IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF ALABAMA

JESSICA ALENA SMITH, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. CV-08-AR-1498-S
APPLE, INC., a California corporation;	)	
Defendant.	)	

AMENDED COMPLAINT

COME NOW Plaintiffs, Jessica Alena Smith and Wilton Lee Triggs, II, by and through their counsel of record, and, pursuant to Rule 15 of the Federal Rules of Civil Procedure, amend and restate their Complaint as follows:

DEFINITIONS

1. As used herein, the phrase "Defective iPhone 3G" shall refer to Apple, Inc.'s electronic device designed, manufactured and sold as a mobile phone, iPod and internet communications device with desktop-class email, web browsing, GPS functionality, maps and searching. Additionally, the Defective iPhone 3G differed from its predecessor, the iPhone, in that it included a new wireless communication protocol or standard, 3G.

PARTIES

2. Plaintiffs, Jessica Alena Smith and Wilton Lee Triggs, II, each purchased a Defective iPhone 3G in or around the Summer of 2008. Plaintiffs incurred significant monetary and non-monetary damages as a result of the Defendant's conduct complained of herein. Plaintiffs are both residents of the

State of Alabama and maintain their residences within the metropolitan area of Birmingham.

3. Apple, Inc., operating under the fictitious name of Apple Computer, Inc. in Alabama, is a California corporation that maintains its headquarters at 20525 Mariana Avenue, M/5 28C, Cupertino, California 95014 and has done business throughout the United States and in the State of Alabama at all times relevant to this lawsuit.

4. The acts charged in this Complaint have been done by Defendant or were authorized, ordered or done by its officers, agents, employees or representatives while actively engaged in the management of Defendant's business or affairs and were acting within the scope and course of their authority as such agents, principals, employees, servants, partners, joint venturers, and representatives, and were acting with the permission and consent of each other.

JURISDICTION AND VENUE

5. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1332(d)(2) because: (i) there are 100 or more class members, (ii) there is an aggregate amount in controversy exceeding $5,000,000, exclusive of interest and costs, and (iii) there is minimal diversity because at least one plaintiff and one defendant are citizens of different states. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a)(2) and because a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this Judicial District

FACTUAL ALLEGATIONS

7. Defendant Apple, Inc. holds itself out to the public as a manufacturer of cutting-edge consumer electronics.

8. In or around the Summer of 2007, Apple, Inc. began marketing and put out for consumption the iPhone. The iPhone is an electronic device designed, manufactured and sold as a mobile phone, iPod and internet communications device with desktop-class email, web browsing, maps and searching.

9. In or around the Summer of 2008, Apple, Inc. began marketing and put out for consumption the Defective iPhone 3G.

10. The release for consumption of the Defective iPhone 3G was preceded and followed by an aggressive marketing campaign, which included radio, television and paper advertisements.

11. In said advertisements, Defendant makes numerous express warranties about the quality and compatibility of the 3G protocol or standard included in the phone; for example, Defendant claims that the device is "twice as fast" as its predecessor.

12. One could barely turn on the television without hearing that the new iPhone 3G was "twice as fast for half the price".

13. In conjunction with each sale, Defendant marketed, advertised and warranted that the Defective iPhone 3Gs were fit for the ordinary purpose for which such goods were used – receiving telephone calls, GPS device, browsing the internet, email, and other data streams or sources at 3G speeds and/or

otherwise functioning suitably and/or properly with the 3G protocol or standard.

14. Defendant manufactured, marketed, advertised, warranted and sold, either directly or through their authorized distribution channels, the Defective iPhone 3Gs.

15. Defendant manufactured and distributed the Defective iPhone 3Gs intending that consumers would purchase, regardless of place of purchase, or the location where customers actually use them. The Defective iPhone 3Gs were placed into the stream of commerce, distributed, and, ultimately, offered for sale and sold to Plaintiff, as well as purchasers in Alabama and the United States.

16. Defendant intended for customers to believe its statements and representations about the Defective iPhone 3Gs.

17. In or around the Summer of 2008, Plaintiffs each purchased a Defective iPhone 3G. Both devices were purchase at the Apple Store located at 217 Summit Boulevard, Space F1, Birmingham, Alabama 35243.

