

1 JONATHAN SHUB (SBN 237708)
 2 MIRIAM L. SCHIMMEL (SBN 185089)
3 SEEGER WEISS LLP
 1515 Market Street, Suite 1380
 3 Philadelphia, Pennsylvania 19102
 (215) 564-2300 tel; (215) 851-8029 fax
 4 jshub@seegerweiss.com

5 ***[ADDITIONAL COUNSEL ON SIGNATURE PAGE]***

6 Attorneys for Plaintiff,
 7 and all others similarly situated

8 **UNITED STATES DISTRICT COURT**
9 NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

10 ARAM HOVSEPIAN, individually and
 11 on behalf of all others similarly situated,

12 Plaintiff,

13 vs.

14 APPLE, INC.,

15 Defendant.

Case No. C08-05788 JF

**OPPOSITION TO DEFENDANT'S
 MOTION TO STRIKE CLASS
 ALLEGATIONS FROM
 PLAINTIFF'S SECOND AMENDED
 COMPLAINT**

Date: Dec. 4, 2009
 Time: 9:00 a.m.
 Dept. Crtm. 3, 5th Floor

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1 Plaintiff Aram Hovsepien, individually and on behalf of all others similarly
2 situated (“Plaintiff”), hereby submits his Opposition to Defendant, Apple, Inc.’s
3 (“Defendant”) Motion to Strike Class Allegations from Plaintiff’s Second Amended
4 Complaint (“SAC”) as follows:

5 **I. INTRODUCTION.**

6 The Court should deny Defendant Apple Inc’s Motion to Strike the Class
7 Allegations, as it is both premature and substantively infirm. First, Defendant is
8 premature in seeking to strike Plaintiff’s class claims at the pleading stage because, as
9 the motion makes evident, the grounds upon which the motion is based are arguments
10 which should be raised at the class certification stage, or at the earliest, after class-
11 related discovery has been conducted. At the present time, Defendant has not
12 responded to the Second Amended Complaint, Plaintiff has not moved for Class
13 Certification and no discovery pertaining to class certification has been commenced.

14 Defendant’s motion also fails because it lacks valid, sustainable grounds upon
15 which to dismiss class allegations at the pleading stage; specifically, Defendant is
16 erroneously mixing the grounds for *pleading* class claims, with those for *certifying a*
17 *class*. The issues raised by Defendant of class ascertainability and class maintenance
18 should be evaluated at the certification stage, not at the pleading stage before an
19 evidentiary record has been established. Moreover, the facts here clearly illustrate that
20 the issues raised by Defendant regarding, for example, whether all or just a subset of
21 the computers at issue are inherently defective, are not those which are suitable for
22 decision at the pleading stage, since they raise issues outside of the Second Amended
23 Complaint. As such, the motion should be denied. Finally, if this Court is inclined to
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1 grant Defendant’s motion, Plaintiff should be granted leave to amend.

2
3 **II. DEFENDANT’S MOTION TO STRIKE THE CLASS ALLEGATIONS**
4 **SHOULD BE DENIED BECAUSE IT IS AN EXTREMELY RARE AND**
5 **HIGHLY DISFAVORED MEANS OF ATTACKING CLASS ACTION**
6 **ALLEGATIONS.**

7 It is hornbook law that motions to strike are disfavored:

8 ...Because of the limited importance of pleadings in federal matters,
9 motions to strike are generally disfavored. *Rosales v. Citibank*, 133
10 F.Supp.2d 1177, 1180 (N.D. Cal.2001). In most cases, a motion to
11 strike should not be granted unless “the matter to be stricken clearly
12 could have *no possible bearing* on the subject of the litigation.” *Platte*
13 *Anchor Bolt, Inc. v. IHI, Inc.*, 352 F.Supp.2d 1048, 1057 (N.D.
14 Cal.2004).

15 *See Hibbs-Rines v. Seagate Technologies, LLC*, Slip Copy, 2009 WL 513496
16 (N.D.Cal.) (emphasis added). Further, ‘any doubt concerning the import of the
17 allegations to be stricken weighs in favor of denying the motion to strike.’ See *In re*
18 *2TheMart.com, Inc. Sec. Litig.*, 114 F.Supp.2d 955, 965 (C.D.Cal.2000).

