

1 Plaintiff JAMES M. WIMMER, for their Class Action Complaint on behalf of themselves
2 and all others similarly situated, upon personal knowledge as to facts pertaining to himself and
3 upon information and belief as to all other matters, based on the investigation of his counsel,
4 against Defendant APPLE COMPUTER, INC. (“Defendant” or “Apple”), states as follows:

5 **I.**

6 **JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

7 1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
8 §1332 (2005). This Court also has personal jurisdiction over Defendant because a substantial
9 portion of the wrongdoing alleged in this Complaint took place in this state, Defendant’s principle
10 executive offices are located in this state, and Defendant is authorized to do business here, has
11 sufficient minimum contacts with this state, and/or otherwise intentionally avails itself of the
12 markets in this state through the promotion, marketing and sale of its products in this state, to
13 render the exercise of jurisdiction by this Court permissible under traditional notions of fair play
14 and substantial justice.

15 2. Venue in this Court is proper because Defendant’s principle executive offices are
16 located at 1 Infinite Loop, Cupertino, California 95014, and became a substantial part of the acts or
17 omissions giving rise to the claims in this action occurred in this Judicial District.

18 3. Intradistrict assignment to the San Jose Division is proper because Defendant’s
19 principal executive offices are located within Santa Clara County.

20 **II.**

21 **NATURE OF ACTION**

22 4. This consumer class action arises from Apple’s deceptive and unlawful conduct in
23 designing, manufacturing, distributing and selling defectively designed portable, digital music
24 players. Specifically, Plaintiff brings this class action on behalf of a nationwide class of consumers
25 who purchased Defendant’s defective iPod Nano (“Nano”) for consumer use. As a result of
26 Defendant’s defectively designed product, these Nanos scratch excessively during normal usage,
27 rendering the screen on the Nanos unreadable, and violating state consumer protection statutes,
28 breaching express and implied warranties that accompanied the Nanos, and causing Plaintiff and

1 proposed class members to incur loss of use and monetary damages associated with the repair
2 and/or replacement caused by the defective design. Plaintiff and proposed class members would
3 not have purchased Nanos and/or paid as much for them had they known the truth about the
4 product.

5 5. Although Defendant knew that there were problems with the design of the Nano,
6 Defendant did not recall the defectively designed Nanos that had been sold to class members nor
7 the Nanos waiting for sale to other consumers. Instead, Defendant permitted proposed class
8 members to purchase the defectively designed Nanos and passed the expense, hassle, and
9 frustration of replacing the defectively designed Nanos along to class members.

10 6. On behalf of themselves and all others similarly situated, Plaintiff seeks relief,
11 including: (a) an order certifying the action to be maintained as a class action and ordering
12 Plaintiff and his counsel to represent the class; (b) restitution and/or disgorgement of profits; (c)
13 compensatory and consequential damages; (d) punitive damages; (d) attorneys' fees; (f) costs of
14 this suit; (g) pre and post judgment interest; and (h) such other and further relief as this Court may
15 deem necessary or proper.

16 **III.**

17 **PARTIES**

18 7. Plaintiff JAMES M. WIMMER is a resident of the State of Virginia. In or about
19 September 2005, Plaintiff purchased a defective Nano designed, manufactured, distributed,
20 supplied and/or sold by Defendant. Plaintiff would not have purchased it and/or paid as much for it
21 had he know the truth about the product.

22 8. Defendant has been and still is engaged in the business of designing, manufacturing,
23 and marketing of personal computers and related software, services, peripherals, and networking
24 solutions worldwide. It also designs, develops, and markets a line of portable, digital music
25 players along with related accessories and services, including the online distribution of third-party
26 music and audio books. Apple is a Delaware Corporation with its principal executive offices at 1
27 Infinite Loop, Cupertino, CA 95014.

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IV.

GENERAL ALLEGATIONS

9. In late 2001, Apple launched a new product called the iPod. By the end of 2001, Apple had already sold as many as 125,000 new iPod portable music players and was working on the next generation for release in mid-2002. Over the next few years Apple responded to increased demand and staunch competition by redesigning the original iPod multiple times as well as developing and releasing new “sister” products such as the iPod Mini, iPod Shuffle, and finally in September 2005 releasing the highly anticipated Nano.

10. The Nano is .27 inches thick and weighs 1.5 ounces. Apple has advertised and marketed the Nano as being impossibly small and durable, while allowing all of the conveniences and features their customers have come to expect in the iPod series of products. Unfortunately their customers have been disappointed as the Nano does not function as advertised by Apple.

11. In a television advertisement broadcast throughout North America, prior to and immediately following the release of the Nano, Steve Jobs, the co-founder of Apple, is shown using the Nano and specifically removing it from his pocket. Seemingly, this television advertisement was designed to tout the durability and convenience, due to size, of the Nano. By advertising the product in this way, Defendant lead its consumers to believe that the Nano was in fact durable enough to put it in your pocket, briefcase, backpack, etc., without doing irreparable damage to the device.

12. The Nano screen, however, scratches excessively even when used in its normal intended manner. And it scratches so excessively that the items shown on the screen can no longer be viewed by the user. In fact, if users were to put their Nanos in their pockets with common items such as coins, keys, a money clip, a credit card, or even the earphones that accompany the Nanos, the devices would likely be scratched so badly that viewing the screens would be extremely difficult, if not impossible.

13. The Nano was defectively designed by Defendant. This defective design causes the Nano to scratch, resulting in irreparable damage to the Nano’s screen, during foreseeable and normal usage. Each of the iPods in the series of portable, digital music players sold by Defendant

1 prior to the Nano have been covered with a film of plastic resin, in order to protect the device from
2 scratching and other damage. In designing the Nano, the goal of Defendant was to create a device
3 much smaller than its predecessors in order to attract new and repeat customers. In doing so,
4 Defendant, in an attempt to drastically reduce the size of the Nano, redesigned the housing of
5 previous iPod models, of which the screen and controls were separate from the casing, into a
6 seamless front where the screen and controls reside under the resin covering the entire device.

7 14. The defect of the Nano lies within this resin. On previous versions of the iPod
8 series of devices, the resin has been much thicker and stronger. The amount and durability of the
9 resin applied as a protective coating during the Nano manufacturing process is clearly defective in
10 that it is not sufficient to adequately protect the face of the Nano from extreme scratching and
11 ultimately irreparable damage.

12 15. Although it was clear that the Nano was defective, with fierce competition in the
13 digital music industry, Apple decided not to delay the release of the defectively designed Nano, but
14 to pass the cost of replacing the defective product along to class members. Moreover, rather than
15 admit the design flaw when consumers began to express widespread complaints about the screen's
16 propensity to scratch easily and excessively (and rather than agreeing to replace them as Apple had
17 done with respect to Nanos with cracked screens), Apple concealed the defect and advised class
18 members that they would need to purchase additional equipment to prevent the screen from
19 scratching excessively.

