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CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
SANTA ANA

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18 *Attorneys for plaintiffs Michael R. Frost and Kevin Ellerholz*

19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

21 MICHAEL R. FROST, an individual; KEVIN
22 ELLERHOLZ, an individual on their own
23 behalves and on behalf of all others similarly
24 situated;

25 Plaintiffs,

26 v.

27 GATEWAY, INC., a Delaware corporation;
28 and DOES 1 through 10;

Defendants.

CLASS ACTION

Case No.: SACV10-1785 AG(JEMP)

**CLASS ACTION COMPLAINT FOR
DAMAGES AND EQUITABLE
RELIEF**

"BY FAX"

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

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1 Plaintiffs Michael R. Frost and Kevin Ellerholz, individually and on behalf of all
2 others similarly situated, by their undersigned counsel, allege the following upon personal
3 knowledge as to their own acts and upon information and belief as to all other matters, which
4 is likely to have evidentiary support after the opportunity for further investigation and
5 discovery.

6 NATURE OF THE ACTION

7 1. Plaintiffs bring this action against defendant Gateway Inc. ("Gateway" or the
8 "Company") on behalf of those who purchased a Gateway LX6810 desktop computer.

9 2. A defect in the Gateway LX6810 desktop computers causes the computers to
10 freeze, crash, or shut down completely, rendering the computers inoperable and causing the
11 user to lose data and/or work product.

12 3. Defendant knew or should have known of the defect prior to selling or placing
13 the Gateway LX6810 desktop computers into the stream of commerce.

14 4. Gateway is aware of hundreds (if not thousands) of consumer reports and
15 complaints about the performance problems plaguing the Gateway LX6810 desktop
16 computer.

17 5. The defect results in the inability of Plaintiffs and Class members to use their
18 Gateway LX6810 desktop computers for their intended purposes.

19 6. Plaintiffs and Class members purchased thousands of defective Gateway
20 LX6810 desktop computers.

21 7. Gateway has harmed Plaintiffs and other Class members throughout the
22 country by manufacturing and selling defective Gateway LX6810 desktop computers.
23 Gateway has failed to remedy the harm consumers suffered and has earned substantial profits
24 from its unlawful conduct.

25 JURISDICTION AND VENUE

26 8. This Court has jurisdiction over all causes of action asserted herein pursuant to
27 28 U.S.C. § 1332(d) because the aggregate claims of Plaintiffs and members of the Class

1 exceed the sum or value of \$5,000,000, and there is diversity of citizenship between Plaintiffs
2 and Defendant.

3 9. Venue is proper in this District under 28 U.S.C. § 1391(a)(1) and (2). Gateway
4 conducts substantial business in this District through the promotion, sale, marketing, and
5 distribution of its products in this District. Additionally, Gateway is headquartered in this
6 District.

7 THE PARTIES

8 10. Plaintiff Michael R. Frost ("Frost") is a citizen of Michigan. On or about
9 August 6, 2009, Plaintiff Frost purchased a Gateway LX6810 desktop computer from Best
10 Buy. On or about December 2009, Plaintiff Frost began to experience failures with his
11 Gateway LX6810 desktop computer. Specifically, Plaintiff Frost's computer overheats,
12 freezes, and shuts down entirely without warning. Plaintiff Frost and/or his wife thereafter
13 contacted Gateway within the period of warranty about the failures of his Gateway LX6810
14 desktop computer. Gateway failed to provide a cure and eventually did not respond to
15 Plaintiff Frost's request for service. Plaintiff Frost paid for a third party repair and/or service
16 in attempt to remedy the operational failures of his Gateway LX6810 desktop computer.
17 However, the computer continues to overheat, freeze, and shut down entirely without
18 warning. At the time of purchase, Plaintiff Frost was not aware of the defect complained of
19 herein, and as a result, Plaintiff Frost has suffered injuries and damages in a manner similar to
20 other Class members.

21 11. Plaintiff Kevin Ellerholz ("Ellerholz") is a citizen of Michigan. On or about
22 February 13, 2009, Plaintiff Ellerholz purchased a Gateway LX6810 desktop computer from
23 Best Buy. Plaintiff Ellerholz immediately experienced operational failure with his Gateway
24 LX6810 desktop computer on the day of purchase. He called Gateway and spoke to a service
25 agent who directed Plaintiff Ellerholz to follow certain procedures, which failed to cure the
26 operational failures. On February 14, 2009, Plaintiff Ellerholz returned his newly purchased
27 computer for another, new Gateway LX6810 desktop computer. On or about April 2009,

1 Plaintiff Ellerholz's Gateway LX6810 desktop computer began to overheat, freeze, and shut
2 down without warning. Plaintiff Ellerholz thereafter contacted Gateway within the period of
3 warranty about the failures of his Gateway LX6810 desktop computer. A Gateway service
4 agent told Plaintiff Ellerholz he could ship his Gateway LX6810 desktop computer to
5 Gateway but that he would have to pay for shipping. Gateway failed to offer any cure to
6 Plaintiff Ellerholz to address the failures of his Gateway LX6810 desktop computer. At the
7 time of purchase, Plaintiff Ellerholz was not aware of the defect complained of herein, and as
8 a result, Plaintiff Ellerholz has suffered injuries and damages in a manner similar to other
9 Class members.