19 A motion to strike the class allegations at the pleading stage is even less favored
20 because Rule 23 provides an established method through which it can be determined
21 whether a class is ascertainable and the definition sustainable: “[M]otions to strike
22 class allegations ‘are disfavored because a motion for class certification is a more
23 appropriate vehicle’ for arguments about class propriety.” *Hibbs-Rines*, 2009 WL
24 513496 at *3 (quoting *Thorpe v. Abbott Labs., Inc.*, 534 F.Supp.2d 1120, 1125
(N.D.Cal.2008)). Indeed, “the granting of motions to dismiss class allegations before
discovery has commenced is rare.” *In Re Wal-Mart Stores, Inc.*, 505 F.Supp.2d 609,

1 615 (N.D.Cal.2007).¹

2 Defendant's motion is premature and should be denied on that basis. As the
3 Supreme Court has explained, because issues of certification are enmeshed with the
4 merits, rulings regarding the propriety of a class action should await class discovery
5 and subsequent class briefing. *See General Telephone Co. of Southwest v. Falcon*, 457
6 U.S. 147, 160 (1982).

7 In *In Re Wal-Mart Stores, Inc.*, 505 F.Supp.2d 609 (N.D.Cal.2007), the court
8 followed the Supreme Court's teaching regarding why motions to strike class
9 allegations are inappropriate:

10[T]he granting of motions to dismiss class allegations before
11 discovery has commenced is rare. Indeed, while there is little
12 authority on this issue within the Ninth Circuit, decisions from courts
13 in other jurisdictions have made clear that "dismissal of class
14 allegations at the pleading stage should be done rarely and that the
15 better course is to deny such a motion because 'the shape and form of
16 a class action evolves only through the process of discovery.'" *See*
Myers v. MedQuist, Inc., No. 05-4608, 2006 WL 3751210, *4
(D.N.J.2006) (internal citations omitted) (declining to strike class
allegations because discovery had not yet commenced and observing
that most courts deny such motions if brought prior to discovery)
(string citation omitted).

17 *In re Wal-Mart Stores, Inc.*, 505 F.Supp 2d at 615.²

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19 ¹ *See also Lockwood v. Conagra Foods, Inc.*, 597 F.Supp.2d 1028, 1034 (N.D. Cal. 2009)
20 ("defendant's motion to strike the class allegations is denied" with "the Court considering the issue
21 on a fully-briefed and supported motion concerning class certification"); *Cole v. Asurion Corp.*,
22 2008 WL 5423859 at *13 (C.D.Cal. December 30, 2008) ("the Court is disinclined to explore the
23 merits of these arguments at this time. Instead, the Court chooses to consider these arguments in
24 connection with Plaintiff's motion for class certification.)

² In *In re Wal-Mart*, the Court noted that plaintiffs' class definitions were somewhat suspicious. For
example, it found that, in order to evaluate some of the terms used in the class definition and also
determine who the members of the class were (i.e., what constituted unpaid and due wages and
whether wages "due" to terminated employees were legally due; what "full and complete"
compensation was), it appeared to involve a legal determination based on the facts relevant to an
individual potential class members. Notwithstanding that observation, the court still denied Wal-
Mart's Motion to Strike the class allegations as premature.

1 In rejecting Wal-Mart’s argument, the court pointed out that most of Wal-
2 Mart’s authority consisted of cases addressing the substance of class definitions at the
3 certification stage. The *Wal-Mart* court rejected the cases which defendant Wal-Mart
4 cited in support of striking class allegations at the pleading stage, including the case
5 cited by Apple in its moving papers, *Kamm v. Cal. City Development Co.*, 509 F.2d
6 205, 212 (9th Cir.1975). The court stated:

