

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

DAVID C. PURDUE, on behalf of himself
and all others similarly situated,

Plaintiff,

vs.

APPLE INC., and AT&T CORP.,

Defendants.

Case No. _____

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiff David C. Purdue (“Plaintiff”) on behalf of himself and all others similarly situated, alleges by and through his attorneys, upon information and belief, as follows:

JURISDICTION AND VENUE

1. The Court has original jurisdiction over this class action pursuant to 28 U.S.C. § 1332(d)(2). Plaintiff and members of the Class have suffered aggregate damages exceeding \$5,000,000, exclusive of interest and costs.

2. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(a)(2) because Plaintiff resides in this district and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

PARTIES

3. Plaintiff David C. Purdue is a resident of Williamson County, Tennessee. On or about July 6, 2010, Plaintiff purchased an iPhone 4 at an AT&T store in Franklin, Tennessee, primarily for personal use. Plaintiff paid approximately \$200.00 for his iPhone 4. In addition, at the time of purchase Plaintiff entered into a contract with AT&T that included calling and data plans. Plaintiff decided to purchase his iPhone, in part, after watching a Steve Jobs San Francisco video presentation of the new generation phone. Plaintiff began experiencing

extremely poor reception with his iPhone immediately after purchase. Such poor reception has lead to, among other things, frequent dropped calls and inability to stream video. In addition, because of the position of the phone's antenna, if Plaintiff holds his iPhone in his left hand the problem is compounded. Plaintiff attempted to return his iPhone, but an AT&T representative told him that he would be subject to a 15 percent restocking fee.

4. Defendant Apple Inc. ("Apple") is a California corporation that maintains its principal place of business at 1 Infinite Loop, Cupertino, California, USA, 95014. Apple has developed, designed, manufactured, assembled, branded, promoted, marketed, distributed and/or sold the Product throughout the United States.

5. Defendant AT&T Corp. ("AT&T") is a New York corporation that has at all relevant times done business in the State of Tennessee. AT&T marketed, promoted, distributed and sold iPhones throughout the United States. In addition, AT&T has obtained substantial revenues from entering into contracts for wireless services to be provided to iPhone purchasers throughout the United States.

6. At all times herein mentioned, each of the Defendants was the agent, servant, representative, officer, director, partner or employee of the other. At all times, each of the Defendants was acting within the scope and course of his/her/its authority as such agent, servant, representative, officer, director, partner or employee, and with the permission and consent of each Defendant. Additionally, at all times herein mentioned Defendants were members of, and engaged in, a joint venture, partnership and common enterprise, and acting within the course and scope of, in pursuance of the joint venture, partnership and common enterprise.

FACTS

7. In June 2010, Apple released the iPhone 4, touting a new design for its iPhone that features a metal band that wraps around the edge of the phone on four sides. The band serves as the iPhone 4's antenna.

8. AT&T is the exclusive wireless carrier that allows the iPhone 4 to be used on a 3G wireless network.

9. An estimated 1.7 million iPhone 4s were sold or delivered in the first week of its release, June 21 through 25, 2010.

10. Consumers have been able to purchase iPhone 4s combined with a new two-year contract with AT&T for \$199.00 for a version with 16 gigabytes (“GB”) of internal memory, or \$299.00 for 32 GB of internal memory. Consumers with existing AT&T contracts who are not eligible for an upgrade must purchase the 16 GB or 32 GB phones for \$499.00 and \$599.00, respectively.

11. First officially announced by Apple on June 7, 2010 by Apple’s CEO Steve Jobs at the Moscone Center in San Francisco, the phone was advertised by Apple and AT&T as having a redesigned wireless antenna placement, with its antenna now integrated into the metal side plates encasing the outer edges of the phone. Defendants, and Mr. Jobs in particular, claimed this new antenna design improved call quality and reception.

