

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

M. ROYER-BRENNAN

NO: 500-06-000333-068

Petitioner

-vs.-

APPLE COMPUTER, INC.

-and-

APPLE CANADA INC.

Defendants

**AMENDED & PRECISED MOTION TO AUTHORIZE
THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER
STATES AS FOLLOWS:

GENERAL PRESENTATION

The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

- all residents in Canada who purchased and/or used any portable digital music player ("MP") and/or ear bud head phones manufactured by the Defendants, or any other group to be determined by the Court;

alternately

- all residents in Quebec who purchased and/or used any portable digital music player ("MP") and/or ear bud head phones

manufactured by the Defendants, or any other group to be determined by the Court;”

United States

2. The following paragraphs (3 to 9) appear more fully from a copy of the Class Action Complaint instituted in the United States District Court for the Northern District of California San Jose Division on January 31st 2006, attached hereto as **Exhibit R-1**;
- 2.1 Further, the allegations herein were supplemented, restated, and amended in the file of *Birdsong v. Apple Computers Inc.* (case number: C 06-02280) and entitled “Plaintiff’s Supplemental Amended and Restated Master Complaint” dated May 18th 2006, attached hereto and produced herein as if recited at full length as **Exhibit R-1b**;
3. In that action, the class contends that the Defendant Apple Computer, Inc. designed, manufactured, distributed, and sold defectively designed portable digital music players (including the iPod, iPod mini, iPod shuffle, iPod nano, and iPod video) and their components (ear bud headphones); it is alleged that these products are not sufficiently adorned with adequate warnings regarding the likelihood of hearing loss and specifically the onset of noise-induced hearing loss;
4. It is said that the Defendant’s MP’s can produce sounds in excess of 104 decibels and up to 115 decibels, which can cause damage;
5. This risk forced the Defendant to pull its MP’s from stores in France and upgrade its software to limit sound output in Europe to 100 decibels;
6. Further, the ear buds do not dilute the sound entering the ear canal and are inadequately designed in other aspects as well;
7. The action is based on defective designs and inadequate warnings;

Canada and Quebec

8. Petitioner contends that the same situation has taken place in Canada and Quebec;
9. By reason of Defendants’ acts and omissions, Petitioner and the members of the group suffered damages that they wish to claim;

The Defendant

10. Defendant Apple Computer, Inc. is a computer hardware and software company having its head office at 1 Infinite Loop, city of Cupertino, State of California, 95014, USA
11. Defendant Apple Computer, Inc does business in Canada and Quebec through Apple Canada Inc., which has a principal place of business at 555, Dr. Frédérik-Phillips, suite 210, city of Saint-Laurent, Province of Quebec, H4M 2X4, the whole as more fully appears from a copy of the Quebec Inspector General of Financial Institutions Report attached hereto as **Exhibit R-2**;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

12. Petitioner purchased an MP at a Quebec retail store;
13. Petitioner is at risk of developing hearing problems;
14. In consequence of the foregoing, Petitioner is justified in claiming damages;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

15. Every member of the group has purchased an MP;
 - 15.1 A “Survey of Teens and Adults about the Use of Personal Electronic Devices and Head Phones” by Zogby International published in March 2006 highlights some of the damages that these MP’s have caused, the whole as more fully appears from a copy of the survey attached hereto as **Exhibit R-3**;
 - 15.2 Defendants have recently (on or about March 30, 2006) released onto their website an “iPod Software Update 1.1.1” which, once downloaded, allows the user to set the maximum volume on his/her MP device and allows parents to set the maximum volume allowed on their children’s MP device the whole as more fully appears from a copy of Defendants’ website (www.apple.com) attached hereto as **Exhibit R-4**;
 - 15.3 An article written by Dr. Jamie Rappaport pointed out the danger of portable music players on a person’s hearing, the whole as appears more fully from a copy of the article attached hereto as **Exhibit R-5**;
16. Each member of the group is justified in claiming for damages;

CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

17. The composition of the group makes the application of article 59 or 67 C.C.P. impractical for the following reasons:
 - a) The number of persons included in the group is estimated at over 1000;
 - b) The names and addresses of persons included in the group are not known to the Petitioner;
 - c) All the facts alleged in the preceding paragraphs make the application of articles 59 or 67 C.C.P. impossible;

18. The recourses of the members raise identical, similar or related questions of fact or law, namely:
 - a) Were Defendants' portable music players defectively designed in that they can cause exposure to dangerous levels of sound?
 - b) Do the ear bud headphones provided with portable music players defectively designed in that they can cause exposure to dangerous levels of sound?
 - c) Did Defendants know or should they have known that the music players were defectively designed?
 - d) Did Defendants fail to accurately and sufficiently warn of the defective characteristics of the music players and their components?
 - e) Did Defendants knowingly conceal the defective design of the music players?
 - f) Did Defendants violate express and implied warranties?
 - g) Were Defendants unjustly enriched?
 - h) Did Defendants violate:
 - Civil Code of Quebec (S.Q., 1991, c. 64) art. 3, 10, 1457, 1458, 1726, 1728
 - Consumer Protection Act (R.S.Q., c. P-40.1) art. 37, 53, 228, 272
 - Charter of Human Rights and Freedoms (R.S.Q., c. C-12) art. 1, 49