20 16. Representative Plaintiff Wimmer purchased his Nano upon release in September of
21 2005 and used his Nano in a foreseeable manner and in the manner in which it is intended to be
22 used. The Nano that he purchased became so scratched after a few hours in his sweatshirt pocket
23 during his first day of use that he could no longer reasonably view the screen. He contacted Apple
24 to voice his concern over the excessive scratching, and even sent his Nano to Apple so that they
25 could see the damage. Apple responded by stating that there was nothing that they could do and to
26 date he has kept the Nano in the box in which Apple returned it, as it is no longer usable for its
27
28

1 intended purpose. Thus, Representative Plaintiff Wimmer has suffered economic loss from his
2 purchase of a Nano that he would not have purchased and/or paid as much for in the first place had
3 he known the truth about the product.

4 17. Defendant has been made aware of the design defect through numerous consumer
5 complaints. Due to Defendant's lack of response in resolving this widespread problem, consumers
6 have taken to posting their complaints on the internet, in an attempt to somehow inform others
7 about the problem:

8 **Consumer Frustration**

9 I received my black 4 GB Nano on Monday. By Monday night, despite the
10 fact that I had treated it delicately and barely handled it, I noticed tons of
11 fine scratches in the finish - like you see on a car's clear coat. The only thing
12 I'd wiped it with (because it gets grungy-looking from even minimal
13 handling) was a clean, micro-fiber lens cloth. I used my Nano maybe three
14 times, kept it in a soft-lined case when it wasn't in use, and by Friday I
15 noticed more scratches, including over the screen area. I did some research
16 (links below) and saw I wasn't alone - and worse, that users were finding the
gorgeous LCD screen obscured by scratches in the clear plastic overlay after
a few weeks of normal (putting it in a pocket, wiping with a t-shirt) use...
Also, although it's tempting to put it in your pocket (it fits perfectly in the
tiny coin pocket on jeans), a lot of people report major scratches and even
cracked LCDs from doing so. Steve Jobs pulled a Nano out of his pocket
when they announced it, implying it is an acceptable way to carry it, but I
wouldn't."¹

17 * * *

18 I'm really sick of Apple's response to this problem !!! I contacted customer
19 relations and some guy said that he did not even hear or was aware of any
Nano scratch issues.²

20 * * *

21 Like pretty much everyone else that has an Nano, mine has scratches all over
22 the screen and the body after 1 week of having it. This is highly
23 disappointing, especially from a company from Apple who is known for
24 user-friendly product. I would think with all the technology Apple has come
up with, it can find a way (or get someone who does) to have a scratch
resistant screen (like those on watches). Or at least ship your iPod with a
skin included (which probably costs less than \$1 to make). A very loyal and
dissasti[s]fied customer. (owner of 2 iPods and iBook).³

25 * * *

26 ¹
27 <http://www.macworld.com/forums/ubbthreads/showthreaded.php?Board=newstthread&Number=355931>

28 ² <http://discussions.info.apple.com/webx?14@28.Bff6anI11s5.0@.68b94d61/714>

³ <http://discussions.info.apple.com/webx?128@2.G0UzaDuhUya.0@.68b94d61>

1 Went down to Mac store and confirmed that Nano was indeed full of
2 scratches. And I was easily able to scratch it with a light touch... These
3 things happen all the time (I do industrial design for living..) Wrong choice
4 of material!!!

5 Curious though.. Consumer products like MP3 players usually go through
6 beta testing and feedback/re-design loop before market release... Wonder
7 how no one at Apple noticed it... I never planned on buying one, but still,
8 seeing a scratched unit got me disgusted.⁴

9 * * *

10 What's the key selling point of the nano over other players of similar size
11 and sound quality (or any Apple product over its competition)? A refined
12 form and slick interface. Fun stuff but if that's the point, scratches won't do.
13 If the key selling points are easily corrupted, its just another beta sold to the
14 "gotta have it now" crowd...⁵

15 * * *

16 Get a clue. The scratching of the Nano goes way beyond normal for a plastic
17 product with an LCD screen. I've got plenty of devices with tiny LCD
18 screens that I've had and used for years and they are all clear and scratch free
19 enough to see everything from corner to corner. There's clearly something
20 substandard about the material used in the Nano.⁶

21 * * *

22 I will never buy apple again. I'm so disappointed this is my FIRST apple
23 purchase, why couldn't I have seen this thread first? Arg, guess all i'm left to
24 do is to spread the word of pure dissatisfaction until they come up with
25 something to amend this tragedy.⁷

26 * * *

27 I dare not take the plastic cover off of the screen/click wheel and only once
28 have I removed it from the plastic wrap encasing the entire product. My
hope is that a resolution will be offered soon as users should not be expected
to spend \$250 plus tax on a product that they need to either baby or accept as
a piece of junk, I see neither of those as viable options for a product that
bares the name and reputation of Apple and iPod.⁸

18. The problem was also recently featured in an online Wall Street Journal article:

⁴ <http://discussions.info.apple.com/webx?128@2.G0UzaDuhUya.0@.68b94d61>

⁵ <http://discussions.info.apple.com/webx?128@2.G0UzaDuhUya.0@.68b94d61>

⁶ <http://discussions.info.apple.com/webx?14@28.Bff6anI11s5.0@.68b94d61/714>

⁷ <http://discussions.info.apple.com/webx?128@2.G0UzaDuhUya.0@.68b94d61>

⁸ <http://discussions.info.apple.com/webx?128@2.G0UzaDuhUya.0@.68b94d61>

1 *You and other writers gave the Apple iPod nano a rave review. But my nano*
2 *is badly scratched up after only a couple of weeks of careful use, and there*
3 *are lots of similar reports online. What's going on?*

4 **A:** Based on my own experience of about a month with the product, and
5 emails I've received from readers, I believe the tiny, thin iPod nano is much
6 more prone to scratching than earlier iPods, even though they, too, picked up
7 scratches.

8 If I were reviewing the nano today, I would still call it "the best combination
9 of beauty and functionality of any music player I've tested," as I did in my
10 review. But I would include a strong, prominent, warning that it scratches too
11 easily in normal usage. This is a real downside to an otherwise excellent
12 product.

13 My review of the nano ran on Sept. 8, and was based on four days of tests
14 with an evaluation unit lent me by Apple. I bought my own nano the next
15 day. The test nano, a new production model delivered in the box, picked up
16 some scratches in testing, like any iPod, but nothing out of the ordinary or
17 which impacted functionality.

18 But, after just under a month of daily use, my own nano is badly scratched,
19 and looks beat up when viewed at an angle. Worse, there are several large
20 scratches across the screen that impede functionality by making text and
21 photos slightly harder to see. I have never tested or owned any portable
22 electronic device that picked up as many scratches as quickly as the iPod
23 nano.