18. Immediately after purchase, Plaintiffs soon noticed that the internet connection, receipt and sending of email, text messages and other data transfers through the device were slower than expected and advertised. Plaintiffs were familiar with the speeds at which the previous the iPhone operated. The Defective iPhone 3G appeared to connect to the 3G standard or protocol less than 25% of the time and/or otherwise to function properly with the 3G standard or protocol. Additionally, Plaintiffs experienced an inordinate amount of dropped calls.

19. Said failure to connect to said 3G standard or protocol occurred in the metropolitan area of Birmingham, Alabama, where Plaintiffs work, play, and

live. Furthermore, upon information and belief, said area is a location that provides excellent 3G coverage.

20. Upon information and belief, there have been numerous complaints concerning the inoperability and/or poor performance of 3G services in connection with the Defective iPhone 3G.

21. Upon information and belief, Defendant is aware of the above-stated defects with Defective iPhone 3G and have attempted to undertake corrective action too late and with little to no success.

22. Plaintiffs and the Class have thereby been damaged.

CLASS ACTION ALLEGATIONS

23. Plaintiffs bring this suit as a class action on behalf of themselves and on behalf of all others similarly situated (the "Class") pursuant to Fed. R. Civ. P. 23(a), 23(b)(2), and/or 23(b)(3). Subject to additional information obtained through further investigation and/or discovery, the foregoing definition of the Class may be expanded or narrowed by amendment or amended complaint. Plaintiffs seek to represent the following Class:

All persons in the United States who purchased a Defective iPhone 3G

24. This action has been brought and may be properly maintained as a class action for the following reasons:

a. Numerosity: Members of the Class are so numerous that their individual joinder is impracticable. Plaintiffs are informed and believe, and on that basis alleges, that the proposed Class contains millians of members. Defendant has manufactured and distributed millians of Defective iPhone 3Gs

throughout the United States. The Class is therefore sufficiently numerous to make joinder impracticable, if not impossible. The precise number of Class members is unknown to Plaintiffs.

b. Existence and Predominance of Commons Questions of Fact and Law: Common questions of law and fact exist as to all members of the Class. These questions predominate over the questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

i. whether Defendant breached express and/or implied warranties relating to the sale of its Defective iPhone 3Gs;

ii. whether Defendant breached any express or implied warranties when they manufactured and sold the Defective iPhone 3Gs;

iii. the appropriate nature of class-wide equitable relief; and

iv. the appropriate measurement of restitution and/or measure of damages to award to Plaintiffs and members of the Class.

These and other questions of law or fact which are common to the members of the Class predominate over any questions affecting only individual members of the Class.

c. Typicality: Plaintiffs claims are typical of the claims of the Class since Plaintiffs purchased a Defective iPhone 3G did each member of the Class. Furthermore, Plaintiffs and all members of the Class sustained monetary and economic injuries arising out of Defendant's wrongful conduct. Plaintiffs is advancing the same claims and legal theories on behalf of themselves and all

absent class members.

d. Adequacy: Plaintiffs are an adequate representative of the Class because her interests do not conflict with the interests of the Class that they seek to represent; they have retained competent counsel; and counsel intends to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiffs andtheir counsel.

e. Superiority: A class action is superior to other available means of fair and efficient adjudication of the claims of Plaintiffs and members of the Class. The injury suffered by each individual Class member is relatively small in comparison to the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendant's conduct. It would be virtually impossible for members of the Class individually to redress effectively the wrongs done to them. Even if the members of the Class could afford such individual litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

f. Defendant has acted, and refused to act, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole; and

g. In the absence of a class action, Defendant would be unjustly

enriched because it would be able to retain the benefits and fruits of its wrongful conduct.

COUNT I: BREACH OF EXPRESS WARRANTY

25. Plaintiffs and the Class repeat and incorporate herein by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

26. Defendant expressly warranted that the Defective iPhone 3G would be "twice as fast", would perform adequately on the 3G standard or protocol and/or access data at "twice as fast" speeds.

27. The Defective iPhone 3Gs do not conform to these express representations because they fail to connect and/or adequately maintain a connection to the 3G standard and/or protocol.

28. As a direct and proximate result of the breach of said warranties, Plaintiffs and Class members have been injured and are therefore entitled to damages.

COUNT II - BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

29. Plaintiffs and the Class repeat and incorporate herein by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

30. Defendant impliedly warranted that the Defective iPhone 3Gs were merchantable.

31. Defendant breached the implied warranty of merchantability, as the Defective iPhone 3Gs are not merchantable.

32. As a direct and proximate result of the breach of said warranties, Plaintiff and Class members were injured and are therefore entitled to damages.

