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 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
 all others similarly situated,
 16
 Plaintiff,
 17
 v.
 18 APPLE INC.,
 19
 Defendant.

Case No. C-08-04969 JF

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

Date: March 6, 2009
 Time: 9:00am
 Courtroom: 3

21 PLEASE TAKE NOTICE that on March 6, 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 Amended Notice of Motion and Motion and the
15 Memorandum of Points and Authorities, the Request for Judicial Notice ("RJN"), and the
16 declaration of Anne M. Hunter filed on December 22, 2008, all pleadings and papers filed therein,
17 oral argument by counsel, and such other and further matter that properly may be received by the
18 Court.

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20 Dated: January 21, 2009

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24 By: /s/ Penelope A. Preovolos
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25 Attorneys for Defendant
26 APPLE INC.
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