24 Like the previous iPods I've owned, my nano has never been sheathed in a
25 case. Like the others, I carry the nano -- by itself -- in my pants or jacket or
26 shirt pockets; or loosely in a briefcase or carry-on travel bag, in a pocket
27 containing no other hard objects. This is also how I carry my Treo smart
28 phone, whose screen is free of scratches after much longer and harder use
29 than the nano's. My nano hasn't been dropped or scraped. Yet it is badly
30 scratched.

31 My recommendation now is that nano owners must buy and use a case for the
32 device. That's a shame with a product as beautiful and sleek like this, because
33 it ruins the look and feel of the thing and adds to the cost. But I don't consider
34 it optional.

35 Apple says it uses exactly the same clear coating on the nano as on some
36 earlier iPods, and that its engineers have conducted tests that show the nano
37 isn't any more vulnerable to scratches than other current iPods. Apple also
38 says it hasn't had a large number of complaints about scratching on the nano.

39 Company officials speculate that, because cases for the nano aren't being sold
40 in volume yet, early buyers who would normally protect an iPod with a case
41 haven't been able to do so with the nano. They also suggest that, because of
42 its small size, some users may have carried it in places and ways that differ
43 from how they carried larger iPods, and which increased the possibility of
44 scratching.

1 I can't dispute any of that, but I believe that something about the size and
2 weight of the nano, and therefore the way it is used and behaves when
3 carried, is making the coating Apple applies far less effective than it is with
4 larger iPods.

5 I believe Apple should include a strong, thin case with every nano, starting as
6 soon as possible. And Apple should research some sort of tougher coating for
7 future nano models.⁹

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10 19. Despite an overwhelming number of complaints, Defendant has failed to remedy the
11 problem in any meaningful way. In fact, many of the complaints cited above are from Defendant's
12 own website. Not only has Defendant chosen not to remedy this defect but it has begun deleting
13 posts relating to the scratching defect on its website's forum and has locked numerous chat threads
14 in an attempt to limit the effect on the sales of the Nano. Therefore, Defendant is not only ignoring
15 the defect but is hindering the communication of its customers with regard to this defect in an
16 attempt to sell more Nanos.

17 20. These incidents experienced by the class members evidence an ongoing problem
18 experienced by purchasers of the Nano. These problems, created by a defect within the design of
19 the Nano, were apparent to Defendant, but instead of recalling and/or replacing the product they
20 are choosing to ignore it, causing damage to class members and additional financial gain for itself.

21 V.

22 CLASS ACTION ALLEGATIONS

23 21. Plaintiff brings this action pursuant to Rule 23(b)(2) and (b)(3) of the Federal Rules
24 of Civil Procedure, on behalf of themselves and a Class defined as follows:

25 **All persons and entities residing in the United States who purchased an**
26 **Nano portable, digital music player manufactured by Defendant Apple**
27 **Compuer, Inc., since the product's release in September 2005.**

28 **Excluded from the Class are (i) Defendant, any entity in which**
Defendant has a controlling interest or which has a controlling interest
in Defendant, and Defendant's legal representatives, predecessors,
successors, assigns, and employees, (ii) any person or entity whose
purchase was made in the State of California, and (iii) the judge and
staff to whom this case is assigned, and any member of the judge's
immediate family.

⁹ <http://online.wsj.com/article/SB112855984185861237.html>

1 22. The definition of the Class is unambiguous. Plaintiff is a member of the Class that
2 he seeks to represent. Members of the Class can be identified using Defendant's records of retail
3 sales and other information that is kept by Defendant in the usual course of business and/or in the
4 control of Defendant. Records kept by Defendant identify the class members who purchased
5 Nanos in a retail transaction. Class members can be notified of the class action through publication
6 and direct mailings to address lists maintained in the usual course of business by Defendant.

7 23. Class members are so numerous that their individual joinder is impracticable. In
8 fact, Timothy D. Cook, the executive Vice President for worldwide sales and operations, called the
9 demand for the Nano "staggering," and said Apple sold more than a million units in the 17 days of
10 the fourth quarter [2005] that it was available. Apple, which has roughly 75 percent of the
11 worldwide share of portable music players, shipped a total of 6.5 million iPods in the quarter, an
12 increase from two million in the quarter last year.¹⁰ The precise number of class members is
13 unknown to Plaintiff, but it is clear that the number greatly exceeds the number to make joinder
14 impossible.

15 24. Common questions of law and fact predominate over the questions affecting only
16 individual Class Members. Some of the common legal and factual questions include:

- 17 (a) Whether Apple's Nano portable music players were defectively designed in
18 that they were susceptible to excessive scratching that renders the screen
19 unreadable;
- 20 (b) Whether Defendant knew or should have known that the Nanos were
21 defectively designed;
- 22 (c) Whether Defendant knowingly concealed the defective design of the Nano;
23 (d) Whether Defendant engaged in illegal business practices by failing to recall
24 or sufficiently repair the defective Nano without charging the class
25 members;
- 26 (e) Whether Defendant refused to recall the defectively designed Nano in order
27 to increase the sales of new portable, digital music players;
- 28 (f) Whether Defendant misrepresented the durability and usefulness of the
Nano;

¹⁰ <http://www.nytimes.com/2005/10/12/technology/12apple.html>

- 1 (g) Whether Defendant misrepresented that it had a price and/or size advantage
2 in comparison to its competitors when it did not because its product was not
3 comparable to the products of its competitors due to the Nano's
4 susceptibility to excessive scratching that renders the screen unreadable;
- 5 (h) Whether Defendant violated consumer protection statutes and/or false
6 advertising statutes and/or state deceptive business practices statutes;
- 7 (i) Whether Defendant violated express and implied warranty statutes;
- 8 (j) Whether Defendant violated the common laws of negligent
9 misrepresentation and unjust enrichment; and
- 10 (k) The nature and extent of damages and other remedies to which the conduct
11 of Defendant entitles the class members.

12 25. Defendant engaged in a common course of conduct giving rise to the legal rights
13 sought to be enforced by the class members. Similar or identical defective designs, statutory and
14 common law violations, deceptive business practices, and defective products are involved.
15 Individual questions, if any, pale by comparison to the numerous common questions that dominate.

16 26. The injuries sustained by the class members flow, in each instance, from a common
17 nucleus of operative facts; Defendant's misconduct. In each case Defendant designed,
18 manufactured, supplied and/or sold defective Nano portable music players.

19 27. The class members have been damaged by Defendant's misconduct. The class
20 members have purchased defectively designed Nano portable music players. Many of the class
21 members have been required to prematurely purchase a new properly-designed portable music
22 players or protective coverings for their devices due to the fact that the defectively designed Nanos
23 were unable to withstand their normal, foreseeable and intended usage. The class members would
24 not have purchased the Nanos and/or paid as much had they known the truth about the product.

25 28. Plaintiff's claims are typical of the claims of the other proposed class members.
26 Each Plaintiff purchased a Nano, manufactured by Defendant, that was prone to excessive
27 scratching during normal and foreseeable use, causing extreme damage to the viewing screen and
28 limited future use, as a result of the defective design of the Nano.

29 29. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff is
30 familiar with the basic facts that form the bases of the proposed class members' claims. Plaintiff's
31 interests do not conflict with the interests of the other class members that he seeks to represent.

1 Plaintiff has retained counsel competent and experienced in class action litigation and intends to
2 prosecute this action vigorously. Plaintiff's counsel has successfully prosecuted complex class
3 actions, including consumer protection class actions. Plaintiff and Plaintiff's counsel will fairly
4 and adequately protect the interests of the class members.

5 30. The class action device is superior to other available means for the fair and efficient
6 adjudication of the claims of Plaintiff and the proposed class members. The relief sought per
7 individual member of the Class is small given the burden and expense of individual prosecution of
8 the potentially extensive litigation necessitated by the conduct of Defendant. Furthermore, it
9 would be virtually impossible for the class members to seek redress on an individual basis. Even if
10 the class members themselves could afford such individual litigation, the court system could not.

11 31. Individual litigation of the legal and factual issues raised by the conduct of
12 Defendant would increase delay and expense to all parties and to the court system. The class
13 action device presents far fewer management difficulties and provides the benefits of a single,
14 uniform adjudication, economies of scale and comprehensive supervision by a single court. Given
15 the similar nature of the class members' claims and the absence of material differences in the state
16 statutes and common laws upon which the class members' claims are based, a nationwide Class
17 will be easily managed by the Court and the parties.

18 CAUSES OF ACTION

19 **FIRST CAUSE OF ACTION**

20 **(Violation Of The State Consumer Protection Laws)**

21 32. The preceding paragraphs of this Complaint are realleged and incorporated by
22 reference and asserted by Plaintiff on behalf of himself and members of the proposed Class.

23 33. Plaintiff and the members of the proposed Class are consumers who purchased
24 goods (Nanos) from Defendant for, *inter alia*, personal, family, or household purposes.

25 34. Defendant had a statutory duty to refrain from unfair or deceptive acts or practices
26 in the manufacture, promotion, and sale of Nanos to Plaintiff and the proposed class members.

1 35. Defendant violated this duty by misrepresenting the characteristics, uses, benefits,
2 quality, durability and usefulness of Nanos and omitting to disclose the Nano's susceptibility to
3 extreme scratching from normal usage.

4 36. Plaintiff and members of the proposed Class were directly and proximately injured
5 by Defendant's conduct and would not have purchased Nanos and/or paid as much for them had
6 they known the true nature of the product.

7 37. Defendant's deceptive representations and material omissions to Plaintiff and the
8 proposed class members were, and are unfair and deceptive acts and practices.

9 38. Defendant engaged in wrongful conduct while at the same time obtaining, under
10 false pretenses, significant sums of money from Plaintiff and the proposed class members.

11 39. Plaintiff and the proposed class members were deceived by Defendant's
12 misrepresentations.

13 40. As a proximate result of Defendant's misrepresentations, Plaintiff and the proposed
14 class members have suffered an ascertainable loss and are entitled to relief, in an amount to be
15 determined at trial.

16 41. Defendant's actions, as complained of herein, constitute unfair competition or
17 unfair, unconscionable, deceptive or fraudulent acts or practices in violation of various state
18 consumer protection statutes listed below:

19 (a) Defendant has engaged in unfair competition or unfair or deceptive acts or
20 practices in violation of Ala. Code § 8-19-1, *et seq.*;

21 (b) Defendant has engaged in unfair competition or unfair or deceptive acts or
22 practices in violation of Alaska Stat. Code § 40.50.471, *et seq.*;

23 (c) Defendant has engaged in unfair competition or unfair or deceptive acts or
24 practices in violation of Ariz. Rev. Stat. § 44-1522, *et seq.*;

25 (d) Defendant has engaged in unfair competition or unfair or deceptive acts or
26 practices in violation of Ark. Code § 4-88-101, *et seq.*;

27 (e) Defendant has engaged in unfair competition or unfair or deceptive acts or
28 practices in violation of Colo. Rev. Stat. § 6-1-105, *et seq.*;

1 (f) Defendant has engaged in unfair competition or unfair or deceptive acts or
2 practices in violation of Conn. Gen. Stat. § 42-110b, *et seq.*;

3 (g) Defendant has engaged in unfair competition or unfair or deceptive acts or
4 practices in violation of 6 Del. Code § 2511, *et seq.*;

5 (h) Defendant has engaged in unfair competition or unfair or deceptive acts or
6 practices in violation of D.C. Code § 28-3901, *et seq.*;

7 (i) Defendant has engaged in unfair competition or unfair or deceptive acts or
8 practices in violation of Fla. Stat. § 501.201, *et seq.*;

9 (j) Defendant has engaged in unfair competition or unfair or deceptive acts or
10 practices in violation of Ga. Stat. § 10-1-392, *et seq.*;

11 (k) Defendant has engaged in unfair competition or unfair or deceptive acts or
12 practices in violation of Haw. Rev. Stat. § 480, *et seq.*;

13 (l) Defendant has engaged in unfair competition or unfair or deceptive acts or
14 practices in violation of Idaho Code § 48-601, *et seq.*;

15 (m) Defendant has engaged in unfair competition or unfair or deceptive acts or
16 practices in violation of 815 ILCS § 505/1, *et seq.*;

17 (n) Defendant has engaged in unfair competition or unfair or deceptive acts or
18 practices in violation of Ind. Code Ann. § 24-5-0.5.1, *et seq.*;

19 (o) Defendant has engaged in unfair competition or unfair or deceptive acts or
20 practices in violation of Iowa Code § 714.1b, *et seq.*;

21 (p) Defendant has engaged in unfair competition or unfair or deceptive acts or
22 practices in violation of Kan. Stat. § 50-623, *et seq.*;

23 (q) Defendant has engaged in unfair competition or unfair or deceptive acts or
24 practices in violation of Ky. Rev. Stat. § 367.110, *et seq.*;

25 (r) Defendant has engaged in unfair competition or unfair or deceptive acts or
26 practices in violation of La. Rev. Stat. § 51:1401, *et seq.*;

27 (s) Defendant has engaged in unfair competition or unfair or deceptive acts or
28 practices in violation of 5 Me. Rev. Stat. § 207, *et seq.*;

1 (t) Defendant has engaged in unfair competition or unfair or deceptive acts or
2 practices in violation of Md. Com. Law Code § 13-101, *et seq.*;

3 (u) Defendant has engaged in unfair competition or unfair or deceptive acts or
4 practices in violation of Mass. Gen. L. Ch. 93A, *et seq.*;

5 (v) Defendant has engaged in unfair competition or unfair or deceptive acts or
6 practices in violation of Mich. Stat. § 445.901, *et seq.*;

7 (w) Defendant has engaged in unfair competition or unfair or deceptive acts or
8 practices in violation of Minn. Stat. § 325F.67, *et seq.*;

9 (x) Defendant has engaged in unfair competition or unfair or deceptive acts or
10 practices in violation of Miss. Code Ann. § 75-24-1, *et seq.*;

11 (y) Defendant has engaged in unfair competition or unfair or deceptive acts or
12 practices in violation of Vernon's Mo. Rev. Stat. § 407.010, *et seq.*;

13 (z) Defendant has engaged in unfair competition or unfair or deceptive acts or
14 practices in violation of Mont. Code § 30-14-101, *et seq.*;

15 (aa) Defendant has engaged in unfair competition or unfair or deceptive acts or
16 practices in violation of Neb. Rev. Stat. § 59-1601, *et seq.*;

17 (bb) Defendant has engaged in unfair competition or unfair or deceptive acts or
18 practices in violation of Nev. Rev. Stat. § 598.0903, *et seq.*;

19 (cc) Defendant has engaged in unfair competition or unfair or deceptive acts or
20 practices in violation of N.H. Rev. Stat. § 358-A:1, *et seq.*;

21 (dd) Defendant has engaged in unfair competition or unfair or deceptive acts or
22 practices in violation of N.J. Stat. Ann. § 56:8-1, *et seq.*;

23 (ee) Defendant has engaged in unfair competition or unfair or deceptive acts or
24 practices in violation of N.M. Stat. Ann. § 57-12-1, *et seq.*;

25 (ff) Defendant has engaged in unfair competition or unfair or deceptive acts or
26 practices in violation of N.Y. Gen. Bus. Law § 349, *et seq.*;

27 (gg) Defendant has engaged in unfair competition or unfair or deceptive acts or
28 practices in violation of N.C. Gen. Stat. § 75-1.1, *et seq.*;

1 (hh) Defendant has engaged in unfair competition or unfair or deceptive acts or
2 practices in violation of N.D. Cent. Code § 51-15-01, *et seq.*;

3 (ii) Defendant has engaged in unfair competition or unfair or deceptive acts or
4 practices in violation of Ohio Rev. Stat. § 1345.01, *et seq.*;

5 (jj) Defendant has engaged in unfair competition or unfair or deceptive acts or
6 practices or made representations in violation of Okla. Stat. tit. 15 § 751, *et seq.*;

7 (kk) Defendant has engaged in unfair competition or unfair or deceptive acts or
8 practices in violation of Or. Rev. Stat. § 646.605, *et seq.*;

9 (ll) Defendant has engaged in unfair competition or unfair or deceptive acts or
10 practices in violation of 73 Pa. Stat. § 201-1, *et seq.*;

11 (mm) Defendant has engaged in unfair competition or unfair or deceptive acts or
12 practices in violation of R.I. Gen. Laws. § 6-13.1-1, *et seq.*;

13 (nn) Defendant has engaged in unfair competition or unfair or deceptive acts or
14 practices in violation of S.C. Code Laws § 39-5-10, *et seq.*;

15 (oo) Defendant has engaged in unfair competition or unfair or deceptive acts or
16 practices in violation of S.D. Code Laws § 37-24-1, *et seq.*;

17 (pp) Defendant has engaged in unfair competition or unfair or deceptive acts or
18 practices in violation of Tenn. Code § 47-18-101, *et seq.*;

19 (qq) Defendant has engaged in unfair competition or unfair or deceptive acts or
20 practices in violation of Tex. Bus. & Com. Code § 17.41, *et seq.*;

21 (rr) Defendant has engaged in unfair competition or unfair or deceptive acts or
22 practices in violation of Utah Code Ann. § 13-1 1-1, *et seq.*;

23 (ss) Defendant has engaged in unfair competition or unfair or deceptive acts or
24 practices in violation of Vt. Stat. Ann. tit. 9, § 245 1, *et seq.*;

25 (tt) Defendant has engaged in unfair competition or unfair or deceptive acts or
26 practices in violation of Va. Code § 59.1-196, *et seq.*;

27 (uu) Defendant has engaged in unfair competition or unfair, deceptive acts or
28 fraudulent acts or practices in violation of Wash. Rev. Code § 19.86.010, *et seq.*;

1 (vv) Defendant has engaged in unfair competition or unfair or deceptive acts or
2 practices in violation of W. Va. Code § 46A-6-101, *et seq.*;

3 (ww) Defendant has engaged in unfair competition or unfair or deceptive acts or
4 practices in violation of Wis. Stat. § 100.20, *et seq.*; and

5 (xx) Defendant has engaged in unfair competition or unfair or deceptive acts or
6 practices in violation of Wyo. Stat. § 40-12-100, *et seq.*

7 42. Plaintiff and members of the proposed Class were injured by Defendant's conduct,
8 which created artificial demand for Nanos at an artificially inflated price. As a direct and
9 proximate result of Defendant's unfair methods of competition and unfair or deceptive acts or
10 practices, Plaintiff and the proposed Class have suffered actual economic loss by paying for Nanos
11 at an artificially inflated price. Plaintiff and the proposed class members are entitled to damages,
12 restitution, disgorgement, and/or such orders or judgments as may be necessary to restore to any
13 person in interest, any money which may have been acquired by means of such unfair practices and
14 to the relief set forth below.

15 **SECOND CAUSE OF ACTION**
16 **(Breach Of State Express Warranties)**

17 43. The preceding paragraphs of this Complaint are realleged and incorporated by
18 reference and asserted by Plaintiff on behalf of himself and members of the proposed Class.

19 44. Defendant expressly represented and warranted to Plaintiff and members of the
20 proposed Class, by and through statements, descriptions, and affirmations of fact made by
21 Defendant or its authorized agents or sales representatives, orally and in writing on product
22 packaging and in product advertisements and marketing materials and other written materials
23 intended for the general public, that the Nano was durable, effective, and fit and proper for its
24 intended use. For example, Apple warrants that its portable, digital music players against
25 "[d]efects in materials and workmanship in...new 'Products' manufactured, sold or certified by
26 Apple Computer, Inc...." This express warranty runs to every "first end-user purchaser." The
27 aforementioned documents and others containing express warranties regarding Nanos and their
28 usage were created by and at the direction of Apple.

1 (e) Apple's sale and promotion of the Nano constitutes a breach of express
2 warranty in violation of Co. Rev. St. § 4-2-313.

3 (f) Apple's sale and promotion of the Nano constitutes a breach of express
4 warranty in violation of Conn. Gen. Stat. Ann. § 42a-2-313.

5 (g) Apple's sale and promotion of the Nano constitutes a breach of express
6 warranty in violation of 6 Del. C. § 2-313.

7 (h) Apple's sale and promotion of the Nano constitutes a breach of express
8 warranty in violation of D.C. Stat. § 28:2-313.

9 (i) Apple's sale and promotion of the Nano constitutes a breach of express
10 warranty in violation of Fla. Stat. Ann. § 672.313.