COUNT III - UNJUST ENRICHMENT

33. This claim is being plead in the alternative to Counts I through II.

34. Plaintiffs and Class members purchased the Defective iPhone 3G manufactured and distributed by the Defendant based on the understanding that it would perform as advertised and/otherwise adequately. By purchasing Defendant's products, Plaintiffs and Class members conferred a tangible economic benefit upon Defendant.

35. Defendant was and continues to be unjustly enriched at the expense of Plaintiff and Class members.

36. Defendant's retention of the benefit conferred upon it by Plaintiff and members of the Class would be unjust.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray, on behalf of themselves and members of the Class, that this Court:

A. determine that the claims alleged herein may be maintained as a class action under Rule 2S(a), (b)(2), and/or (b)(S) of the Federal Rules of Civil Procedure, and issue order certifying the Class as defined above;

B. award all actual, general, special, incidental, statutory, and consequential damages to which Plaintiff and Class members are entitled;

C. award pre-judgment and post-judgment interest on such monetary relief;

D. grant appropriate injunctive and/or declaratory relief, including, without limitation, an order that requires Defendant to repair and/or replace its Defective iPhone 3G;

E. award reasonable attorney's fees and costs; and

F. grant such further and other relief that this Court deems appropriate.

JURY DEMAND

Plaintiffs hereby demand a trial by struck jury of all issues raised in the foregoing Complaint.

Respectfully Submitted,

/s/ Haydn M. Trechsel
Haydn M. Trechsel
(Ala Bar No. ASB-9795-R44H)
/s/ Edward S. Reisinger
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CERTIFICATE OF SERVICE

I hereby certify that I have filed the original of the foregoing document in this Court with copies to be served upon all parties of record as listed below by US Mail on this the 25 day of August, 2008.

/s/ Haydn M. Trechsel
Attorney for Plaintiff

Apple Computer, Inc.
c/o The Corporation Company,
2000 Interstate Park Drive, suite 204,
Montgomery, Alabama 36109

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JESSICA ALENA SMITH, et al., etc.,	}	
Plaintiffs,	}	CIVIL ACTION NO. 08-AR-1498-S
v.	}	
APPLE, INC.,	}	
Defendant.	}	

MEMORANDUM OPINION

Before the court is the motion of defendant Apple, Inc. ("Apple") to dismiss the amended complaint in the above entitled action, pursuant to Fed. R. Civ. Pro. 12(b)(6). In addition to the briefs, the court heard oral argument. The existence and/or delivery of a One Year Limited Warranty ("written warranty") remains a contested issue. Thus, the court rules on Apple's motion without assuming the existence of and/or the delivery of the written warranty. For the reasons that follow, Apple's motion to dismiss will be GRANTED as to the warranty claims and DENIED as to the unjust enrichment claim.

PERTINENT ALLEGED FACTS[1]

In or around the summer of 2008, plaintiffs, Jessica Smith and

[1] For purposes of a Rule 12(b)(6) motion, the court takes as true the facts alleged in the complaint and draws all reasonable inferences in plaintiffs's favor. *See Hardy v. Regions Mortgage, Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006). The complaint's allegations must plausibly suggest a right to relief, raising that right "above the speculative level." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1965 (2007). Mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action" are insufficient. *Id.*

Wilton Triggs II (collectively "plaintiffs"), each purchased an iPhone 3G from the Apple Store located at 217 Summit Boulevard, Space FI, Birmingham, Alabama 35243. Immediately after the purchases, plaintiffs began experiencing problems with their iPhones. According to the complaint, the iPhones did not perform as expressly advertised, and as warranted by Apple, and contained numerous defects. The complaint alleges breach of express warranty, breach of the implied warranty of merchantability, and unjust enrichment, and requests class certification. In addition, plaintiffs allege that there have been numerous complaints concerning certain defects present in the iPhone 3G and its poor performance generally and that Apple is aware of these problems and has attempted to undertake corrective action too late and with little or no success. There is no allegation that either plaintiff notified Apple of an alleged breach of warranty before the suit was filed.

