

ORIGINAL

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7 *Attorneys for Defendant*
APPLE INC.
8 f/k/a APPLE COMPUTER, INC.

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

13 WILLIAM J. GILLIS, JR., on behalf of himself
14 and All Others Similarly Situated and on Behalf
of the General Public,

15 Plaintiff,

16 v.

17 APPLE COMPUTER, INC., AT&T, and DOES 1
18 through 10,

19 Defendants.

Case No. '08 CV 1835 LAB LSP

CLASS ACTION

DEFENDANT APPLE INC.'S
NOTICE OF REMOVAL

First Amended Complaint filed:
September 5, 2008

20 **DEFENDANT APPLE INC.'S NOTICE OF REMOVAL**

21 Defendant Apple Inc. f/k/a Apple Computer, Inc. ("Apple"), pursuant to
22 28 U.S.C. § 1441, removes to this Court the state action described below, which is within the
23 original jurisdiction of this Court and properly removed under 28 U.S.C. §§ 1332, 1441, 1446,
24 and 1453. Pursuant to 28 U.S.C. § 1446(d), copies of this Notice of Removal are being served
25 upon counsel for Plaintiff William Gillis ("Plaintiff"), as well as counsel for Defendant AT&T
26 (with Apple, collectively, "Defendants"), and filed with the Clerk of the California Superior
27 Court for the County of San Diego, as an exhibit to a Notice to State Court of Removal to Federal
28

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
smz

1 Court. A copy of the Notice being filed in state court is attached hereto (without exhibits) as
2 Exhibit A.

3 **PROCEDURAL HISTORY AND TIMELINESS OF REMOVAL**

4 1. On August 29, 2008, Plaintiff filed a purported class action captioned *Gillis, et al. v.*
5 *Apple Computer, Inc., et al.*, Case No. 37-2008-00090743-CU-BT-CTL, against Defendants in
6 the California Superior Court for the County of San Diego ("State Court Action"). Plaintiff filed
7 a First Amended Complaint ("FAC") on September 5, 2008.

8 2. Apple was served with the State Court Action Summons, Complaint, and First
9 Amended Complaint on September 9, 2008. This notice is therefore timely pursuant to 28 U.S.C.
10 § 1446(b). Pursuant to 28 U.S.C. § 1446(a), true and correct copies of all process, pleadings, and
11 orders served upon Apple in the State Court Action are attached to this Notice as Exhibit B.

12 3. The California Superior Court for the County of San Diego is located within the
13 Southern District of California. 28 U.S.C. § 84(d). This Notice of Removal is therefore properly
14 filed in this Court pursuant to 28 U.S.C. § 1441(a).

15 **NO JOINDER NECESSARY**

16 4. No other Defendants are required to consent to this removal. 28 U.S.C. § 1453(b).

17 **ALLEGATIONS OF THE COMPLAINT**

18 5. This action is a putative class action against Defendants on behalf of California
19 purchasers of Apple's iPhone 3G. (FAC ¶ 27.) Apple's iPhone 3G is supported exclusively by
20 AT&T's network. (FAC ¶ 4.) Plaintiff alleges that Apple and AT&T "misrepresented to the
21 public the speed, strength and performance of the 3G-bandwidth network" supporting Apple's
22 iPhone 3G. (FAC ¶ 1.) In particular, Plaintiff alleges that the iPhone 3G "demands too much
23 power from the 3G bandwidths" and that AT&T's "infrastructure is insufficient to handle this
24 overwhelming 3G signal based upon the high volume of 3G iPhones it has sold." (FAC ¶ 7.)
25 Plaintiff alleges that, "[d]ue to the overloaded 3G network, it is quite common for 3G iPhone
26 users to be on the 3G network for only a few minutes before their 3G iPhone switches over to the
27 slower EDGE network." (FAC ¶ 9.)

1 6. Plaintiff alleges that Defendants misrepresented the speed of the iPhone 3G's
2 performance on the network in the "marketing, advertising, and/or sale of [the] 3G iPhone and
3 service plans." (FAC ¶ 26.) Plaintiff complains that "Apple and AT&T have failed to disclose
4 the true and actual speed and performance of the 3G iPhone and the insufficient infrastructural 3G
5 network" and that Apple's iPhone 3G does not "contain a disclaimer on the outside of each and
6 every one of defendant's 3G iPhone boxes." (FAC ¶¶ 12, 114.)

7 7. Plaintiff seeks to represent "[a]ll persons in California who have purchased an iPhone
8 3G and AT&T 3G Service Plan." (FAC ¶ 27.) On behalf of Plaintiffs and the putative class, the
9 Complaint attempts to state claims for: (1) negligence; (2) breach of the implied warranty of
10 merchantability; (3) fraud and deceit; (4) negligent misrepresentation; (5) civil conspiracy; (6)
11 violation of California's Unfair Competition Law, California Business and Professions Code
12 §§ 17200 *et seq.* ("UCL"); and (7) violation of California's False Advertising Law, California
13 Business and Professions Code §§ 17500 *et seq.* ("FAL"). (FAC ¶¶ 39-117.) The Complaint
14 seeks, *inter alia*, compensatory damages, punitive damages, injunctive relief, restitution,
15 disgorgement, attorneys' fees, and costs. (FAC ¶ 16; Prayer for Relief.)

16 8. Apple disputes Plaintiff's allegations, believes the First Amended Complaint lacks
17 merit, and denies that Plaintiff or the putative class members have been harmed in any way.

18 **BASIS FOR REMOVAL**

19 9. This action is within the original jurisdiction of this Court, and removal is therefore
20 proper under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), which grants
21 district courts original jurisdiction over class actions in which the amount in controversy exceeds
22 \$5,000,000 and any member of the class of plaintiffs is a citizen of a State different from any
23 defendant. As set forth below, this action satisfies each of the requirements of Section 1332(d)(2)
24 for original jurisdiction under CAFA. *See Lowdermilk v. United States Bank, N.A.*, 479 F.3d 994
25 (9th Cir. 2007).

26 10. Covered Class Action. This action meets the CAFA definition of a class action,
27 which is "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar
28

1 State statute or rule of judicial procedure.” 28 U.S.C. §§ 1332(d)(1)(B), 1453(a) & (b). (FAC
2 ¶ 21.)

3 11. Class Action Consisting of More than 100 Members. The First Amended
4 Complaint alleges that “the number of people who have bought the iPhone 3G and signed up for
5 the 3G service in California is in the millions of people.” (FAC ¶ 29.) Accordingly, based on
6 Plaintiff’s allegation, the aggregate number of class members is greater than 100 persons for
7 purposes of 28 U.S.C. § 1332(d)(5)(B).

8 12. Diversity. The required diversity of citizenship under CAFA is satisfied because
9 “any member of a class of plaintiffs is a citizen of a State different from any defendant.”
10 28 U.S.C. § 1332(d)(2)(A). Plaintiff is a citizen of the State of California. (FAC ¶ 20.) Apple is
11 “a California corporation which is licensed to do, and is doing, business in California and
12 throughout the United States.” (FAC ¶ 23.) Plaintiff alleges AT&T is “a Texas corporation
13 which is licensed to do, and is doing, business in California and throughout the United States.”
14 (FAC ¶ 24.) Thus, according to the allegations of Plaintiff’s Complaint, the diversity
15 requirements of CAFA are satisfied. Apple notes that AT&T Mobility, LLC, the AT&T entity
16 that provides 3G network support for Apple’s iPhone 3G, is headquartered in Atlanta, Georgia.
17 Irrespective of whether the “AT&T” plaintiff generically named in his Complaint is AT&T Inc.
18 (Texas) or AT&T Mobility, LLC (Georgia), each member of the purported class is a citizen of a
19 state (California) different from a defendant (Texas or Georgia), thus satisfying the diversity
20 requirements of 28 U.S.C. § 1332(d)(2)(A).

21 13. Amount in Controversy. Under CAFA, the claims of the individual class members
22 are aggregated to determine if the amount in controversy exceeds the required “sum or value of
23 \$5,000,000, exclusive of interest and costs.” 28 U.S.C. §§ 1332(d)(2), (d)(6). Plaintiff alleges
24 the “recovery of compensatory, statutory and/or punitive damage as well as obtaining restitution
25 and disgorgements from Defendants of their ill-gotten gains” as well as “equitable and injunctive
26 relief, including corrective labeling and advertising and/or product recall.” (FAC ¶ 16.) Without
27 conceding any merit to the First Amended Complaint’s damages allegations or causes of action,
28 the amount in controversy here satisfies CAFA’s jurisdictional threshold.

1 14. Amount in Controversy – Compensatory Damages. The amount in controversy with
2 respect to compensatory damages alone exceeds \$5,000,000. The First Amended Complaint
3 alleges that “the remedy to resolve the common class issues regarding the iPhones and Network
4 Connectivity deficit capacity would be to refund the cost of the iPhones and Service Agreement
5 Costs, which is estimated at approximately *\$500.00 per plaintiff.*” (FAC ¶ 34 (emphasis added).)
6 The Complaint further alleges that the size of the class would be ascertainable by looking to
7 Apple and AT&T’s “records to confirm the sales of 3G iPhones and 3G Service Plans within
8 California.” (FAC ¶ 30.) The iPhone 3G is sold through Apple Retail Stores as well as through
9 AT&T’s retail stores. Since the iPhone 3G was launched in July 2008, Apple’s internal records
10 reflect it sold well in excess of 10,000 iPhone 3G units through Apple’s Retail Stores in
11 California alone. (Declaration of James Bean ¶¶ 1-2.) If each purchaser is allegedly entitled to
12 \$500 in damages, the amount in controversy Plaintiff alleges is at least \$5,000,000 and easily
13 meets the amount-in-controversy requirement even without considering AT&T’s additional sales
14 of the iPhone 3G in California or the sales of its service plans.¹

15 15. Thus, Plaintiff’s allegations place in controversy an amount plainly in excess of \$5
16 million. While Apple disputes that it is liable to Plaintiff or any of the putative class members, or
17 that Plaintiffs or the putative class members suffered injury or incurred damages in any amount
18 whatsoever, for purposes of satisfying the jurisdictional prerequisites of CAFA, the matter in
19 controversy exceeds \$5 million.

20 16. Amount in Controversy — Punitive Damages. The Complaint also seeks punitive
21 damages. (FAC ¶ 16.) Punitive damages are considered part of the amount in controversy. *See*
22 *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001); *see also, e.g., Sanchez v. Wal-Mart*
23 *Stores, Inc.*, No. Civ. S-06-CV-2573 DFL KJM, 2007 U.S. Dist. LEXIS 33746, *5-6 (E.D. Cal.,
24 May 8, 2007) (including punitive damages for amount in controversy under CAFA); *Alexander v.*

25 _____
26 ¹ Apple is not in possession of AT&T’s sales records, and therefore cannot provide any
27 concrete data regarding AT&T’s sales of iPhone 3G units and its own service plans through its
28 California retail stores. AT&T’s sales data would further increase the amount in controversy over
the jurisdictional minimum.

1 *FedEx Ground Package Sys.*, No. C-05-0038 MHP, 2005 U.S. Dist. LEXIS 5129, *15 (N.D. Cal.
2 Mar. 24, 2005) (same). Apple believes that no damages, compensatory or punitive, should or will
3 be awarded in this case; however, for purposes of the amount in controversy requirement, claimed
4 punitive damages may be considered.

5 17. Amount in Controversy – Attorneys’ Fees. Plaintiff also seeks an award of
6 attorneys’ fees. (Prayer for Relief ¶ 6.) This amount is likewise included in the amount in
7 controversy calculation. *See Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199, 202 (1933);
8 *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005), *amended and rehearing denied at*
9 *2006 U.S. App. LEXIS 3376* (9th Cir. 2006); *see also, e.g., Sanchez*, 2007 U.S. Dist. LEXIS
10 33746, at *6 (including attorneys’ fees in calculation).

11 18. No CAFA Exclusions. The action does not fall within any exclusion to removal
12 jurisdiction recognized by 28 U.S.C. § 1332(d), and therefore this action is removable pursuant to
13 CAFA, 28 U.S.C. §§ 1332(d) and 1453(b).

14 **CONCLUSION**

15 19. For all of the reasons stated above, this action is within the original jurisdiction of
16 this Court pursuant to 28 U.S.C. § 1332(d). Accordingly, this action is removable pursuant to
17 28 U.S.C. § 1441(a) and § 1453.

18
19 WHEREFORE, Defendant Apple gives notice that the above-described action pending
20 against it in the Superior Court for the County of San Diego is removed to this Court.

21 Dated: October 7, 2008

PENELOPE A. PREOVOLOS
ANDREW D. MUHLBACH
HEATHER A. MOSER
MORRISON & FOERSTER LLP

24
25 By: 
PENELOPE A. PREOVOLOS

Attorneys for Defendant
APPLE INC.

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8 f/k/a APPLE COMPUTER, INC.

9
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11 COUNTY OF SAN DIEGO - CENTRAL DISTRICT
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15 Plaintiff,

16 v.

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18 through 10,

19 Defendants.
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Case No. 37-2008-00090743-CU-
BT-CTL

CLASS ACTION

**DEFENDANT APPLE INC.'S
NOTICE OF REMOVAL**

First Amended Complaint filed:
September 5, 2008

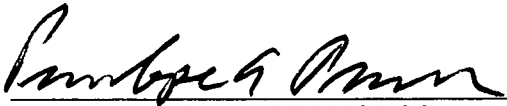
1 TO PLAINTIFF, HIS COUNSEL OF RECORD, AND THE CLERK OF THE SUPERIOR COURT
2 OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO:

3 PLEASE TAKE NOTICE that on October 8, 2008, Defendant Apple Inc. f/k/a Apple
4 Computer, Inc., filed a Notice of Removal of this action in the United States District Court for the
5 Southern District of California. A true and correct copy of said Notice of Removal (without exhibits)
6 is attached hereto as Exhibit A and is served and filed herewith.

7 PLEASE TAKE FURTHER NOTICE that, pursuant to 28 U.S.C. § 1446, the filing of said
8 Notice affects the removal of this action to the federal court, and this Court is directed to "proceed no
9 further unless and until the case is remanded." 28 U.S.C. § 1446(d).

10 Dated: October 7, 2008

PENELOPE A. PREOVOLOS
ANDREW D. MUHLBACH
HEATHER A. MOSER
MORRISON & FOERSTER LLP

11
12
13
14 By: 

PENELOPE A. PREOVOLOS

Attorneys for Defendant
APPLE INC.
f/k/a APPLE COMPUTER, INC.



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CIVIL BUSINESS OFFICE 1
CENTRAL DIVISION

2008 OCT -7 PM 4: 04

CENTRAL SUPERIOR COURT
SAN DIEGO COUNTY, CA

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19 Defendants.

