

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

NO: 500-06-000333-068

(Class Action)
 SUPERIOR COURT

M. ROYER

and

J. HERMAN

Petitioners

-vs.-

APPLE COMPUTER, INC.

and

APPLE CANADA INC.

Respondents

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

TO THE HONOURABLE JUSTICE JOHANNE MAINVILLE OF THE SUPERIOR COURT, SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONERS STATE AS FOLLOWS:

1. Petitioner ROYER wishes to institute a class action on behalf of the following class, of which he is a member, namely:
 - all residents in Canada who were the age of majority when they purchased and/or used any IPOD designed, manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents, or any other group to be determined by the Court;
 alternately (or as a subclass)
 - all residents in Quebec who were the age of majority when they purchased and/or used any IPOD designed, manufactured,



distributed, sold, or otherwise put onto the marketplace by the Respondents, or any other group to be determined by the Court;

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

- all residents in Canada who were minors when they purchased and/or used any IPOD designed, manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents, or any other group to be determined by the Court;
alternately (or as a subclass)
- all residents in Quebec who were minors when they purchased and/or used any IPOD designed, manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents, or any other group to be determined by the Court;

(2...) see paragraph 30

(2.1...) see paragraph 30

(3...) see paragraphs 25 and 60

(4...) see paragraph 43

(5...) see paragraph 28

(6...) see paragraph 50

(7...) see paragraphs 60 and 61

(8...) see paragraph 103

(9...) see paragraph 111

Facts that give rise to an individual action of the part of the Petitioners against the Respondents

9.1. Petitioners are addressing this Honourable Court because the Respondents, have placed onto the marketplace a noxious (*nocif*) product, made so by the various features of the iPod (i.e. volume control and earbud capabilities) without proper warnings of the serious risk of noise-induced hearing loss and how to prevent it. Therefore, the Respondents are responsible for all the damages related thereto;

- 9.2. The product is dangerous to the great majority of users even under regular everyday circumstances. It does not depend simply on a minor portion of listeners abusing or exaggerating the use of their iPods;
- 9.3. The risk of noise-induced hearing loss could easily have been avoided by a simple change in product design and/or the addition of adequate warnings;
- 9.4. Petitioner HERMAN additionally asserts that the Respondents have violated their statutory duties with respect to minors;

The Respondents

10. Respondent Apple Computer, Inc. is a computer hardware and software company having its head office at 1 Infinite Loop, city of Cupertino, State of California, 95014, USA;
11. Respondent Apple Computer, Inc does business in Canada and Quebec through Apple Canada Inc., which has a principal place of business at 555, Dr. Frédérik-Phillips, suite 210, city of Saint-Laurent, Province of Quebec, H4M 2X4, the whole as more fully appears from a copy of the Quebec Inspector General of Financial Institutions Report attached hereto as **Exhibit R-2**;
- 11.1. Apple Canada Inc. is an affiliate of Apple Computer, Inc. and as such they have both, either directly or indirectly, performed any one of the commercial activities of designing, manufacturing, distributing, importing, selling, and/or putting iPods onto the marketplace in Canada and Quebec;
- 11.2. Given the close ties between the Respondents and considering the preceding, both Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, both Respondents will be referred to as “Apple” for the purposes hereof;

(12...) see paragraph 81

(13...) see paragraph 86

(14...) see paragraph 88

(15...) see paragraph 97

(15.1...) see paragraphs 66, 67, and 68

(15.2...) see paragraph 64

- (15.3...) removed
- (16...) see paragraph 100
- (17...) a) see paragraph 103
 b) see paragraph 105
 c) see paragraph 108
- (18...) a) see paragraphs 114 and 128
 b) see paragraphs 114 and 128
 c) see paragraphs 116 and 130
 d) see paragraphs 115 and 129
 e) removed
 f) see paragraphs 117 and 131
 g) see paragraphs 121e, 135a, and 135f
 h) 1. see paragraphs 118 and 132
 2. see paragraphs 115, 117, 121f, 129, 135g
 3. see paragraphs 121f, and 131, 135g
 4. see paragraphs 125, 137, and 138
 i) see paragraphs 120, 121, 122, 123, 124, 134, 135, 136, 137, 138, 139, and 140
- (19...) see paragraph 155
- (20...) see paragraph 142
- (21...) see paragraph 143
- (22...) a) see paragraph 152
 b) see paragraph 153
 c) see paragraph 154
- (23...) a) see paragraph 144
 b) see paragraph 150
 c) see paragraph 148
 d) see paragraph 151
- (24...) see paragraph 156

Background

25. (3...) On or about October 2001, Apple launched a new product called the iPod, which is a type of portable digital music player. Subsequent to the original iPod release, Apple developed new variations of the iPod line, which now has four (4) main types: (i) classic (ii) shuffle (iii) nano [which replaced



the mini] and (iv) touch. In addition, each category of iPods may have up to six (6) different “generations”;

26. Upon its release, the iPod was an instant success. Sales have steadily increased over the years and it has been reported that the total number of iPods sold worldwide has surpassed 100 million units to date;
27. The iPod was a new product in that it was small and light enough to carry around anywhere and at any time. It can store thousands of songs and has a rechargeable battery which can last up to 14 hours. It became a trendy staple with adolescents due to the Respondents heavy advertising. It has allowed people to listen to music more often and for greater periods of time;
28. (5...) On or about September 2002, Apple was forced to pull its iPods off of store shelves in France due to article L5232-1 of the *Code de la santé publique* which states:
- « Les baladeurs musicaux vendus sur le marché français ne peuvent excéder une puissance sonore maximale de sortie correspondant à une pression acoustique de 100 décibels S.P.L.
- Ils doivent porter sur une étiquette lisible, non détachable, la mention : "A pleine puissance, l'écoute prolongée du baladeur peut endommager l'oreille de l'utilisateur".
- Les baladeurs musicaux qui ne seraient pas conformes à ces dispositions ne peuvent être commercialisés en France.
- Les conditions d'application du présent article sont précisées par arrêté. »
- A copy of the French legislation at the time and as of today is attached hereto as **Exhibit R- 6 en liasse**;
29. In response, Apple modified their iPods in France and also released a software upgrade in its European models to limit sound output to 100 decibels. Notwithstanding this incident, Apple continued to sell their iPods in North America without any change. This should have served as an alert that the iPods (Music Player or “MP”s and earbuds) are a dangerous product and, further, that other countries may have similar legislation [such as the Canadian *Hazardous Products Act* (R.S., 1985, c. H-3) with respect to children];
30. (2..., 2.1...) On January 31st 2006, a class action was instituted against Apple Computer, Inc. in the United States District Court for the Northern District of California San Jose Division. The original class action complaint has been the subject of three (3) amendments. Additionally, both the



