

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No:

500-06-000565-115

SUPERIOR COURT

(CLASS ACTION)

YVONNE AL TAYAR, coordinator of human resources, domiciled and residing at 1699 Taillefer Street, in the city and district of Laval, province of Quebec, H7L1T9,

Petitioner

vs.

APPLE CANADA INC., a legal person and corporate body, founded according to the Ontario Business Corporations Act, 1990 R.S.O., having its head office at 7495 Birchmount Road, in the City of Markham, Province of Ontario, L3R 5G2, Canada and *in the Province of Quebec having as elected domicile 4823 Sherbrooke Street West, Suite 220, in the City of Westmount, District of Montreal, Province of Quebec, H3Z 1G7, Canada, c/o Weinstein & Associates,*

-and-

APPLE INC. (formerly known as "APPLE COMPUTER INC."), a legal person and corporate body, founded according to the California Corporations Code, and having its head office at 1 Infinite Loop, Cupertino, State of California, 95014, United States of America,

Respondents

***MOTION FOR AUTHORIZATION TO EXERCISE A CLASS
ACTION AND TO OBTAIN THE STATUS OF
REPRESENTATIVE***

**TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN
THE PRACTICE DIVISION FOR AND IN THE DISTRICT OF MONTREAL, PETITIONER
RESPECTFULLY SUBMITS AS FOLLOWS:**

1. Petitioner Yvonne Al Tayar, desires to institute a class action on behalf of the following natural persons forming part of the group (as hereinafter defined) and of which Petitioner is a member, namely,:

"All persons who have purchased, owned, used or carried around in the Province of Quebec an iPad 3G or an iPhone with the iPhone OS 3.2 or iOS4 operating system";

2. THE FACTS GIVING RISE TO AN INDIVIDUAL RECOURSE AGAINST RESPONDENTS BY PETITIONER, WHO REQUESTS TO ACT AS THE DESIGNATED PERSON ON BEHALF OF THE GROUP, ARE:

PETITIONER

- 2.1 Petitioner is a consumer who, like most people, does not have an extended knowledge of computer, software or hardware sciences;
- 2.2 Accordingly, when Petitioner purchases a product, she relies on the label and descriptions given by the manufacturers and distributors of the said product;
- 2.3 Through different marketing and advertising campaigns made by Respondents, Petitioner was informed of a product commonly referred to as an "iPhone";
- 2.4 iPhone is a smartphone that may be thought of as a handheld computer integrated with a mobile telephone. An iPhone can function as a video camera, a camera phone with text messaging and visual voicemail, a portable media player and an internet client with e-mail and web browsing capabilities, both with Wi-Fi and 3G connectivity;

- 2.5 The iPhone is controlled by an operating system (a software) also known as a mobile OS -- similar in principal to an operating system such as Windows, Mac OS, or Linux that controls a desktop computer or laptop;
- 2.6 There are four (4) generations of iPhone models which were accompanied by four (4) major releases of iOS (formerly iPhone OS);
- 2.7 iPad is a line of tablet computers primarily used as a platform for audio-visual media including books, periodicals, movies, music, games, and web content;
- 2.8 On or about August 8, 2010, Petitioner purchased an iPhone 4 as appears from her purchase receipt to be filed at the hearing of the presents as Petitioner's **Exhibit R-1**;
- 2.9 The iPhone's box contained no indication of any tracking of its purchaser, user, owner or carrier;
- 2.10 Subsequent to the said purchase, Petitioner used her iPhone without noticing anything unusual concerning tracking;
- 2.11 However, since the date of purchase and use, Petitioner's iPhone secretly recorded and stored details of all her movements. The location data, although hidden from Petitioner, were unencrypted, making it easy for Respondents or third parties to access them at will;
- 2.12 These data were regularly transmitted to Apple;

