

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

LILLIAN KIM, SIRIA LUCKEY,
DAVID DEBURRO, and others
similarly situated

Plaintiffs

VS.

APPLE, INC.,

Defendant

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CIVIL ACTION NO. 7:13-CV-286

CLASS ACTION COMPLAINT

(JURY DEMAND)

CLASS ACTION COMPLAINT

TO THE HONORABLE U.S. DISTRICT JUDGE:

COME NOW, Lillian Kim, Siria Luckey, and David Deburro (“Plaintiffs”), by and through their attorneys, and bring this action on behalf of themselves and all others similarly situated against Apple, Incorporated (“Apple” or “Defendant”). Plaintiffs hereby allege, on information and belief, except as to those allegations pertaining to the named Plaintiffs, which allegations are based on personal knowledge, as follows:

I.

NATURE OF THE ACTION

1. Plaintiffs bring this class action on behalf of purchasers of Apple’s “Operating System X, Version 10.8” (known as Mountain Lion) in Texas and throughout the United States.

2. The Mountain Lion operating system was represented to be, “The world’s most advanced desktop operating system gets even better.” The subject operating system was also noted to, “Make the Mac, iPad, and iPhone work even better together.” Furthermore, iCloud was represented as, “It just works. In more ways than ever.” And, “It keeps your mail, calendars, contacts, reminders, documents, notes, and more up to date wherever you use them. So when you add, delete, or change something on your Mac, it also happens automatically on your iPad, iPhone, and iPod touch. And vice versa. You don’t have to do anything at all — iCloud is automatic.” See <http://www.apple.com/osx/> and <http://www.apple.com/osx/whats-new/>.

3. The iCloud software is part of the ensemble of software touted in the new Mountain Lion upgrade. However, the iCloud software is not fit for the ordinary purposes (remotely accessing cloud data, saving data to the cloud, file backup, user login, and iTunes accessibility) for which it was intended. Instead, the iCloud software – because it was negligently designed, produced, and tested – prematurely fails to work and causes users to lose data, fails to backup data automatically, deletes user accounts, renders user accounts inaccessible, and loses user’s songs purchased on iTunes. As iCloud software is the only automatic means on the Mountain Lion operating system to access and modify remotely stored data, the Mountain Lion operating system does not have the intrinsic ability to access and modify remotely stored data without the iCloud component. As the iCloud software fails, a portion of the Mountain Lion operating system fails, thus rendering a portion of the new operating system useless. Furthermore, users have reported losing remotely stored data completely, erasure of data on their own desktop harddrives, and inability to access the user accounts maintained by Apple.

Apple is and was aware of this substantial defect, but it failed to disclose it or warn Plaintiffs and the Class of the defect. As of the date of this filing, it continues to market and sell the defective Mountain Lion operating system, resulting in continuing damage to the Class. In some instances, Apple has attempted to hide the defect by refusing to answer customer service calls on its Apple Care telephone support line and not addressing the software defect on customer support websites. This cover-up shows that Apple had knowledge of the defect, yet willfully and intentionally decided to hide the defect, resulting in continuing damage to the Class.

Furthermore, if a consumer calls Apple Customer Care in Cupertino, California, consumers are told that the software defects are “being addressed” and that the “bugs are only temporary.” As a result, Plaintiffs and the Class (which likely number in the millions) have purchased flawed a Mountain Lion operating system, which prematurely fails and limit the functionality of the operating system.

4. Plaintiffs bring this class action on behalf of themselves and all others similarly situated, asserting claims as Fraud under Texas Common Law, violations of the Texas Deceptive Trade Practices Act, violations of the California Unfair Competition Law, violations of the California Consumers Legal Remedies Act, violations of the Magnuson-Moss Warranty Act, 15 U.S.C. §2310(d)(1), Breach of the Implied Warranty of Fitness for a Particular Purpose, Breach of the Implied Warranty of Merchantability, Negligence, and Unjust Enrichment. Plaintiffs seek damages and equitable relief on behalf of the class, which relief includes but is not limited to the following: providing class members with an error-free and functional version of the iCloud component of the

Mountain Lion operating system, or if no such product exists, to refund Plaintiffs and class members the full amount paid for their Mountain Lion operating system software, which relies on iCloud as a major component of its usage; a refund of the replacement cost of the defective software; costs and expenses, including attorney's fees; and any additional relief that this Court determines to be necessary to provide complete relief to Plaintiffs and the Class.

II.

JURISDICITON AND VENUE

5. This Court has subject matter jurisdiction pursuant to 15 U.S.C. §2310(d)(1)(B) and 28 U.S.C. §§1331, 1332, and 1367, because Plaintiffs' claims arise under federal statute. The Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. §1367(a).

6. With respect to the Magnusson-Moss Warranty Act claims, the amount in controversy in each individual claim is at least twenty dollars (\$20), the proposed class consists of over 2,500 members, and the aggregate damages exceed \$50,000.

7. This Court has original jurisdiction over this action under the Class Action Fairness Act of 2005, 28 U.S.C. §1332(d)(2) ("CAFA"), as to the named Plaintiffs and every member of the Class, because the proposed Class contains more than 100 members, the aggregate amount in controversy exceeds \$5 million, and members of the Class reside across the United States and are therefore diverse from Defendant.

8. This Court has personal jurisdiction over Apple because Apple has a manufacturing plant in Texas, Apple is authorized to conduct business in Texas, and Apple has intentionally availed itself of the laws and markets of Texas through the promotion, marketing, distribution, and sale of its Mountain Lion software in Texas.

9. Venue is proper in this District pursuant to 28 U.S.C. §1391(b), because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District. Venue is also proper under 18 U.S.C. §1965(a), because Defendant transacts a substantial amount of its business in this District. Plaintiffs are filing concurrently herewith an affidavit stating facts showing that this action has been commenced in a proper county pursuant to the Texas Rules of Civil Procedure.

III.

PARTIES

10. Plaintiff Lillian Kim ("Ms. Kim") resides in Harlingen, Texas. Ms. Kim purchased the Apple Mountain Lion Operating System 10.8 in December, 2012. Approximately one day after purchase, Kim noticed that the iCloud software was not functioning as advertised and not backing up her data. Immediately after installation, Kim noted that the iCloud software would not allow her to login with her multiple iTunes accounts, thus denying her access to the songs that she paid money for and paid the license to use. Ms. Kim could find no fix for these issues. Ms. Kim also attempted to logon to her iCloud account and was unable to, on several occasions.

11. Plaintiff Siria Luckey resides in San Antonio, Texas. Ms. Luckey purchased the Apple Mountain Lion Operating System version 10.8 and installed it on

her MacBook in December, 2012. Immediately after purchase, Luckey noted that the iCloud software was not automatically backing-up her data. Ms. Luckey also was unable to synchronize her multiple Apple IDs for her iTunes accounts, thus losing access to the iTunes songs she purchased. Furthermore, Ms. Luckey lost some of the data stored on her computer via use of the iCloud system. Ms. Luckey also noticed that her address book did not back up automatically, as the iCloud advertisement claimed it would. Lastly, Ms. Luckey was unable to access her iCloud account on various occasions. To date, Plaintiff Luckey has found no fix for these issues.