BIRDSONG and WAGGONER actions have been consolidated. Attached hereto in the third amended complaint in case number C 06-02280 JW, produced herein as **Exhibit R-1c**;

Noise-Induced Hearing Loss Explained

31. Hearing is the result of a series of events in which the ear converts sound waves into electrical signals that are sent to the brain and interpreted as sound. The ear has three (3) main parts: the outer, middle, and inner ear. Sound waves enter through the outer ear and reach the middle ear where they cause the eardrum to vibrate;
32. The vibrations are transmitted through three (3) tiny bones in the middle ear, called the ossicles. These three (3) bones are named the malleus, incus, and stapes (also known as the hammer, anvil, and stirrup). The eardrum and ossicles amplify the vibrations and carry them to the inner ear. The stirrup transmits the amplified vibrations through the oval window and into the fluid that fills the inner ear. The vibrations move through fluid in the snail-shaped hearing part of the inner ear (cochlea) that contains the hair cells. The fluid in the cochlea moves the top portion of the hair cells, called the hair bundle, which initiates the changes that lead to the production of nerve impulses. These nerve impulses are carried to the brain, where they are interpreted as sound. Different sounds move the hair bundles in different ways, thus allowing the brain to distinguish one sound from another, such as vowels from consonants;
33. Noise-induced hearing loss happens when excessive sound pressure damages the hair cells in the inner ear, causing them to lose their ability to transfer sound to the brain. Noise-induced hearing loss is believed to last forever. There is no known treatment, no medicine, no surgery; not even a hearing aid can truly correct your hearing once it is damaged by noise. Noise-induced hearing loss is, however, preventable.
34. Noise-induced hearing loss is directly related to both:
- (1) the volume of the sound [called intensity]; and
 - (2) the duration of exposure.
- The longer and louder you listen, the greater the likelihood for lasting damage;
35. There are two (2) basic types of noise-induced hearing loss:
- a. noise-induced hearing loss caused by acoustic trauma: a one-time exposure to excessive sound pressure, such as a gunshot; and

- b. gradually developing noise-induced hearing loss caused by repeated exposure to loud sounds over a period of time

36. Gradual noise-induced hearing loss occurs slowly, is not painful, and is often not noticeable until it is quite extensive. It has been said to accrue progressively and often unnoticed until it reaches a certain degree. It begins with only slight disturbances that are hardly perceptible which usually disappear within some time after noise exposure and so they are almost always neglected. It is also insidious because as it develops a listener becomes accustomed to a certain sound level and in an effort to overcome their decreased hearing sensitivity, they unwittingly turns up the device even louder to hear at the same level;

37. The result of noise-induced hearing loss will distort hearing and cause difficulty understanding speech. This is often accompanied with tinnitus, which is a phantom perception of sound that a person perceives as spontaneous auditory sensations, such as ringing, buzzing, hissing, roaring, and rushing in the absence of an external signal;

38. In order to prevent hearing impairment from occurring it is important to assess the sensitivity of hearing change as soon as possible. Consequently, changes in hearing sensitivity between 0 to 20 dB may be important, especially in children and young people;

Volume and Duration Standards

39. In the United States, the National Institute for Occupational Safety and Health (NIOSH) and the Centers for Disease Control (CDC) offer these guidelines for continuous decibel levels and permissible exposure times:

- 85 dB -- 8 hours
- 88 dB -- 4 hours
- 91 dB -- 2 hours
- 94 dB -- 1 hour
- 97 dB -- 30 minutes
- 100 dB -- 15 minutes
- 103 dB -- 7.5 minutes
- 106 dB -- less than 4 minutes
- 109 dB -- less than 2 minutes
- 112 dB -- less than 1 minute
- 115 dB -- about 30 seconds

40. As can be seen, each time the noise level increases by three (3) decibels, the safe exposure time is cut in half (1/2); this may also be called the “exchange rate”;



41. In Europe, the directive Noise at work Regulations on the minimum health and safety agents introduced a lower exposure action value of 80 decibels (Directive 2003/10/EC);

42. In Canada, each province has enacted its own occupational health standards as the following:

Jurisdiction	Maximum Permitted Exposure Level for 8 Hours: dB(A)	Exchange Rate dB(A)+
Canada (Federal)	87	3
British Columbia	85	3
Alberta	85	3
Saskatchewan	85	3
Manitoba	85	3
Ontario	85	3
Quebec	90	5
New Brunswick	85	3
Nova Scotia	85	3
Prince Edward Island	85	3
Newfoundland	85	3
Northwest Territories	85	5
Nunavut	85	3
Yukon Territories	85	3

The MP's (Music Players)

43. (4...) The MP's alone are capable of producing sounds as high as 115 decibels. The earbuds can boost the sounds signals by as much as 6 to 9 decibels. In addition, sudden spikes in songs can push the decibel level up even higher;

44. By way of comparison, most people can hear sounds as low as 0 dB, the level of rustling leaves. The sound of a whisper is about 20 dB, rainfall, close to 45 dB. Normal conversation takes place at about 60 dB; vacuum cleaners



and big-city traffic generate about 85 dB; a hairdryer produces about 90 dB; the buzz in a busy bar on a Saturday night might reach about 95 dB; and jackhammers and ambulance sirens operate at about 120 dB;

45. The MP's do not have any numerical equivalent either by range or by decibel number to indicate the volume level. There is simply a linear volume bar that can be increased or decreased by the individual user. The user is forced to guess the "percentage" of the volume controls. There is no way for a user to know what "too loud" would be, other than to go by their own personal intuition. An image of this volume bar looks like the following:



46. The MP's are different in their design from the "old-fashioned" walkmans or CD players in that they:
- are capable of storing tens of thousands of songs and have a battery life of up to 14 hours, which means that user can listen continuously and without giving their ears a rest;
 - the sound is digital, which means that listeners can increase the volume easily without the sound distortion typical of other technologies which serve as an indication to the user that the volume is too loud;

47. The mere fact that the MP is capable of reaching such a high volume gives the listener a false sense of security as they rely upon the skill and judgement of the Respondents to not make a device that could cause harm. In other words, users would be surprised to find out that they may only listen to their iPods at 60% of the volume level for only one (1) hour a day without risking noise-induced hearing loss. The result of which being that users may feel comfortable using their iPods at 70% or 80% of the volume level;

