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UNITED STATES DISTRICT COURT

HRL

NORTHERN DISTRICT OF CALIFORNIA

CV 12 2131

19 ROBERT HERSKOWITZ, individually and
20 on behalf of all others similarly situated,

21 Plaintiff,

22 v.

23 APPLE, INC.,

24 Defendants.

No.

COMPLAINT

CLASS ACTION

DEMAND FOR JURY TRIAL

1 Plaintiff Robert Herskowitz, individually and on behalf of all others similarly situated,
2 by and through his undersigned attorneys, for his Complaint against defendant Apple, Inc.
3 (“Apple”), states as follows on knowledge as to himself and his own acts and on information
4 and belief as to all other matters, which will likely have evidentiary support after a reasonable
5 opportunity for discovery:

6 **NATURE OF THE ACTION**

7 1. This is a nationwide putative class action for damages and injunctive relief
8 relating to Apple’s unlawful policy and practice of refusing to refund Apple’s customers who
9 have been overcharged for purchases of products and services from Apple’s “e-Stores” in
10 violation of the customer agreements governing those transactions, the California Unfair
11 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et seq.*, and common law.

12 2. Apple is a multinational corporation that designs and sells consumer electronics,
13 computer software, and personal computers. It is the largest publicly traded company in the
14 world by market capitalization, and the largest technology company in the world by revenue
15 and profit, worth more than Google and Microsoft combined.

16 3. Apple’s hardware products include the iPhone, the iPad, the iPod Touch, and the
17 Mac personal computer. Apple customers can purchase songs, videos, and books for use on
18 these devices through the App Store, the iTunes Store, the iBookstore, and the Mac App Store
19 (collectively, the “Apple Stores” or the “e-Stores”). Customers’ use of the Apple Stores is
20 governed by Apple’s standard “Terms and Conditions” (the “Agreement”).

21 4. Under the Agreement, as with any consumer transaction, customers are to be
22 billed only once for the products and services they purchase. Apple, however, has “double
23 billed” customers for purchases made through the Apple Stores. Even more troubling, Apple
24 has implemented a policy and practice of refusing to refund the extra charge to customers who
25 have been overbilled, causing their credit cards or PayPal accounts to be billed twice for a
26 single purchase.

27 5. That is what happened to Plaintiff Robert Herskowitz. On or about December 2,
28 2010, Mr. Herskowitz was charged twice for purchasing a single song. When Mr. Herskowitz

1 brought this overcharge to Apple's attention, he was told that Apple would not refund the
2 overcharge based on its purported no-refund policy:

3 Your request for a refund for "Whataya Want from Me" was carefully
4 considered; however, according to the iTunes Store Terms of Sale, all purchases
made on the iTunes Store are ineligible for refund. This policy matches Apple's
refund policies and provides protection for copyrighted materials.

5 But the Agreement governing the "use of" the Apple Stores says no such thing.

6 6. Upon information and belief, this policy has resulted in substantial numbers of
7 Apple customers throughout the country having been double billed by Apple.

8 7. Apple's practice and policy of refusing to refund payments made by customers
9 who have been double billed violates the terms of the Agreement, California statutory law, and
10 common law. Accordingly, Plaintiff seeks to maintain this nationwide class action to recover
11 damages for all customers who have been overbilled and to obtain equitable relief enjoining
12 Apple's enforcement of its blatantly illegal "no refund" policy.

13 JURISDICTION AND VENUE

14 8. This Court has jurisdiction over Apple because: (1) Apple's principal place of
15 business is in Cupertino, California, which is in the District; (2) Apple conducts substantial
16 business in the State of California; and (3) Apple has sufficient minimum contacts with
17 California, or otherwise intentionally avails itself of the markets within California, through the
18 collection of monies and the distribution of its services in California, to render the exercise of
19 jurisdiction by this Court permissible under traditional notions of fair play and substantial
20 justice.

21 9. Subject-matter jurisdiction is proper under the Class Action Fairness Act,
22 28 U.S.C. § 1332(d) because Plaintiff and Apple are from different states and the amount in
23 controversy exceeds \$5 million.