Case No. 37-2008-00090743-CU-
BT-CTL

**DEFENDANT APPLE INC.'S
ANSWER TO FIRST AMENDED
COMPLAINT**

First Amended Compl. filed:
September 5, 2008
Trial Date: None set

20
21 Defendant Apple Inc., f/k/a Apple Computer, Inc., ("Apple"), answers the First Amended
22 Complaint ("First Amended Complaint") filed by Plaintiff William J. Gillis, Jr. ("Plaintiff") as
23 follows:

24 **GENERAL DENIAL**

25 Pursuant to section 431.30(d) of the California Code of Civil Procedure, Apple denies each,
26 every and all allegations of the First Amended Complaint, and the whole thereof, and denies that
27 Plaintiff and/or the putative class are entitled to any recovery or relief sought or alleged by reason of
28 any act, omission or conduct on the part of Apple.

1 **AFFIRMATIVE DEFENSES**

2 Apple does not, by stating the matters set forth in these defenses, allege or admit that it has
3 the burden of proof and/or persuasion with respect to any of these matters, and does not assume the
4 burden of proof or persuasion as to any matters to which Plaintiff has the burden of proof or
5 persuasion.

6 **FIRST AFFIRMATIVE DEFENSE**

7 **(Failure to State A Claim – All Causes of Action)**

8 1. The First Amended Complaint, and each and every cause of action therein, fails to
9 state facts sufficient to constitute a cause, or causes, of action against Apple.

10 **SECOND AFFIRMATIVE DEFENSE**

11 **(Complaint Uncertain, Vague, and Ambiguous)**

12 2. The First Amended Complaint and the allegations thereof are uncertain, vague, and
13 ambiguous.

14 **THIRD AFFIRMATIVE DEFENSE**

15 **(Apple's Practices Not Unlawful)**

16 3. Apple alleges that to the extent that Plaintiff proves that Apple conducted any of the
17 activities alleged in the First Amended Complaint, those activities conformed with and were pursuant
18 to any and all applicable statutes and regulations and were not unlawful.

19 **FOURTH AFFIRMATIVE DEFENSE**

20 **(Apple's Practices Not Unfair)**

21 4. Apple alleges that to the extent that Plaintiff proves that Apple conducted any of the
22 activities alleged in the First Amended Complaint, those activities were not and are not unfair within
23 the meaning of the California Business & Professions Code §§ 17200, *et seq.* and §§ 17500, *et seq.*

24 **FIFTH AFFIRMATIVE DEFENSE**

25 **(Apple's Practices Not Deceptive or Misleading)**

26 5. Any statements made by Apple were truthful and accurate and were not misleading or
27 deceptive or likely to mislead or deceive Plaintiff or the purported class, and could not have been
28

1 reasonably understood by Plaintiff or any member of the purported class in a manner that was
2 misleading or deceptive or likely to mislead or deceive.

3 **SIXTH AFFIRMATIVE DEFENSE**

4 **(Improper Class Action)**

5 6. Plaintiff's claims, and those of the purported class, are barred because this action is
6 not properly maintainable as a class action as alleged by Plaintiff, and Plaintiff is not a proper class
7 representative.

8 **SEVENTH AFFIRMATIVE DEFENSE**

9 **(No Injury in Fact or Loss of Money or Property)**

10 7. Apple alleges on information and belief that Plaintiff and the members of the
11 purported class have not sustained the required injury in fact and/or lost the requisite money or
12 property necessary to confer standing pursuant to California Business & Professions Code §§ 17200,
13 *et seq.*

14 **EIGHTH AFFIRMATIVE DEFENSE**

15 **(No Injury or Damage)**

16 8. Apple denies that Plaintiff or any member of the purported class have suffered any
17 injury or damage whatsoever, and further denies that it is liable to Plaintiff or any member of the
18 purported class for any of the injury or damage claimed or for any injury or damage whatsoever.

19 **NINTH AFFIRMATIVE DEFENSE**

20 **(Alleged Injury or Damage Caused by Others)**

21 9. To the extent that Plaintiff and/or the purported class suffered injury or damage, which
22 Apple denies, such injury or damage was caused by the action or conduct of others, not of Apple.

23 **TENTH AFFIRMATIVE DEFENSE**

24 **(No Causation)**

25 10. To the extent that Plaintiff or the purported class suffered injury or damage, which
26 Apple denies, such injury or damage was not proximately caused by any conduct or inaction of
27 Apple, or was not foreseeable, or both.

1 **ELEVENTH AFFIRMATIVE DEFENSE**

2 **(No Reliance)**

3 11. Plaintiff's claims, and those of the purported class, are barred, in whole or in part,
4 because Plaintiff did not rely on the statement or omissions of which Plaintiff now complain in
5 purchasing the Apple iPhone 3G and, moreover, the alleged statements or omissions were not
6 material.

7 **TWELFTH AFFIRMATIVE DEFENSE**

8 **(Equitable Relief – Remedies)**

9 12. Plaintiff and the purported class are barred from asserting the claims for equitable
10 relief alleged in the First Amended Complaint because they have adequate remedies at law and/or the
11 equitable relief is neither necessary nor proper under applicable law.

12 **THIRTEENTH AFFIRMATIVE DEFENSE**

13 **(Failure to Mitigate)**

14 13. Plaintiff and the purported class have failed to mitigate their damages, if any.

15 **FOURTEENTH AFFIRMATIVE DEFENSE**

16 **(Good Faith)**

17 14. Plaintiff's claims, and those of the purported class, are barred in whole or in part,
18 because Apple at all times acted in good faith and did not directly or indirectly perform any act
19 whatsoever that would constitute a violation of any right of Plaintiff or the purported class or any
20 duty owed to Plaintiff or the purported class.

21 **FIFTEENTH AFFIRMATIVE DEFENSE**

22 **(Absence of Intent or Knowledge)**

23 15. Apple alleges that to the extent that Plaintiff proves that Apple conducted any of the
24 activities alleged in the First Amended Complaint, Plaintiff's claims, and those of the purported class,
25 are barred, in whole or in part, because Apple had no intention or knowledge, nor any reasonable
26 grounds to know, that any such activities were untrue or misleading.

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SIXTEENTH AFFIRMATIVE DEFENSE

(Puffing)

16. Plaintiff's claims, and those of the purported class, are barred by the fact that the alleged deceptive statements were such that no reasonable person in Plaintiff's position could have reasonably relied on or misunderstood Apple's statements as claims of fact.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Failure to Notify of Breach of Warranty)

17. Plaintiff failed to notify Apple of any breach of warranty within a reasonable time after Plaintiff knew or should have known of any purported defect.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Claims Barred By Written Warranty)

18. To the extent Plaintiff asserts claims on behalf of himself and/or the purported class for remedies outside of Apple's One (1) Year Limited Warranty for the iPhone 3G, those claims are barred.

NINETEENTH AFFIRMATIVE DEFENSE

(Warranties Were Limited)

19. Apple expressly limited any express warranty and any implied warranty that may have been in existence or otherwise been created.

TWENTIETH AFFIRMATIVE DEFENSE

(Cure)

20. Plaintiff's claims, and those of the purported class, are barred, in whole or in part, because, although Apple denies each and every claim of Plaintiff and the purported class and denies that Apple engaged in wrongdoing or error of any kind, Apple has established an appropriate correction, repair, replacement, or other remedy.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Estoppel)

21. The First Amended Complaint, and each of its purported causes of action, is barred, in whole or in part, by the equitable doctrine of estoppel.

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TWENTY-SECOND AFFIRMATIVE DEFENSE

(Unclean Hands)

22. Plaintiff is barred by the doctrine of unclean hands from asserting any of the claims in the First Amended Complaint.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Waiver)

23. The First Amended Complaint, and each of its purported causes of action, is barred, in whole or in part, by the doctrine of waiver.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Lack of Scienter)

24. Apple alleges that to the extent that Plaintiff proves that Apple conducted any of the activities alleged in the First Amended Complaint, Plaintiff's claims, and those of the purported class, are barred, in whole or in part, because Apple had no intent or knowledge, nor any reasonable grounds to know, that any such activities or omissions were unlawful, untrue, or misleading, nor did Apple act with any intent that others rely upon such activities or omission.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Comparative Fault)

25. Plaintiff's claims, and those of the purported class, are barred, in whole or in part, by their own comparative fault.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Assumption of Risk)

26. Plaintiff and/or any member of the purported class knowingly, willingly, and voluntarily assumed the risk of all damages allegedly sustained, if any.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Contributory Negligence)

27. Any and all events, happenings, injuries and damages set forth in the First Amended Complaint were proximately caused and contributed to by the acts and/or omissions of Plaintiff

1 and/or members of the purported class, and such acts and/or omissions totally bar or reduce any
2 recovery on the part of plaintiff and/or the purported class.

3 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

4 **(No Duty)**

5 28. Any recovery on the First Amended Complaint, or any claim for relief averred therein,
6 is barred to the extent Apple owed no duty to Plaintiff or to members of the purported class.

7 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

8 **(Performance of Duties)**

9 29. The First Amended Complaint, and each purported claim for relief alleged therein, are
10 barred because Apple fully performed any and all contractual and other duties, if any, owed to
11 Plaintiff and/or any member of the purported class.

12 **THIRTIETH AFFIRMATIVE DEFENSE**

13 **(Lack of Materiality)**

14 30. Plaintiff's claims, and those of the putative class, are barred, in whole or in part,
15 because the alleged statements and/or omissions were not material.

16 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

17 **(Lack of Privity)**

18 31. As to those causes of action based upon a breach of warranty, Plaintiff's claims, and
19 those of the purported class, are barred, in whole or in part, by lack of privity as required under the
20 warranty laws.

21 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

22 **(Lack of Standing)**

23 32. Apple alleges on information and belief that Plaintiff and the members of the
24 purported class lack standing.

25
26 Apple reserves the right to assert other defenses as discovery progresses.

27 **PRAYER**

28 WHEREFORE, Apple prays for judgment as follows:

COPY

FILED
CIVIL BUSINESS OFFICE 1
CENTRAL DIVISION
2008 OCT -7 PM 4:04
CLERK SUPERIOR COURT
SAN DIEGO COUNTY, CA

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22 Complaint ("First Amended Complaint") filed by Plaintiff William J. Gillis, Jr. ("Plaintiff") as
23 follows:

24 **GENERAL DENIAL**

25 Pursuant to section 431.30(d) of the California Code of Civil Procedure, Apple denies each,
26 every and all allegations of the First Amended Complaint, and the whole thereof, and denies that
27 Plaintiff and/or the putative class are entitled to any recovery or relief sought or alleged by reason of
28 any act, omission or conduct on the part of Apple.

1 **AFFIRMATIVE DEFENSES**

2 Apple does not, by stating the matters set forth in these defenses, allege or admit that it has
3 the burden of proof and/or persuasion with respect to any of these matters, and does not assume the
4 burden of proof or persuasion as to any matters to which Plaintiff has the burden of proof or
5 persuasion.

6 **FIRST AFFIRMATIVE DEFENSE**

7 **(Failure to State A Claim – All Causes of Action)**

8 1. The First Amended Complaint, and each and every cause of action therein, fails to
9 state facts sufficient to constitute a cause, or causes, of action against Apple.

10 **SECOND AFFIRMATIVE DEFENSE**

11 **(Complaint Uncertain, Vague, and Ambiguous)**

12 2. The First Amended Complaint and the allegations thereof are uncertain, vague, and
13 ambiguous.

14 **THIRD AFFIRMATIVE DEFENSE**

15 **(Apple's Practices Not Unlawful)**

16 3. Apple alleges that to the extent that Plaintiff proves that Apple conducted any of the
17 activities alleged in the First Amended Complaint, those activities conformed with and were pursuant
18 to any and all applicable statutes and regulations and were not unlawful.

19 **FOURTH AFFIRMATIVE DEFENSE**

20 **(Apple's Practices Not Unfair)**

21 4. Apple alleges that to the extent that Plaintiff proves that Apple conducted any of the
22 activities alleged in the First Amended Complaint, those activities were not and are not unfair within
23 the meaning of the California Business & Professions Code §§ 17200, *et seq.* and §§ 17500, *et seq.*

24 **FIFTH AFFIRMATIVE DEFENSE**

25 **(Apple's Practices Not Deceptive or Misleading)**

26 5. Any statements made by Apple were truthful and accurate and were not misleading or
27 deceptive or likely to mislead or deceive Plaintiff or the purported class, and could not have been
28

1 reasonably understood by Plaintiff or any member of the purported class in a manner that was
2 misleading or deceptive or likely to mislead or deceive.

3 **SIXTH AFFIRMATIVE DEFENSE**

4 **(Improper Class Action)**

5 6. Plaintiff's claims, and those of the purported class, are barred because this action is
6 not properly maintainable as a class action as alleged by Plaintiff, and Plaintiff is not a proper class
7 representative.

8 **SEVENTH AFFIRMATIVE DEFENSE**

9 **(No Injury in Fact or Loss of Money or Property)**

10 7. Apple alleges on information and belief that Plaintiff and the members of the
11 purported class have not sustained the required injury in fact and/or lost the requisite money or
12 property necessary to confer standing pursuant to California Business & Professions Code §§ 17200,
13 *et seq.*

14 **EIGHTH AFFIRMATIVE DEFENSE**

15 **(No Injury or Damage)**

16 8. Apple denies that Plaintiff or any member of the purported class have suffered any
17 injury or damage whatsoever, and further denies that it is liable to Plaintiff or any member of the
18 purported class for any of the injury or damage claimed or for any injury or damage whatsoever.

19 **NINTH AFFIRMATIVE DEFENSE**

20 **(Alleged Injury or Damage Caused by Others)**

21 9. To the extent that Plaintiff and/or the purported class suffered injury or damage, which
22 Apple denies, such injury or damage was caused by the action or conduct of others, not of Apple.

23 **TENTH AFFIRMATIVE DEFENSE**

24 **(No Causation)**

25 10. To the extent that Plaintiff or the purported class suffered injury or damage, which
26 Apple denies, such injury or damage was not proximately caused by any conduct or inaction of
27 Apple, or was not foreseeable, or both.

1 **ELEVENTH AFFIRMATIVE DEFENSE**

2 **(No Reliance)**

3 11. Plaintiff's claims, and those of the purported class, are barred, in whole or in part,
4 because Plaintiff did not rely on the statement or omissions of which Plaintiff now complain in
5 purchasing the Apple iPhone 3G and, moreover, the alleged statements or omissions were not
6 material.

7 **TWELFTH AFFIRMATIVE DEFENSE**

8 **(Equitable Relief – Remedies)**

9 12. Plaintiff and the purported class are barred from asserting the claims for equitable
10 relief alleged in the First Amended Complaint because they have adequate remedies at law and/or the
11 equitable relief is neither necessary nor proper under applicable law.

12 **THIRTEENTH AFFIRMATIVE DEFENSE**

13 **(Failure to Mitigate)**

14 13. Plaintiff and the purported class have failed to mitigate their damages, if any.

15 **FOURTEENTH AFFIRMATIVE DEFENSE**

16 **(Good Faith)**

17 14. Plaintiff's claims, and those of the purported class, are barred in whole or in part,
18 because Apple at all times acted in good faith and did not directly or indirectly perform any act
19 whatsoever that would constitute a violation of any right of Plaintiff or the purported class or any
20 duty owed to Plaintiff or the purported class.

