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15 *Attorneys for Plaintiffs*
16 *and the putative class*

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 OAKLAND DIVISION

20 ELYSE WOOD and JACK HAUGHT,
21 individually, and on behalf of all others
22 similarly situated,

23 Plaintiffs,

24 v.

25 MOTOROLA MOBILITY, INC., a Delaware
26 corporation,

27 Defendant.

) Case No.

ADR
C11-04409 EDL

) COMPLAINT FOR:

-) 1. Violations of the Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750, *et seq.*);
-) 2. Violations of the Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*);
-) 3. Violations of the False Advertising Law (Cal. Bus. & Prof. Code §§ 17500, *et seq.*);
-) 4. Fraud by Omission;
-) 5. Negligent Misrepresentation;
-) 6. Restitution/Unjust Enrichment.

) DEMAND FOR JURY TRIAL

) CLASS ACTION

FILED *C*

SEP - 2 2011

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

*File
for
ISS.*

(1)

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FAXED

1 Plaintiffs Jack Haught and Elyse Wood (“Plaintiffs”) bring this Class Action
2 Complaint against Defendant Motorola Mobility, Inc. (“Defendant” or “Motorola”) based
3 upon its false and misleading representations made to Plaintiffs, as well as material omissions
4 not disclosed to Plaintiffs, and similarly-situated others, of the capability of its CLIQ XT
5 mobile device to be updated with the newer version of its mobile operating system.

6 Plaintiffs, for their Class Action Complaint, allege as follows upon personal knowledge as to
7 themselves and their own acts and experiences and, as to all other matters, upon information
8 and belief, including investigation conducted by their own attorneys.

9 PARTIES

- 10 1. Jack Haught is a natural person and citizen of the State of Ohio.
11 2. Elyse Wood is a natural person and citizen of the State of California.
12 3. Defendant Motorola Mobility, Inc. is a corporation incorporated and existing
13 under the laws of the State of Delaware with its headquarters located at 600 N US Highway
14 45, Libertyville, Illinois. Motorola Mobility maintains a significant operational and
15 management presence in the State of California, with one third of its primary corporate
16 offices in the United States, and over one thousand employees, located in California.

17 JURISDICTION AND VENUE

18 3. The Court has subject matter jurisdiction over this action pursuant to 28
19 U.S.C. § 1332(d), because (a) at least one member of the putative class is a citizen of a state
20 different from Defendant, (b) the amount in controversy exceeds \$5,000,000, exclusive of
21 interest and costs, and (c) none of the exceptions under that subsection apply to this action.

22 4. Personal jurisdiction and venue are proper because of Defendant’s significant
23 operations in California, including this District, and/or because the improper conduct alleged
24 in the Complaint occurred in, was directed from, and/or emanated from California.

25 5. Venue is proper in this District under 28 U.S.C. § 1391(a) as Plaintiff Wood
26 resides in this District. Venue is additionally proper because Defendant maintains a primary
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1 office and transacts significant business in this District, including soliciting consumer
2 business and entering into business-to-business transactions.

3 **FACTUAL BACKGROUND**

4 6. Defendant Motorola is an international manufacturer of cellular telephones
5 and other mobile devices, with over \$10 billion in revenue reported for fiscal year 2010
6 alone.

7 7. While Defendant sells a variety of mobile devices, one of its most popular
8 models in 2010 was the CLIQ XT. Defendant released the CLIQ XT on March 17, 2010, and
9 has since sold hundreds of thousands of units to consumers nationwide.

10 8. Like dozens of other mobile devices manufactured by numerous companies,
11 the CLIQ XT utilizes the Android operating system created by Google.

12 9. A mobile device's operating system, not unlike a traditional computer, is the
13 primary interface and point of contact a user has with the device. It contains all the primary
14 features and functions of the mobile device. The operating system is the heart of a mobile
15 device and is a material aspect of consumers' choice in purchasing and using the device.

