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ADR

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CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

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9 *Attorneys for Plaintiffs*

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

E-filing

12 LANCE WAIDZUNAS, BRENT
13 WEST, MICHAEL MANN, TYLER
14 BURGERT, CHI LOK LEUNG, and
15 BRIAN ROBINSON, individually
16 and on behalf of all others similarly
17 situated,

Case No. **C08 05081**

CLASS ACTION

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

HRL

Plaintiffs,

v.

18 HEWLET-PACKARD CO.,
19 Defendant,

20 1. Plaintiffs, Lance Waidzunas, Brent West, Michael Mann, Tyler
21 Burgert, Chi Lok Leung, and Brian Robinson (collectively, "Plaintiffs"), allege the
22 following as their class action complaint on their own behalf and on behalf of a
23 class of all similarly situated persons who purchased Hewlett-Packard Co.
24 notebook computers, equipped with chip sets manufactured by NVIDIA Corp.,
between September 18, 2004, through the present (the "Class Period").

I.

JURISDICTION AND VENUE

25 2. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1332, as
26 amended. The matter in controversy exceeds the sum or value of \$5,000,000,

BY FAX

1 exclusive of interest and costs, and no more than one-third of the members of the
2 Class reside in California.

3 3. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because,
4 during the Class Period, Defendant resided, transacted business, was found, and
5 had agents in this District and because a substantial part of the events giving rise to
6 Plaintiffs' claims occurred, and a substantial portion of the affected interstate trade
7 and commerce described below has been carried out, in this District.

8 4. This Court has personal jurisdiction over Defendant because, *inter*
9 *alia*, Defendant: (i) transacted business throughout the United States, including in
10 California and in this District; and (ii) maintained its principal place of business in
11 this District.

12 II.

13 PARTIES

14 5. Plaintiffs purchased H-P notebook computers with defective NVIDIA
15 chip sets and were damaged thereby, as set forth more fully below.

16 6. Defendant Hewlett-Packard Co. ("H-P" or "Defendant") is one of the
17 world's largest manufacturers of personal computers. H-P is headquartered in this
18 District and maintains its principal place of business at 3000 Hanover Street, Palo
19 Alto, California 94304.

20 III.

21 SUBSTANTIVE ALLEGATIONS

1 7. According to its website, NVIDIA Corp. (“NVIDIA”) is “the world
2 leader in visual computing technologies and the inventor of the GPU^[1] a high-
3 performance processor which generates breathtaking, interactive graphics on
4 workstations, personal computers, game consoles, and mobile devices.” The
5 Company’s product portfolio includes graphics processors, wireless
6 communications processors, PC motherboard chipsets, and media and
7 communications processors (“MCPs”). Among consumers, NVIDIA is probably
8 best known for its “GeForce” line of graphics processors.

9 8. On July 2, 2008, NVIDIA announced that flawed processes and
10 materials used in manufacturing GPU’s and MCP’s was causing these mobile
11 video adapters to fail at unusually high rates. While NVIDIA claims that it has
12 “not been able to determine a root cause for these failures,” NVIDIA admits that
13 “testing suggests a weak material set of die/package combination, system thermal
14 management designs, and customer use patterns are contributing factors.” Prior to
15 the total failure of the graphics cards, affected computers often suffer from a
16 variety of symptoms, including black screens, duplicate images, wireless
17 networking complications, and the random appearance of lines, characters, and
18 other on-screen interference.

19 9. According to a NVIDIA SEC filing:

20 NVIDIA plans to take a one-time charge from \$150
21 million to \$200 million against cost of revenue for the

22 ¹ “GPU” stands for “Graphics Processing Unit.”

1 second quarter to cover anticipated warranty, repair,
2 return, replacement and other costs and expenses, arising
3 from a weak die/packaging material set in certain
4 versions of its previous generation GPU and MCP
5 products used in notebook systems. Certain notebook
6 configurations with GPUs and MCPs manufactured with
7 a certain die/packaging material set are failing in the field
8 at higher than normal rates.

9 10. Michael Hara, NVIDIA's Vice President for Investor Relations and
10 Communications, conceded during the September 4, 2008, "Citigroup Technology
11 Conference" that NVIDIA began troubleshooting these problems with major
12 computer manufacturers, including H-P, beginning no later than August of 2007.
13 "We've ... been working on this problem with the customers for well over a year,"
14 Hara admitted, "going all the way back to August of last year."

15 11. The problem stems from what has been termed "heat cycling" by
16 industry professionals. When H-P computers equipped with NVIDIA's graphics
17 cards are switched on, the cards quickly reach high temperatures. As the cards
18 cool down, however, the rapid change in temperature subjects them to extreme
19 physical stress. As a result, solder joints weaken and ultimately crack, causing the
20 video adapters to malfunction or stop working altogether.

21 12. Though faced with hundreds of consumer complaints regarding these
22 problems, H-P failed to warn consumers about the common design and
23 manufacturing defects contained in its affected notebook computers. Instead, H-P
24 remained silent while consumers purchased its defective products, knowing that
they would malfunction and result in, among other things, Plaintiffs' and the Class'
inability to use their notebook computers for their intended purposes and functions.

1 13. In response to these defects, H-P released hardware BIOS updates that
2 activate the system cooling fan sooner and for a longer period of time, with the aim
3 of keeping the adapter from growing too hot. This is only a temporary solution,
4 however, and it is accompanied by a host of negative side effects that H-P
5 purposefully failed to disclose. It dramatically reduces battery life, for example,
6 while simultaneously increasing the level of noise produced by the fan.

7 14. Recently, NVIDIA's investment relations officer specifically
8 acknowledged that the defects, even if corrected, "cause a degradation in battery
9 life." He suggested that, among others, purchasers of H-P notebooks with
10 defective NVIDIA chip sets should be satisfied with a second-rate computer:
11 "[T]here will always be a trade off, but the trade off of not having your notebook
12 fail is probably the best one to make."

13 15. Additionally, technology commentators have suggested that H-P's
14 quick fix may lead to the premature failure of the cooling fan. It has also been
15 predicted that these BIOS updates will merely postpone failure of NVIDIA video
16 cards, including those installed in notebook computers manufactured by H-P, until
17 after their warranties expire. As reported on July 29, 2008, by one of the Internet's
18 leading technology portals, ZDNet, "*a BIOS update is little more than a band-aid
19 and isn't going to fix the underlying problem.*" (Emphasis added.)

20 16. According to multiple public sources, the earliest of the BIOS updates
21 was issued by Hewlett-Packard no later than November 2007. Not until July 2008,
22 however, did H-P admit that certain of its notebook computers contained defective
23

1 chip sets and publish a list of the defective notebook computers. Included were
2 systems in H-P's Pavilion and Compaq Presario computer lines.

3 17. On its website, H-P listed some of the symptoms that affected
4 computers may be suffering from:

- 5 a. "The notebook does not detect wireless networks and the
6 wireless adapter is not detected in the Device Manager."
7 b. "There is no video on the computer LCD panel or external
8 monitor."
9 c. "The notebook has no power and no active LEDs."
10 d. "The notebook does not start."
11 e. "The battery charge indicator light does not turn on when the
12 battery is installed and the AC adapter is connected."
13 f. "The notebook issues a single beep during boot indicating no
14 power."
15 g. "The external monitor functions but there is no image on the
16 notebook LCD panel."

17 18. H-P has been flooded with complaints from purchasers of its notebook
18 computers, and overall consumer response to the defective NVIDIA video cards
19 has been overwhelmingly negative. These are some examples gathered from
20 public message boards by technology reporter Adrian Kingsley-Hughes:

21 [H]aving the BIOS activate the fans sooner to
22 compensate for a defective chipset is a band-aid solution.

23 * * *

24 CLASS ACTION COMPLIANT
CASE NO _____

1 [S]ince this BIOS update won't mysteriously change the
2 die packaging material, the only real thing you can do is
3 to extend warranty or premium support to the amount of
4 years you wan[t to] use the computer, and still then live
5 with the fact that your computer could die on you any
6 time.

