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10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA

ADR

13 ZOLTAN STIENER and YNEZ STIENER,
 individually and on behalf of all others
 14 similarly situated,

15 Plaintiffs,

16 vs.

18 APPLE, INC., AT&T MOBILITY, LLC, and
 19 DOES 1 through 50, inclusive,

20 Defendants.

C07-04486

SBA

CLASS ACTION COMPLAINT FOR DAMAGES,
 INJUNCTIVE RELIEF AND RESTITUTION

[JURY TRIAL DEMANDED]

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 fees of over \$100 would
 25 be required to replace the iPhone battery and maintain service while the battery was being replaced.
 26 Plaintiffs seek the following for themselves 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 sold the iPhone cellular telephone without disclosing that fees of over \$100 would be required to
2 replace the iPhone battery and maintain service while the battery was 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. Plaintiffs purchased the
8 iPhone 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 approximately 300 charges. Estimates for
25 anticipated 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.
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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
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facts about the time and expense of replacing the iPhone battery from the media, the technology community and/or the consuming public;

- e) whether Defendants' conduct constituted an unlawful, unfair or fraudulent business act or practice within the meaning of California Business and Professions Code § 17200;
- f) whether Defendants' conduct constituted unfair, deceptive, untrue or misleading advertising within the meaning of California Business and Professions Code § 17200;
- g) whether the costs and procedures of replacing the iPhone battery violate Defendants' express or implied warranties; and
- h) the appropriate measure of damages and other relief.

40. Common questions predominate over individual ones.

41. Plaintiffs, as the Class representatives, are asserting claims and defenses typical of the rest of the Class.

42. Plaintiffs, as Class representatives, will fairly and adequately represent the interests of the Class. Mr. and Mrs. Stiener have the same causes of action as the other Class members and do not have interests adverse to them. Also, Mr. and Mrs. Stiener are committed to vigorously prosecuting this lawsuit and have retained experienced counsel, Hoffman & Lazear and Folkenflik & McGerity, for this purpose.

43. Plaintiffs are aware of no difficulty that will be encountered in the management of this litigation that would preclude maintaining this national Class action.

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

FIRST COUNT
(Breach of Contract)

45. Plaintiffs repeat, reallege and incorporate each and every allegation contained in the

1 paragraphs above as if fully set forth herein.

2 46. The contract between Plaintiffs, the Class and Defendants contained an implied Duty
3 of Good Faith and Fair Dealing.

4 47. Defendant breached its contract with Plaintiffs and the Class.

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

7 SECOND COUNT
8 (Violation of Implied Warranty of Merchantability)

9 49. Plaintiffs repeat, reallege and incorporate each and every allegation contained in the
10 paragraphs above as if fully set forth herein.

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

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

28 Cal Com Code § 2314

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

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

2 THIRD COUNT
3 (Fraudulent Concealment)

4 53. Plaintiffs repeat, reallege and incorporate each and every allegation contained in the
5 paragraphs above as if fully set forth herein.

6 54. Defendants concealed material facts as follows:

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

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

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

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

19 FOURTH COUNT
20 (Cal. Business and Professions Code § 17200 *et seq.*)

21 58. Plaintiffs repeat, reallege and incorporate each and every allegation contained in the
22 paragraphs above as if fully set forth herein.

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

FIFTH COUNT
(Accounting)

60. Plaintiffs repeat, reallege and incorporate 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 Plaintiffs and the Class, a portion of which is due to Plaintiffs and the class as previously alleged.

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

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

1. On Plaintiffs' First, Second and Third Counts, for an amount to be proven at trial for all direct and consequential damages incurred by the Plaintiffs and Class as a result of Defendants' wrongful conduct;
2. On Plaintiffs' Fourth Count, for restitution of all amounts lost as a result of Defendants' violation of Business and Professions Code § 17200 *et seq.*;
3. On Plaintiffs' Fifth Count, 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 29, 2007

HOFFMAN & LAZEAR

By:



H. TIM HOFFMAN
Attorney for Plaintiffs