

ORIGINAL

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FILED

Filed

2008 OCT 30 P 2: 14

RICHARD W. WIEKING
 CLERK
 U.S. DISTRICT COURT
 NO. DIST. OF CA. S.J.

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(1/8/08)

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 GIORGIO GOMELSKY
 and all others similarly situated

C/PVT

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

GIORGIO GOMELSKY,
 On behalf of himself and
 all others similarly situated

Case No.
C08 04969 PVT
CLASS ACTION COMPLAINT

Plaintiffs,

v.

DEMAND FOR JURY TRIAL

APPLE INC.,

Defendants.

Plaintiff, Giorgio Gomelsky, by his attorneys, Meiselman, Denlea, Packman, Carton & Eberz P.C., as and for his class action complaint, alleges, with personal knowledge as to his own actions, and upon information and belief as to those of others, as follows:

Nature of this Case

1
2 1. This class action seeks to redress the widespread and commonplace
3 characteristic defect and design flaw which renders one or more of Apple's PowerBook
4 G4's memory slots inoperative. The defect manifests itself when a PowerBook owner adds
5 additional memory (RAM) to the first or second (upper or lower) memory slot available in
6 most PowerBooks, including the PowerBook G4. Typically, when the additional memory
7 is added, the Powerbook does not recognize the memory, resulting in slower processing
8 speeds, decreased computer function and other computing problems. Unfortunately for
9 consumers, because both memory slots are hardwired to the PowerBook's motherboard,
10 consumers who choose to repair the defect can incur costs of more than \$500 in parts and
11 labor.

12 2. Moreover, the defect oftentimes manifests itself months or even years after
13 purchase of a new PowerBook and/or installation of memory (RAM) in a memory slot.

14 3. In response to thousands of complaints from its PowerBook customers, Apple
15 has admitted that its PowerBooks, specifically certain PowerBook G4 models, have
16 defective memory slots. Aside from a limited number of PowerBooks manufactured
17 between January, 2005 and April, 2005, however, Apple has refused to repair the defect
18 which has manifested itself in PowerBooks manufactured before and after this time period.

19 4. As a result of Apple's actions, thousands of its customers have purchased
20 PowerBook computers with defective memory slots. Apple has refused to repair the defect
21 free of charge, and has refused its customers' requests for refunds or exchanges of their
22 defective PowerBooks. As such, thousands of Apple PowerBook owners have been
23 compelled to either repair the defective memory slot at their own expense or lose
24 permanently the ability to add additional memory to their computers.

25 5. This suit is brought on behalf of a nationwide class of all persons who have
26 purchased Apple PowerBook computers, including but not limited to the PowerBook G4,
27 manufactured with defective memory slots, between January 1, 2003, to the present, and
28 who were damaged thereby (the "Class"). It seeks, inter alia, compensatory damages for

1 Plaintiff and each Class member, including but not limited to: reimbursement of expenses
2 incurred to repair defective memory slots; attorneys' fees; and the costs of this suit.

3 **Jurisdiction and Venue**

4 6. Jurisdiction in this civil action is authorized pursuant to 28 U.S.C. § 1332(d),
5 as Plaintiff's citizenship is diverse from Defendant, there are more than 100 class members,
6 and the amount in controversy is in excess of \$5 million.

7 7. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
8 This is an action for violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 et.
9 seq. The amount in controversy in each individual claim is at least twenty five dollars
10 (\$25.00), the proposed Class consists of over 100 members, and aggregate damages exceed
11 \$50,000.00.

12 8. This Court has supplemental jurisdiction over Plaintiff's state and common
13 law causes of action pursuant to 28 U.S.C. § 1367(a).

14 9. Venue is proper in this district under 28 U.S.C. § 1391(b)(2), as a substantial
15 part of the events or omissions giving rise to Plaintiff's claims occurred in the Northern
16 District of California.

17 10. Venue is also proper in this district under 28 U.S.C. § 1391(a)(2), on the
18 grounds that a substantial part of the events relating to Plaintiff's claims occurred in the
19 Northern District of California.

20 **Intradistrict Assignment**

21 11. Plaintiff respectfully requests that this matter be assigned to the San Jose
22 Division because a substantial portion of the actions and omissions giving rise to this action
23 occurred in Santa Clara County, California. Specifically, Defendant's marketing of the
24 PowerBook G4, Defendant's communications about the Extended Warranty and
25 Defendant's refusal to repair the defective memory slots all emanated from its principal
26 place of business in Cupertino, California.

1 Parties

2 12. Plaintiff Giorgio Gomelsky is a resident of the State of New York, County of
3 New York. Mr. Gomelsky purchased an Apple PowerBook G4 with a defective memory
4 slot, Apple refused to repair the defect, and he has suffered damage.