48. In a study by Fligor and Portnuff entitled “Sound Output Levels of the iPod and Other MP3 Players: Is there potential risk?” they measured the output levels of several music players, including iPods, with different types of headphones (in-the-ear, earbuds, and over-the-ear). It was concluded that with the earbuds a user can safely use his/her iPod at 70% of the volume control for up to 4.6 hours a day and at 80% for up to 1.2 hours a day. A copy of this study is attached hereto and produced as **Exhibit R-7**;

The Ear Buds

49. The Respondents iPods are sold together with their MP’s and a set of earbuds;

50. (6..) These earbuds are defectively designed and/or increase the danger of noise-induced hearing loss in the following manner:

- a. they boost sound signals by as much as 6 to 9 decibels;
- b. they provide no noise-isolation, noise-reduction or noise-cancellation safety features. This means that they do not block out the background noise in everyday situations causing the listener to raise their MP’s volume just to hear at the same volume level that they are accustomed to;
- c. they are placed into the listeners’ concha, close to the ear canal and cochlea. This means that there is less chance of sound dilution. In addition, the fact that these ear buds are placed in the concha causes there to be a high resonance peak;
- d. the problem is even more serious for children, because their ear canals are shorter and not fully developed;

51. While listening to loud music in a club or concert hall is dangerous, piping it directly into your ears through earbuds is far more dangerous. Contrary to music with speakers, wired music is not diluted before it enters the ear or dampened by walls and bodies, or the distance between the listener and the speakers;



52. In March/April 2005, Audiology Today reported a study on the use of different earphones which was conducted to see which type reached the point at which noise-induced hearing loss would occur. The study concluded that earbuds (like those sold by apple) put listeners at risk far faster than any other type of listening devices. The authors recommended that with earbuds an MP should only be used at a level 6 and only for limited periods. However, due to the design of the volume control on the MP, a listener has no way of knowing what a level 6 is and, further, how long they can reasonably be exposed to it; a copy of said Audiology Today article is attached hereto and produced as **Exhibit R-8**;

53. A study by Fliger and Ives entitled “Does Earphone Type Affect Risk for Recreational Noise-induced Hearing Loss?” was performed whereby the iPod earbuds were compared to both over-the-head earphones and other ear bud earphones with noise isolation properties;

54. It was determined that the iPod earbuds “provide essentially no sound isolation”. In consequence, while the listening habits of all the subjects in the study were relatively similar when there was no background noise regardless of the type of earphones used (only “6 % of subjects listening in a quiet setting are “risky listeners”), when those same subjects were put into a common environment (such as an airplane cabin) with more background noise “80% of subjects using ... iPod ear buds exceeded 85 dBA”; a copy of this study is attached hereto and produced as **Exhibit R-9**;

55. Many listeners use their iPods in the subway, on busy downtown streets, in planes, as passengers in cars, and at the gym for extensive hours. A user will unwittingly raise the volume of their iPods to compensate for the lack of noise-isolation. Such actions will cause the user to suffer noise-induced hearing loss;

56. Additionally, a consumer, after paying anywhere between \$250 to \$350, is unlikely to purchase noise-isolation or over-the-ear headphones and simply use the earbuds that were sold to them by the Respondents. In fact a March 2006 poll indicated that 81% of adults and 77% of minors do not purchase special headphones for their electronic devices and simply use the ones that were provided by the manufacturer.

57. Further, an iPod user would not see the need to purchase noise-reduction headphones because the Respondents have not warned the users of any increased risk associated with using their earbuds;

Respondents' Fault



58. Respondents are not faced with a situation that they could not have foreseen. In addition to the incident in France, on December 7th 2005, Apple Computer, Inc. filed a US patent application (# 20070129828) in which they write:

“[0001] Portable media players are becoming pervasive, particularly among relatively younger people. An unintended side effect of using such players is the damaging effect on the users' hearing. The damaging effect on the users' hearing may be exacerbated by new manners of use (all day use, versus for limited time periods such as during jogging) and, perhaps, by the configuration of the headphones (in the ear).

[0002] Furthermore, since the damaging effect on users' hearing is both gradual and cumulative, even those users who are concerned about hearing loss may not behave with respect to their portable media players in a manner that would limit or minimize such damaging hearing effects.”

The whole as appears more fully from a copy of this US patent application, produced herein as **Exhibit R-10**;

59. With respect to most iPod models (Petitioners are unaware of which models and/generations of iPods are included), Apple inserted an inconspicuous warning in the user manual, usually as far back as on pages 40 to 60 of said manuals, the following statement:

“Avoid Hearing Damage

Warning Permanent hearing loss may occur if earbuds or headphones are used at high volume. You can adapt over time to a higher volume of sound, which may sound normal but can be damaging to your hearing. Set you iPod to a safe level before that happens. If you experience ringing in your ears, reduce the volume or discontinue use of your iPod.”

60. (3..., 7...) This warning is deficient for the following reasons:

- a. It is not prominently placed, but hidden far back in a user manual as opposed to on the body of the device or another well-positioned place; especially given the serious nature of noise-induced hearing loss;
- b. There is no mention of the words “noise-induced hearing loss” and how it is gradual and cumulative;
- c. There is no mention of the nature of the earbuds and how they can increase the likelihood of noise-induced hearing loss by failing to block out background noises;



- d. There is no definition of the words “high volume” and there is no way for the user to predict what this means. Once the iPod is at a volume level of above 60%, it is already capable of causing noise-induced hearing loss;
 - e. There is no definition of the words “safe level”. A safe level depends on the volume and the time of the exposure. A level of 80% may be safe for one (1) hour but unsafe for two (2) hours;
 - f. A user may not experience “ringing” in their ears until after the damage has set in. Further, once the noise-induced hearing loss has set in, the sufferer may experience ringing, buzzing, roaring, or rushing in the ears and not simply “ringing”;
 - g. There is no guideline relating the appropriate time periods of use with the volume level; nor how this volume to time period ratio can be affected by the type of headphones used, such as the earbuds which can increase the volume level by up to 9 decibels;
 - h. Even if such warnings existed, a user would have no way of implementing them because the MP volume indicator does not allow a user to tell the actual level; they are left guessing by way of a percentage of the total volume. So even if a user is aware of the potential for hearing loss he/she simply does not know how to set their iPod to a safe level;
61. (7...) The Respondents have failed to adequately warn consumers of the significant risks associated with noise-induced hearing loss created by the ordinary use of iPods. Respondents should have, at the very minimum, warned users of the following:
- a. not to listen to music for more than an hour a day;
 - b. that listening with a volume above 85 decibels is harmful, which in terms of the volume controls is 60%;
 - c. that switching from earbuds to over-the-ear headphones reduces the risk;
 - d. that certain music, such as rap or rock, are more dangerous as they tend to have more volume spikes;
62. In addition some features that would have alleviated the risk of noise-induced hearing loss, all of which the Respondents neglected to implement, would have been:



- a. earphones with noise-cancellation technology to block out background noise;
- b. a volume limit of no more than 100 decibels;
- c. a volume control that indicates at what level range or at what decibel level a user is listening. This would allow for the Respondents to publish in the user manual guidelines for a safe volume to time period ratio so as to avoid injury;

63. With respect to minors, proper warnings and features would still be needed to educate parents, but in addition all iPods should not be capable of producing sounds in excess of 100 decibels as the *Hazardous Products Act* (R.S., 1985, c. H-3) states:

“2. In this Act,...