7 Wal-Mart cites numerous cases for the proposition that the class
8 definitions must be sufficiently definite so that it is administratively
9 feasible for the Court to determine whether a particular individual is a
10 member without delving into the merits of the claim. However, nearly
11 all of these cases considered the issue of the appropriate contours of
12 class definitions in the context of a motion for class certification.
13 (*citations omitted.*) Generally, courts review class allegations through
14 a motion for class certification. See, e.g. *Moreno v. Baca*, No.
15 CV007149ABCCWX, 2000 WL 33356835, *2 (C.D.Cal.2000)
16 (finding defendants' motion to strike class allegations premature
17 because no motion for class certification was before the court). Such a
18 motion should be filed “as soon as practicable” after a defendant
19 answers. See Fed. R. Civ.P. 23(c)(1). Wal-Mart has not yet answered
20 the FACC.

21 While Wal-Mart correctly cites *Kamm v. Cal. City Development Co.*,
22 509 F.2d 205, 212 (9th Cir.1975), for the proposition that class
23 allegations may be stricken at the pleading stage, the granting of
24 motions to dismiss class allegations before discovery has commenced
is rare.

In re Wal-Mart, 505 F.Supp.2d, 615-616.

Accordingly, the court denied the motion to strike the class allegations because it was
premature, noting that the proper time for considering class issues will be at the class
certification stage.

This Court’s decision in *In re Wal-Mart* should guide the Court here. Here,
Defendant’s position is that the class allegations should be stricken because the class
definition includes members who may not legally have a claim for damages resulting

1 from the defect, or may not have standing to assert a claim. Defendant's assertion
2 here, however, is similar to Wal-Mart's because it seeks to prematurely delve into the
3 merits of the class' legal claims. Again, just as the court concluded in *In re Wal-Mart*,
4 even if Plaintiff in this case is ultimately unable to legally define a sustainable class
5 for the reasons asserted in Defendant's Motion to Strike (a point which Plaintiff
6 denies), this Court must still deny Defendant's motion to strike as premature.
7 Defendant has not yet answered the AC, discovery has not commenced, nor has
8 plaintiff moved for class certification.

9 Further, Defendant is making a merits-type argument that the class cannot be
10 sustained because it *presently* may include individuals who either bought a defective
11 product, but did not experience the subject defect; did not buy what is (or will
12 become) known to be a defective product; or bought a defective product, but
13 experienced the failure after the warranty expired. [See Defendant's Motion, Section
14 IV(B), 5:23-8:28]. Clearly, after Plaintiff has conducted class discovery and is
15 seeking class certification, the class sought will include only those who are proper
16 class members. To strike the class allegations at the pleading stage, however, when
17 no discovery concerning the nature of the defect(s), the extent of the iMac products
18 that are defective, and other facts pertinent to class allegation, would be wholly
19 prejudicial to Plaintiffs and consumers, and it would defeat the nature and purpose of
20 the class action vehicle under *Fed. Rules of Civ. Pro.* Rule 23.

21 While Apple correctly notes that there is no *per se* rule against motions to strike
22 class allegations, its only precedent is a case which is 35 years old and has been
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1 widely distinguished and limited by courts in this district and Circuit as a “rare case.”³
2 Consequently, Defendant’s motion should be denied.

3 **III. APPLE’S SUBSTANTIVE ARGUMENTS ARE NOT SUPPORTED BY**
4 **TENABLE AUTHORITY**

5 Defendant incorrectly asserts that the class claims should be struck at the
6 pleading stage because the proposed class: (1) is not ascertainable since the class
7 definition includes class members who did not purchase the defective product(s) and
8 therefore have no injury⁴; (2) is not sustainable because it contains individuals who
9 purchased the product but have not experienced the defect; (3) includes individuals
10 who experienced a defect after the warranty expired; and (4) includes entities which
11 cannot maintain claims under the CLRA. (Defendant’s Motion To Strike, Section I,
12 1:3-2:1). Not only are these arguments premature, they are untenable.

