

1 KABATECK BROWN KELLNER LLP
2 BRIAN S. KABATECK, SBN 152054
(bsk@kbklawyers.com)
3 RICHARD L. KELLNER, SBN 171416
(rlk@kbklawyers.com)
4 Alfredo Torrijos, SBN 222458
350 South Grand Avenue, 39th Floor
5 Los Angeles, California 90071
Telephone: (213) 217-5000
6 Facsimile: (213) 217-5010

7 COTCHETT PITRE SIMON & MCCARTHY
8 BRUCE L. SIMON, SBN 96241
(bsimon@cpsmlaw.com)
9 ESTHER L. KLISURA, SBN 221171
(eklisura@cpsmlaw.com)
840 Malcolm Road, Suite 200
10 Burlingame, California 94010
Telephone: (650) 697-6000
11 Facsimile: (650) 692-3606

12 THE GARCIA LAW FIRM
13 STEPHEN M. GARCIA, SBN 123338
(sgarcia@lawgarcia.com)
14 SARINA M. HINSON, SBN 228255
(shinson@lawgarcia.com)
One World Trade Center #1950
15 Long Beach, California 90831
Telephone: (562) 216-5270
16 Facsimile: (562) 216-5271

17 MCNICHOLAS & MCNICHOLAS
18 PATRICK MCNICHOLAS, SBN 125868
(pmc@mcnicholaslaw.com)
10866 Wilshire Boulevard, #1400
19 Los Angeles, California 90024
Telephone: (310) 474-1582
20 Facsimile: (310) 475-7871

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22 Attorneys for Plaintiff
Carl K. Rich

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CARL K. RICH, on Behalf of Himself and
All Others Similarly Situated, as Well as on
Behalf of the General Public and Acting in
the Public Interest,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY, a
California Corporation; and DOES 1 through
250, inclusive;

Defendants.

CASE NO. C-06-03361-JF (HRL)

**FIRST AMENDED CLASS ACTION
COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

JURY TRIAL DEMANDED

Plaintiff, CARL K. RICH ("Plaintiff"), individually and on behalf of the Class described below, by his attorneys, makes the following allegations pursuant to the investigation of his counsel and based upon information and belief, except as to allegations specifically pertaining to Plaintiff and his counsel, which are based on personal knowledge. Plaintiff brings this action for damages and injunctive relief against Defendants, demanding a trial by jury.

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DEMAND FOR JURY TRIAL 20

1 **I. NATURE OF THE ACTION**

2 1. Plaintiff brings this action on behalf of all individuals who purchased color
3 inkjet printers and replacement cartridges for those printers manufactured by Defendant
4 Hewlett-Packard Company (“HP”) between May 22, 2002 and the present. This action
5 involves HP’s wrongful business practices of failing to disclose to consumers that its inkjet
6 color printers use substantial amounts of color ink when printing black text and graphics.
7 As a result, the “ink” component price of printing black text and graphics on HP inkjet color
8 printers is more than ten percent greater than the apparent cost of the ink used from the
9 separate black ink cartridges.

10 2. HP, founded in 1939 by William R. Hewlett and David Packard, offers
11 imaging and printing systems, commercial and consumer personal computers, workstations,
12 handheld computing devices, digital entertainment systems, calculators and other related
13 accessories, software and services, inkjet printers, laser printers, digital photography and
14 entertainment, graphics, and imaging and printer supplies for printer hardware, printing
15 supplies, and scanning devices to individual consumers, businesses and institutions.

16 3. One of HP’s most profitable areas is its printing and imaging business.
17 Almost all of the profits generated by HP’s Imaging and Printing Group result from the sale
18 of ink cartridges. Printer supplies account for approximately \$12.5 billion, or half of the
19 annual revenues, generated by HP’s Imaging and Printing Group. The unit makes little
20 money from the sale of printers. According to HP, 10 percent of revenue year-over-year is
21 generated by the sale of consumables: “The growth in revenue was driven by the continuing
22 increase in HP’s installed base and growth in ink-intensive digital imaging solutions and
23 applications.” An HP ink cartridge costs the consumer on average \$35, while it costs HP
24 much less, with some estimates as low as \$3 to manufacture the cartridge.

