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15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

'08 CV 2134 ¹ BLM

CASE NO.:

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

17
18
19 PETER KELLER, on behalf of himself and
all others similarly situated,

20 Plaintiff,

21 v.

22
23 APPLE, INC., a California Corporation; and
DOES 1 through 100, inclusive.

24 Defendants.
25
26

1. Negligence
2. Breach of the Express Warranty and Implied Warranty of Merchantability
3. Fraud and Deceit
4. Negligent Misrepresentation
5. Unlawful Business Practice in Violation of Bus. & Prof. Code §17200, *et seq.*
6. False and Misleading Advertising in Violation of California Bus. & Prof. Code §17500, *et seq.*

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FILED

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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY DEPUTY

1 Plaintiff, on behalf of himself and all others similarly situated, based on the investigation
2 of counsel, the existing public record and on knowledge, information and belief, formed after an
3 inquiry reasonable under the circumstances, except where so indicated, alleges as follows, which
4 except where alleged on personal knowledge, will likely have evidentiary support after a
5 reasonable opportunity for further investigation or discovery.

6 NATURE OF THE ACTION

7 1. Defendant Apple Computer, Inc. (hereinafter "Apple") has misrepresented to the public the
8 speed, strength and performance of the 3G-bandwidth network while using either of the two
9 Apple's 3G iPhones. These two (2) products are as follows: the 3G-8GB iPhone and the 3G-
10 16GB iPhone (hereinafter "3G iPhones").

11 2. The term '3G' refers to the third generation in mobile communications. Specifically, 3G
12 technology features faster bandwidth and transfer rates. 3G networks are supposed to have a
13 potential transfer rate of 3 Mbps. Apple's 3G iPhones combined with AT&T's 3G Service Plan
14 fail to deliver 3G to Plaintiff and all other 3G iPhone users as advertised.

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

20 4. Defendants Apple and AT&T Mobility Inc. ("AT&T") have an agreement, whereby AT&T
21 is the exclusive service provider for the iPhones and iPhone 3G. Consumers are unable to choose
22 any other network or carrier when using their iPhone 3G. Through this joint agreement, Apple
23 and AT&T have engaged in a collaborated scheme to deceive plaintiff and other consumers, since
24 the iPhone 3G and AT&T 3G Network is faulty and rarely provides 3G connectivity to its
25 customers. Most of the time plaintiff receives no 3G connectivity at all.

26 5. Apple knew, or should have known, or was obligated under the law to understand that the
27 iPhone 3G could not deliver the promised speed. Yet both Apple and AT&T profited by selling
28 upgraded plans at a \$10/month premium and requiring plaintiff and others to enter into a new two

1 (2) year contract. Additionally, they enjoyed the benefit of being the exclusive service provider
2 for Apple 3G iPhones in the United States.

3 6. Apple & AT&T knew, should have known, or were obligated under the law to understand,
4 that AT&T's 3G Network might not be able to handle the massive influx of their 3G iPhones.
5 Public reports indicate the companies anticipated sale of 10 million iPhone 3G phones. Yet,
6 Apple profited by being the first to market, by gaining market share and by receiving hundreds of
7 millions of dollars in revenue selling millions of new 3G iPhones.

8 7. The 3G iPhones suffer from either a hardware flaw, demanding too much power from the
9 3G bandwidths, or a software flaw in the programmed algorithms. Plaintiff and other 3G users
10 are unable to connect to the 3G network. Consequently, users are not getting 3G transfer rates.
11 Therefore, Apple and AT&T have oversold the network by selling more phones and more
12 subscription plans than the 3G infrastructure can handle.

13 8. Based on how the iPhone is set up and designed, the strain on the network would make it
14 impossible to provide reliable and sustained 3G connectivity to customers.

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

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

27 11. However, the 3G iPhones' sensitivity to third-generation network signals is well below the
28 level specified in the 3G standard. This poor connectivity most likely resulted from either a

1 hardware problem introduced during mass production or a software problem with the internal
2 programmed algorithms.

3 12. Neither of Apple's 3G iPhones contain a disclaimer on the outside of the 3G iPhone boxes.