11 (j) Apple's sale and promotion of the Nano constitutes a breach of express
12 warranty in violation of Ga. Code Ann. § 11-2-313.

13 (k) Apple's sale and promotion of the Nano constitutes a breach of express
14 warranty in violation of Haw. Rev. Stat. § 490:2-313.

15 (l) Apple's sale and promotion of the Nano constitutes a breach of express
16 warranty in violation of Id. Stat. § 28-2-313.

17 (m) Apple's sale and promotion of the Nano constitutes a breach of express
18 warranty in violation of 810 ILCS 512-313.

19 (n) Apple's sale and promotion of the Nano constitutes a breach of express
20 warranty in violation of Ind. Code § 26-1-2-313.

21 (o) Apple's sale and promotion of the Nano constitutes a breach of express
22 warranty in violation of Iowa Code Ann. § 554.2313.

23 (p) Apple's sale and promotion of the Nano constitutes a breach of express
24 warranty in violation of Kansas Stat. Ann. § 84-2-313.

25 (q) Apple's sale and promotion of the Nano constitutes a breach of express
26 warranty in violation of Ken. Rev. Stat. § 355.2-313.

27 (r) Apple's sale and promotion of the Nano constitutes a breach of express
28 warranty in violation of La. Civ. Code Ann. art. 2520.

1 (s) Apple's sale and promotion of the Nano constitutes a breach of express
2 warranty in violation of 11 Maine Rev. Stat. Ann. § 2-313.

3 (t) Apple's sale and promotion of the Nano constitutes a breach of express
4 warranty in violation of Md. Com. Law Code Ann. § 2-313.

5 (u) Apple's sale and promotion of the Nano constitutes a breach of express
6 warranty in violation of Mass. Gen. Laws Ann. 106 § 2-313.

7 (v) Apple's sale and promotion of the Nano constitutes a breach of express
8 warranty in violation of Mich. Comp. Laws Ann. 440.2313b.

9 (w) Apple's sale and promotion of the Nano constitutes a breach of express
10 warranty in violation of Minn. Stat. Ann. § 336.2-313.

11 (x) Apple's sale and promotion of the Nano constitutes a breach of express
12 warranty in violation of Miss. Code Ann. § 75-2-313.

13 (y) Apple's sale and promotion of the Nano constitutes a breach of express
14 warranty in violation of Missouri Ann. Stat. 400.2-313.

15 (z) Apple's sale and promotion of the Nano constitutes a breach of express
16 warranty in violation of Mont. Code Ann. 30-2-313.

17 (aa) Apple's sale and promotion of the Nano constitutes a breach of express
18 warranty in violation of Neb. Rev. Stat. § 2-313.

19 (bb) Apple's sale and promotion of the Nano constitutes a breach of express
20 warranty in violation of Nev. Rev. Stat. 104.2313.

21 (cc) Apple's sale and promotion of the Nano constitutes a breach of express
22 warranty in violation of N.H. Rev. Stat. § 382-A:2-313.

23 (dd) Apple's sale and promotion of the Nano constitutes a breach of express
24 warranty in violation of N.J. Stat. Ann. 12A:2-313.

25 (ee) Apple's sale and promotion of the Nano constitutes a breach of express
26 warranty in violation of N.M. Stat. Ann. § 55-2-313.

27 (ff) Apple's sale and promotion of the Nano constitutes a breach of express
28 warranty in violation of N.Y. U.C.C. Law § 2-313.

1 (gg) Apple's sale and promotion of the Nano constitutes a breach of express
2 warranty in violation of N.C. Gen. Stat. Ann. § 25-2-313.

3 (hh) Apple's sale and promotion of the Nano constitutes a breach of express
4 warranty in violation of N.D. Stat 41-02-30.

5 (ii) Apple's sale and promotion of the Nano constitutes a breach of express
6 warranty in violation of Ohio Rev. Code Ann. § 1302.26.

7 (jj) Apple's sale and promotion of the Nano constitutes a breach of express
8 warranty in violation of Okla. Stat. Ann. tit. 12A, § 2-313.

9 (kk) Apple's sale and promotion of the Nano constitutes a breach of express
10 warranty in violation of Or. Rev. Stat. § 72.3130.

11 (ll) Apple's sale and promotion of the Nano constitutes a breach of express
12 warranty in violation of Pa. Stat. Ann. tit. 13, § 2313.

13 (mm) Apple's sale and promotion of the Nano constitutes a breach of express
14 warranty in violation of R.I. Stat. § 6A-2-313.

15 (nn) Apple's sale and promotion of the Nano constitutes a breach of express
16 warranty in violation of S.C. § 36-2-313.

17 (oo) Apple's sale and promotion of the Nano constitutes a breach of express
18 warranty in violation of S.D. Cod. Laws. § 57A-2-313.

19 (pp) Apple's sale and promotion of the Nano constitutes a breach of express
20 warranty in violation of Tenn. Code Ann. § 47-2-313.

21 (qq) Apple's sale and promotion of the Nano constitutes a breach of express
22 warranty in violation of Tex. Bus. & Com. Code Ann. § 2.313.

23 (rr) Apple's sale and promotion of the Nano constitutes a breach of express
24 warranty in violation of Ut. Code Ann. § 70A-2-313.

25 (ss) Apple's sale and promotion of the Nano constitutes a breach of express
26 warranty in violation of Vt. Stat. Ann. § 2-313.

27 (tt) Apple's sale and promotion of the Nano constitutes a breach of express
28 warranty in violation of Va. Code Ann. § 8.2-313.

1 (uu) Apple's sale and promotion of the Nano constitutes a breach of express
2 warranty in violation of Wa. Ann. 62A.2-313.

3 (vv) Apple's sale and promotion of the Nano constitutes a breach of express
4 warranty in violation of W. Va. Code § 46-2-313.

5 (ww) Apple's sale and promotion of the Nano constitutes a breach of express
6 warranty in violation of Wis. Stat. Ann. 402.313.

7 (xx) Apple's sale and promotion of the Nano constitutes a breach of express
8 warranty in violation of Wyo. Stat. 34.1-2-313.

9 52. Defendant's conduct injured Plaintiff and members of the proposed Class by
10 breaching its express warranties, thereby causing them to pay a premium price for a product that
11 should not have been on the market and/or should have been lower priced to reflect its lack of
12 durability.

13 53. Plaintiff and the proposed class members have incurred damages as described herein
14 as a direct and proximate result of the breach and failure of Defendant to honor its express
15 warranty, in that Plaintiff and the proposed class members would not have purchased and/or paid as
16 much for their Nanos had they known the truth about the product.

17 **THIRD CAUSE OF ACTION**

18 **(Breach Of State Implied Warranties)**

19 54. The preceding paragraphs of this Complaint are realleged and incorporated by
20 reference and asserted by Plaintiff on behalf of themselves and members of the proposed Class.

