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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 **SAN JOSE DIVISION**

19 JOSEPH BIRDSONG and BRUCE) Case No. C 06-02280 JW (RS)
20 WAGGONER, Individually and on Behalf of)
21 Others Similarly Situated,) CLASS ACTION

22 Plaintiffs,)

23 v.)

24 APPLE, INC.)

25 Defendant.)

26 **PLAINTIFFS' THIRD AMENDED**
27 **COMPLAINT**

28 **DEMAND FOR JURY TRIAL**

HONORABLE JAMES WARE

TABLE OF CONTENTS

	<u>PAGE</u>
I. JURISDICTION, VENUE, AND INTRA-DISTRICT ASSIGNMENT	1
II. NATURE OF THE ACTION	1
III. THE PARTIES	4
IV. FACTUAL ALLEGATIONS	4
A. Background.....	4
B. Noise Induced Hearing Loss	6
C. Centers for Disease Control and National Institute for Occupation Safety and Health.....	7
D. Apple’s MPs	8
E. Apple Has Known of the Risk Imposed by Use of Its Products	13
F. The Ear Bud Itself is Not Properly Designed.....	25
V. CLASS ACTION ALLEGATIONS	26
VI. CAUSES OF ACTION.....	29
FIRST CAUSE OF ACTION VIOLATIONS OF UNFAIR COMPETITION LAW (BUS. AND PROF. CODE §§ 17200, <i>ET SEQ.</i>) (CLASS AGAINST DEFENDANT)	29
SECOND CAUSE OF ACTION BREACH OF EXPRESS WARRANTIES (CAL. COM. CODE § 2313, § 2714) (CLASS AND SUBCLASS AGAINST DEFENDANT).....	32
THIRD CAUSE OF ACTION BREACH OF IMPLIED WARRANTIES (CAL. COM. CODE § 2314, § 2714) (CLASS AND SUBCLASS AGAINST DEFENDANT).....	33
FOURTH CAUSE OF ACTION BREACH OF IMPLIED WARRANTY (CAL. CIV. CODE §§ 1790 <i>ET SEQ.</i>) (PLAINTIFF WAGGONER AND CAL. SUBCLASS AGAINST DEFENDANT).....	34
FIFTH CAUSE OF ACTION MAGNUSON-MOSS WARRANTY ACT (15 U.S.C. §§ 2301, <i>ET SEQ.</i>) (CLASS AND SUBCLASS AGAINST DEFENDANT)	36
VII. REQUESTED REMEDIES.....	37
PRAYER FOR RELIEF.....	39

1 DEMAND FOR JURY TRIAL40

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1 Plaintiffs Joseph A. Birdsong and Bruce Waggoner (“Plaintiffs”), through their undersigned
2 counsel and for their Third Amended Complaint (“TAC”) on behalf of themselves and all others
3 similarly situated, upon personal knowledge as to facts pertaining to themselves and upon
4 information and belief as to all other matters, against Defendant Apple, Inc. (“Defendant” or
5 “Apple”), states as follows:

6 **I. JURISDICTION, VENUE, AND INTRA-DISTRICT ASSIGNMENT**

7 1. This Court has subject-matter jurisdiction over this action pursuant to the Class
8 Action Fairness Act (CAFA), 28 U.S.C. § 1332(d). Plaintiffs allege that the amount in controversy
9 exceeds the sum or value of \$5,000,000.00 exclusive of interest and costs. Further, there are
10 members of the putative Class of plaintiffs that are citizens of a state different from Defendant,
11 Apple, Inc. As an additional jurisdictional basis, this Court has supplemental jurisdiction over
12 Plaintiffs’ Magnuson-Moss Warranty Act Claim, 15 U.S.C. §§ 2301, *et seq.*, pursuant to 28 U.S.C.
13 § 1367. This Court also has personal jurisdiction over Defendant because a substantial portion of
14 the wrongdoing alleged in this TAC emanates from this state, Defendant’s principle executive
15 offices are located in this state, and Defendant is authorized to do business here, has sufficient
16 minimum contacts with this state, and/or otherwise intentionally avails itself of the markets in this
17 state through the promotion, marketing and sale of its products in this state, to render the exercise of
18 jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

19 2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(a) and (c) because
20 Defendant, as a corporation, is “deemed to reside in any judicial district in which [it is] subject to
21 personal jurisdiction” and because the misrepresentation and material omissions “giving rise to
22 claim[s] occurred” in this District as well as throughout the State of California.

23 3. Intra-district assignment to the San Jose Division is proper because Defendant’s
24 principal executive offices are located within Santa Clara County.

25 **II. NATURE OF THE ACTION**

26 4. Plaintiffs bring this action on behalf of a nationwide class and a California subclass
27 of consumers who purchased portable, digital music players (“MPs”) from Apple (including the
28

1 iPod, iPod mini, iPod shuffle, iPod nano, and iPod video). This action seeks to redress Apple's
2 unfair and unlawful conduct in manufacturing and selling defectively designed MPs, and their
3 components, without adequate warnings and without important disclosures about the actual and
4 avoidable risks of hearing loss associated with Apple's MP products. As sold and marketed by
5 Apple, iPods pose an unreasonable risk of hearing loss when used for their ordinary purpose.

6 5. The unreasonable risk of hearing loss is currently spreading through the iPod
7 generation at epidemic levels. According to the National Institute for Hearing Research, some four
8 (4) million adolescents alone are estimated to be at risk of hearing damage from over-amplified
9 music.¹ In fact, millions of consumers of all ages are at risk of hearing loss from their reasonably
10 foreseeable use of Apple MPs, a loss that could easily have been avoided by a simple change in
11 product design and/or the addition of adequate warnings.

12 6. Apple's MP products do not perform as safely and effectively as ordinary
13 consumers would expect, particularly since they embody excessive risks of otherwise preventable
14 hearing loss. Apple continues to sell MP products despite the danger of causing hearing loss,
15 without prominently and accurately disclosing the risks, and without providing basic safety
16 modifications to reduce such risks. Among other things, Apple's conduct broadly endangers the
17 public welfare and amounts to unfair and unlawful business practices under California's Unfair
18 Competition Laws (CAL. BUS. & PROF. CODE §§ 17200, *et seq.*) ("UCL").

19 7. Apple's MP products are inherently defective in design and are not sufficiently
20 adorned with adequate warnings regarding the likelihood of hearing loss (specifically the onset of
21 noise-induced hearing loss, a condition which has no known cure or treatment). Not only are the
22 MPs defectively designed, but the iPod headphones, commonly referred to as "ear buds," that are
23 packaged with each MP are likewise defective in design and do not contain adequate warnings. As
24 such, iPods pose an unreasonable risk of hearing loss when used for their ordinary purpose. As
25 such the product is not fit for its ordinary purpose, listening to music, because it creates an
26 unreasonable risk when used for that purpose.

27 ¹ William La Jeunesse, *Popular Portable Music Players Could Lead to Hearing Loss*,
28 FOXNews, Dec. 19, 2007, <http://www.foxnews.com/story/0,2933,317505,00.html>.

1 8. MPs have the capacity to produce sounds in excess of 104 decibels (“dB” or
2 “dBA”). It is safe to listen to music at that level for less than seven-and-a-half minutes a day.
3 Studies indicate that exposure to 115 dB for more than 28 seconds per day, can cause damage. The
4 risk posed by Apple’s MPs is such that Apple was forced to pull its MPs from stores in France.
5 Apple then upgraded the MPs’ software to limit sound output in Europe to 100 dB, but has not
6 done so in the United States. This level is still not safe. Further, the ear buds that come with
7 Apple’s MPs are defective because they do not dilute the sound entering the ear canal and are
8 inadequately designed in other aspects.

9 9. Apple has known for years that when used for its intended purpose, its products
10 create an unreasonable risk of hearing loss. Recently, in a patent application filed on June 7, 2005,
11 Apple conceded that use of its product in the ordinary course created a risk of “damaging” users’
12 hearing.

13 10. This consumer protection class action seeks certification under Fed. R. Civ. P.
14 23(b)(2) because Apple has manufactured and distributed the MPs to all Class and Subclass
15 members with the herein described defects making injunction or declaratory relief appropriate.
16 This action is also brought under Fed. R. Civ. P. 23(b)(3) since Plaintiffs are entitled to restitution
17 and money damages as a result of Apple’s conduct. It is important that the action be brought on
18 behalf of the Class and Subclass because the sale of MPs with the iPod ear buds will continue to
19 endanger the health of millions of consumers unless enjoined so that the product is sold in a safe
20 fashion. Significantly, Apple’s liability in this case is clearly a matter of common proof.

21 11. Plaintiffs and the Class and Subclass seek an Order enjoining Apple from selling
22 and/or distributing MP products, or their components, without implementing the important safety
23 measures, adequate warnings, and complete disclosures, as further described herein. The key
24 safety measures should include volume control software and noise-reducing or limiting headphones
25 for all iPod purchasers. Appropriate warnings should be included on product packaging and/or on
26 the MP units themselves, as well as in product advertisements. Plaintiffs also seek an Order
27 enjoining Apple from further marketing, advertising, selling, and/or distributing of MP products
28

1 without full and accurate disclosure of the material facts known about the association between
2 iPods and hearing loss, and meaningful information about safe decibel levels on these products.
3 Plaintiffs and members of the Class and Subclass also seek restitution of monies owed to them,
4 which they overpaid for MP products that – in light of the increased risk of noise-induced hearing
5 loss – are not safe and fit for their ordinary use. In addition, Plaintiffs are entitled to recover
6 damages, court costs, reasonable attorneys’ fees, and such other relief as the Court may deem
7 proper.