4 13. Consumers, such as the Plaintiff, may look for disclosures and/or disclaimers on the
5 outside of its boxes or advertising material prior to making any electronics device purchase. Such
6 information provides consumers with necessary information to make an informed purchasing
7 decision. This is especially true in the case of the speed and performance of an expensive device;
8 an important feature in any electronics device purchase. Disclosures about the true nature of the
9 iPhone 3G and AT&T's 3G network should have been provided to customers prior to purchasing
10 the iPhone 3G. However, based on its extensive advertising campaign focusing on this 3G
11 characteristic, potential and actual customers were likely to be misled into believing that the 3G
12 iPhones would operate primarily, if not exclusively, on a 3G network.

13 14. AT&T charged consumers \$10/month in an additional fee to be able to sign up for the
14 additional 3G network coverage. Additionally, plaintiff was required to enter to a 2 year contract
15 with AT&T in order to sign up for AT&T's 3G network. AT&T did not warn plaintiff of the
16 connectivity problems with the 3G Network using the iPhone, despite the express statements and
17 advertisements to the contrary.

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

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

26 17. AT&T sells 3G iPhones on its website. AT&T also exclusively provides 3G network
27 service for the 3G iPhones.

28 18. President and CEO of AT&T's wireless unit Ralph de la Vega directly aligned the

1 company with the sale of the iPhone in a statement on the companies website: "We will continue
2 to expand our 3G network coverage into new areas, grow our lineup of industry-leading devices,
3 such as iPhone 3G, and deliver compelling new 3G services to market like Video Share SM."
4 *AT&T Offers Nation's Fastest 3G Network*, "Nation's Fastest 3G Network Complements Best
5 Global Coverage and Industry-Leading Portfolio of 3G Devices", July 10, 2008,
6 <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25921> (Accessed
7 September 4, 2008) (Emphasis added).

8 19. Apple intended to sell 10 million 3G iPhones within the first year. Such information was
9 made public and available to AT&T.

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

13 21. This complaint seeks, among other things: (1) equitable and injunctive relief, including
14 corrective labeling and advertising, and the imposition of a constructive trust on all monies
15 unlawfully obtained by Defendants; and (2) the recovery of compensatory, statutory and/or
16 punitive damage as well as obtaining restitution and disgorgement from Defendants of their ill-
17 gotten gains.

18 JURISDICTION AND VENUE

19 22. This Court has jurisdiction over this action. The damages suffered and sought to be
20 recovered by Plaintiff and the Class that he seeks to represent is, in the aggregate, in excess of the
21 jurisdictional minimum of this Court for a class action. The exact amount of damages caused to
22 the Class members cannot be precisely determined without access to Defendants' records.

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

1 liability of the Defendants arose in this District, certain contracts were entered into here, were to
2 be performed here and were breached here.

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

11 THE PARTIES

12 25. On personal knowledge, Plaintiff, Peter Keller, is, and at all material times were, a
13 resident of San Diego, California. Plaintiff sues on behalf of himself and all others similarly
14 situated. Plaintiff purchased an Apple 3G iPhone 16GB model, which was advertised, distributed,
15 and/or sold, by Defendant Apple, and monthly service provided by AT&T, as named and defined
16 herein, in San Diego, California. Moreover, for all the reasons stated herein, plaintiff has suffered
17 injury in fact and has lost money and/or property as a result of Defendants' improper acts, i.e.,
18 their practice of engaging in false and misleading advertising concerning the speed and
19 performance in two (2) of its 3G iPhones, as defined above.

20 26. In bringing this action, as to the individual and Class claims, Plaintiff either directly or
21 indirectly acted in response to, *inter alia*, the representations, advertising and other promotional
22 materials which were prepared and approved by Apple and their agents and disseminated on the
23 face of the containers and/or through local and national advertising media, including Defendants'
24 Internet websites, containing the misrepresentations and/or omissions alleged hereinafter.

25 27. Plaintiff also acted in response to the representations of these Defendants concerning the
26 way they represented the speed and performance of its phone and network to Plaintiff and the
27 proposed Class. Defendants also failed to disclose to Plaintiff and the proposed that the
28

1 infrastructure of the 3G network and the 3G iPhone was insufficient to provide the represented
2 performance and speed.