5 13. Defendant Apple Inc. is incorporated under the laws of the State of
6 California, with its principal place of business located in Cupertino, California.

7 14. Defendant Apple Inc. does actual business throughout the State of California,
8 including through the direct sale of its merchandise in the State and operation and
9 maintenance of an interactive website – *apple.com* – accessible to consumers in, and
10 residents of, California.

11 Operative Facts

12 15. Defendant Apple Inc. is a publicly traded company engaged in the business of
13 designing, manufacturing, marketing, distributing and selling personal computers and
14 related products and services through its own retail stores, online, direct sales, third party
15 wholesalers and resellers. Apple has sold its PowerBook computers, including the G4
16 model, to tens of thousands of consumers throughout the United States.

17 16. In or about January, 2001, Apple began designing, manufacturing,
18 warranting, advertising, marketing, selling and providing PowerBook G4 laptop computer
19 to consumers throughout the United States. Between 2001 and 2003, Apple produced the
20 Titanium PowerBook G4; between 2003 and 2006, the Aluminum models were produced.

21 17. When the Aluminum PowerBook G4s were released in January, 2003, Apple
22 marketed them as being designed to exacting standards and touted their many features,
23 including the fact that each Aluminum PowerBook G4 has two memory slots. The memory
24 slots are an essential feature of the computer, and are marketed so as to give consumers the
25 ability to expand the PowerBook's memory (RAM) at any time, thereby increasing the
26 computer's functionality.

27 18. Based on Apple's own admissions, however, certain of its PowerBook G4
28 computers have defective memory slots. Indeed, usually the lower – but sometimes the

1 upper – memory slot does not work; it does not recognize the additional memory added and
2 is thus useless.

3 19. As Apple has admitted in an article posted on its website, affected
4 PowerBook G4 computers exhibit at least one of the following symptoms upon installation
5 of RAM memory in the lower memory slot: (1) The computer does not start up; or (2) The
6 computer does not recognize that the lower memory slot is filled, thus degrading system
7 performance because the memory in only one slot is recognized. Apple has also admitted
8 that these symptoms may only occur intermittently, and that an owner of a PowerBook with
9 a defective memory slot may not know or become aware of the defect until months, or
10 years, after installation of memory in the defective memory slot.

11 20. After receiving thousands of complaints from its customers regarding
12 defective memory slots, Apple extended the warranty available to PowerBook G4
13 customers by initiating, in or around 2006, the PowerBook G4 Memory Slot Repair
14 Extension Program covering a limited number of PowerBook G4 models experiencing
15 specific component issues and that were manufactured between January, 2005 and April,
16 2005 (“Extended Warranty”).

17 21. The Extended Warranty was available, however, to a very limited number of
18 PowerBook customers, as it only covered affected PowerBook G4 computers having eleven
19 digit serial numbers in the following range: W8503xxxxxx-W8518xxxxxx. The Extended
20 Warranty did not cover any PowerBook G4 outside of this serial number range and ended
21 on July 24, 2008. Thus, the vast majority of Powerbooks were not covered by the Extended
22 Warranty. And should a PowerBook owner with a computer which was covered by the
23 Extended Warranty find out about the computer’s defective memory slot after July 24,
24 2008, he or she would have no recourse other than incurring the expense of fixing the
25 defective memory slot, or continue to use the computer without having the ability to utilize
26 the defective memory slot and add memory.

27 22. Tens of thousands of people nationwide have purchased PowerBook
28 computers with defective memory slots. Aside from the limited number of PowerBooks

1 covered by the Extended Warranty, Apple has informed Plaintiff and other customers with
2 defective PowerBooks that they have no recourse other than to repair the defective memory
3 slots at their own expense. Apple has refused to warrant, repair or pay for any repairs
4 relating to the PowerBook's defective lower memory slot, or to warrant any PowerBooks
5 should the defect manifest itself sometime in the future.

6 23. Moreover, Apple did not give adequate notice of its Extended Warranty to its
7 customers. Apple did not contact purchasers of PowerBook computers to inform them that
8 they may be covered by the Extended Warranty, nor did Apple notify all PowerBook
9 owners of the defective memory slot so that consumers could have their PowerBooks
10 repaired during the one year warranty in effect from the date of purchase.

11 24. To date, Apple has not taken effective action to remedy defective memory
12 slots in its PowerBook computers. To ensure that the memory slots in all of its PowerBook
13 computers were fit for the ordinary or particular purpose for which the memory slots were
14 intended to be used, Apple should have tested both memory slots prior to installing and
15 selling its PowerBook computers. Had Apple exercised reasonable care in testing the
16 memory slots of its PowerBook computers, it would have discovered that the slots were
17 defective. Instead, Apple sold PowerBook computers with memory slots that were not fit
18 for their intended use.

