the Defendant's documents and in its initial disclosure statement as having knowledge of the relevant issues; **(b)** persons designated by Defendant to testify on its behalf about relevant issues pursuant to Federal Rule of Civil Procedure 30(b)(6); **(c)** third-party witnesses; **(d)** persons designated by Defendant as expert witnesses; and **(e)** persons whose testimony Defendant offers in opposition to Plaintiff's motion for class certification. In addition to the foregoing, Plaintiff will serve third parties (*e.g.,* AT&T Corporation, which provides wireless services for the iPhone, and 3M Company, which manufactures the LSIs Defendant installs in Class Devices) with subpoenas *duces tecum* before the parties appear before the Court for the initial Case Management Conference.

In light of the number of depositions planned at this juncture, and because Plaintiff has not yet received the Defendant's document production and initial disclosures, Plaintiff is not in a position to know the precise scope of necessary discovery at this juncture. The parties have, however, agreed to strive to conduct discovery in the most efficient manner possible. Accordingly, the parties have agreed to coordinate discovery with discovery that is conducted in related cases (discussed in Section 10 herein) to the extent that such coordination efforts do not have the effect of complicating and slowing the progress of discovery, rather than simplifying and expediting it. Toward that end, on May 26, 2010, Plaintiff provided Defendant with a proposed draft of a Stipulated Protective Order ("SPO"), which is based on protective orders that have been adopted by state and federal courts in class actions and other forms of complex litigation in which Plaintiff's counsel have been involved since the mid-1990s. Plaintiff has also provided a draft of the SPO to counsel for the plaintiffs in the related matters. Defendant responded by sending Plaintiff its own draft of a stipulated protective order on July 8, 2010,

which differs substantially from the SPO. Based on a discussion by the parties' counsel the following day (July 9), Defendant's primary concern is protecting sensitive information from disclosure to competitors. Plaintiff has responded to that concern by importing into the SPO the provisions pertaining to competitors from Defendant's draft. The parties have yet to discuss whether that revision resolves the issue.

Defendant's Statement. Defendant's discovery responses and initial disclosures are not due as of the date of this statement. As noted, the Parties are negotiating the terms of a protective order regarding confidential information.

Defendant's counsel has advised Plaintiff's counsel that due to the breadth of the proposed discovery and various issues particular to Apple, they expect the document production process will be very time-consuming. Defendant intends to produce documents on a rolling basis until complete and will confer with Plaintiff concerning the status of that effort as needed during document production.

Defendant anticipates propounding written discovery and taking the deposition of the named Plaintiff.

9. CLASS ACTION

Plaintiff originally proposed to move for class certification by October 8, 2010. In light of Defense counsel's representations about the anticipated "agonizingly" slow pace of Defendant's document production, Plaintiff does not believe that it will be possible to move for class certification before the end of this year, absent active case management and cooperation from Defense counsel.

Defendant believes it is premature to set a class certification schedule given the uncertain but significant time necessary to complete the discovery Plaintiff proposes prior to filing the motion. Defendant proposes that a class certification schedule be set at a future case management conference once discovery has been substantially completed.

10. RELATED CASES

Pennington v. Apple, Inc., No. 1-10-CV-162659, is a related case that is pending in the Santa Clara County Superior Court. Unlike the present case, which seeks to certify a nationwide

class of consumers who own any iPhone or iPhone touch device equipped with external LSIs, the *Pennington* plaintiffs currently seek to certify a class of California consumers who own some, but not all, of the iPhones (and none of the iPods) at issue in the present case, and seek equitable relief, but not damages on behalf of the class proposed in *Pennington*. Plaintiffs' counsel in the *Pennington* matter has indicated to Defendant's counsel an intent to file an amended complaint potentially expanding the relief sought.[2]

Defendant has also received a demand letter from a New Jersey resident (Corsi) pursuant to the relevant provisions of the CLRA (*i.e.,* Cal. Civ. Code § 1782(a)), making claims similar to those in *Pennington* and the present case. Counsel for Corsi has advised Plaintiff's counsel that he provided Defendant with a demand letter on behalf of Corsi in November 2009. To date, Corsi has not filed a complaint, but Corsi's counsel has advised Plaintiff's counsel that a complaint will be filed in the near future.