3 28. Defendant Apple Computer, Inc. ("Apple") is a California corporation which is licensed to
4 do, and is doing, business in California and throughout the United States. Its principal offices are
5 located in Cupertino, California. Apple transacts business in San Diego County, California and at
6 all relevant times designed, manufactured, promoted, marketed, distributed, and/or sold the
7 products that are the subject of this complaint, throughout the United States and California.

8 29. The true names and capacities, whether individual, corporate, associate, or otherwise, of
9 Defendants sued herein as DOES 1 through 100, inclusive, are currently unknown to Plaintiff,
10 who therefore sue Defendants by such fictitious names. Plaintiff will seek leave of Court to
11 amend this Complaint to reflect the true names and capacities of the Defendants designated
12 hereinafter as DOES when such identities become known.

13 30. Each of the defendants acted in concert with each other in the design of the iPhones and/or
14 the advertisements in question and as a result are legally responsible in some manner for the
15 unlawful acts referred to herein. Apple's and AT&T's authorized retailers/resellers were Apple's
16 and AT&T's agents, ostensible agents, employees, servants, joint ventures, actors in concert,
17 aiders and abettors and co-conspirators.

18 31. At all relevant times, Defendants have made, and continue to make misrepresentations in
19 the marketing, advertising and/or sale of its 3G iPhone and service plans described above.

20 CLASS ACTION ALLEGATIONS

21 32. Plaintiff brings this action of behalf of himself and all others similarly situated within the
22 State of California or all other states as the Court may deem appropriate. The proposed class is
23 both ascertainable, and shares a well-defined community of interest in the questions of law and
24 fact as further detailed below.

25 33. Plaintiff seeks to represent a Class composed of and defined as follows: "All persons in
26 California, or such other states of the Court determines to be appropriate, who purchased an
27 iPhone 3G and AT&T 3G Service Plan." Plaintiff reserves the right to amend or modify the Class
28

1 description with greater specificity or further division into subclasses or limitation to particular
2 issues.

3 **A. Numerosity**

4 34. The potential members of the Class as defined are so numerous that joinder of all the
5 members of the Class is impracticable. While the precise number of Class Members has not been
6 determined at this time and the facts on which to calculate that number are presently within the
7 sole control of defendant, Plaintiff believes that the number of people who have bought the
8 iPhone 3G and signed up for the 3G service is over a million people. Joinder of all members of
9 the Class is not practicable.

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

17 **B. Commonality**

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

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

28

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

3 **C. Typicality**

4 37. The claims of the named Plaintiff is typical of the claims of the Class. Plaintiff and all
5 members of the Class sustained damages arising out of and caused by Defendants' common
6 course of conduct in violation of laws as alleged herein. He purchased the 3G iPhone as it was
7 advertised with having the characteristics of better speed and performance than it actually has.
8 Yet plaintiff is not getting 3G connectivity with his 3G iPhone the majority of the time that he is
9 connected to the AT&T 3G Network. He did not receive any disclosures prior to, or after
10 purchase, by Defendant Apple or AT&T that contradicted defendants' contrary representations
11 explaining the actual limitations in the iPhone 3G and its interaction with AT&T 3G Network's
12 actual speed and performance. These facts are typical among the proposed class. Further, these
13 facts are essential in proving the claims alleged in this complaint against Defendants.

14 **D. Adequacy of Representation**

15 38. Plaintiff will fairly and adequately represent and protect the interests of the members of the
16 Class. The Class Representative can adequately represent the class because his claim is both
17 typical of the class, and the issues are based on facts that are common between the class
18 representatives and the proposed class. Moreover, the representative has suffered all of the
19 potential injuries and damages that might arise out of the conduct complained of herein. As such,
20 the representative can adequately represent the class because he will bring all potential legal
21 actions and remedies that would be available to individual members of the class. Plaintiff has
22 retained attorneys that are competent and experienced in litigating large class actions, to represent
23 their interests and that of the Class. Plaintiff and his counsel have done significant work in
24 identifying and investigating the potential claims in this action, and the necessary resources to
25 adequately and vigorously litigate this Action, have significant experience in handling class
26 actions and the types of claims asserted herein and have been appointed as class counsel by courts
27 in other actions, and Plaintiff and counsel are aware of the fiduciary responsibilities to the Class
28 Members to fairly and adequately represent the class and are determined to diligently discharge

1 those duties by vigorously seeking the maximum possible recovery for the Class based on the
2 merits of these claims and the resource available.

3 **E. Superiority of Class Action**

4 39. To the extent it is an element for class certification, a class action is a superior method for
5 resolving the claims herein alleged as compared to other group methods for adjudicating these
6 issues. The remedy to resolve the common class issues regarding the iPhones and Network
7 Connectivity deficit capacity would be to refund the cost of the iPhones and Service Agreement,
8 which is estimated at approximately \$500.00 per plaintiff. Individually, this is not a significant
9 amount, and would be likely be limited to a small claims action by individual plaintiffs. Such
10 actions are inconceivable, as the costs associated with proving a prima-facie case would likely
11 exceed the obtainable recovery.

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

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

26 42. Finally, failure to certify a class would literally make it impossible for a great many of the
27 class members to seek relief, as the costs of litigation would far exceed the remedy available. For
28 those who do seek judicial relief, there is a strong likelihood that separate courts would lead to

1 inconsistent verdicts; working a substantial prejudice on Defendants, especially, as in this case,
2 where equitable relief is being sought. As such, a class action presents for fewer management
3 difficulties and provide the benefits of single adjudication, economy of scale, and comprehensive
4 supervision by a single court.

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

7 **FIRST CAUSE OF ACTION**

8 **(Negligence)**

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

11 45. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

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

15 47. The Apple iPhone was negligently manufactured and designed, which causes it to fail to
16 provide reliable and sustained 3G connectivity.

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

21 49. As a result of said negligence and carelessness of Defendants, Plaintiff suffered damages as
22 alleged herein.

23 **SECOND CAUSE OF ACTION**

24 **(Breach of the Express Warranty and Implied Warranty of Merchantability)**

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

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

28 52. Plaintiff purchased the iPhone 3G and AT&T 3G Service Plan and used it for its ordinary

1 and intended purpose of providing reliable and sustained 3G service.

2 53. The iPhone 3G cannot perform its ordinary and intended purpose. The iPhone 3G will not
3 function as a phone or as an internet device without the buyer first purchasing an AT&T 3G
4 Service Plan.

5 54. Plaintiff and the Class purchased their 3G iPhones and AT&T 3G Service Plans with the
6 reasonable expectation that they would receive reliable and sustained 3G connectivity to their
7 phones. In addition, the advertisements disseminated by defendants stressing the excellence and
8 reliability of their 3G iPhone constitute a warranty that the products will operate as intended
9 during their useful life. However, the 3G iPhones are not fit for their warranted, advertised,
10 ordinary and intended purpose of providing reliable 3G service and is in fact defective. This
11 defect has manifested as Plaintiff and Class members do not receive 3G connectivity at all most of
12 the time.

13 55. When Defendants placed the iPhone 3G into the stream of commerce, they knew or
14 reasonably should have known that the intended and ordinary purpose of their phone was to
15 provide 3G connectivity and that users would expect 3G connectivity.

16 56. No repairs appear to be presently available to fix the iPhone 3G nor for the AT&T 3G
17 Network so as to provide reliable 3G connectivity. Apple has tried several firmware fixes, which
18 has not provided plaintiff or the Class with reliable or sustained 3G connectivity.

19 57. Defendants' breach of the warranty described above constitutes a violation of Cal. Civ.
20 Code §1792 et seq. and entitles Plaintiff and the Class to damages.

21 58. WHEREFORE, Plaintiff and the Class they seek to represent request relief as described
22 below.