21 **FIFTEENTH AFFIRMATIVE DEFENSE**

22 **(Absence of Intent or Knowledge)**

23 15. Apple alleges that to the extent that Plaintiff proves that Apple conducted any of the
24 activities alleged in the First Amended Complaint, Plaintiff's claims, and those of the purported class,
25 are barred, in whole or in part, because Apple had no intention or knowledge, nor any reasonable
26 grounds to know, that any such activities were untrue or misleading.

1 **SIXTEENTH AFFIRMATIVE DEFENSE**

2 **(Puffing)**

3 16. Plaintiff's claims, and those of the purported class, are barred by the fact that the
4 alleged deceptive statements were such that no reasonable person in Plaintiff's position could have
5 reasonably relied on or misunderstood Apple's statements as claims of fact.

6 **SEVENTEENTH AFFIRMATIVE DEFENSE**

7 **(Failure to Notify of Breach of Warranty)**

8 17. Plaintiff failed to notify Apple of any breach of warranty within a reasonable time
9 after Plaintiff knew or should have known of any purported defect.

10 **EIGHTEENTH AFFIRMATIVE DEFENSE**

11 **(Claims Barred By Written Warranty)**

12 18. To the extent Plaintiff asserts claims on behalf of himself and/or the purported class
13 for remedies outside of Apple's One (1) Year Limited Warranty for the iPhone 3G, those claims are
14 barred.

15 **NINETEENTH AFFIRMATIVE DEFENSE**

16 **(Warranties Were Limited)**

17 19. Apple expressly limited any express warranty and any implied warranty that may have
18 been in existence or otherwise been created.

19 **TWENTIETH AFFIRMATIVE DEFENSE**

20 **(Cure)**

21 20. Plaintiff's claims, and those of the purported class, are barred, in whole or in part,
22 because, although Apple denies each and every claim of Plaintiff and the purported class and denies
23 that Apple engaged in wrongdoing or error of any kind, Apple has established an appropriate
24 correction, repair, replacement, or other remedy.

25 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

26 **(Estoppel)**

27 21. The First Amended Complaint, and each of its purported causes of action, is barred, in
28 whole or in part, by the equitable doctrine of estoppel.

1 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

2 (Unclean Hands)

3 22. Plaintiff is barred by the doctrine of unclean hands from asserting any of the claims in
4 the First Amended Complaint.

5 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

6 (Waiver)

7 23. The First Amended Complaint, and each of its purported causes of action, is barred, in
8 whole or in part, by the doctrine of waiver.

9 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

10 (Lack of Scienter)

11 24. Apple alleges that to the extent that Plaintiff proves that Apple conducted any of the
12 activities alleged in the First Amended Complaint, Plaintiff's claims, and those of the purported class,
13 are barred, in whole or in part, because Apple had no intent or knowledge, nor any reasonable
14 grounds to know, that any such activities or omissions were unlawful, untrue, or misleading, nor did
15 Apple act with any intent that others rely upon such activities or omission.

16 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

17 (Comparative Fault)

18 25. Plaintiff's claims, and those of the purported class, are barred, in whole or in part, by
19 their own comparative fault.

20 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

21 (Assumption of Risk)

22 26. Plaintiff and/or any member of the purported class knowingly, willingly, and
23 voluntarily assumed the risk of all damages allegedly sustained, if any.

24 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

25 (Contributory Negligence)

26 27. Any and all events, happenings, injuries and damages set forth in the First Amended
27 Complaint were proximately caused and contributed to by the acts and/or omissions of Plaintiff
28

1 and/or members of the purported class, and such acts and/or omissions totally bar or reduce any
2 recovery on the part of plaintiff and/or the purported class.

3 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

4 (No Duty)

5 28. Any recovery on the First Amended Complaint, or any claim for relief averred therein,
6 is barred to the extent Apple owed no duty to Plaintiff or to members of the purported class.

7 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

8 (Performance of Duties)

9 29. The First Amended Complaint, and each purported claim for relief alleged therein, are
10 barred because Apple fully performed any and all contractual and other duties, if any, owed to
11 Plaintiff and/or any member of the purported class.

12 **THIRTIETH AFFIRMATIVE DEFENSE**

13 (Lack of Materiality)

14 30. Plaintiff's claims, and those of the putative class, are barred, in whole or in part,
15 because the alleged statements and/or omissions were not material.

16 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

17 (Lack of Privity)

18 31. As to those causes of action based upon a breach of warranty, Plaintiff's claims, and
19 those of the purported class, are barred, in whole or in part, by lack of privity as required under the
20 warranty laws.

21 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

22 (Lack of Standing)

23 32. Apple alleges on information and belief that Plaintiff and the members of the
24 purported class lack standing.

25
26 Apple reserves the right to assert other defenses as discovery progresses.

27 **PRAYER**

28 WHEREFORE, Apple prays for judgment as follows:

- 1 1. That Plaintiff and the purported class take nothing by way of the First Amended
2 Complaint;
- 3 2. That the First Amended Complaint be dismissed with prejudice and judgment entered
4 in favor of Apple;
- 5 3. That Apple be awarded its costs of suit; and
- 6 4. For such other and further relief as the Court deems just and proper.

7 **DEMAND FOR JURY TRIAL**

8 Apple hereby demands a trial by jury on all issues upon which trial by jury may be had.

9
10 Dated: October 6, 2008

PENELOPE A. PREOVOLOS
ANDREW D. MUHLBACH
HEATHER A. MOSER
MORRISON & FOERSTER LLP

11
12
13 By: *Penelope A. Preovolos*
14 PENELOPE A. PREOVOLOS

15 *Attorneys for Defendant*
16 APPLE INC.
17 f/k/a APPLE COMPUTER, INC.

1 **PROOF OF SERVICE**

2 I am employed in the County of San Diego, State of California. I am over the age of
3 eighteen years, and not a party to the within action. My business address is Morrison & Foerster,
12531 High Bluff Drive, Suite 100, San Diego, California 92130-2040.

4 On October 7, 2008, I served the within documents:

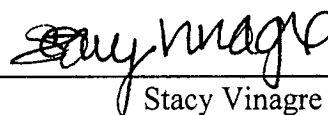
5 **DEFENDANT APPLE, INC.'S ANSWER TO FIRST AMENDED COMPLAINT**

- 6 (FAX) By transmitting via facsimile the document(s) listed above to the fax
7 number(s) set forth below.
- 8 (PERSONAL) By placing the document listed above in a sealed envelope for
9 personal delivery by Worldwide Attorney Services to the person(s) at the address(es)
10 set forth below.
- 11 (MAIL) By placing a copy of the document(s) listed above in a sealed envelope
with postage thereon fully prepaid, in the United States Mail at San Diego,
California addressed as set forth below.

12 Michael Ian Rott
13 David V. Hiden, Jr.
14 HIDEN, ROTT & OERTLE, LLP
2635 Camino del Rio South, Suite 306
San Diego, California 92108

- 15 (State) I declare under penalty of perjury under the laws of the State of California
16 that the above is true and correct.

17 Executed on October 7, 2008, at San Diego, California.

18 
19 _____
20 Stacy Vinagre

1 **HIDEN, ROTT & OERTLE, LLP**
2 A Limited Liability Partnership
3 Including Professional Corporations
4 MICHAEL IAN ROTT, ESQ. (C.S.B. 169468)
5 DAVID V. HIDEN, JR., ESQ. (C.S.B. 169915)
6 ERIC M. OVERHOLT, ESQ. (C.S.B. 248762)
7 2635 Camino del Rio South,
8 Suite 306
9 San Diego, California 92108
10 Telephone: (619) 296-5884
11 Facsimile: (619) 296-5171

12 *Attorneys for William J. Gillis, Jr., on behalf of himself and all others similarly situated.*

13 **SUPERIOR COURT OF CALIFORNIA**
14 **COUNTY OF SAN DIEGO – CENTRAL DISTRICT**

15 WILLIAM J. GILLIS, JR., on behalf of
16 himself and all others similarly situated,

17 Plaintiff,

18 v.

19 APPLE COMPUTER, INC., a California
20 Corporation; AT&T, INC., a Texas
21 Corporation; and DOES 1 through 10,
22 inclusive.

23 Defendants.

CASE NO.: 37-2008-00090743-CU-BT-CTL

Assigned for all Purposes to:
Hon. Luis R. Vargas/ Dept. C-63

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR DAMAGES,
INJUNCTIVE RELIEF AND RESTITUTION**

1. Negligence (Against Defendant Apple)
2. Negligence (Against Defendant AT&T)
3. Breach of the Implied Warranty of Merchantability
4. Fraud and Deceit
5. Negligent Misrepresentation
6. Civil Conspiracy
7. Unlawful Business Practice in Violation of Bus. & Prof. Code §17200, *et seq.*
8. False and Misleading Advertising in Violation of California Bus. & Prof. Code §17500, *et seq.*

Original Complaint filed: August 29, 2008
Trial Date: None Set

JURY TRIAL DEMANDED

24 Plaintiff, WILLIAM J. GILLIS, JR., on behalf of himself and all others similarly
25 situated, based on the investigation of counsel, the existing public record and on information and
26 belief, alleges as follows:
27
28

1 NATURE OF THE ACTION

2 1. As set forth fully herein, the issue in this case is quite simple. Defendants, Apple
3 Computer, Inc. (hereinafter "Apple") and AT&T, Inc. (hereinafter "AT&T") have misrepresented
4 to the public the speed, strength and performance of the 3G-bandwidth network while using either
5 of the two Apple's 3G iPhones. These two (2) products are as follows: the 3G-8GB iPhone and
6 the 3G-16GB iPhone (hereinafter "3G iPhones").

7 2. The term '3G' refers to the third generation in mobile communications. Specifically, 3G
8 technology features faster bandwidth and transfer rates. 3G networks are supposed to have a
9 potential transfer rate of 3 Mbps. Apple's 3G iPhones combined with AT&T's 3G Service Plan
10 fail to deliver 3G to William J. Gillis, Jr. (hereinafter "Mr. Gillis" of "Plaintiff") and all other 3G
11 iPhone users as advertised.

12 3. Apple has named the iPhone 3G in order to advertise that their product is a 3G phone.
13 Built-in to the very name of the phone, Apple has engaged in a campaign to lead consumers to
14 believe that their phone is always connected for 3G speeds. This is not the case, since Mr. Gillis
15 and others similarly situated only experience 3G connectivity only a fraction of the time that they
16 are connected to the AT&T Network.

17 4. Apple and AT&T have an agreement, whereby AT&T is the exclusive service provider for
18 the iPhones and iPhone 3G. Consumers, including Mr. Gillis, are unable to choose any other
19 network or carrier when using their iPhone 3G. Through this joint agreement, Apple and AT&T
20 have engaged in a collaborated scheme to deceive Mr. Gillis and other consumers, since the
21 iPhone 3G and AT&T 3G Network is faulty and rarely provides 3G connectivity to its customers.
22 Most of the time Mr. Gillis receives no 3G connectivity at all.

23 5. Apple and AT&T knew, or should have known, that the iPhone 3G could not deliver the
24 promised speed. Yet AT&T profited by selling upgraded plans at a \$10/month premium and
25 requiring Mr. Gillis and others to enter into a new two (2) year contract. Additionally, they
26 enjoyed the benefit of being the exclusive service provider for Apple 3G iPhones in the United
27 States.

28 ///

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1 6. Apple & AT&T knew, or should have known, that AT&T's 3G Network could not handle
2 the massive influx of their 3G iPhones. Based on information and belief, the companies
3 anticipated sale of 10 million iPhone 3G phones. Yet, Apple profited by being the first to market,
4 by gaining market share and by receiving hundreds of millions of dollars in revenue selling
5 millions of new 3G iPhones.

6 7. Based upon information and belief, the 3G iPhones demand too much power from the 3G
7 bandwidths. The AT&T infrastructure is insufficient to handle this overwhelming 3G signal
8 based upon the high volume of 3G iPhones it has sold. Mr. Gillis and other 3G users are unable
9 to connect to the 3G network. Consequently, users are not getting 3G transfer rates. Therefore,
10 Apple and AT&T have oversold the network by selling more phones and more subscription plans
11 than the 3G infrastructure can handle.

12 8. Apple and AT&T knew, or should have known that the strain on the network would make
13 it impossible to provide reliable and sustained 3G connectivity to customers.

14 9. Due to the overloaded 3G network, it is quite common for iPhone 3G users to be on the 3G
15 network for only a few minutes before their 3G iPhone switches over to the slower EDGE
16 network, even in areas with rich 3G coverage. Yet, not only did they fail to warn customers, they
17 actively advertised that the new iPhone was 3G on the nation's fastest 3G network.

18 10. Based on information and belief, AT&T has intentionally misrepresented the performance
19 of its 3G network. Upon information and belief, AT&T spokesperson, Brad Mays stated that
20 iPhone 3G is "performing great". "Customers in 300 major metro areas in the United States and
21 350 by the end of the year are experiencing the fast network connectivity that our 3-G network
22 provides", according to Mays in an email interview. Mays also stated that "We have anticipated
23 the influx of users and have reported that the strength of the network can, does and will continue
24 to support that". Brian X. Chen, "iPhone 3G Users Heated Over Network Issues", July 23, 2008,
25 <http://blog.wired.com/gadgets/2008/07/iphone-3g-users.html>, (Accessed on August 29, 2008)

26 11. Based on information and belief, the 3G iPhones' sensitivity to third-generation network
27 signals is well below the level specified in the 3G standard. Upon information and belief, this
28

1 poor connectivity most likely resulted from a hardware problem introduced during mass
2 production. Additionally, both Defendants oversold the 3G network.

3 12. Neither of Apple's 3G iPhones, contain a disclaimer on the outside of each and every one
4 of defendant's 3G iPhone boxes.

5 13. Consumers, such as the Plaintiff, all others similarly situated herein, look for disclosures
6 and/or disclaimers on the outside of its boxes or advertising material prior to making any
7 electronics device purchase. Such information provides consumers with necessary information to
8 make an informed purchasing decision. This is especially true in the case of the speed and
9 performance of an expensive device; an important feature in any electronics device purchase.
10 Disclosures about the true nature of the iPhone 3G and AT&T's 3G network should have been
11 provided to customers prior to purchasing the iPhone 3G.

12 14. AT&T charged Mr. Gillis \$10/month in an additional fee to be able to sign up for the
13 additional 3G network coverage. Additionally, Mr. Gillis was required to enter to a 2 year
14 contract with AT&T in order to sign up for AT&T's 3G network. AT&T did not warn Mr. Gillis
15 of the connectivity problems with the 3G Network.

16 15. As a proximate result of the misrepresentations of Defendants, Plaintiff is locked into a two
17 (2) year Service Plan with AT&T, for 3G connectivity that is spotty at best and for which he pays
18 a premium. Plaintiff is also out the premium that he paid to have an iPhone 3G (he bought the
19 iPhone 3G to replace his existing non- 3G phone) and the eighteen dollar (\$18.00) additional
20 service fee that AT&T charges at contract signing time.