13 **A. Common Matters Predominate in Plaintiff’s Claim, Especially When**
14 **All Facts Plead Are Taken As True and Construed in Plaintiff’s Favor.**

16 ³ The cases which Defendant offers as ‘authority to strike class allegations prior to discovery if the
17 complaint demonstrates that a class action cannot be maintained’ do not in fact provide that
18 authority. In *Kay v. Wells Fargo & Co. N.A.*, 2007 WL 2141292, at *2 (N.D. Cal. July 24, 2007),
19 the court only struck the class allegations at the pleading stage because the legal claims upon which
20 the action was based (equitable tolling and fraudulent concealment) were not pled sufficiently to
21 show that putative class members would be entitled to assert those claims. *Id.*, at *6. That is not the
22 basis upon which the motion to strike here is predicated. The other two cases cited by Apple for this
23 proposition are similarly inapplicable. *Kamm v. California City Dev. Co.*, 509 F.2d 205, 210 (9th
24 Cir. 1975) has been distinguished and limited in *In Re Wal-Mart Stores, Inc.*, 505 F.Supp.2d 609,
615 (N.D.Cal.2007) (quoting *. Myers v. MedQuist, Inc.*, No. 05-4608, 2006 WL 3751210, *4
(D.N.J.2006)). *Thompson v. Merck & Co.*, 2004, WL 62710, at *2, *5 (E.D. Pa. Jan. 6, 2004) is also
not applicable because the court struck class claims prior to certification but notably after discovery
was conducted which revealed facts that plaintiffs would not be able to sustain their claims.

22 ⁴ Defendant asserts: “During the statutory period, there were different iMac models and different
23 iMac screens that used various different components and technologies. Thus, the class includes
24 members who did not purchase the type of screen that Plaintiff alleges contains a defect. A
determination of whether the class member purchased the type of display screen at issue would
require an individual analysis of factual issues for each class member.” (6:16-22.)

1 Apple argues that the presence of individual issues precludes class certification.
2 In doing so, Apple makes arguments that rely on facts that are beyond the pleadings
3 and on facts that it will not be able to prove, even through class discovery. Apple's
4 argument is better addressed at the class certification stage.

5 As listed in paragraph 44 of the SAC, there are numerous issues common to the
6 class that will most efficiently be adjudicated on a class wide basis. Apple does not
7 even try to controvert the existence this plethora of common issues. Indeed, because it
8 is pursuing a Rule 12 motion, it cannot controvert these well-plead allegations.⁵
9 Apple instead raises a series of supposedly individual issues that: (1) do not appear on
10 the face of the complaint, (2) require inferences from facts plead in Apple's favor, (3)
11 are factually unsupported theoretical possibilities that will be disproven during class
12 discovery, and (4) have no bearing on the issues of liability and damages.⁶

13 Contrary to Apple's arguments, there will be little individual analysis of claims
14 at class certification. Because the defect existed in the iMac screens when they were
15 manufactured, the injury occurred when the consumer purchased the product,
16

17 ⁵ As the Court stated in *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 2009 WL 1769444 (C.D.Cal.),
18 under Rule 12(b)(6), plaintiff need only state "enough facts to state a claim to relief that is plausible
19 on its face." (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has "facial
20 plausibility" if the plaintiff pleads facts that "allow [] the court to draw the reasonable inference that
21 the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ---U.S. ---, 2009 WL
22 1361536, at *12 (May 18, 2009). In resolving a 12(b)(6) motion under *Twombly*, the Court must
23 also accept all well-plead factual allegations as true. *Id.* (quoting *Twombly*, 550 U.S. at 555). Factual
24 challenges generally have no bearing under Rule 12(b)(6), and therefore, the Court may not consider
material beyond the pleadings in ruling on a 12(b)(6) motion. *Id.* at 555.

⁶ For example, Apple argues individual issues exist because the class includes persons who manifest
the defect after the warranty expires. (Apple MTS at 6-7) This argument is not based on facts in the
complaint. Further, such persons have claim if Apple had a duty to disclose, an issue extensively
briefed with regard to Apple's 12(b)(6) motion. Plaintiff incorporates his response to those
arguments found in his Response to Apple's Motion to Dismiss as if fully stated herein. Further, this
is hardly a particularly individual issue as it is a binary question as to whether the uniform warranty
Apple supplies with its computers has expired, or whether the class member purchased one of
Apple's uniform extended warranty programs. This argument is a classic red herring.

