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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 H. TIM HOFFMAN (049141)
ARTHUR W. LAZEAR (083603)
2 MORGAN M. MACK (212659)
HOFFMAN & LAZEAR
3 180 Grand Avenue, Suite 1550
Oakland, California 94612

4 MAX FOLKENFLIK, ESQ.
5 MARGARET McGERITY, ESQ.
FOLKENFLIK & MCGERITY
6 1500 Broadway, 21st Floor
New York, NY 10036
7 Telephone: (212) 757-0400
Facsimile: (212) 757-2010

8 Attorneys for Plaintiff
9 Sydney Leung

SBA

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

13 SYDNEY LEUNG, individually and on)
behalf of all others similarly situated,)

CASE NO.

C 07 4143

15 Plaintiff,

CLASS ACTION COMPLAINT FOR DAMAGES,
INJUNCTIVE RELIEF AND RESTITUTION

16 vs.

[JURY TRIAL DEMANDED]

17 APPLE COMPUTER, INC., AT&T, INC.,)
18 and DOES 1 through 50, inclusive,)

19 Defendants.
20
21

22 INTRODUCTION

23 1. This action arises out of Defendants' pattern and practice of failing to inform a
24 nationwide group of initial purchasers of the iPhone cellular telephone that annual fees of over \$100
25 would be required to replace the iPhone battery and maintain service while the battery was being
26 replaced. Plaintiff seeks the following for himself and others similarly situated: an award of actual,
27 compensatory and punitive damages; attorneys fees and costs; equitable relief; and other forms of
28 relief available under California and federal law.

1 \$100 would be required to replace the iPhone battery and maintain service while the battery was
2 being replaced.

3 JURISDICTION AND VENUE

4 18. This Court has jurisdiction pursuant to 28 U.S.C. §1332(d)(2) because diversity of
5 citizenship exists between parties in this action, the aggregate amount in controversy exceeds
6 \$5,000,000, and there are 100 or more members of the proposed plaintiff class.

7 19. Venue is proper in this District pursuant to 28 U.S.C. §1391. Plaintiff purchased
8 iPhones in the Northern District of California. Defendants advertised in this District and made
9 material omissions and misrepresentations and breaches of warranties in this District.

10 20. Assignment to the San Francisco division is proper because the iPhones were
11 purchased in the city and county of San Francisco.

12 FACTUAL BACKGROUND

13 21. The iPhone is a multimedia and internet-enabled mobile phone designed and sold by
14 Defendant Apple.

15 22. The iPhone was first sold on June 29, 2007 from Apple's retail stores, Apple's online
16 store, and from AT&T for a price of \$499 for a 4 GB model and \$599 for a 8 GB model.

17 23. Apple announced in their 2007 Q3 sales report and conference call that they sold
18 270,000 iPhones in the first 30 hours on launch weekend. Estimates for the first week of sales have
19 exceeded 500,000.

20 24. In addition to selling the iPhone at AT&T retail locations, AT&T sells and
21 exclusively provides mobile phone services to iPhone users.

22 25. The iPhone contains a battery within the sealed unit. This battery cannot be removed
23 by the consumer.

24 26. The iPhone battery must be replaced after 300 charges. Estimates for anticipated
25 battery replacement are one year or less.

26 27. Apple charges a fee of \$79, plus \$6.95 shipping and handling to replace the iPhone
27 battery.
28

1 28. Apple charges a fee of \$29 for use of an "AppleCare Service Phone" during the time
2 it takes Apple to replace the battery of an iPhone.

3 29. Plaintiff Sydney Leung bought two iPhones for \$599 each, plus tax, on June 29, 2007
4 in San Francisco, California. As a condition of using the iPhone, Plaintiff was obligated to agree to a
5 two-year service plan with AT&T.

6 30. Plaintiff was not informed at the time of purchase of the costs and procedures of
7 replacing the battery. Neither the box the iPhone was sold in nor the written information within the
8 box explained the costs and procedures required to change the iPhone battery.

9 31. Despite having knowledge of the time and expense required to change the iPhone
10 battery, Apple and AT&T did not disclose this information to the Plaintiff or the class in the months
11 of promotion leading up to the sale date or at the time of the sale.

12 CLASS ACTION ALLEGATIONS

13 32. Plaintiff's action is brought on behalf of himself and all others similarly situated. The
14 Class that Plaintiff seeks to represent is defined as all individuals or entities who at any time from
15 June 29, 2007 to the date of judgment in this action bought and implemented the iPhone and
16 sustained damages as a result.