"prohibited product" means any product, material or substance included in Part I of Schedule I;

4. (1) No person shall advertise, sell or import a prohibited product.

SCHEDULE I

PART I

10. Toys, equipment and other products for use by a child in learning or play that

(a) make or emit noise exceeding one hundred decibels measured at the distance that the product ordinarily would be from the ear of the child using it;”

64. (15.2...) After the present action and the American action had been instituted (on or about March 30th 2006), Respondents released onto their website an “iPod Software Update 1.1.1” which, once downloaded, allows the user to set the maximum volume on his/her MP and allows parents to set the maximum volume allowed on their children’s MP the whole as more fully appears from a copy of Respondents’ website (www.apple.com) attached hereto as Exhibit R-4; In addition, in March 2006, the Respondents expanded on their warning to consumers on their website;

65. These actions are a step in the right direction but are still deficient in the following respects:

- a. the software does not work for all iPods, only the newest generations; many iPod owners’ situations will not be affected by this volume control software;



- b. users are required to obtain knowledge about the volume control software and then take affirmative steps to use the software; many users will not realize that such volume control software exists;
- c. the warnings are still insufficient in that they have not been distributed to all iPod users and they do not adequately warn of the potential for and means to prevent noise-induced hearing loss; no warnings are apparent on the iPod when purchased out of the box and, even if a user does download the volume control program, the user will still not know the level and duration of use before noise-induced hearing loss sets in;
- d. there is no mechanism that allows users to quantify the decibel level; the user will still be guessing, when using their iPods as to what level they are using and if such a level is “too loud”;
- e. these measures have no effect on the use of earbuds, which do not provide noise-reduction, noise-isolation, or noise-cancellation features; this is the key component causing users to raise the volume to an unsafe level without realizing it;

With regard to minors, these actions are further deficient in that:

- f. they rely on the parents to discover the software program and install it themselves; this is inconsistent with the *Hazardous Products Act* (R.S., 1985, c. H-3); merely shifting the onus onto the parents as opposed to the manufacturer/distributor does not comply with the legislation;
- g. iPods will continue to be sold to children in violation of the law as they are capable of emitting sound in excess of 100 decibels;

Consequences of the Respondents Conduct

66. (15.1...) In a March 2006 poll commissioned by the America Speech-Language-Hearing Association, more than half (51%) of American high school students surveyed reported signs of hearing loss. In the same poll, it was found that thirty seven percent (37%) of adults show signs of hearing loss. Symptoms included:

- a. Turning the volume up on your television or radio in order to hear it better;
- b. Finding yourself saying “what” or “huh” a lot when having a conversation with someone in normal voice tones;



- c. People appearing to mumble or speak with muffled voices;
- d. Tinnitus or ringing in the ears

the whole as appears more fully from a copy of said survey, produced herein as **Exhibit R-3**;

67. (15.1...) In that same survey, it was found that the amount of time that users listen to their iPods was:

a. Adults

4 hours or more	15%
1 to 4 hours	38%
30 min. to 1 hour	31%

b. Minors

4 hours or more	11%
1 to 4 hours	30%
30 min. to 1 hour	41%

68. (15.1...) Also, in that same survey it was found that the typical iPod volume was described as “loud” by 38% of adults and 41% of minors;

69. In an August 2005 poll performed by the National Acoustic Laboratories of Australia it was found that around 25% of MP users had daily noise exposures high enough to cause hearing damage. Some of the users were well above the limit at which damage occurs. For this survey, the noise exposure level was calculated from the sound level multiplied by the amount of time of use. The age of the users ranged from between 15 to 48 years old. A copy of the media release is attached hereto and produced as **Exhibit R-11**;

70. In a survey conducted by Britain’s Royal National Institute for Deaf People it was determined that young people, ages 18 to 24, were more likely than other adults to exceed safe listening limits. A copy of the press release is attached hereto and produced as **Exhibit R-12**;

71. In a survey conducted by the Hearing Foundation of Canada it was found that 30% of minors (there were a few adults included) “were listening to digital music at levels and duration considered to be dangerous by hearing professionals”, the whole as more fully appears from a copy of said survey, produced herein as **Exhibit R-13**;

72. In a study conducted by the Hearing Cooperative Research Center of Australia it was shown that a third (1/3) of teens routinely listen to music at 85 decibels or more;
73. Audiologists across the United States have seen a swell in hearing loss cases and are treating an increasing number of young adults and teens for noise-induced hearing damage. They are seeing the kind of hearing loss in younger people typically found in aging adults;
74. It has been theorized that the iPod generation has a rate of impaired hearing 2 ½ times that of their parents and grandparents;
75. At the Harvest Preparatory Academy in Ohio, 12.5% of students were found to be suffering from “significant hearing loss”; some newspaper articles related to the above are attached hereto and produced as **Exhibit R-14**;
76. Some may argue that if a person listens to his/her iPod too loud (i.e. over 85 decibels) that he/she is the master of their own misfortune and, further that every person inherently knows what “too loud” should mean. This argument is flawed in the context of iPods for the following reason:
- a. Due to the lack of any meaningful warnings, the user could be using their iPods at a volume that is either too loud, for a period that is too long, or a combination of both;
 - b. Noise-induced hearing loss occurs slowly, is not painful, and is often not noticeable until it is quite extensive. Therefore, to many people it is not inherently obvious as to what “too loud” is until it is too late;
 - c. Noise-induced hearing loss is gradual so that listeners could be listening only slightly “too loud” (i.e. 91 decibels) but for extended periods of time. A hairdryer (90 decibels) is considered a device that could cause hearing loss but the average person does not consider it as such. The difference being that a hairdryer is generally used for no more than 30 minutes and will only cause noise-induced hearing loss after 2 hours. That same level of volume on an iPod could easily be used by a listener for well over 2 hours;
 - d. Noise-induced hearing loss is cumulative so that if a user is listening only slightly “too loud” (i.e. 91 decibels) for more than 2 hours a say consistently and has therefore sustained some noise-induced hearing loss, they will tend to raise the volume progressively higher to hear at the same level that they have become accustomed to;
 - e. The volume control mechanism as a simple linear bar and without any numerical indication (i.e. by numerical level or by decibel level) creates



a situation where even if a user is concerned about hearing loss, they would not be able to tell their device is being used “too loud”;