24 **II. THE PARTIES**

25 4. Plaintiff Carl K. Rich is a resident of New Hampshire and has previously
26 purchased a color inkjet printer manufactured or sold by HP as more particularly described
27 herein. Plaintiff has also previously purchased HP replacement inkjet cartridges as more
28

1 particularly described herein.

2 5. Plaintiff is informed and believes and thereon alleges that defendant HP, is a
3 California Corporation doing business in the state of California. HP is a publicly traded
4 company with its principal campus and corporate headquarters located at 3000 Hanover
5 Street, Palo Alto, California.

6 6. Plaintiff does not know the true names or capacities of the persons or entities
7 sued herein as DOES 1 to 250, inclusive, and therefore sues such defendants by such
8 fictitious names. Plaintiff is informed and believes and thereon alleges that each of the DOE
9 defendants is in some manner legally responsible for the damages suffered by plaintiff and
10 the members of the class as alleged herein. Plaintiff will amend this complaint to set forth
11 the true names and capacities of these defendants when they have been ascertained, along
12 with appropriate charging allegations, as may be necessary.

13 **III. JURISDICTION AND VENUE**

14 7. This Court has original jurisdiction over this action pursuant to 28 U.S.C. §
15 1332(d)(2) in that it is class action filed under rule 23 of the Federal Rules of Civil
16 Procedure, the matter in controversy, as aggregated pursuant to 28 U.S.C. § 1332(d)(6)
17 exceeds the sum of \$5,000,000 exclusive of interest and costs, and a substantial number of
18 members of the class of plaintiffs are citizens of a state different from that of defendant HP.

19 8. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §
20 1391(a) in that: (1) HP resides in this judicial district; (2) a substantial part of the events or
21 omissions giving rise to the claims asserted herein occurred in this judicial district; and (3)
22 HP is subject to personal jurisdiction in the Northern District of California.

23 **IV. FACTUAL BACKGROUND**

24 9. In the context of personal computers, a "printer" is a computer peripheral
25 which exports data to paper form. An inkjet printer is any printer that places extremely
26 small droplets of ink onto paper to create an image. Inkjet printers have always been fairly
27 inexpensive and prices of inkjet printers have been dropping in recent years due to broad
28 technological and consumer trends.

1 10. The ink used by inkjet printers is stored in, and dispensed from, one or more
2 inkjet cartridges. An inkjet cartridge dispenses one or more types of ink until it is empty, at
3 which point the cartridge must be replaced. Unlike the price of inkjet printers, the price for
4 inkjet cartridges, which must be continually replaced, has remained relatively high. As a
5 result, printer companies (such as HP), derive more revenue – and profits – from the sale of
6 replacement inkjet cartridges than from the sale of the printers that use those cartridges.

7 11. HP manufactures and sells inkjet printers throughout the United States. HP is
8 one of the largest manufacturers of inkjet printers in the United States. In addition to inkjet
9 printers, HP also manufactures and sells inkjet cartridges for printers throughout the United
10 States. HP recommends that customers, owners and users of its color inkjet printers use
11 only genuine HP inkjet cartridges.

12 12. HP's color inkjet printers operate on the thermal ink jet concept. Ink droplets
13 are formed by bubble nucleation on metallic thin films (e.g., an alloy of tantalum and
14 aluminum) flooded with ink. The bubble acts like a piston to force ink out of a hole (nozzle)
15 aligned with the heater. The ink droplet travels through the air and impinges on the paper
16 where it is absorbed. A print character is formed by programmed motion of the nozzles and
17 activation of the heaters aligned with them in the cartridge housing. The assembly of ink
18 containment, nozzle and heater are integrated into the cartridge itself and programmed by
19 HP.

20 13. Color inkjet printers use multiple inkjet cartridges, both color inkjet
21 cartridges as well as black inkjet cartridges.

22 14. Black inkjet cartridges are substantially less expensive than color cartridges.
23 For example, the suggested retail price for the HP 94 black ink cartridge is \$19.99 for an 11
24 ml. cartridge, or \$34.99 for two 11 ml. cartridges. In contrast, the suggested retail price for
25 the HP 95 color ink cartridge is \$24.99 for a 7 ml. cartridge. The HP 95 color ink cartridge
26 is only sold individually. Consequently, black ink (if purchased in a two-pack) costs \$1.59
per ml, while color ink costs \$3.57 per ml.