17 33. At this time, the number of individuals in the Plaintiff Class is unknown and can only
18 be ascertained by discovery. However, the number exceeds 100, and the exact number can easily be
19 determined by obtaining account records from Defendants. Plaintiff anticipates that there will be
20 hundreds of thousands of class members.

21 34. This action satisfies the numerosity, commonality, typicality, and adequacy
22 requirements of Rule 23(a)(1)-(4), and the predominance and superiority requirements of Rule
23 23(b)(3) and the requirements of Rule 23(b)(2).

24 35. Federal Rule of Civil Procedure 23(a) establishes four threshold requirements for
25 class certification:

- 26
- 27 1. The class is so numerous that joinder of all members is impracticable;
 - 28 2. there are questions of law or fact common to the class;

1 3. the claims or defenses of the representative parties are typical of the claims or
2 defenses of the class; and

3 4. the representative parties will fairly and adequately protect the interest of the
4 class. FED.R.CIV.P. 23(a).

5 36. Class certification under Rule 23(b)(2) requires one finding: that the party opposing
6 the class has acted or refused to act on grounds generally applicable to the class, thereby making
7 appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a
8 whole. FED.R.CIV.P. 23(b)(2).

9 37. Class certification under Rule 23(b)(3) requires two findings: that common questions
10 of law and fact predominate and that a class action is superior to other forms available for fair and
11 efficient adjudication. FED.R.CIV.P. 23(b)(3).

12 38. The Plaintiff Class satisfies the numerosity standards. The Class is believed to
13 number in the hundreds of thousands of persons. As a result, joinder of all Class members in a single
14 action is impracticable.

15 39. There are questions of fact and law common to the Class which predominate over any
16 questions affecting only individual members. The questions of law and fact common to the Class
17 arising from Defendants' actions include, without limitation, the following:

- 18 a) whether, in marketing and selling the iPhone, Defendants failed to disclose the
19 time and expense replacement of the battery would require;
- 20 b) whether Defendants falsely and fraudulently misrepresented in their
21 advertisements, promotional materials and other materials, among other
22 things, the cost to replace the iPhone battery, the time required to replace the
23 iPhone battery, the inconvenience of replacing the iPhone battery, and the
24 convenience of the iPhone;
- 25 c) whether Defendants knew or should have known that the time and expense of
26 replacing the iPhone battery would affect initial sales of the iPhone;
- 27 d) whether Defendants knowingly omitted, suppressed or concealed material
28

- 1 facts about the time and expense of replacing the iPhone battery from the
2 media, the technology community and/or the consuming public;
- 3 e) whether Defendants' conduct constituted an unlawful, unfair or fraudulent
4 business act or practice within the meaning of California Business and
5 Professions Code § 17200;
- 6 f) whether Defendants' conduct constituted unfair, deceptive, untrue or
7 misleading advertising within the meaning of California Business and
8 Professions Code § 17200;
- 9 g) whether the costs and procedures of replacing the iPhone battery violate
10 Defendants' express or implied warranties; and
- 11 h) the appropriate measure of damages and other relief.

12

13 40. Common questions predominate over individual ones.

14 41. Plaintiff Leung, as the Class representative, is asserting claims and defenses typical of
15 the rest of the Class.

16 42. Plaintiff, as Class representative, will fairly and adequately represent the interests of
17 the Class. Mr. Leung has the same causes of action as the other Class members and does not have
18 interests adverse to them. Also, Mr. Leung is committed to vigorously prosecuting this lawsuit and
19 has retained experienced counsel, Hoffman & Lazear and Folkenflik & McGerity, for this purpose.

20 43. Plaintiff is aware of no difficulty that will be encountered in the management of this
21 litigation that would preclude maintaining this national Class action.

22 44. The names and addresses of potential Class members can be obtained from
23 Defendants. Notice can be provided to the members of the Class via-first class mail or otherwise as
24 directed by this Court.

25 AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT
26 (Breach of Contract)

27 45. Plaintiff repeats, realleges and incorporates each and every allegation contained in the
28 paragraphs above as if fully set forth herein.

1 46. The contract between Plaintiff and the Class and Defendants contained an implied
2 Duty of Good Faith and Fair Dealing.

3 47. Defendant breached its contract with Plaintiff and the Class.

4 48. As a result of the foregoing, Plaintiff and the Class incurred and will incur significant
5 damages based on Defendant's breach of contract in an amount to be proved at trial.

6 AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT
7 (Violation of Implied Warranty of Merchantability)

8 49. Plaintiff repeats, realleges and incorporates each and every allegation contained in the
9 paragraphs above as if fully set forth herein.