11. RELIEF

Plaintiff seeks declaratory relief regarding the enforceability of Defendant's invocation of the exclusion provisions of the warranties at issue in this litigation, and a judicial declaration that the coverage period applicable to Class Devices is tolled from the date on which Defendant denied coverage based on a triggered external Liquid Submersion Indicator until the date on which owners of those Class Devices receive notification that Defendant's invocation of the Liquid-Damage Exclusion was not valid. Plaintiff also seeks, *inter alia*, **(a)** specific performance in the form of an order requiring Defendant to honor the terms of its Standard Warranty and its Extended Warranty; **(b)** an award of compensatory, incidental, consequential, and punitive damages according to proof adduced at trial; **(c)** an order enjoining Defendant from continuing to rely on LSIs as the sole means of determining whether a Class Device has actually been damaged

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[2] Although the present action was filed approximately three months after the *Pennington* action was filed, counsel for Plaintiff Gallion have been investigating the facts and researching the legal principles applicable to this action since September 2009. As discussed above, the core claims in *Pennington* are quite similar to those alleged in the present case—that Defendant has wrongfully denied warranty coverage based solely on triggered external LSIs—but seeks damages and other relief that the *Pennington* plaintiffs do not seek, and a nationwide class of all iPhone and iPod touch owners versus the California class of certain iPhone owners sought in *Pennington*.

as a result of exposure to liquid; **(d)** an award of restitution; and **(e)** an award of attorney fees and litigation expenses.

Defendant denies that Plaintiff or the putative class have been injured or damaged and further disputes that Plaintiff or the putative class are entitled to relief of any kind.

12. SETTLEMENT AND ADR

The parties do not believe that engaging in the ADR process prior to the commencement of discovery is likely to be an effective or efficient way to resolve this case. Moreover, Plaintiff believes that, without the discovery Plaintiff seeks, the ability to engage in meaningful, informed discussions about settlement will be sharply curtailed, hence the time and resources expended on such efforts pre-discovery are likely to be all but wasted. Nonetheless, the parties do not foreclose the possibility of engaging in ADR later, depending on developments in discovery and motions, including class certification and the dispositive motions mentioned above.

An ADR Phone Conference has been scheduled for July 26, 2010 at 10:00 a.m.

13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

The parties do not consent to assignment of this case to a United States Magistrate Judge for all purposes.

14. OTHER REFERENCES

The parties do not believe the case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict litigation.

15. NARROWING OF ISSUES

The parties do not anticipate any requests to bifurcate issues, claims or defenses. At this time, it is premature to attempt to identify specific issues that might be narrowed by stipulation.

16. EXPEDITED SCHEDULE

Although the parties are discussing ways that the litigation may be expedited through coordination efforts and an early motion for class certification, they do not believe that this is the type of case that is amenable to expedition by way of an expedited scheduling order.

17. SCHEDULING

As discussed in Section 9, above, Plaintiff has proposed a schedule for the class

certification brief and the hearing of Plaintiff's motion for class certification and Defendant proposes that a schedule be set at a future CMC after discovery has progressed. The parties respectfully suggest that other dates, such as the discovery cutoff, a deadline for the filing of dispositive motions, and the trial date, be set following the ruling on the class certification motion.

18. TRIAL

The parties agree that not all of Plaintiff's claims are subject to jury trial and that it is premature to estimate the length of trial prior to a ruling on class certification.

19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES/PERSONS

All required disclosure certificates have been filed. There are no such interests to report.

DATED: July 21, 2010 **FAZIO | MICHELETTI LLP**

by */s/ Jeffrey L. Fazio*
Jeffrey L. Fazio
Attorneys for Plaintiff, Charlene Gallion, on behalf of herself and the proposed class

DATED: July 21, 2010 **MORRISON | FOERSTER LLP**

by */s/ Andrew D. Muhlbach*
Andrew D. Muhlbach
Attorneys for Defendant, Apple, Inc.