1 *regardless of whether the consumer has experienced the defect yet*, because the
2 consumer did not receive the product that he/she thought he/she was purchasing; i.e., a
3 screen that would not have vertical lines that blocked the material on the screen and
4 rendered it unusable. Hence, no analysis of individual issues is needed to establish
5 injury. Because in the Ninth Circuit “a district court may not resolve any factual
6 disputes in determining whether the Rule 23 requirements are satisfied”, even on a full
7 rule 23 record, Apple’s Rule 12 predominance arguments are particularly
8 inappropriate. *In re. Live Concert Antitrust Litigation*, 247 F.R.D. 98, 110 (C.D. Cal.
9 2007) (finding that “the Ninth Circuit intended to prohibit district courts from
10 weighing conflicting evidence when determining whether the Rule 23 requirements
11 are satisfied” *Id.* at 115).

12 Here, the common issues as to liability are overwhelmingly amenable to proof
13 on a class-wide basis and were set forth in Plaintiffs’ Statement of Proposed Class
14 Structures: (1) Is there a defect in the design of the iMac screen or related
15 components? (2) How does the defect manifest itself? (3) Did Apple know of the
16 defect (and when did it know about it)? (4) Did Apple conceal the existence of the
17 defect from consumers while continuing to sell iMacs? These questions, among many
18 others, will be litigated in every Apple iMac vertical screen line defect case should a
19 class not be certified here, and Apple has not explained why any of these specific
20 issues are laden with individual issues. Such a failing would doom Apple on a Rule
21 23(b) motion, and is instantly fatal at the Rule 12 stage.

22 The commonality of issues here are very similar to those found to be common
23 and predominant in a recently certified and settled product defect case: “commonality
24

1 exists because all Class members allegedly share the same problem: a defect in their
2 ChoiceDek product Common questions include whether the product is defective
3 [and] whether Defendants knew or should have known of the defect” *Pelletz v.*
4 *Weyerhaeuser Co.*, --- F.R.D. ---, 2009 WL 59126, at *3 (W.D. Wash. Jan. 9, 2009) .

5 **B. Apple’s Ascertainability and Standing Arguments Are Legally and**
6 **Factually Incorrect and Procedurally Premature.**

7 Apple raises a series of arguments directed at the specificity of the class
8 definition and whether class membership is ascertainable and would include persons
9 who might lack standing to pursue a claim. These arguments are just wrong factually
10 and legally and are improperly premature on the pleadings.

11
12 **1. Class Membership is Ascertainable Through Objective**
Criteria and Can Be Refined as Part of the Rule 23 Process.

13 Apple claims the class is not ascertainable because the class definition includes
14 all purchasers of iMacs, not just those that Plaintiffs who had the defect manifest.
15 (Apple MTS at 4-5.) Like Apple’s other arguments, it is wrong factually and legally,
16 and is premature in any event.

17 First, Apple misstates what is required to meet the implied requirement of
18 ascertainability. “An identifiable class exists if its members can be ascertained by
19 reference to *objective criteria.*” (Manual For Complex Litigation (Fourth), § 21.222
20 (2004).) The criteria in the class definition is entirely objective: Did the class
21 member buy an iMac?

22 Second, Plaintiff’s claim is that the members of the class have been injured by
23 purchasing a defectively designed product without being given notice in violation of
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1 Apple's duty to disclose. The manifestation of the defect is not the sole source of
2 injury. Apple cites no authority and makes no claim that Plaintiff's theory of injury is
3 not cognizable (other than Apple's duty to disclose arguments which have been
4 extensively briefed). Indeed, the law is to the contrary.

5 Third, Plaintiff seeks injunctive and compensatory relief. Specifically, Plaintiff
6 seeks equitable relief under the UCL requiring Apple to extend its warranties. All
7 members of the class benefit from that relief and all have been injured by the risk of
8 having their warranty expire prior to the defect manifesting. Apple does not explain
9 why ascertainability is a problem in light of the injunctive relief sought.

