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8 Attorneys for Defendant  
 9 APPLE INC.

10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN JOSE DIVISION

14 GIORGIO GOMELSKY,  
 15 on behalf of himself and  
 16 all others similarly situated,

17 Plaintiff,

18 v.

19 APPLE INC.,

20 Defendant.

Case No. C-08-04969 JF

**APPLE INC.'S NOTICE OF  
 MOTION TO DISMISS AND TO  
 STRIKE**

Date: February 20, 2009  
 Time: 9:00am  
 Courtroom: 3

21 PLEASE TAKE NOTICE that on February 20, 2009 at 9:00am, in the courtroom of the  
 22 Honorable Jeremy Fogel, San Jose, California, defendant Apple Inc. ("Apple") will move to  
 23 dismiss all of plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to  
 24 state a claim upon which relief can be granted. If plaintiff's Unfair Competition Law ("UCL")  
 25 claim is not dismissed, Apple will also move to strike plaintiff's prayer for damages under the  
 26 UCL, pursuant to Federal Rule of Civil Procedure 12(f).

1 Apple moves to dismiss plaintiff's claims on the following grounds: (1) plaintiff fails to  
2 state a claim for breach of the implied warranty of merchantability, breach of the implied  
3 warranty of fitness for a particular purpose, violation of the Song-Beverly Consumer Warranty  
4 Act, and violation of the Magnuson-Moss Warranty Act because the alleged defect in plaintiff's  
5 computer manifested itself after any implied warranties had expired; (2) plaintiff fails to state a  
6 claim for violation of Song-Beverly Act for the additional, independent, reason that he does not  
7 allege he purchased his computer in California; (3) plaintiff fails to state a claim for negligence  
8 because he seeks damages only for economic loss, which are not recoverable under a negligence  
9 theory; (4) plaintiff fails to state a claim for violation of the UCL because Apple's actions were  
10 neither unlawful nor unfair; (5) plaintiff fails to state a claim for unjust enrichment because that  
11 claim is based on his other claims, all of which fail as a matter of law.

12 If plaintiff's UCL claim is not dismissed, Apple moves to strike plaintiff's prayer for  
13 damages under that statute, because damages are unavailable under the UCL.

14 This motion is based on this Notice of Motion and Motion, the Memorandum of Points  
15 and Authorities that follows, the Request for Judicial Notice ("RJN"), and the declaration of Anne  
16 M. Hunter filed concurrently herewith, all pleadings and papers filed herein, oral argument by  
17 counsel, and such other and further matter that properly may be received by the Court.

18  
19 Dated: December 22, 2008

PENELOPE A. PREOVOLOS  
ANDREW D. MUHLBACH  
ANNE M. HUNTER  
ALEXEI KLESTOFF  
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23 By: /s/ Penelope A. Preovolos  
Penelope A. Preovolos

24 Attorneys for Defendant  
25 APPLE INC.  
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