RESPONDENTS

- 2.13 Respondent Apple Inc. (hereinafter referred to as "Apple") is an American multinational corporation as appears from a copy of the Business Entity Detail site as well as Apple's certificate of Status both issued by the California Secretary of State, to be filed together as **Petitioner's Exhibit R-2**;
- 2.14 Apple focuses on designing and manufacturing consumer electronics products such as iPhone and iPad;
- 2.15 Respondent Apple Canada Inc. (hereinafter referred to as "Apple Canada") is a subsidiary of Apple Operations International as appears from a printout of an extract of the Quebec Register of Enterprises to be filed at the hearing of the presents as Petitioner's **Exhibit R-3**;
- 2.16 The said Apple Operations International is in turn a subsidiary of Respondent Apple, as appears from an extract of Ireland's Companies Registration Office and the annual return of Apple Operations International with said Irish

authorities, to be filed at the hearing of the presents as Petitioner's **Exhibit R-4**;

2.17 Apple Canada was incorporated in order to manufacture, sell and distribute its ultimate parent company's products in the Canadian market;

2.18 Respondents are thus both involved in the chain of events preceding the sale of the product to Petitioner and members of the group as well as collecting location coordinates from iPhones and iPads;

3. THE FACTS GIVING RISE TO PERSONAL CLAIMS BY EACH OF THE MEMBERS OF THE GROUP AGAINST THE RESPONDENTS ARE AS FOLLOWS:

3.1 On April 20, 2011, the guardian, a British national daily newspaper, published an article to the effect that iPhones and iPads continuously store location coordinates and timestamps of their owner's movements;

3.2 In fact, the newspaper reported the findings of two security researchers Alasdair Allan and Pete Warden. As the latter put it "Apple has made it possible for almost anybody – a jealous spouse, a private detective – with access to your phone or computer to get detailed information about where you've been;"

3.3 Along with iPhones, the 3G-enabled iPads are also keeping track of the data;

3.4 The database of location information is stored primarily on the iPhone and iPad, although due to the iOS device backup system in iTunes, these files also end up in the consumer's computer. When iTunes saves these backups, which are set by default to be stored every time one synchronizes an iOS device, the data file goes along with it;

3.5 Respondent Apple with the help and collaboration of Respondent Apple Canada collects the location data in Quebec, including the GPS coordinates, of iPhone and iPad users and nearby Wi-Fi networks and transmits that data to itself every 12 hours;

3.6 Users of iPhones and iPads have no way to prevent Respondents from collecting this information because if users disable the iPhone and iPad GPS components, Apple's tracking system remains fully functional;

3.7 All iPhones and iPads log, record and store user's locations based on latitude and longitude alongside a timestamp. The iPhones and iPads store this information in a file called "consolidated.db" or some other similar name. Respondents use a cell-tower triangulation to obtain user location.

Alternatively, Respondents may use global positioning system (GPS) data to obtain user location;

- 3.8 Respondents' collection of this information has been clearly intentional, while users of iPhones and iPads were completely unaware of Respondents' tracking their locations and did not consent to such tracking;
- 3.9 In addition, the accessibility of the unencrypted information collected by Respondents places users at serious risk of privacy invasions, including stalking;
- 3.10 The members of the group have the fundamental right to be able to travel without being tracked, and without their unencrypted tracking information being synchronized with computers that are networked to the internet and are unsecured;
- 3.11 At no time upon the **purchase** of an iPhone or an iPad, the members of the group consented to being tracked by Respondents;
- 3.12 At no time upon the subscription to a mobile phone line, the members using an iPhone consented to being tracked by Respondents;
- 3.13 Respondents' unfair omissions of mentioning the truth injure both members of the group and competition. Members of the group are injured in all the ways already described above while competition suffers in several ways: (1) honest competitors that do not covertly track their customer's locations have lost and continue to lose market share to Respondents; (2) Respondents are rewarded for their deceit with millions of dollars in revenues (which should all be disgorged); and (3) competitors feel an economic pressure to similarly track users' whereabouts to later sell and thereby avoid losing further market share;
- 3.14 Respondents have refused to disclose, or even hint at, the full extent of their user location tracking. For example, they could have required a single sentence disclosure on the iPhone or iPad Box describing their rampant covert tracking of individual users' locations;
- 3.15 In response to the public revelations made by the international media, Respondent Apple posted an FAQ on its web site on April 27, 2011, in order to respond to many questions about the gathering and use of location information. In there, however, Respondent Apple admitted that a bug allows the iPhone to continue updating its Wi-fi and cell tower data even when the location services are turned off;
- 3.16 Furthermore, in a letter to U.S. Reps. Edward Markey and Joe Barton on dated July 24, 2010, Respondent Apple wrote "Apple collects GPS