21 16. This complaint seeks, among other things: (1) equitable and injunctive relief, including
22 corrective labeling and advertising and/or product recall, and the imposition of a constructive trust
23 on all monies unlawfully obtained by Defendants; and (2) the recovery of compensatory, statutory
24 and/or punitive damage as well as obtaining restitution and disgorgements from Defendants of
25 their ill-gotten gains for unfair business practices, untrue and misleading advertising.

26 ///

27 ///

28 ///

1 **JURISDICTION AND VENUE**

2 17. Pursuant to Article VI, §10 of the California Constitution, as well as California Code of
3 Civil Procedure §§382 and 410.10, this Court has jurisdiction over the following action. The
4 damages suffered and sought to be recovered by Plaintiff and the Class that he seeks to represent
5 is, in the aggregate, in excess of the jurisdictional minimum of this Court. The exact amount of
6 damages caused to the Class members cannot be precisely determined without access to
7 Defendants' records.

8 18. Venue is proper in this Court since the Plaintiff is a resident of this County. Further,
9 Plaintiff entered into an agreement for the purchase of his Apple 3G iPhone and network service
10 rate plan agreement ("Service Plan") in this judicial district. Defendants received substantial
11 compensation from sale and Service Plan of these two (2) iPhone 3G models in this County by
12 doing business here and Defendants made numerous misrepresentations, which had effects in this
13 County. Thus, as to the named Plaintiff, thousands of class members and a portion of the overall
14 Class, certain liability of the Defendants arose in this County, certain contracts were entered into
15 here, were to be performed here and were breached here.

16 19. This Court also has jurisdiction over each Defendant named herein because each Defendant
17 is either a corporation or an association organized under the laws of the State of California, a
18 foreign corporation or association authorized to do business in California and registered with the
19 California Secretary of State, or does sufficient business, has sufficient minimum contacts with
20 California, or otherwise intentionally avails itself of the California market, through the promotion,
21 marketing, advertising of employment positions for delivery drivers and/or sell their products in
22 California, to render the exercise of jurisdiction by the California courts permissible under
23 traditional notions of fair play and substantial justice.

24 **THE PARTIES**

25 20. Plaintiff, William J. Gillis, Jr., is, and at all material times were, a resident of San Diego
26 County, California. Plaintiff sues on behalf of himself, all others similarly situated. Plaintiff
27 purchased a black Apple 3G iPhone 16GB model, which was advertised, distributed, and/or sold,
28 by Defendant Apple, and monthly service provided by AT&T, as named and defined herein, in

1 San Diego, California. Moreover, for all the reasons stated herein, plaintiff has suffered injury in
2 fact and has lost money and/or property as a result of Defendant Apple's and AT&T's acts, i.e.,
3 their practice of engaging in false and misleading advertising concerning the speed and
4 performance in two (2) of its 3G iPhones, as defined above and omissions concerning those same
5 products, as defined above.

6 21. In bringing this action, as to the individual and Class claims, Plaintiff either directly or
7 indirectly relied upon, *inter alia*, the representations, advertising and other promotional materials
8 which were prepared and approved by this Defendant and their agents and disseminated on the
9 face of the containers for this Defendant's documentation, and/or through local and national
10 advertising media, including Defendants' Internet websites, containing the misrepresentations
11 and/or omissions alleged hereinafter.

12 22. Plaintiff also relied upon the representations of this Defendant herein, in researching which
13 product to purchase. Specifically, Plaintiff relied on the representations of these Defendants
14 concerning the way they represented the speed and performance of its phone and network to
15 Plaintiff, the proposed Class. Defendants failed to disclose to Plaintiff and the proposed that the
16 infrastructure of the 3G network and the 3G iPhone was insufficient to provide the represented
17 performance and speed.

18 23. Defendant Apple Computer, Inc. ("Apple") is a California corporation which is licensed to
19 do, and is doing, business in California and throughout the United States. Its principal offices are
20 located in Cupertino, California. Apple transacts business in San Diego County, California and at
21 all relevant times designed, manufactured, promoted, marketed, distributed, and/or sold the
22 products that are the subject of this complaint, throughout the United States and California.
23 Apple also has significant contacts with San Diego County, California, and the activities
24 complained of herein occurred, at least in part, in San Diego County, California.

25 24. Defendant AT&T is a Texas corporation which is licensed to do, and is doing, business in
26 California and throughout the United States. Its principal offices are located in San Antonio,
27 Texas. AT&T transacts business in San Diego County, California and at all relevant times
28 designed, manufactured, promoted, marketed, distributed, and/or sold service plans that is one of

1 the subjects of this complaint, throughout the United States and California. AT&T owns,
2 operates, and/or maintains a 3G network in San Diego County AT&T also has other significant
3 contacts with San Diego County, California, and the activities complained of herein occurred, at
4 least in part, in San Diego County, California.

5 25. The true names and capacities of the Defendant sued in this Complaint as Does 1-10,
6 inclusive, are currently unknown to Plaintiff, who therefore sues such Defendant by this fictitious
7 name. This Defendant designated herein as a Doe is legally responsible in some manner for the
8 unlawful acts referred to herein. Plaintiff will seek leave of the Court to amend this complaint to
9 reflect the true names and capacities of this Defendant designated herein as Does 1-10 when such
10 identities become known.

11 26. At all relevant times, Apple, AT&T and Does 1-10, inclusive, have made, and continue to
12 make misrepresentations in the marketing, advertising and/or sale of its 3G iPhone and service
13 plans described above.

14 **CLASS ACTION ALLEGATIONS**

15 27. Plaintiff brings this action of behalf of himself and all others similarly situated within the
16 State of California pursuant to California Code of Civil Procedure §382. The proposed class is
17 both ascertainable, and shares a well-defined community of interest in the questions of law and
18 fact as further detailed below. Plaintiff seeks to represent a Class composed of and defined as
19 follows: "All persons in California who purchased an iPhone 3G and AT&T 3G Service Plan."

20 Plaintiff reserves the right under Rule 3.765, subdivision (b), California Rules of
21 Court, to amend or modify the Class description with greater specificity or further division into
22 subclasses or limitation to particular issues.

23 28. This action has been brought and may properly be maintained as a class action under the
24 provisions of §382 of the California Code of Civil Procedure because there is a well- defined
25 community of interest in the litigation and the proposed Class is easily ascertainable.

26 **A. Numerosity**

27 29. The potential members of the Class as defined are so numerous that joinder of all the
28 members of the Class is impracticable. While the precise number of Class Members has not been

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1 determined at this time and the facts on which to calculate that number are presently within the
2 sole control of defendant, Plaintiff is informed and believes that Defendant Apple currently still
3 sells the iPhone in California and AT&T still offers connections to its 3G network in California.
4 Plaintiff believes that the number of people who have bought the iPhone 3G and signed up for the
5 3G service in California is in the millions of people. Joinder of all members of the Plaintiff Class
6 is not practicable.

7 30. California Class members are readily ascertainable. Upon information and belief, Plaintiff
8 alleges Defendants' sales subscription records would provide information as to the number and
9 location of all Class members. The means available for identifying Class members would be
10 based on a proposed class announcement, and initial discovery from Defendant Apple's and
11 AT&T's records to confirm the sales of 3G iPhones and 3G Service Plans within California.
12 Since Defendants Apple and AT&T are likely to have accurate and detailed sales and service
13 information regarding individuals who would be identified as Class members, there is an easy and
14 accurate method available for identifying such members.

15 **B. Commonality**

16 31. There are questions of law and fact common to the Class that predominates over any
17 questions affecting only individual Class members. These common questions of law and fact
18 include, without limitation:

- 19 1. Whether Defendant Apple and AT&T advertised and sold the 3G iPhones and 3G
20 Service Plans, claiming increased speed and performance over the iPhone 3G,
21 knowing that the connection would last for only a few minutes before reverting to
22 the slower EDGE speed, which is not on the 3G Network?; and
- 23 2. Whether Apple and AT&T failed to disclose the 3G speed and performance
24 discrepancy to consumers and whether such failure violates California's statutory
25 and common-law prohibitions against such conduct?

26 Thus, liability can be proven uniformly throughout the class by facts common to all
27 members of the proposed class.

28 ///

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1 **C. Typicality**

2 32. The claims of the named Plaintiff is typical of the claims of the Class. Plaintiff and all
3 members of the Class sustained damages arising out of and caused by Defendants' common
4 course of conduct in violation of laws and regulations that have the force and effect of law and
5 statutes as alleged. This Representative purchased the 3G iPhone while it was advertised with
6 having better speed and performance than it actually has. Mr. Gillis is not getting 3G connectivity
7 with his 3G iPhone the majority of the time that he is connected to the AT&T 3G Network. He
8 did not receive any disclosures prior to, or after purchase, by Defendant Apple or AT&T
9 explaining the actual facts regarding the iPhone 3G and AT&T 3G Network's actual speed and
10 performance. These facts are typical among the proposed class. Further, these facts are essential
11 in proving the claims alleged in this complaint against Defendants.

12 **D. Adequacy of Representation**

13 33. Plaintiff will fairly and adequately represent and protect the interests of the members of the
14 Class. The Class Representative can adequately represent the class because his claim is both
15 typical of the class, and the issues are based on facts that are common between the class
16 representatives and the proposed class. Moreover, the representative has suffered all of the
17 potential injuries and damages that might arise out of the conduct complained of herein. As such,
18 the representative can adequately represent the class because he will bring all potential legal
19 actions and remedies that would be available to individual members of the class. Plaintiff has
20 retained attorneys that are competent and experienced in litigating large class actions, to represent
21 their interests and that of the Class. Plaintiff and his counsel have the necessary financial
22 resources to adequately and vigorously litigate this Class Action, and Plaintiff and counsel are
23 aware of the fiduciary responsibilities to the Class Members and are determined to diligently
24 discharge those duties by vigorously seeking the maximum possible recovery for the Class.

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1 **E. Superiority of Class Action**

2 34. In addition to what has been mentioned above, a class action is a superior method for
 3 resolving the claims herein alleged. The remedy to resolve the common class issues regarding the
 4 iPhones and Network Connectivity deficit capacity would be to refund the cost of the iPhones and
 5 Service Agreement Costs, which is estimated at approximately \$500.00 per plaintiff.
 6 Individually, this is not a significant amount, and would be likely be limited to a small claims
 7 action by individual plaintiffs. Such actions are inconceivable, as the costs associated with
 8 proving a prima-facie case would likely exceed the obtainable recovery.

9 35. Important public interests will be served by addressing the matter as a Class Action. The
 10 adjudication of individual litigation claims would result in a great expenditure of court and public
 11 resources. However, treating the claims as a class action will result in a significant savings of
 12 these costs. Class Action treatment will allow those similarly situated persons to litigate their
 13 claims in the manner that is most efficient and economical for the parties and the judicial system.

14 36. Also, there is a substantial likelihood of inconsistent verdicts, which would frustrate the
 15 resolution of these legal issues for Defendants, forcing them to comply with inconsistent legal
 16 standards. Moreover, there is no assurance individual claims will prevent the continued deceptive
 17 practices alleged herein. This would frustrate the purpose of California consumer protection laws.
 18 Considering the actual size of the class, estimated to be in the millions, and the importance of the
 19 issues presented to the State of California (enforcing consumer protections through deceptive
 20 practices within the state), a Class Action is the desired method for resolving this matter.
 21 Moreover, with such common questions of fact, the Court is in a superior position to fashion a
 22 remedy that would uniformly apply to each, or nearly all, Class members.

23 37. Finally, failure to certify a class would literally make it impossible for a great many of the
 24 class members to seek relief, as the costs of litigation would far exceed the remedy available. For
 25 those who do seek judicial relief, there is a strong likelihood that separate courts would lead to
 26 inconsistent verdicts; working a substantial prejudice on Defendants, especially, as in this case,
 27 where equitable relief is being sought. As such, a class action presents for fewer management
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1 difficulties and provide the benefits of single adjudication, economy of scale, and comprehensive
2 supervision by a single court.

3 38. Plaintiff is unaware of any difficulties that are likely to be encountered in the management
4 of this action that would preclude its maintenance as a Class Action.

5 **FIRST CAUSE OF ACTION**

6 (Negligence)

7 (Against Defendant Apple)

8 39. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
9 forth herein.

10 40. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

11 41. At all times mentioned, Defendant Apple had a duty to properly manufacture, design,
12 formulate, compound, test, produce, assemble, inspect, research, distribute, market, label,
13 package, prepare for use and sell the iPhone 3G to function as a 3G phone as advertised.

14 42. The Apple iPhone was negligently manufactured and designed, which causes it to fail to
15 provide reliable and sustained 3G connectivity. Plaintiff frequently gets no 3G connectivity at all.

16 43. At all times mentioned, Defendant Apple negligently and carelessly failed to properly
17 manufacture, design, formulate, compound, test, produce, assemble, inspect, research, distribute,
18 market, label, package, prepare for use, sell the iPhone 3G to function as a 3G phone as
19 advertised.

20 44. As a result of said negligence and carelessness of Defendant Apple, Plaintiff suffered
21 damages as alleged herein.

22 **SECOND CAUSE OF ACTION**

23 (Negligence)

24 (Against Defendant AT&T)

25 45. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
26 forth herein.

27 46. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

28 47. At all times mentioned, Defendant AT&T had a duty to properly manufacture, design,

1 formulate, compound, test, produce, assemble, inspect, research, distribute, market, label,
2 package, prepare for use and sell a network that provided 3G service to users of the iPhone 3G, as
3 advertised.

4 48. Based upon information and belief the 3G iPhones demand too much power from the 3G
5 bandwidths. The AT&T infrastructure is insufficient to handle this overwhelming 3G signal
6 based upon the high volume of 3G iPhones it has sold. Mr. Gillis and other 3G users are unable to
7 connect to the 3G Network. Consequently, users are not getting 3G transfer rates.

8 49. At all times mentioned, Defendant AT&T, working in an exclusive agreement with Apple,
9 negligently and carelessly failed to properly manufacture, design, formulate, compound, test,
10 produce, assemble, inspect, research, distribute, market, label, package, prepare for use and sell a
11 network that provided 3G service to users of the iPhone 3G, as advertised.

12 50. As a result of said negligence and carelessness of Defendant AT&T, Plaintiff suffered
13 damages as alleged herein.

14 THIRD CAUSE OF ACTION

15 **(Breach of the Implied Warranty of Merchantability- Cal. Civ. Code §1792, et seq.)**

16 **(Against Defendants Apple and AT&T)**

17 51. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
18 forth herein.

19 52. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

20 53. Plaintiff purchased the iPhone 3G and AT&T 3G Service Plan and used it for its ordinary
21 and intended purpose of providing reliable and sustained 3G service.

22 54. The iPhone 3G cannot perform its ordinary and intended purpose without the AT&T 3G
23 Service Agreement. The iPhone 3G will not function as a phone or as an internet devise without
24 the buyer first purchasing an AT&T 3G Service Plan.

25 55. Plaintiff and the Class purchased their 3G iPhones and AT&T 3G Service Plans with the
26 reasonable expectation that they would receive reliable and sustained 3G connectivity to their
27 phones. However, the 3G iPhones are not fit for their ordinary and intended purpose of providing
28 plaintiff with reliable 3G service and is in fact defective. Plaintiff does not receive 3G

1 connectivity at all most of the time.