27 15. When printing *black and white images* and text, HP color inkjet printers are
28

1 designed to use substantial amounts of color ink in addition to the significantly less
2 expensive black ink.

3 16. Even though HP color inkjet printers use substantial amounts of color ink
4 when printing in black text and images, no color *other than black* is discernable on the
5 printed page. Thus, consumers have no way of knowing that color ink is actually hidden
6 within the black text or images that they have printed.

7 17. Nowhere in its promotional materials, packaging materials, reference
8 materials or warranty materials for its color inkjet cartridges, black inkjet cartridges and
9 color inkjet printers does HP disclose that its color inkjet printers use color ink when
10 printing black and white images and text.

11 18. Based on HP's marketing statements and the absence of any information
12 from HP to the contrary, a reasonable consumer would have no reason to suspect that HP
13 has engineered its printers and cartridges to use color ink when printing black text and
14 images.

15 19. Furthermore, HP does not provide consumers with the option to print black
16 and white images and text by only using the less expensive black ink.

17 20. On its website, HP recognizes and has affirmatively sought to provide this
18 information to potential consumers of its product. HP maintains that pricing and yield issues
19 are important in the decision of whether or not to select HP printing products:

20 "When comparing costs, customers also need to consider these
21 factors. HP wants customers to have meaningful information on all the
22 factors involved to help them make the best choices for their needs."

23 21. HP claims that, "HP has designed its inkjet printers and cartridges, including
24 both individual ink and tri-color cartridges, for efficient ink usage so customers can save ink
25 and money."

26 22. On its website, HP advises consumers to base their purchasing decision on
27 the "page yield" or the ink cost per page of HP replacement ink cartridges:

28 "HP recommends that customers consider page yield when comparing

1 printers and cartridges, because printers from *different manufacturers vary*
2 *in how they use ink.*”

3 23. On its website, HP represents to consumers the average “page yield” that
4 consumers can expect from particular cartridges. (An example is attached as Exhibit A.) For
5 example, HP represents that an HP 96 black inkjet print cartridge will yield approximately
6 870 pages, *but does not advise the consumer that to print 870 pages of black text and*
7 *graphics, a substantial amount of color ink will also be used.*

8 24. Consumers have no way of knowing that in addition to paying for HP black
9 inkjet cartridges to print black text and graphics, HP consumers must also pay for and
10 expend substantial amounts of color ink – thereby increasing the actual price of printing
11 black text and graphics.

12 25. Because HP does not disclose that substantial amounts of color ink are used
13 by HP color inkjet printers when printing black images and text, a reasonable consumer has
14 no reason to suspect, that the page yield of a color ink cartridge will be substantially
15 decreased solely by printing black text and graphics. Furthermore, HP does not disclose that
16 the page yield of a color ink cartridge will be substantially decreased solely by printing black
17 text and graphics.

18 26. Separate and apart from not disclosing and preventing HP consumers from
19 determining the true cost of printing black and white images and text, any reason for using
20 the color ink in printing black text and graphics is pretextual.

21 27. Plaintiff Carl K. Rich purchased and owns an HP OfficeJet 6210, which
22 utilizes the HP 94 black inkjet cartridge and the HP 95 color inkjet cartridge. Since
23 purchasing this printer, Plaintiff Rich has purchased numerous replacement HP 94 black
24 inkjet cartridges and HP 95 color inkjet cartridges for his printer.

24 **V. CLASS ALLEGATIONS**

25 28. Description of the Class: Plaintiff brings this nationwide class action on
26 behalf of himself and the Class defined as follows:

27 *All persons, sole proprietorships, partnerships,*

1 *corporations or any other entity located within the United States*
2 *who purchased an HP color inkjet printer which utilizes color*
3 *ink when printing black text and images and any replacement*
4 *inkjet cartridges for that printer.*

5 29. Excluded from the Class are governmental entities, Defendants, any entity in
6 which Defendants have a controlling interest, and Defendants' officers, directors, affiliates,
7 legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also
8 excluded from the Class is any judge, justice, or judicial officer presiding over this matter and
9 the members of their immediate families and judicial staff.

10 30. Plaintiff reserves the right to modify the Class description and the Class period
11 based on the results of discovery.

12 31. Numerosity: The proposed Class is so numerous that the individual joinder of all
13 its members is impracticable. Due to the nature of the trade and commerce involved, Plaintiff
14 believes that the total number of Class members is at least in the hundreds of thousands and
15 members of the class are numerous and geographically dispersed across the United States.
16 While the exact number and identities of the Class members are unknown at this time, such
17 information can be ascertained through appropriate investigation and discovery. The disposition
18 of the claims of the Class members in a single class action will provide substantial benefits to
19 all parties and to the Court.

20 32. Common Questions of Law and Fact Predominate: There are many questions of
21 law and fact common to the representative Plaintiff and the Class, and those questions
22 substantially predominate over any questions that may affect individual Class members.
23 Common questions of fact and law include, but are not limited to, the following:

24 a. Whether HP color inkjet printers use color ink when printing black and
25 white images and text;

26 b. Whether or not Plaintiff and the members of the Class have been
27 damaged by the wrongs complained of herein, and if so, the measure of those damages
28 and the nature and extent of other relief that should be afforded.

1 c. Whether HP engaged in unfair, unlawful and/or fraudulent business
2 practices;

3 d. Whether HP failed to disclose material facts about the subject HP
4 cartridges and printers;

5 e. Whether HP breached its warranties with Plaintiff and the Class;

6 f. Whether HP breached the implied covenant of good faith and fair dealing
7 with Plaintiff and the Class; and

8 33. Typicality: Plaintiff's claims are typical of the claims of the members of the
9 class. Plaintiff and all members of the class have been similarly affected by Defendants'
10 common course of conduct since their printers acted in exactly same way.

11 34. Adequacy of Representation: Plaintiff will fairly and adequately represent and
12 protect the interests of the Class. Plaintiff has retained counsel with substantial experience in
13 prosecuting complex and class action litigation. Plaintiff and his counsel are committed to
14 vigorously prosecuting this action on behalf of the Class, and have the financial resources to do
15 so. Neither Plaintiff nor his counsel has any interests adverse to those of the Class.

16 35. Superiority of a Class Action: Plaintiff and the members of the Class suffered,
17 and will continue to suffer, harm as a result of Defendants' unlawful and wrongful conduct. A
18 class action is superior to other available methods for the fair and efficient adjudication of the
19 present controversy. Individual joinder of all members of the class is impractical. Even if
20 individual class members had the resources to pursue individual litigation, it would be unduly
21 burdensome to the courts in which the individual litigation would proceed. Individual litigation
22 magnifies the delay and expense to all parties in the court system of resolving the controversies
23 engendered by Defendants' common course of conduct. The class action device allows a single
24 court to provide the benefits of unitary adjudication, judicial economy, and the fair and
25 equitable handling of all class members' claims in a single forum. The conduct of this action as
26 a class action conserves the resources of the parties and of the judicial system, and protects the
27 rights of the class member. Furthermore, for many, if not most, class members, a class action is
28 the only feasible mechanism that allows therein an opportunity for legal redress and justice.

1 warranty period.

2 45. On its website, labels and marketing materials, HP represents that its printer
3 cartridges would be free of defects in materials in workmanship for the duration of the
4 warranty period. HP also represents that its black inkjet cartridges will produce black text
5 and graphics.

6 46. Plaintiff and the Class have performed all conditions, covenants and promises
7 required to be performed on their part in accordance with the warranties.

8 47. HP has breached its warranty obligations by concealing the fact that its color
9 inkjet printers use substantial amounts of color ink when printing black text and graphics. A
10 black inkjet cartridge that cannot print black text and images without the use of color inkjet
11 cartridges is defective and breaches HP's warranty.

12 48. Defendants' breach of the warranty was a substantial factor in causing
13 Plaintiff and the Class to suffer economic losses and other general, consequential and
14 specific damages in an amount to be shown at trial.

15 WHEREFORE, Plaintiff and the Class pray for relief as set forth below.

16 **THIRD CAUSE OF ACTION**

17 **Breach of Implied Warranty**

18 49. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to
19 the extent necessary, pleads this cause of action in the alternative.