24 10. Venue is proper in this District under 28 U.S.C. § 1391(b) because the acts upon
25 which this action is based occurred in part in this District. Apple received substantial
26 compensation and profits from the sale of its products and services in this District, and Apple
27 entered into agreements and transactions and/or breached agreements in this District. Thus,
28 Apple's liability arose, in part, in this District.

1 **PARTIES**

2 11. Plaintiff Robert Herskowitz is a New York domiciliary.

3 12. Defendant Apple is a California corporation with its principal place of business
4 in Cupertino, California.

5 **FACTUAL ALLEGATIONS**

6 13. Apple is a multinational corporation that designs and sells consumer electronics,
7 computer software, and personal computers. Apple's hardware products include the Mac
8 personal computer, the iPhone, the iPad, and the iPod Touch.

9 14. Through the iTunes media browser, which Apple describes as "a free
10 application" that "lets you organize and play digital music and video on your computer,"
11 customers can purchase music, videos, and songs, among other things, from the "iTunes Store,"
12 a software-based online digital-media store operated by Apple. Launched on or about April
13 2003, the iTunes Store has over 200,000 items to purchase, making it the number-one music
14 vendor in the United States.

15 15. On July 10, 2008, Apple launched its "App Store," a digital-application
16 distribution platform developed and maintained by Apple that allows users to browse and
17 purchase applications (commonly referred to as "apps"). The App Store offers more than
18 600,000 apps for iPhones, iPads and iPod Touches. By July 2011, Apple customers had
19 downloaded over 15 billion apps from the App Store, and the App Store already has generated
20 billions of dollars in revenue for Apple and its developers

21 16. On January 6, 2011, Apple launched the Mac App Store, allowing customers to
22 purchase and download applications for personal Mac computers. According to Apple, "[t]he
23 Mac App Store is just like the App Store for iPhone, iPod touch, and iPad." Within twenty-four
24 hours of the Mac App Store's release, Apple announced that customers had downloaded more
25 than one million applications from the Mac App Store.

26 17. Apple's iBookstore is part of iBooks, Apple's e-book application allowing
27 customers to download and read books from the iPhone, the iPad, and the iPod Touch. From
28

1 the iBookstore, customers can browse “700,000 books and counting” by title, author, or genre,
2 and view featured books available on the New York Times bestseller lists.

3 18. The “use of the” Apple Stores is governed in every case by Apple’s standard
4 “Terms and Conditions”:

5 THE LEGAL AGREEMENTS SET OUT BELOW GOVERN YOUR USE OF
6 THE ITUNES STORE, MAC APP STORE, APP STORE, AND IBOOKSTORE
7 SERVICES. TO AGREE TO THESE TERMS, CLICK “AGREE.” IF YOU DO
8 NOT AGREE TO THESE TERMS, DO NOT CLICK “AGREE,” AND DO
9 NOT USE THESE SERVICES.

10 *See* www.apple.com/legal/itunes/us/terms.html.

11 19. Customers cannot make any purchases through the Apple Stores without
12 agreeing to these Terms and Conditions. Accordingly, every customer, including Plaintiff,
13 entered into the Agreement with Apple prior to using the Apple Stores to purchase products or
14 services.

15 20. Under the Agreement, Apple may only charge customers “for any products
16 purchased and for any additional amounts (including any taxes and late fees, as applicable) that
17 may be accrued by or in connection with your Account.”

18 21. Apple’s “refund policy,” as stated in the Agreement, provides that the Apple
19 Stores “do not provide price protection or refunds in the event of a price reduction or
20 promotional offering.” Accordingly, by its own terms, Apple’s “no refund” policy is limited to
21 “the event of a price reduction or promotional offering.” In fact, the Agreement explicitly
22 provides for the “remedy” of “a refund” in other circumstances, including if: (1) “a product
23 becomes unavailable following a transaction but prior to download,” and (2) “technical
24 problems prevent or unreasonably delay delivery of your product.”