12. The hundreds of thousands of iPhone 4 purchasers discovered soon after purchase, however, that the phones uniformly suffer from a common defect that causes extreme reception problems. Because the antenna for the phone surrounds the entire phone, it is nearly impossible to hold the phone without touching the antenna. Touching an antenna on a cell phone results in decreased functionality of the phone.

13. These design and manufacturing defects have been documented and discussed by users throughout the Internet.

14. Mr. Jobs had the following response to one consumer inquiry at Macrumors.com:

MacRumors forum user samcraig emailed Steve Jobs about the low signal issue while holding the new iPhone 4 in a specific way. The potential issue has been generating a lot of discussion.

Samcraig emailed Steve Jobs:

Question - What’s going to be done about the signal dropping issue. Is it software or hardware?

To which, Jobs replied with a typically short response:
Non issue. Just avoid holding it in that way.

In a later email, Mr. Jobs further explained:

Gripping any phone will result in some attenuation of its antenna performance, with certain places being worse than others depending on the placement of the antennas. This is a fact of life for every wireless phone. If you ever experience this on your iPhone 4, avoid gripping it in the lower left corner in a way that covers both sides of the black strip in the metal band, or simply use one of many available cases.

Arnold Kim, Macrumors.com, “Steve Jobs Describes iPhone 4 Signal Strength as a ‘Non Issue’,” June 24, 2010, at <http://www.macrumors.com/2010/06/24/steve-jobs-describes-iphone-4-signal-strength-a-non-issue>.

15. Apple is now marketing and selling a rubber band-like strip that surrounds the metal edge of the phone serving as its antenna, called a “bumper.” Apple sells the bumper for \$29.00. As explained above, Plaintiff purchased a bumper in the hope that the reception issues would be solved.

16. Plaintiff and the Class have been injured in fact and lost money as a result of Defendants’ material misstatements and omissions of material fact, paying more to receive inferior service and an inferior product in relation to what they believed they had purchased.

17. As a result of Defendants’ material misrepresentations and omissions of material facts, Plaintiff and the Class are obligated to lengthy service contracts for iPhones that do not properly function. A substantial and material factor in entering into those contracts was the representation that the iPhone 4 would operate fully functionally and as an actual improvement – rather than a retrogression – from earlier versions of the phone.

18. Defendants acted in concert to sell the iPhone 4 and either knew, should have known, or were obligated to understand that they were trying to sell Apple iPhone 4 devices that in regular use would suffer substantially lacking network connectivity and performance, and that the Apple iPhone 4 itself suffered from defective hardware and/or software. Plaintiff and other Class members were injured, either directly or indirectly, in response to the representations, advertising and/or other promotional materials that were prepared and approved by Defendants and disseminated on the face of the product and/or through assertions that contained the representations regarding the iPhone 4 and AT&T’s wireless network. Had the true facts been disclosed, Plaintiff and other Class members would not have purchased the iPhone 4 at the prices

and under the terms and conditions to which they were and are subjected, or have been put in a position where they must pay additional money to Apple or other parties in an attempt to make the iPhone 4 properly function.

19. Plaintiff is informed and believes, and on that basis alleges, that Defendants did not act with due care when designing, manufacturing, marketing, and selling the defective iPhone 4. Defendants also failed to use due care by failing to issue a voluntary recall, by failing to waive the restocking fee for returned iPhone 4's, and by failing to refund monies for service contracts where the bargained-for service is not provided.

20. At all relevant times, Defendants had actual or constructive knowledge of the foregoing problems with the iPhone 4 antenna design and placement, and therefore is directly liable for the injuries to Plaintiff and the Class.

21. Plaintiff and the Class had no knowledge of the defects inherent in the iPhone 4 prior to purchase. Plaintiff and the Class could not have known or reasonably discovered, or have had reason to know of the defect inherent in the iPhone 4 until after they purchased and began using the product.

CLASS ACTION ALLEGATIONS

22. This class action is properly brought pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure. Plaintiff brings this action on behalf of himself and all persons and entities in the United States who purchased an Apple iPhone 4 (the "Class").