ANALYSIS

The Express and Implied Warranty Claims

The Alabama Commercial Code explicitly makes notice a condition precedent to any claim of breach of warranty: "(3) Where a tender has been accepted: (a) The buyer must within a reasonable time after he discovers or should have discovered any breach **notify the seller of breach or be barred from any remedy**." Ala. Code § 7-2-607(3)(a)(emphasis added); *see also Parker v. Bell Ford, Inc.*,

425 So. 2d 1101, 1102 (1983)("This court, on several occasions, has characterized notice, such as required by § 7-2-607, as a condition precedent to recovery.") (citing *Smith v. Pizitz of Bessemer, Inc.*, 122 So. 2d 591, 592 (1960)). There is no distinction between implied warranties and express warranties insofar as this precondition is concerned. Affirmatively pleading notice is critical to the stating of a claim for breach of warranty under Alabama law. *See Hobbs v. Gen. Motors Corp.*, 134 F. Supp. 2d 1277, 1285-86 (M.D. Ala. 2001)(noting that the filing of a lawsuit itself constitutes sufficient notice only if personal injuries are involved).

Nowhere in their amended complaint do plaintiffs allege that they provided Apple notice of the alleged breach. Rather, they allege that Apple was "aware" of the alleged defects, as evidenced by its attempt to take corrective action. Plaintiffs ask this court to create an exception to the notice requirement found in § 7-2-607. They argue that "notice in this instance should not be required because the imposition of the obligation upon Plaintiff runs contrary to the intended purpose of the Alabama Commercial Code." (Pls.' Resp. 6-7). The court respectfully declines plaintiffs' invitation to create such an exception.

The purpose of the § 7-2-607 notification requirement is two-fold: "First, express notice opens the way for settlement through negotiation between the parties. . . . Second, [it] minimizes the

possibility of prejudice to the seller by giving" him a chance to cure or take any act necessary to defend himself or minimize damages. *Jewell v. Seaboard Indus., Inc.*, 667 So. 2d 653, 660 (1995) (internal quotation marks omitted). The Supreme Court of Alabama has abrogated the notice requirement in a very few circumstances where the purposes of the requirement are ill-served. *See Simmons v. Clemco Indus.*, 368 So. 2d 509, 524-15 (Ala. 1979)(holding that a warranty beneficiary who suffers a personal injury need not give notice, because warranty beneficiaries are not "buyers", and notice is inconsequential in preventing or mitigating harm in these situations). The purposes of the notice requirement would be ill-served in this instance if plaintiffs are excused. Had Apple received notice from plaintiffs that the particular iPhones bought by them were defective, Apple could have taken a direct route towards fixing the alleged defects or could have reached a settlement with plaintiffs at a time before litigation expenses were incurred. Plaintiffs did not afford Apple statutorily guaranteed opportunities. Contrary to plaintiffs' argument, a general awareness on Apple's part of alleged defects in its iPhone does not extinguish the purposes of the notice requirement, nor does it substitute for that requirement under Alabama law. Likewise, the court is not persuaded that the Alabama Supreme Court would create an exception to the notice requirement that would provide relief to plaintiffs in this instance, and the issue is not

worthy of a certification pursuant to Fed. R. Civ. Pro. 18. Thus, plaintiffs' claims for breach of warranty must be dismissed.

The Unjust Enrichment Claim

Apple contends that unjust enrichment is precluded here for two reasons, both of which are dependent upon the existence of a written warranty between the parties. Because the parties are not in agreement as to the existence or non-existence of a written warranty, the court must rule on Apple's motion without assuming the existence of a written warranty. Inasmuch as Apple's motion to dismiss plaintiffs' unjust enrichment claim is premised upon the existence of a written warranty, the motion will be denied as to this claim. The same issue can be raised under Rule 56 if and when the written warranty becomes an undisputed fact.

CONCLUSION

A separate order consistent with this opinion will be entered.

DONE this 4th day of November, 2008.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

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Defendant.	}	

ORDER

In accordance with the accompanying memorandum opinion, the motion of defendant, Apple, Inc., to dismiss the above-entitled action is **GRANTED** as to Counts I and II of plaintiffs' complaint, and the action insofar as it is contained in said counts is hereby **DISMISSED** with prejudice. This dismissal with prejudice does not affect the rights of any members of the putative class. The motion to dismiss plaintiffs' claim of unjust enrichment is **DENIED**. Defendant shall answer the complaint, as it has survived this ruling, within 10 days.

DONE this 4th day of November, 2008.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE