

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL

SUPERIOR COURT OF QUÉBEC  
(CLASS ACTION)

No.: 500-06-

N [REDACTED] OHANA, [REDACTED]  
[REDACTED]

*Petitioner*

vs.

**APPLE CANADA INC.**, legal person duly incorporated according to the Law, having its principal establishment at 555, Dr. Frédérik- Phillips, bureau 210, in the City of Saint-Laurent, District of Montreal, Province of Quebec, H4M 2X4

-and-

**APPLE, INC.**, legal person duly incorporated according to the Law, having its head office at 1 Infinite Loop, in the City of Cupertino, State of California, 95014, USA

*Respondents*

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

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**TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT OF  
QUÉBEC, SITTING IN AND FOR THE DISTRICT OF MONTRÉAL, THE  
PETITIONER STATES THE FOLLOWING:**

**Introduction:**

1. Petitioner wishes to institute a class action on behalf of the following Group of which Petitioner is a member:

All Canadian residents who are or were owners of any Apple iPhone or Apple iPod touch device that was the subject of a warranty claim that was denied based on Apple's Former Liquid Damage Policy (the "**Class Device**") on or before December 31, 2009 for any iPhone device and on or before June 30, 2010 for any iPod touch device (hereinafter the "**Relevant Time Period**"), (a) that was tendered to Apple in Canada for repair or replacement during the Relevant Time Period and (b) at the time of tender, the Class Device was within either the one-year limited warranty period or, if covered by an AppleCare Protection Plan, the two-year plan coverage period, and (c) repair or replacement of the tendered Class Device was denied by Respondent(s) on the basis of Apple's Former Liquid Damage Policy, or any other Group or Sub-Group to be determined by the Court;

(hereinafter referred to as the "**Class Members**", the "**Class**", the "**Group Members**", the "**Group**", or the "**Consumers**");

2. Respondent Apple, Inc. ("**Apple USA**") is an American company. Apple USA developed, manufactured, distributed, and sold the iPhone and the iPod touch devices throughout Canada, including in the Province of Quebec, either directly or indirectly through its affiliate and/or subsidiary Respondent Apple Canada Inc. ("**Apple Canada**"), the whole as appears more fully from a copy of the *Registre des entreprises* CIDREQ report, communicated herewith as **Exhibit R-1**. Given their close ties, both Respondents are being collectively referred to herein as "**Apple**";

**The situation:**

3. The Apple iPhone is a multimedia-enabled “smartphone” designed and marketed by Apple. Apple introduced the original iPhone for sale in 2007. Since then, Apple has introduced the iPhone 3G, the iPhone 3GS, the iPhone 4, and recently the iPhone 5, and has sold iPhones at prices ranging from \$99 to over \$699, depending on, *inter alia*, the features and storage capacity of the device, and whether the cost is subsidized as a result of entering into a contract for wireless services with one of the various services providers in Canada such as (without limitation) Rogers, Bell or Telus;
4. Apple also designs, markets, and sells the iPod touch throughout the Canada. The iPod touch is virtually identical to the iPhone in design, manufacture, and features, except for those features that pertain to the iPhone’s telephonic capabilities. Apple sell the iPod touch at prices ranging from \$199 to \$399, depending on, *inter alia*, their features and storage capacity;

**The Standard Warranty and Extended Warranty**

5. At all times relevant to the subject matter of these proceedings, when consumers purchase Class Devices, they were advised by Apple and its agents, in the written material that accompanies the product, on the Apple official website, and other sites and locations where Class Devices are sold, that the cost of Apple’s standard one-year limited warranty (the “Standard Warranty”) was included in the purchase price;
6. Apple also offered consumers the opportunity to purchase the “AppleCare Protection Plan” for Class Devices, which Apple markets as providing “comprehensive coverage” under an extended warranty for two years from the date of original purchase (the “Extended Warranty”);

7. The Standard Warranty excludes coverage for certain occurrences or misuses including water damages such as liquid spills or submersion;
8. Apple had included similar exclusion provisions for its Extended Warranty;