23 **THIRD CAUSE OF ACTION**

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

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

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

28 61. With regard to each false representation alleged in this cause of action, at all relevant times,

1 Plaintiff and the class was unaware that the representation was false.

2 62. Defendants, and each of them, from the time that the iPhone 3G and Service Plans on the
3 3G Network were first designed, manufactured, marketed and/or distributed and up to the present,
4 deceived and falsely promised Plaintiff and the Class by (1) making false and fraudulent
5 misrepresentations to Plaintiff, the Class and the public, including but not limited to that the said
6 products and service plans would provide customers with 3G connectivity; and (2) concealing
7 from Plaintiff, the class and the public despite having superior knowledge thereof that the iPhone
8 3G would not function at 3G speeds do to the manufacture and design of the iPhone and the
9 limitations of the AT&T 3G Network.

10 63. Defendants, and each of them, maintained a nationwide multi-million dollar sales and
11 marketing campaign of the iPhone 3G and deceived Plaintiff as to the connectivity of the iPhone
12 3G. Apple also inserted the descriptive word '3G' in the name of the phone, representing that
13 users can expect data to travel at 3G rates on the iPhone

14 64. Defendants suggested, asserted and/or promised that the iPhone 3G with AT&T's 3G
15 service plan would have reliable and sustained 3G functionality. Defendants suggested, asserted
16 and/or promised a phone that was "Twice as Fast" and on "The nations fastest 3G network".
17 However this claim was false.

18 65. Defendants either misrepresented or suppressed the fact that their iPhone 3G and AT&T's
19 3G Network could not provide reliable and sustained 3G connectively. They also suppressed the
20 fact that they 3G network could not handle the massive influx of users as a result of the marketing
21 and sale of the iPhone 3G.

22 66. When Defendants made the foregoing misrepresentations, they knew or recklessly
23 disregarded them to be false and/or had no reasonable basis for believing them to be true.

24 67. The misrepresentations and concealment by Defendants were made and conducted with the
25 intent to willfully induce Plaintiff and the Class to purchase the iPhone 3G and the required 3G
26 Service Plan.

27 68. In response to the false, fraudulent and/or willful misrepresentation and concealment by the
28 Defendants, and each of them, Plaintiff was induced to and did purchase an iPhone 3G and AT&T

1 3G Service Plan. Plaintiff and other class members reasonably based their decision to purchase
2 these phones and plans on the representations of Apple and AT&T. H

3 69. Defendants' acts were done willfully, maliciously, with fraudulent intent and with
4 deliberate disregard of the rights of Plaintiff and the Class.

5 70. WHEREFORE, Plaintiffs and the Class they seek to represent request relief as described
6 below.

7 **FOURTH CAUSE OF ACTION**

8 **(Negligent Misrepresentation)**

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

11 72. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

12 73. At all times herein, Plaintiff and the class was unaware of the falsity of the statements
13 made by Defendants.

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

19 75. At all relevant times, Defendants had no reasonable grounds for believing that their
20 representations were true because the phone had existing issues with 3G connectivity and the
21 AT&T Network could not guarantee 3G connectivity to customers who purchased 3G Network
22 service.

23 76. In making these representations to Plaintiff, Defendants Apple and AT&T intended to
24 induce Plaintiff and the Class to purchase the 3G iPhone and AT&T 3G Service Plan.

25 77. Plaintiff and the class reasonably acted in response to the statements made by Defendants
26 when they purchased an iPhone 3G and AT&T 3G Service Plan.

27 78. As a proximate result of the negligent misrepresentations of Defendants, Plaintiff and class
28 members are locked into a two (2) year Service Plan with AT&T, for 3G connectivity that is

1 spotty at best and for which he pays a premium. Plaintiff and class members are also out the
2 premium that they paid to have an iPhone 3G (he bought the phone to replace his existing non-3G
3 phone) and the eighteen dollar (\$18.00) additional service fee that AT&T charges at contract
4 signing time.

5 79. WHEREFORE, Plaintiffs and the Class he seeks to represent request relief as described
6 below.

7 **FIFTH CAUSE OF ACTION**

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

10 80. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
11 forth herein.

12 81. Plaintiff asserts this cause of action on behalf of himself and on behalf of the Class.

13 82. The Unfair Competition Law defines unfair competition to include any “unfair,”
14 “unlawful,” or “fraudulent” business act or practice. California Business and Professions Code
15 §17200 et seq. The Act also provides for injunctive relief and restitution for violations.