10 Finally, a motion to strike pleadings is not the right vehicle to address
11 ascertainability considerations, given that class definitions are frequently adjusted
12 following class discovery to conform to the facts discovered, and the adjusted class
13 definitions are what the courts are asked to certify.⁷ These realities led the Court in
14 *Hibbs-Rines* to recently observe that:

15 While Plaintiff's class definitions may be insufficiently definite for the
16 reasons cited in defendants' moving papers, the Court finds that the
17 motion to strike the class allegations is premature. Plaintiff should at
18 least be permitted to conduct some discovery before the Court rules
19 on the propriety of the class allegations. The class determination
20 "generally involves considerations that are enmeshed in the factual
21 and legal issues comprising the plaintiff's cause of action."

22 2009 WL 513496 at *3 (the problems to be resolved during the class process
23 were that the plaintiff's class definition "has not identified any job titles that actually
24

⁷ Defendant's contention regarding the possible inclusion of entity plaintiffs in the class definition is another example of an issue that should be addressed at the class certification stage, when discovery will help define the contours of the issue and inform whether an amended class definition is necessary.

1 exist at either company”)(quoting General Telephone Co. of Southwest v. Falcon, 457
2 U.S. 147, 160 (1982)).

3
4 **2. Plaintiffs Have Standing to Defeat Defendant’s Motion to Strike.**

5 Defendant next attacks the class definition on standing grounds that the class is
6 overbroad because it includes members of the Class whose screens have not yet
7 exhibited the defect. Defendant is wrong that this issue is ripe for consideration at the
8 pleading stage and is wrong on the law.

9 Defendant incorrectly relies on *Denney v. Deutsche Bank AG*, 443 F.3d 253,
10 264 (2nd Cir. 2006), to assert that a ‘class cannot be certified that has members which
11 lack Article III standing.’ *Denney* is not applicable because it addresses standing in
12 the context of class certification (i.e., classes cannot be certified if they contain
13 members who did not suffer an injury from the alleged defect). *Denney* does not
14 address whether an alleged lack of standing is sufficient to strike class allegations at
15 the premature pleading stage.⁸

16 Similarly, the other cases Defendant cites also solely address class member
17 standing issues pertaining to the certification process; they neither address nor
18 mention standing as it pertains to class definition or sustainability issues at the
19 pleading stage. Both *Bishop v. Saab Auto. A.B.*, 1996 U.S. Dist. LEXIS 22890 (C.D.
20 Cal. Feb. 16, 1996) and *American Suzuki Motor Corp. v. Super. Ct.*, 37 Cal. App. 4th

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22 _____
23 ⁸ The actual holding of *Denney* supports Plaintiff as the court found that Plaintiffs who had received
24 bad tax shelter advice but had not been audited had standing and an injury and noted that “exposure
to toxic or harmful substances has been held sufficient to satisfy the Article III injury-in-fact
requirement even without physical symptoms of injury caused by the exposure, and even though
exposure alone may not provide sufficient ground for a claim under state tort law.” *Id.* at 264-65.

1 1291, 1299 (1995) are inapposite as they were cases decided at the class certification
2 stage after consideration of the evidence obtained in discovery regarding personal
3 injuries (*American Suzuki*) or the product's failure rate (*Saab*).

4 In fact, one of the other cases Defendant cites illustrates why standing exists in
5 the present case. In *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 722-723 (5th Cir.
6 2007), plaintiff brought a class action for the defective airbag deployment in GM
7 vehicles. Defendant GM argued that plaintiffs lacked standing to the extent that any
8 plaintiffs' air bags had not deployed inadvertently, and therefore, those plaintiffs
9 cannot have suffered an injury in fact. As Apple argues here, GM urged the court to
10 adopt the argument that, without a premature deployment, a plaintiff's injury is
11 speculative, and, therefore, plaintiff's suit should be dismissed for lack of standing.