#### The Liquid Submersion Indicators

9. Apple has included on the Class Devices external Liquid Submersion Indicators that are located in the headphone jack in all Class Devices, and in the dock-connector housing of the iPhone;
10. Apple represented to consumers that the purpose of the Liquid Submersion Indicators was to enable Apple to determine whether liquid has entered the device and that Liquid Submersion Indicators were designed not to be triggered by humidity and temperature changes that are within the product's environmental requirements described by Apple. Apple also stated that corrosion, if evident, leads to the irreversible deterioration or degradation of metal components and may cause the device to not work properly;
11. In actuality, Submersion Indicators are subject to being triggered by humidity and temperature changes and for other reasons that do not damage Class Devices;
12. Apple personnel were instructed to refuse warranty coverage to consumers who seek a repair or replacement of a Class Device if its external Liquid Submersion Indicator had been triggered, namely if the external Liquid Submersion Indicator on their Class Device had turned pink or red, which devices they then considered to have been submersed or immersed in liquid, thus sustaining damage which rendered the Standard Warranty and the Extended Warranty void;
13. However, in actuality and contrary to what Apple represented to

consumers, Apple was aware that Liquid Submersion Indicators cannot be relied upon to establish with any reasonable degree of certainty that a Class Device has even been exposed to (much less damaged by) liquid;

14. Liquid Submersion Indicators can be triggered by, among other things, cold weather and humidity that are within Apple's technical specifications for the Class Devices;
15. Petitioner does not challenge Apple's right to decline warranty coverage to a consumer if his or her Class Device has actually been damaged as a result of a spill or submersion in liquid. Nor does Petitioner challenge Apple's right to employ Liquid Submersion Indicators to alert Apple personnel that a Class Device may have been exposed to liquid, as long as an inspection is conducted for the purpose of ascertaining whether the Class Device actually has been exposed to liquid and actually has been damaged as a result of that exposure. Rather, Petitioner challenges Apple's use of Liquid Submersion Indicators as the sole basis for denying coverage under the liquid damage exclusion;
16. Liquid Submersion Indicators can be triggered by other types of moisture that should not cause damage in any event, such as a palm that becomes sweaty after a work-out, and other small amounts of moisture to which the devices would be exposed during ordinary, foreseeable use;
17. In addition to the external Liquid Submersion Indicators, Class Devices contain internal Liquid Submersion Indicators, whose purpose is to assist Apple service personnel in verifying whether those devices have actually been damaged due to liquid spills or submersion;
18. The presence of actual damage by liquid can be verified by, *inter alia*, having a technician open the Class Device's outer cover to inspect the internal indicators and the internal components for actual damage caused

- by liquid (e.g., inoperable circuitry as a result of corrosion);
19. Furthermore, Apple's Standard Warranty warned consumers not to open their Class Device, that only Apple or its authorized representatives should open Class Devices, and that their warranties may be void if they do not heed that warning;
20. Because Liquid Submersion Indicators do not, and cannot, detect the existence of damage to an electronic device, a triggered Liquid Submersion Indicator does not establish the existence of such damage. Furthermore, because Liquid Submersion Indicators can be triggered by exposure to sweaty palms, humidity, cold weather, and other climatic conditions, they do not establish that a Class Device has been submersed or immersed in liquid, either;
21. Apple's Former Liquid Damage Policy was in effect until on or before December 31, 2009 for any iPhone device and on or before June 30, 2010 for any iPod touch device (hereinafter the "Relevant Time Period"). It prohibited Apple representatives from conducting internal inspections of the devices except in rare circumstances (e.g., when Apple technical-support personnel are directed to do so by Apple management), and Apple corporate policy at the time dictated that Apple personnel were to refuse warranty coverage under the Standard and Extended Warranty whenever an external Liquid Submersion Indicator has turned red or pink, without attempting to verify actual damage by examining the internal liquid Submersion Indicators and by conducting an inspection to determine whether Class Devices have actually been damaged by a liquid spill or submersion;
22. Apple's Former Liquid Damage Policy is no longer in effect since the above-mentioned dates and these proceedings are therefore only concerning the Class Members having been denied warranty coverage on a Class Device

pursuant to the said Former Liquid Damage Policy;