- f. The fact that the volume level goes up to 115 decibels at 100% gives the listeners a false sense of security to listen to their iPods at 70% or 80% of the volume level relying on the judgement of the manufacturer to not create a device that can go up so high. In reality, a user should not go up more than 60% of the volume level indicator;
- g. The combination of the MP’s with the earbuds increases the likelihood of noise-induced hearing loss because it induces listeners who otherwise would listen to their MP’s at safe levels to listen “too loud” in everyday situations where they need to drown out the background noise. This could happen for a number of hours while remaining in a noisy area, such as on an airplane, subway, in the gym, etc...;
- h. With respect to minors, the legislature has accorded them extra protection because they are a segment of the population that has a propensity to engage in more dangerous activities without fully evaluating the consequences thereof. Minors listen to their iPods louder and longer than adults;

77. Just as the Respondents concede in their US patent application, even users that are concerned with hearing loss may still use their iPods in a way that will cause them injury. As such, iPods are not fit for their ordinary purpose (listening to music) because they create an unreasonable risk of noise-induced hearing loss to the average user when used;

78. All of the studies, research, and surveys on the matter have given a clear picture of the results of the above; namely that many people are listening to their iPods with the earbuds too loud and for too long. This has caused a significant portion of the population to suffer signs of noise-induced hearing loss and the results are even more significant for minors, whose ears are less developed;

79. At all material times, the Respondents knew or should have known about the risks inherent in the use of iPods created by its very design and nature. Nonetheless, the Respondents continue to sell their iPods without any alterations to their volume level mechanism or their earbuds and without disclosing the increased dangers posed by their use or any meaningful warnings, which would serve to mitigate the harm to listeners;

80. Additionally, then Respondents continue to sell to minors iPods capable of producing sounds in excess of 100 decibels;

Petitioners Situations



ROYER

81. (12...) Petitioner ROYER is a member of the class with respect to residents of Quebec and Canada that are the age of majority; he purchased an iPod Nano at La Source on Cote-des-Neiges;

82. Petitioner never saw any warnings, whether by Apple or otherwise, relating to:

- a. noise-induced hearing loss
- b. how long he should use his iPod
- c. or at what volume;

83. Petitioner used his iPod at any given time with the earbuds at a volume level of between 70% to 90% for several hours a day. Petitioner listened to his iPod in everyday settings, such as riding the subway, walking on downtown streets, coffee shops, and other noisy areas; he was forced to raise the volume on his iPod to drown out the background noise;

84. Before the institution of the present action, Petitioner listened to his iPod at a volume which he now realizes was unsafe. Had he known about the risks of using the MP with the earbuds at the time that he purchased his iPod he would not have paid such a high price. Further, had he been adequately informed of the manner (volume and listening time) he would have adjusted his listening habits to avoid any noise-induced hearing loss;

85. Petitioner has discontinued using the earbuds and only used his MP on external speakers such as in the car and with stereo speakers; this is a diminished use from that which he expected to obtain when he purchased the iPod;

86. (13...) Petitioner is at risk of developing more pronounced hearing problems in the near future. He has in recent years experienced buzzing and ringing in his ears and often asks people to repeat themselves;

87. Petitioner's damages are a direct and proximate result of his use of his iPod and Respondents' negligence;

88. (14...) In consequence of the foregoing, Petitioner is justified in claiming damages;

HERMAN

89. Petitioner HERMAN is a member of the class with respect to residents of Quebec and Canada that are minors. He purchased an iPod Nano at Future Shop at Angrignon. He was sixteen (16) years old at the time;
90. Petitioner never saw any warnings, whether by Apple or otherwise, relating to:
- a. noise-induced hearing loss
 - b. how long he should use his iPod
 - c. or at what volume;
91. Petitioner used his iPod at any given time with the earbuds at a volume level of between 70% to 90% for several hours a day. Petitioner listened to his MP in everyday settings, such as riding the subway, walking on downtown streets, coffee shops, and other noisy areas; he was forced to raise the volume on his iPod to drown out the background noise;
92. Petitioner HERMAN has been using his MP with the earbuds for quite some time but has since discontinued using the earbuds and only used his MP on external speakers such as in the car and with stereo speakers; this is a diminished use from that which he expected to obtain when he purchased the iPod;
93. Petitioner listened to his iPod at a volume which he now realizes was unsafe. Had he know about the risks of using the MP with the earbuds at the time that he purchased his iPod he would not have paid such a high price. Further, had he been adequately informed of the manner (volume and listening time) he would have adjusted his listening habits to avoid any noise-induced hearing loss;
94. Petitioner is at risk of developing more pronounced hearing problems in the near future. He has in recent years experienced buzzing and ringing in his ears and often asks people to repeat themselves;
95. Petitioner's damages are a direct and proximate result of his use of his iPod and Respondents' negligence;
96. In consequence of the foregoing, Petitioner is justified in claiming damages;
- Facts giving rise to an individual action by each of the members of the class**
97. (15...) Every member of the class has purchased and/or used an iPod;
98. All of these iPods were designed in such a fashion (sound level of up to 115 decibels, linear volume control system, and non-isolation earbuds) so as to expose the listener to noise-induced hearing loss;



99. None of the class members were provided adequate warnings as to how to use their iPods without risk of injury. Had such disclosure been made available to them they would have been able to act accordingly;

100. (16...) In lieu of the foregoing, each member of the class is justified in claiming at least one or more of the following as damages:

- a) a reduction in price for the diminished usefulness of their iPods since they cannot safely be used as personal music devices and/or repayment of the costs to purchase any supplemental noise-isolation earphones (if already purchased) or damages in an amount necessary to purchase supplemental noise-isolation earphones;
- b) costs of an appointment with an audiologist to evaluate and assess the physical damages that have already occurred, as well as, the risk of further injury to a listeners' hearing, so that he/she can take the appropriate steps to prevent and/or mitigate continued noise-induced hearing loss;
- c) damages to those who already suffered from any form of noise-induced hearing loss (amount varying according to the audiologists evaluation);
- d) damages to those who are now at a higher risk of suffering permanent noise-induced hearing loss;
- e) an injunctive remedy to order proper warnings, prominently displayed, regarding iPod use at the appropriate level and time period so as to avoid noise-induced hearing loss;
- f) with respect to any minors, all of the above, plus in addition:
 - i. a complete refund of the retail price of the iPod because the contract is null ab initio due to the violation of a provision of public order found in the Hazardous Products Act;
 - ii. and/or an injunctive remedy to replace the existing iPods with a version that does not produce sounds in excess of 100 decibels;
 - iii. an injunctive order to only sell to iPods to minors that cannot produce sounds in excess of 100 decibels in the future;