23. Subject to additional information obtained through further investigation and discovery, the foregoing definition of the Class may be expanded or narrowed by amendment or amended complaint. Specifically excluded from the proposed Class are Defendants, their officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint venturers, or entities controlled by Defendants, and their heirs, successors, assigns, or other persons or entities related to or affiliated with Defendants and/or their officers and/or directors, or any of them; the Judge assigned to this action, and any member of the Judge's immediate family.

24. Numerosity. Fed.R.Civ.P. 23(a)(1) - Members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the proposed class contains millions of members. The precise number of class members is unknown to Plaintiff. Class members are known by Defendants, however, and thus may be notified of the pendency of this action by direct mail, and/or email, and supplemented by published notice if necessary.

25. Existence and Predominance of Common Questions of Fact and Law – Fed.R.Civ.P. 23(a)(2), 23(b)(3) - Common questions of fact and law predominate over any questions affecting only individual members of the Class. The predominating common or class-wide questions of fact include the following:

(a) Whether Defendants advertised and sold the Apple iPhone 4 by promoting the product's performance, when in fact the actual performance was materially worse than the promises and claims made by Defendants;

(b) Whether Defendants were negligent in the design, manufacturing, and distribution of the iPhone 4;

(c) Whether the iPhone 4 units designed, manufactured, marketed, distributed, or sold by Defendants are unfit for their intended purpose and use because of their design;

(d) Whether Defendants breached any warranties in selling the iPhone 4 units;

(e) Whether Defendants failed to disclose material facts about limitations in the performance characteristics of the Apple iPhone 4 to consumers,

(f) Whether Plaintiff is entitled to injunctive relief; and

(g) Whether Plaintiff is entitled to damages, and if so, by what measure.

26. Defendants' defenses, to the extent that any such defenses apply, are applicable generally to Plaintiff and the entire Class and are not distinguishable as to proposed Class members.

27. Typicality - Fed.R.Civ.P. 23(a)(3). Plaintiff's claims are typical of the claims of the members of the Class as a whole, all of whom have sustained and/or will sustain damages,

including irreparable harm, as a proximate or legal result of the common course of conduct of Defendants as complained of herein. Plaintiff's claims are typical of the Class because Defendants subjected all Class members to the same course of conduct.

28. Adequacy – Fed.R.Civ.P.23(a)(4). Plaintiff is an adequate representative of the Class because his interests do not conflict with the interests of the members of the Class he seeks to represent. Plaintiff has retained counsel highly experienced in the prosecution of complex class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff and his counsel will fairly and adequately protect the interests of all members of the Class.

29. Superiority – Fed.R.Civ.P. 23(b)(3). A class action is superior to any other methods available for both fair and efficient adjudication of the rights of each Class member. Joinder of individual members of the Class is impracticable. Individual litigation would be unnecessarily costly and burdensome and would deter individual claims. To process individual cases would increase both the expenses and the delay not only to Class members, but also to Defendants and the Court. In contrast, a class action in this matter will avoid case management difficulties and provide multiple benefits to the litigating parties, including efficiency, economy of scale, unitary adjudication with consistent results, and equal protection of the rights of each Class member, all by way of the comprehensive and efficient supervision of the litigation by a single court.

30. In the alternative, the Class may be certified because:

- a. The prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual members of the proposed Class that would establish incompatible standards of conduct for Defendants;
- b. The prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them which would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability

to protect their interests; and

- c. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final and injunctive relief with respect to members of the Class as a whole.

31. Defendants benefited from the sale of iPhone 4s to Plaintiff and the Class. The benefit to Defendants can be identified from the sale of such phones to Plaintiff and the Class, and such monies can be restored to Plaintiff and the Class. Such monies are the property of the Plaintiff and the Class. All or a portion of this benefit retained by Defendants is money in which Plaintiff and the Class have an ownership interest. Plaintiff and the Class were injured in fact and lost money as a result of Defendants' unfair, unlawful and fraudulent business practices described herein.