Information from mobile devices running the iPhone OS 3.2 or iOS 4... The collected GPS Information is batched on the device, encrypted, and transmitted to Apple over a secure Wi-Fi Internet connection (if available) every twelve hours with random identification number that is generated by the device every twenty-four hours." admitting to collect the data generated by iPhones and iPads of the group;

- 3.17 In the same letter, Respondent Apple admitted that "Apple first began offering location-based service in January of 2008 and began collecting Wi-Fi Access Point Information at that time;"
- 3.18 Therein, Respondent Apple has alleged to have a Customer Privacy Policy. Respondent referred to the following extract:

"... Apple and our partners and licensees may collect, use, and share precise location data, including the real-time geographic location of your Apple computer or device."
- 3.19 However, this policy does not indicate that Respondents will be tracking on a continuous basis the members of the group;
- 3.20 In any event, the member does not consent to such a clause upon purchasing an iPhone or iPad. In fact, no such clause is presented to the member at the time of purchase. If any consent is granted by a member to such a clause, it is only after the fact and subsequent to the purchase of the device or subscription to a mobile phone service and under constraint that no service will be provided to them even though the iPhone or iPad is already purchased or that a mobile service agreement is already concluded;
- 3.21 As a consequence, each member of the group has sustained damages and has been deceived in a similar way as was Petitioner;
- 3.22 Each member of the group is entitled to claim a compensation and punitive damages as a result of the same deception, negligent behaviour and misconduct displayed by Respondents, the whole as set forth herein;
- 3.23 Each member of the Group, for the purchase of his/her own iPhone or iPad, has relied on the labelling and marketing for which Respondents are responsible;
- 3.24 Therefore, all members of the group have therefore suffered from the same inconveniences and have been deceived in the same way as was Petitioner;
- 3.25 Due to Respondents' ill intention, wrongdoings and the shortfalls which in turn translated into tracking of members of the group, each and every one of them as described hereinabove has the same rights and recourses against

Respondents as Petitioner;

4. THE COMPOSITION OF THE MEMBERS OF THE GROUP RENDERS THE APPLICATION OF SECTION 59 OR 67 OF THE CODE OF CIVIL PROCEDURE DIFFICULT AND IMPRACTICAL FOR THE FOLLOWING REASONS:
 - 4.1 It is estimated that by the end 2009 more than forty-one million (41,000,000) iPhone units alone have been sold in the world. As of today, Petitioner does not have an estimate of the total number of units from iPads sold;
 - 4.2 From the above data, one might easily conclude that the number of all iPhones sold in the Province of Quebec well exceeds fifty thousand (50,000);
 - 4.3 However, there exists no list of persons who have purchased the concerned products, whether it be an iPhone or iPad;
 - 4.4 Nor does Petitioner possess a list of persons that purchased the concerned products;
 - 4.5 A significant number of natural persons that are part of the Group have their principal residences, employment or places of business at various geographical distances within the Province of Quebec;
 - 4.6 It would therefore be impossible for Petitioner to track down each and every individual to obtain their mandate or authorization to proceed by joinder of actions;

5. THE IDENTICAL, SIMILAR OR RELATED QUESTIONS OF LAW OR FACT BETWEEN EACH MEMBER OF THE GROUP AND THE RESPONDENTS WHICH PETITIONER WISHES TO HAVE DECIDED BY THE CLASS ACTION ARE:
 - 5.1 Did Respondents store the location information of members of the group?
 - 5.2 Did members of the group accept to have their locations stored?
 - 5.3 Did Respondents have the right according to their duties and obligations under contract, Common Law, civil law as well as statutory law to track members of the group?
 - 5.4 Did Respondents commit a fault towards Petitioner and other members of the group and misrepresent the specifications of their products?
 - 5.5 Did members of the group agree to be tracked by Respondents?