12. Plaintiff David DeBurro resides in North Andover, Massachusetts. Mr. DeBurro purchased a MacBook Air in March 2013 with the Mountain Lion Operating System installed. Approximately one day after purchase, Mr. DeBurro noticed problems with the operation of Mountain Lion and iCloud. The iCloud component of the Mountain Lion Operating System was not backing up the files on Mr. DeBurro's laptop. In addition, Mr. DeBurro attempted on several occasions to sync the contacts from his address book and his iPhone to the iCloud system, to no avail. When Mr. DeBurro asked the Geniusbar at his local Apple store for help he was told to "keep trying", "we know there's bugs", and "this doesn't always work, sorry." Mr. DeBurro could find no fix for these issues. Mr. DeBurro also attempted to logon to his iCloud account and was unable to, on several occasions.

13. Defendant Apple, Inc. ("Apple") is incorporated in California. Its executive offices and company headquarters are located in Cupertino, Santa Clara County, California. Apple has an assembly factory in the State of Texas, has consumer sales outlets in the State of Texas, and conducts substantial business here. Apple is a

publicly traded company, with net sales of over \$85 billion in 2011, \$37.4 billion of that total in the United States alone. Apple sells its Computers (“Subject Computers”) with the installed Mountain Lion Operating System to consumers throughout the United States, including to at least tens of thousands of consumers in Texas, which constitutes a significant percentage of Apple’s sales in the United States and in Texas. Apple also sells its Operating System upgrade, the Mountain Lion Operating System version 10.8, to consumers throughout the United States, including to at least tens of thousands of consumers in Texas, which constitutes a significant percentage of Apple’s sales in the United States and in Texas.

IV.

DEFENDANT’S UNLAWFUL CONDUCT

14. Since the early 1970s, Apple has engaged in the business of designing, manufacturing, marketing, distributing and selling personal computers, software, and related products and services through its own retail (and more recently, online) stores, direct sales, third party wholesalers and resellers.

15. On or about July 25, 2012, Apple began warranting, advertising, marketing, selling and providing the new Mountain Lion Operating System version 10.8 on its website, and installed on newly sold MacBook Air, MacBook Pros, iMacs, Mac Pros, and Mac Mini series laptop and desktop computers. The Mountain Lion Operating System version 10.8 was the first generation of this new series of software (collectively, referred to as “Mountain Lion”). Apple sold Mountain Lion to Plaintiffs and the Class as a operating system upgrade and original equipment included on its Subject Computers.

16. Apple markets the reliability and functionality of the Mountain Lion Operating System.

17. Regarding Mountain Lion, Apple makes the following representations: “People are going to love the new features in Mountain Lion and how easy it is to download and install from the Mac App Store.” Senior Executives at Apple also note, “With iCloud integration, Mountain Lion is even easier to set up, and your important information stays up to date across all your devices so you can keep editing documents, taking notes, creating reminders, and continue conversations whether you started on a Mac, iPhone or iPad,” from Philip Schiller - Apple’s senior vice president of Worldwide Marketing. *See* Apple Press Release July 25, 2012 <http://www.apple.com/pr/library/2012/07/25Mountain-Lion-Available-Today-From-the-Mac-App-Store.html>.

18. Apple also boasts that Mountain Lion is the “World’s most advanced desktop operating system.” Furthermore, Apple represents that, “With more than 200 innovative new features, Mountain Lion includes: iCloud integration, for easy set up of your Mail, Contacts, Calendar, Messages, Reminders and Notes, and keeping everything, including iWork documents, up to date across all your devices”. *See* Apple Press Release July 25, 2012 <http://www.apple.com/pr/library/2012/07/25Mountain-Lion-Available-Today-From-the-Mac-App-Store.html>.

19. Apple markets the iCloud portion of Mountain Lion by representing, “iCloud is how a Mac, iPad, iPhone, and iPod touch work together.¹ It keeps your mail, calendars, contacts, reminders, documents, notes, and more up to date wherever you use them. So when you add, delete, or change something on your Mac, it also happens automatically on your iPad, iPhone, and iPod touch. And vice versa. You don’t have to

do anything at all — iCloud is automatic. Just sign in once with your Apple ID and iCloud is set up in all the apps that use it. Suddenly, life's easier to juggle.” See <http://www.apple.com/osx/whats-new/>.

20. The footnote referenced in Apple's advertising only states, “1 - iCloud requires iOS 5 on iPhone 3GS or later, iPod touch (3rd and 4th generation), or iPad; a Mac computer with OS X Lion or later; or a PC with Windows Vista or Windows 7 (Outlook 2007 or 2010 or an up-to-date browser is required for accessing email, contacts, and calendars). Some features require a Wi-Fi connection. Some features are not available in all countries. Access to some services is limited to 10 devices.” See <http://www.apple.com/osx/whats-new/>.

21. Under the Tab “Documents in the Cloud”, Apple represents, “iCloud keeps the latest version of your documents on your Mac, iPad, iPhone, and iPod touch. When you edit a document, the changes appear across all your devices.” See <http://www.apple.com/osx/whats-new/>.

22. As to iCloud, Apple also claims, “Reminders. Now nothing slips your mind. Organize your life on your Mac. It's all in a list. More than one, in fact. Make as many lists as you need and easily add to them. Set due dates and you'll get alerts as deadlines approach. Set a location from your Mac, and your iPhone or iPad will remind you when you get there.² Check items off your lists as you go and keep track of what you've completed. iCloud keeps your reminders up to date on your Mac, iPad, iPhone, and iPod touch, so you don't forget anything.” See <http://www.apple.com/osx/whats-new/>.

23. As to iCloud, Apple claims, “iCloud stores your content and wirelessly pushes it to all your devices.” See <http://www.apple.com/osx/whats-new/>. Apple also claims, “iCloud does more than store your content — it lets you access your music, photos, calendars, contacts, documents, and more, from whatever device you’re on. And it’s built into every new iOS device and every new Mac.” See <http://www.apple.com/icloud/>.

24. As to iCloud, Apple claims, “Documents in the Cloud. If you have the same iCloud-enabled apps on more than one device, iCloud automatically keeps the documents you create — and other important data used by your apps — up to date across all your devices.”

Apple continues, “All your documents, with all your edits, on every device. With iCloud, the documents you create stay up to date across all your devices — automatically. You don’t have to remember to upload your work to a special folder, or browse a cluttered file system to find it again. Your documents are right there in your app, completely up to date and ready whenever you need them. Which means you can easily access the latest versions on whatever device you happen to be using at the time.” See <http://www.apple.com/icloud/features/documents.html>,

25. For integration of iTunes songs into iCloud, Apple claims, “iTunes in the Cloud. Your music, movies, and TV shows. Wherever you want them.” Apple continues, “You never know when you’ll suddenly be in the mood to listen to a favorite song, rewatch a classic movie, or laugh at that hilarious sitcom episode with a friend. With iCloud, you can have iTunes automatically download new music purchases to all your devices the moment you tap Buy. You can also access past music, movie, and TV

show purchases from any of your devices — wirelessly and without syncing.¹”. See <http://www.apple.com/icloud/features/#itunes>

The footnote merely mentions, “1 - Automatic downloads and downloading previous purchases require iOS 4.3.3 or later on iPhone 3GS or later, iPod touch (3rd generation or later), or iPad; iOS 5 or later on iPhone 4 (CDMA model); or a Mac or PC with iTunes 10.3.1 or later. Previous purchases may be unavailable if they are no longer in the iTunes Store, App Store, or iBookstore. Downloading previous movie purchases requires iTunes 10.6 or later, iOS 5 or later, or Apple TV software 4.3 or later. Not all previously purchased movies are available for downloading to your other devices.” See <http://www.apple.com/icloud/features/#itunes>.

