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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID WALSH, an individual, on behalf of himself, and on behalf of all persons similarly situated,

Plaintiff,

v.

APPLE INC.; and DOES 1-10,

Defendants.

Civil No. 08 CV 1410 JM POR

INDEX OF ATTACHMENTS TO DEFENDANT APPLE INC.'S NOTICE OF MOTION AND MOTION TO STRIKE AND FOR A MORE DEFINITE STATEMENT

Date: November 14, 2008
Time: 1:30 p.m.
Dept.: 16
Judge: Hon. Jeffrey T. Miller

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DAVID WALSH, an individual, on behalf of himself, and on behalf of all persons similarly situated,

Plaintiff,

v.

APPLE INC.; and DOES 1-10,

Defendants.

CASE NO. 08 CV 1410 JM POR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT APPLE INC'S MOTIONS TO STRIKE AND FOR A MORE DEFINITE STATEMENT

Date: November 14, 2008
Time: 1:30 p.m.
Dept.: 16
Judge: Hon. Jeffrey T. Miller

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I. INTRODUCTION

Defendant Apple Inc. ("Apple") brings its Motions to Strike and For a More Definite Statement with respect to the proposed class definition, the first claim under Business and Professions Code Section 17200 *et seq.* ("UCL"), references to "Doe" defendants, and the Prayer for Relief, in Plaintiff David Walsh's First Amended Class and Collective Action Complaint ("FAC"). The FAC fails to meet basic pleading requirements and requests improper relief.

First, the proposed class definitions are so ambiguous and unascertainable that Apple cannot reasonably determine who is included within the classes, and Apple and this Court are improperly left to guess which employees Plaintiff is attempting to include in his putative classes. Plaintiff repeatedly uses the phrases "other similarly situated" positions and "substantially similar positions," but fails to provide any information about who such "similarly situated" employees are or what positions Plaintiff considers "similar" or "substantially similar." Identifying the specific job title(s) at issue in this litigation should not be difficult for Plaintiff, particularly since he is claiming to be an adequate representative for employees in these unspecified job titles. This Court should therefore strike the class definitions and all class allegations in the FAC, or in the alternative, order that Plaintiff clarify his class definitions by specifying all of the job title(s) in his putative classes.

Second, the Court should strike Plaintiff's attempts to incorporate California Labor Code sections 203 and 226 into his first claim under the UCL because these Labor Code provisions provide for penalties, not restitution, and therefore cannot be recovered under the UCL. Additionally, the Court should strike all references to "Doe" defendants from the FAC on the ground that such references are improper.

Finally, Apple moves to strike portions of Plaintiff's Prayer for Relief. Plaintiff has not pled any facts in any of his claims that could support his requests for an accounting or a constructive trust, and as a matter of law, Plaintiff cannot show that any grounds exist to impose an accounting or establish a constructive trust. Therefore, this Court should strike Plaintiff's requests for an order requiring an accounting or the imposition of a constructive trust.

For all of these reasons, and as explained more fully below, Apple respectfully requests

that the Court grant its Motion to Strike and Motion for a More Definite Statement without leave to amend.

II. PLAINTIFF'S ALLEGATIONS

Plaintiff purports to bring this suit as a class action on behalf of himself and a "California Class" consisting of:

> [A]ll individuals who are or previously were employed by DEFENDANT as Network Support Staff Members and other similarly situated positions in California during the period four years prior to the filing of this Complaint and ending on the date as determined by the Court ("CALIFORNIA CLASS PERIOD"), who were classified by Defendant as exempt, and who have been or may be subject to the challenged exemption classification policies and practices used by Defendant (the "CALIFORNIA CLASS").

FAC, ¶ 18.