16 83. Defendant Apple violated, and continues to violate, California Business and Professions
17 Code §17200 et seq., by misrepresenting the actual speed and performance of two (2) of its 3G
18 iPhone models.

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

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

25 86. Defendant Apple’s and AT&T’s acts and practices as described herein have deceived
26 and/or are likely to deceive members of the public. Apple advertises the iPhone 3G as “Twice as
27 Fast. Half the Price”, when the phone connects to the internet over their slower EDGE network
28 the majority of the time. Calling the phone the iPhone 3G, leads the reasonable consumer,

1 including Mr. Keller, to believe that the advertised "Twice as fast" is in relation to the 3G (third
2 generation mobile connection), which is twice as fast as the 2G predecessor.

3 87. The acts and practices of Apple and AT&T are also unlawful because they violate one or
4 more of the following: Negligence, Breach of Express and Implied Warranty of Merchantability,
5 Fraud and Deceit, Negligent Misrepresentation, the Consumers Legal Remedies Act, Civil
6 Conspiracy and California Business & Professions Code §17500, as described below.

7 88. As discussed above, Plaintiff and the members of the Class purchased one of these 3G
8 iPhone models directly from Apple and service plan from AT&T and/or its authorized
9 retailers/resellers.

10 89. In this regard, the funds paid by Plaintiff and the members of the Class to Apple's and
11 AT&T's retailers/resellers were, in fact, paid directly to Apple and AT&T. Apple and AT&T
12 profited enormously through falsely representing the speed and performance of two of its models
13 through its authorized retailers/resellers. Apple and AT&T's revenues attributable thereto are
14 thus directly traceable to millions of dollars paid out by Plaintiff and the members of the Class for
15 the 3G iPhones at issue, and plaintiff and the members of the class were injured in fact and lost
16 money or property as a result thereof.

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

21 91. Apple and AT&T, through their acts of unfair competition, have acquired money from
22 members of the proposed Class. Thus, Plaintiff and the members of the Class request this Court
23 disgorge and restore this money to them and enjoin Apple and AT&T from continuing to violate
24 California Business and Professions Code §17200 et seq., as discussed above.

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

27 ///

28 ///

SIXTH CAUSE OF ACTION

(False and Misleading Advertising in Violation of

California Business & Professions Code §17500, et seq.)

1
2
3
4 93. Plaintiff incorporates by reference each and every preceding paragraph as though fully set
5 forth herein.

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

7 95. Defendant Apple's and AT&T's acts and practices as described herein have deceived
8 and/or are likely to deceive members of the public. Apple's and AT&T's advertise, including its
9 website on the Internet, to call attention to, or give publicity to Apple and AT&T's iPhone 3G and
10 3G network service. Apple advertises the iPhone 3G as "Twice as Fast. Half the Price". In
11 reality, the 3G iPhones connect to the internet over their slower EDGE network the majority of
12 the time. Marketing the phone by naming it "iPhone 3G", leads the reasonable consumer,
13 including plaintiff, to believe that they will receive 3G connections to their phone.

14 96. AT&T advertises and sells 3G Network plans, yet customers are frequently kicked off of
15 the 3G Network. The majority of time Plaintiff is not on the 3G Network and cannot get any 3G
16 connectivity most of the time, despite being such connectivity being advertised and sold to
17 Plaintiff.

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

22 98. Further, the above-described false, misleading, and deceptive advertising conducted by
23 Apple and AT&T continues to have a tendency to deceive the general public in that Apple and
24 AT&AT have failed to disclose the true and actual speed and performance of the 3G iPhone and
25 the insufficient infrastructural 3G network, as described above. Apple and AT&T have also failed
26 to instigate a public information campaign to alert consumers of these deficiencies in its
27 advertising which continues to create a misleading and confusing perception of the 3G iPhones'
28 speed, performance and network connectivity.