26. However, contrary to its advertisements, Apple’s Mountain Lion is not the “World’s most advanced desktop operating system”. Apple’s iCloud does not “Store your content wirelessly push it to all your devices” but rather is fragile, defective, deceptive, unusable, and tends to fail when used as intended.

27. The iCloud feature consistently fails and does not automatically back up data generated by the user. The iCloud feature however, does erase data on user’s computers. Once erased by iCloud, the data cannot be recovered. Furthermore, users are not able to login to the iCloud’s remote servers or access data that the users have saved previously.

Moreover, iCloud does not allow users to access iTunes music that the users paid for. If the users purchased songs for their children or family members (as is common since only adults with credit cards can purchase iTunes music) the users can no longer

access all of the songs that the users purchased on iTunes. This occurs because the iCloud will only allow the user to link one iTunes account to one iCloud account. Thus music purchases using the same credit card (but under different iTunes accounts) are lost.

28. With the limitations of the subject computers, it is imperative to have a functioning operating system to operate the computer. Any operating system designed for the subject computers must be functional and durable enough to withstand the uses for which it is intended. Such normal use should not limit the advertised functionality of the operating system, nor disable data, nor disable iTunes access, or nor stop users from accessing remotely stored data. The normal use of the subject computers and Mountain Lion causes this failure.

29. As no other manufacturers produce operating systems for Apple computers, Apple has a production monopoly on their computer's operating system. As consumers have no other alternative, but to purchase and use the defective Mountain Lion operating system (and in some instances, the defective operating system is sold pre-installed in to the subject computers), consumers are placed at a great disadvantage in bargaining power to Defendant's unconscionable actions.

30. As the operating system designer and manufacturer, (and the designer and manufacturer of the subject computers), Apple possesses specialized knowledge regarding the composition of its operating systems, and is in a superior position to know and learn about defects in its operating system and iCloud component. In fact, as evidenced by the many purchasers of the defective subject operating system, who have gone through the trouble of logging on to Apple's website to complain of the problems

alleged herein, Apple has been aware of these defects for nearly one year, but has done nothing about them.

31. From July 2012 through November 2012, numerous “customer reviews” of the Mountain Lion operating system have been posted to the Apple Online Store. The vast majority of the reviews are extremely negative, notifying Apple again and again about its defective operating system. More than 14,362 complaints have been posted regarding the iCloud software component. For example, a recent posting about the defective operating system, posted on October 19, 2012 titled iCloud Backup Failure, written by user “aMused Too” states:

* “I have an iPad3 that I purchased in the spring which is now running IOS6, I updated on the day IOS6 came out.

On October 17th I received a notification that my iPad hadn't been updated in 2 weeks. This has never happened to me because I typically plug in my iPad at night and let it recharge and update over night. I have it set to automatically backup when the iPad is plugged in and turned off.

I checked to make sure I had ample storage. I had only used 2.6 GB of the 5.0 GB available. So I tried the automatic backup again the next night.

It didn't work, my information showed that my last backup had been October 3rd.

So I tried to manually back up and got the spinning timer with no estimate as to time remaining. So I figured it was going to take some time. I left the iPad plugged into the wall and walked away. I came back about 20-30 minutes later and the backup had stopped during that time and failed again.

I tried various suggestions that I've read on the forums, including deleting all my iCloud data and starting over with nothing but Calendar, Contacts and Reminder running.

I still have the same issue . . . the backup wheel keeps spinning, no estimate, no backup.”

* On October 21, 2012, still another customer named OldHoya wrote, “I have the same problem with iCloud. I first noticed Pages won't sync. Tried changing Pages settings.

Tried turning backup on and off.

Tried turning off various apps from backup then all apps.

Tried deleting the existing backup file.

Tried logging out of the icloud account, tried forced sync of Pages files (had to delete the dupes)

In short I have tried everything I can find on these boards and from Apple. Until then I have to stop using Pages for ipad and will use apps that sync to more reliable services like Dropbox, Box.com, Google docs and Evernote. I have accounts with all of these and they have never failed on iPad, phone or Pc. In contrast, iCloud is not ready for prime time and I can't risk my docs to apps that depend solely on iCloud until Apple steps up. Sorry I paid for Pages.”

* On November 6, 2012, another customer named Lotu wrote, “Did you ever find a solution? I had the same thing happen with both my iPhone 4S and iPad 2. I've called apple and they had me try all the things you've done but with no success. They bumped it up to a senior iOS engineer whatever that is but he didn't have any solutions either. He basically acknowledged the problem was with icloud and is supposed to be conferring with icloud engineers to see what other ideas they have. But this is just ridiculous. No apple product should be this difficult to implement. It reminds me of my microsoft days.

I think iCloud just has a lot of issues. It's never worked without a struggle and iCloud email was so unreliable I stopped using it altogether. I was wondering why apple extended my old MobileMe account with 20 extra gb on iCloud for an extra year but now I know why. It doesn't work anyway so they could keep extending it for years with no real impact on them at all. I was a big supporter of apple but lately they are giving me no real reasons to stay loyal and lots of reasons to leave.”

* On November 7, 2012, another customer named Marion BJ writes, “I have the exact same problem, only difference is I have an iPad2, but I guess it works the same. Personally I found that I've only been having issues with it since the iOS6 upgrade.. I think that's the cause of all the problems.. Still if you can try to upgrade your itunes as well, maybe if it isn't the same version as the iPad and is failing to connect. If you find the solution please let me know!”

* On November 9, 2012, another customer named VIVIANABERNARD writes, "I HAVE BOUGHT 25 GB OF STORAGE, GOT 21.4 FREE, AND WHENEVER I WANT TO BACK UP MY MUSIC THE SYSTEM RESPONDS I DON'T HAVE ENOUGH STORAGE....! HOW DO I CONCENTRATE MY STORAGE UNDER ONE ID??? BY THE WAY, THIS IS HAPPENING IN MY IPHONE 4S!!!"

* On March 3, 2012, another customer named Vogon-Poet writes, "I'm trying to get my iPad 2 to automatically back itself up to iCloud."

It seems as if the iPad's automatic backup is not being "triggered." Every couple of weeks I get a message on the iPad telling me "I haven't been backed up in a while." I'd like to get it so that the backups occur (each night?) without me having to think about them."

* On October 27, 2012, another customer named TechnoDiva writes, "I updated the OS and now my ipad is stuck on icloud backup. I can't unlock it. Anyone else have this problem?"

* On November 11, 2012, another customer named tpmac22 writes, "I decided to give icloud a go so I uploaded an important document (my personal statement for university no less) and it has decided to delete it. Thank you Apple, thank you very much."

* On November 11, 2012, another customer named xmench writes, "I've been trying to sign into iCloud using my CORRECT Apple ID / password combination but it keeps telling me my password is incorrect."

I know this is not true because I just used the same Apple ID / password combo to sign into this Apple support community (which was required in order to post this message). Also, I have had no problems using it to download apps on my iphone from the App Store.

I've tried changing my password (as prompted to do by Apple Support, since there is no password recovery) and while my iphone / App store sign in recognizes the new combination, my macbook doesn't.

Please help."

* On November 11, 2012, another customer named Ncat notes, "Hi All, Recently I've been having intermittent problems with iCloud Mail and Safari on my iMac."

Mail - I keep getting "p05-imap.mail.me.com cannot be contacted on port 993" and cannot receive email until I restart the Mail program then it all works, seems to

happen overnight that authentication fails. I don't have any problems on multiple iOS devices, just OSX and recreating the account doesn't make any difference.”