2 56. Based on information and belief, when Defendant Apple placed the iPhone 3G into the
3 stream of commerce, it knew that the intended and ordinary purpose of their phone was for 3G
4 connectivity and that users would expect 3G connectivity all the time.

5 57. Based on information and belief, Defendant Apple and AT&T knew that the iPhone 3G
6 and AT&T 3G Network could not provide reasonable 3G connectivity to all of the 3G iPhones
7 that Apple was selling.

8 58. No repairs are available to fix the iPhone 3G nor for the AT&T 3G Network so as to
9 provide reliable 3G connectivity. Apple has tried several firmware fixes, which has not provided
10 Mr. Gills, or the Class with reliable or sustained 3G connectivity. In addition, based on
11 information and belief, AT&T cannot fix its 3G Network in any reasonable amount of time to
12 meet the demand of all the iPhone 3G users.

13 59. Defendants' breach of the implied warranty described above constitutes a violation of Cal.
14 Civ. Code §1792 et seq. and entitles Plaintiff and the Class to damages.

15 60. WHEREFORE, Plaintiff and the Class they seek to represent request relief as described
16 below.

17 **FOURTH CAUSE OF ACTION**

18 **(Fraud and Deceit – Cal. Civ. Code §§1709-1710)**

19 **(Against Defendants Apple & AT&T)**

20 61. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
21 forth herein.

22 62. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

23 63. With regard to each false representation alleged in this cause of action, at all relevant time,
24 Plaintiff was unaware that the representation was false.

25 64. Based on information and belief, Defendants, and each of them, from the time that the
26 iPhone 3G and Service Plans on the 3G Network were first designed, manufactured, marketed
27 and/or distributed and up to the present, willfully deceived and falsely promised Plaintiff and the
28 Class by (1) making false and fraudulent misrepresentations to Plaintiff, the Class and the public,

1 including but not limited to that the said products and service plans would provide customers with
2 3G connectivity; and (2) concealing from Plaintiff, the class and the public that the iPhone 3G
3 would not function at 3G speeds do to the manufacture and design of the iPhone and the
4 limitations of the AT&T 3G Network.

5 65. Defendants, and each of them, maintained a nationwide multi-million dollar sales and
6 marketing campaign of the iPhone 3G and willfully deceived Plaintiff as to the connectivity of the
7 iPhone 3G.

8 66. Defendants suggested, asserted and/or promised that the iPhone 3G with AT&T's 3G
9 service plan would have reliable and sustained 3G functionality. Defendants suggested, asserted
10 and/or promised a phone that was "Twice as Fast" and on "The nations fastest 3G network".
11 However, Defendants knew this to be false.

12 67. Defendants suppressed the fact that their iPhone 3G and AT&T's 3G Network could not
13 provide reliable and sustained 3G connectivity. They also suppressed the fact that they 3G
14 network could not handle the massive influx of users as a result of the marketing and sale of the
15 iPhone 3G.

16 68. Based on information and belief, when Defendants made the foregoing misrepresentations,
17 they knew them to be false and/or had no reasonable basis for believing them to be true.

18 69. The misrepresentations and concealment by Defendants were made and conducted with the
19 intent to willfully induce Plaintiff and the Class to purchase the iPhone 3G and the required 3G
20 Service Plan.

21 70. In reliance on the false, fraudulent and/or willful misrepresentation and concealment by the
22 Defendants, and each of them, Plaintiff was induced to and did purchase an iPhone 3G and AT&T
23 3G Service Plan. Plaintiff reasonably relied on the representations of Apple and AT&T. Had
24 Defendant not made these misrepresentations, Plaintiff would not have suffered damages.

25 71. Upon information and belief, Defendants acts were done willfully, maliciously, with
26 fraudulent intent and with deliberate disregard of the rights of Plaintiff and the Class.

27 72. WHEREFORE, Plaintiffs and the Class they seek to represent request relief as described
28 below.

FIFTH CAUSE OF ACTION

(Negligent Misrepresentation)

(Against Defendants Apple & AT&T)

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4 73. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
5 forth herein.

6 74. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

7 75. At all times herein, Plaintiff was unaware of the falsity of the statements made by
8 Defendant.

9 76. Apple and AT&T negligently misrepresented that the 3G iPhones and the AT&T 3G
10 service plans would provide customers with 3G connectivity. Apple advertised their iPhone 3G
11 as "Twice as Fast" as the previous iPhone. Apple also inserted the descriptive word '3G' in the
12 name of the phone, representing that users can expect data to travel at 3G rates on the iPhone.
13 Both Apple and AT&T represented 3G connectivity with the 3G iPhone and AT&T 3G Network.

14 77. Based on information and belief, at all relevant times, Defendants had no reasonable
15 grounds for believing that their representations were true because the phone had existing issues
16 with 3G connectivity and the AT&T Network could not guarantee 3G connectivity to customers
17 who purchased 3G Network service.

18 78. Based on information and belief, in making these representations to Plaintiff, Defendants
19 Apple and AT&T intended to induce Plaintiff and the Class to purchase the 3G iPhone and AT&T
20 3G Service Plan.

21 79. Plaintiff reasonably relied on the statements made by Defendants when he purchased an
22 iPhone 3G and AT&T 3G Service Plan. Had Defendant not made these misrepresentations,
23 Plaintiff would not have suffered damages.

24 80. As a proximate result of the negligent misrepresentations of Defendants, Plaintiff is locked
25 into a two (2) year Service Plan with AT&T, for 3G connectivity that is spotty at best and for
26 which he pays a premium. Plaintiff is also out the premium that he paid to have an iPhone 3G (he
27 bought the phone to replace his existing non-3G phone) and the eighteen dollar (\$18.00)
28 additional service fee that AT&T charges at contract signing time.

1 81. WHEREFORE, Plaintiffs and the Class they seek to represent request relief as described
2 below.

3 **SIXTH CAUSE OF ACTION**

4 **(Civil Conspiracy)**

5 **(Against Defendants Apple & AT&T)**

6 82. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
7 forth herein.

8 83. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

9 84. A Civil Conspiracy exists where there is a formation and operation of a conspiracy and the
10 plaintiff suffers damage from an act or acts done in furtherance of the common design.
11 Defendants and each of them knowingly and willfully conspired and agreed among themselves to
12 sell more iPhone 3G, and AT&T 3G service plans than the AT&T 3G Network can handle.

13 85. Apple and AT&T have an exclusive agreement, whereby AT&T is the exclusive provider
14 for service for Apple iPhone 3G in North America.

15 86. Apple provides information to and requires customers to call or otherwise contact AT&T to
16 setup service for the iPhone 3G, in order for the iPhone 3G to function as a phone or for internet
17 usage.

18 87. AT&T sells 3G iPhones on its website. AT&T also exclusively provides 3G network
19 service for the 3G iPhones.

20 88. President and CEO of AT&T's wireless unit Ralph de la Vega, directly aligned the
21 company with the sale of the iPhone in a statement on the companies website: "We will continue
22 to expand our 3G network coverage into new areas, grow our lineup of industry-leading devices,
23 such as iPhone 3G, and deliver compelling new 3G services to market like Video Share SM."
24 *AT&T Offers Nation's Fastest 3G Network*, "Nation's Fastest 3G Network Complements Best
25 Global Coverage and Industry-Leading Portfolio of 3G Devices", July 10, 2008,
26 <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25921> (Accessed
27 September 4, 2008) (Emphasis added).

28 89. Based on information and belief, Apple intended to sell 10 million 3G iPhones within the

1 first year. Such information was made public and available to AT&T.

2 90. Apple and AT&T acted in concert to sell the iPhone 3G and services and knew or should
3 have known that they would sell more iPhone 3Gs and Service Plans than the AT&T network
4 could handle.

5 91. The acts of Defendants as alleged herein, constituted intention conspiracy, agreement, plan
6 or scheme designed to sell 3G iPhones and 3G Service Plans, knowing that they could not deliver
7 the 3G connectivity promised to Plaintiff and the Class.

8 92. This joint scheme caused damage to Mr. Gillis and all iPhone 3G users, since users
9 frequently experience connectivity that is less than the promised 3G connectivity.

10 93. Plaintiff and all others similarly situated were lured by Apple and AT&T to purchase an
11 iPhone 3G and were required to sign up for a new two (2) year contract for 3G service with
12 AT&T, pay a connection fee, and pay for a plan that was more expensive than their previous plan.

13 94. Upon information and belief, Defendants' joint acts were done willfully, maliciously, with
14 fraudulent intent and with deliberate disregard of the rights of Plaintiff and the Class.

15 95. WHEREFORE, Plaintiffs and the Class they seek to represent request relief as described
16 below.

17 **SEVENTH CAUSE OF ACTION**

18 **(Unlawful, Unfair and Deceptive Business Practices in Violation of**
19 **California Business & Professions Code §17200, et seq.)**

20 **(Against Defendants Apple & AT&T)**

21 96. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
22 forth herein.

23 97. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

24 98. The Unfair Business Practices Act defines unfair business competition to include any
25 "unfair," "unlawful," or "fraudulent" business act or practice. *California Business and*
26 *Professions Code §17200 et seq.* The Act also provides for injunctive relief and restitution for
27 violations.

28 99. Defendant Apple violated, and continues to violate, California Business and Professions

1 Code §17200 et seq., by misrepresenting the actual speed and performance of two (2) of its 3G
2 iPhone models.

3 100. Defendant AT&T violated, and continues to violate California Business and Professions
4 Code §17200 et seq., by misrepresenting the strength of the network and its ability to support the
5 millions of 3G users. They have misrepresented Plaintiff's ability to connect to the 3G Network.

6 101. By engaging in the above described acts and practices, Defendant Apple & AT&T have
7 committed one or more acts of unfair competition within the meaning of California Business and
8 Professions Code §17200 et seq.

9 102. Defendant Apple's and AT&T's acts and practices as described herein have deceived
10 and/or are likely to deceive members of the public. Apple advertises the iPhone 3G as "Twice as
11 Fast. Half the Price", when the phone connects to the internet over their slower EDGE network
12 the majority of the time. Calling the phone the iPhone 3G, leads the reasonable consumer,
13 including Mr. Gillis, to believe that the advertised "Twice as fast" is in relation to the 3G (third
14 generation mobile connection), which is twice as fast as the 2G predecessor.

15 103. The acts and practices of Apple and AT&T are also unlawful because they violate one or
16 more of the following: Negligence, Implied Warranty of Merchantability, Fraud and Deceit,
17 Negligent Misrepresentation, Civil Conspiracy and California Business & Professions Code
18 §17500, as described below.

19 104. As discussed above, Plaintiff and the members of the Class purchased one of these 3G
20 iPhone models directly from Apple and service plan from AT&T and/or its authorized
21 retailers/resellers. Plaintiff is informed and believes and, based upon such information and belief,
22 allege that Apple's and AT&T's authorized retailers/resellers were Apple's and AT&T's agents,
23 ostensible agents, employees, servants, joint ventures, actors in concert, aiders and abettors and
24 co-conspirators.

25 105. In this regard, the funds paid by Plaintiff and the members of the Class to Apple's and
26 AT&T's retailers/resellers were, in fact, paid directly to Apple and AT&T. Plaintiff is informed
27 and believes and, based upon such information and beliefs, alleges that Apple and AT&T profited
28 enormously through falsely representing the speed and performance of two of its models through

1 its authorized retailers/resellers. Apple and AT&T's revenues are thus directly traceable to
2 millions of dollars paid out by Plaintiff and the members of the Class for the 3G iPhones at issue.

3 106. Unless Defendant Apple and AT&T are enjoined from continuing to engage in the
4 unlawful, unfair, fraudulent, untrue, and deceptive business acts and practices as described herein,
5 Plaintiff and the Class members residing within California will continue to be damaged by
6 Apple's and AT&T's unfair competition.

7 107. Apple and AT&T, through their acts of unfair competition, have acquired money from
8 members of the proposed Class. Thus, Plaintiff and the members of the Class request this Court
9 restore this money to them and enjoin Apple and AT&T from continuing to violate California
10 Business and Professions Code §17200 et seq., as discussed above.

11 108. Such conduct is ongoing and continues to this date. Plaintiff and the Class members are
12 therefore entitled to relief described below.

13 **EIGHTH CAUSE OF ACTION**

14 **(False and Misleading Advertising in Violation of**
15 **California Business & Professions Code §17500, et seq.)**

16 **(Against Defendant Apple and AT&T)**

17 109. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
18 forth herein.

19 110. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

20 111. Defendant Apple's and AT&T's acts and practices as described herein have deceived
21 and/or are likely to deceive members of the public. Apple's and AT&T's use of direct-mail to
22 advertise, including its website on the Internet, to call attention to, or give publicity to Apple and
23 AT&T's iPhone 3G and 3G network service. Apple advertises the iPhone 3G as "Twice as Fast.
24 Half the Price". In reality, the 3G iPhones connect to the internet over their slower EDGE
25 network the majority of the time. Marketing the phone by naming it "iPhone 3G", leads the
26 reasonable consumer, including Mr. Gillis, to believe that they will receive 3G connections to
27 their phone.

28 112. AT&T advertises and sells 3G Network plans, yet customers are frequently kicked off of

1 the 3G Network. The majority of time Plaintiff is not on the 3G Network and cannot get any 3G
2 connectivity, despite being such connectivity being advertised and sold to Plaintiff.

3 113. Thus, by its actions, Apple and AT&T are disseminating advertising concerning its
4 products and services, which by its very nature is unfair, deceptive, untrue, or misleading within
5 the meaning of California Business & Professions Code §17500, et. seq. Such advertisements are
6 likely to deceive, and continue to deceive, the consuming public.

7 114. Further, the above-described false, misleading, and deceptive advertising conducted by
8 Apple and AT&T continues to have a tendency to deceive the general public in that Apple and
9 AT&AT have failed to disclose the true and actual speed and performance of the 3G iPhone and
10 the insufficient infrastructural 3G network, as described above. Apple and AT&T have also failed
11 to instigate a public information campaign to alert consumers of these deficiencies in its
12 advertising which continues to create a misleading and confusing perception of the 3G iPhones'
13 speed, performance and network connectivity.

14 115. In making and disseminating the statements alleged herein, Apple and AT&T knew or
15 should have known that the statements were untrue and misleading, and action in violation of
16 California Business & Professions Code §17500, et. seq.

17 116. The misrepresentations and non-disclosures by Apple and AT&T of the material facts
18 detailed above constitute false and misleading advertising and therefore constitute a violation of
19 California Business & Professions Code §17500, et. seq.

20 117. As a direct and proximate result of Apple's and AT&T's wrongful conduct, Plaintiff and
21 the members of the Class request that this Court cause Apple and AT&T to restore this money to
22 them, and to enjoin Apple and AT&T from continuing to violate California Business &
23 Professions Code §17500, et. seq., as discussed above. Otherwise, Plaintiff and the members of
24 the Class will continue to be damaged by Apple's false and/or misleading advertising.