19 25. On or about April, 2, 2004, Plaintiff purchased directly from Apple an
20 Aluminum PowerBook G4 15" (1GHz), serial number W8413166NRY. In early May,
21 2006, Plaintiff realized that his PowerBook had become very sluggish and was not working
22 well. Thinking that he may require additional memory to optimize the performance of his
23 computer, Plaintiff purchased a 1 GB memory card and installed it in his PowerBook's
24 upper memory slot, for a total of 1.5 GB of memory. Computer functioning did not
25 improve, and was in fact worse than when Plaintiff's computer had less memory installed.
26 It was at this time that Plaintiff realized that his PowerBook's upper memory slot was
27 defective, and that his computer was not recognizing the additional 1GB of memory
28 installed.

1 26. Plaintiff contacted Apple directly requesting that it repair the defective
2 memory slot. Apple refused, informing Plaintiff that because his PowerBook's serial
3 number was outside of the serial number range covered by the Extended Warranty, Apple
4 would not repair Plaintiff's PowerBook's defective memory slot.

5 27. As a long time Apple customer, Plaintiff was shocked that although Apple
6 had acknowledged that its PowerBooks were defective, it would not repair Plaintiff's
7 defective PowerBook simply because its serial number was outside the very limited range
8 of serial numbers covered by the Extended Warranty. As such, Plaintiff wrote a letter of
9 complaint to Apple in December, 2006, mailed to Apple's headquarters in Cupertino,
10 California. Plaintiff received a written reply which stated that Apple would not repair the
11 defective memory slot as Plaintiff's computer's serial number fell outside of the range of
12 serial numbers covered by the Extended Warranty.

13 28. It was at this time that Plaintiff joined an online petition consisting of Apple
14 customers whom had purchased PowerBooks with defective memory slots which Apple
15 refused to repair. Plaintiff also wrote to Apple again in March, 2007, citing to the online
16 petition and the thousands of complaints posted on internet forums by owners of
17 PowerBooks with defective memory slots. When Plaintiff received no reply to his second
18 letter, he wrote to the Attorney General of California, lodging a formal complaint regarding
19 his defective PowerBook and the fact that Apple refused to repair or pay for repair of the
20 defective memory slot.

21 29. As a result of the defect, Plaintiff cannot use his PowerBook as intended, and
22 has suffered damage. Plaintiff purchased a computer which he now cannot use for its
23 intended purpose because of the defective memory slot; Plaintiff's PowerBook – whose
24 memory has been reduced by half – is not fully functional. And the expense in repairing
25 the memory slot – upwards of \$500 – would constitute almost half the original purchase
26 price of the computer.

27 30. There have been numerous consumer complaints to various Federal and State
28 authorities about the PowerBook's defective lower memory slots, and web sites are full of

1 consumers who have complained about the fact that their PowerBook computers' memory
2 slots do not work. Consumers have posted complaints stating that they have had to repair
3 the defective memory slot at their own expense, that Apple has refused to reimburse them
4 for the expense incurred, and that Apple has refused to exchange defective PowerBooks for
5 PowerBooks with properly functioning memory slots.

6 31. Moreover, as referenced above, an online petition has been initiated by Apple
7 customers who have purchased PowerBooks with defective memory slots, and which Apple
8 has refused to repair. As of the date of this Complaint, almost 5,000 PowerBook owners
9 have signed the petition, providing their name, address and email address, demanding that
10 Apple repair the defective memory slots or reimburse the petitioners for expenses incurred
11 in repairing the memory slots.

12 32. Apple continued to manufacture and sell PowerBook computers with
13 defective memory slots even after receiving thousands of complaints informing it of the
14 specific defect alleged herein. As such, Apple profited enormously from sales of its
15 PowerBook G4 computers while Plaintiff and the Class incurred significant damages,
16 including but not limited to the expenses incurred in repairing or replacing their defective
17 PowerBook computers.

18 33. Apple has, and continues to this day, refused to respond to the thousands of
19 customer complaints regarding the PowerBook's defective memory slot, and has refused to
20 repair at its own expense the defective memory slot or compensate thousands of
21 PowerBook purchasers who repaired the defective memory slot at their own expense.

22 34. As referred to above, no adequate notice has been provided to Plaintiff, and
23 no consent or bargained-for approval has been granted by Plaintiff or other Apple
24 customers who purchased PowerBook computers, including the PowerBook G4, that their
25 computers have defective memory slots. Nor did Defendant provide any notice, adequate
26 notice or full disclosure of the fact that its PowerBook computers have defective memory
27 slots.

1 **Class Action Allegations**

2 35. Plaintiff brings this action on his own behalf and additionally, pursuant to
3 Rule 23 of the Federal Rules of Civil Procedure, on behalf of a nationwide class of all
4 persons who have purchased PowerBook computers with one or more defective memory
5 slots and who were damaged thereby, during the period from January 1, 2003, to the
6 present (the "Class").