8 12. Application of California law to the putative nationwide class is proper because
9 Apple markets, advertises and sells its MP products in and from this state. Consequently, a
10 substantial portion of the alleged wrongdoing emanates from this state. Moreover, California’s
11 consumer protection laws are among the strongest in the country.

12 III. THE PARTIES

13 13. Plaintiff Joseph Birdsong is an individual domiciled in the State of Louisiana who
14 brings this action on behalf of a nationwide class of consumers who purchased Apple MPs.

15 14. Plaintiff Bruce Waggoner is an individual domiciled in the State of California who
16 brings this action on behalf of a nationwide class and a California Subclass of consumers who
17 purchased Apple MPs.

18 15. Defendant is a corporation domiciled in the State of California, located at 1 Infinite
19 Loop, Cupertino, California.

20 IV. FACTUAL ALLEGATIONS

21 A. Background

22 16. In late 2001, Apple launched a new product called the iPod, which is a type of
23 portable, digital music player. Subsequent to the original iPod’s release in 2001, Apple developed
24 new variations of the iPod line, including the iPod mini, iPod Nano, iPod video, and iPod shuffle.

25 17. Net sales of iPods rose \$961 million or 279% during fiscal 2004 compared to 2003.
26 Unit sales of iPods totaled \$4.4 million in fiscal 2004, which represents an increase of 370% from
27 the 939,000 iPod units sold in fiscal 2003. Strong demand for the iPods during fiscal 2004
28

1 continued to be experienced in all of Apple's operating segments and was driven by enhancements
2 to the iPod, the introduction of the iPod mini, increased expansion of Apple's iPod distribution
3 network, and continued success of the iTunes Music Store due largely to making it available to
4 both Macintosh and Windows users in the U.S., U.K., France and Germany. Apple sold more than
5 10 million iPods in the fiscal third quarter of 2007 and reported that the total number of iPods sold
6 has surpassed 100 million units to date.

7 18. In approximately May 2005, Plaintiff Birdsong ("Birdsong") purchased an iPod
8 Photo. This iPod allowed Birdsong to easily download pictures from his digital camera and to
9 listen to music previously downloaded to his personal computer. Before this purchase, Birdsong
10 saw Apple advertisements touting the iPod. Before his purchase, Birdsong extensively researched
11 the iPod, conducting much of his research online on Apple's website. Based upon his extensive
12 research, Birdsong purchased an iPod Photo in approximately May 2005. Because he wanted to
13 stay current with technology and desired a thinner MP, extended battery life, and expanded storage
14 capabilities, Birdsong purchased an iPod Video in approximately October 2005 directly from
15 Apple online. Apple gave Birdsong a "student discount" on his purchase. Again, Birdsong saw
16 advertisements on television and Apple's website touting the new device prior to purchase. In
17 Apple's marketing materials, Birdsong never saw any mention for the potential of noise-induced
18 hearing loss through the reasonable and customary use of an Apple iPod. Likewise, there was no
19 mention that Apple iPods, operating as intended, produced sound levels at which consumers can
20 safely listen to the MP for only minutes a day.

21 19. In approximately January 2005, Plaintiff Waggoner ("Waggoner") purchased an
22 iPod U2 from the Apple Store in Grove, California. Before this purchase, Waggoner saw Apple
23 marketing materials touting the iPod, both on television and in print media. The advertisements
24 depicted iPod users apparently operating the iPod at loud levels. In none of these advertisements
25 was there any mention of the potential of noise-induced hearing loss through the reasonable and
26 customary use of an Apple iPod. Likewise, there was no mention that Apple iPods, operating as
27 intended, produce sound levels at which consumers can safely listen to the MP for only minutes a
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1 day. After approximately six (6) months of use, Waggoner was forced to replace the Apple iPod
2 ear bud with a more expensive and better functioning headphone, thus incurring additional costs
3 necessary for use of the unit.

4 **B. Noise-Induced Hearing Loss**

5 20. As detailed by the National Institute on Deafness and Other Communication
6 Disorders (<http://www.nidcd.nih.gov/health/hearing/noise.asp>), hearing is a series of events in
7 which the ear converts sound waves into electrical signals that are sent to the brain and interpreted
8 as sound. The ear has three main parts: the outer, middle, and inner ear. Sound waves enter
9 through the outer ear and reach the middle ear where they cause the eardrum to vibrate.

10 21. The vibrations are transmitted through three tiny bones in the middle ear, called the
11 ossicles. These three bones are named the malleus, incus, and stapes (and are also known as the
12 hammer, anvil, and stirrup). The eardrum and ossicles amplify the vibrations and carry them to the
13 inner ear. The stirrup transmits the amplified vibrations through the oval window and into the fluid
14 that fills the inner ear. The vibrations move through fluid in the snail-shaped hearing part of the
15 inner ear (cochlea) that contains the hair cells. The fluid in the cochlea moves the top portion of
16 the hair cells, called the hair bundle, which initiates the changes that lead to the production of nerve
17 impulses. These nerve impulses are carried to the brain, where they are interpreted as sound.
18 Different sounds move the hair bundles in different ways, thus allowing the brain to distinguish one
19 sound from another, such as vowels from consonants.

20 22. Noise-induced hearing loss is the slow loss of hearing caused by too much noise.
21 Hearing loss happens when too much noise hurts the hair cells in the inner ear. Noise-induced
22 hearing loss is one of the most common causes of nerve deafness. Noise-induced hearing loss is
23 believed to last forever. There is no known treatment, no medicine, no surgery, not even a hearing
24 aid that truly corrects your hearing once it is damaged by noise.

25 23. Both the loudness of sound (called the intensity) and the amount of time you hear
26 the noise are important. Sound is measured in decibels. Eight hours of hearing noise at 85 dB
27
28

1 could hurt your hearing. At higher sound levels, you could lose hearing in even less time. Noise-
2 induced hearing loss usually happens slowly. There is no pain.

3 24. Noise-induced hearing loss can be caused by a one-time exposure to loud sound as
4 well as by repeated exposure to sounds at various intensity levels over an extended period of time.

5 25. Noise-induced hearing loss and hearing loss occurs when listeners become
6 accustomed to a sound level. Accordingly, in an effort to overcome this decreased hearing
7 sensitivity, the listener unwittingly turns the device up even louder to hear at the same level.

8 26. Studies estimate that as many as 5.2 million children in the United States between
9 the ages of 6 and 19 have some hearing damage caused by amplified music and other sources.
10 While listening to loud music in a club or concert hall is dangerous, piping it directly to your ears
11 through ear buds is far more so. Wired music is not dampened by walls and bodies, or the distance
12 between the listener and the speakers, and goes straight into the listener's ears. The most
13 dangerous parts – sudden spikes in volume – can cause instant damage.

14 **C. Centers for Disease Control and National Institute for Occupation Safety and Health**

15 27. The Centers for Disease Control (“CDC”) is an operating component of the United
16 States Department of Health and Human Services. The CDC’s mission is “to promote health and
17 quality of life by preventing and controlling disease, injury, and disability.”

18 28. CDC’s organizational structure includes the National Institute for Occupation Safety
19 and Health (“NIOSH”). NIOSH is a federal agency responsible for conducting research and
20 making recommendations for the prevention of work-related injury and illness. NIOSH is
21 authorized by statute to make policy recommendations for occupational safety and health
22 standards. NIOSH has a board of scientific counselors renowned in a variety of fields.

23 29. In June 1998, NIOSH recommended standards for promulgation by regulatory
24 agencies, such as the Occupational Safety and Health Administration (“OSHA”), to protect
25 workers from hearing losses resulting from occupational noise exposure.

26 30. NIOSH recommended standards include requiring employers to institute an
27 effective hearing loss prevention program when any worker’s 8 hour, time weighted average
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1 (“TWA”) exposure to sound equals or exceeds 85 dBA. For those workers exposed to noise that
2 equals or exceeds 85 dBA for 8 hours or more, employers must require workers to wear hearing
3 protectors to attenuate noise below 85 dBA.

4 31. Additionally, NIOSH standards instruct that warning signs, such as the one below,
5 concerning potential hearing loss dangers should be posted and “clearly visible at the entrance to or
6 the periphery of areas where noise exposures routinely equal or exceed 85 dBA as an 8-hr TWA”:



11
12 32. NIOSH standards also require that exposed workers be informed about the potential
13 consequences of noise exposure and the methods of preventing noise-induced hearing loss.

14 33. Every time the volume level increases by 3 dBA, the safe exposure time drops by
15 half. Therefore, the permissible exposure time for 88 dBA is four hours a day, the permissible
16 exposure time for 91 dBA is two hours a day, the permissible exposure for 94 dBA is one hour a
17 day, the permissible exposure for 97 dBA is thirty minutes, the permissible exposure for 100 dBA
18 is fifteen minutes, and the permissible exposure for 103 dBA is seven and a half minutes.

19 34. Pursuant to federal regulations (*e.g.*, 29 C.F.R. § 1910.95), employers are required
20 to implement a “hearing conservation program” whenever employee noise exposures equal or
21 exceed an 8 hour TWA sound level of 85 dBA.

22 35. According to NIOSH, “noise-induced hearing loss is 100 percent preventable but
23 once acquired, hearing loss is permanent and irreversible.” Available online at
24 <http://www.cdc.gov/niosh/topics/noise/about/abouthlp/abouthlp.html#noisemeter>.