25 118. Such conduct is ongoing and continues to this date. Plaintiff and the Class are therefore
26 entitled to the relief described below.

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28 ///

RELIEF REQUESTED

WHEREFORE, Plaintiff, on behalf of himself and on behalf of the members of the Class defined herein, as applicable, pray for judgment and relief on all Causes of Action as follows:

1. An order certifying this case as a class action and appointing Plaintiff and their counsel to represent the Class;

2. For a temporary, preliminary and/or permanent order for injunctive relief enjoining Defendants from pursuing the policies, acts and practices complained of herein;

3. For a temporary, preliminary and/or permanent order for injunctive relief requiring Defendants to undertake an immediate public campaign to inform members of the general public as to their prior practices and notifying members of the proposed Class as to the presence of potential restitutionary relief;

4. For an award of exemplary and/or punitive damages as appropriate to deter and punish Defendants for their unfair and deceptive business practices, their conspiracy, as well as for their other fraudulent and deceitful conduct;

5. For an order requiring disgorgement of Defendants' ill-gotten gains and to pay restitution to Plaintiffs and all members of the Class all funds acquired by means of any act or practice declared by this Court to be an unlawful, fraudulent or unfair business act or practice, a violation of laws, statutes or regulations, or constituting unfair competition;

6. Reasonable attorneys' fees;

7. Costs of this suit;

8. Pre- and post-judgment interest; and

9. Such other and further relief as the Court may deem necessary or appropriate.

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ARMSTRONG, ANGLI & GUNVILLE, LLP

2635 Camino Del Rio South, Suite 306

San Diego, California 92108

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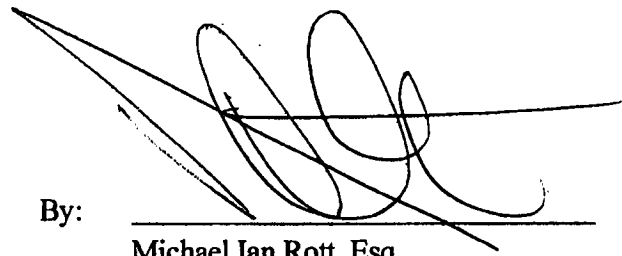
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JURY DEMAND

Plaintiff and the Class demand a trial by jury.

DATED: 9/5/08

HIDEN, ROTT & OERTLE, LLP



By: _____

Michael Ian Rott, Esq.
David V. Hiden, Jr., Esq.
Eric M. Overholt, Esq.
*Attorneys for Plaintiff, on behalf of himself
and all others similarly situated.*

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

STREET ADDRESS: 330 West Broadway
MAILING ADDRESS: 330 West Broadway
CITY AND ZIP CODE: San Diego, CA 92101
BRANCH NAME: Central
TELEPHONE NUMBER: (619) 450-7063

PLAINTIFF(S) / PETITIONER(S): William J. Gillis, Jr

DEFENDANT(S) / RESPONDENT(S): Apple Computer, Inc et.al.

GILLIS VS. APPLE COMPUTER, INC

NOTICE OF CASE ASSIGNMENT

CASE NUMBER:

37-2008-00090743-CU-BT-CTL

Judge: Luis R. Vargas

Department: C-63

COMPLAINT/PETITION FILED: 08/29/2008**CASES ASSIGNED TO THE PROBATE DIVISION ARE NOT REQUIRED TO COMPLY WITH THE CIVIL REQUIREMENTS LISTED BELOW**

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT).

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

TIME STANDARDS: The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil consists of all cases except: Small claims appeals, petitions, and unlawful detainers.

COMPLAINTS: Complaints must be served on all named defendants, and a CERTIFICATE OF SERVICE (SDSC CIV-345) filed within 60 days of filing. This is a mandatory document and may not be substituted by the filing of any other document.

DEFENDANT'S APPEARANCE: Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than a 15 day extension which must be in writing and filed with the Court.)

DEFAULT: If the defendant has not generally appeared and no extension has been granted, the plaintiff must request default within 45 days of the filing of the Certificate of Service.

THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO LITIGATION, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. MEDIATION SERVICES ARE AVAILABLE UNDER THE DISPUTE RESOLUTION PROGRAMS ACT AND OTHER PROVIDERS. SEE ADR INFORMATION PACKET AND STIPULATION.

YOU MAY ALSO BE ORDERED TO PARTICIPATE IN ARBITRATION PURSUANT TO CCP 1141.10 AT THE CASE MANAGEMENT CONFERENCE. THE FEE FOR THESE SERVICES WILL BE PAID BY THE COURT IF ALL PARTIES HAVE APPEARED IN THE CASE AND THE COURT ORDERS THE CASE TO ARBITRATION PURSUANT TO CCP 1141.10. THE CASE MANAGEMENT CONFERENCE WILL BE CANCELLED IF YOU FILE FORM SDSC CIV-359 PRIOR TO THAT HEARING

**SUMMONS
(CITACION JUDICIAL)**

SUM-100

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

APPLE COMPUTER, INC., a California Coporation; AT&T, INC., a Texas Corporation; and DOES 1 through 10, inclusive.

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

WILLIAM J. GILLIS, JR., on behalf of himself and all others similarly situated,

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

2008 SEP -5 A 10:50

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):
Superior Court of San Diego - Central District
330 W. Broadway
San Diego, CA 92101

CASE NUMBER:
(Número del Caso): 37-2008-00090743-CU-BT-CTL

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Michael Ian Rott, Esq. (CSB 169468)
Hiden, Rott & Oertle, LLP
2635 Camino Del Rio S. Ste. 306
San Diego, CA 92108

DATE: 9/5/08

SEP 05 2008

Clerk, by _____ Deputy
(Secretario) K Brown (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

- 1. as an individual defendant.
- 2. as the person sued under the fictitious name of (specify):

- 3. on behalf of (specify):

- under:
- CCP 416.10 (corporation)
 - CCP 416.20 (defunct corporation)
 - CCP 416.40 (association or partnership)
 - other (specify):
 - CCP 416.60 (minor)
 - CCP 416.70 (conservatee)
 - CCP 416.90 (authorized person)

- 4. by personal delivery on (date):



S U M M O N S
(CITACION JUDICIAL)

SUM-100

NOTICE TO DEFENDANT:

(AVISO AL DEMANDADO):

Apple Computer, Inc., AT&T, and
Does 1 Through 10.

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

MAR 29 10 15 30

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

William J. Gillis, Jr., On Behalf of Himself, and All
Others Similarly Situated and on Behalf of the
General Public

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

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The name and address of the court is:

(El nombre y dirección de la corte es):

Superior Court of San Diego - Central District
330 W. Broadway
San Diego, Ca. 92101

CASE NUMBER: **37-2008-00090743-CU-BT-CTL**
(Número del Caso):

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Michael Ian Rott, Esq.
Hiden, Rott & Oertle, LLP.
2635 Camino Del Rio S. Ste 306
San Diego, Ca. 92108

DATE: ~~8/29/08~~

AUG 29 2008

Clerk, by

(Secretario)

Deputy

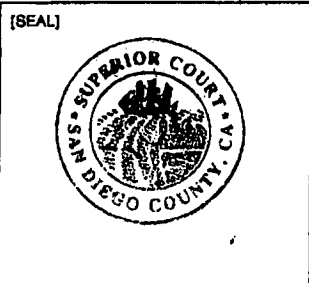
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service-of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

- as an individual defendant.
- as the person sued under the fictitious name of (specify):
- on behalf of (specify):
under: CCP 416.10 (corporation) CCP 416.60 (minor)
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
 other (specify):
- by personal delivery on (date):



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Michael Ian Rott, Esq. (CSB 169468)
Hiden, Rott & Oertle, LLP.
2635 Camino Del Rio S. Ste 306
San Diego, Ca. 92108
TELEPHONE NO.: 619-296-5884 FAX NO.: 619-296-5171
ATTORNEY FOR (Name): Plaintiff William J. Gillis, Jr.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 330 W. Broadway
MAILING ADDRESS:
CITY AND ZIP CODE: San Diego, Ca. 92108
BRANCH NAME:

CASE NAME: William J. Gillis v. Apple Computer, Inc., AT&T, and Does 1 Through 10

FOR COURT USE ONLY
2008 APR 29 A 10:58
CASE NUMBER: 09-2808-00090743-CU-BT-CTL
JUDGE:
DEPT:

CIVIL CASE COVER SHEET
 Unlimited (Amount demanded exceeds \$25,000)
 Limited (Amount demanded is \$25,000 or less)

Complex Case Designation
 Counter **Joinder**
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:
- | | | |
|---|--|--|
| Auto Tort
<input type="checkbox"/> Auto (22)
<input type="checkbox"/> Uninsured motorist (46)
Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
<input type="checkbox"/> Asbestos (04)
<input type="checkbox"/> Product liability (24)
<input type="checkbox"/> Medical malpractice (45)
<input type="checkbox"/> Other PI/PD/WD (23)
Non-PI/PD/WD (Other) Tort
<input checked="" type="checkbox"/> Business tort/unfair business practice (07)
<input type="checkbox"/> Civil rights (08)
<input type="checkbox"/> Defamation (13)
<input type="checkbox"/> Fraud (16)
<input type="checkbox"/> Intellectual property (19)
<input type="checkbox"/> Professional negligence (25)
<input type="checkbox"/> Other non-PI/PD/WD tort (35)
Employment
<input type="checkbox"/> Wrongful termination (38)
<input type="checkbox"/> Other employment (15) | Contract
<input type="checkbox"/> Breach of contract/warranty (06)
<input type="checkbox"/> Rule 3.740 collections (09)
<input type="checkbox"/> Other collections (09)
<input type="checkbox"/> Insurance coverage (18)
<input type="checkbox"/> Other contract (37)
Real Property
<input type="checkbox"/> Eminent domain/Inverse condemnation (14)
<input type="checkbox"/> Wrongful eviction (33)
<input type="checkbox"/> Other real property (26)
Unlawful Detainer
<input type="checkbox"/> Commercial (31)
<input type="checkbox"/> Residential (32)
<input type="checkbox"/> Drugs (38)
Judicial Review
<input type="checkbox"/> Asset forfeiture (05)
<input type="checkbox"/> Petition re: arbitration award (11)
<input type="checkbox"/> Writ of mandate (02)
<input type="checkbox"/> Other judicial review (39) | Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)
<input type="checkbox"/> Antitrust/Trade regulation (03)
<input type="checkbox"/> Construction defect (10)
<input type="checkbox"/> Mass tort (40)
<input type="checkbox"/> Securities litigation (28)
<input type="checkbox"/> Environmental/Toxic tort (30)
<input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)
Enforcement of Judgment
<input type="checkbox"/> Enforcement of judgment (20)
Miscellaneous Civil Complaint
<input type="checkbox"/> RICO (27)
<input type="checkbox"/> Other complaint (not specified above) (42)
Miscellaneous Civil Petition
<input type="checkbox"/> Partnership and corporate governance (21)
<input type="checkbox"/> Other petition (not specified above) (43) |
|---|--|--|

2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
a. Large number of separately represented parties d. Large number of witnesses
b. Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
c. Substantial amount of documentary evidence f. Substantial postjudgment judicial supervision
3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (specify): 2
5. This case is is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)
Date: 8/29/08
Michael Ian Rott, Esq. (CSB 169468)
(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
• Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
• File this cover sheet in addition to any cover sheet required by local court rule.
• If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
• Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.
Page 1 of 2

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

CM-010

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

- Auto (22)—Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) (*if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto*)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

- Asbestos (04)
 - Asbestos Property Damage
 - Asbestos Personal Injury/Wrongful Death
- Product Liability (*not asbestos or toxic/environmental*) (24)
- Medical Malpractice (45)
 - Medical Malpractice—Physicians & Surgeons
 - Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
 - Premises Liability (e.g., slip and fall)
 - intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
 - Intentional Infliction of Emotional Distress
 - Negligent Infliction of Emotional Distress

Non-PI/PD/WD (Other) Tort

- Business Tort/Unfair Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) (*not civil harassment*) (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
 - Legal Malpractice
 - Other Professional Malpractice (*not medical or legal*)
- Other Non-PI/PD/WD Tort (35)

Employment

- Wrongful Termination (36)
- Other Employment (15)

Contract

- Breach of Contract/Warranty (06)
 - Breach of Rental/Lease Contract (*not unlawful detainer or wrongful eviction*)
- Contract/Warranty Breach—Seller Plaintiff (*not fraud or negligence*)
- Negligent Breach of Contract/Warranty
- Other Breach of Contract/Warranty
- Collections (e.g., money owed, open book accounts) (09)
- Collection Case—Seller Plaintiff
- Other Promissory Note/Collections Case
- Insurance Coverage (*not provisionally complex*) (18)
 - Auto Subrogation
 - Other Coverage
- Other Contract (37)
 - Contractual Fraud
 - Other Contract Dispute

Real Property

- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
 - Writ of Possession of Real Property
 - Mortgage Foreclosure
 - Quiet Title
 - Other Real Property (*not eminent domain, landlord/tenant, or foreclosure*)

Unlawful Detainer

- Commercial (31)
- Residential (32)
- Drugs (38) (*if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential*)

Judicial Review

- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
 - Writ—Administrative Mandamus
 - Writ—Mandamus on Limited Court Case Matter
 - Writ—Other Limited Court Case Review
- Other Judicial Review (39)
 - Review of Health Officer Order
 - Notice of Appeal—Labor Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

- Antitrust/Trade Regulation (03)
- Construction Defect (10)
- Claims Involving Mass Tort (40)
- Securities Litigation (28)
- Environmental/Toxic Tort (30)
- Insurance Coverage Claims (*arising from provisionally complex case type listed above*) (41)

Enforcement of Judgment

- Enforcement of Judgment (20)
 - Abstract of Judgment (Out of County)
 - Confession of Judgment (*non-domestic relations*)
 - Sister State Judgment
 - Administrative Agency Award (*not unpaid taxes*)
 - Petition/Certification of Entry of Judgment on Unpaid Taxes
 - Other Enforcement of Judgment Case

Miscellaneous Civil Complaint

- RICO (27)
- Other Complaint (*not specified above*) (42)
- Declaratory Relief Only
- Injunctive Relief Only (*non-harassment*)
- Mechanics Lien
- Other Commercial Complaint Case (*non-tort/non-complex*)
- Other Civil Complaint (*non-tort/non-complex*)

Miscellaneous Civil Petition

- Partnership and Corporate Governance (21)
- Other Petition (*not specified above*) (43)
 - Civil Harassment
 - Workplace Violence
 - Elder/Dependent Adult Abuse
 - Election Contest
 - Petition for Name Change
 - Petition for Relief from Late Claim
 - Other Civil Petition



HIDEN, ROTT & OERTLE, LLP
A Limited Liability Partnership
Including Professional Corporations
MICHAEL IAN ROTT, ESQ. (C.S.B. 169468)
DAVID V. HIDEN, JR., ESQ. (C.S.B. 169915)
ERIC M. OVERHOLT, ESQ. (C.S.B. 248762)
2635 Camino del Rio South, Suite 306
San Diego, California 92108
Telephone: (619) 296-5884
Facsimile: (619) 296-5171

FILED
CIVIL DIVISION OFFICE 13
2008 AUG 29 A 10:38
SAN DIEGO COUNTY, CA

Attorneys for William J. Gillis, Jr., the Proposed Class, and the General Public

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO – CENTRAL DISTRICT

WILLIAM J. GILLIS, JR, on behalf of
himself, and All Others Similarly Situated
and on Behalf of the General Public,

Plaintiff,

v.