10 50. California Commercial Code §2314 provides in relevant part:

- 11 (1) Unless excluded or modified (Section 2316), a warranty that the goods shall
12 be merchantable is implied in a contract for their sale if the seller is a
13 merchant with respect to goods of that kind. Under this section the serving for
14 value of food or drink to be consumed either on the premises or elsewhere is a
15 sale.
16 (2) Goods to be merchantable must be at least such as
17 (a) Pass without objection in the trade under the contract description; and
18 (b) In the case of fungible goods, are of fair average quality within the
19 description; and
20 (c) Are fit for the ordinary purposes for which such goods are used; and
21 (d) Run, within the variations permitted by the agreement, of even kind,
22 quality and quantity within each unit and among all units involved; and
23 (e) Are adequately contained, packaged, and labeled as the agreement may
24 require; and
25 (f) Conform to the promises or affirmations of fact made on the container
26 or label if any.

27 Cal Com Code § 2314

28 51. The iPhone was not merchantable as required by law in that it was not adequately
labeled and failed to conform to the affirmations of fact of Defendants.

52. As a result of the foregoing, Plaintiff and the Class incurred and will incur significant
damages based on Defendant's breach of contract in an amount to be proved at trial.

1 AS AND FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANT
2 (Fraudulent Concealment)

3 53. Plaintiff repeats, realleges and incorporates each and every allegation contained in the
4 paragraphs above as if fully set forth herein.

5 54. Defendants concealed material facts as follows:

- 6 a) that the iPhone battery could not be replaced by the consumer directly;
7 b) that replacement of the battery cost \$79 plus \$6.95 in shipping in handling,
8 plus \$29 for a iPhone rental while the battery was being replaced;
9 c) that replacement of the iPhone battery was a process that took a number of
10 days;

11 55. Defendants concealed these facts with the intent to defraud and induce Plaintiff and
12 the Plaintiff Class to purchase the iPhone.

13 56. At the time Plaintiff and the class bought the iPhone, they were unaware of the
14 concealed or suppressed facts and would not have purchased the iPhone if they had been aware of the
15 facts.

16 57. As a result, of the foregoing Plaintiff and the Class incurred and will incur significant
17 damages based on Defendant's fraudulent concealment in an amount to be proved at trial.

18 AS AND FOR A FOURTH CAUSE OF ACTION AGAINST DEFENDANT
19 (Cal. Business and Professions Code § 17200 *et seq.*)

20 58. Plaintiff repeats, realleges and incorporates each and every allegation contained in the
21 paragraphs above as if fully set forth herein.

22 59. As a result of the business practices described above, Plaintiff, on behalf of himself
23 and others similarly situated, and pursuant to Business and Professions Code §17203 is entitled to an
24 order enjoining such future conduct on the part of Defendant, and such other orders and judgments
25 which may be necessary, including the appointment of a receiver, to restore to any person in interest
26 money paid for the purchase of the iPhone or damages as a result of the acts of Defendant, plus
27 interest.

28 ///

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST DEFENDANT
(Accounting)

60. Plaintiff repeats, realleges and incorporates each and every allegation contained in the paragraphs above as if fully set forth herein.

61. As a result of the aforementioned conduct, Defendants have received money from Plaintiff and the Class, a portion of which is due to Plaintiff and the class as previously alleged.

62. The amount of money due is unknown to Plaintiff and cannot be ascertained without an accounting of the aforementioned transactions.

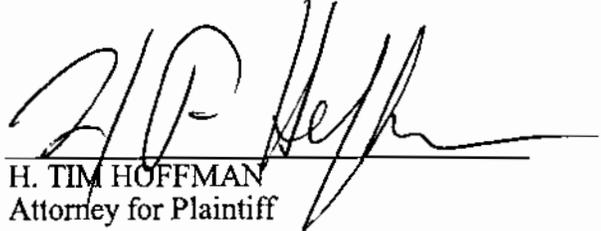
WHEREFORE, Plaintiff and the Class Members pray for an award and judgment against Defendant jointly and severally:

1. On Plaintiff's First through Third Claims for Relief, for an amount to be proven at trial for all direct and consequential damages incurred by the Plaintiff and Class as a result of Defendants' wrongful conduct;
2. On Plaintiff's Fourth Claim for Relief, for restitution of all amounts lost as a result of Defendants' violation of Business and Professions Code § 17200 *et seq.*;
3. On Plaintiff's Fifth Claim for Relief, for an accounting of all improper earnings, as alleged above;
4. For all costs of suit, including reasonable attorneys' fees, and interest;
5. For such other and further relief as this Court deems just.

Dated: August 10, 2007

HOFFMAN & LAZEAR

By:



H. TIM HOFFMAN
Attorney for Plaintiff