25 **D. Apple’s MPs**

26 36. Since late 2001, Apple has been designing, manufacturing, marketing, advertising,
27 selling and distributing iPod MP products, including the original iPod, the iPod mini, the iPod

1 shuffle, the iPod Nano and iPod video. Apple distributes each iPod with a set of ear bud
2 headphones.

3 37. Upon information and belief, some of the Defendant's MPs generally have the
4 capability to produce sounds as high as 115 dBA. By way of comparison, a screaming child
5 produces a noise level of 90 dB. A ride in a convertible on a freeway produces a noise level of 95
6 dB. A subway train, a diesel truck, a pneumatic drill, and a jackhammer all produce noise levels of
7 100 dB. A helicopter and power mower produce noise levels of 105 dB. Sandblasting produces a
8 noise level of 110 dB. A propellor aircraft produces noise levels of 120 dB.

9 38. Under OSHA standards, exposure to sound at 115 dB for only about 2 minutes is
10 permissible. In fact, studies indicate that exposure to 115 dB for more than 28 seconds per day,
11 over time, can cause permanent damage.

12 39. In 2002, France required Apple to limit personal listening device output at 100 dB.
13 In response, Apple was forced to pull its MPs from store shelves in France. In turn, Apple then
14 "upgraded" the software in its European MP models to limit sound output to 100 dB. Although
15 still a dangerous level, this maximum output is significantly less than that found in American MP
16 models. Further, given these restrictions placed on listening devices in other countries in the past,
17 and the significant consequences of high sound exposure, Apple knowingly continues to market
18 and distribute MPs with dangerous sound capabilities.

19 40. Mead Killion, president and chief executive of Etymotic Research Inc., a company
20 that designs hearing products, notes in the Tribune that:

21 A personal music player can probably put out as much as 110 to 115
22 decibels, which certainly will affect one's hearing. There is no
23 simple solution to this problem, and it's frustrating because there
exists a lot of misinformation about safe sound levels.

24 41. In April, 2005, Audiology Today reported a study of typical use of personal stereo
25 systems. The purpose of the survey was to determine when a person would achieve a 100% noise
26 dose, beyond which level a person can sustain noise-induced hearing loss, while using these
27 personal stereo systems. The study of various personal stereo systems found that the ear bud
28 headphones sold by Apple, and at issue in this litigation, put listeners at risk far faster than other

1 forms of listening devices. The authors recommend that consumers using these type of earphones
2 limit their listening time at “level 6” to a specified amount of time. Because of the defective design
3 of the MPs with ear buds, the lack of adequate warnings, and the lack of full and accurate
4 disclosures from Apple, consumers cannot possibly know what “level 6” is or the appropriate
5 amount of time to which they can be exposed to music at that level. As a result, millions of
6 consumers using Apple MPs may listen to their devices at unsafe levels.

7 42. Apple’s MPs do not contain a warning of any sort on the body of the device that
8 advises of the level at which hearing loss may occur. Further, Apple does not inform its customers
9 of the maximum dBA level that its MPs reach or how long a consumer can safely listen to its MP at
10 a certain level. This is important since noise-induced hearing loss is more likely to occur with
11 smaller increases in dBA at higher volumes, and since increases in sound are measured
12 exponentially. It is not the case that 100 dBA is twice as loud as 50 dBA, or that 100 dBA is only
13 20% louder than 80 dBA. As a result of Apple’s failure to warn, listeners have no basis on which
14 to adjust their listening patterns or to make appropriate choices. Also, because the batteries for the
15 MPs now last longer and are rechargeable, the length of continued use has significantly increased.
16 In fact, the typical battery life ranges between 12 and 14 hours, despite that hearing loss at even a
17 modest level can cause hearing loss within a matter of minutes or hours.

18 43. Compounding this problem is the MPs capability to store and play tens of thousands
19 of songs, giving the listener the ability to listen to seemingly endless music without any rest, and
20 without giving ears a chance to recover. Also, because the sound is digital, listeners can crank up
21 the volume louder without distortion typical in older technologies.

22 44. Apple did initially provide an inconspicuous general warning buried in the on-line
23 user’s manual for its iPod, which reads:

24 Avoid Hearing Damage

25 Warning: Permanent hearing loss may occur if earphones or
26 headphones are used at high volume. You can adapt over time to a
27 higher volume of sound, which may sound normal but can be
28 damaging to your hearing. Set your iPod’s volume to a safe level
before that happens. If you experience ringing in your ears, reduce
the volume or discontinue use of your iPod.

1 45. This warning does not specifically mention noise-induced hearing loss, nor what
2 may cause it, and does not advise the listener what is a “high volume” or a “safe level.” Further,
3 this warning is not prominently displayed, and is inadequate, especially given the significant
4 consequences of noise-induced hearing loss. In addition, there are no guidelines addressing the
5 exposure limits when using the product in various environments, such as on an airplane or subway
6 where there are other noises competing with the music produced by the MPs. Warnings should be
7 placed directly on the MP, the packaging, and the advertising materials in order to provide
8 meaningful notice to consumers about the serious risk of noise-induced hearing loss, including
9 notice about proper dBA levels.

10 46. Soon after the Original Complaint was filed, Apple took steps to satisfy some of the
11 requests for relief made by Plaintiffs. In tiny print Apple tells users to “Listen Responsibly.” It
12 then directs users to a website: www.Apple.com/support/manuals/ipod. If a user downloads there
13 is a warning but the warning does not adequately describe what volume levels or duration many
14 result in impact.

15 47. These actions, while a small step in the right direction, are still insufficient to
16 correct the defects. Specifically, Apple’s efforts are insufficient in the following, non-exclusive
17 ways:

- 18 a. The software does not work for all iPods, only the newest generations;
- 19 b. The warnings are not sufficient in that they have not been distributed to all
20 iPod consumers, they do not adequately warn of the potential for and means of reducing
21 noise-induced hearing loss, and there is no provision that the warnings will be included with all
22 future iPods in the packing material or otherwise;
- 23 c. Apple has not provided full and accurate disclosures that educate existing
24 owners about decibel output, nor has it provided a mechanism that allows the user to quantify
25 decibel levels;
- 26 d. Users are required to obtain knowledge about the volume control software
27 and then take affirmative steps to make use of the software; and

1 e. The ear bud headphones do not provide noise-reduction, noise-isolation, or
2 noise-cancellation safety features.

3 48. Even with the improved warnings, Apple provides no guidance on what maximum
4 level a consumer can safely set the iPod or how long someone could listen to their iPod at that
5 level.

6 49. Whether a sound is damaging depends on both the level of the sound and how long
7 the sound is heard. To properly set the level, then, a listener would have to know how many dBA's
8 were being produced at a given level. Further, after the level had been set, a listener would need to
9 know how long you can safely listen to that level in one day. According to national standards by
10 OSHA, a sound at 85 dBA can be safely heard for eight (8) hours but there is no information at
11 what level that is on an iPod. Upon information and belief, 85 dBA is just below the 60% mark on
12 the iPod Nano volume control and indications are that it will be at an even lower setting on larger
13 and more powerful iPods. Upon information and belief, a volume setting of 80% on the iPod Nano
14 produces a 98 dBA level, producing a safe listening duration of 23 minutes. Full volume on the
15 iPod Nano at 111 dBA allows for one minute of safe listening. None of this information is
16 disclosed by Apple to the consumer. Further, on the Nano, there is no percentage gauge only a
17 linear volume bar graph so, even if the consumer knew about this information from an independent
18 source, the consumer would have to guess what is actually the appropriate percentage.

19 50. The software upgrade is also inadequate because it does not ask whether the person
20 is listening with insert earphones or ear buds. Acoustic measurements indicate that levels are
21 approximately 7 dB higher at the eardrum with certain types of earphones. This means that for the
22 same volume setting, insert earphones cut the safe listening time by four. The software does not
23 tell consumers that limits should be set lower when the ear buds are used.

24 51. Further, the MPs themselves do not have a digital meter that advises the listener of
25 the dB listening level, nor do they possess any special feature to dilute the sound entering the ear
26 canal.

1 52. Right now, the upgrade and warnings are like being told not to drive a car beyond
2 the speed limit but not being given any information on what the speed limit actually is, how fast the
3 car will go, or being given a speedometer to make an informed determination.

4 53. The warning is made even more ineffective given Apple's knowledge and tacit
5 encouragement of MP users to listen to their MPs at unsafe levels. In its on-line tutorial, Apple
6 entitled its introduction "Crank up the Tunes" and a lesson section as "Bring in the Noise!" Such
7 statements and encouragements obviate any warning on unsafe noise levels.

8 54. Upon information and belief, before the sale of iPods, Apple performed testing to
9 determine the maximum sound output of its MPs, and Apple has on its staff trained experts
10 knowledgeable about safe listening levels and times. Alternatively, Apple began selling iPods
11 without performing such testing and did not consider that its MPs could output sound at unsafe
12 levels.

13 **E. Apple Has Known of the Risk Imposed by Use of Its Products**

14 55. Apple has known for years its MPs pose a serious risk of hearing loss when used for
15 their ordinary purpose. On June 7, 2005, Apple filed United States Patent Application
16 20070129828, entitled: *Portable audio device providing automated control of audio volume*
17 *parameters for hearing protection*. Therein, Apple admits the danger posed by its MPs and ear
18 buds.

19 56. In describing the purpose of the patent, Apple stated:

20 Portable media players are becoming pervasive, particularly among
21 relatively younger people. ***An unintended side effect of using such***
22 ***players is the damaging effect on the users' hearing.*** The damaging
23 effect on the users' hearing may be exacerbated by new manners of
 use (all day use, versus for limited time periods such as during
 jogging) and, perhaps, by the configuration of the headphones (in the
 ear).