APPLE COMPUTER, INC., AT&T, and
DOES 1through10,

Defendants.

CASE NO.: ~~08-000000-00-00-00~~

CLASS ACTION

COMPLAINT FOR:

1. Unlawful Business Practice in Violation of Bus. & Prof. Code §17200, *et seq.*
2. False and Misleading Advertising in Violation of California Bus. & Prof. Code §17500, *et seq.*

JURY TRIAL DEMANDED

Plaintiff, WILLIAM J. GILLIS, JR., on behalf of himself and all others similarly situated, based on the investigation of counsel, the existing public record and on information and belief, allege as follows:

NATURE OF THE ACTION

1. As set forth fully herein, the issue in this case is quite simple. Defendants, Apple Computer, Inc. (hereinafter "Apple") and AT&T have misrepresented to the public the speed, strength and performance of the 3G-bandwidth network while using either of the two Apple's 3G

1 iPhone's. These two (2) products are as follows: the 3G-8GB iPhone and the 3G-16GB iPhone
2 (hereinafter "Affected Models").

3 2. Based upon information and belief the G3 iPhone demands too much power from the 3G
4 bandwidths. The AT&T infrastructure is insufficient to handle this overwhelming 3G signal based
5 upon the high volume of 3G iPhones it has sold.

6 3. It should come as no surprise to either of the defendants, that since it is part of their
7 business model to sell (Apple) and service (AT&T) "ten million of the devices by the end of 2008",
8 as reported by Mercury News.com in Silicon Valley, that there are so many problems with the
9 Affected Models and network.

10 4. Apple's prior EDGE-based iPhone had complaints of being too slow over the internet,
11 despite early ads that made it appear as if the iPhone could surge at desktop-like speeds.

12 5. Due to the overloaded 3G network, it is quite common for 3G iPhone users to be on the 3G
13 network for only a few minutes before their 3G iPhone switches over to the slower EDGE network,
14 even in areas with rich 3G coverage.

15 6. AT&T has misrepresented the performance of its 3G network. AT&T spokesperson, Brad
16 Mays stated that iPhone 3G is "performing great". "Customers in 300 major metro areas in the
17 United States and 350 by the end of the year are experiencing the fast network connectivity that our
18 3-G network provides", according to Mays in an email interview. Mays also stated that "We have
19 anticipated the influx of users and have reported that the strength of the network can, does and will
20 continue to support that".

21 7. According to Information Week, Apple CEO, Steve Jobs responded to an upset 3G-iPhone
22 owner via email stating that "This is a known iPhone bug that is being fixed in the next software
23 update in September". So far, Apple has issued two firmware updates to make corrections to the
24 device's many bugs.

25 8. Neither of Apple's Affected Models, contain a disclaimer on the outside of each and every
26 one of defendant's 3G iPhone boxes.
27
28

1 9. Consumers, such as the Plaintiff, all others similarly situated, and the General Public
2 herein, look for disclosures and/or disclaimers on the outside of its boxes or advertising material prior
3 to making any electronics device purchase. Why? Because it points out to them to ask questions, to
4 further investigate, or to simply disclose complete and accurate information about the product. It
5 provides them with necessary information to make an informed purchasing decision. This is
6 especially true in the case of the speed and performance of an expensive ; an important feature in any
7 electronics device purchase.

8
9 10. This complaint seeks, among other things: (1) equitable and injunctive relief, including
10 corrective labeling and advertising and/or product recall, and the imposition of a constructive trust on
11 all monies unlawfully obtained by Defendants; and (2) the recovery of compensatory, statutory and/or
12 punitive damage as well as obtaining restitution and disgorgements from Defendants of their ill-
13 gotten gains for unfair business practices, untrue and misleading advertising.

14 JURISDICTION AND VENUE

15 11. Pursuant to Article VI, §10 of the California, as well as California Code of Civil Procedure
16 §382 and 410.10, this Court has jurisdiction over the following action. The damages suffered and
17 sought to be recovered by Plaintiff (as defined below) and the Class (as defined below) they seek to
18 represent is, in the aggregate, in excess of the jurisdictional minimum of this Court. The exact
19 amount of damages caused to the Class members and the General Public cannot be precisely
20 determined without access to Defendants' records.

21 12. Venue is proper in this Court since, as detailed below, the Plaintiff is a resident of this
22 County. Further, Plaintiff entered into an agreement for the purchase of his Apple 3G iPhone and
23 network service rate plan agreement ("Service Plan") in this judicial district. Defendants received
24 substantial compensation from sale and Service Plan of these 2 models in this County by doing
25 business here and Defendants made numerous misrepresentations, which had effects in this County.
26 Thus, as to the named Plaintiff, thousands of class members and a portion of the overall Class, certain
27 liability of the Defendants arose in this County, certain contracts were entered into here, were to be
28 performed here, were breached here.

1 13. This Court also has jurisdiction over each Defendant named herein because each Defendant
2 is either a corporation or an association organized under the laws of the State of California, a foreign
3 corporation or association authorized to do business in California and registered with the California
4 Secretary of State, or does sufficient business, has sufficient minimum contacts with California, or
5 otherwise intentionally avails itself of the California market, through the promotion, marketing,
6 advertising of employment positions for delivery drivers and/or sell their products in California, to
7 render the exercise of jurisdiction by the California courts permissible under traditional notions of fair
8 play and substantial justice.

9
10 **THE PARTIES**

11 14. Plaintiff, William J. Gillis, Jr., is, and at all material times were, a resident of San Diego
12 County, California. Plaintiff sues on behalf of himself, all others similarly situated, and the General
13 Public pursuant to the "Private Attorney General" provisions of the Unfair Competition Laws
14 embodied in California Business and Professions Code §§17204 and 17535. Plaintiff purchased a
15 black Apple 3G iPhone, which was advertised, distributed, and/or sold, by Defendant Apple, and
16 monthly service provided by AT&T, as named and defined herein. Moreover, for all the reasons
17 stated herein, plaintiff has suffered injury in fact and has lost money and/or property as a result of
18 Defendant, Apple's and AT&T's acts, i.e., their practice of engaging in false and misleading
19 advertising concerning the speed and performance in two (2) of its 3G iPhones, as defined above and
20 omissions concerning those same products, as defined above.

21 15. This individual may be referred to herein as "Plaintiff." In bringing this action, as to the
22 individual and Class claims, Plaintiff either directly or indirectly relied upon, *inter alia*, the
23 representations, advertising and other promotional materials which were prepared and approved by
24 this Defendant and their agents and disseminated on the face of the containers for this Defendant's
25 documentation, and/or through local and national advertising media, including Defendants' Internet
26 websites, containing the misrepresentations and/or omissions alleged hereinafter.

27 16. Plaintiff also relied upon the representations of this Defendant herein, in researching
28 which product to purchase. Specifically, Plaintiff relied on the representations of these Defendants

1 concerning the way they represented the speed and performance of its phone and network to
2 Plaintiff, the proposed Class and the General Public. Defendants will be hard pressed to explain why
3 they failed to disclose to Plaintiff herein, the proposed Class and the General Public that the
4 infrastructure of the 3G network was insufficient to provide the represented performance and speed to
5 the 2-3G iPhone models, as defined above, were artificially inflated, even though they disclosed
6 and/or disclaimed this very same fact regarding all of their other computer models to the General
7 Public.

8 17. Defendant Apple Computer, Inc. ("Apple") is a California corporation which is licensed to
9 do, and is doing, business in California and throughout the United States. Its principal offices are
10 located in Cupertino, California. Apple transacts business in San Diego County, California and at all
11 relevant times designed, manufactured, promoted, marketed, distributed, and/or sold the products that
12 are the subject of this complaint, throughout the United States and California. Apple also has
13 significant contacts with San Diego County, California, and the activities complained of herein
14 occurred, at least in part, in San Diego County, California. According to Apple's website, its
15 products can be purchased directly from Apple through its website, at "Apple's own retail store
16 locations around the country" or at "thousands of Apple authorized resellers."

17 18. Defendant AT&T is a Texas corporation which is licensed to do, and is doing, business in
18 California and throughout the United States. Its principal offices are located in San Antonio, Texas.
19 AT&T transacts business in San Diego County, California and at all relevant times designed,
20 manufactured, promoted, marketed, distributed, and/or sold service plans that is one of the subjects of
21 this complaint, throughout the United States and California. AT&T also has significant contacts with
22 San Diego County, California, and the activities complained of herein occurred, at least in part, in San
23 Diego County, California.

24 19. The true names and capacities of the Defendant sued in this Complaint as Does 1-50,
25 inclusive, are currently unknown to Plaintiff, who therefore sues such Defendant by this fictitious
26 name. This Defendant designated herein as a Doe is legally responsible in some manner for the
27 unlawful acts referred to herein. Plaintiff will seek leave of the Court to amend this complaint to
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1 reflect the true names and capacities of this Defendant designated herein as Does 1-50 when such
2 identities become known.

3 20. At all relevant times, Apple, AT&T and Does 1-50, inclusive, have made, and continue to
4 make misrepresentations in the marketing, advertising and/or sale of its 3G iPhone and service plans
5 described above. The marketing, advertising, and/or packaging concerning these Apple products and
6 AT&T services, which are sold to the General Public and the members of the class, contain "spotty
7 wireless broadband connectivity, most likely resulted from a hardware problem introduced during
8 mass production, a Swedish technical magazine reported two weeks ago. Ny Teknik, Sweden's
9 foremost engineering weekly, said it obtained a report on tests conducted by unnamed experts that
10 showed some handsets' sensitivity to third-generation network signals is well below the level
11 specified in the 3G standard."

12 CLASS ACTION ALLEGATIONS

13 21. Plaintiff brings this action on behalf of himself and all others similarly situated within the
14 State of California pursuant to California Code of Civil Procedure §382. The proposed class is both
15 ascertainable, and shares a well-defined community of interest in the questions of law and fact as
16 further detailed below.

17 Ascertainable Class

18 (1) Class Definition

19 22. This proposed definition of this class is limited to those individuals who have purchased
20 the Affected Models stated elsewhere in this complaint. As stated above, Apple & AT&T have failed
21 to disclose that the AT&T 3G network is unable to handle the millions of Apple 3G iPhone users,
22 which causes the device to involuntarily switch from 3G to slower EDGE speeds.

23 As a result of such failure, those who have purchased the Affected Models have been
24 intentionally misled regarding the speed and performance of their 3G iPhones.

25 (2) Size of the Class

26 23. The size of the class is dependant on the number of sales of the Affected Models, which as
27 the date of this complaint, are still being sold without any disclosure regarding speed and
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1 performance problems. The proposed class would be limited to those citizens within the State of
2 California who purchased the Affected Models without any such disclosures. It is believed there are
3 thousands of individuals who would qualify as a "class member" under this proposed action.

4 (3) Means Available for Identifying Class Members

5 24. The means available for identifying class members would be based on a proposed class
6 announcement, and initial discovery from Defendant Apple's and AT&T's records to confirm the
7 sales of Affected Models and Service Plans within California. Since Defendants Apple and AT&T
8 are likely to have accurate and detailed sales and service information regarding individuals who
9 would be identified as "class members," there is an easy and accurate method available for
10 identifying such members.

11 Community of Interest

12 (1) Predominant Common Questions of Law or Fact

13 25. Here, each member of the proposed class will be claiming exactly the same questions of
14 law and fact. First, the class is limited to California residents. Thus, the available relief under
15 relevant California statutes (further identified below) will not be frustrated by a multi-state
16 application of California law. Second, the questions presented are identical for any proposed class
17 member, i.e.: (a) Did Defendant Apple advertise and sell the Affected Models, claiming increased
18 speed and performance of its 3G iPhone would last for only a few minutes before reverting to the
19 slower EDGE speed?; (b) if so, Did Defendant Apple fail to disclose the 3G speed and performance
20 discrepancy to consumers?; (c) if so, Does such failure violate California's statutory and common-law
21 prohibitions against such conduct?

22 (d) Did AT&T advertise and sell service plans for these Affected Models claiming it has anticipated
23 the influx of users and have reported that the strength of the network can, does and will continue to
24 support that?; (e) if so, Did Defendant AT&T fail to disclose the 3G speed and performance
25 discrepancy to consumers?; (f) if so, Does such failure violate California's statutory and common-law
26 prohibitions against such conduct?
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1 If all of these questions are answered in the affirmative, then each class member has
2 shown liability. Thus, liability can be proven uniformly throughout the class by facts common to all
3 members of the proposed class.

4 (2) *Class Representative Claims are Typical of the Class*

5 26. As shown above, the facts needed to prove liability are uniform throughout the class. As
6 such, the proposed class representative's claim is typical of the class itself. This representative
7 purchased the Affected Models while it was advertised with having better speed and performance
8 than it actually has. This representative did not receive any disclosures prior to, or after purchase, by
9 Defendant Apple or AT&T explaining the actual facts regarding its phone and network speed and
10 performance. It is these facts that are typical among the proposed class. Further, it is these facts that
11 are essential in proving the claims alleged in this complaint against Defendants.

12 (3) *Class Representatives Can Adequately Represent Class*

13 27. The class representative can adequately represent the class because his claim is both
14 typical of the class, and the issues to be decided are based on facts that are common between the class
15 representatives and the proposed class. Moreover, the representative has suffered all of the potential
16 injuries that might arise out of the conducted complained of herein. As such, the representative can
17 adequately represent the class because he will bring all potential legal actions and remedies that
18 would be available to individual members of the class.