7 36. Excluded from the Class is Defendant; any parent, subsidiary, or affiliate of
8 Defendant; any entity in which Defendant has or had a controlling interest, or which
9 Defendant otherwise controls or controlled; and any officer, director, employee, legal
10 representative, predecessor, successor, or assignee of Defendant.

11 37. This action is brought as a class action for the following reasons:

12 a. The Class consists of at least thousands of persons and is
13 therefore so numerous that joinder of all members, whether otherwise required or
14 permitted, is impracticable;

15 b. There are questions of law or fact common to the Class that
16 predominate over any questions affecting only individual members, including:

17 i. whether Defendant violated Cal. Bus. & Prof. Code § 17200 by
18 manufacturing and selling PowerBook computers with defective memory slots;

19 ii. whether Defendant breached the implied warranty of
20 merchantability by manufacturing and selling PowerBook computers with defective
21 memory slots;

22 iii. whether Defendant breached the implied warranty of fitness for
23 a particular purpose by manufacturing and selling PowerBook computers with defective
24 memory slots;

25 iv. whether Defendant violated the Song-Beverly Consumer
26 Warranty Act, Cal. Civ. Code §§ 1791 et. seq.;

27 v. whether Defendant violated the Magnuson-Moss Warranty Act,
28 15 U.S.C. §§ 2301 et. seq.;

1 vi. whether Defendant was negligent in manufacturing and selling
2 PowerBook computers with defective memory slots;

3 vii. whether Defendant unjustly enriched itself in manufacturing
4 and selling PowerBook computers with defective memory slots;

5 viii. whether members of the Class have sustained damages and, if
6 so, the proper measure thereof; and

7 ix. whether Defendant should be enjoined from selling PowerBook
8 computers with defective memory slots.

9 c. The claims asserted by Plaintiff are typical of the claims of the
10 members of the Class;

11 d. Plaintiff will fairly and adequately protect the interests of the Class,
12 and Plaintiff has retained attorneys experienced in class and complex litigation, including
13 related litigation involving consumer fraud;

14 e. A class action is superior to other available methods for the fair and
15 efficient adjudication of the controversy, for at least the following reasons:

16 i. Absent a class action, Class members as a practical matter will
17 be unable to obtain redress, Defendant's violations of its legal obligations will continue
18 without remedy, additional customers will be harmed, and Defendant will continue to retain
19 its ill-gotten gains;

20 ii. It would be a substantial hardship for most individual members
21 of the Class if they were forced to prosecute individual actions;

22 iii. When the liability of Defendant has been adjudicated, the Court
23 will be able to determine the claims of all members of the Class;

24 iv. A class action will permit an orderly and expeditious
25 administration of Class claims, foster economies of time, effort, and expense and ensure
26 uniformity of decisions; and

27 v. The lawsuit presents no difficulties that would impede its
28 management by the Court as a class action.

1 f. Defendant has acted on grounds generally applicable to Class
2 members, making class-wide monetary and injunctive relief appropriate; and

3 g. The prosecution of separate actions by individual members of the
4 Class would create a risk of incompatible standards of conduct for Defendant and of
5 inconsistent or varying adjudications for all parties.

6 38. Defendant's violations of the common law are applicable to all members of
7 the Class, and Plaintiff is entitled to have Defendant enjoined from engaging in unlawful
8 conduct in the future.

9 **FIRST CAUSE OF ACTION**

10 **(Violation of California Business and Professions Code § 17200)**

11 39. Plaintiff repeats and re-alleges the allegations contained in Paragraphs 1
12 through 38 above as if fully set forth herein.

13 40. California Business and Professions Code § 17200 prohibits acts of unfair
14 competition, including any "unlawful, unfair or fraudulent business act or practice[.]"

15 41. Apple engaged in an unlawful and unfair business act or practice in violation
16 of Cal. Bus. & Prof. Code § 17200 by manufacturing and selling PowerBook computers
17 with defective memory slots to Plaintiff and other members of the Class, by failing to use
18 reasonable care to test the memory slots in its PowerBook computers prior to sale, and by
19 continuing to sell PowerBook computers with defective memory slots even after learning
20 that the memory slots in its PowerBook computers were defective, all in violation of Cal.
21 Civ. Code §§ 1791 *et. seq.*, Cal. Com. Code § 2314, U.C.C. §§ 2-314 and 315, 15 U.S.C.
22 §§ 2301 *et. seq.*, and the common law.

23 42. Defendant's unlawful and unfair business acts and practices caused and
24 continues to cause substantial injury to consumers and their property, including Plaintiff
25 and the other members of the Class. Furthermore, as there were reasonable alternatives
26 available to Apple to further its business interests other than voluntarily placing into the
27 stream of commerce PowerBook computers with defective memory slots, the gravity of