FIRST CLAIM FOR RELIEF
(Against All Defendants for Negligence)

32. Plaintiff realleges and hereby incorporates all proceeding paragraphs as if they were fully set forth herein.

33. As manufacturers, marketers and sellers of iPhones, Defendants had a duty to the Plaintiff and Class members to sell them as advertised and free of material defects.

34. Defendants also had a duty to thoroughly test the iPhone 4's functionality before distribution and sale to consumers.

35. Defendants breached their duty to the Plaintiff and Class members. Plaintiff and Class members have been substantially inconvenienced in dealing with such defective iPhone 4s, and have paid significant sums for the product itself, service for the product, and subsequent efforts to fix the poor reception defect.

36. Defendants' breach of their duty to consumers proximately caused damages to Plaintiff and Class members who have experienced significant economic damages.

37. Plaintiff, on behalf of himself and all others similarly situated, is entitled to seek restitution from Defendants and an order disgorging all profits, benefits, and other compensation obtained by Defendants for their wrongful conduct.

SECOND CLAIM FOR RELIEF
(Against All Defendants for Breach of Express and Implied Warranty)

38. Plaintiff incorporates by reference each and every preceding paragraph as if fully set forth herein.

39. Plaintiff and the Class members purchased their iPhone 4s and used them for the ordinary and intended purpose of providing consistent, reliable and sustained access to AT&T's network, and entered into agreements with Defendants or their agents and received uniform warranties in connection with the purchase of such phones.

40. The Apple iPhone 4 cannot perform its ordinary and represented purpose because the Apple iPhone 4 does not provide consistent connection to the AT&T wireless network in combination with ordinary use of the Apple iPhone 4. Whether the problem is with the Apple iPhone 4 itself, with the AT&T network, or with a combination of the two, is irrelevant as to whether the warranty was breached.

41. When Defendants placed the Apple iPhone 4 into the stream of commerce they knew, reasonably should have known, or were obligated to understand that the intended and ordinary purpose of their phone was to provide consistent connectivity to AT&T's wireless network, and that users would expect regular connectivity and materially faster data transfer rates than other devices and previous iPhones through ordinary use of the Apple iPhone 4.

42. Plaintiff and the Class members purchased their Apple iPhone 4s with the reasonable expectation that they would receive reliable and sustained connectivity to AT&T's network. The advertisements Defendants disseminated that stressed the excellence and reliability of the Apple iPhone 4 and its new antenna design constitute a warranty that the products would operate as advertised during their useful life, upon which Plaintiff and the Class reasonably acted. The Apple iPhone 4 is not fit for its warranted, advertised, ordinary and intended purpose

of providing reliable network connectivity and is in fact defective, or would not pass without objection in the trade or industry in terms of being unable to provide consistent and reliable network connectivity through ordinary use. This defect has manifested for Plaintiff and all Class members, as they do not consistently receive network connectivity using their Apple iPhone 4.

43. Defendants' breach of the warranty described above also constitutes a violation of Cal. Civ. Code § 1792, et seq.

44. Plaintiff and the Class members were injured and are entitled to damages as a result of such breaches. Plaintiff and the Class request relief as described below, as appropriate for this Cause of Action.

THIRD CLAIM FOR RELIEF
(Against All Defendants for Negligent Misrepresentation)

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

46. Defendants negligently and recklessly misrepresented various material facts regarding the quality and character of the iPhone 4 and its service, under circumstances where Defendant either knew or, in the exercise of reasonable care, should have known that the representations were not true or were not known to be true. These misrepresentations were contained in various advertising, packaging, and correspondence from Defendants, and such misrepresentations were further reiterated and disseminated by the officers, agents, representatives, servants, or employees of Defendants acting within the scope of their authority.