24 Furthermore, ***since the damaging effect on users' hearing is both***
25 ***gradual and cumulative, even those users who are concerned about***
26 ***hearing loss may not behave with respect to their portable media***
 players in a manner that would limit or minimize such damaging
 hearing effects.

1 United States Patent Application 20070129828, *Portable audio device providing automated*
2 *control of audio volume parameters for hearing protection*, Lee, Michael M.; *et al.*, June 7, 2007.

3 57. Since the Original Complaint was filed, the Apple iPod and its use in real-life
4 situations has been the subject of numerous scientific studies by experts in the field of audiology
5 whose findings independently confirm the allegations of the Plaintiffs' claims.

6 58. In one study, the experts measured the output levels of portable music players,
7 including the Apple iPod, the Apple iPod Nano, and the Apple iPod Mini, using several different
8 kinds of headphones (in-the-ear, ear buds, and over-the ear). "Sound Output Levels of the iPod
9 and Other MP3 Players: Is There Potential Risk to Hearing?" Cory D. F. Portnuff and Brian J.
10 Fligor, Sc. D.

11 59. Those researchers found that based on the sound outputs of those MPs, typical
12 individuals can safely listen to their iPods using stock earphones for a total of 1.2 hours a day if the
13 volume is at 80% of maximum level, but for only 18 minutes if the volume is set at 90%. Listening
14 to an iPod at full volume is not recommended for more than five (5) minutes per day.

15 60. Importantly, this study found that "On average, output levels of ear bud style
16 earphones are 5.5 decibels higher than earphones that sit on top of the ears (supra-aural
17 earphones)." Thus, listening time is significantly cut when using stock earphones.

18 61. The researchers also made the common-sense point that "As technology improves,
19 with greater music storage and longer battery life, it is possible that people will choose to listen for
20 long periods of time. Users of MP3 players must be aware of their volume levels, and the
21 maximum amount of time they can listen at their chosen volume without risking hearing loss."

22 62. The only way consumers can reasonably obtain such information is from MP
23 manufacturers, like Apple. Apple refuses to provide consumers with this essential information or it
24 has sold these MPs without appropriate testing and, hence, does not have the information to share
25 with consumers.

26 63. Another problem is the design of the ear buds themselves, in light of how they sit in
27 the ear, the amount of sound actually output, and the lack of any sound isolation.

1 64. Packaged with the MPs, the consumer may either use the stock ear buds or expend
2 additional cost to purchase other earphones. Thus, a consumer is likely to simply use the
3 earphones provided with the MPs, especially after spending up to \$300 on the MP itself.

4 65. “Does Earphone Type Affect Risk for Recreational Noise Induced Hearing Loss?”
5 by Brian J. Fligor, Sc.D., Clarithromycin-A and Terri E. Ives, Sc.D., Au. D., FAAA, CCC-A also
6 describes how loud people listened to their MPs using different earphones and how real-life
7 background noise affected listening behavior.

8 66. The Fligor study indicated that “when subjects listened in a noisy environment of a
9 simulated airplane cabin (using actual airplane cabin noise recorded in coach class), striking
10 differences were seen in the average chosen listening levels.” The study showed “the level of
11 background noise had a large impact on chosen listening levels, and that a large number of people
12 who listen at benign levels in quiet set the volume control to riskier levels in the nosier conditions,
13 like the airplane cabin environment. This riskier behavior was ameliorated, though, when sound
14 isolated earphones were used instead of earphones that did not block out background noise.”

15 67. Apple was and is aware of numerous reports citing medical research and consumer
16 habits are revealing the danger to young persons’ hearing as a result of noise-induced hearing loss
17 caused by personal music players, including Apple MPs. For example one Article notes:

18 If you don’t have one already, there may be one waiting for you
19 under the Christmas tree. We’re talking about portable music
20 players, like the iPod or Microsoft Zune.

21 But before you turn them on, or give one to your kids – you should
22 know the risk.

23 “We have actually clocked an iPod listening to Led Zeppelin’s ‘Rock
24 and Roll’ at 115 decibels on average,” says Andy Vermiglio, senior
25 researcher at the House Ear Institute.

26 How loud is 115 decibels or dba?

27 The sound of a jackhammer is around 120 decibels.

28 ***Consider this: it is illegal to expose employees to 115 decibels in
the workplace for more than 28 seconds without ear protection.***
And yet, studies show personal stereos routinely pump out that level
of sound and people listen to it – a lot.

1 “My mom tells me all the time don’t listen to my iPod, but I do it
2 anyways, even though I know it damages my ear. But I still do it,”
3 says Sandra Iryami, a Los Angeles high school student.

4 She’s not alone. Studies have found plenty of kids are beginning to
5 show the side effects of incessant exposure to excessive sound and
6 nearly 30 million Americans have some degree of hearing loss. A
7 third of that is noise-induced.

8 A recent study of college students in North Carolina found one-third
9 showed evidence of high frequency hearing loss. In Australia,
10 researchers found 25 percent of students played their music at
11 damaging levels.

12 In the U.S., 50 percent of high school students report symptoms of
13 hearing loss. A study last year at Harvard Medical School concluded
14 listening to personal stereos for more than three minutes puts users at
15 risk for hearing loss.

16 ***“The scary part of being exposed to devices like this is that the type
17 of hearing loss can become permanent,” says Vermiglio. “And it
18 can become a type of hearing loss that effects not just their ability
19 to understand music, but to understand communication in the
20 world.”²***

21 68. Another Article notes that:

22 The Royal National Institute for Deaf People (RNID) has led calls
23 for restrained listening and claimed that more than four million
24 young people aged between 16 and 24 years old are at risk of hearing
25 damage from listening to loud music.

26 Its research showed more than half of that age group were listening
27 to digital music players for more than an hour a day. Twenty per
28 cent notch up more than 21 hours a week.

29 RNID chief executive Dr John Low said: ‘If young people don’t
30 heed our warnings about safer listening, they could end up facing
31 premature hearing damage.

32 ‘If you regularly plug in, it is only too easy to clock up noise doses
33 that could damage your hearing for ever.’

34 Last year, researchers in the U.S. claimed that listening to an iPod on
35 full blast for just five minutes a day could cause irrevocable hearing
36 damage.³

37 69. Another Article notes:

38 ² William La Jeunesse, *Popular Portable Music Players Could Lead to Hearing Loss*,
39 FOXNews, Dec. 19, 2007, <http://www.foxnews.com/story/0,2933,317505,00.html>.

40 ³ Paul Sims, *The iPod That Won’t Let You Harm Your Hearing*, DAILY MAIL (London),
41 Dec. 24, 2007.

1 The Apple iPod, whose incarnations account for more than 70
2 percent of the market for portable digital music play-ers (more than
3 100 million sold), does have a setting that can limit noise to a
4 particular output level, but it can be changed via normal settings.
5 And Apple's Web site is curiously vague about figuring out just how
6 loud is too loud.

7 . . .

8 Yet another study, by Australia's Hearing Cooperative Research
9 Centre, showed that a third of teens routinely listen to music at 85
10 decibels or more.⁴

11 70. Josh Harris, in an article entitled *Some Youths Deaf to Danger of iPods Ear Buds*,
12 Portage Daily Graphic (Manitoba), Aug. 21, 2007, noted:

13 Studies conducted by American Speech-Language-Hearing
14 Association have pointed to an increase in hearing loss in today's
15 youth, from 13.2 million Americans age 3 and older in 1971, to 30
16 million today. Of the 30 million cases, one-third are said to be
17 people with noise-induced hearing loss. Although there are many
18 factors that can contribute to hearing loss, iPods, along with other
19 MP3 players, allow users to crank the volume of their music above
20 90 decibels, which can be dangerous and cause permanent damage to
21 a person's hearing.

22 71. Dudley Price, in an article *Hearing Aid Industry Loves That Rock 'N' Roll; Loud*
23 *Music, Use of Earphones Contributing To Demand For Devices*, Charlotte Observer, July 29,
24 2007, wrote:

25 Boomers are "the first generation where rock 'n' roll has had a
26 negative impact on hearing," said Sergei Kochkin, executive director
27 of the Better Hearing Institute.

28 "But an iPod is louder than a stereo. They're probably in more
danger now than when you were a child." Already, one in 14 of
those age 29 to 40 have hearing loss, according to the Better Hearing
Institute.

72. David Levin, *Turn Down the Volume to Protect Hearing*, The Daily Journal,
May 24, 2007 wrote:

But one of the most frequent causes is noise induced hearing loss
(exposure to loud music). With the advent of MP3 players and
iPods, the risk of getting tinnitus greatly increases. Turning up the
volume on an MP3 player or iPod will greatly increase the chance
that somewhere down the road you may get tinnitus. This probably

⁴ Mike Himowitz, *Turning Down the Volume; Portable Music Players Are Setting Up Today's
Teens For Future Hearing Problems*, The Baltimore Sun, Sept. 13, 2007.

1 won't happen over-night. You may wake up one morning with a
2 buzzing or ringing in your ears and wondered what happened.

3 73. Jules Sowder, *Use Of Personal Audio Technology Fueling Nation's Hearing-Loss*
4 *Epidemic, Says Hollins Communications Research Institute's Executive Director*, Comtex News
5 Network, May 1, 2007 wrote:

6 The surge in the use of iPods and other MP3 players, supported by
7 persuasive advertising slogans including "live life loud," is fueling
8 the nation's hearing-loss epidemic, according to Dr. Ronald Webster,
9 executive director of the Hollins Communications Research Institute
10 (HCRI) in Roanoke, Virginia.