19 (4) *Class Action as Superior Method to Resolve Claims*

20 28. In addition to what has been mentioned above, a class action is a superior method for
21 resolving the claims herein alleged. **As stated above, the remedy to resolve the Affected Models
22 and Network Connectivity deficit capacity would be to refund the cost of the Affected Models
23 and Service Agreement Costs, which is estimated at approximately \$500.00 per plaintiff.**
24 Individually, this is not a significant amount, and would be likely be limited to a small claims action
25 by individual plaintiff's. Such actions are inconceivable, as the costs associated with proving a prima-
26 facie case would likely exceed the recovery obtainable. In addition, there is a substantial likelihood
27 of inconsistent verdicts, which would frustrate the resolution of these legal issues for Defendants,
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1 forcing them to comply with inconsistent legal standards. Moreover, there is no assurance individual
2 claims will prevent the continued deceptive practices alleged herein. This would frustrate the purpose
3 of California consumer protection laws. Considering the actual size of the class (estimated to be in
4 the tens of thousands), and the importance of the issues presented to the State of California (enforcing
5 consumer protections through deceptive practices within the state), a class action is the desired
6 method for resolving this matter. Moreover, with such common questions of fact, the Court is in a
7 superior position to fashion a remedy that would uniformly apply to each, or nearly all, class
8 members. Finally, failure to certify a class would literally make it impossible for a great many of the
9 class members to seek relief, as the costs of litigation would far exceed the remedy available. For
10 those who do seek judicial relief, there is a strong likelihood that separate courts would lead to
11 inconsistent verdicts; working a substantial prejudice on Defendants, especially, as in this case, where
12 equitable relief is being sought. As such, a class action presents for fewer management difficulties
13 and provide the benefits of single adjudication, economy of scale, and comprehensive supervision by
14 a single court.
15

16 PRIVATE ATTORNEY GENERAL ALLEGATIONS

17 29. In addition to asserting class action claims in this litigation, Plaintiffs assert claims as
18 private attorney generals on behalf of the members of the General Public residing within the State of
19 California pursuant to *California Business and Professions Code §§17204 and 17535*. The purpose
20 of such a claim is to enjoin Defendants from engaging in the unfair business practices and deceptive
21 advertising alleged in this Complaint and to require Defendants to restore to the affected members of
22 the General Public all monies wrongfully obtained by Defendants through their false advertising and
23 unfair business practices. A private attorney general action is necessary and appropriate because
24 Defendants have engaged in the wrongful acts and deceptive advertising described herein as a general
25 business practice.
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FIRST CAUSE OF ACTION

(Unlawful, Unfair and Deceptive Business Practices in Violation of

California Business & Professions Code §17200, et seq.)

(Against Defendants Apple & AT&T)

30. Plaintiff hereby incorporates by reference each and every preceding and succeeding paragraph as though more fully set forth at length herein.

31. Plaintiff asserts this cause of action on behalf of himself, on behalf of the Class in his capacity as private attorney general on behalf of the members of the General Public residing within the State of California.

32. The Unfair Business Practices Act defines unfair business competition to include any "unfair," "unlawful," or "fraudulent" business act or practice. *California Business and Professions Code §17200 et seq.* The Act also provides for injunctive relief and restitution for violations.

33. Defendant Apple violated, and continues to violate, *California Business and Professions Code §17200 et seq.*, by misrepresenting the actual speed and performance of 2 of its 3G-iPhone models.

34. Defendant AT&T violated, and continues to violate *California Business and Professions Code §17200 et seq.*, by misrepresenting the strength of the network and its ability to support the millions of 3G users.

35. By engaging in the above described acts and practices, Defendant Apple & AT&T have committed one or more acts of unfair competition within the meaning of *California Business and Professions Code §17200 et seq.*

36. Defendant Apple's and AT&T's acts and practices as described herein have deceived and/or are likely to deceive members of the public.

37. The acts and practices of Apple and AT&T are also unlawful because they violate one or more of the following: the *California Business & Professions Code §17500*, as described below.

38. As discussed above, Plaintiff and the members of the Class purchased one of these 2-3G iPhone models directly from Apple and service plan from AT&T and/or its authorized

1 retailers/resellers. Plaintiff is informed and believes and, based upon such information and belief,
2 allege that Apple's and AT&T's authorized retailers/resellers were Apple's and AT&T's agents,
3 ostensible agents, employees, servants, joint venturers, actors in concert, aiders and abettors and co-
4 conspirators.

5 39. In this regard, the funds paid by Plaintiff and the members of the Class to Apple's and
6 AT&T's retailers/resellers were, in fact, paid directly to Apple and AT&T. Plaintiff is informed and
7 believes and, based upon such information and beliefs, alleges that Apple and AT&T profited
8 enormously through falsely representing the speed and performance of two of its models through its
9 authorized retailers/resellers. Apple and AT&T's revenues are thus directly traceable to millions of
10 dollars paid out by Plaintiff and the members of the Class for the 2-3G iPhone models at issue.

11 40. Unless Defendant Apple and AT&T are enjoined from continuing to engage in the
12 unlawful, unfair, fraudulent, untrue, and deceptive business acts and practices as described herein,
13 members of the General Public residing within California will continue to be damaged by Apple's
14 and AT&T's unfair competition.

15 41. Apple and AT&T, through their acts of unfair competition, have acquired money from
16 members of the proposed Class. Thus, Plaintiff and the members of the Class request this Court
17 restore this money to them and enjoin Apple and AT&T from continuing to violate *California*
18 *Business and Professions Code §17200 et seq.*, as discussed above.

19 42. Such conduct is ongoing and continues to this date. Plaintiff, the Class members and the
20 General Public are therefore entitled to relief described below.

21
22 **SECOND CAUSE OF ACTION**

23 (False and Misleading Advertising in Violation of
24 California Business & Professions Code §17500, et seq.)
25 (Against Defendant Apple and AT&T)

26 43. Plaintiff realleges and incorporates herein by reference each of the foregoing paragraphs,
27 and further alleges as follows.

1 44. Plaintiff asserts this cause of action on behalf of himself, on behalf of the Class and in
2 their capacity as private attorney general on behalf of the members of the General Public residing
3 within the State of California.

4 45. Defendant Apple's and AT&T's use of direct-mail to advertise, including its website on
5 the Internet, to call attention to, or give publicity to, the hard drive capacity of its products, falsely
6 and deceptively represents its products and services to the proposed Class. Thus, by its actions,
7 Apple and AT&T are disseminating advertising concerning its products and services, which by its
8 very nature is unfair, deceptive, untrue, or misleading within the meaning of *California Business &*
9 *Professions Code §17500, et. seq.* Such advertisements are likely to deceive, and continue to deceive,
10 the consuming public.

11 46. Further, the above-described false, misleading, and deceptive advertising conducted by
12 Apple and AT&T continues to have a tendency to deceive the General Public in that Apple and
13 AT&AT have failed to disclose the true and actual speed and performance of the 3G iPhone and the
14 insufficient infrastructural 3G network, as described above. Apple and AT&T have also failed to
15 instigate a public information campaign to alert consumers of these deficiencies in its advertising
16 which continues to create a misleading and confusing perception of the Affected Models' speed,
17 performance and network connectivity.

18 47. In making and disseminating the statements alleged herein, Apple and AT&T knew or
19 should have known that the statements were untrue and misleading, and action in violation of
20 *California Business & Professions Code §17500, et. seq.*

21 48. The misrepresentations and non-disclosures by Apple and AT&T of the material facts
22 detailed above constitute false and misleading advertising and therefore constitute a violation of
23 *California Business & Professions Code §17500, et. seq.*

24 49. As a direct and proximate result of Apple's and AT&T's wrongful conduct, Plaintiff and
25 the members of the Class request that this Court cause Apple and AT&T to restore this money to
26 them, and to enjoin Apple and AT&T from continuing to violate *California Business & Professions*

1 Code §17500, et. seq., as discussed above. Otherwise, Plaintiff and the members of the Class will
2 continue to be damaged by Apple's false and/or misleading advertising.

3 50 Such conduct is ongoing and continues to this date. Plaintiff, the Class members and the
4 General Public are therefore entitled to the relief described below.

5 **RELIEF REQUESTED**

6 WHEREFORE, Plaintiff, on behalf of himself, on behalf of the members of the Class
7 defined herein, and the General Public as applicable, pray for judgment and relief on all Causes of
8 Action as follows:

- 9 1. An order certifying this case as a class action and appointing Plaintiff and their counsel to
10 represent the Class;
- 11 2. For a temporary, preliminary and/or permanent order for injunctive relief enjoining
12 Defendants from pursuing the policies, acts and practices complained of herein;
- 13 3. For a temporary, preliminary and/or permanent order for injunctive relief requiring
14 Defendants to undertake an immediate public campaign to inform members of the General Public as
15 to their prior practices and notifying members of the proposed Class as to the presence of potential
16 restitutionary relief;
- 17 4. For an award of exemplary and/or punitive damages as appropriate to deter and punish
18 Defendants for their unfair and deceptive business practices, as well as their fraudulent and deceitful
19 conduct;
- 20 5. For an order requiring disgorgement of Defendants' ill-gotten gains and to pay restitution
21 to Plaintiffs and all members of the Class and the General Public all funds acquired by means of any
22 act or practice declared by this Court to be an unlawful, fraudulent or unfair business act or practice, a
23 violation of laws, statutes or regulations, or constituting unfair competition;
- 24 6. For distribution of any monies recovered on behalf of the General Public, or members of
25 the Class, via *fluid* recovery or *cy pres* recovery where necessary to prevent Defendants from
26 retaining the benefits of their wrongful conduct;
- 27 7. Reasonable attorneys' fees;
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8. Costs of this suit;
 9. Pre- and post-judgment interest; and
 10. Such other and further relief as the Court may deem necessary or appropriate.

JURY DEMAND

Plaintiffs and the Class demand a trial by jury.

DATED: 8/29/08

HIDEN, ROTT & OERTLE, LLP

By: 

Michael Ian Rott, Esq.
David V. Hiden, Jr., Esq.
Eric M. Overholt, Esq.
*Attorneys for Plaintiff,
the Proposed Class, and
the General Public*

Complaint.doc

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

155854 - TC

**October 08, 2008
15:08:06**

Civ Fil Non-Pris

USAO #: 08CV1835

Judge.: LARRY A BURNS

Amount.: \$350.00 CK

Check#: BC99005035

Total-> \$350.00

**FROM: GILLIS
VS
APPLE COMPUTER**

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained hereon neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<p>(a) PLAINTIFFS WILLIAM J. GILLIS, JR., on behalf of himself and All Others Similarly Situated and on Behalf of the General Public</p> <p>(b) County of Residence of First Listed Plaintiff <u>San Diego</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorney's (Firm Name, Address, and Telephone Number) HIDEN, ROTT & OERTLE, LLP MICHAEL IAN ROTT, ESQ. (C.S.B. 169468) DAVID V. HIDEN, JR. ESQ. (C.S.B. 169915) ERIC M. OVERHOLT, ESQ. (C.S.B. 248762) 2635 Camino del Rio South, Suite 306 San Diego, CA 92108 Telephone: (619) 296-5884 Facsimile: (619) 296-5171</p>	<p>DEFENDANTS APPLE COMPUTER, INC., AT&T, and DOES 1 through 10</p> <p style="text-align: center;">FILED 08 CV 1835 LAB LSP 08 OCT 8 11 13</p> <p>County of Residence of First Listed Defendant <u>San Francisco</u> (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p> <p>Attorneys (If Known) PENELOPE A. PREVOLOS (BAR NO. 87607) PPrevolos@mofo.com ANDREW D. MUHLBACH (BAR NO. 175694) AMuhlbach@mofo.com HEATHER A. MOSER (BAR NO. 212686) HMoser@mofo.com MORRISON & FOERSTER LLP 425 Market Street San Francisco, California 94105-2482 Telephone: 415.268.7000 Facsimile: 415.268.7522</p>
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II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<p>CONTRACT</p> <p><input type="checkbox"/> 110 Insurance</p> <p><input type="checkbox"/> 120 Marine</p> <p><input type="checkbox"/> 130 Miller Act</p> <p><input type="checkbox"/> 140 Negotiable Instrument</p> <p><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)</p> <p><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits</p> <p><input type="checkbox"/> 160 Stockholders' Suits</p> <p><input type="checkbox"/> 190 Other Contract</p> <p><input type="checkbox"/> 195 Contract Product Liability</p> <p><input type="checkbox"/> 196 Franchise</p>	<p>TORTS</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers' Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 362 Personal Injury—Med. Malpractice</p> <p><input type="checkbox"/> 365 Personal Injury—Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</p> <p>PERSONAL PROPERTY</p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p>FORFEITURE/PENALTY</p> <p><input type="checkbox"/> 610 Agriculture</p> <p><input type="checkbox"/> 620 Other Food & Drug</p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 630 Liquor Laws</p> <p><input type="checkbox"/> 640 R.R. & Truck</p> <p><input type="checkbox"/> 650 Airline Regs.</p> <p><input type="checkbox"/> 660 Occupational Safety/Health</p> <p><input type="checkbox"/> 690 Other</p> <p>LABOR</p> <p><input type="checkbox"/> 710 Fair Labor Standards Act</p> <p><input type="checkbox"/> 720 Labor/Mgmt. Relations</p> <p><input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act</p> <p><input type="checkbox"/> 740 Railway Labor Act</p> <p><input type="checkbox"/> 790 Other Labor Litigation</p> <p><input type="checkbox"/> 791 Empl. Ret. Inc. Security Act</p> <p>IMMIGRATION</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 463 Habeas Corpus – Alien Detainee</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>	<p>BANKRUPTCY</p> <p><input type="checkbox"/> 422 Appeal 28 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p>PROPERTY RIGHTS</p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 840 Trademark</p> <p>SOCIAL SECURITY</p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p>FEDERAL TAX SUITS</p> <p><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)</p> <p><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609</p>	<p>OTHER STATUTES</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 410 Antitrust</p> <p><input type="checkbox"/> 430 Banks and Banking</p> <p><input type="checkbox"/> 450 Commerce</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Sat TV</p> <p><input type="checkbox"/> 810 Selective Service</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 875 Customer Challenge 12 USC 3410</p> <p><input checked="" type="checkbox"/> 890 Other Statutory Actions</p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 892 Economic Stabilization Act</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 894 Energy Allocation Act</p> <p><input type="checkbox"/> 895 Freedom of Information Act</p> <p><input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p>
<p>REAL PROPERTY</p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent Lease & Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p>	<p>CIVIL RIGHTS</p> <p><input type="checkbox"/> 441 Voting</p> <p><input type="checkbox"/> 442 Employment</p> <p><input type="checkbox"/> 443 Housing/Accommodations</p> <p><input type="checkbox"/> 444 Welfare</p> <p><input type="checkbox"/> 445 Amer. w/Disabilities - Employment</p> <p><input type="checkbox"/> 446 Amer. w/Disabilities - Other</p> <p><input type="checkbox"/> 440 Other Civil Rights</p>	<p>PRISONER PETITIONS</p> <p><input type="checkbox"/> 510 Motions to Vacate Sentence</p> <p>Habeas Corpus:</p> <p><input type="checkbox"/> 530 General</p> <p><input type="checkbox"/> 535 Death Penalty</p> <p><input type="checkbox"/> 540 Mandamus & Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Condition</p>		

V. ORIGIN (Place an "X" in One Box Only)

<input type="checkbox"/> 1 Original Proceeding	<input checked="" type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. sections 1332, 1441, 1446, 1453 **28:1441 DSM**

Brief description of cause:
alleged unfair business practices and false advertising of consumer product; alleged negligence, fraud, breach of warranty and civil conspiracy in sale and/or marketing thereof

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$**

CHECK YES only if demanded in complaint.
JURY DEMAND: American Legal Net, Inc. www.ProfessionalLaw.com

ORIGINAL

VIII. RELATED CASE(S)
IF ANY

(See instructions)

JUDGE (see notice of related cases)

FILE NUMBER

DATE

October 8, 2008

SIGNATURE OF ATTORNEY OF RECORD

Ramona M. ...

FOR OFFICE USE ONLY

RECEIPT # 156854

AMOUNT

\$350

APPLYING IFP

JUDGE

MAG. JUDGE

LAC 10/8/08

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.