Plaintiff further brings his second, third, fourth and fifth claims on behalf of a "California Labor Subclass" consisting of:

> [A]ll members of the CALIFORNIA CLASS who were employed by Defendant Apple who were classified by Defendant as exempt and who performed work in excess of eight (8) hours in one day and/or forty (40) hours in one week and/or hours on the seventh (7th) consecutive day of a workweek and did not receive overtime compensation as required by Labor Code Section 510 and Wage Order 4-2001 (the "CALIFORNIA LABOR SUBCLASS").

Id., ¶ 29.

Plaintiff additionally purports to bring this suit as a collective action under the FLSA on behalf of himself and a collective class, which he defines as:

> [A]ll persons who were, are, or will be employed by DEFENDANTS as Network Support Staff Members, or in other substantially similar positions during the period commencing three years prior to the filing of this Complaint and ending on the date as the Court shall determine (the "COLLECTIVE CLASS PERIOD"), who performed work in excess of forty (40) hours in one week and did not receive overtime compensation as required by the FLSA (the "COLLECTIVE CLASS").

Id., ¶ 88.

Plaintiff defines "Network Support Staff Members" as individuals "in a staff position as a Network Engineer, or in any other similarly situated position[.]" *Id.*, ¶ 13.

Plaintiff alleges that he worked for Apple from around April 1995 to November 2007 as a "Network Engineer." *Id.*, ¶ 5. Plaintiff alleges that Apple misclassified him and members of the putative classes as exempt from overtime. *See id.*, ¶¶ 7, 9, 15, 20-22, 46, 57, 59 and 96. Plaintiff further alleges that he and other "Network Support Staff Members" worked in excess of eight (8) hours per day and/or forty (40) hours per week and/or on the seventh (7th) day of the workweek. *Id.*, ¶ 7 and 11. Plaintiff contends that as a result he and members of the putative classes are entitled to unpaid overtime wages. *Id.*, ¶ 14 and 35. Plaintiff also alleges that Apple failed to provide rest and/or meal periods for him and the California Class and California Labor Subclass as required by Labor Code 226.7. *Id.*, ¶ 85. Plaintiff further alleges Apple did not pay him and the California Class and California Labor Subclass all wages due upon the termination of their employment. *Id.*, ¶ 74. Finally, Plaintiff alleges Apple failed to provide him and the California Class and California Labor Subclass with accurate itemized wage statements showing the correct number of hours he and the putative classes worked at the effective regular and overtime rates of pay. *Id.*, ¶ 78.

Plaintiff alleges six claims: (1) unfair competition in violation of California Business and Professions Code § 17200 *et seq.*; (2) failure to pay overtime wages in violation of Cal. Lab. Code § 510, *et seq.*; (3) failure to provide wages when due in violation of Cal. Lab. Code § 203; (4) failure to provide accurate itemized wage statements in violation of Cal. Lab. Code § 226; (5) failure to provide meal and rest periods in violation of Cal. Lab. Code §§ 226.7 and 512; and (6) failure to pay compensation in violation of 29 U.S.C. § 201, *et seq.*

III. ARGUMENT

A. Legal Standards

1. Class Allegations May Be Stricken Under 12(f)

Rule 12(f) provides that a court "may order stricken from any pleading any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). This provision allows the Court to dispense with spurious issues prior to trial to prevent waste of the Court's time and resources. *See Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983) ("[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise

from litigating spurious issues by dispensing with those issues prior to trial ....").

Class allegations may also be dismissed or stricken at the pleading stage. Rule 23(d)(1)(D) provides that "the court may make appropriate orders ... requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly." *See also Kamm v. Sugasawara*, 509 F.2d 205, 212 (9th Cir. 1975) (district court properly granted motion to dismiss and strike class allegations); *Palmer v. Combined Ins. Co. of Am.*, No. 02 C 1764, 2003 U.S. Dist. LEXIS 2534, *5 (N.D. Ill. Aug. 29, 2003) ("[I]t is sometimes possible to determine from the pleadings alone [the Rule 23] requirements cannot possibly be met, and in such cases, striking class allegations before commencing discovery is appropriate.").