11 ...

12 The Better Hearing Institute (BHI) cites that more than 30 million
13 Americans have some form of hearing loss, with more than one-third
14 or 10 million attributed to excessive sound exposure. Audiologists
15 across the country are seeing a swell in hearing loss cases and are
16 treating increasing numbers of young adults and teens for noise-
17 induced hearing damage.

18 A recent study commissioned by the American Speech-Language-
19 Hearing-Association (ASHA) revealed that more than half of high
20 school students surveyed who used personal music players reported
21 at least one symptom of irreversible hearing loss.

22 ...

23 "People don't think about taking care of their ears because there are
24 no overt or alarming symptoms that create a sense of urgency.
25 Noise-induced hearing damage occurs gradually over time before
26 people notice they are having hearing difficulties," Dr. Webster
27 explained.

28 "More awareness and education is essential, and electronics
companies need to step up and do more to protect their customers'
hearing health. It's not just a matter of adding volume control
features, like those available with iPods," Dr. Webster advises.
"Preventing hearing damage requires giving consumers information
and tools to understand risks and determine appropriate, safe
listening levels."

74. David Sharos, *MP3 Player Plugged In, Hearing on the Way Out; In-ear*
Headphones, Longer Listening Time Creating Problem, Chicago Tribune, Apr. 23, 2007 wrote:

At blame, say audiologists, are the tiny, dime-size earbuds favored
by music listeners. Unlike the earmuff-style headphones that came
with Walkmans, earbuds are placed directly into the ear, boosting the
sound signal by as much as six to nine decibels. That's the
difference between the sound made by a vacuum cleaner and the

1 sound of a motorcycle engine, said Dean Garstecki, a Northwestern
2 University audiologist and professor who has studied the issue.

3 “We’re seeing the kind of hearing loss in younger people typically
4 found in aging adults. Unfortunately, the earbuds preferred by music
5 listeners are even more likely to cause hearing loss than the muff-
6 type earphones that were associ-ated with the older devices,”
7 Garstecki said in a university release.

8 75. Toni Hoh, *Protect Your Hearing and Turn Down the Volume of Your Life*, The Post
9 Crescent, Mar. 24, 2007:

10 Our overall hearing health is “certainly worse than 50 years ago,”
11 said Dr. Juliette Sterkens, audiologist at Fox Valley Hearing Center
12 of Neenah and Oshkosh

13 Experts agree that today’s personal music players are culprits when it
14 comes to noise-induced hearing loss, especially when users play
15 them loudly.

16 “You know you’re overdoing it when somebody sits at 2- or 3-foot
17 distance and asks you something and you can’t hear them. At that
18 point, you ought to be able to hear that someone else is talking.
19 Generally that means keeping the volume below 50 percent,”
20 Sterkens said.

21 76. Rashid Grier, *iPod Listeners at Risk for Hearing Loss, U. Connecticut Study Says*,
22 The Daily Campus, Mar. 23, 2007:

23 According to a University of Connecticut Advance article by Carolyn
24 Pennington, the iPod generation has a rate of impaired hearing 2 1/2
25 times that of their parents and grandparents.

26 77. Lindsey Tassin, *iPods Add to Hearing Loss, Study Shows*, Independent Florida
27 Alligator, Mar. 20, 2007:

28 Due to loud music and noisy environments, young people have a rate
of impaired hearing 2.5 times that of their parents and grandparents,
according to a study by Stanford University. The study added that in
2050, as many as 50 million Americans could be hearing impaired.

Scott Griffiths, the director of the University of Florida’s Doctor of
Audiology Program, said a lot of damage can be done to the ears
before any problems are noticed. Hearing loss symptoms include
ringing or any noise from within the ear, said Griffiths, who has
studied hearing and audiology for 21 years.

A primary cause of such damage is the increasing popularity of MP3
players, he said. Damage can result from the amount of time the
MP3 player is used as much as its volume. The longer an audio
device is listened to, the lower the volume should be, he said.

1 78. *Portable Music Players Can Cause Hearing Problems*, Financial Times
2 Information, Mar. 8, 2007:

3 According to Wu Hao, a doctor at Shanghai Children’s Medical
4 Center, hearing damage among teenagers was mainly caused by
5 drugs 20 years ago. Hearing loss from over-exposure to noise
6 happened mainly among workers in very noisy environments.
7 “Hearing loss from noise among teenagers was hardly seen at that
8 time,” he said. “Now it has become the most important reason for
9 hearing loss among school students, while drug-caused hearing
10 damage is rarely seen now, as people learn more about side effects of
11 some medicines.” Chi Fanglu, professor at the Ear Nose and Throat
12 Hospital of Fudan University warned that listening to portable music
13 players for long hours could result in more youngsters suffering
14 hearing loss. “I could hardly do without my Ipod when I bought it,”
15 Wu Manqiao, a 24-year-old woman, said. Exposed to noise above 90
16 decibels for two weeks consecutively could result in total deafness,
17 Wang Zhengmin, another professor from the same hospital warned.
18 He said that young people who wear earplugs listening to MP3s or
19 other portable music players face the risk of total deafness 30 years
20 earlier than their parents’ generation.

21 79. Darin Fenger, *Mp3 Players Raise Concerns About Effects On Youths’ Hearing*,
22 KRTBN Knight-Ridder Tribune Business News - The Sun, Feb. 27, 2007.

23 Pleas for kids to turn down their music really are falling on deaf ears,
24 says a local audiology firm that blames the popularity of MP3
25 players for causing increasingly early damage to young ears.

26 Audibility Hearing Care recently screened the hearing of an entire
27 elementary school and was shocked to find that significant hearing
28 loss, instead of being slight, turned out to be pretty serious.

 Out of 358 students at Harvest Preparatory Academy, 45 students or
12.5 percent were found to be suffering from “significant hearing
loss.”

“They all did what we would call: fail the test,” said Lin Hamill,
health care educator for Audibility Hearing Care. “This is terrible.
This means that there is speech these kids are unable to discern, that
they’re probably having a hard time listening in class.”

Hamill said she was shocked to find hearing loss in such young
students, who usually only have hearing loss due to diseases that are
generally preventable today.

 80. Kamille Bostick, *Listen Up!; Loud Music Puts Teens At Risk For Hearing Loss*, The
Augusta Chronicle, Feb. 6, 2007:

“I just like to listen to my music loud,” she said. “I never asked
myself if this was too loud.”

1 Maybe she should. With the popularity of personal, portable music
2 players and the tendency for teens to like music loud, there's a real
risk of hearing damage and loss.

3 In a poll conducted for the American Speech-Language-Hearing
4 Association, 17 percent of high school students (and 12 percent of
5 students (21 percent of adults) reported having to say "What?" or
6 "Huh?" during normal conversations. The National Institutes of
Health estimates that 22 million Americans ages 20-69 have suffered
hearing damage from loud noise.

7 81. *Listen Up! MP3 Players Are Hard On Hearing*, Daily Mail (London), Jan. 30, 2007:

8 Keith Ross, a hearing aid audiologist with Hidden Hearing, a
9 network of hearing clinics in Ireland, said: 'Young people need to be
10 aware of their hearing and protect their ears from loud or
11 unnecessary noise. Many people who use iPods or MP3 players for
long periods of time are frighteningly unaware of the fact that loud
noise can damage their hearing,' he said.

12 82. Angie Toole, *Can You Hear Me NOW?: Maybe Not, If You've Had The Volume In
13 Your Ipod Cranked Up*, Northwest Florida Daily News, Jan. 29, 2007:

14 "Part of the problem is with the ear buds that come with these
15 players," Bilovecky said. "They fit down in the ear, so there is less
16 space between the speaker and your ear. That increases the impact
17 that a high decibel number can have on the ear, because the waves
compress." Local otolaryngologist Dr. James Connolly describes it
this way: The sound pressure is at a higher rate for the devices that
insert into the ear canal than for old-school options like headphones,
which rest on the outside of the ear.

18 And, he warns, kids are actually able to bounce back easier than
19 older adults from the damage an ear bud can do.

20 "The difference is, most kids aren't savvy enough to turn (the music)
21 down if it makes their ears ring," he said. "Kids just aren't as good
at articulating if there's a problem with their hearing.

22 "It takes you some time in life to think about your hearing as
important, and kids just blow it off."

23 83. Marla Jo Fisher, *Experts Worry About Harm To Hearing From MP3 Players;
24 Experts Worry MP3 Players May Harm Hearing*, Bradenton Herald, Jan. 13, 2007:

25 About two years ago, University of California, Irvine, professor Fan-
26 Gang Zeng started noticing something alarming among his students:
unexplained hearing loss.

27 In each of his biomedical engineering classes, Zeng said, he's found
28 several students with the type of damaged hearing you normally
wouldn't see until 50 or 60 years of age.

1 It's been two years since the phenomenon began. And that's about
2 how long it's been since the MP3 player became a campus staple for
college students nationwide.

3 Coincidence? He doesn't think so.

4 "We can't say for sure it's from MP3 players, but I don't know what
5 else has changed," said Zeng, a researcher specializing in hearing
loss. "The climate and the food are the same."

6 Another UCI hearing expert, Dr. Hamid Djalilian, is also concerned
7 about the effects of MP3 players, saying parents are bringing in more
and more teenagers complaining of ringing in their ears.

8 . . .

9 Experts say the problems are probably caused by the use of "ear
10 buds" that sit inside the ear, coupled with the increased length of
listening time available, compared to previous portable music
11 players.

12 Most MP3 players come with stock ear buds, which unlike
headphones that sit outside the ear, fit snugly in the ear canal and do
13 not allow any sound to escape.

14 Because the sound is digital, listeners can crank it up louder without
the distortion faced by previous technologies.

15 One of Apple's initial slogans for the iPod was "Play It Loud."

16 84. Camilla A. Herrera, *Now Hear This: Loud Music on MP3 Players Can Cause*

17 *Lasting Damage*, The Stamford Advocate, Sept. 26, 2006:

18 "There is more sound pressure than people are aware of," says Bruce
19 Klenoff, director of the Oto-Rhino-Laryngology, Ear, Nose & Throat
Center at the Tully Health Center in Stamford. The sound pressure is
20 intensified by the insertion of earphones into the ear canal, close to
the ear drum. "The distance between sound and your inner ear
21 exponentially increases the volume. Distance is key."

22 . . .

23 And unlike the Walkmans and CD players of yore, with earphones
that rested on the ear, there is no break to change a cassette or CD.

24 "If you are doing something like running on a treadmill or mowing a
25 lawn or riding a motorcycle, you turn (the volume) up even louder to
drown out the background noise," says Klenoff. "You have no idea
26 that the music is too loud because there is no more background
noise."

1 85. Iain Ilich, *Some Sound Advice: Sure You Love Your iPod, Right Down To Its Little,*
2 *White Earbuds. But How You Listen To It Now May Affect How Well You'll Be Able To Hear It In*
3 *The Future*, National Post, June 19, 2006:

4 While most listeners might not take to the sky every week, they'll
5 likely turn up the volume on the daily bus ride to help block out
6 engine and traffic noise. Even with only a half-hour commute to and
7 from work or school, the total weekly exposure time to overly loud
8 sound levels can be extremely detrimental.

9 “Noise is accumulated,” says Dr. Towers. “Hearing loss from noise
10 happens over time, so just because we’re not seeing it widespread at
11 the moment doesn’t mean we won’t in the future. The whole thrust of
12 the PR about this is to prevent it, because once it’s happened, it’s too
13 late. Give it five years or 10 years, we could see it a lot more
14 prevalent.”

15 ...

16 Lab tests conducted by the American Speech-Language-Hearing
17 Association have shown that even at the halfway volume level on an
18 iPod, the device can generate roughly 100 decibels, which is 15 more
19 decibels than the safe maximum. At the one-quarter volume mark, an
20 acceptable level of between 80 to 83 decibels was recorded.

21 86. Frank Nelson, *‘Louder And Longer’ Becomes A Recipe For Hearing Loss*, Santa
22 *Barbara News-Press*, Apr. 1, 2006:

23 Last month, *a study commissioned by the American Speech-*
24 *Language-Hearing Association revealed that 40 percent of high*
25 *school students set the volume of their MP3 players to a level that*
26 *puts them at risk of hearing loss.*

27 The association says an iPod or MP3 player played at the highest
28 volume is comparable to a jet plane taking off, with both at nearly
29 120 decibels.

30 Audiologists say that could mean a heavy user in high school could
31 suffer hearing loss by age 25.

32 ...

33 “Louder and longer is definitely not the way to use these products,”
34 says Brenda Lonsbury-Martin, the American Speech-Language-
35 Hearing Association’s chief staff officer for science and research.
36 “Eventually, that becomes a recipe for noise-induced hearing loss,
37 which is permanent.”

1 87. Frank James, in *He Can't Hear You Now*, Chicago Tribune, Mar. 25, 2006 reported
2 on the concerns of experts on the impact of Apple like products on young people:

3 But the leaps in technology that are allowing commuters on a bus or
4 kids walking to high school to feel like they're at a deafening concert
5 are also channeling ever higher volumes of music more directly, and
6 longer, onto people's ear-drums.

7 Hearing experts who called a news conference here Tuesday to voice
8 their fears didn't use the words "crisis" or "epidemic," but it was
9 clear they were worried about the results of a survey conducted by
10 the polling firm Zogby International.

11 Twenty-eight percent of high school students questioned said they
12 had to turn up the volume on a TV or radio to hear it better, for
13 example, and 29 percent of the teenagers said they often found
14 themselves saying, "What?" and "Huh?" during normal conversation.

15 Though that may sound like ordinary behavior for some teenagers,
16 audiologists are taking it seriously, especially since the adult
17 percentages weren't much lower.

18 "The results should give pause to anyone who's concerned about the
19 nation's hearing health," said Alex Johnson, president of the
20 American Speech-Language Hearing Association, based in
21 Rockville, Md.

22 88. Ron Krueger, *Turn it Down; Popular Earphones Could Lead To Early Hearing*
23 *Loss For Some, Experts Warn*, The Flint Journal, Mar. 2, 2006:

24 Digital technology makes it possible to play music in these devices
25 without the signal distortion produced by, say, a transistor radio.

26 The other issue is that the newest iPods are capable of holding up to
27 15,000 songs and being able to play for up to 20 hours on a fully
28 charged battery.

29 "***If you use them at high volume for eight hours there's no doubt***
30 ***you could have damage,***" says ***Flint Township ear, nose and throat***
31 ***specialist Bobby Mukkamala.*** "There's a point where even resistant
32 ears will break down."

33 89. Kevin Joy, *Turn Down the Volume!; Blasting Tunes Through Headphones Can*
34 *Damage Hearing, Experts Say*, The Columbus Dispatch, Mar. 1, 2006:

35 Still, many young people are unaware of the risks. Only 8 percent of
36 the 10,000 people who responded to an MTV survey last year said
37 they considered hearing loss from loud music "a very big problem."

38 An informal survey of central Ohio teens and young people revealed
39 similar attitudes.

1 **F. The Ear Bud Itself is Not Properly Designed**

2 90. The Apple iPod ear bud was not manufactured to block out background noise.

3 91. The study found that 80% of subjects using the iPod ear bud earphones in real-life
4 situations, like in an airplane cabin, exceeded the recognized safe listening level of 85 dBA and
5 that the stock iPod earphones “provided essentially no sound isolation.”

6 92. Thus, Apple iPod listeners were required to crank up the volume to dangerous levels
7 to actually hear the music in a real-life situation whereas listeners using sound isolating earphones
8 were able to listen to music at a safe level.

9 93. The ear buds are also inherently dangerous because they allow dangerously high
10 volumes to reach the ear instead of limiting that output regardless of the volume set on the MP.

11 94. In addition to the lack of sound isolation and the lack of anything to limit the
12 volume received from the MP, the ear buds are inherently dangerous because of their size and
13 placement. The ear buds are small and are placed in the listener’s concha, close to the listener’s ear
14 canal and cochlea. The close proximity to the ear canal directly impacts the amount of hearing loss
15 caused by the MPs, simply because there is less chance of dilution of the sound. Furthermore, the
16 fact that these ear buds are placed in the concha causes there to be a high resonance peak. These
17 problems are even more serious for children because their ear canals are shorter and not fully
18 developed.

19 95. Apple hasn’t changed the design of its stock ear buds, nor has Apple advised the
20 public about the increased dangers posed by the use of the stock ear buds.

21 96. Had Plaintiffs, and members of the Class and Subclass they seek to represent,
22 known of the defective characteristics of the MPs, and their components, they would not have
23 purchased them or would have purchased them at a lesser price.

24 97. Similarly, Plaintiffs, and members of the Class and Subclass they seek to represent,
25 are now forced either to purchase safe headphones, to sacrifice part of the use and enjoyment of
26 their MP purchase, and/or to suffer heightened risks of hearing loss from these products. Had they
27 known of the need to purchase additional headphones, and known of the defective characteristics

1 of the MPs, they would not have purchased the MPs or would have purchased them at a lesser
2 price.

3 **V. CLASS ACTION ALLEGATIONS**

4 98. Plaintiffs bring this Class Action pursuant to Federal Rule of Civil Procedure
5 23(b)(2) and (3) on behalf of: all persons and entities in the United States who purchased a
6 portable, digital music player manufactured by Defendant Apple, Inc, since four years prior to the
7 filing of the Original Complaint.

8 99. Plaintiff Waggoner also brings this Class Action pursuant to Federal Rule of Civil
9 Procedure 23(b)(2) and (3) on behalf of a Subclass composed of: all persons and entities residing
10 in the State of California who purchased in California a portable digital music player manufactured
11 by Defendant Apple, Inc, since four years prior to the filing of the Original Complaint.

12 100. Plaintiffs do not assert claims for personal injury in this action on behalf of the
13 Class or Subclass members, nor does this action otherwise seek recovery of personal injury
14 damages. Said definitions may be further defined by additional pleadings, evidentiary hearings, a
15 class certification hearing, and orders of this Court.

16 101. Class and Subclass members are so numerous that their individual joinder is
17 impracticable. In fact, Apple, which has roughly 70 percent of the worldwide share of MPs, has
18 sold more than 100 million iPods since 2001. The precise number of Class and Subclass members
19 is unknown to Plaintiffs, but it is clear that the number greatly exceeds the number that makes
20 joinder impracticable.