21 55. Defendant sold and promoted Nanos, which they placed into the stream of
22 commerce. Defendant knew or had reason to know of the specific use for which the Nanos were
23 purchased, and it impliedly warranted that Nanos were of merchantable quality and fit for such use.
24 This implied warranty included, among other things (i) a warranty that the Nanos manufactured,
25 supplied, distributed and/or sold by Defendant would not incur extreme scratching; and (ii) a
26 warranty that the Nanos would be fit for their intended use and would not excessively scratch when
27 used in a foreseeable manner for their normal intended use.

1 56. Plaintiff and members of the proposed Class reasonably relied upon the expertise,
2 skill, judgment and knowledge of Defendant and upon their implied warranty that Nanos were of
3 merchantable quality and fit for their intended use.

4 57. Through the conduct alleged herein, Apple has breached the implied warranty of
5 fitness for a particular purpose. The defectively designed Nano was not fit for the particular
6 purpose for which it was purchased by the class members to perform. The class members
7 purchased the Nano for the particular purpose of being durable enough to carry it in places such as
8 their pockets due to its small size. Apple knew that the class members were purchasing the Nano
9 for this particular purpose. Indeed, Apple marketed the Nano as being fit for this particular
10 purpose.

11 58. Plaintiff and members of the proposed Class relied on Defendant's
12 misrepresentations by purchasing Nanos.

13 59. Defendant knew or had reason to know that Plaintiff and members of the proposed
14 Class were influenced to purchase Nanos through Defendant's expertise, skill, judgment and
15 knowledge in furnishing Nanos for their intended use.

16 60. Nanos were not of merchantable quality and were not fit for their intended use
17 because they are not durable and are susceptible to excessive scratching that renders the screen
18 unreadable.

19 61. Defendant's actions, as complained of herein, violate various state statutes listed
20 below:

21 (a) Apple breached its implied warranty that Nanos were of merchantable
22 quality and fit for such use in violation of Ala. Code § 7-2-314.

23 (b) Apple breached its implied warranty that Nanos were of merchantable
24 quality and fit for such use in violation of Alaska Stat. § 45.02.314.

25 (c) Apple breached its implied warranty that Nanos were of merchantable
26 quality and fit for such use in violation of Ak. St. § 45.02.314.

27 (d) Apple breached its implied warranty that Nanos were of merchantable
28 quality and fit for such use in violation of Ariz. Rev. Stat. Ann. § 47-2314.

1 (e) Apple breached its implied warranty that Nanos were of merchantable
2 quality and fit for such use in violation of Co. Rev. St. § 4-2-314.

3 (f) Apple breached its implied warranty that Nanos were of merchantable
4 quality and fit for such use in violation of Conn. Gen. Stat. Ann. § 42a-2-314.

5 (g) Apple breached its implied warranty that Nanos were of merchantable
6 quality and fit for such use in violation of 6 Del. C. § 2-314.

7 (h) Apple breached its implied warranty that Nanos were of merchantable
8 quality and fit for such use in violation of D.C. Stat. § 28:2-314.

9 (i) Apple breached its implied warranty that Nanos were of merchantable
10 quality and fit for such use in violation of Fla. Stat. Ann. § 672.314.

11 (j) Apple breached its implied warranty that Nanos were of merchantable
12 quality and fit for such use in violation of Ga. Code Ann. § 11-20-314.

13 (k) Apple breached its implied warranty that Nanos were of merchantable
14 quality and fit for such use in violation of Haw. Rev. Stat. § 490:2-314.

15 (l) Apple breached its implied warranty that Nanos were of merchantable
16 quality and fit for such use in violation of Id. Stat. § 28-2-314.

17 (m) Apple breached its implied warranty that Nanos were of merchantable
18 quality and fit for such use in violation of 810 ILCS 512-314.

19 (n) Apple breached its implied warranty that Nanos were of merchantable
20 quality and fit for such use in violation of Ind. Code § 26-1-2-314.

21 (o) Apple breached its implied warranty that Nanos were of merchantable
22 quality and fit for such use in violation of Iowa Code Ann. § 554.2314.

23 (p) Apple breached its implied warranty that Nanos were of merchantable
24 quality and fit for such use in violation of Kansas Stat. Ann. § 84-2-314.

25 (q) Apple breached its implied warranty that Nanos were of merchantable
26 quality and fit for such use in violation of Ken. Rev. Stat. § 355.2-314.

27 (r) Apple breached its implied warranty that Nanos were of merchantable
28 quality and fit for such use in violation of La. Civ. Code Ann. art. 2520.

1 (s) Apple breached its implied warranty that Nanos were of merchantable
2 quality and fit for such use in violation of 11 Maine Rev. Stat. Ann. § 2-314.

3 (t) Apple breached its implied warranty that Nanos were of merchantable
4 quality and fit for such use in violation of Md. Com. Law Code Ann. § 2-314.

5 (u) Apple breached its implied warranty that Nanos were of merchantable
6 quality and fit for such use in violation of Mass. Gen. Laws Ann. 106 § 2-314.

7 (v) Apple breached its implied warranty that Nanos were of merchantable
8 quality and fit for such use in violation of Mich. Comp. Laws Ann. 440.2314.

9 (w) Apple breached its implied warranty that Nanos were of merchantable
10 quality and fit for such use in violation of Minn. Stat. Ann. § 336.2-314.

11 (x) Apple breached its implied warranty that Nanos were of merchantable
12 quality and fit for such use in violation of Miss. Code Ann. § 75-2-314.

13 (y) Apple breached its implied warranty that Nanos were of merchantable
14 quality and fit for such use in violation of Missouri Ann. Stat. 400.2-314.

15 (z) Apple breached its implied warranty that Nanos were of merchantable
16 quality and fit for such use in violation of Mont. Code Ann. 30-2-314.

17 (aa) Apple breached its implied warranty that Nanos were of merchantable
18 quality and fit for such use in violation of Neb. Rev. State. § 2-314.

19 (bb) Apple breached its implied warranty that Nanos were of merchantable
20 quality and fit for such use in violation of Nev. Rev. Stat. 104.2314.

21 (cc) Apple breached its implied warranty that Nanos were of merchantable
22 quality and fit for such use in violation of N.H. Rev. Stat. § 382-A:2-314.

23 (dd) Apple breached its implied warranty that Nanos were of merchantable
24 quality and fit for such use in violation of N.J. Stat. Ann. 12A:2-314.

25 (ee) Apple breached its implied warranty that Nanos were of merchantable
26 quality and fit for such use in violation of N.M. Stat. Ann. § 55-2-314.

27 (ff) Apple breached its implied warranty that Nanos were of merchantable
28 quality and fit for such use in violation of N.Y. U.C.C. Law § 2-314.

1 (gg) Apple breached its implied warranty that Nanos were of merchantable
2 quality and fit for such use in violation of N.C. Gen. Stat. Ann. § 25-2-314.