- Hazardous Products Act (R.S., 1985, c. H-3) art. 4, schedule 1 Part 1 (par. 10)
 - i) What is the nature and the extent of damages and other remedies to which the conduct of the Defendants entitles the class members?
19. The interests of justice favour that this motion be granted in accordance with its conclusions;

NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

20. The action that Petitioner wishes to institute on behalf of the members of the class is an action in liability;
21. The conclusions that Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT Plaintiffs motion;

CONDEMN Defendants to pay to the members of the group damages temporarily evaluated at \$6,000,000, à parfaire;

GRANT the class action of Petitioner on behalf of all the members of the group;

ORDER the treatment of individual claims of each member of the group in accordance with articles 1037 to 1040 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

22. Petitioner suggests that this class action be exercised before the Superior Court in the district of Montreal for the following reasons:
- a) A great number of the members of the group resides in the judicial district of Montreal and in the appeal district of Montreal;
 - b) Defendant Apple Canada Inc. has its principal place of business in the district of Montreal;
 - c) Their attorneys practice their profession in the judicial district of Montreal;

23. Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the members of the group for the following reason:

- a) He has purchased an MP manufactured by the Defendants;
- b) He understands the nature of the action;
- c) He is available to dedicate the time necessary for an action and to collaborate with members of the group;
- d) His interests are not antagonistic to those of other members of the group;

24. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the group herein described as:

- all residents in Canada who purchased and/or used any portable digital music player (“MP”) and/or ear bud head phones manufactured by the Defendants, or any other group to be determined by the Court;

alternately

- all residents in Quebec who purchased and/or used any portable digital music player (“MP”) and/or ear bud head phones manufactured by the Defendants, or any other group to be determined by the Court;”

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Were Defendants’ portable music players defectively designed in that they can cause exposure to dangerous levels of sound?

- b) Do the ear bud headphones provided with portable music players defectively designed in that they can cause exposure to dangerous levels of sound?
- c) Did Defendants know or should they have known that the music players were defectively designed?
- d) Did Defendants fail to accurately and sufficiently warn of the defective characteristics of the music players and their components?
- e) Did Defendants knowingly conceal the defective design of the music players?
- f) Did Defendants violate express and implied warranties?
- g) Were Defendants unjustly enriched?
- h) Did Defendants violate:
 - Civil Code of Quebec (S.Q., 1991, c. 64) art. 3, 10, 1457, 1458, 1726, 1728
 - Consumer Protection Act (R.S.Q., c. P-40.1) art. 37, 53, 228, 272
 - Charter of Human Rights and Freedoms (R.S.Q., c. C-12) art. 1, 49
 - Hazardous Products Act (R.S., 1985, c. H-3) art. 4, schedule 1 Part 1 (par. 10)
- i) What is the nature and the extent of damages and other remedies to which the conduct of the Defendants entitles the class members?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT Plaintiffs motion;

CONDEMN Defendants to pay to the members of the group damages temporarily evaluated at \$6,000,000, à parfaire;

GRANT the class action of Petitioner on behalf of all the members of the group;

ORDER the treatment of individual claims of each member of the group in accordance with articles 1037 to 1040 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

DECLARE that all members of the group that have not requested their exclusion from the group in the prescribed delay to be bound by any judgement to be rendered on the class action to be instituted;

FIX the delay of exclusion at 30 days from the date of the publication of the notice to the members;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P.;

THE WHOLE, with costs to follow.

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Petitioner

-vs.-

APPLE COMPUTER, INC.

-and-

APPLE CANADA INC.

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NOTICE OF DISCLOSURE OF EXHIBITS

TAKE NOTICE that the Petitioner intends producing the following exhibits at the hearing:

- R-1: Class Action Complaint filed in the United States District Court for the Northern District of California, San Jose Division on January 31st 2006;
- R-1b: Plaintiff's Supplemental Amended and Restated Master Complaint filed in the United States District Court for the Northern District of California, San Jose Division dated May 18th 2006 in the file of *Birdsong v. Apple Computers Inc.* (case number: C 06-02280);
- R-2: Quebec Inspector General of Financial Institutions Report;
- R-3: "Survey of Teens and Adults about the Use of Personal Electronic Devices and Head Phones" by Zogby International published in March 2006;
- R-4: Defendants' website with "iPod Software Update 1.1.1"
- R-5: Article written by Dr. Jamie Rappaport published in the Jewish General Hospital News dated summer 2006;