47. In reliance upon these misrepresentations, Plaintiff and the Class purchased the iPhone 4 for use as a cellular communication device. Had Plaintiff or Class members known the true facts, including but not limited to the fact that the iPhone 4s were defectively designed, they would not have purchased the phones from Defendants.

48. As a direct and proximate consequence of Defendants' negligent misrepresentations, Plaintiff and Class members have been injured.

FOURTH CLAIM FOR RELIEF
(Against All Defendants for
Violations of the Tennessee Consumer Protection Act (“TCPA”))

49. Plaintiff incorporates by reference each and every preceding paragraph as if fully set forth herein.

50. Defendants are “persons” within the meaning of Tennessee Code Ann. §47-18-103(9), and provide “services” and sell “goods” all within the meaning of Tennessee Code Ann. §§47-18-103(10) and 103(5).

51. Plaintiff and the Class are “consumers” within the meaning of Tennessee Code Ann. §47-18-103(2).

52. Plaintiff’s purchase of an iPhone 4 manufactured, marketed, promoted and/or sold by Defendants constitutes a “consumer transaction” within the meaning of Tennessee Code Ann. §47-18-103(11).

53. Defendants’ unfair or deceptive acts or practices as described herein were undertaken by Defendants in transactions intended to result or which resulted in the sale of goods and services to consumers, and were intended to induce – and did in fact induce – Plaintiff and the Class to purchase for personal use such goods and services, which they would not have otherwise purchased. Further, Defendants’ suppression and/or concealment of the material facts as described herein was calculated to induce– and did in fact induce – Plaintiff and the Class to provide valuable consideration to Defendants.

54. Defendants’ practices, acts and course of conduct as described herein violate TCPA in that they caused the following unfair and deceptive practices to occur:

- a. Defendants “represent[ed] that goods or services . . . have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have;” in violation of section 47-18-104(b)(5) of the TCPA;

b. Defendants advertised goods and services with the intent not to sell them as advertised. Tennessee Code Ann. §47-18-104(b)(9);

c. Defendants represented that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. Tennessee Code Ann. §47-18-104(b)(12).

55. Defendants' practices, acts and course of conduct as described above are likely to mislead a reasonable consumer acting reasonably under the circumstances to her or her detriment. In engaging in their violations of the TCPA, Defendants actively concealed and failed to disclose material facts about the true characteristics of the iPhone 4s.

56. As a result of Defendants' acts and practices as alleged in this Complaint, Plaintiff seeks an Order enjoining Defendants from continuing to engage in unlawful, unfair or fraudulent business practices, as well as the above-referenced violations of the TCPA. Plaintiff has provided notice to Defendants pursuant to Tennessee Code Ann. §20-9-606, and will amend this Complaint to add claims for damages under the TCPA if Defendants do not take appropriate corrective action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, prays for judgment against Defendants as follows:

1. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiff and his counsel of record to represent the Class;
2. For restitution, disgorgement and/or other equitable relief as the Court deems proper;

3. That Defendants be permanently enjoined from performing or proposing to perform any of the aforementioned acts of unfair, unlawful and fraudulent business practices;
4. For compensatory damages sustained by Plaintiff and all others similarly situated as a result of Defendants' unlawful acts and conduct;
5. For a permanent injunction prohibiting Defendants from engaging in the conduct and practices complained of herein;
6. For pre-judgment and post-judgment interest;
7. For reasonable attorneys' fees and costs of suit, including expert witness fees; and
8. For such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all claims so triable.

Dated: July 15, 2010

**McCALLUM, HOAGLUND, COOK & IRBY,
LLP**

By: /s/ R. Brent Irby
905 Montgomery Highway, Suite 201
Vestavia Hills, Alabama 35216
Telephone: (205)824-7767
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Attorney for Plaintiff and the Proposed Class

PLEASE SERVE DEFENDANTS VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED AS FOLLOWS:

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c/o CT Corporation System
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Suite 2021
Knoxville, Tennessee 37929

AT&T Corp.
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