16 10. In the mobile industry, operating systems are regularly upgraded to provide
17 additional features and increase overall functionality. This has been a standard practice
18 across all mobile phone manufactures. For example, the Apple iPhone has gone through four
19 major upgrades and over two dozen minor upgrades over the last three years.

20 11. As a phone's operating system is upgraded, third party developers, including
21 mobile application developers, also update their products to function correctly with the new
22 release. Often times, as an operating system becomes more dated, new applications will not
23 function unless the mobile device utilizes the most recent version of the operating system.
24 While technology is constantly evolving, a reasonable consumer would expect a mobile
25 device to remain compatible and up to date for at least the two-year span of a standard cell
26 phone contract.

1 12. At the time of the CLIQ XT's release in March of 2010, it came packaged
2 with version 1.5 of the Android operating system, which was originally released in May
3 2009.

4 13. At the time of the CLIQ XT's release to the public, the most current available
5 version of the Android operating system was version 2.1, having previously released versions
6 1.6 and 2.0. Since the release of version 2.1, Google has upgraded its operating system with
7 version 2.2 and 2.3. As of April 1, 2011, less than 3% of all mobile phones utilizing the
8 Android operating system were using version 1.5.

9 14. The current versions of many of the most popular Android mobile
10 applications available today will not work on Android 1.5, including applications such as
11 Facebook, MySpace, Gmail, Angry Birds, Dropbox, Google Maps, Google Goggles, Kindle,
12 Wells Fargo, USA Today, CNN, Yahoo Mail, YouTube, Groupon, MSNBC, Fox News, NY
13 Times, NPR News, My Verizon, Blockbuster, QuickOffice Pro, and numerous others.

14 15. Accordingly, any failure to update a device's operating system can
15 significantly hinder the function of the device and quickly make it obsolete.

16 16. The Motorola Droid, another mobile device made by Motorola, first received
17 an upgrade to version 2.1 on March 31, 2010, approximately two weeks after the release of
18 the CLIQ XT.

19 17. On or around March 31, 2010, and no later than April 13, 2010, Defendant
20 announced on its website, through an upgrade chart, that, as it applied to the CLIQ XT,
21 "Upgrade to Android 2.1 planned for Q2," with the second quarter ending June 30, 2010.
22 (See "Motorola Android Software Upgrade News" website screenshots, true and accurate
23 copies of which are attached as Exhibit A).

24 18. This chart also listed several other Motorola devices, and their accompanying
25 upgrade statuses, including "Upgrade to Android 2.1 for select countries/carriers is currently
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1 rolling out in stages,” “Upgrade to Android 2.1 planned for Q3” and “*Upgrade under*
2 *evaluation.*” (See Exhibit A) (emphasis added).

3 19. On March 30, 2010, through Defendant’s customer support forum,¹ a
4 consumer asked, “I was just wondering if there is any update coming out for the xt or will we
5 be getting the same 2.0 update as the cliq soon.” In response, Defendant stated, through a
6 Forum Manager, “This just in. CLIQ XT made it,” followed by a link to the update chart
7 referenced above. (See Defendant’s Support Forum Posts, true and accurate copies of which
8 are attached as Exhibit B).

9 20. By June 17, 2010, Defendant’s website still listed the CLIQ XT for a planned
10 upgrade in the second quarter. (See Exhibit A).

11 21. On June 30, 2010, Defendant stated through its official Twitter account:
12 “Continuing work on an upgrade for CLIQ/CLIQ XT to deliver even better experience and
13 will update on timing when we can.”² (See “Motorola Twitter Posts,” true and accurate
14 copies of which are attached at Exhibit C).