12 The court held that standing was not dependent on the manifestation of the
13 defect. As the *Cole* court found, even without premature manifestation, plaintiffs
14 suffered a loss because the airbags in the subject vehicles were defective **at the**
15 **moment of purchase**. Hence, the injury-in-fact requirement was satisfied and,
16 therefore Article III standing is satisfied. *Cole*, 484 F.3d at 722-723. The court
17 opined:

18 Whether recovery for such a claim is permitted under governing law
19 is a separate question; it is sufficient for standing purposes that the
20 plaintiffs seek recovery for an economic harm that they allege they
21 have suffered. See *Parker v. District of Columbia*, 478 F.3d 370, 377
22 (D.C.Cir.2007) ("The Supreme Court has made clear that when
23 considering whether a plaintiff has Article III standing, a federal court
24 must assume arguendo the merits of his or her legal claim." (citing
Warth v. Seldin, 422 U.S. 490, 501-02, 95 S.Ct. 2197, 45 L.Ed.2d 343
(1975))). We therefore conclude that plaintiffs have established a
concrete injury in fact and have standing to pursue this class action.

Cole, Id., at 722-723.

1 In this case, the injury-in-fact is similarly satisfied since the defect existed in
2 the iMac screens when they were manufactured. Therefore, every purchaser suffered
3 an actual economic loss at the moment of purchase. *Cole, Id.*, at 722-723.

4 Indeed, the California Supreme Court has recently made beyond clear that
5 members of a UCL class need not have standing as part of that statute and that only
6 the class representative had to establish standing. *In re. Tobacco II Cases*, 46 Cal.
7 4th 298 (May 18, 2009). Accordingly, standing should not be at issue here.

8 **B. A Duty to Disclose Exists Regardless if the Defect Manifested After**
9 **the Warranty Period Ended.**

10 Defendant's argument, that under *Daugherty v. American Honda Motor Co.,*
11 *Inc.*, 144 Cal. App. 4th 824 (2006) and its progeny, the complaint fails to state a claim
12 as a matter of law, is clearly inapplicable in this motion to strike class allegations.
13 Moreover, Defendant is mistaken as *Daugherty* does not control in this case.
14 Plaintiffs address these arguments in their Opposition to Defendant's Motion to
15 Dismiss the Second Amended Complaint.
16

17 **C. Whether The Class May Include Entity-Plaintiffs Is An Issue to Be**
18 **Determined At Class Certification.**

19 Defendant's contention that the class claims should be struck at the pleading
20 stage because the class definition may include consumers and businesses is another
21 example of an issue that should be addressed at the class certification stage. If the
22 Court holds that entities are not consumers and therefore cannot sustain a claim under
23 the CRLA, then clearly the class definition will be revised accordingly. But this is an
24

1 issue of whether the class is properly defined as to the subject claim, not whether the
2 claim may or may not be sustained.

3 As such, the issue is prematurely made on Defendant’s motion to strike and
4 should instead be denied without prejudice so that Defendant may reassert it at the
5 certification stage.

6 **IV. THE CLASS CAN BE MAINTAINED UNDER F.R.C.P. RULE 23(B)(1)**
7 **AND (B)(2).**

8 Again, whether the class can be maintained under Rule 23(b) is one to be
9 determined at the certification stage. Defendant provides no authority to establish that
10 it must, or even can, be determined at this pleading stage. Even Defendant’s own
11 arguments use language and cite cases that address the issue for purposes of class
12 certification. Thus, these arguments are again entirely premature. Nevertheless,
13 Plaintiff will address the substance of Defendant’s assertions.

14 **A. Plaintiff’s Rule 23(b)(2) Claim is Sustainable.**

15 First, money is not the primary relief sought, as Plaintiff is seeking injunctive
16 and declaratory relief. Rule 23(b)(2) allows class actions where the party opposing
17 the class has acted or refused to act on grounds generally applicable to the class,
18 thereby making appropriate final injunctive relief or corresponding declaratory relief
19 with respect to the class as a whole. *Federal Rules of Civil Procedure*, Rule 23(b)(2).