7 * * *

8 So rather than replacing the faulty parts you are going to
9 just turn up the fans, at the expense of battery life and
10 noise. I would rather just leave the BIOS as it is and get
11 a proper fix if the problem occurs. Even if the problem
12 occurs out of warranty I think there is a strong case for ...
13 fixing it for free since there is an admitted manufacturing
14 defect.

15 * * *

16 With this solution, you try to push the issue outside the
17 customers' warranty-time ... but what[] [about] after that
18 time? Will you repair the notebooks for free?

19 * * *

20 Nice to see that a hardware issue is fixed by software
21 update. How is a physical defect suppose[d] to be fixed
22 by software? Time to step up to the plate ... and start
23 offering a replacement device.

24 * * *

I tend to agree with some of the other comments. A
BIOS update to turn on cooling fans is not the
appropriate response when I have spent approx[imately]
\$2000 on a[] [laptop computer] that I now fear will have
a shortened life span.

IV.

CLASS ACTION ALLEGATIONS

CLASS ACTION COMPLIANT
CASE NO _____:

1 19. Plaintiffs bring each of the claims in this action on their own behalf
2 and on behalf of a class of all persons similarly situated (the "Class"), pursuant to
3 Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure.

4 20. The Class definition is as follows: "All persons who, during the period
5 from September 18, 2004, to the present, purchased Hewlett-Packard Co. notebook
6 or laptop computers equipped with chip sets or video graphics cards manufactured
7 by NVIDIA Corp."

8 21. The Class is so numerous that joinder of all members is impractical.
9 It is estimated that the Class numbers at least in the tens of thousands.

10 22. There are questions of law and fact which are common to the Class
11 which predominate over any questions affecting only individual members,
12 including:

- 13 a. Whether H-P notebook computers were equipped with
14 defective NVIDIA chip sets;
- 15 b. Whether H-P concealed the existence of such defects;
- 16 c. Whether H-P was unjustly enriched by the conduct alleged
17 herein;
- 18 d. Whether H-P violated the provisions of the California Code set
19 forth in the below-numbered counts; and
- 20 e. The extent to which the members of the Class have sustained
21 damages and the proper measure of damages.
- 22
- 23

1 27. H-P has engaged in unfair, unlawful, and fraudulent business practices
2 as set forth above and has been unjustly enriched thereby.

3 28. By engaging in the above-described acts and practices, H-P has
4 committed one or more acts of unfair competition within the meaning of Bus. &
5 Prof. Code § 17200, *et seq.*

6 29. H-P's acts and practices have and/or are likely to deceive members of
7 the consuming public.

8 30. H-P's acts and practices are also unlawful because they violate Bus. &
9 Prof. Code § 17500, *et seq.* Specifically, H-P marketed and sold notebook
10 computers in defective condition and deceptively failed to disclose their defects.
11 H-P's acts and practices are also unlawful because they violate the Song-Beverly
12 Act, Civ. Code § 1790, *et seq.*

13 31. Plaintiffs, on behalf of themselves, on behalf of the Class and on
14 behalf of the common or general interest, seek an order of this Court awarding
15 restitution, disgorgement, injunctive relief and all other relief allowed under §
16 17200, *et seq.*, plus interest, attorneys' fees and costs.

17 32. Plaintiffs meet the standing requirements to bring this cause of action
18 because, among other reasons, the questions presented are ones of a common or
19 general interest and/or because the members of the Class are so numerous that it is
20 impracticable to bring them all before the Court.

21
22 .../

23 CLASS ACTION COMPLIANT
24 CASE NO _____

1 *Second Cause of Action*

2 **For Violation of Bus. & Prof. Code § 17500 by Plaintiffs Individually,**
3 **as a Class Action and on Behalf of the Common or General Interest**

4 33. Plaintiffs reallege and incorporate the above allegations by reference
5 as if set forth fully herein.