15 22. On August 20, 2010, Defendant announced through its customer support
16 forum that it was working on the 2.1 upgrade for the CLIQ XT and that it anticipated
17 “providing the upgrade on each of these devices in the late Q3/early Q4 timeframe.” (Exhibit
18 B). Additionally, Defendant stated through its customer support Forum Manager: “we’ve
19 made a decision to take more time on the release to optimize the experience in some key
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22 ¹ Defendant hosts and operates a customer support forum at <https://supportforums.motorola.com>.
23 Within the support forums are several “threads” devoted to Defendant’s statements related to its general failure
24 to provide an Android 2.1 update for the CLIQ XT. One such thread was entitled “CLIQ XT 2.1 T-Mobile
25 upgrade – News” and had 1,020,233 views and 5,586 comments (taking up 373 pages) before it was locked
26 down due to its size, and a new thread was created in its place entitled “CLIQ XT 2.1 T-Mobile upgrade – News
27 (Second Edition),” which itself presently has 222,400 views, 3,248 comments and occupied 217 pages. (See
28 supportforums.motorola.com/thread/31532 & supportforums.motorola.com/thread/41889). These forums are
moderated and controlled by “Forum Managers” who periodically respond to consumer comments and make
statements on the forums on behalf of Defendant.

² Defendant maintains an official Twitter account as a means to communicate with its customers and
market its products to the public at <http://twitter.com/Motorola>. The account presently has 56,822 consumers
following its posts and is publically available to consumers even without a Twitter account.

1 areas. We will continue to work to deliver it as soon as possible and apologize that we have
2 been unable to provide an upgrade to these users in Q2 as planned..." (Exhibit B).

3 23. On September 23, 2010, Defendant stated through its official Twitter account:
4 "The CLIQ XT upgrade is slated for late Q3/early Q4." (Exhibit C).

5 24. On October 4, 2010, Defendant stated through its official Twitter account:
6 "We are currently working to upgrade CLIQ and CLIQ XT to Android 2.1 in Q4. Apologies
7 for any confusion." (Exhibit C).

8 25. On October 26, 2010, Defendant stated through its customer support Forum
9 Manager: "CLIQ XT rollout now Q4. We'll let you know when it goes into pre-release
10 status." (Exhibit B).

11 26. On November 10, 2010, Defendant stated through its customer support Forum
12 Manager: "We attempted to offer the upgrade in Q2 *but an opportunity to further optimize*
13 *the upgrade arose late in Q2* which delayed this to Q3 and then several factors in Q3 after
14 OpenGL and JIT compiler implementation required our additional attention... Again we
15 attempted to offer the upgrade in Early Q4 (October) but several circumstances have further
16 contributed to a delay. We're getting closer. I don't have a definite date yet but we're close to
17 pending approval from our business partners." (Exhibit B) (emphasis added).

18 27. On December 16, 2010, in reference to the 2.1 update, Defendant stated
19 through its customer support Forum Manager: "Just for fun (no money), my bet is that the
20 update WILL COME BEFORE CHRISTMAS!" (Exhibit B).

21 28. On December 22, 2010, Defendant changed its Software Update page to
22 state, as it pertained to the CLIQ XT carried by T-Mobile, "Upgrade to Android 2.1 –
23 additional testing in process; more details when available." (Exhibit A).

24 29. On January 25, 2011, CLIQ XT owners received an email offering "Upgrade
25 your Motorola CLIQ XT now!" While most consumer's believed this to be the long awaited
26 upgrade to Android 2.1, in fact it was a marketing email promoting the release of
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1 Defendant's CLIQ 2 mobile device, the successor to the CLIQ XT. This new device came
2 with Android 2.2.

3 30. On February 3, 2011, approximately ten months after the CLIQ XT was
4 released and the first upgrade announcement was made, Defendant stated through its
5 customer service Forum Manager, "After comprehensive testing of the Android 2.1 upgrade
6 for the CLIQ XT, we have concluded that this device will remain on Android 1.5." (Exhibit
7 B).

8 31. As of the date of this filing, Defendant has not upgraded the CLIQ XT
9 operating system above Android 1.5.

10 **FACTS RELATING TO PLAINTIFF HAUGHT**

11 32. Plaintiff Jack Haught purchased a Motorola CLIQ XT in or around June 2010.