1 99. In making and disseminating the statements alleged herein, Apple and AT&T should have
2 known that the statements were untrue and misleading, and action in violation of California
3 Business & Professions Code §17500, et. seq. Apple and AT&T's revenues attributable thereto
4 are thus directly traceable to millions of dollars paid out by Plaintiff and the members of the Class
5 for the 3G iPhones at issue, and plaintiff and the members of the class were injured in fact and
6 lost money or property as a result thereof.

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

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

15 102. Such conduct is ongoing and continues to this date. Plaintiff and the Class are therefore
16 entitled to the relief described below.

17 **PRAYER FOR RELIEF**

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

- 21 1. An order certifying this case as a class action and appointing Plaintiff and counsel to
22 represent the Class;
- 23 2. For a temporary, preliminary and/or permanent order for injunctive relief enjoining
24 Defendants from pursuing the policies, acts and practices complained of herein;
- 25 3. For a temporary, preliminary and/or permanent order for injunctive relief requiring
26 Defendants to undertake an immediate public campaign to inform members of the general public
27 as to their prior practices and notifying members of the proposed Class as to the presence of
28 potential restitutionary relief;

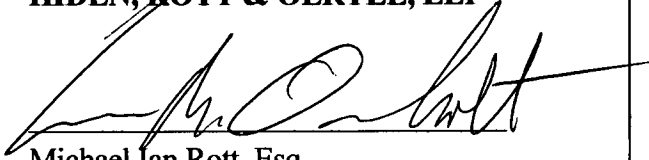
- 1 4. For an award of damages as appropriate;
- 2 5. For an order requiring disgorgement of Defendants' ill-gotten gains and to pay restitution
- 3 to Plaintiffs and all members of the Class all funds acquired by means of any act or practice
- 4 declared by this Court to be an unlawful, fraudulent or unfair business act or practice, a violation
- 5 of laws, statutes or regulations, or constituting unfair competition;
- 6 6. Reasonable attorneys' fees;
- 7 7. Costs of this suit;
- 8 8. Pre- and post-judgment interest; and
- 9 9. Such other and further relief as the Court may deem necessary or appropriate.

JURY DEMAND

11 Plaintiff and the Class demand a trial by jury on all claims so triable.

12
13 DATED: 11/19/08

HIDEN, ROTT & OERTLE, LLP

14
15 By: 

16 Michael Ian Rott, Esq.
17 David V. Hiden, Jr., Esq.
18 Eric M. Overholt, Esq.

ROSNER & MANSFIELD, LLP

Alan M. Mansfield, Esq

DOYLE LOWTHER, LLP

William J. Doyle II, Esq.
John A. Lowther IV, Esq.

Attorneys for Plaintiff, on behalf of himself
and all others similarly situated.

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein 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.)

I. (a) PLAINTIFFS

PETER KELLER, on behalf of himself and all others similarly situated

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

08 CV 2134 JSBLM

(c) Attorney's (Firm Name, Address, and Telephone Number)
Hidden, Rott & Oertle, LLP, 2635 Camino del Rio South, #306
San Diego, CA 92108, (619) 296-5884

DEFENDANTS

APPLE, INC., a California Corporation; and DOES 1 through 100, inclusive.

County of Residence of First Listed Defendant Santa Clara
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)
Morrison & Forester, LLP, 425 Market St., San Francisco, CA 94105; (415) 268-7000

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 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)

- | | | | | | |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input 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 checked="" type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input 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)

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

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

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

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. 1332(a)

Brief description of cause:

Class Action for Negligence, Breach of Implied Warranty, Fraud & , and CA Bus. & Prof Codes

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ > \$5,000,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Larry Alan Burns

DOCKET NUMBER 08CV1835 LAB(RBB)

DATE

SIGNATURE OF ATTORNEY OF RECORD

11/18/08

FOR OFFICE USE ONLY

RECEIPT # 157243 AMOUNT \$350 APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Handwritten notes:
OK
vrc
11/19/08

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

157243 - TC

**November 19, 2008
11:35:14**

Civ Fil Non-Pris

USAO #: 08CV2134

Judge.: JANIS L. SAMMARTINO

Amount.:

\$350.00 CK

Check#: 7765

Total-> \$350.00

**FROM: KELLER VS
APPLE**