10 12. Defendant Gateway is a Delaware corporation with its headquarters and
11 principal place of business at 7565 Irvine Center Drive, Irvine, California, 92618. Gateway is
12 one of the largest personal computer companies in the world and a wholly owned subsidiary
13 of Acer Inc.

14 FACTUAL ALLEGATIONS

15 13. Defendant Gateway markets, distributes, and warrants the Gateway LX6810
16 desktop computer.

17 14. The Gateway LX6810 desktop computer has a defect that causes the computer
18 to freeze, crash, or shut down completely, rendering the computer inoperable and causing the
19 user to lose data and/or work product.

20 15. Plaintiffs contacted Gateway about the defects in their Gateway LX6810
21 desktop computer while it was still under warranty. Gateway failed to cure the defect or
22 replace Plaintiffs' Gateway LX6810 desktop computers.

23 16. Gateway is aware that its Gateway LX6810 desktop computers regularly
24 freeze, crash, or shut down completely, yet it continues to market and sell the Gateway
25 LX6810 desktop computer. Gateway further refuses to remedy the harm Plaintiffs and
26 consumers suffered by replacing or permanently repairing the Gateway LX6810 desktop
27 computer.

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1 (c) typicality: Plaintiffs' claims are typical of the claims of the Class
2 because Plaintiffs and members of the Class each sustained damages arising out of
3 Defendant's wrongful conduct as complained of herein; and

4 (d) adequacy: Plaintiffs will fairly and adequately protect the interests of
5 the Class. Plaintiffs have no interests that are antagonistic to, or in conflict with, the interests
6 of the Class as a whole, and have engaged competent counsel, highly experienced in class
7 actions and complex litigation.

8 22. A class action is superior to all other available methods for this controversy
9 because: (a) the prosecution of separate actions by the members of the Class would create a
10 risk of adjudications with respect to individual members of the Class that would, as a practical
11 matter, be dispositive of the interests of the other members not parties to the adjudications, or
12 substantially impair or impede their ability to protect their interests; (b) the prosecution of
13 separate actions by the members of the Class would create a risk of inconsistent or varying
14 adjudications with respect to the individual members of the Class, which would establish
15 incompatible standards of conduct for Defendant; (c) Defendant acted or refused to act on
16 grounds generally applicable to the Class; and (d) questions of law and fact common to
17 members of the Class predominate over any questions affecting only individual members, and
18 a class action is manageable and superior to other available methods for the fair and efficient
19 adjudication of the controversy.

20 COUNT I

21 Violations of California Business & Professions Code §§ 17200 *et seq.*

22 23. Plaintiffs hereby incorporate all the above allegations by reference as if fully
23 set forth herein.

24 24. Gateway's practices as alleged in this Complaint constitute unlawful and unfair
25 business acts and practices under California's Unfair Competition Law ("UCL"), Bus. & Prof.
26 Code §§ 17200 *et seq.*

1 (c) Plaintiffs and Class members have paid for repairs and replacement
2 parts that they would not and should not have paid for; and

3 (d) Plaintiffs and Class members were denied their right to receive
4 property free from defect.

5 31. Plaintiffs and Class members seek declaratory and injunctive relief, restitution
6 and disgorgement of all profits obtained by Defendant from the unfair competition alleged
7 herein and other relief as appropriate.

8 COUNT II

9 Violation of California's Consumers Legal Remedies Act

10 32. Plaintiffs hereby incorporate all the above allegations by reference as if fully
11 set forth herein.

12 33. The CLRA was enacted to protect consumers against unfair and deceptive
13 business practices. The CLRA applies to Defendant's acts and practices described herein
14 because it extends to transactions that are intended to result, or which have resulted, in the
15 sale or lease of goods or services to consumers.

16 34. The circumstances giving rise to Plaintiffs' and Class members' allegations,
17 including the design, development, and marketing of the Gateway LX6810 desktop
18 computers, occurred in the State of California. Additionally, Gateway maintains its corporate
19 headquarters in Irvine, California. Accordingly, application of California law is appropriate.

20 35. The Gateway LX6810 desktop computers are "goods" within the meaning of
21 Cal. Civ. Code § 1761(a).

22 36. Plaintiffs and each member of the Class are "consumers" within the meaning
23 of Cal. Civ. Code § 1761(d).

24 37. Gateway's deceptive acts and practices occurred in the course of selling a
25 defective consumer product.