12 33. Prior to purchasing the CLIQ XT, an in-store sales representative informed
13 Plaintiff Haught that the mobile device would be receiving an upgrade to Android 2.1
14 imminently.

15 34. Immediately following his purchase of the CLIQ XT, and knowing he was
16 still within his return period, Plaintiff viewed various representations made by Defendant on
17 Defendant's online forum prior to and after July 1, 2010.

18 35. Plaintiff Haught relied on the in-person and online representations related to
19 the upgrade in both purchasing and choosing not to return the CLIQ XT during the return
20 period.

21 36. But for the representations made by or on behalf of Defendant related to the
22 upgrade to Android 2.1, Plaintiff Haught would not have purchased and/or kept the CLIQ
23 XT.

24 37. Less than one year after purchase, Plaintiff Haught's CLIQ XT is now
25 outdated and incompatible with a variety of popular mobile applications.
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1 **FACTS RELATING TO PLAINTIFF WOOD**

2 38. Plaintiff Elyse Wood purchased a Motorola CLIQ XT in or around May 2010.

3 39. Prior to purchasing the CLIQ XT, Plaintiff understood that the CLIQ XT
4 would be upgraded to a better version of the Android operating system in 2010.

5 40. Following her purchase, Plaintiff was exposed to representations throughout
6 2010 made by Defendant that the CLIQ XT would be upgraded to Android 2.1, including
7 statements on Defendant's customer support forums and Defendant's upgrade timeline chart.

8 41. Plaintiff relied on Defendant's representations as a primary reason for
9 continuing to use the CLIQ XT.

10 42. But for Defendant's omissions, Plaintiff would not have purchased the CLIQ
11 XT; and, but for Defendant's representations and omissions, Plaintiff would not have
12 continued to use the CLIQ XT throughout 2010, or she would have attempted to return or
13 exchange the mobile device. Accordingly, Plaintiff did not receive the benefit of the bargain
14 she made when she purchased the CLIQ XT.

15 43. Plaintiff continued to view representations made by Defendant regarding its
16 intent to update the CLIQ XT operating system, and continued to rely on those
17 representations in using the device.

18 44. Less than one year after purchase, Plaintiff's CLIQ XT is now outdated and
19 incompatible with a variety of popular mobile applications.

20 **CLASS ALLEGATIONS**

21 45. Plaintiffs Haught and Wood bring this action pursuant to Fed. R. Civ. P.
22 23(b)(2) and 23(b)(3) on behalf of themselves and a class of similarly situated individuals
23 (the "Class") defined as follows:

24 All individuals and entities in the United States who purchased a Motorola
25 CLIQ XT prior to February 2, 2011. Excluded from the Class are (1)
26 Defendant, its legal representatives, assigns, and successors, and any entity in
27 which Defendant has a controlling interest, and (2) the judge and magistrate
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1 judge to whom this case is assigned and the judge's and magistrate judge's
2 immediate family.

3 46. The exact number of the members of the Class is unknown and is not
4 available to Plaintiffs at this time, but individual joinder in this case is impracticable as the
5 Class consists of thousands of individuals.

6 47. Plaintiffs' claims are typical of the claims of all of the other members of the
7 Class. Plaintiffs and each Class member were affected in substantially the same way by
8 Defendant's fraudulent, misleading, and unlawful marketing of its product.

9 48. Plaintiffs will fairly and adequately represent and protect the interests of the
10 other members of the Class. Plaintiffs have retained counsel with substantial experience in
11 prosecuting complex litigation and class actions. Plaintiffs and their counsel are committed
12 to vigorously prosecuting this action on behalf of the members of the Class, and have the
13 financial resources to do so. Neither Plaintiffs nor their counsel have any interest adverse to
14 those of the other members of the Class.