20 Here, the Second Amended Complaint seeks “injunctive relief in the form of
21 restitution and/or proportional disgorgement of funds paid to Apple to purchase the
22 iMac or repair and/or replace the defective screens, an injunction requiring Apple to
23 adequately repair the Defect or replace the iMacs free of charge.” (Second Amended
24

1 Complaint, paras. 63, 81.) Plaintiff’s claims for injunctive relief are essential to the
2 resolution of the class claims and recovery for the class since monetary damages does
3 not correct the wrong done to the class, nor put it in a position where consumers will
4 receive a working, reliable product as they believed they had originally purchased.
5 Defendant’s characterization of Plaintiff’s requested injunctive relief to repair or
6 replace the defective screens as monetary damages is incorrect. While repair or
7 replacement has monetary value, it is clearly an equitable remedy and not simply a
8 payment of a cash amount.

9 Last, the cost to repair or replace the defective products would not require an
10 examination of individualized damages as defendant contends. Rather, once the
11 defect is sufficiently assessed, the remedy will be the same as to all of them. While
12 Defendant is correct that each Class member may have varying amounts of monetary
13 damage depending on the costs to replace or repair the defective display screens, it is
14 axiomatic that this variation does not make class certification inappropriate. A class
15 action is not inappropriate simply because each member of the class may at some
16 point be required to make an individual showing as to his or her eligibility for
17 recovery or as to the amount of his or her damages. *See Sav-on Drug Stores, Inc. v.*
18 *Superior Court*, (2004) 34 Cal. 4th 319 [emphasis added]. *See also, Weld v. Glaxo*
19 *Welcome Inc.*, 434 Mass. 81, 746 N.E.2d 522 (2001) (“The necessity of an
20 individualized inquiry to determine damages does not preclude class certification
21 where all other requirements are met.”)

22 **B. Rule 23(b)(1) Claim is Sustainable and Appropriate.**

23 Here, the prosecution of separate actions by or against individual members of
24

1 the class would create a risk of inconsistent or varying adjudications with respect to
2 individual members of the class which would establish incompatible standards of
3 conduct for the party opposing the class, or (B) adjudications with respect to
4 individual members of the class which would as a practical matter be dispositive of
5 the interests of the other members not parties to the adjudications or substantially
6 impair or impede their ability to protect their interests.

7 Further, as Defendant states “[c]ertification under 23(b)(1) should properly be
8 confined to those causes of action in which there is a total absence of individual
9 issues,” here there is an absence of individual issues. *Tober v. Charnita, Inc.*, 58
10 F.R.D. 74, 81 (M.D. Pa. 1973). The problem at issue here is universal among all
11 those who purchased defective iMac screens. Once discovery is conducted and the
12 cause of the vertical lines in the affected product(s) is determined, there will be no
13 need for any assessment of each consumer’s individual screen.

14 **V. CONCLUSION**

15 For all of the foregoing reasons, Plaintiff respectfully requests that this Court
16 deny Defendant’s Motion to Strike Plaintiff’s Class Allegations.

17 Dated: November 13, 2009

Respectfully Submitted,

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19 By: /s/ Jonathan Shub
20 JONATHAN SHUB (SBN 237708)
21 **SEGER WEISS LLP**
22 1515 Market Street, Suite 1380
23 Philadelphia, Pennsylvania 19102
24 (215) 564-2300

1 Eric D. Freed (SBN 164526)
George K. Lang
Michael J. Lotus
2 **FREED & WEISS LLC**
111 W. Washington St., Suite 133
3 Chicago, Illinois 60602
(312) 220-0000
4

5 Michael J. Boni
BONI & ZACK, LLC
16 St. Asaphs Road
6 Bala Cynwyd, PA 19004
(610) 822-2000
7

8 David R. Buchanan
SEEGER WEISS LLP
9 One Williams Street
New York, NY 10004
10 (212) 584-0700
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Michael D. Donovan
DONOVAN SEARLES, LLC
1845 Walnut Street
Suite 1100
Philadelphia, PA 19103
(215) 732-6067

Richard J. Burke
RICHARD J. BURKE LLC
1010 Market Street, Suite 650
St. Louis, Missouri 63101
(314) 621-8647

**Attorneys for Plaintiff, ARAM
HOVSEPIAN, and all others similarly
situated**