- 5.6 If any agreement was given by members of the group, was it under constraint?
- 5.7 Did Respondents invade the privacy of members of the group?
- 5.8 Did Respondents intend to market or otherwise exploit user's location information?
- 5.9 Are members of the group, including Petitioner, entitled to claim compensatory damages? If yes, how much?
- 5.10 Are members of the group, including Petitioner, entitled to claim punitive damages? If yes, how much?
- 5.11 *SUBSIDIARILY*, did Respondents benefit from an unjust enrichment?
- 5.12 Are Respondents jointly and severally (solidarily) liable?

6. THE QUESTIONS OF FACT OR LAW PARTICULAR TO EACH MEMBER OF THE GROUP:

- 6.1 There exists no substantial questions of fact or law particular to each member of the Group save for the slight variation in the extent of the quantum of the claim, depending on the purchase price paid for the product bought;

7. IT IS APPROPRIATE AND EXPEDIENT THAT THE INSTITUTION OF A CLASS ACTION FOR THE BENEFIT OF THE MEMBERS OF THE GROUP BE AUTHORIZED, BECAUSE:

- 7.1 The class action is the best procedural vehicle available to the members of the Group in order to protect and enforce their rights herein;
- 7.2 There exists veritably no particular individual difference in the position of members of the Group, except for possibly having been tracked for a longer period of time;
- 7.3 While the amount of claim for each member of the group may differ, the faults, misrepresentations, wrongdoings, negligence and shortfalls committed by Respondents and their liability are identical with respect to each member;
- 7.4 Members of the group who may relatively have minor claims, in the absence of a class action, could be prevented from instituting a separate recourse

against Respondents in view of costs involved to enforce their rights compared to the value of the claim they may have;

7.5 In the absence of a class action, the immense number of the affected consumers would result in a multitude of recourses against Respondents that may lead to contradictory judgements on questions of fact and law which are identical for each member of the Group;

8. THE NATURE OF THE RECOURSE THAT PETITIONER INTENDS TO EXERCISE ON BEHALF OF THE MEMBERS OF THE GROUP IS:

8.1 An action in damages for invasion of privacy or *SUBSIDIARILY* for unjust enrichment;

8.2 The action is based on sections 35, 36 and 1493 of the civil code of Quebec;

9. THE CONCLUSIONS THAT PETITIONER SEEKS ARE TO:

GRANT the action of Petitioner;

CONDEMN Respondents jointly and severally (solidarily) to pay each member FIFTY DOLLARS (\$50) per day of tracking plus punitive damages equivalent to ONE HUNDRED DOLLARS (\$100);

THE WHOLE with costs, including the costs of all experts, expertise, exhibits and publication notices;

10. PETITIONER REQUESTS THAT HE BE ASCRIBED THE STATUS OF REPRESENTATIVE;

11. PETITIONER IS IN A POSITION TO REPRESENT THE MEMBERS OF THE GROUP ADEQUATELY FOR THE FOLLOWING REASONS:

11.1 Petitioner is well informed of and understands the facts giving rise to the present action and the nature of this action;

11.2 She has the best interest of the Group at heart;

11.3 She personally has a claim as a result of Respondents' negligence, misrepresentations, shortfalls, wrongdoings and fault and readily understands the position of the members of the group with whom their various problems has been discussed;

- 11.4 She has taken the necessary time and made the effort and is determined to act as a representative of the group in the present action;
- 11.5 She has retained competent counsel with considerable experience in the field of litigation;
- 11.6 She has taken the necessary time and made the effort and is determined to act as a representative of the group in the present action;
- 11.7 Petitioner has fully cooperated with the undersigned attorneys in the context of this action, including answering diligently and intelligently their questions and there is every reason to believe that he will continue to do so;
- 11.8 She is in at least as good a position to represent the group as any other member may be;

12. **PETITIONER PROPOSES THAT THE CLASS ACTION BE FILED BEFORE THE SUPERIOR COURT SITTING IN AND FOR THE DISTRICT OF MONTREAL FOR THE FOLLOWING REASONS:**