15 49. Absent a class action, most members of the Class would find the cost of
16 litigating their claims to be prohibitive and will have no effective remedy. The class
17 treatment of common questions of law and fact is also superior to multiple individual actions
18 or piecemeal litigation in that it conserves the resources of the courts and litigants, and
19 promotes consistency and efficiency of adjudication.

20 50. Defendant has acted and failed to act on grounds generally applicable to
21 Plaintiffs and the other members of the Class, requiring the Court's imposition of uniform
22 relief to ensure compatible standards of conduct toward members of the Class.

23 51. The factual and legal bases of Defendant's liability to Plaintiffs and to the
24 other members of the Class are the same, resulting in injury to Plaintiffs and all of the other
25 members of the Class. Plaintiffs and the other members of the Class have all suffered harm
26 and damages as a result of Defendant's wrongful conduct.
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1 52. There are many questions of law and fact common to the claims of Plaintiffs
2 and the other members of the Class, and those questions predominate over any questions that
3 may affect individual members of the Class. Common questions for the Class include but are
4 not limited to the following:

5 a) Whether Defendant's conduct described herein constitutes a violation
6 of the Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750, *et seq.*);

7 b) Whether Defendant's conduct described herein constitutes a violation
8 of the Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*);

9 c) Whether Defendant's conduct described herein constitutes a violation
10 of the False Advertising Law (Cal. Bus. & Prof. Code §§ 17500, *et seq.*);

11 d) Whether Defendant's conduct described herein constitutes fraud by
12 omission;

13 e) Whether Defendant's conduct described herein constitutes negligent
14 misrepresentation; and

15 f) Whether Defendant's conduct described herein resulted in unjust
16 enrichment to Defendant.

17 53. This class action is appropriate for certification because class proceedings are
18 superior to all other available methods for the fair and efficient adjudication of this
19 controversy, since joinder of all members is impracticable. The damages suffered by the
20 individual members of the Class will likely be relatively small, especially given the burden
21 and expense of individual prosecution of the complex litigation necessitated by Defendant's
22 actions. It would be virtually impossible for the individual members of the Class to obtain
23 effective relief from Defendant's misconduct. Even if members of the Class themselves
24 could sustain such individual litigation, it would still not be preferable to a class action,
25 because individual litigation would increase the delay and expense to all parties due to the
26 complex legal and factual controversies presented in this Complaint. By contrast, a class
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1 action presents far fewer management difficulties and provides the benefits of single
2 adjudication, economy of scale, and comprehensive supervision by a single court.
3 Economies of time, effort, and expense will be fostered and uniformity of decisions will be
4 ensured.

5 54. Plaintiffs reserve the right to revise the foregoing "Class Allegations" based
6 on facts learned in discovery.

7 **FIRST CAUSE OF ACTION**
8 **Violation of the Consumer Legal Remedies Act**
9 **Cal. Civ. Code § 1750 et seq.**

10 55. Plaintiffs incorporate by reference the foregoing allegations.

11 56. The Consumers Legal Remedies Act ("CLRA") applies to Defendant's
12 actions and conduct as described herein because it extends to transactions that are intended to
13 result, or which have resulted, in the sale of goods or services to consumers.

14 57. Defendant is a "person" as defined by Cal. Civ. Code § 1761(c).

15 58. Plaintiffs and each member of the Class are "consumers" as defined by Cal.
16 Civ. Code § 1761(d).

17 59. The CLIQ XT mobile device is a "good" within the meaning of Cal. Civ.
18 Code § 1761(a).

19 60. Defendant violated the CLRA by representing that it would upgrade the
20 operating system on the CLIQ XT to Android version 2.1, when in fact it was unwilling or
21 unable to do so.