3 (hh) Apple breached its implied warranty that Nanos were of merchantable
4 quality and fit for such use in violation of N.D. Stat 41-02-31.

5 (ii) Apple breached its implied warranty that Nanos were of merchantable
6 quality and fit for such use in violation of Ohio Rev. Code Ann. § 1302.267.

7 (jj) Apple breached its implied warranty that Nanos were of merchantable
8 quality and fit for such use in violation of Okla. Stat. Ann. tit. 12A, § 2-314.

9 (kk) Apple breached its implied warranty that Nanos were of merchantable
10 quality and fit for such use in violation of Or. Rev. Stat. § 72.3140.

11 (ll) Apple breached its implied warranty that Nanos were of merchantable
12 quality and fit for such use in violation of Pa. Stat. Ann. tit. 13, § 2314.

13 (mm) Apple breached its implied warranty that Nanos were of merchantable
14 quality and fit for such use in violation of R.I. Stat. § 6A-2-314.

15 (nn) Apple breached its implied warranty that Nanos were of merchantable
16 quality and fit for such use in violation of S.C. § 36-2-314.

17 (oo) Apple breached its implied warranty that Nanos were of merchantable
18 quality and fit for such use in violation of S.D. Cod. Laws. § 57A-2-314.

19 (pp) Apple breached its implied warranty that Nanos were of merchantable
20 quality and fit for such use in violation of Tenn. Code Ann. § 47-2-314.

21 (qq) Apple breached its implied warranty that Nanos were of merchantable
22 quality and fit for such use in violation of Tex. Bus. & Com. Code Ann. § 2.314.

23 (rr) Apple breached its implied warranty that Nanos were of merchantable
24 quality and fit for such use in violation of Ut. Code Ann. § 70A-2-314.

25 (ss) Apple breached its implied warranty that Nanos were of merchantable
26 quality and fit for such use in violation of Vt. Stat. Ann. § 2-314.

27 (tt) Apple breached its implied warranty that Nanos were of merchantable
28 quality and fit for such use in violation of Va. Code Ann. § 8.2-314.

1 (uu) Apple breached its implied warranty that Nanos were of merchantable
2 quality and fit for such use in violation of Wa. Ann. 62A.2-314.

3 (vv) Apple breached its implied warranty that Nanos were of merchantable
4 quality and fit for such use in violation of W. Va. Code § 46-2-314.

5 (ww) Apple breached its implied warranty that Nanos were of merchantable
6 quality and fit for such use in violation of Wis. Stat. Ann. 402.314.

7 (xx) Apple breached its implied warranty that Nanos were of merchantable
8 quality and fit for such use in violation of Wyo. Stat. 34.1-2-314.

9 62. Plaintiff and the proposed class members have incurred damages as described herein
10 as a direct and proximate result of the breach and failure of Defendant to honor its implied
11 warranty in that Plaintiff and the proposed class members would not have purchased and/or paid as
12 much for their Nanos had they known the truth about the product.

13 **FOURTH CAUSE OF ACTION**

14 **(Violation Of State Negligent Misrepresentation Common Laws)**

15 63. The preceding paragraphs of this Complaint are realleged and incorporated by
16 reference and asserted by Plaintiff on behalf of himself and members of the proposed Class.

17 64. Defendant made a series of misrepresentations and material omissions, as alleged
18 herein. Its statements were material, false, deceptive, and misleading and omitted material facts
19 necessary to make the statements not misleading, and such material misrepresentations and
20 omissions were a result of Defendant's negligence, in violation of all state negligent
21 misrepresentation common laws.

22 65. Defendant owed a duty to Plaintiff and the members of the proposed Class to
23 exercise reasonable care in making representations about Nanos.

24 66. Plaintiff and the proposed class members relied (or should be presumed to have
25 relied) on Defendant's material misrepresentations in purchasing Nanos. As a result of their
26 justifiable reliance, Plaintiff and the members of the proposed Class were induced to and did
27 purchase Nanos. Plaintiff's reliance and the proposed class members' reliance were reasonably
28

1 foreseeable by Defendant (and, in fact, that is why Defendant made the misrepresentations that it
2 did).

3 67. As a direct and proximate result of the negligent misrepresentations made by
4 Defendant, Plaintiff and the proposed class members have been damaged.

5 **FIFTH CAUSE OF ACTION**

6 **(Violation Of State Unjust Enrichment Common Laws)**

7 68. The preceding paragraphs of this complaint are realleged and incorporated by
8 reference and asserted by Plaintiff on behalf of himself and members of the proposed Class.

9 69. To the detriment of Plaintiff and members of the proposed Class, Defendant has
10 been, and continues to be, unjustly enriched as a result of the unlawful and/or wrongful collection
11 of, *inter alia*, payments for Nanos.

12 70. Defendant has unjustly benefited through the unlawful and/or wrongful collection
13 of, *inter alia*, payments for Nanos and continues to so benefit to the detriment and at the expense of
14 Plaintiff and members of the proposed Class.

15 71. Accordingly, Plaintiff and members of the proposed Class seek full restitution of
16 Defendant's enrichment, benefits and ill-gotten gains acquired as a result of the unlawful and/or
17 wrongful conduct alleged herein.

18
19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiff and the proposed class members request that the Court enter an
21 order or judgment against Defendant including the following:

22 A. Certification of the action as a Class Action pursuant to Rule 23(b)(2) of the Federal
23 Rules of Civil Procedure with respect to Plaintiff's claims for injunctive relief, and Rule 23(b)(3)
24 of the Federal Rules of Civil Procedure with respect to the claims for damages, and appointment of
25 Plaintiff as Class Representative and his counsel of record as Class Counsel;

26 B. Damages in the amount of monies paid for Nanos;

27 C. Actual damages, statutory damages, punitive or treble damages, and such other
28 relief as provided by the statutes cited herein;

- 1 D. Prejudgment and post-judgment interest on such monetary relief;
2 E. Equitable relief in the form of restitution and/or disgorgement of all unlawful or
3 illegal profits received by Defendant as a result of the unfair, unlawful and/or deceptive conduct
4 alleged in herein;
5 F. Other appropriate injunctive relief;
6 G. The costs of bringing this suit, including reasonable attorneys' fees; and
7 H. All other relief to which Plaintiff and members of the proposed Class may be
8 entitled at law or in equity.

9

10 DATED: October 25, 2005

HAGENS BERMAN SOBOL SHAPIRO LLP
LEE M. GORDON
ELAINE T. BYSZEWSKI

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/s/

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Attorneys for Plaintiff and the Proposed Class

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2 **DEMAND FOR JURY TRIAL**

3 Plaintiff hereby demands a trial by jury, pursuant to Rule 38(b) of the Federal Rules of
4 Civil Procedure, of all issues so triable.

5 DATED: October 25, 2005

6 HAGENS BERMAN SOBOL SHAPIRO LLP
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