20 50. HP had direct dealings with Plaintiff and the Class through its vast marketing
21 efforts and the through the driver software installed on consumers' computer. As a result of
22 these direct dealings with Defendant, Plaintiff and the Class purchased HP color inkjet
23 printers and inkjet cartridges from HP and/or HP-authorized retailers. Plaintiff and the Class
24 relied on HP's marketing materials and representations regarding their printers and ink
25 cartridges. Specifically, Plaintiff and the Class relied on HP's assertion that its black inkjet
26 cartridges would produce black text and graphics. Plaintiff and the Class also relied on HP's
27 reputation and brand name in selecting HP color inkjet printers and inkjet cartridges. Thus,
28 Plaintiff and the Class reasonably believed that HP would exercise skill and judgment to

1 furnish printers and cartridges suitable for the purpose for which they are intended.

2 51. Defendant impliedly warranted that their color inkjet printers and inkjet
3 cartridges were fit for the purpose for which they were intended, and free of defects. Plaintiff
4 and the Class are the intended beneficiaries of HP's implied warranties.

5 52. HP therefore has made an implied warranty to Plaintiff and the Class that
6 HP's color inkjet printers are fit for their intended purpose.

7 53. Plaintiff and the Class have performed all conditions, covenants and promises
8 required to be performed on their part in accordance with the warranties.

9 54. HP's implied warranty to Plaintiff and the Class has not been excluded or
10 modified by any writing or by HP's words or conduct.

11 55. HP breached the warranties by undertaking the wrongful acts herein alleged.

12 56. Plaintiff and the Class have been damaged by HP's breach of implied
13 warranty.

14 WHEREFORE, Plaintiff and the Class pray for relief as set forth below.

15 **FOURTH CAUSE OF ACTION**

16 **Unjust Enrichment**

17 57. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to
18 the extent necessary, pleads this cause of action in the alternative.

19 58. Through the schemes described above, HP has received money belonging to
20 Plaintiff and the Class through the sale of replacement color inkjet cartridges resulting from
21 the use of color ink when printing black text and graphics.

22 59. Defendant HP has reaped substantial profit by concealing the fact that its
23 color inkjet printers use of substantial amounts of color ink when printing black and white
24 images. Ultimately, this resulted in Defendants' wrongful receipt of profits and injury to
25 Plaintiff and the Class. HP has benefited from the receipt of such money that it would not
26 have received but for the use of color ink when printing black text and graphics. As a direct
27 and proximate result of Defendants' misconduct as set forth above, Defendants have been
28 unjustly enriched.

1 relies upon HP to communicate the true state of facts relating to its color inkjet printers and
2 inkjet cartridges and that consumers would take the relative cost of printing black and white
3 images and text into consideration when deciding whether to use HP products, creates a
4 legal obligation on HP's part to disclose to Plaintiff and the Class that its color inkjet
5 printers use color ink when printing black text and graphics.

6 67. HP intended and intends to deceive Plaintiff and the Class by failing to
7 disclose that its color inkjet printers use color ink when printing black text and graphics.

8 68. Plaintiff and the Class were unaware of the facts and would not have acted as
9 they did if they had known of the concealed material facts.

10 69. HP's fraudulent concealment of the fact that its color inkjet printers use color
11 ink when printing black text and graphics inkjet has caused damage to Plaintiff and the Class
12 in an amount to be shown at trial.

13 WHEREFORE, Plaintiff and the Class pray for relief as set forth below.

14 **SIXTH CAUSE OF ACTION**

15 **Breach of the Covenant of Good Faith and Fair Dealing**

16 70. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to
17 the extent necessary, pleads this cause of action in the alternative.

18 71. The warranties entered into between Plaintiff, the Class and Defendant are
19 contracts that contain an implied covenant of good faith and fair dealing, which obligated
20 Defendant to perform the terms and conditions of the contracts fairly and in good faith and
21 to refrain from doing any act that would prevent or impede Plaintiff and the Class from
22 performing any or all conditions of the contracts that they agreed to perform, or any acts that
23 would deprive Plaintiff and the Class of their benefits.

24 72. Plaintiff and the Class performed all conditions, covenants and promises to
25 be performed on their part in accordance with the contracts.

26 73. Defendant HP knew Plaintiff and the Class fulfilled all their duties and
27 conditions under the contract.

28 74. Defendant HP breached the implied covenant of good faith and fair dealing

1 under the contracts by engaging in the conduct complained of herein, including increasing
2 the cost of use of HP printers through its utilization of color ink in printing black and white
3 text.