22 61. By representing that it would upgrade the operating system on the CLIQ XT
23 to Android version 2.1, failing to disclose, and concealing the fact that it was unwilling or
24 unable to upgrade the operating system on the CLIQ XT to Android version 2.1, Defendant
25 violated Civil Code section 1770(a), as it represented that the CLIQ XT had characteristics
26 and benefits that it did not have, and represented that the CLIQ XT was of a particular
27 standard, quality or grade when it was of another. (Civ. Code §§ 1770(a)(5, 7).)
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1 62. Defendant's unfair or deceptive acts or practices occurred repeatedly in
2 Defendant's trade or business, and were capable of deceiving a substantial portion of the
3 purchasing public.

4 63. Defendant knew that it was unable or unwilling to upgrade the CLIQ XT to
5 the Android 2.1 operating system.

6 64. Defendant was under a duty to Plaintiffs and the Class to disclose its inability
7 or unwillingness to upgrade the CLIQ XT to Android 2.1 because:

- 8 a. Defendant was in a superior position to know the true state of facts
9 about the upgrade potential for the CLIQ XT;
- 10 b. Plaintiffs and the Class Members could not reasonably have been
11 expected to learn or discover that Defendant was unable or unwilling
12 to upgrade the CLIQ XT's operating system; and
- 13 c. Defendant knew that Plaintiffs and the Class Members could not
14 reasonably have been expected to learn or discover the upgrade issue.

15 65. In failing to disclose its inability or unwillingness to upgrade the CLIQ XT
16 operating system for over ten months, Defendant has knowingly and intentionally concealed
17 material facts and breached its duty not to do so.

18 66. The facts concealed or not disclosed by Defendant to Plaintiffs and the Class
19 are material in that a reasonable consumer would have considered them to be important in
20 deciding whether to purchase Defendant's CLIQ XT mobile device or pay a lesser price.
21 Had Plaintiffs and the Class known of Defendant's inability or unwillingness to upgrade the
22 CLIQ XT operating system to Android 2.1, they would not have purchased the CLIQ XT or
23 would have paid less for it.

24 67. Plaintiffs and the Class reasonably expected the CLIQ XT to be upgraded to
25 Android 2.1 based on Defendant's public representations. That is a reasonable and objective
26 consumer expectation for mobile devices.

1 75. Plaintiffs and the Class reasonably expected the CLIQ XT to be upgraded to
2 the Android 2.1 operating system. This is the reasonable and objective consumer expectation
3 for Defendant's mobile devices.

4 76. Defendant has violated the fraudulent prong of the UCL by knowingly and
5 willfully making false and misleading claims to the public regarding its willingness or ability
6 to upgrade the CLIQ XT to the Android 2.1 operating system.

7 77. Defendant violated the unfair prong of the UCL by representing that it would
8 upgrade the operating system on the CLIQ XT to Android version 2.1, when in fact it was
9 unable or unwilling to do so.

10 78. Defendant's false representations about the timing and existence of an
11 operating system upgrade for the CLIQ XT was an act likely to mislead Plaintiffs and
12 members of the Class acting reasonably under the circumstances, and constitutes a deceptive
13 trade practice in violation of the UCL.

14 79. In failing to disclose its inability or unwillingness to upgrade the CLIQ XT
15 operating system to Android 2.1, Defendant has knowingly and intentionally concealed
16 material facts and breached its duty not to do so.

17 80. Defendant has violated the fraudulent prong of the UCL by knowingly and
18 willfully failing to disclose its inability or unwillingness to upgrade the CLIQ XT to the
19 Android 2.1 operating system.

20 81. Defendant knew that it was unable or unwilling to upgrade the CLIQ XT to
21 the Android 2.1 operating system.

22 82. As a direct and proximate result of Defendant's unlawful and fraudulent acts,
23 Plaintiffs and each Class member have suffered injury in fact and lost money by purchasing
24 the CLIQ XT and paying more than they would have otherwise had Defendant informed
25 them that the CLIQ XT could not or would not be upgraded to Android 2.1.
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1 unable to upgrade the CLIQ XT to the Android 2.1 operating system. Defendant did not
2 have any reasonable ground for believing its statements to be true.

3 95. Defendant intended that Plaintiffs and the members of the Class rely on its
4 misrepresentations and omissions by purchasing and using the CLIQ XT.

5 96. Plaintiffs and Class Members justifiably relied on Defendant's
6 misrepresentations by purchasing and/or continuing to use the CLIQ XT, and were unaware
7 of the falsity of Defendant's statements at the time they were made.

8 97. As a direct and proximate result of Defendant's misrepresentations, Plaintiffs
9 and the members of the class suffered damages in the form of monies paid to purchase the
10 CLIQ XT, as well as the difference in value between a CLIQ XT with Android 2.1 and one
11 with Android 1.5.

12 **FIFTH CAUSE OF ACTION**
13 **FRAUD BY OMISSION**

14 98. Plaintiffs incorporate by reference the foregoing allegations.

15 99. Based on Defendant's misrepresentations and omissions, Plaintiff and the
16 Class reasonably expected the CLIQ XT to be upgraded to the Android 2.1 operating system.
17 This is the reasonable and objective consumer expectation for Defendant's mobile devices.

18 100. Defendant knew that it was unable or unwilling to upgrade the CLIQ XT to
19 the Android 2.1 operating system.

20 101. Defendant concealed from and failed to disclose to Plaintiffs and the Class its
21 inability or unwillingness to upgrade the CLIQ XT operating system to Android 2.1.

22 102. Defendant was under a duty to Plaintiffs and the Class to disclose its inability
23 or unwillingness to upgrade the CLIQ XT to Android 2.1 because:

- 24 a. Defendant was in a superior position to know the true state of facts
25 about the upgrade ability or potential for the CLIQ XT;
26 b. Plaintiffs and the Class Members could not reasonably have been
27 expected to learn or discover that Defendant was unable or unwilling
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to upgrade the CLIQ XT's operating system; and

c. Defendant knew that Plaintiff and the Class Members could not reasonably have been expected to learn or discover the upgrade issue.

103. The facts concealed or not disclosed by Defendant to Plaintiffs and the Class are material in that a reasonable consumer would have considered them to be important in deciding whether to purchase Defendant's CLIQ XT mobile device or pay a lesser price. Had Plaintiffs and the Class known of Defendant's inability or unwillingness to upgrade the CLIQ XT operating system to Android 2.1, they would not have purchased the CLIQ XT or would have paid less for it.

104. Defendant concealed or failed to disclose the true nature of its ability or willingness to upgrade the CLIQ XT operating system to Android 2.1 in order to induce Plaintiffs and the Class to act thereon. Plaintiffs and the Class justifiably relied on the omission to their detriment. The detriment is evident from Plaintiffs' and Class Members' purchase of Defendant's CLIQ XT mobile device.

105. As a direct and proximate result of Defendant's misconduct, Plaintiffs and the Class have suffered and will continue to suffer actual damages in the form of monies paid to purchase the CLIQ XT, as well as the difference in value between a CLIQ XT with Android 2.1 and one with Android 1.5.

SIXTH CAUSE OF ACTION
Restitution/Unjust Enrichment

106. Plaintiffs incorporate by reference the foregoing allegations.

107. Plaintiffs and the Class have conferred a benefit upon Defendant. Defendant has received and retained money belonging to Plaintiffs and the Class as a result of its unlawful and deceptive practices.

108. Defendant appreciates or has knowledge of said benefit.

1 F. Award Plaintiffs and the Class pre- and post-judgment interest, to the extent
2 allowable;

3 G. Enter such other injunctive and/or declaratory relief as is necessary to protect
4 the interests of Plaintiffs and the Class;

5 H. Award such other and further relief as equity and justice may require.

6 **JURY TRIAL**

7 Plaintiffs demand a trial by jury for all issues so triable.
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9 Respectfully submitted,

10 Dated: September 2, 2011

11 **JACK HAUGHT**
12 **ELYSE WOOD**

13 By: 

14 One of their Attorneys

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* *Pro Hac Vice* admittance to be sought