21 102. There are questions of law and fact common to the Class and Subclass which
22 predominate over any individual issues. Some common questions of law and fact include, without
23 limitation:

24 (a) Whether Apple's MPs were defectively designed in that they are not as safe
25 and fit as ordinary consumers would expect, or in that they pose an excessive risk of otherwise
26 preventable hearing loss;

1 (b) Whether the iPod ear bud headphones provided with Apple MPs were
2 defectively designed in that they are not as safe and fit as ordinary consumers would expect, or in
3 that they pose an excessive risk of otherwise preventable hearing loss;

4 (c) Whether Defendant knew or should have known that the MPs were
5 defectively designed;

6 (d) Whether Defendant failed to accurately and sufficiently warn of the
7 defective design of the MPs and their components;

8 (e) Whether Defendant knowingly concealed the defective design of the MPs or
9 the heightened risk of hearing loss associated with iPod usage;

10 (f) Whether Defendant engaged in unfair business practices by failing or
11 refusing to adequately warn consumers about the safety defects and health risks associated with its
12 MP products;

13 (g) Whether Defendant engaged in unlawful business practices by failing or
14 refusing to adequately warn consumers about the safety defects and health risks associated with its
15 MP products;

16 (h) Whether the alleged failure or refusal to adequately warn consumers about
17 the safety defects and health risks associated with Apple's MP products constitutes unfair
18 competition under the UCL (CAL. BUS. & PROF. CODE §§ 17200, *et seq.*);

19 (i) Whether Defendant violated express or implied warranty statutes, and/or
20 breached any such warranty obligation;

21 (j) Whether Defendant should be ordered to notify all Class and Subclass
22 members of the safety defects and health risks associated with Apple MPs with ear bud
23 headphones; and

24 (k) The measure of restitution and/or damages available to putative consumer
25 Class members.

26 103. Defendant engaged in a common course of conduct giving rise to the legal rights
27 sought to be enforced by the Class and Subclass members. Similar or identical defective designs,
28

1 statutory violations, and defective products are involved. Individual questions, if any, pale by
2 comparison to the numerous common questions that predominate.

3 104. The damages sustained by the Class and Subclass members flow, in each instance,
4 from a common nucleus of operative facts: Defendant's misconduct. In each case, Defendant
5 designed, manufactured, supplied, marketed, advertised, and/or sold defective portable music
6 players, with defective accessories.

7 105. The Class and Subclass members have been damaged by Defendant's misconduct.
8 The Class and Subclass members have purchased defectively designed portable music players.
9 Many of the Class and Subclass members have been and will be required to purchase new
10 headphones to protect themselves from hearing loss. The Class and Subclass members would not
11 have purchased the MPs and/or paid as much had they been adequately warned about the product.

12 106. Plaintiffs' claims are typical of the claims of the other Class and Subclass members.
13 Plaintiffs purchased portable music players, manufactured by Defendant, that were defectively
14 designed and which included a set of ear bud headphones, which were similarly defectively
15 designed.

16 107. Plaintiffs will fairly and adequately protect the interests of the Class and Subclass.
17 Plaintiffs are familiar with the basic facts that form the basis of the Class and Subclass members'
18 claims. Plaintiffs' interests do not conflict with the interests of the other Class and Subclass
19 members that they seek to represent. Plaintiffs have retained counsel competent and experienced
20 in Class Action litigation and intends to prosecute this action vigorously. Plaintiffs' counsel has
21 successfully prosecuted complex class actions, including consumer protection class actions.
22 Plaintiffs and Plaintiffs' counsel will fairly and adequately protect the interests of the Class and
23 Subclass members.

24 108. Apple has acted or refused to act on grounds generally applicable to the Class and
25 Subclass members in its manufacturing, marketing, and selling of MPs.

26 109. The class action device is superior to other available means for the fair and efficient
27 adjudication of the claims of Plaintiffs and the Class and Subclass members. The relief sought per
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1 individual member of the Class and Subclass is small given the burden and expense of individual
2 prosecution of the potentially extensive litigation necessitated by the conduct of Defendant.
3 Furthermore, it would be virtually impossible for the Class and Subclass members to seek redress
4 on an individual basis. Even if the Class and Subclass members themselves could afford such
5 individual litigation, the court system could not.

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

13 111. Application of California law to a nationwide class is appropriate since Apple is
14 incorporated in California with its principal place of business in Cupertino, California, many Class
15 members reside in California, and core decisions at issue in this case were made at Apple's
16 headquarters in California. Moreover, in its terms and conditions, Apple routinely inserts
17 California choice of law clauses, thereby asserting the appropriateness of applying California law
18 uniformly to claims brought against Apple.

19 **VI. CAUSES OF ACTION**

20 **FIRST CAUSE OF ACTION**

21 **VIOLATIONS OF UNFAIR COMPETITION LAW**
22 **(BUS. AND PROF. CODE §§ 17200, *et seq.*)**
23 **(CLASS AGAINST DEFENDANT)**

24 112. All Plaintiffs re-allege and incorporate the foregoing paragraphs as if set forth
25 herein.

26 113. Defendant's actions, as complained herein, constitute unfair and unlawful business
27 practices committed in violation of the Unfair Competition Law, Bus. & Prof. Code §§ 17200,
28 *et seq.*

1 114. Defendant violated the “unfair” prong and the “unlawful” prong of § 17200 by
2 engaging in the following conduct:

3 a. Selling Apple MPs with ear buds that pose an unreasonable risk of hearing
4 loss when used for their ordinary purpose. iPod earphones cause permanent damage. Earphones
5 can boost sound signal by as much as 6 to 9 decibels. That’s about the difference between the
6 sound of a vacuum cleaner and a motorcycle. All it takes is an hour: Earbud headphones, the kind
7 that rest inside the ear, can lead to permanent damage after just an hour of high-volume music in
8 the 110-120 decibel range, equivalent to the noise level of a concert. Worse than walkmans: iPods
9 can store enough music to play for several days and have batteries that can last for more than 12
10 hours at a time. Such prolonged listening ups the risk of hearing impairment.

11 b. Designing defective MPs and ear buds, in that: (a) they fail to perform as
12 safely as ordinary consumers would expect under everyday listening conditions, and/or (b) the
13 inherent risk of noise-induced hearing loss from the existing design outweighs the benefits of the
14 design (if any). In particular, the design of these Apple products embodies an excessive risk of
15 otherwise preventable hearing loss.

16 c. Failing to adequately warn consumers of the significant risks associated with
17 noise-induced hearing loss created by the ordinary use of Apple MPs with ear buds. The Apple
18 MPs should warn users to:

- 19 • Restrict listening to an hour a day.
- 20 • Volume above 80 decibels is harmful. Experts suggest dialing down the
21 volume on iPods to “6” or lower.
- 22 • Switch from insert earphones to over-the-ear headphones.
- 23 • Rock and rap music are most dangerous, since they’re typically played at
24 a higher volume than jazz or classical music.

24 d. Choosing to sell its MP products without making adequate safety
25 modifications.

26 e. Violating Cal. Com. Code §§ 2313 and 2314, Cal. Civ. Code §§ 1790, *et*
27 *seq.*, and 15 U.S.C. §§ 2301, *et seq.*

1 f. Knowingly continuing to sell these products without (1) adequate warnings,
2 (2) limiting dBA levels on all iPods, as Apple was forced to do in Europe, and (3) providing
3 headphones that have commonly-available safety features to reduce the risk of noise-induced
4 hearing loss. This challenged business practice is immoral, unethical, oppressive, unscrupulous
5 and substantially injurious to consumers. It also constitutes an unfair business practice insofar as
6 the serious threat of hearing loss to consumers outweighs the utility of the challenged conduct.

7 g. Denying consumers the full benefit of the bargain in purchasing Apple's MP
8 products. As part of the purchase transaction, Apple agreed that the MP products would be safe
9 and fit for their ordinary use. As described above, the MP products are not, in fact, safe and fit for
10 their ordinary use. Moreover, Apple induces consumers to purchase iPods by promoting product
11 qualities, capabilities, benefits, and characteristics that purportedly enable consumers to listen to
12 music for hours anywhere they go. But in fact, consumers cannot safely listen to music on Apple
13 iPods with ear buds except for short periods of time at volumes far lower than ordinary consumers
14 would expect. Since there is no volume gauge and no disclosures to define when the volume is too
15 loud, consumers must choose between sacrificing the full use and enjoyment of their purchase and
16 safeguarding their hearing.

17 115. At the time of purchase, Plaintiffs were not aware iPods posed an unreasonable risk
18 of hearing loss when used for their ordinary purpose.

19 116. Had Apple made full and accurate disclosures regarding the specific risks of noise-
20 induced hearing loss from Apple MPs with ear buds, and had Apple disclosed its safety-related
21 design defects, Plaintiffs either would not have purchased the product or would have paid less
22 money for it. Consequently, Plaintiffs have suffered injury in fact and have lost money or property
23 as a result of Apple's unfair and unlawful business practices. Moreover, had Apple designed and
24 sold MPs that did not pose an unreasonable risk of hearing loss when used for their ordinary
25 purpose, Plaintiffs and the Class and Subclass members would not be required to purchase
26 additional headphones in order to listen to Defendant's MPs safely.

1 117. All of the conduct alleged herein occurs and continues to occur in Defendant's
2 business. Defendant's wrongful conduct is part of a pattern or generalized course of conduct
3 repeated on thousands of occasions daily.

4 118. Plaintiffs request that this Court enjoin Apple from engaging in business practices
5 that constitute unfair competition. Plaintiffs further request that this Court enter such orders or
6 judgments as may be necessary to restore to any person in interest any money which may have
7 been acquired by means of such unfair practices, as provided in Bus. & Prof. Code § 17203 and
8 Cal. Civ. Code § 3345, and for such other relief as set forth below.