6 34. Plaintiffs bring this cause of action on behalf of themselves, on behalf
7 of the Class and on behalf of the common or general interest. Plaintiffs have
8 suffered injury in fact and have lost money or property as a result of Defendant's
9 violation of Bus. & Prof. Code § 17500, *et seq.*

10 35. Beginning in or before September 2004, H-P engaged in advertising
11 and marketing to the public and offered notebook computers equipped with
12 NVIDIA chip sets for sale throughout the United States, including California.

13 36. H-P engaged in such advertising and marketing with an intent to
14 directly or indirectly induce the purchase of such notebook computers.

15 37. H-P's advertisements and marketing representations regarding the
16 technical and other characteristics of such notebook computers were false,
17 misleading, and deceptive.

18 38. At the time H-P made and disseminated such false advertisements and
19 marketing representations, it knew or should have known that the statements were
20 untrue or misleading, and thus it acted in violation of Bus. & Prof. Code § 17500,
21 *et seq.*

1 39. H-P actively concealed its knowledge that its notebook computers
2 equipped with NVIDIA chip sets contained inherent defects.

3 40. Plaintiffs have been harmed as a result of the foregoing. Plaintiffs, on
4 behalf of themselves, on behalf of the Class and on behalf of the common or
5 general interest, seek restitution, disgorgement, injunctive relief and all other relief
6 allowable under § 17500, *et seq.*

7 41. Plaintiffs meet the standing requirements to bring this cause of action
8 because, among other reasons, the questions presented are ones of a common or
9 general interest and/or because the members of the Class are so numerous that it is
10 impracticable to bring them all before the Court.

11
12 ***Third Cause of Action***

13 **For Breach of Express Warranty by Plaintiffs Individually**
14 **and on Behalf of all Others Similarly Situated**

15 42. Plaintiffs reallege and incorporate the above allegations by reference
16 as if set forth fully herein.

17 43. Under the terms of H-P's warranty, H-P notebook computers
18 equipped with NVIDIA chip sets came with an express warranty.

19 44. H-P's written warranty stated that each such notebook computer was
20 free of defects in materials and workmanship and conformed to H-P's product
21 specifications.

1 45. H-P breached its express warranties by supplying notebook computers
2 with the defects enumerated above and refusing to repair or replace the defective
3 computers.

4 46. As a result of H-P's breach of express warranty, Plaintiffs and the
5 Class have suffered damages in an amount to be determined at trial.

6
7 ***Fourth Cause of Action***

8 **For Breach of the Song-Beverly Act by Plaintiffs Individually**
9 **and on Behalf of all Others Similarly Situated**

10 47. Plaintiffs reallege and incorporate the above allegations by reference
11 as if set forth fully herein.

12 48. Plaintiffs assert the fourth Cause of Action individually, on behalf of
13 the Class and on behalf of the common or general interest for breach of implied
14 warranty under the Song-Beverly Act, Civ. Code § 1790, *et seq.*

15 49. The defective H-P notebook computers equipped with NVIDIA chip
16 sets are "consumer goods" within the meaning of Civ. Code §1791(a).

17 50. H-P's express warranty and implied warranty of merchantability arose
18 out of and/or were related to the sales of such computers.

19
20 51. H-P has failed to comply with its obligations under its express
21 warranty and under its implied warranty of merchantability.

22 52. Plaintiffs and the Class have suffered and will continue to suffer
23 damages as a result of H-P's failure to comply with its warranty obligations.

1 Accordingly, Plaintiffs and the Class are entitled to recover such damages under
2 the Song-Beverly Act, including damages pursuant to Civ. Code §§ 1791.1(d) and
3 1974.

4 53. H-P's breaches of warranty were willful. Accordingly, a civil penalty
5 should be imposed upon Defendant in an amount not to exceed twice the amount
6 of actual damages.

7
8 ***Fifth Cause of Action***

9 **For Violation of the CLRA by Plaintiffs Individually,
10 on Behalf of the Common or General Interest Pursuant to the Standing
11 Provisions of C.C.P. § 382 and as a Class Action on Behalf of all Others
Similarly Situated**

12 54. Plaintiffs reallege and incorporate the above allegations by reference
13 as if set forth fully herein.

14 55. Plaintiffs bring this claim individually and on behalf of the Class
15 against Defendant.

16 56. Defendant has engaged in deceptive practices, unlawful methods of
17 competition and/or unfair acts as defined by Civ. Code § 1750, *et seq.*, to the
18 detriment of Plaintiffs, members of general public, and the Class. Plaintiffs, the
19 general public, and the members of the Class have suffered harm as a proximate
20 result of the violations of law and wrongful conduct of Defendant alleged herein.

21 57. Defendant intentionally, knowingly, and unlawfully perpetrated harm
22 upon Plaintiffs by the above-described facts. Specifically, Defendant's actions in
23
24

1 selling defective products and failing to remedy these defects have violated the
2 following provisions of the CLRA, among others:

- 3 a. Civil Code § 1770(a)(5): Representing that goods or services
4 have sponsorship, approval, characteristics, ingredients, uses,
5 benefits or quantities which they do not have.
- 6 b. Civil Code § 1770(a)(7): Representing that goods or services
7 are of a particular standard, quality or grade, or that goods are
8 of a particular style or model, if they are of another.
- 9 c. Civil Code § 1770(a)(9): Advertising goods or services with
10 intent not to sell them as advertised.

11 58. Defendant's policies and practices are unlawful, unethical, oppressive,
12 fraudulent, and malicious. The gravity of the harm to all consumers and to the
13 general public from Defendant's policies and practices far outweighs any
14 purported utility those policies and practices have.

15 59. Pursuant to Civ. Code § 1780(a), Plaintiffs seek an order enjoining
16 Defendant from engaging in the methods, acts, or practices alleged herein.

17 60. Pursuant to Civ. Code § 1782, if Defendant does not rectify its illegal
18 acts within 30 days, Plaintiffs intend to amend this Complaint to add claims for:

- 19 a. actual damages;
- 20 b. restitution of money to Plaintiffs, the general public and Class
21 members;
- 22 c. punitive damages;
- 23 d. attorneys' fees and costs; and
- 24

1 e. any other relief that this Court deems proper.

2 VI.

3 **PRAAYER FOR RELIEF**

4 WHEREFORE, Plaintiffs, on behalf of themselves, all others similarly
5 situated and the general public, pray for judgment against H-P as follows:

- 6 A. An order certifying this case as a class action and appointing Plaintiffs
7 and its counsel to represent the Class.
- 8 B. An injunction against H-P selling, directly or indirectly, notebook
9 computers with defective NVIDIA chip sets.
- 10 C. Restitution and disgorgement of all amounts obtained by H-P as a
11 result of its misconduct, together with interest thereon from the date of
12 payment, to the victims of such violations.
- 13 D. Actual damages for injuries suffered by Plaintiffs and the Class.
- 14 E. Compensatory money damages according to proof.
- 15 F. Punitive damages.
- 16 G. Attorneys' fees and costs.
- 17 H. An order requiring H-P to immediately cease its wrongful conduct as
18 set forth above; enjoining H-P from continuing to falsely market and
19 advertise, conceal material information, and conduct business via the
20 unlawful and unfair business acts and practices complained of herein;
21 requiring H-P to engage in a corrective notice campaign; requiring H-
22 P to implement a full replacement program of all defective notebook
23 computers with new, fully functional, non-defective, replacement
24

1 computers of equal or greater advertised specifications, and to refund
2 to Plaintiffs and all members of the Class the funds paid to H-P for the
3 defective computers; directing H-P to disgorge all profits improperly
4 obtained as a result of its conduct and establishing a fund thereof for
5 the benefit of Plaintiffs and the Class; and requiring H-P to pay for
6 reasonable attorneys' fees and costs of prosecuting this action.

7 I. For statutory prejudgment interest.

8 J. For such other relief as this Court may deem just and proper.

9 **VII.**

10 **JURY TRIAL DEMANDED**

11 Plaintiffs hereby demand a trial by jury.

12
13
14 Dated: November 06, 2008

Respectfully submitted,

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CLASS ACTION COMPLIANT
CASE NO _____

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