2. Ambiguous Pleadings Should Be Stricken Under 12(e)

Under Federal Rule of Civil Procedure 12(e), the Court has broad discretion to order Plaintiff to provide a more definite statement where the complaint is "so vague or ambiguous" that Apple "cannot reasonably be required to frame a responsive pleading." Fed. R. Civ. P. 12(e). Trial courts have broad discretion to require amendment of the complaint to provide additional detail. *Warth v. Seldin*, 422 U.S. 490, 501-502 (1975). An order for a more definite statement serves the Court's and the parties' interests because, "[u]nless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 367 (11th Cir. 1996) (holding that trial court should have instructed plaintiff's counsel to provide more definite statement).

B. Plaintiff's Proposed Class Definition Is Imprecise And Ambiguous Because Plaintiff Fails To Identify Sufficiently The Job Titles At Issue

A class action complaint must set forth facts sufficient to show the requisite ascertainable class. The class definition must be "precise, objective and presently ascertainable." *O'Connor* v. *Boeing N.A., Inc.*, 197 F.R.D. 404, 416 (C.D. Cal. 2000)[1] (quoting Manual for Complex

[1] It is Plaintiff's burden to establish that all the requirements for class action adjudication are met. *Senter*

Litigation Third § 30.14 at 217 (1995)); *see also In re Tetracycline,* 107 F.R.D. 719, 728 (W.D. Mo. 1985) (proposed class must not be amorphous, vague or indeterminate). The class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. *Aiken v. Miller,* 442 F. Supp. 628, 658 (E.D. Cal. 1977); *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 63 (D. Nev. 1985).

Here, Plaintiff's current class definitions are imprecise, vague, and ambiguous because the identities of the people who fall within them are unascertainable. Plaintiff seeks to represent individuals in an unspecified and unlimited number of job titles within his proposed classes. Rather than identifying specific job titles, Plaintiff vaguely defines each of his classes to include individuals "in a staff position as a Network Engineer, or in any other similarly situated position (the 'Network Support Staff Members')." FAC, ¶ 13 (emphasis added); *see also id.*, ¶ 18 ("Network Support Staff Members and other similarly situated positions") and ¶ 88 ("Network Support Staff Members, or in other substantially similar positions"). This definition renders each of Plaintiff's class definitions impermissibly vague and ambiguous because it does not clearly apprise Apple or the Court of the identities of those Plaintiff seeks to represent. The phrase "or in any other similarly situated position" leaves Apple and the Court to guess at what Plaintiff considers "similar" or "substantially similar." The terms "similar" or "substantially similar" are amorphous terms that can mean different things to different people at different times. How Plaintiff construes these undefined and broad terms, and thus the class definition, is open to constant revision at the whim of Plaintiff without Court notice or approval. Plaintiff's overly broad and ambiguous class definition makes it impossible to determine who is encompassed in the purported classes and whether Plaintiff will attempt to claim later that the class definitions include other employees not specifically mentioned in the FAC. If there are titles meant to be included in Plaintiff's class definitions, Plaintiff should simply identify them and remove the uncertainty. If Plaintiff later wishes to change the class definitions, Plaintiff can file a motion to amend. However, vague language such as "or in any other similarly situated position" in the proposed class definitions will almost certainly lead to confusion and the inability to proceed with

v. GM Corp., 532 F.2d 511, 522 (6th Cir. 1976).

coherent discovery, or to give notice to the purported class.

Because it is impossible to determine who falls within the purported classes, Apple cannot respond to these allegations, and these allegations fail to state a claim. *See* Newberg on Class Actions § 6.14 (class definition of complaint serves to demonstrate existence of adequate class definition). The Court should therefore strike the class definitions and all class allegations, or order Plaintiff to fix these defects in his proposed class definitions by specifying the particular job title(s) he seeks to include in his class definitions. This should not be difficult to do for a proposed class representative who contends he is an adequate representative. If Plaintiff does not know which positions he contends are similar, how would Apple have any idea? Apple cannot be expected to attempt to read Plaintiff's mind and ascertain who he considers similarly situated. And if Plaintiff cannot identify them, he should not be trying to represent them.[2] As the FAC is presently pled, the Court and Apple are left to guess which persons are intended to be included in the class definitions. Accordingly, the Court should strike Plaintiff's putative class definitions, or order a more definite statement.