- 12.1 One of Respondents has its main place of business in Quebec in the City and District Montreal (Borough of Saint-Laurent);
- 12.2 Numerous members of the group, if not the majority, live and/or work and/or study on the island of Montreal and are thus subjected to the jurisdiction of this honourable Court in the District of Montreal;
- 12.3 Petitioner has engaged counsel with offices in the judicial District of Montreal;
- 12.4 The attorneys for Respondents have their offices in the judicial District of Montreal;

13. **PETITIONER'S MOTION IS WELL FOUNDED IN FACT AND IN LAW;**

WHEREFORE, PETITIONERS PRAY THIS HONOURABLE COURT THAT BY JUDGEMENT TO INTERVENE HEREIN:

- (A) **MAINTAIN** and **GRANT** the present Motion;
- (B) **AUTHORIZE** the institution of a class action in damages and punitive damages;
- (C) **ATTRIBUTE** to Petitioner the status of designated representative for purposes of exercising the class action recourse on behalf of the following group, namely:

"All persons who have purchased, owned, used or carried around in the Province of Quebec an iPhone with the iPhone OS 3.2 or iOS4 operating system or an iPad 3G";

(D) IDENTIFY the following principal questions of fact and law to be dealt with collectively:

- Did Respondents store the location information of members of the group?
- Did members of the group accept to have their locations stored?
- Did Respondents have the right according to their duties and obligations under contract, Common Law, civil law as well as statutory law to track members of the group?
- Did Respondents commit a fault towards Petitioner and other members of the group and/or misrepresent the specifications of their products?
- Did members of the group agree to be tracked by Respondents?
- If any agreement was given by members of the group, was it under constraint?
- Did Respondents invade the privacy of members of the group?
- Did Respondents intend to market or otherwise exploit user's location information?
- Are members of the group, including Petitioner, entitled to claim compensatory damages? If yes, how much?
- Are members of the group, including Petitioner, entitled to claim punitive damages? If yes, how much?
- *SUBSIDIARILY*, did Respondents benefit from an unjust enrichment?
- Are Respondents jointly and severally (solidarily) liable?

(E) IDENTIFY the conclusions sought with relation to such questions as follows:

GRANT the action of Petitioner;

CONDEMN Respondents jointly and severally (solidarily) to pay each member FIFTY DOLLARS (\$50) per day of tracking plus punitive damages equivalent to ONE HUNDRED DOLLARS (\$100);

THE WHOLE with costs, including the costs of all experts, expertise, exhibits and publication notices;

(F) **DECLARE** that any member who has not requested his/her exclusion from the Group be bound by any judgement to be rendered on the class action, in accordance with the law;

(G) **FIX** the delay for exclusion at sixty (60) days from the date of notice to the members of the Group; and

(H) **ORDER** that a notice to the members of the Group be published on the date to be determined by this honourable Court in the following manner and form attached hereto:

A notice published in the following newspapers:

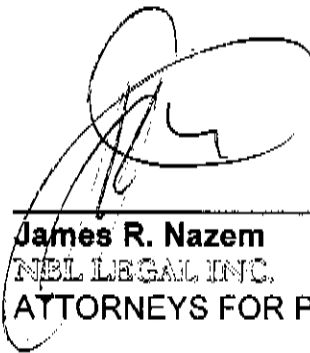
- La Presse;
- The Gazette;

(I) **THAT** the record be referred to the Chief Justice so that he may fix the district in which the class action is to be brought and the judge before whom it will be heard.

(J) **THAT** in the event that the class action is to be brought in another district, the Clerk of this Court be ordered, upon receiving the decision of the Chief Justice, to transmit the present record to the Clerk of the district designated.

(K) **THE WHOLE** with costs to follow suit, save in case of contestation;

Montreal, April 28th, 2011



James R. Nazem
NBL LEGAL INC.
ATTORNEYS FOR PETITIONER

500-06-000565-115

No:
Court : Superior
District : of Montreal

YVONNE AL TAYAR,

Petitioner

v.

APPLE INC. et al.,

Respondent

***MOTION FOR AUTHORIZATION
TO EXERCISE A CLASS ACTION***

ORIGINAL

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