### **FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER**

23. Petitioner is an avid Apple product enthusiast and purchaser;
24. In fact, over the past years, Petitioner has purchased multiple iPhone devices and multiple iPod touch devices for herself and/or her husband and/or her daughters;
25. During the Relevant Time Period, namely in 2009 (the exact date of which Petitioner does not recall), Petitioner was denied warranty coverage at her local Apple Store in Montreal, concerning her iPod touch (2<sup>nd</sup> generation) device purchased that same year, the whole pursuant to Apple's Former Liquid Damage Policy;
26. Indeed, when Petitioner presented her device for inspection and repair during the Standard Warranty period, the Apple representative at the Apple Store only inspected the outer casing of Petitioner's iPod touch device and informed Petitioner that the warranty on said device was void since the external Liquid Submersion Indicator had turned red or pink;
27. The Apple representative concluded (and informed Petitioner of same) that said device had been water damaged, rendering the warranty void, whereas Petitioner had specifically stated and maintained to the said representative that said device had never been damaged by a liquid spill or submersion and that his conclusion in this regard was clearly false;
28. The representative explained to Petitioner that Apple's warranty provisions were clear and he therefore refused to open a case file and refused to take possession of the device for further inspection or testing;

29. Petitioner was therefore not offered the free repair or replacement of her iPod touch device under the Standard Warranty, although she maintained and still maintains that said device had never been damaged by liquid. She chose at that time not to spend additional money on the repairs;

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

30. Each Class Member is or was an owner of a model iPhone or iPod touch device that was the subject of a warranty claim that was denied based on Apple's Former Liquid Damage Policy in effect on or before December 31, 2009 for any iPhone device and on or before June 30, 2010 for any iPod touch device (the "**Relevant Time Period**");

31. Every Class Member tendered his her device to Apple in Canada for repair or replacement during the Relevant Time Period and at the time of tender, the Class Device was within either the one-year limited warranty period or, if covered by an AppleCare Protection Plan, the two-year plan coverage period;

32. At that time, the Class Member's repair or replacement of the tendered Class Device was denied by Apple on the basis of Apple's Former Liquid Damage Policy, without actually inspecting the inside of the device for actual signs of liquid damage;

33. The said Class Members therefore had no other choice but to pay for the repair or device replacement themselves, if they wished to continue using their device, and Apple is therefore liable to reimburse said amounts paid by the Class Members;



34. For all of the reasons more fully detailed herein, Petitioner respectfully submits that Apple intentionally promulgated and used its Former Liquid Damage Policy during the Relevant Time Period in an abusive manner, making it liable to pay punitive and exemplary damages to the Class Members, in an amount to be determined by the Court;
35. Apple's said actions show a malicious, oppressive and high-handed conduct that represents a marked departure from ordinary standards of decency when dealing with customers. In that event, punitive damages should be awarded to Class Members;

Prescription and/or statute of limitation issues and the US Class Action Settlement

36. Any prescription or statutes of limitation has been interrupted by Apple's knowing and active concealment of the information it possessed about the true nature, purpose and characteristics of the Liquid Submersion Indicators it installed on Class Devices, the true nature and scope of its Standard and Extended Warranty, and by its false and misleading representations with respect to its application of the liquid damage exclusion;
37. Apple kept Petitioner and the Class Members ignorant of vital information essential to the pursuit of these claims, without any fault or lack of diligence on their part. The Class Members could not reasonably have discovered this information or what Apple knew about any of the issues and facts described herein;
38. When Apple changed its policy and no longer considered a triggered Liquid Submersion Indicator as voiding the warranty, Apple did not retroactively compensate the Class Members;
39. In fact, the Petitioner, and likely many Class Members were only informed of

the existence of this issue when the media reported the existence of a class action settlement being reached on this same issue in April 2013, in the context of multiple class action proceedings taken in the United States of America;