C. California Labor Code Sections 203 And 226 Cannot Serve As The Basis For Plaintiff's First Claim Under Business & Professions Code Section 17200

Business and Professions Code Section 17200 defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice . . . ." An action based on the UCL to redress "unlawful" practices "borrows" violations of other laws and treats them as unlawful practices independently actionable under the UCL. *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 383 (1992). Although the UCL permits the borrowing of other substantive claims,

[2] Plaintiff seeks to be a class representative, and as such must have knowledge adequate to show that he and the proposed classes are similarly situated. Plaintiff alleged that he worked for Apple in the position of "Network Engineer," and does not allege that he worked in any other position or under any other job titles. It is extremely unlikely that he has knowledge of the job duties of any position other than his own, such that he can knowledgeably claim that other unnamed positions are similarly situated to him. At the pleading stage, however, Plaintiff should at least be able to identify the specific job titles he is seeking to represent. This is not just a class action requirement, it is a basic pleading and Rule 11 requirement. Under Rule 11, both Plaintiff and his counsel are required to conduct a reasonable inquiry to establish that the allegations in the FAC are well founded in fact and law. Fed. R. Civ. P. 11; *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991). If Plaintiff cannot even identify specific job titles within Apple that are similarly situated, he cannot plead that these unnamed and unknown individuals were subject to the same alleged wrongdoing, and thus, his compliance with Rule 11 is highly questionable.

its own unique remedies are very narrow. *Cel-Tech Commc'ns v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) ("In contrast to its *limited remedies*, the unfair competition law's scope is broad") (emphasis added). The Supreme Court has emphasized that the only remedies available to a private plaintiff under the UCL are injunctive relief and restitution. *Cel-Tech*, 20 Cal. 4th at 179 ("Prevailing plaintiffs are generally limited to injunctive relief and restitution"); *Korea Supply Company v. Lockheed Martin Corporation*, 29 Cal. 4th 1134, 1144 (2003) (same); *see* Cal. Bus. & Prof. Code § 17203 (court may order defendant "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition").

Thus, penalties cannot be recovered in a private UCL action[3] because they are not restitution. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002) ("In a suit under the UCL, a *public prosecutor* may collect civil penalties, but a *private plaintiff's* remedies are generally limited to injunctive relief and restitution") (internal quotation marks omitted) (emphases added); *Korea Supply*, 29 Cal. 4th at 1144 ("Civil penalties may be assessed in *public* unfair competition actions, but the law contains no criminal provisions. (§ 17206.) We have stated that under the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'") (emphasis added); *Tomlinson v. Indymac Bank*, 359 F. Supp. 2d 891, 895 (C.D. Cal. 2005) ("The Court agrees ... that the remedy contained in [Labor Code] section 203 is a penalty because section 203 does not merely compel Indymac to restore the *status quo ante* by compensating Plaintiffs for the time they worked; rather, it acts as a penalty by punishing Indymac to pay Plaintiffs an additional amount. *This type of payment is clearly not restitutionary, and thus cannot be recovered under the UCL.*") (emphasis added); *Reese v. Walmart Stores, Inc.*, 73 Cal. App. 4th 1225, 1240 n.8 (1999) (in discussing section 17200 claims, the court stated: "the decisions do suggest that the equitable relief available under the unfair competition statutes can argue against the superiority of class treatment. And although *equitable relief would not include the statutory penalties* offered

[3]A "public action" under the UCL is one brought in the name of the people of the State of California by the Attorney General, a district attorney, county counsel, or a city attorney, as described in Business & Professions Code Sections 17204, 17204.5, and 17206-17207. A "private action" under the UCL is one brought by any person who has "suffered injury in fact and has lost money or property as a result of unfair competition" as described in Business & Professions Code Section 17204.

under the Unruh Civil Rights Act or the Gender Tax Repeal Act, the inability to obtain such penalties on a class-wide basis would not justify class treatment here because they are unnecessary to avoid unjust enrichment") (emphasis added).