25 22. Under the Agreement, as with any consumer transaction, Apple may bill
26 customers only once for each product or service that is purchased. With troubling regularity,
27 however, Apple has “double billed” customers for purchases made through the Apple Stores. In
28 those cases, when a customer purchases a song, movie, or book, Apple bills that customer twice
for the same download. Apple, however, has effectuated a policy and practice of refusing to
refund the extra charge to customers whom it has overbilled.

1 23. That is what happened to Plaintiff Robert Herskowitz. On or about December 2,
2 2010, Mr. Herskowitz purchased twenty-two songs from the iTunes Store. However, Apple
3 double billed Plaintiff for one of his selections, a “pop” song entitled, “Whataya Want from
4 Me.” In other words, Apple billed Mr. Herskowitz a total of \$2.58 for a song that cost \$1.29 to
5 download.

6 24. Later that same day, December 2, 2010, Plaintiff reported the double billing to
7 Apple, which generated an automated message stating an iTunes representative is “reviewing
8 your request and will send you a personal response soon.”

9 25. On December 3, 2010, Apple e-mailed Plaintiff denying his request for a refund
10 based on its purported no-refund policy:

11 Your request for a refund for “Whataya Want from Me” was carefully
12 considered; however, according to the iTunes Store Terms of Sale, all purchases
13 made on the iTunes Store are ineligible for refund. This policy matches Apple’s
14 refund policies and provides protection for copyrighted materials.

15 26. Mr. Herskowitz is not the only customer in the United States to have been denied
16 a refund by Apple. Upon information and belief, this policy has resulted in substantial numbers
17 of Apple customers throughout the country having been double billed by Apple.

18 CLASS ACTION ALLEGATIONS

19 27. Plaintiff brings this purported class action under Rule 23 of the Federal Rules of
20 Civil Procedure on behalf of all others similarly situated based on his own circumstances as a
21 representative member of the following proposed class (the “Class”):

22 All individuals or entities who purchased products and services from the App
23 Store, the iTunes Store, the iBookstore, and/or the Mac App Store and who were
24 billed more than once and paid Defendant for the same product or services.

25 28. Specifically excluded from the proposed Class are the Court and its staff, Apple,
26 any entity in which Apple has a controlling interest, and the officers, directors, affiliates, legal
27 representatives, successors, subsidiaries, and/or assigns of any such entity.

28 29. The proposed Class meets all requirements for class certification.

1 **NUMEROSITY**

2 30. The proposed Class is so numerous that the individual joinder of all its members
3 in one action is impracticable. While the exact number and the identities of Class members are
4 unknown at this time and can only be ascertained through investigation and discovery in this
5 action, Apple conducts business nationwide and, on information and belief, there currently are
6 over 50 million Apple Store customers in the United States—that is approximately one quarter
7 of the country’s internet users.

8 **EXISTENCE AND PREDOMINANCE OF**
9 **COMMON QUESTIONS OF LAW AND FACT**

10 31. Plaintiff seeks common equitable relief, including declaratory, injunctive,
11 restitutionary and other equitable monetary relief, and common measures of economic,
12 compensatory, exemplary and/or statutory damages as set forth more fully below. This
13 includes, but is not limited to, full credits for and/or repayment of the improper charges, or any
14 other monies that were improperly required to be expended as a result of Apple’s wrongdoing,
15 plus interest thereon.

16 32. Common questions of law and fact arising out of the claims here at issue exist as
17 to all members of the Class and predominate over any potential individual issues. These
18 common legal and factual questions include, but are not limited to, the following:

- 19 (a) Whether Apple breached the Agreement with its Apple Stores customers;
20 (b) Whether Apple’s course of conduct was unfair, unreasonable or
21 unconscionable or constitutes acts of unfair competition, misleading or
22 deceptive acts or practices;
23 (c) Whether Apple improperly imposed certain charges that were not to be
24 imposed upon the Class as it was either improper to do so or was not
25 authorized by the Class;
26 (d) The amount of revenues and profits Apple received and/or the amount of
27 monies or other obligations imposed on or lost by Class as a result of
28 such wrongdoing;

1 (e) Whether the Class is threatened with irreparable harm or is otherwise
2 entitled to injunctive and other equitable relief; and

3 (f) Whether the Class is entitled to payment of equitable monetary relief,
4 actual, incidental, consequential, exemplary and/or statutory damages,
5 plus interest thereon.