9 **SECOND CAUSE OF ACTION**

10 **Breach of Express Warranties**
11 **(CAL. COM. CODE § 2313, § 2714)**
12 **(Class and Subclass Against Defendant)**

13 119. The preceding paragraphs of this Complaint are realleged and incorporated by
14 reference and asserted by all Plaintiffs on behalf of themselves and members of the Class.

15 120. Defendant expressly represented and warranted to Plaintiffs and members of the
16 Class and Subclass, by and through statements, descriptions, and/or affirmations of fact made by
17 Defendant or its authorized agents or sales representatives, orally and in writing on product
18 packaging and in product advertisements and marketing materials and other written materials
19 intended for the general public, that its MP products were fit for ordinary uses. For example,
20 Apple warrants its portable, digital music players against “[d]efects in materials and workmanship
21 in . . . new Products’ manufactured, sold or certified by Apple Computer, Inc. . . .” This express
22 warranty runs to every “first end-user purchaser.”

23 121. Said warranties are part of the basis of the bargain by which Plaintiffs and the Class
24 members purchased Apple MP products.

25 122. At the time it made such warranties, Apple knew its MPs and stock ear buds posed
26 an unreasonable risk of hearing loss when used for their ordinary purpose, despite warranting the
27 MP products as fit for such purposes.

1 among other things (i) a warranty that the MP products marketed, advertised, sold, and distributed
2 by Apple would be safe; and (ii) a warranty that the MP products would be fit for reasonably
3 foreseeable uses as ordinary consumers would expect.

4 129. Apple's actions, as complained of herein, breached its implied warranty because its
5 MP products pose an unreasonable risk of hearing loss when used for their ordinary purpose, in
6 violation of Cal. Com. Code § 2314.

7 130. Through the conduct alleged herein, Apple has also breached the implied warranty
8 of fitness for a particular purpose. The defectively designed MP products were not fit for the
9 particular purposes of listening to music for extended periods in busy environments. Apple knew
10 that Class and Subclass members were purchasing MP products for this particular purpose, and
11 indeed encouraged such use.

12 131. Plaintiffs and the Class and Subclass members have incurred damages as described
13 herein as a direct and proximate result of the breach and failure of Defendant to honor its implied
14 warranty in that Plaintiffs and the Class and Subclass members would not have purchased and/or
15 paid as much for their MP products had they known the truth about the design defect and health
16 risks associated with iPod usage. Plaintiffs and the Class members are entitled to recover damages
17 in accordance with Cal. Com. Code § 2714.

18 **FOURTH CAUSE OF ACTION**

19 **BREACH OF IMPLIED WARRANTY**

20 **(CAL. CIV. CODE §§ 1790 *et seq.*)**

21 **(Plaintiff Waggoner and California Subclass Against Defendant)**

22 132. Plaintiff Waggoner and members of the Subclass re-allege and incorporate the
23 foregoing paragraphs as if set forth herein.

24 133. Apple MPs are consumers goods as defined in Cal. Civ. Code § 1791.

25 134. Apple MPs have been sold with the implied warranty that they are fit for ordinary
26 purposes for which MPs are used, *i.e.*, listening to music and/or other audio programs in everyday
27 listening environments, such as while exercising or traveling on planes, buses, or trains, etc.

1 135. Apple MPs are not reasonably fit for their ordinary use, and fail to adequately warn
2 consumers of their danger of causing noise-induced hearing loss; iPods pose an unreasonable risk
3 of hearing loss when used for their ordinary purpose.

4 136. The defect in the MPs existed prior to the delivery of the MPs to the Subclass
5 members. In fact, the defect existed immediately upon their manufacture.

6 137. Plaintiff Waggoner and members of the Subclass reasonably relied upon the
7 expertise, skill, judgment and knowledge of Defendant and upon their implied warranty that they
8 MPs were of merchantable quality and fit for their intended use.

9 138. Defendant has known and continues to know at the time of sale that consumers will
10 purchase iPods for the particular purpose of listening to iPods in everyday environments, such as
11 while exercising or on public transportation.

12 139. Defendant has known and continues to know at the time of sale that consumers will
13 purchase iPods for the particular purpose of listening to iPods for extended periods of time.

14 140. Plaintiff Waggoner and members of the Subclass have reasonably relied on the
15 expertise, skill, judgment and knowledge of Defendant that its MP products will be designed in a
16 manner to fit these particular purposes.

17 141. Apple has breached its implied warranty of fitness by selling MP products that pose
18 an unreasonable risk of hearing loss when used to listen to music in everyday environments for
19 extended periods of time.

20 142. Soon after the Original Complaint was filed, Apple took incremental steps to satisfy
21 some of the requests for relief in the Original Complaint. Specifically, Apple has now made
22 available for download software which would allow the user to limit the volume output on only the
23 most recent generation of the iPod nano and iPod video. Further, Apple has amended its warnings
24 to advise of possible hearing loss through the use of the MPs and ear buds. These steps are still
25 inadequate.

1 143. California law provides for the recovery of attorneys' fees and costs incurred when
2 a party changes its behavior in response to the filing of a suit against it and otherwise provides a
3 common benefit to a large group of people.

4 144. Such recovery is particularly appropriate when a suit in the public interest causes a
5 party to change its behavior. In this case, after suit was filed, Apple took efforts to rectify some of
6 the problems outlined in the Original Complaint by making software available for download and
7 amending its warnings. Upon information and belief, these actions were taken as a direct result of
8 the filing of this Complaint.

9 145. Similarly, after suit was filed and Apple took these actions, a demand has been
10 made for further actions to comply with all of the demands for relief in the Complaint.
11 Accordingly, Plaintiffs are entitled to recover attorneys' fees and costs in recognition of the efforts
12 taken by Apple to rectify the problems outlined in the Complaint, and which have benefited the
13 public and specifically iPod consumers, including recovery of attorneys fees and costs under Cal.
14 Civ. Code § 1021.5.

15 **FIFTH CAUSE OF ACTION**

16 **Magnuson-Moss Warranty Act**
17 **(15 U.S.C. §§ 2301, *et seq.*)**
18 **(Class and Subclass Against Defendant)**

19 146. Plaintiffs re-allege and incorporate the foregoing paragraphs as if set forth herein.

20 147. All Apple iPod MPs that are subject to this class action are tangible personal
21 property which were distributed in commerce and normally used for personal, family or household
22 purposes and therefore are "consumer products" within the meaning of 15 U.S.C. § 2301(1).

23 148. Plaintiffs, and all putative Class and Subclass members are "consumers" within the
24 meaning of 15 U.S.C. § 2301(3).

25 149. Apple is a "supplier" and is engaged in the business of manufacturing and selling
26 the Apple iPod MPs, available either directly or indirectly to consumers, and is therefore a
27 "supplier" within the meaning of 15 U.S.C. § 2301(4).

1 components without implementing suitable safety measures, warnings, and/or disclosures as
2 described herein.

3 155. Defendant's misconduct has exposed Plaintiffs' and members of the Class to a
4 significant risk of hearing impairment. Such exposure is greater than the exposure that would
5 occur with a safe product. The exposure was caused by Apple's negligence and as a result
6 Plaintiffs and members of the Class have a significantly increased risk of hearing impairment.
7 Early detection of impairment of Apple MP users, through testing by an audiologist, is made
8 necessary and medically advisable by the Defendant's manufacturing, marketing, and sale of Apple
9 MPs. Indeed, Apple has admitted in its patent filing and its post-lawsuit warnings that "permanent
10 hearing loss may occur if earbuds or headphones are used at high volume." Apple knows that
11 thousands if not millions of users have used Apple's MPs at high volume and may have suffered
12 and continued to be at risk for hearing loss or a worsening of hearing loss. A test by a competent
13 audiologist would alert users to the extent of the injury and allow for future mitigation. Such
14 testing is necessary to detect a possible injury and to prevent further injury resulting from
15 Defendant's actions. Plaintiffs thus request that this Court enter an order or judgments as may be
16 necessary to establish a testing program.

17 156. Plaintiffs request that this Court enter such orders or judgments as may be necessary
18 to provide full restitution of monies owed to Class members and to otherwise restore to any person
19 in interest any money which may have been acquired by means of the challenged unfair
20 competition.

21 157. Plaintiffs request that Apple be ordered to upgrade software loaded onto MPs
22 already purchased and those not yet sold, which would enable each iPod user to limit the sound
23 output on these devices to 100 dB (with the ability of the user being able to later adjust the level).

24 158. Alternatively, and in addition, Plaintiffs request that Apple be ordered to provide a
25 device to each of the Class and Subclass members which may be connected to the MPs to limit
26 their sound output to a reasonable level. Such devices are readily available by various third parties.
27 Similarly, Apple should be required to provide these devices with any MP purchased in the future.

1 D. An Order of restitution, restoring to Class members all monies acquired by means of
2 the alleged violations of the UCL.

3 E. For damages as alleged herein;

4 F. For pre-judgment interest from the date of filing this suit;

5 G. For reasonable attorneys' fees;

6 H. For all costs of this proceeding; and

7 I. For all general, special, and equitable relief to which the Plaintiffs and the members
8 of the Class are entitled by law or as may be determined to be just, equitable, and proper.

9 **DEMAND FOR JURY TRIAL**

10 Plaintiffs hereby demand a trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil
11 Procedure on all issues so triable.

12
13 DATED: January 10, 2008

HAGENS BERMAN SOBOL SHAPIRO LLP

14
15 By: /s/ Steve W. Berman

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DECLARATION OF SERVICE

I hereby certify that on January 10, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses registered, as denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

/s/ Steve W. Berman

STEVE W. BERMAN

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Manual Notice List

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