In his first claim, Plaintiff attempts an end-run around this black-letter law by seeking in his UCL claim penalties provided by Labor Code Sections 203 and 226. *See* FAC, ¶ 46. As discussed above, penalties are not restitution, and thus cannot be recovered under the UCL. Consequently, those portions of the FAC that seek Labor Code section 203 waiting-time penalties under the UCL must be stricken. *Tomlinson*, 359 F. Supp. 2d at 895 (section 203 penalties not recoverable under UCL). For the same reason, Plaintiff cannot recover under the UCL penalties for alleged failure to furnish accurate itemized wage statements or failure to timely compensate for all wages due at end of employment. Cal. Lab. Code § 226(e)-(f) (providing for a penalty for failure to provide itemized wage statements); Cal. Lab. Code § 203 (providing for a penalty for failure to timely compensate wages due at termination of employment). This is important because waiting time penalties under Labor Code Section 203 have a three year statute of limitations (*see* Cal. Lab. Code §203), and violation of the itemized wage statement statute only has a one-year statute of limitations. *See* Cal. Civ. Proc. Code § 340 (providing that an action upon a statute for a penalty must be brought within one year). However, Business & Professions Code Section 17200 has a four-year statute of limitations. *Cortez v. Purolator Air Filtration Products*, 23 Cal. 4th 163, 179 (2000) (noting different statute of limitations for claims brought under Labor Code and claims under Section 17200). If Plaintiff is allowed to incorporate Labor Code sections 203 and 226 into his UCL claim, he may recover additional years of Labor Code penalties to which he is not entitled under the statute.

Thus, all language referencing Labor Code sections 203 and 226 must be stricken from the first claim. *See* FAC, ¶ 46.

D. <u>All References To "Doe" Defendants Are Improper And Must Be Stricken.</u>

Plaintiff purports to assert claims against "Does 1-10" as defendants in this action. However, the use of "Doe" defendants is improper under the federal pleading rules. *See Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (use of "Doe" to identify defendants improper

except in special circumstances, such as where the identity of a specific individual is not known at time of filing). Therefore, any facts or references related to such fictitious defendants are irrelevant and must be stricken. *See* FAC, ¶ 8; Fed. R. Civ. P. 12(f).

E. Portions Of Plaintiff's Prayer For Relief Must Be Stricken

1. Plaintiff's Request For Accounting Must Be Stricken

Plaintiff requests an order requiring Apple to provide an accounting of all wages and all sums allegedly withheld from Plaintiff and the putative classes. *See* Prayer for Relief, ¶ 1C. To request an accounting, Plaintiff must show: (1) a fiduciary relationship or other circumstance that requires an accounting; and (2) that an unknown balance is due that cannot be ascertained without an accounting. To meet the first element of an accounting, Plaintiff must plead either a fiduciary relationship, that money is owed and the accounting relationship is so complicated that an ordinary legal action would be inappropriate, *Union Bank v. Superior Court*, 31 Cal. App. 4th 573, 593 (1995), or that the facts are peculiarly within the knowledge of one party who acted fraudulently. *Prince v. Harting*, 177 Cal. App. 2d 720, 733 (1960).

Here, plaintiff has not pled any of these circumstances. Plaintiff alleges only a simple employer/employee relationship, which, without more, does not constitute a fiduciary relationship. *See Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 129 (1966) ("Under prevailing judicial opinion no presumption of a confidential relationship arises from the bare fact that parties to a contract are employer and employee; rather, additional ties must be brought out in order to create the presumption of a confidential relationship between the two.") (emphasis added); *see also Amid v. Hawthorne Community Med. Gp., Inc.*, 212 Cal. App. 3d 1383, 1391 (1989) ("A bare employee-employer relationship does not create a confidential relationship.").

Nor has plaintiff alleged sufficient facts to show a complicated accounting relationship. A suit for accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law. *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 359 (1955). Plaintiff pleads no factual allegation that facts needed to calculate the amount of overtime compensation allegedly due Plaintiff and the purported class are not available through the normal course of discovery.

Plaintiff has not alleged a fiduciary duty, complicated accounts, or fraud.[4] Accordingly, his request for an accounting is improper, and Apple's motion to strike thereto should be granted without leave to amend.

2. Plaintiff's Request For Constructive Trust Must Be Stricken

Plaintiff additionally requests imposition of a constructive trust. *See* Prayer for Relief, ¶ 1D. To assert a constructive trust, Plaintiff must plead "fraud, breach of fiduciary duty, breach of promise to buy property for plaintiff, or repudiation of [an] unenforceable express trust." 5 Witkin Cal. Proc. 4th (1997) Plead., § 796, p. 253. As previously explained, Plaintiff has not pled that Apple defrauded him. Nor has Plaintiff pled that Apple owed him a fiduciary duty. In any event, Plaintiff cannot allege a fiduciary duty because no such duty exists between employers and employees under California law. *See Calvao v. Superior. Court (Klippert),* 201 Cal. App. 3d 921, 923 (1988) ("There is no confidential or fiduciary relationship in this [employment contract] context"). Indeed, "[n]o presumption of a confidential relationship arises from the bare fact that parties to a contract are employer and employee; rather, additional ties must be brought out in order to create the presumption of a confidential relationship between the two." *Miller v. Yokohama Tire Corp.,* 358 F.3d 616, 621 (9th Cir. 2004) (holding that a fiduciary relationship did not exist between employer and employee and that an employee's fraud claim could not rest on the employee-employer relationship). Finally, Plaintiff has not alleged, and there is no basis upon which he can allege, that Apple breached a promise to buy property from him or that Apple repudiated an unenforceable express trust. Thus, Plaintiff has not pled any claims that could support a constructive trust, and as a matter of law, Plaintiff cannot show that any of the grounds for establishing a constructive trust exist.

Moreover, to create a constructive trust, there must also be a *res*, an "identifiable kind of property or entitlement in defendant's hands." *Korea Supply Co.*, 29 Cal. 4th at 1150. As

[4] Plaintiff has not alleged that Apple has committed fraud, except to state vaguely that Apple "acted deceptively by falsely and fraudulently telling" Plaintiff and the putative classes certain facts. *See* FAC, ¶ 15. Because fraud must be pled with particularity, such a bare allegation is an insufficient allegation of fraudulent behavior. A general pleading of misrepresentation or fraud is insufficient; the facts constituting every element of the fraud must be alleged factually and specifically. *See, e.g.*, Fed. R. Civ. P. 9(b); 5 Witkin Cal. Proc. 4th (1997) Plead., § 669; *Hills Transp. Co. v. Southwest Forest Indus., Inc.*, 266 Cal. App. 2d 702 (1968). Plaintiff has failed to meet this heightened pleading requirement.

explained by the Supreme Court, a constructive trust requires "money or property identified as belonging in good conscience to the plaintiff [which can] *clearly be traced to particular funds or property* in the defendant's possession." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (emphasis added). Plaintiff has not specifically identified any *res* to be placed in a constructive trust held by Apple for Plaintiff's benefit, nor can he do so, since he is seeking general damages. The Court should therefore strike Plaintiff's request for imposition of a constructive trust.

IV. CONCLUSION

For all of the foregoing reasons, including the need to avoid confusion in this class action proceeding, Apple respectfully requests that the Court grant its Motions to Strike and For a More Definite Statement in its entirety.

Dated: September 23, 2008

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