1 38. Gateway had exclusive knowledge of undisclosed material facts, *i.e.* that the
2 Gateway LX6810 desktop computers were defective, which was not known to Plaintiffs or the
3 Class.

4 39. Gateway engaged in unfair acts and practices by withholding these material
5 facts from Plaintiffs and the Class.

6 40. Plaintiffs and the Class were not aware of the failures of the Gateway LX6810
7 desktop computers at the time of sale.

8 41. Had Plaintiffs and Class members known of the failures of the Gateway
9 LX6810 desktop computers, they would not have purchased the Gateway LX6810 desktop
10 computer.

11 42. Defendant has violated the CLRA by engaging in the above unfair acts and
12 practices, which results in the following violations:

13 (a) In violation of § 1770(a)(5), Defendant has represented that the
14 Gateway LX6810 desktop computer has characteristics, uses and benefits that it does not
15 have; and

16 (b) In violation of § 1770(a)(7), Defendant has represented that the
17 Gateway LX6810 desktop computer is of a particular standard, quality or grade when it is not.

18 43. As a proximate result of Gateway's unfair acts and practices, Plaintiffs and
19 Class members suffered damages in purchasing the defective Gateway LX6810 desktop
20 computers.

21 44. Pursuant to California Civil Code § 1782, Plaintiffs and the Class seek an
22 injunction to restrain Defendants from engaging in the unlawful, unfair, deceptive, untrue, and
23 misleading business acts alleged herein. Not less than 30 days after the commencement of this
24 action, and after compliance with the provisions of California Civil Code § 1782(a), Plaintiffs
25 and the Class will amend this complaint without leave of court to include a request for
26 damages.

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COUNT III

Breach of Warranty

45. Plaintiffs hereby incorporate all the above allegations by reference as if fully set forth herein.

46. Defendant expressly gave warranties by specific words or actions to Plaintiffs and Class members, both through the issuance of its written warranty accompanying all its computers and/or its advertising campaigns, product packaging and literature and sales professionals used to promote the sale and use of its Gateway LX6810 desktop computers. Defendant warranted to the general public, including Plaintiffs and Class members, these computers were effective, free from material defects in materials and/or workmanship and fit for their intended use.

47. Defendant also impliedly warranted to members of the general public, including Plaintiffs and Class members, these computers were of merchantable quality, would pass without objection in the trade or business, were free from material defects and reasonably fit for the use for which they were intended by Defendant, namely, for the purpose of mobile computing and other related activities.

48. Plaintiffs and Class members based their decision on the skill and judgment of Defendant.

49. Defendant's warranties became part of the basis of the bargain between Plaintiffs, Class members and Defendant.

50. Defendant breached its warranties by: (a) selling and leasing Gateway LX6810 desktop computers that were defective in materials and workmanship and are likely to fail during the useful life of such products; and (b) refusing to recall, repair or replace, free of charge, all Gateway LX6810 desktop computers or any of their defective component parts.

51. Plaintiffs, on behalf of themselves and the Class, provided Defendant with notice of their breach of express and implied warranties. Defendant already was on notice of the defect from complaints and service requests they received from Class members, from

1 repairs and/or replacements of the Gateway LX6810 desktop computers, and through their
2 own public admissions and internal investigations.

3 52. As a direct and proximate result of Defendant's breach of their warranties,
4 Plaintiffs and Class members have suffered damages and continue to suffer damages,
5 including economic damages at the point of sale in terms of the difference between the value
6 of the computers as promised and the value of the computers as delivered. Additionally,
7 Plaintiffs and Class members either have or will incur economic damages at the point of
8 repair in the form of the cost of repair.

9 53. Plaintiffs and Class members are entitled to legal and equitable relief against
10 Defendant, including damages, specific performance, rescission, attorneys' fees, costs of suit,
11 and other relief as appropriate.

12 **COUNT IV**

13 **Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.***

14 54. Plaintiffs hereby incorporate all the above allegations by reference as if fully
15 set forth herein.

16 55. Plaintiffs assert this count individually and on behalf of the proposed class.

17 56. The Gateway LX6810 desktop computers are "consumer products" within the
18 meaning of the Magnuson-Moss Act, 15 U.S.C. § 2301(1).

19 57. Plaintiffs and class members are "consumers" within the meaning of the
20 Magnuson-Moss Act, 15 U.S.C. § 2301(3).

21 58. Gateway is a "supplier" and "warrantor" within the meaning of the Magnuson-
22 Moss Act, 15 U.S.C. §§ 2301(4)-(5).

23 59. Gateway warranted to Plaintiffs and to Class members the Gateway LX6810
24 desktop computers were of merchantable quality and fit for the ordinary purposes for which
25 the computers are used.

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DEMAND FOR JURY TRIAL

Plaintiffs, individually and on behalf of all others similarly situated, demand a trial by jury on all issues so triable.

DATED: November 18, 2010



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