6 **TYPICALITY OF CLAIMS**

7 33. Plaintiff's claims are typical of the claims of the Class. Plaintiff, like the
8 members of the Class, was a victim of the illegal practices in question by being wrongfully
9 charged, and by not receiving reimbursement of such charges plus interest thereon.

10 34. Plaintiff and the Class have similarly had their legal rights infringed upon,
11 sustained injuries, losses and damages as described herein and/or are facing irreparable harm
12 arising out of Apple's common course of conduct. The right of Plaintiff and each member of
13 the Class to payment of any actual, incidental, consequential, exemplary and/or statutory
14 damages or equitable monetary relief resulting therefrom equally arise from and are attributable
15 to Apple's wrongful conduct in violation of the laws alleged herein, as these claims arise from
16 the same core set of facts.

17 **ADEQUATE REPRESENTATION**

18 35. Plaintiff will fairly and adequately protect the interests of the members of the
19 Class because: (1) he has no irreconcilable conflicts with or interests materially antagonistic to
20 those of the other Class members; (2) the Plaintiff's interests are aligned with the interests of the
21 Class; and (3) Plaintiff understands the nature of these allegations and his responsibilities as
22 class representative to represent the interests of those persons who have been overbilled by
23 Apple.

24 36. Plaintiff has retained attorneys who are experienced in the prosecution of class
25 actions, including consumer class actions, who have done significant work investigating or
26 identifying potential claims in this litigation, who have extensive knowledge of the applicable
27 law, and who have committed and will continue to commit substantial resources to representing
28 the Class.

1 Plaintiff, entered into the Agreement with Apple prior to using the Apple Stores to purchase
2 products or services.

3 43. Plaintiff has performed all, or substantially all conditions, covenants, and
4 promises required on his part to be performed in accordance with the terms and conditions of
5 the Agreement.

6 44. On or about December 2, 2010, Plaintiff requested that Apple refund the amount
7 of \$1.29 that Apple had overbilled Plaintiff in connection with his purchase of a song on iTunes.

8 45. On or about December 3, 2010, Apple breached the Agreement by refusing to
9 refund to Plaintiff the \$1.29 that it had overbilled Plaintiff. Apple also double billed or
10 overcharged the Class members for their purchases under the Agreement, but to date Apple has
11 not refunded those overcharges.

12 46. As a result of Apple's breach of the Agreement, Plaintiff and the Class members
13 have been damaged in an amount to be determined at trial, but in no event less than \$5 million,
14 exclusive of interest and costs.

15 **COUNT II**
16 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

17 47. Plaintiff repeats and realleges each and every allegation contained above as if set
18 forth fully herein.

19 48. Apple entered into the Agreement with Plaintiff and the Class. There exists in
20 the Agreement an implied promise of good faith and fair dealing.

21 49. Plaintiff has performed all, or substantially all conditions, covenants, and
22 promises required on his part to be performed in accordance with the terms and conditions of
23 the Agreement.

24 50. Apple unfairly interfered with the rights of Plaintiff to receive the benefits of the
25 Agreement by double billing and otherwise overcharging Plaintiff for services and products
26 purchased under the Agreement. Accordingly, Apple breached the implied covenant of good
27 faith and fair dealing.

- 1 C. Enjoining Apple from implementing its "no refund" policy concerning double
2 billing and overcharges;
- 3 D. Imposing punitive damages on Apple by virtue of its willful and intentional
4 misconduct;
- 5 E. Awarding Plaintiff his costs, expenses, disbursements and reasonable attorneys'
6 fees in an amount to be determined at trial; and
- 7 F. Awarding Plaintiff such other relief as the Court deems just and proper.

8 **DEMAND FOR TRIAL BY JURY**

9 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands
10 trial by jury of all issues that may be so tried.

11 Dated: April 27, 2012

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