101. Some of the expenses related to the medical treatment that the class members have undergone or will undergo, will have been borne by the various provincial health insurers including the *Régie de l'assurance maladie du Québec* and the Ontario Health Insurance Plan. As a result of



the Respondent's conduct, these various provincial health insurers have suffered and will continue to suffer damages for which they are entitled to be compensated by virtue of their right of subrogation in respect to all past and future insured services. These subrogated interests are asserted by the Petitioner and the class members;

102. All of these damages to the class members are a direct and proximate result of their iPod use and Respondents' negligence;

The composition of the group renders the application of articles 59 or 67 C.C.P. difficult or impractical

103. (8..., 17a...) iPods have been sold in Canada and Quebec since the year 2001. Petitioners are unaware of the specific number of iPods that have been sold in Canada and/or Quebec but it is safe to estimate that it is in the tens of thousand (if not hundreds of thousands) given its tremendous popularity;

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

105. (17b...) Petitioners have no way of knowing the names and addresses of potential class members, however, the Respondents are likely to possess data regarding sales figures and warranty information;

106. 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.

107. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province) risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;

108. (17c...) 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;

109. 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;



The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioners wish to have adjudicated upon by this class action

110. Individual questions, if any, pale by comparison to the numerous common questions that predominate;

111. (9...) The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents misconduct;

A. With respect to adults these are:

112. Were Respondents negligent and/or did they fail in their duty of safety, duty of care, and/or duty to inform imposed upon them as manufacturers, distributors, importers, and/or sellers of iPods?

113. Are Respondents' iPods a noxious product in that they can cause listeners noise-induced hearing loss?

114. (18a..., 18b...) Are Respondents' iPods defectively designed in that they can expose listeners to dangerous levels of sound?

115. (18d..., 18h2...) Did Respondents fail to accurately and sufficiently warn of the noxious and/or defective characteristics of the music players and their components, including but not limited to, the express obligation found in article 53 of the Consumer Protection Act (R.S.Q., c. P-40.1) and articles 1468 and 1469 of the Civil Code of Quebec (S.Q., 1991, c. 64)?

116. (18c...) Did Respondents negligently, recklessly, and/or carelessly market, distribute, and/or sell iPods without adequate instructions or warnings of the product's serious and dangerous risks and, further, in violation of articles 36 and 52 of the Competition Act (R.S., 1985, c. C-34) and article 219 of the Consumer Protection Act (R.S.Q., c. P-40.1)?

117. (18f..., 18h2...) Did Respondents violate any express and/or implied warranties, such as those found in the Consumer Protection Act (R.S.Q., c. P-40.1) articles 37, and 228?

118. (18h1...) Did Respondents violate any of the provisions of the Civil Code of Quebec (S.Q., 1991, c. 64) articles 3, 10, 1457, 1458, 1726, and 1728?

119. In the affirmative to any of the above questions, did Respondents' conduct constitute a fault engaging their solidarily liability to the members of the class?



120. (18i...) If the responsibility of the Respondents is established, what is the nature and the extent of damages and other remedies to which the class members are entitled?

121. (18i...) Should the members of the class be compensated for:

- a) physical damages to the person for the degree of hearing loss already suffered and/or the increased risk of suffering hearing loss in the future?
- b) economic damages in the form of a reduction in price (or monetary damages equivalent thereto) and/or the costs associated with the purchase of noise-isolation earphones?
- c) moral damages for anxiety, stress, fear, and worry resulting from exposure to the risks and dangers inherent to the iPod?
- d) loss of time, trouble, inconvenience, and disbursements for medical examinations and follow-ups?
- e) (18g...) any other direct damages?
- f) (18h2..., 18h3...) punitive damages in accordance with the Consumer Protection Act (R.S.Q., c. P-40.1) article 272 and/or the Charter of Human Rights and Freedoms (R.S.Q., c. C-12) articles 1 and 49?

122. (18i...) Should an injunctive remedy be ordered to force Respondents to place proper warnings, prominently displayed, regarding iPod use at the appropriate level and time period so as to avoid noise-induced hearing loss?

123. (18i...) Should the Respondents be condemned to establish a fund for the benefit of the various provincial health insurers for subrogation relating to the medical treatments and expenses that the class members have undergone and will continue to undergo in the future?

124. (18i...) Should the Respondents be condemned to establish a fund for the purpose of informing and educating consumers on the risks inherent in the use of iPods and on how to prevent injury, to encourage safe use, and for medical research related to hearing loss?

B. With respect to minors those are:



125. (18h4...) Did Respondents violate article 4 and schedule 1 Part 1 (par. 10) of the Federal Hazardous Products Act (R.S., 1985, c. H-3) by putting onto the marketplace a device which can emit noise exceeding 100 decibels?
126. Were Respondents negligent and/or did they fail in their duty of safety, duty of care, and/or duty to inform imposed upon them as manufacturers, distributors, importers, and/or sellers of iPods?
127. Are Respondents' iPods a noxious product in that they can cause listeners noise-induced hearing loss?
128. (18a..., 18b...) Are Respondents' iPods defectively designed in that they can expose listeners to dangerous levels of sound?
129. (18d..., 18h2...) Did Respondents fail to accurately and sufficiently warn of the noxious and/or defective characteristics of the music players and their components, including but not limited to, the express obligation found in article 53 of the Consumer Protection Act (R.S.Q., c. P-40.1) and articles 1468 and 1469 of the Civil Code of Quebec (S.Q., 1991, c. 64)?
130. (18c...) Did Respondents negligently, recklessly, and/or carelessly market, distribute, and/or sell iPods without adequate instructions or warnings of the product's serious and dangerous risks and, further, in violation of articles 36 and 52 of the Competition Act (R.S., 1985, c. C-34) and article 219 of the Consumer Protection Act (R.S.Q., c. P-40.1)?
131. (18f..., 18h2...) Did Respondents violate any express and/or implied warranties, such as those found in the Consumer Protection Act (R.S.Q., c. P-40.1) articles 37, and 228?
132. (18h1...) Did Respondents violate any of the provisions of the Civil Code of Quebec (S.Q., 1991, c. 64) articles 3, 10, 1457, 1458, 1726, and 1728?
133. In the affirmative to any of the above questions, did Respondents' conduct constitute a fault engaging their solidarily liability to the members of the class?
134. (18i...) If the responsibility of the Respondents is established, what is the nature and the extent of damages and other remedies to which the class members are entitled?
135. (18i...) Should the members of the class be compensated for:
- a) (18g...) the entire purchase price of the iPod due to the absolute nullity of the contract of sale or alternately for the disgorgement of the Respondents profits from said sales?



