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14  
 15 **UNITED STATES DISTRICT COURT**  
 16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
 17 **SAN JOSE DIVISION**

18 REUBEN BERENBLAT, ANDREW  
 PERSONETTE, EARL C. SIMPSON,  
 19 LAURA MILLER, On behalf of themselves  
 and all others similarly situated,

20 Plaintiffs,

21 v.

22 APPLE INC.,

23 Defendant.  
24

Case No. C-08-04969 JF

**PLAINTIFFS' MOTION FOR  
 ADMINISTRATIVE RELIEF**

**[Declaration of Michael A. Berg and  
 Proposed Order Submitted Herewith]**

1 Pursuant to Local Civil Rule 7-11, Plaintiffs respectfully move this Court for  
2 an opportunity to conduct limited, narrowly focused discovery of facts known  
3 exclusively to defendant Apple, Inc. (“Apple”) before filing the Third Amended  
4 Complaint contemplated by the Court’s order of April 7, 2010. Pursuant to Local  
5 Rule 7-12, Plaintiffs, through counsel, have requested that Apple enter into a  
6 stipulation providing for the relief requested herein. Apple declined to so stipulate.

7 The Second Amended Complaint (“SAC”) alleged in part that Apple  
8 committed a fraudulent business practice in violation of California’s Unfair  
9 Competition Law (“UCL”) by marketing PowerBook G4 computers with defective  
10 memory slots. The Court, in its April 7 order, dismissed this claim with leave to  
11 replead, citing the “reasonable possibility that Plaintiffs could provide additional  
12 factual support.” Order at 15. The Court also dismissed plaintiffs’ unjust  
13 enrichment claim with leave to replead. *Id.*

14 In revising the complaint, Plaintiffs are guided by the Court’s recent decision  
15 in another consumer class action decided after briefing was completed in the instant  
16 case, *Tietsworth v. Sears, Roebuck & Co.*, No. 5:09-CV-00288 JF (HRL) (Mar. 31,  
17 2010). A crucial issue in both decisions was whether the complaint adequately  
18 alleged a duty to disclose material facts concerning the product’s defects. In  
19 *Tietsworth*, the Court held that a duty to disclose arises “when the defendant had  
20 exclusive knowledge of material facts not know to the plaintiff,” or “when the  
21 defendant actively conceals a material fact from the plaintiff.” *Tietsworth*, at 10  
22 (citations omitted).

23 In this action, the SAC alleged with as much specificity as practicable Apple’s  
24 knowledge and deliberate concealment of the memory slot defect. Among other  
25 things, the SAC alleged that Apple knew of the defect due to pre-sale testing, a  
26 limited warranty program that applied to only certain PowerBooks, numerous  
27 complaints that consumers posted on Apple’s web site, and Apple’s deletion from its  
28 web site of a discussion thread containing over 350 posts about the PowerBook

1 memory slot defect. SAC ¶¶ 31-33, 44-48, 86. As Plaintiffs understand it, the Court  
2 found these allegations somewhat persuasive, but insufficient to establish corporate  
3 knowledge of the memory slot defect. *See* Order at 13. In *Tietsworth*, the Court  
4 gave great weight to allegations that the defendants jointly developed a protocol for  
5 responding to customer complaints about the alleged defect, and agreed to share the  
6 cost of replacing the defective parts. The Court also relied on an allegation that a  
7 Sears engineer was aware of, and specifically commented on, the alleged defect. *See*  
8 *Tietsworth*, at 12.

9 Without conceding that the SAC was inadequate, Plaintiffs believe narrowly  
10 targeted discovery will enable them to frame sufficient allegations that Apple knew  
11 of the memory slot defect and intentionally concealed it, which will survive Apple’s  
12 inevitable motion to dismiss. Indeed, such discovery may be the only means by  
13 which to adduce additional allegations in circumstances where the “defendant had  
14 exclusive knowledge of material facts not known to the plaintiff.” *See id.* at 10.

15 Accordingly, to satisfy the Court’s requirements for the Third Amended  
16 Complaint, Plaintiffs respectfully request (i) an opportunity to serve not more than  
17 five document requests on Apple; (ii) a one-day deposition of an Apple designee  
18 pursuant to Federal Rule of Civil Procedure 30(b)(6), limited to Apple’s knowledge  
19 of the alleged defect, the sources of its knowledge, its responses to information and  
20 complaints received about the defect, and its concealment thereof; and (iii) sufficient  
21 time to amend the complaint based on such discovery.

1 DATED: April 22, 2010

Respectfully submitted,

2 CALDWELL LESLIE & PROCTOR, PC  
3 ROBYN C. CROWTHER  
4 ERIC S. PETTIT

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6  
7 By \_\_\_\_\_ /S/  
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