40. The Petitioner learned about the issue and immediately recalled her own experience in 2009 when she read news articles online, which referred her to a copy of the actual US Class Action Stipulation of Settlement Agreement dated April 10, 2013, a copy of said US settlement agreement being communicated herewith, as though recited at length herein, as **Exhibit R-2**;
41. Petitioner refers to the various compensations provided for in the US settlement agreement (R-2) and notes that Apple is not offering these compensations to the Class Members residing in Canada. The US settlement has yet to be approved by the US Courts (as at the date of the present motion);
42. Respondents employed the same Former Liquid Damage Policy in Canada as it did in the USA, concerning the Class Devices, and Canadian Consumers are therefore entitled to compensation;

#### **CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

43. The composition of the Group makes the application of Articles 59 or 67 C.C.P. impractical for the following reasons;
44. The sale of iPhone and iPod touch devices are widespread in Quebec and Canada;
45. Petitioner is unaware of the specific number of persons included in the Group but given the Class Devices' tremendous popularity, it is safe to estimate that

it is in the tens of thousands (if not hundreds of thousands);

46. Class members are numerous and are scattered across the entire province and country;

47. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the class members themselves could afford such individual litigation, the Court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the Court system;

48. Also, a multitude of actions instituted risks having contradictory judgments on questions of fact and law that are similar or related to all members of the class;

49. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;

50. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;

51. The recourses of the members raise identical, similar or related questions of fact or law, namely:

a. Whether Liquid Submersion Indicators produce false-positive results;

b. Whether and when Apple knew Liquid Submersion Indicators produce

false-positive results;

- c. Whether the representations Apple had made about the nature, purpose, and accuracy of Liquid Submersion Indicators were false;
  - d. Whether Apple used Liquid Submersion Indicators as a means of earning profit and avoiding its obligations under the Standard Warranty and/or Extended Warranty;
  - e. Whether Apple breached the Standard Warranty by denying warranty claims based solely on a triggered Liquid Submersion Indicator;
  - f. Whether Apple breached the Extended Warranty by denying warranty claims based solely on a triggered Liquid Submersion Indicator;
  - g. Whether Apple is liable to pay compensatory damages to the Class Members, and if so in what amount?
  - h. Whether Apple is liable to pay exemplary or punitive damages to the Class Members, and if so in what amount?
52. The majority of the issues to be dealt with are issues common to every Class Member;
53. The interests of justice favour that this motion be granted in accordance with its conclusions;

#### **NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

54. The action that the Petitioner wishes to institute for the benefit of the Class Members is an action in damages;

55. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

**GRANT** the class action of the Petitioner and each of the Class Members;

**DECLARE** the Defendants solidarily liable for the damages suffered by the Petitioner and each of the Class Members;

**CONDEMN** the Defendants solidarily to pay to each of the Class Members a sum to be determined in compensation of the damages suffered, and **ORDER** collective recovery of these sums;

**CONDEMN** the Defendants solidarily to pay to each of the Class Members a sum to be determined in punitive and/or exemplary damages, and **ORDER** collective recovery of these sums;

**CONDEMN** the Defendants solidarily to pay interest and additional indemnity on the above sums according to Law from the date of service of the motion to authorize a class action;

**ORDER** the Defendants to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest, additional indemnity, and costs;

**ORDER** that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

**CONDEMN** the Defendants solidarily to bear the costs of the present action including experts' fees and notice fees;

**RENDER** any other order that this Honourable Court shall determine and that is in the interest of the Class Members;

56. Petitioner suggests that this class action be exercised before the Superior Court in the District of Montreal for the following reasons:

- a. Petitioner resides in the District of Montreal;
- b. Respondents sell the Class Devices in the District of Montreal and Apple Canada has its *domicile élu* and principal place of business in the District of Montreal;
- c. Many Class Members are domiciled or work in the District of Montreal;
- d. Petitioner's legal counsel and Respondents' legal counsel practice law in the District of Montreal;

57. Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the Class Members since Petitioner:

- a. is a member of the class;
- b. understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interests of the Class Members;
- c. is available to dedicate the time necessary for the present action before the Courts of Quebec and to collaborate with Class Counsel in

this regard;

- d. is ready and available to manage and direct the present action in the interest of the Class Members and is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class Members;
- e. does not have interests that are antagonistic to those of other Class Members;
- f. has given the mandate to the undersigned attorneys to obtain all relevant information to the present action and intends to keep informed of all developments;
- g. has given the mandate to the undersigned attorneys to post the present matter on their firm website in order to keep the Class Members informed of the progress of these proceedings and in order to more easily be contacted or consulted by said Class Members;
- h. is, with the assistance of the undersigned attorneys, ready and available to dedicate the time necessary for this action and to collaborate with other Class Members and to keep them informed;

58. 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 Canadian residents who are or were owners of any Apple iPhone or Apple iPod touch device that was the subject of a warranty claim that was denied based on Apple's Former Liquid Damage Policy (the "**Class Device**") on or before December 31, 2009 for any iPhone device and on or before June 30, 2010 for any iPod touch device (hereinafter the "**Relevant Time Period**"), (a) that was tendered to Apple in Canada for repair or replacement during the Relevant Time Period and (b) at the time of tender, the Class Device was within either the one-year limited warranty period or, if covered by an AppleCare Protection Plan, the two-year plan coverage period, and (c) repair or replacement of the tendered Class Device was denied by Respondent(s) on the basis of Apple's Former Liquid Damage Policy, or any other Group or Sub-Group to be determined by the Court;

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

- a. Whether Liquid Submersion Indicators produce false-positive results;
- b. Whether and when Apple knew Liquid Submersion Indicators produce false-positive results;
- c. Whether the representations Apple had made about the nature, purpose, and accuracy of Liquid Submersion Indicators were false;



- d. Whether Apple used Liquid Submersion Indicators as a means of earning profit and avoiding its obligations under the Standard Warranty and/or Extended Warranty;
- e. Whether Apple breached the Standard Warranty by denying warranty claims based solely on a triggered Liquid Submersion Indicator;
- f. Whether Apple breached the Extended Warranty by denying warranty claims based solely on a triggered Liquid Submersion Indicator;
- g. Whether Apple is liable to pay compensatory damages to the Class Members, and if so in what amount?
- h. Whether Apple is liable to pay exemplary or punitive damages to the Class Members, and if so in what amount?

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

**GRANT** the class action of the Petitioner and each of the Class Members;

**DECLARE** the Defendants solidarily liable for the damages suffered by the Petitioner and each of the Class Members;

**CONDEMN** the Defendants solidarily to pay to each of the Class Members a sum to be determined in compensation of the damages suffered, and **ORDER** collective recovery of these sums;

**CONDEMN** the Defendants solidarily to pay to each of the Class Members a sum to be determined in punitive and/or exemplary damages, and **ORDER** collective recovery of these sums;

**CONDEMN** the Defendants solidarily to pay interest and additional indemnity on the above sums according to Law from the date of service of the motion to authorize a class action;

**ORDER** the Defendants to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest, additional indemnity, and costs;

**ORDER** that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

**CONDEMN** the Defendants solidarily to bear the costs of the present action including experts' fees and notice fees;

**RENDER** any other order that this Honourable Court shall determine and that is in the interest of the Class Members;

**DECLARE** that all Class Members who have not requested their exclusion from the Group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;

**FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the Class Members;

**ORDER** the publication of a notice to the Class Members in accordance with Article 1006 C.C.P., pursuant to a further Order of the Court, and **ORDER** Respondents to pay for said publication costs;

**THE WHOLE** with costs including all publication costs.

**MONTREAL, APRIL 15, 2013**

**LEX GROUP INC.**

**(s) David Assor**

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**Per: David Assor**

Attorneys for Petitioner