4 75. As a result of Defendant HP's breach of the implied covenant of good faith
5 and fair dealing, Plaintiff and the Class have suffered economic losses and other general,
6 consequential and specific damages in an amount to be shown at trial.

7 WHEREFORE, Plaintiff and the Class pray for relief as set forth below.

8 **SEVENTH CAUSE OF ACTION**

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

10 76. Plaintiff realleges the preceding paragraphs as if fully set forth herein and, to
11 the extent necessary, pleads this cause of action in the alternative.

12 77. HP's actions described in the complaint constitute unfair or deceptive
13 practices within the meaning of California Business and Professions Code § 17200 in that
14 HP's actions are unfair, unlawful and fraudulent. Plaintiff and each member of the Class
15 have suffered injury in fact and have lost money or property as a result of HP's actions a
16 delineated herein.

17 78. Defendant HP's alleged wrongful business acts constituted, and constitute, a
18 continuing course of conduct of unfair competition since Defendant HP is marketing and
19 selling their products in a manner that is likely to deceive the public. Plaintiff and the Class
20 have standing to pursue this claim as Plaintiff and the Class have been injured by virtue of
21 suffering a loss of money and/or property as a result of the wrongful conduct alleged herein.

22 79. The Defendant's business practices, and each of them, are unfair because they
23 offend established public policy and/or are immoral, unethical, oppressive, unscrupulous
24 and/or substantially injurious to consumers in that consumers are led to believe that only HP
25 black ink cartridges are need to produce black text and graphics (and not additional HP color
26 ink cartridges) when this is not true. Consumers are further injured when their printers
utilize expensive color ink to create black and white text.

27 80. The Defendant's business practices are unlawful because the conduct
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1 constitutes a violation of HP's warranty, a breach of said warranty, false marketing and
2 advertising, as well as the other causes of action herein alleged.

3 81. The practices are fraudulent because they are likely to deceive consumers into
4 believing that their black ink cartridges would produce black text and graphics and by
5 concealing the fact from consumers that the printers utilize more expensive color ink to
6 produce black and white text.

7 82. Defendant's business acts and practices, as alleged herein, have caused injury
8 to Plaintiff, the Class, and the public.

9 83. Pursuant to California Business and Professions Code §17203, Plaintiff and
10 the Class seek an order of this Court enjoining HP from continuing to engage in unlawful,
11 unfair, or deceptive business practices and any other act prohibited by law, including those
12 acts set forth in the complaint. Plaintiff and the Class also seek an order (a) requiring HP to
13 make full restitution of all moneys it wrongfully obtained from Plaintiff and the Class, and
14 (b) requiring HP to disgorge all ill-gotten revenues and/or profits as an additional form of
15 restitution of funds wrongfully taken from Plaintiff and the Class to which Defendants are
16 not entitled.

17 WHEREFORE, Plaintiff and the Class pray for relief as set forth below.

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VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff and members of the Class request that the Court enter an order or judgment against the Defendants as follows:

1. Certification of the proposed Class and notice thereto to be paid by Defendants;
2. Adjudge and decree that Defendants, and each of them, have engaged in the conduct alleged herein;
3. For restitution and disgorgement on certain causes of action;
4. For an injunction ordering Defendants to cease and desist from engaging in the unfair, unlawful, and/or fraudulent practices alleged in the Complaint;
5. For compensatory and general damages according to proof on certain causes of action;
6. For special damages according to proof on certain causes of action;
7. For both pre and post-judgment interest at the maximum allowable rate on any amounts awarded;
8. Costs of the proceedings herein;
9. Reasonable attorneys fees as allowed by statute; and
10. Any and all such other and further relief that this Court may deem just and proper.

Dated: September 29, 2006

THE GARCIA LAW FIRM

By: _____

STEPHEN M. GARCIA
SARINA M. HINSON
Counsel for Plaintiff and the class

BRIAN S. KABATECK
RICHARD L. KELLNER
KABATECK BROWN KELLNER LLP
Counsel for Plaintiff and the class

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BRUCE L. SIMON
ESTHER L. KLISURA
COTCHETT PITRE SIMON & MCCARTHY
Counsel for Plaintiff and the class

PATRICK MCNICHOLAS
MCNICHOLAS & MCNICHOLAS
Counsel for Plaintiff and the class