- b) physical damages to the person for the degree of hearing loss already suffered and/or the increased risk of suffering hearing loss in the future?
 - c) economic damages in the form of a reduction in price (or monetary damages equivalent thereto) and/or the costs associated with the purchase of noise-isolation earphones?
 - d) moral damages for anxiety, stress, fear, and worry resulting from exposure to the risks and dangers inherent to the iPod?
 - e) loss of time, trouble, inconvenience, and disbursements for medical examinations and follow-ups?
 - f) (18g...) any other direct damages?
 - g) (18h2..., 18h3...) punitive damages in accordance with the Consumer Protection Act (R.S.Q., c. P-40.1) article 272 and/or the Charter of Human Rights and Freedoms (R.S.Q., c. C-12) articles 1 and 49?
136. (18i...) Should an injunctive remedy be ordered to force Respondents to place proper warnings, prominently displayed, regarding iPod use at the appropriate level and time period so as to avoid noise-induced hearing loss?
137. (18h4..., 18i...) Should an injunctive remedy be ordered to force Respondents to replace the existing iPods with a version that does not produce sounds in excess of 100 decibels?
138. (18h4..., 18i...) Should an injunctive remedy be ordered to force Respondents to only sell to minors iPods that cannot produce sounds in excess of 100 decibels in the future?
139. (18i...) Should the Respondents be condemned to establish a fund for the benefit of the various provincial health insurers for subrogation relating to the medical treatments and expenses that the class members have undergone and will continue to undergo in the future?
140. (18i...) Should the Respondents be condemned to establish a fund for the purpose of informing and educating consumers on the risks inherent in the use of iPods and on how to prevent injury, to encourage safe use, and for medical research related to hearing loss?

The questions of fact and law which are particular to each member of the class



141. Petitioners are requesting that this Honourable Court identify the physical, economic, and moral damages suffered by each of the members of the class and to determine the quantum;

The nature of the action that the Petitioners wish to exercise for the benefit of the class

142. (20...) The action that Petitioners wish to institute on behalf of the members of the classes is an action of manufacturer-distributer-seller liability of a noxious and/or defective product;

143. (21...) The conclusions that Petitioners wishes to introduce by way of a motion to institute proceedings

GRANT the class action of Petitioners and each of the members of their respective classes;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of their respective classes;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

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

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RESERVE the right of the members of the class to claim future damages related to the use of iPods;

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 and costs;

ORDER that the claims of individual class members be the object of individual liquidation;

ORDER the Defendants to place proper warning relating to the risks of hearing loss associated with iPods;



ORDER the Defendants to replace the existing iPods to minor so as to limit their emission of sound to no more than 100 decibels;

ORDER the Defendants to only sell to minors iPods that cannot produce sounds in excess of 100 decibels in the future;

CONDEMN the Defendants to an amount sufficient to compensate the various provincial health insurers for the medical treatments and expenses that the class members have undergone and will continue to undergo in the future;

CONDEMN the Defendants to an amount sufficient to establish a fund for the purpose of informing and educating consumers on the risks inherent in the use of iPods and on how to prevent injury, to encourage safe use, and for medical research related to hearing loss;

ORDER the Defendants to deposit in the office of this court these sums so as to establish a fund to be administered as this Honourable Court deems fit;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

(23..) The Petitioners request that they be attributed the status of representatives for their respective classes

144. (23a..) The Petitioners are members of their respective classes;

145. Petitioners are ready and available to manage and direct the present action in the interest of the members of the class that they wishes to represent and are determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with their attorneys;

146. Petitioners have the capacity and interest to fairly and adequately protect and represent the interest of the members of the group;

147. Petitioners have given the mandate to their attorneys to obtain all relevant information with respect to the present action and intend to keep informed of all developments;

148. (23c..) Petitioners, with the assistance of their attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;



149. Petitioners are in good faith and have instituted this action for the sole goal of having their rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' actions;

150. (23b...) Petitioners understand the nature of the action;

151. (23d...) Petitioners' interests are not antagonistic to those of other members of the class;

(22...) The Petitioners suggest that this class action be exercised before the Superior Court in the district of Montreal

152. (22a...) A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;

153. (22b...) Respondent Apple Canada Inc. has its principal place of business in the judicial district of Montreal;

154. (22c...) The Petitioners' attorneys practice their profession in the judicial district of Montreal;

155. (19...) The interests of justice favour that this motion be granted in accordance with its conclusions;

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

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages for the liability of the manufacturer-distributor-seller of a noxious and/or defective product;

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

- all residents in Canada who were the age of majority when they purchased and/or used any IPOD designed, manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents, or any other group to be determined by the Court;

alternately (or as a subclass)



- all residents in Quebec who were the age of majority when they purchased and/or used any IPOD designed, manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents, or any other group to be determined by the Court;

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

- all residents in Canada who were minors when they purchased and/or used any IPOD designed, manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents, or any other group to be determined by the Court;
alternately (or as a subclass)
- all residents in Quebec who were minors when they purchased and/or used any IPOD designed, manufactured, distributed, sold, or otherwise put onto the marketplace by the Respondents, or any other group to be determined by the Court;

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

A. With respect to adults these are:

- 1) Were Respondents negligent and/or did they fail in their duty of safety, duty of care, and/or duty to inform imposed upon them as manufacturers, distributors, importers, and/or sellers of iPods?
- 2) Are Respondents' iPods a noxious product in that they can cause listeners noise-induced hearing loss?
- 3) Are Respondents' iPods defectively designed in that they can expose listeners to dangerous levels of sound?
- 4) Did Respondents fail to accurately and sufficiently warn of the noxious and/or defective characteristics of the music players and their components, including but not limited to, the express obligation found in article 53 of the Consumer Protection Act (R.S.Q., c. P-40.1) and articles 1468 and 1469 of the Civil Code of Quebec (S.Q., 1991, c. 64)?
- 5) Did Respondents negligently, recklessly, and/or carelessly market, distribute, and/or sell iPods without adequate instructions or warnings of the product's serious and dangerous risks and, further, in violation of articles 36 and 52 of the Competition Act (R.S., 1985, c. C-34) and article 219 of the Consumer Protection Act (R.S.Q., c. P-40.1)?