Something strange going on with iCloud since the latest updates and introduction of the @icloud.com email address. Anyone got any thoughts?”

* On November 10, 2012, another customer named Piggipop writes, “When I start my computer I receive a message saying "Photos for the iCloud account *****@me.com cannot be accessed. Review your account information in System Preferences". I did this but it didn't resolve the problem. How do I fix this?”

* On November 10, 2012 another customer named mniewski notes, “my notes aren't showing up in all my devices that are shared on icloud. also when i post an event in ical on my iphone it does not show up on my imac. but it does show up on my phone when i post it on my mac.

i am totally befuddled by trying to get icloud to work on my devices.”

* On November 10, 2012 another customer named prisca7 notes, “How do I get the switch-over icloud to "send" my suuck messages?”

* On November 9, 2012, another customer named swsimm writes, “All of my folders are still in My Mac and did not move to the cloud how do I do this”

* On June 10, 2012, another customer named Enver Masud writes, “I've tried to upload a Keynote presentation to iCloud by dragging it from my Mac and dropping it into Keynote on iCloud. It begins to upload but within 10 seconds I get an error message:

There was a problem uploading a presentation

Try again later

I've tried half a dozen times.”

* On November 9, 2012, another customer named Fgrigorio notes, “exactly the same problem, and so far no solution, this after two weeks of senior advisors at Apple messing with my icloud account...”

* On November 9, 2012, another customer named CyberianTsunami notes, “The problem that I'm having is as follows: I can edit any pages documents from

my iCloud on my iPhone or iPad without issues and it automatically syncs between the two. However, when I go to edit the same document on my iMac, which was working just fine a few weeks ago, none of my documents are up to date. In an effort to 'force' them to update, I turned off my iCloud on my mac and turned it back on. Now, instead of outdated documents, all of the documents show up in my iCloud greyed out with a 'loading' bar underneath them that doesn't load. It's as if my iCloud is for some reason not loading to my iMac. Everything else works fine, syncing apps, bookmarks, etc, but none of my documents will load. I'm running OS X 10.8.2 with Pages on my iMac, and iOS 6 with Pages on my iPhone and iPad.

I sincerely hope that this is an easy fix, and I apologize if this issue already has a question. I either couldn't find it or didn't understand what people were asking.”

* On November 9, 2012, another customer named Ms Kirkland notes, “iCal is giving me the following error only on iMac, iCal is syncing with my iPhone and iPad, but not on iMac. Help! I run a small business and the iMac is my main work station, all of our people subscribe to this iCal. I hope there’s a way to fix this.

“The request for account “iCloud” failed. The server responded with “400” to operation CallDAVUpdateShareesQueueableOperation.””

* On November 9, 2012, another customer named jmf mike writes, “I seem to be signed into icloud via @me.com on imac, icloud, and iphone, I use another ID apple store and still another if viewing icloud. Want to have all under one (ie Icloud.com), but when I try to change on any system is states that the @icloud.com is taken, which I know because somewhere in the chain I did create it. What can I do to consolidate everything? Thanks,”

* On October 12, 2011, another customer named Rob Weinberg notes, “Bookmarks, Contacts and Calendars are all syncing with icloud. Works beautifully, however when I change a Pages or Numbers document on my MacBook Pro, it doesn't sync with my ipad. itunes 10.5, ios 5, Lion 7.2 in use. Am I doing something wrong? Thanks, Rob”

* On October 13, 2011, another customer named Josiah Peske writes, “I too realized this was happening for me, and read the iCloud features page more closely. Apparently, it doesn't actually do what we want it to (and what I thought it was presented as doing). It only automatically syncs documents across *iOS devices*, but *not Macs*.
Lame.”

* On July 29, 2012, another customer named nancesendai notes, “I too have macs for work purposes and I find it frustrating that the only reason I got the upgrade to

Mountain Lion was because I wanted to have continuous syncing between my iPad and my iMac at home; and that's the one feature that doesn't work!

I know I have it set up right, because I created a new file on my iMac and saved it to iCloud. Then, on my iPad I went **Settings -> iCloud -> Storage and Backup -> manage storage -> numbers** and all my new files I saved to iCloud are there. So, the files are on my iPad, but when I open my Numbers app, they are not there.

I read every blog I could find and no one had a solution to this problem.

The same thing happens in the opposite direction. If I create a file on my iPad there is no way to save it to iCloud. I can send it to iWork (which goes offline in 2 days) or email it, but there's no iCloud option.

I got excited when I noticed there were updates on all my apps on my iPad as well as all iWork applications on my iMac. Lo and Behold, they now look great with the Retina display, but ABSOLUTELY NO ICLOUD SYNCING even though those were the only two facts SPECIFICALLY MENTIONED IN THE UPDATE!

I hope they fix this soon, because apple is 0 for 3 when it comes to their cloud promises. Steve Jobs even mentioned how committed Apple is to Cloud Syncing in a keynote presentation before he passed. I hope you don't let him down.”

* On July 29, 2012, another customer named Makoclb writes, “Okay, I must still be missing something. I downloaded the updates. I have iCloud turned on on my MacBook, but whenever I try to upload a Pages document to iCloud, I get an error message.”

* On August 1, 2012, another customer named Slowrider74 notes, “I have Mountain Lion on my MBP with the latest iWork updates and I am not able to see the documents that I have in the cloud that I have on my iPad and yes sync is enabled. Also documents that I create on my MBP just say waiting when I say I want them on iCloud.. Any suggestions?”

* On September 28, 2012, another customer named Santarelli writes, “I have your exact same problem but that solution didn't work.”

* On October 17, 2012, another customer named KJayCee2 notes, “This is exactly the problem I am now having - files I create on my iPad in Pages/Numbers/Keynote do not upload to the cloud and files that I upload to the cloud (on icloud.com) from my computer do not appear on my iPad. This is a fairly recent problem (in the last couple of days) and I can't for the life of me figure out what changed. I didn't update the apps in the last few days and I haven't changed any of the settings on the device. I've tried uninstalling one of the apps to see if it fixed the problem and it doesn't. It seems to be a problem with iCloud itself because I can transfer files to my device using iTunes - which now eliminates the ability to transfer files to my device from

anywhere other than my own computer.”

* On October 19, 2012, another customer named Xoineg writes, “I have the same exact issue. I see the little arrow on my documents, then it says syncing and never finishes the upload, or just sits there like nothing is happening, even though i have a 50MB/10MB connection.

icloud syncing has only worked once since last year. I delete the account, delete all iwork apps, i even set my phone as a new iphone. then slowly turned icloud then turned it on for each app and then i saw the documents syncing BUT it only worked for a day or so. I Did not do anything to cause it to stop..it just stopped. which is weird since i saw them working and syncing between my ipad, iphone and macbook air.

At this point I have tried every possible combination of "fixes" and still nothing and has been a year since it came out. I called apple support, and they said they would call me in a few days as they wait for their engineers to take a look at my account.

Anyone has EVER gotten anything that works? anything from apple upper level techs?

Thanks”

32. Apple’s own website provides admissions that Apple is not only aware of these defects, but provides irresponsible advice for consumers regarding how to address the problems complained of. On a page titled, “iCloud: Setup iCloud on all your devices. The rest is automatic,” Apple provides the following advice:

- “1. Make sure your Mac is running OS X v10.7.4 or later. If you don’t have the latest version of OS X, you can purchase it from the Mac App Store. To get the most out of iCloud on your Mac, install OS X Mountain Lion (v10.8).
2. Turn on iCloud. Choose System Preferences from the Apple menu on your Mac. Click iCloud, enter your Apple ID, and select the services you’d like to enable.
3. Enable Photo Stream in iPhoto or Aperture. Open iPhoto ’11 (version 9.2 or later) or Aperture (version 3.2 or later) and click the Photo Stream icon in the left column. Then click Turn On Photo Stream. Shared Photo Streams require iPhoto 9.4, Aperture 3.4, and OS X v 10.8.2 or later.

4. Enable automatic downloads in iTunes. To enable automatic downloads for your music, apps, and books, open iTunes and choose Preferences. Then click Store and select Music, Apps, and Books.*
5. Turn on iCloud for the rest of your devices. To get the most out of iCloud, set it up everywhere.”

See <http://www.apple.com/icloud/setup/mac.html>.

33. It is not just reliability at issue here, but the cost to consumers to use the computers and software for the purposes for which they were intended. Moreover, it appears there is a concerted effort at Apple to keep the defect covert and not inform current or prospective customers about the problems with Mountain Lion and iCloud. Nowhere on the Support nor Setup page, does Apple note that numerous reports have been received of problems with Mountain Lion and iCloud.

34. Of course, it is not just through Apple’s online store that consumers are logging complaints about the Mountain Lion and iCloud. The internet is rife with similar complaints. One consumer recently complained on September 19, 2012 at MacForums:

“Never used iCloud before.

Just upgraded from 10.6.8 to 10.8.1

Most things work, except for the critical info in my iCal, which is all missing!!

I absolutely NEED to retrieve this info ASAP.

When I launch Calendar, the dialogue box indicates "Moving calendars from server account. Couldn't move your calendars to iCloud because an error occurred. Make sure you're connected to the internet, and then try again."

Then there are two buttons: "Try Again Now" and "Try Again Later"

Nothing happens when I try again NOW, even though I am connected to the internet.”

See <http://www.mac-forums.com/forums/os-x-operating-system/284723-upgrade-mountain-lion-issues.html>.

35. Some threads regarding problems with iCloud on MacForums have more than 100,000 page views. See <http://www.mac-forums.com/forums/os-x-operating-system/253324-lion-ical-not-syncing-icloud-calendar.html>.

36. To date, Apple has not taken action to remedy the defects in Mountain Lion or iCloud, or to offer any replacement product. Rather, to hide the defect, Apple has refused to address network outages and iCloud service disruptions. After a 1-3 day outage in September 2012, Apple mentioned on its website that, “About 1-2 percent of users were affected and that the company would be fixing the problem ASAP.” See http://reviews.cnet.com/8301-13727_7-57513006-263/apple-fixes-icloud-outage-but-problems-linger/.

Apple’s refusal to address the problem, and lack on information on the cause of the outage, demonstrates Apple’s desire to hide the defect.

37. Apple knew about the complaints regarding the defective Mountain Lion operating system and the iCloud component. Apple misleads its customers into thinking that these issues are resolved by continuing to market and sell Mountain Lion as, “The World’s most advanced desktop operating system” and iCloud as, “It keeps your content up to date. On every device you use.” See <http://www.apple.com/osx/>

38. To ensure that the Mountain Lion operating system and the iCloud component would be fit for the ordinary or particular purposes for which the computer was intended, Apple should have adequately tested the operating system and components prior to releasing them for commercial sale. Had Apple exercised reasonable care in testing its Mountain Lion operating system and iCloud, it would have discovered that the

operating system and cloud storage component is improperly designed, does not work across Apple computing platforms, causes users to lose data, and causes users to lose access to previously purchased songs on iTunes.

39. Instead, Apple sold defective operating systems and software components to Plaintiffs and proposed class members that were not fit for their intended use.

40. Apple also could and should have tested alternate designs of its operating system to avoid these destructive side-effects. As noted, Apple has been aware of the weakness and defects in its operating system for over 11 months.

41. Furthermore, Apple continues to manufacture and sell its defective Mountain Lion operating system with iCloud components through pre-installation on new Apple computers, even after it was informed by its own customers of the specific design defects alleged herein.

Apple also manufactures and sells its defective Mountain Lion Operating System as an operating system upgrade available for sale on Apple's website, even after it was informed by its own customers of the specific design defects alleged herein.

42. Apple profits enormously from the sales of its operating system, while Plaintiffs and proposed class members incur damages, including the price they paid to purchase the defective operating system and the loss of computer functionality associated therein.

43. Apple has a history of introducing defective products into the stream of commerce, and not informing consumers of significant defects in design. Examples include iPhones with improperly designed antennas; MacBook Pros with defective

monitors; MagSafe Power Adapters that caught fire; and defective Logicboards. These defects have only been remedied through Class Action litigation.

V.

PLAINTIFFS' ALLEGATIONS

44. Plaintiffs are purchasers of new Apple computers, iMacs, MacBook Air, MacBook Pro, MacPros, Macminis, and Iphones. Plaintiffs are also purchasers of the Mountain Lion operating system upgrade version 10.8.

45. Plaintiffs purchased the subject computers or operating system upgrade, believing them to be suited for the purpose for which they were intended: allowing the operating system and iCloud components to work in tandem.

46. Since purchasing these computers or defective operating system upgrades, Plaintiffs have had reduced functionality, data loss, inability to access iCloud storage, and loss of iTunes songs, because, when used as instructed and intended, the Mountain Lion operating system did not function and the iCloud component prematurely failed.

47. Plaintiffs learned that far from being the only one experiencing such problems with the Mountain Lion and iCloud, there were thousands of other similar customer complaints on Apple's website.

48. In fact, Plaintiffs' experiences with the Mountain Lion operating system and iCloud are typical of at least thousands of other Apple purchasers who have registered their complaints with Apple, and have documented their problems with Mountain Lion and iCloud on various website forums dedicated to Apple products,

including Apple's own website. The similarity of the user complaints about the Mountain Lion and iCloud further evidences the uniformity of the product defects alleged herein.

49. Plaintiffs have suffered injury in fact and loss of money or property, and they have been damaged in the amount they paid for the defective Mountain Lion operating system upgrade and the amount they paid for Apple computers with the defective Mountain Lion operating system pre-installed. Moreover, if no adequate and functional replacement operating system exists, Plaintiffs have suffered damages in the amount of the full price they paid for their Apple computers.

VI.

CLASS ALLEGATIONS

50. Plaintiffs bring this class action on behalf of themselves individually and all others similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure.

51. The proposed class consists of all consumers who purchased an Apple computer with the defective Mountain Lion operating system pre-installed or who purchased an upgrade version of the defective Mountain Lion operating system from the time of its introduction in the marketplace through and including the date of the class notice (the "Class").

52. This action is properly brought as a class action for the following reasons:

(a) proposed class is so numerous and geographically dispersed throughout the United States that the joinder of all class members is impracticable. When

Plaintiffs do not know the exact number and identity of all class members, Plaintiff believes there are tens if not hundreds of thousands of class members;

(b) the disposition of Plaintiffs' and proposed class members' claims in a class action will provide substantial benefits to both parties and the Court;

(c) the proposed class is ascertainable and there is a well-defined community of interest in the questions of law or fact alleged herein since the rights of each proposed class member were infringed or violated in the same fashion;

(d) there are questions of law and fact common to the proposed class which predominate over any questions that may affect particular class members. Such common questions include:

(i) Whether Defendant exercised reasonable care in testing its Mountain Lion operating system prior to its release for commercial sale;

(ii) Whether Defendant's Mountain Lion operating system is defective when used as directed, intended or in a reasonably foreseeable manner;

(iii) Whether feasible alternative formulations of the Mountain Lion operating system were available;

(iv) Whether Defendant's Mountain Lion operating system was fit for its intended purpose;

(v) Whether Apple breached the implied warranty of fitness for a particular purpose;

- (vi) Whether Apple has breached the implied warranty of merchantability;
- (vii) Whether Apple has violated the Magnuson-Moss Warranty Act;
- (ix) Whether Apple is strictly liable to Plaintiffs and the class and whether Apple failed to warn Plaintiffs and the class;
- (x) Whether Apple committed Fraud under Texas Common Law;
- (xi) Whether Apple has violated the Texas Deceptive Trade Practices Act;
- (xii) Whether Apple has violated the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*;
- (xiii) Whether Apple has violated the California Consumers Legal Remedies Act, Ca. Civil Code §§ 1750 *et seq.*;
- (xiv) Whether Apple has received funds from Plaintiffs and class member that it unjustly received;
- (xv) Whether Plaintiffs and proposed class members have been harmed and the proper measure of relief; and
- (xvi) Whether Plaintiffs and proposed class members are entitled to an award of punitive damages, attorney's fees and expenses against Defendant.

(e) Plaintiffs' claims are typical of the claims of the members of the proposed class.

(f) Plaintiffs will fairly and adequately protect the interests of the proposed class in that they have no interests antagonistic to those of the other proposed class members, and Plaintiffs have retained attorneys qualified in consumer class actions, business litigation, and complex litigation as counsel.

(g) A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

(i) Given the size of individual proposed class member's claims and the expense of litigating those claims, few, if any, proposed class members could afford to or would seek legal redress individually for the wrongs Defendant committed against them and absent proposed class members have no substantial interest in individually controlling the prosecution of individual actions;

(ii) This action will promote an orderly and expeditious administration and adjudication of the proposed class claims, economies of time, effort, and resources will be fostered and uniformity of decisions will be insured; and

(iii) Without a class action, proposed class members will continue to suffer damages, and Defendant's violations of law will proceed without remedy while Defendant continues to reap and retain the substantial proceeds of its wrongful conduct.

(iv) Plaintiffs know of no difficulty that will be encountered in the management of this litigation, which would preclude its maintenance as a class action.

53. Plaintiffs seek damages and equitable relief on behalf of the proposed class on grounds generally applicable to the entire proposed class.

VII.

FIRST CAUSE OF ACTION

(Fraud under Texas Common Law)

54. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

55. To establish common law fraud in Texas, a plaintiff must prove that a) the defendant made a material misrepresentation, b) which was false, c) which was either known to be false when made or which was recklessly made as a positive assertion without knowledge of its truth, d) which the speaker made with the intent that it be acted upon, e) the other party took action in its reliance upon the representation, and f) thereby suffered injury. *In re FirstMerit Bank, N.A.*, 52 S.W. 3d 749, 758 (Tex. 2001); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998).

56. Apple committed common law fraud in Texas by representing that: the subject computers and Mountain Lion Operating System were functional and suitable for sale; selling subject computers and operating system with the defective Mountain Lion

Operating System; knowing the Mountain Lion operating system was defective; advertising that the Mountain Lion Operating System was suitable for use; that Plaintiffs relied upon Apple's statements of suitability; and that Plaintiffs suffered injury. *In re FirstMerit Bank, N.A.*, 52 S.W. 3d 749, 758 (Tex. 2001); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998).

57. Plaintiffs reserve the right to allege other violations of law that constitute other unlawful business acts and practices. Such conduct is ongoing and continues to this date.

58. Apple's conduct caused and continues to cause substantial injury to consumers and their property, including Plaintiffs and proposed class members. The gravity of Defendant's alleged wrongful conduct outweighs any purported benefits attributable to such conduct. There were also reasonable available alternatives to Apple to further its business interests, other than voluntarily placing its defective Mountain Lion operating system into the stream of commerce.

59. Plaintiffs and Class members have suffered injury in fact and have lost money and/or property as a result of Defendant's unfair and unlawful business practices and are therefore entitled to the relief available under Texas Law.

VIII.

SECOND CAUSE OF ACTION

(Violations of the Texas Deceptive Trade Practices Act)

60. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

61. This cause of action arises under the Texas Deceptive Trade Practices Act, Texas Business and Commerce Code Section 17.46 (b)(5), (7), (9), and (24). Plaintiffs are consumers as defined by Texas Business and Commerce Code Section 17.45 (4). Apple's Mountain Lion operating system constituted "goods" as defined by Tex Bus Comm Code 17.45 (1). At all times relevant hereto, Apple constituted a "person" as that term is defined in Tex Bus Comm Code 17.45(3).

62. Apple violated and continues to violate the DTPA by engaging in the following deceptive practices specifically proscribed by the Tex Bus Comm Code Section 17.46 (b), in transactions with Plaintiffs and class members that were intended to result or which resulted in the sale or lease of goods or services to consumers:

(a) In violation of Tex Bus Comm Code Section 17.46 (b)(5), Defendant has represented that the Mountain Lion operating system has sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which it does not have;

(b) In violation of Tex Bus Comm Code Section 17.46 (b)(7), Defendant has represented that the Mountain Lion operating system is of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(c) In violation of Tex Bus Comm Code Section 17.46 (b)(9), Defendant advertised the Mountain Lion operating system in question with the intent not to sell it as advertised;

(d) In violation of Tex Bus Comm Code Section 17.46 (b)(24),

Defendant has failed to disclose information concerning the Mountain Lion operating system, which was known at the time of the transaction, if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

63. Apple has made uniform representations that its Mountain Lion operating system is a high-quality product that will perform as represented, including but not limited to the fact that consumers' data would be saved via iCloud. These representations, as set forth above, were false, deceptive, and/or misleading and in violation of the Texas Deceptive Trade Practices Act.

64. Pursuant to the Texas Business and Commerce Code, Section 17.505(a), Plaintiffs have notified Apple in writing by certified mail of the particular violations of the Texas Deceptive Trade Practices Act alleged herein, and have demanded that Apple rectify the problems associated with the actions detailed above and give notice to all affected consumers of its intent to act. Plaintiffs sent this notice by certified mail, return receipt requested, to Apple's principal place of business.

65. If Apple fails to rectify or agree to rectify the problems associated with the actions detailed above and give notice to all affected consumers within 60 days of the date of written notice, pursuant to the Texas Deceptive Trade Practices Act, Plaintiffs will amend their Complaint to seek actual, punitive, and statutory damages and all other relief available to Plaintiffs and the Class under the DTPA.

66. In addition, pursuant to the Texas DTPA, Plaintiffs are entitled to, and therefore seek, a Court order enjoining the above-described wrongful acts and practices that violate the Texas DTPA.

67. Plaintiffs and the class are also entitled to recover attorney's fees, costs, expenses, and disbursements pursuant to the Texas DTPA.

IX.

THIRD CAUSE OF ACTION

Violation of California's Unfair Competition Law Cal. Bus. & Prof. Code §§ 17200, *et seq.*

(On Behalf of Plaintiffs and Class Members in California)

68. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

69. California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*, protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

70. The UCL prohibits any unlawful, unfair or fraudulent business act or practice. A business practice need only meet one of three criteria to be considered unfair competition. An unlawful business practice is anything that can properly be called a business practice and that at the same time is forbidden by law.

71. Apple has violated the fraudulent prong of the UCL in that it failed to inform Plaintiffs and the Class that the Mountain Lion Operating System would not perform as advertised and that the iCloud component was incomplete and/or defective.

72. Apple has violated the unfair prong of the UCL in that it continues to

profit from selling Plaintiffs' and the Class members the defective Mountain Lion Operating System.

73. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiffs, on their own behalf and on behalf of the Class, seek an order enjoining Apple from continuing to engage in the unfair and unlawful conduct described herein, an award of attorneys' fees and costs pursuant to Cal. Code Civ. Proc. § 1021.5, as well as such other and further relief as the Court deems just and proper.

X.

FOURTH CAUSE OF ACTION

Violation of California's Consumers Legal Remedies Act Cal. Civil Code §§ 1750, *et seq.*

(On Behalf of Plaintiffs and Class Members in California)

74. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

75. This cause of action arises under the California Consumers Legal Remedy Act, California Civil Code §1770 (a)(5), (7), (9), and (14). Plaintiffs are consumers as defined by California Civil Code §1761(d). Apple's Mountain Lion Operating System constituted "goods" as defined by California Civil Code §1761(a). At all times relevant hereto, Apple constituted a "person" as that term is defined in California Civil Code §1761(c).

76. Apple violated and continues to violate the CCLRA by engaging in the following deceptive practices specifically proscribed by the California Civil Code Section

1770(a), in transactions with Plaintiffs and class members that were intended to result or which resulted in the sale or lease of goods or services to consumers:

(a) In violation of Cal. Civ. Code §1770(a)(5), Defendant represented that the Mountain Lion Operating System has sponsorship, approval, characteristics, uses, or benefits which it does not have;

(b) In violation of Cal. Civ. Code §1770(a)(7), Defendant represented that the Mountain Lion Operating System is of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; and

(c) In violation of Cal. Civ. Code §1770(a)(9), Defendant advertised the Mountain Lion Operating System with the intent not to sell it as advertised.

77. Apple has made uniform representations that its Mountain Lion Operating System is a high-quality product that will perform as represented. These representations, as set forth above, were false, deceptive, and/or misleading and in violation of the California Consumers Legal Remedy Act.

78. Apple made uniform misrepresentations that its Mountain Lion Operating System is the “World’s most advanced desktop operating system.” This representation, as set forth above, was false, deceptive, and/or misleading and in violation of the California Consumers Legal Remedies Act.

79. Apple also made uniform misrepresentations that, “With more than 200 innovative new features, Mountain Lion includes: iCloud integration, for easy set up of your Mail, Contacts, Calendar, Messages, Reminders and Notes, and keeping

everything, including iWork documents, up to date across all your devices.” This representation, as set forth above, was false, deceptive, and/or misleading and in violation of the California Consumers Legal Remedies Act.

80. Apple also assured customers that, “With iCloud integration, Mountain Lion is even easier to set up, and your important information stays up to date across all your devices so you can keep editing documents, taking notes, creating reminders, and continue conversations whether you started on a Mac, iPhone or iPad.” This representation, as set forth above, was false, deceptive, and/or misleading and in violation of the California Consumers Legal Remedies Act.

81. Apple also told customers the following, “All your documents, with all your edits, on every device. With iCloud, the documents you create stay up to date across all your devices — automatically. You don’t have to remember to upload your work to a special folder, or browse a cluttered file system to find it again. Your documents are right there in your app, completely up to date and ready whenever you need them. Which means you can easily access the latest versions on whatever device you happen to be using at the time.” This representation, as set forth above, was false, deceptive, and/or misleading and in violation of the California Consumers Legal Remedies Act.

82. Violations of this statute subject the company to all available civil remedies and a civil penalty of \$1,000.00 for each violation.

83. Pursuant to Cal. Civ. Code §1780, Plaintiffs, on their own behalf and on behalf of the Class, seek an order enjoining Apple from continuing to engage in the

unlawful conduct described herein, an award of attorneys' fees and costs pursuant to Cal. Code Civ. Proc. §1021.5, as well as such other and further relief as the Court deems just and proper.

84. Pursuant to the California Civil Code, §1782, Plaintiffs have notified Apple in writing by certified mail of the particular violations of the California Consumers Legal Remedy Act alleged herein, and have demanded that Apple rectify the problems associated with the actions detailed above and give notice to all affected consumers of its intent to act. Plaintiffs sent this notice by certified mail, return receipt requested, to Apple's principal place of business.

85. If Apple fails to rectify or agree to rectify the problems associated with the actions detailed above and give notice to all affected consumers within 30 days of the date of written notice, pursuant to the California Consumers Legal Remedy Act, Plaintiffs will amend their Complaint to seek actual, punitive, and statutory damages and all other relief available to Plaintiffs and the Class under the CCLRA.

86. In addition, pursuant to the California Consumers Legal Remedy Act, Plaintiffs are entitled to, and therefore seek, a Court order enjoining the above-described wrongful acts and practices that violate the CCLRA.

87. Plaintiffs and the class are also entitled to recover attorney's fees, costs, expenses, and disbursements pursuant to the CCLRA.

XI.

FIFTH CAUSE OF ACTION

(Violations of the Magnuson-Moss Warranty Act, 15 U.S.C. Sec 2310(d)(1))

88. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

89. By placing its Mountain Lion operating system in the stream of commerce, Apple impliedly warranted that it was reasonably suited for its intended use, i.e.,

90. Apple's Mountain Lion operating system is not merchantable. In breach of the implied warranty of merchantability and fitness for a particular purpose, Apple's Mountain Lion operating system fails to work properly, thus rendering data and components of the software unusable.

91. Apple's Mountain Lion operating system was not reasonably designed for its intended use when it left Defendant's control and entered the market.

92. The Mountain Lion operating system defects were not open and/or obvious to consumers. Any purported limitation of the duration and scope of these warranties given by Apple is unreasonable, unconscionable, and void, because Apple knew or recklessly disregarded the fact that the defect in the Mountain Lion operating system existed and might not be discovered, if at all, until the Mountain Lion operating system had been used for a period of time longer than the period of any written warranty, and Apple willfully withheld information about the defect from purchasers of Apple computers. Moreover, due to the unequal bargaining power between the parties, Plaintiffs and the class members had no meaningful alternative to accepting Apple's attempted pro forma limitation of the duration of any warranties.

93. The defective design and manufacture of the Mountain Lion operating system was, and is, an inherent defect which either was known or which should have been known to Apple to be a defect at the time Plaintiffs and class members purchased their Apple computers.

94. The presence of this defect, the problems associated with iCloud, and Apple's failure to warn of its presence or cure the defect, constitutes a breach of both the express and implied warranties.

95. Apple's knowledge of this inherent defect, through both Plaintiff's 60-day demand letter, and through complaints lodged on its own website about the Mountain Lion operating systems, has given Apple more than a reasonable opportunity to cure the defect – an opportunity that Apple has failed and refused to take.

96. As a result, Plaintiffs and proposed class members have been damaged in, inter alia, the amount they paid to purchase Apple's un-merchantable Mountain Lion operating systems, and if no replacement exists, in the amount they paid for their related Apple Computer, which relies on the Mountain Lion operating system for its usage.

97. Pursuant to 15 U.S.C. Sec 2310(D)(2), Plaintiffs are also entitled to attorney's fees and reimbursement of expenses.

XII.

SIXTH CAUSE OF ACTION

(Breach of Implied Warranty of Fitness for a Particular Purpose)

98. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

99. By placing its Mountain Lion operating system in the stream of commerce, Apple impliedly warranted that its Mountain Lion operating system was reasonably fit for its particular purpose, i.e., to function as the primary operating system and save data without premature failure.

100. Apple's Mountain Lion operating system is not fit for its particular purpose. In breach of the implied warranty of fitness for a particular purpose, Apple's Mountain Lion operating system fails by not saving data across devices to a cloud storage location, by not automatically updating data from user's computers to the cloud storage location, by not allowing access to the cloud storage location, and by not allowing access to previously-purchased iTunes songs.

This failure limits the functionality of the subject computers. A common point of failure is the iCloud component. Another common failure is the inability to access previously-purchased iTunes songs.

101. Apple's Mountain Lion operating system was not reasonably suited for its intended particular use when it left Defendant's control and entered the market.

102. The Mountain Lion operating system defects were not open and/or obvious to consumers.

103. Any purported limitation of the duration and scope of the implied warranty of fitness for a particular purpose given by Apple is unreasonable, unconscionable, and void, because Apple knew or recklessly disregarded that the defect

in the Mountain Lion operating system existed and might not be discovered, if at all, until the Mountain Lion operating systems had been used for a period of time longer than the period of any written warranty, and Apple willfully withheld information about the defect from purchasers of Apple computers. Moreover, due to the unequal bargaining power between the parties, Plaintiffs and class members had no meaningful alternative to accepting Apple's attempted pro forma limitation of the duration of any warranties.

104. Furthermore, Apple did have knowledge of the defect, and rather than attempt to repair the defect, Apple hid the defect in future sales of Apple computers and sales of software upgrade by not acknowledging the numerous problems with Mountain Lion. This constructive knowledge and attempt to hide the defect, demonstrates Apple disregarded its duty to notify consumers of the defect.

105. As a result, Plaintiffs and proposed class members have been damaged in, inter alia, the amount they paid to purchase Apple's unfit Mountain Lion operating systems, and if no suitable replacement exists, in the amount they paid for their related Apple Computer, which relies on the Mountain Lion operating system for its function and usage.

XIII.

SEVENTH CAUSE OF ACTION

(Breach of Implied Warranty of Merchantability)

106. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

107. By placing its Mountain Lion operating systems in the stream of commerce, Apple impliedly warranted that its Mountain Lion operating system was reasonably functional for its intended use.

108. Apple's Mountain Lion operating system is not merchantable. In breach of the implied warranty of merchantability, Apple's Mountain Lion operating system fails by not saving data across devices to a cloud storage location, by not automatically updating data from user's computers to the cloud storage location, by not allowing access to the cloud storage location, and by not allowing access to previously-purchased iTunes songs.

109. Apple's Mountain Lion operating system was not reasonably designed and/or manufactured for its intended use when it left Defendant's control and entered the market.

110. The Mountain Lion operating system defects were not open and/or obvious to consumers.

111. Any purported limitation of the duration and scope of the implied warranty of merchantability given by Apple is unreasonable, unconscionable and void, because Apple knew or recklessly disregarded that the defect in the Mountain Lion operating system existed and might not be discovered, if at all, until the Mountain Lion operating systems had been used for a period of time longer than any written warranty, and Apple willfully withheld information about the defect from purchasers of Apple computers. Moreover, due to the unequal bargaining power between the parties,

plaintiffs and the class members had no meaningful alternative to accepting Apple's attempted pro forma limitation of the duration of any warranties.

112. As a result, Plaintiffs and proposed class members have been damaged in, inter alia, the amount they paid to purchase Apple's unmerchantable Mountain Lion operating systems, and if no suitable replacement exists, in the amount they paid for their related Apple Computer, which relies on the Mountain Lion operating system for its usage.

XIV.

EIGHTH CAUSE OF ACTION

(Negligence)

113. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

114. The conduct of Apple in manufacturing, distributing, and selling the Mountain Lion operating systems constituted negligence in failing to reasonably act in accordance with all applicable standards of care. Apple owed Plaintiffs and class members a duty not to disseminate a materially defective product.

115. Apple also breached its duty of care by negligently failing to timely and/or adequately warn Plaintiff and the class of the defective condition of the Mountain Lion operating systems, even after Apple was, or should have been, fully aware of the material defects in said Mountain Lion operating systems.

116. As a direct and proximate result of Apple's negligence, Plaintiffs and members of the class suffered economic injury, entitling them to just compensation, as detailed below.

XV.

NINTH CAUSE OF ACTION

(Money Had and Received)

117. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

118. As more fully set forth above, Apple had in its possession money which in equity and good conscience belongs to Plaintiff and Class members, which should be refunded to Plaintiffs and Class members.

XVI.

TENTH CAUSE OF ACTION

(Unjust Enrichment)

119. Plaintiffs re-allege and incorporate by reference the allegations contained in the paragraphs above as if fully set forth herein.

120. Apple improperly received and continues to improperly receive from Plaintiffs and Class members millions of dollars as result of the conduct alleged above.

121. As a result, Plaintiffs and the class have conferred a benefit on Apple to which Apple is not entitled. Apple has knowledge of this benefit, wrongfully and

deceptively obtained this benefit, and has voluntarily accepted and retained the benefit conferred to it. Apple will be unjustly enriched if it is allowed to retain such funds and therefore, a constructive trust should be imposed on all monies wrongfully obtained by Apple and the money should be disgorged from Defendant, and returned to Plaintiffs and the class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray this Court enter a judgment against Defendant that:

- A. This action be certified and maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure and certify the proposed class as defined;
- B. Awards compensatory and/or punitive damages as to all Causes of Action where such relief is permitted;
- C. Awards Plaintiffs and proposed class members the costs of this action, including reasonable attorney's fees and expenses;
- D. Orders Apple to immediately cease its wrongful conduct as set forth above; enjoins Apple from continuing to falsely market and advertise, conceal material information, and conduct business via the unlawful and unfair business acts and practices complained of herein, orders Apple to engage in a corrective notice campaign, and required Apple to refund to Plaintiffs and all of the class members the

funds paid to Apple for these defective products, including, if no reasonably suited replacement product exists, the full price paid for the subject computers;

E. Awards equitable monetary relief, including restitution and disgorgement of all ill-gotten gains, and the imposition of a constructive trust upon, or otherwise restricting the proceeds of Defendant's ill-gotten gains, to ensure that Plaintiffs and proposed class members have an effective remedy;

F. Awards pre-judgment and post-judgment interest at the legal rate; and

G. Such further legal and equitable relief as this Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

DATED: June 10, 2013

Respectfully submitted,

By: /s/ Omar W. Rosales
Omar W. Rosales

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(956) 423-1417 Tel
(956) 444-0217 Fax

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

/s/ Omar W. Rosales

OMAR W. ROSALES,
ATTORNEY OF
RECORD FOR PLAINTIFFS
LILLIAN KIM
SIRIA LUCKEY
DAVID DEBURRO

CERTIFICATE OF SERVICE

I, Omar W. Rosales, do hereby, certify that on June 10, 2013 a true and correct copy of the above and foregoing First Amended Complaint was sent via US MAIL to Apple Inc., at Apple Inc., Legal Affairs Division, 1 Infinite Loop, Cupertino, CA 95014.

/s/ Omar W. Rosales

OMAR W. ROSALES