- 6) Did Respondents violate any express and/or implied warranties, such as those found in the Consumer Protection Act (R.S.Q., c. P-40.1) articles 37, and 228?
- 7) Did Respondents violate any of the provisions of the Civil Code of Quebec (S.Q., 1991, c. 64) articles 3, 10, 1457, 1458, 1726, and 1728?
- 8) In the affirmative to any of the above questions, did Respondents' conduct constitute a fault engaging their solidarity liability to the members of the class?
- 9) If the responsibility of the Respondents is established, what is the nature and the extent of damages and other remedies to which the class members are entitled?
- 10) Should the members of the class be compensated for:
- a) physical damages to the person for the degree of hearing loss already suffered and/or the increased risk of suffering hearing loss in the future?
 - b) economic damages in the form of a reduction in price (or monetary damages equivalent thereto) and/or the costs associated with the purchase of noise-isolation earphones?
 - c) moral damages for anxiety, stress, fear, and worry resulting from exposure to the risks and dangers inherent to the iPod?
 - d) loss of time, trouble, inconvenience, and disbursements for medical examinations and follow-ups?
 - e) any other direct damages?
 - f) punitive damages in accordance with the Consumer Protection Act (R.S.Q., c. P-40.1) article 272 and/or the Charter of Human Rights and Freedoms (R.S.Q., c. C-12) articles 1 and 49?
- 11) Should an injunctive remedy be ordered to force Respondents to place proper warnings, prominently displayed, regarding iPod use at the appropriate level and time period so as to avoid noise-induced hearing loss?
- 12) Should the Respondents be condemned to establish a fund for the benefit of the various provincial health insurers for subrogation relating to the medical treatments and expenses that the class members have undergone and will continue to undergo in the future?



13) Should the Respondents be condemned to establish a fund for the purpose of informing and educating consumers on the risks inherent in the use of iPods and on how to prevent injury, to encourage safe use, and for medical research related to hearing loss?

B. With respect to minors those are:

- 1) Did Respondents violate article 4 and schedule 1 Part 1 (par. 10) of the Federal Hazardous Products Act (R.S., 1985, c. H-3) by putting onto the marketplace a device which can emit noise exceeding 100 decibels?
- 2) Were Respondents negligent and/or did they fail in their duty of safety, duty of care, and/or duty to inform imposed upon them as manufacturers, distributors, importers, and/or sellers of iPods?
- 3) Are Respondents' iPods a noxious product in that they can cause listeners noise-induced hearing loss?
- 4) Are Respondents' iPods defectively designed in that they can expose listeners to dangerous levels of sound?
- 5) Did Respondents fail to accurately and sufficiently warn of the noxious and/or defective characteristics of the music players and their components, including but not limited to, the express obligation found in article 53 of the Consumer Protection Act (R.S.Q., c. P-40.1) and articles 1468 and 1469 of the Civil Code of Quebec (S.Q., 1991, c. 64)?
- 6) Did Respondents negligently, recklessly, and/or carelessly market, distribute, and/or sell iPods without adequate instructions or warnings of the product's serious and dangerous risks and, further, in violation of articles 36 and 52 of the Competition Act (R.S., 1985, c. C-34) and article 219 of the Consumer Protection Act (R.S.Q., c. P-40.1)?
- 7) Did Respondents violate any express and/or implied warranties, such as those found in the Consumer Protection Act (R.S.Q., c. P-40.1) articles 37, and 228?
- 8) Did Respondents violate any of the provisions of the Civil Code of Quebec (S.Q., 1991, c. 64) articles 3, 10, 1457, 1458, 1726, and 1728?
- 9) In the affirmative to any of the above questions, did Respondents' conduct constitute a fault engaging their solidarity liability to the members of the class?



10) If the responsibility of the Respondents is established, what is the nature and the extent of damages and other remedies to which the class members are entitled?

11) Should the members of the class be compensated for:

- a) the entire purchase price of the iPod due to the absolute nullity of the contract of sale or alternately for the disgorgement of the Respondents profits from said sales?
- b) physical damages to the person for the degree of hearing loss already suffered and/or the increased risk of suffering hearing loss in the future?
- c) economic damages in the form of a reduction in price (or monetary damages equivalent thereto) and/or the costs associated with the purchase of noise-isolation earphones?
- d) moral damages for anxiety, stress, fear, and worry resulting from exposure to the risks and dangers inherent to the iPod?
- e) loss of time, trouble, inconvenience, and disbursements for medical examinations and follow-ups?
- f) any other direct damages?
- g) punitive damages in accordance with the Consumer Protection Act (R.S.Q., c. P-40.1) article 272 and/or the Charter of Human Rights and Freedoms (R.S.Q., c. C-12) articles 1 and 49?

12) Should an injunctive remedy be ordered to force Respondents to place proper warnings, prominently displayed, regarding iPod use at the appropriate level and time period so as to avoid noise-induced hearing loss?

13) Should an injunctive remedy be ordered to force Respondents to replace the existing iPods with a version that does not produce sounds in excess of 100 decibels?

14) Should an injunctive remedy be ordered to force Respondents to only sell to minors iPods that cannot produce sounds in excess of 100 decibels in the future?

15) Should the Respondents be condemned to establish a fund for the benefit of the various provincial health insurers for subrogation relating to the medical treatments and expenses that the class members have undergone and will continue to undergo in the future?



16) Should the Respondents be condemned to establish a fund for the purpose of informing and educating consumers on the risks inherent in the use of iPods and on how to prevent injury, to encourage safe use, and for medical research related to hearing loss?

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

GRANT the class action of Petitioners and each of the members of their respective classes;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of their respective classes;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

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

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RESERVE the right of the members of the class to claim future damages related to the use of iPods;

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 and costs;

ORDER that the claims of individual class members be the object of individual liquidation;

ORDER the Defendants to place proper warning relating to the risks of hearing loss associated with iPods;

ORDER the Defendants to replace the existing iPods to minor so as to limit their emission of sound to no more than 100 decibels;

ORDER the Defendants to only sell to minors iPods that cannot produce sounds in excess of 100 decibels in the future;



CONDEMN the Defendants to an amount sufficient to compensate the various provincial health insurers for the medical treatments and expenses that the class members have undergone and will continue to undergo in the future;

CONDEMN the Defendants to an amount sufficient to establish a fund for the purpose of informing and educating consumers on the risks inherent in the use of iPods and on how to prevent injury, to encourage safe use, and for medical research related to hearing loss;

ORDER the Defendants to deposit in the office of this court these sums so as to establish a fund to be administered as this Honourable Court deems fit;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, (...) be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE, the GLOBE AND MAIL, and the NATIONAL POST;

ORDER that said notice be available on the Respondent Apple Canada Inc.'s website with a link stating "Notice to iPod users";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs including publications fees.

Montreal, July 15, 2009

(s) Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioners

