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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

ORIGINAL

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

KIM KOCH, MALIK AKRAM, KHOLA) CASE NO. 05CV2229 W AJB
HERBERT, DAVID W. MAHY, SHERYL)

DEMARCO GREGORIUS, JAMES PERKINS,) CLASS ACTION

JULIE LENZ, AND DUSTY K. BROWER, On) SECOND AMENDED COMPLAINT

Behalf of Themselves and All Others Similarly) FOR:

Situated,

Plaintiffs,

vs.

GATEWAY, INC., a Delaware corporation,

Defendant.

- (1) VIOLATIONS OF CALIFORNIA'S CONSUMERS LEGAL REMEDIES ACT;
- (2) UNLAWFUL, UNFAIR AND DECEPTIVE BUSINESS PRACTICES;
- (3) FALSE AND MISLEADING ADVERTISING;
- (4) BREACH OF EXPRESS WARRANTY;
- (5) BREACH OF IMPLIED WARRANTY; and,
- (6) VIOLATIONS OF THE SONG-BEVERLY CONSUMER WARRANTY ACT.

Plaintiffs Demand a Trial by Jury

COME NOW, Plaintiffs, KIM KOCH, MALIK AKRAM, KHOLA HERBERT, DAVID W. MAHY, SHERYL DEMARCO GREGORIUS, JAMES PERKINS, JULIE LENZ, and

1 DUSTY K. BROWER, by and through their attorneys, bring this Class Action on behalf of
2 themselves and all persons similarly situated against GATEWAY, INC., a Delaware corporation
3 (hereafter "Gateway" or the "Company" or "Defendant"), and on information and belief, except
4 as to those allegations which pertain to the named Plaintiffs or their attorneys (which are alleged
5 on personal knowledge), hereby allege as follows:

6 JURISDICTION AND VENUE

7 1. This Court has original jurisdiction over this Action under 28 U.S.C. § 1332.
8 Further the value of the aggregated claims of the individual Class members total in excess of
9 \$5,000,000.00, exclusive of interest and costs. 28 U.S.C § 1332 (d)(2)(A) and §1332(6).

10 2. This Court has jurisdiction Gateway inasmuch as it is a corporation doing
11 business in California with sufficient minimum contacts with California and intentionally avails
12 itself of markets in California. Gateway, at all times relevant, was headquartered and/or had one
13 or more locations in San Diego, California. Gateway is currently headquartered in Irvine,
14 California. Gateway also owns and operates an online website accessible to consumers
15 throughout the nation, including but not limited to San Diego, California.

16 3. Venue in this District is proper under 28 U.S.C. § 1391(c).

17 NATURE OF THE ACTION

18 4. This is a consumer Class Action brought on behalf of all persons in the United
19 States (or such states as may be appropriate or as the Court may order) who purchased, for
20 personal use Gateway GTW¹ series plasma televisions (hereafter "GTW" or "television(s)")
21 which were, manufactured for, marketed and sold by Gateway. Gateway marketed these GTW
22 plasma televisions through a nationwide advertising and sales campaign. In its marketing and
23 sales materials as well as its technical specifications, Gateway made certain representations and
24 warranties concerning the durability and quality of their GTW televisions. Once such
25

26 ¹ The Gateway GTW Series actually consists of several models of plasma televisions, including but not
27 limited to models GTW-P42M102, GTW-P42M203, GTW-P42M303, GTW-P42M403, GTW-P46M103, GTW-
28 P42M504 and GTW-P50M603, all of which suffer from the same inadequacies described herein. The retail sales
price of these TV sets range from approximately \$2,500 to \$7,000 or more depending on the model purchased.

1 representation of quality and durability was Gateway's specification for the life of the plasma
2 display panel. The life of a plasma display panel is described in terms of "Lamp Life." Gateway
3 represented to their customers and the public at large that their GTW plasma televisions had a
4 Lamp Life of 25,000 hours. Another representation of durability and quality made by Gateway
5 was its statement of the mean time between failures ("MTBF"). The MTBF is relied upon by
6 consumers in determining the quality of a product. Gateway represented that its GTW
7 televisions had a MTBF of 20,000 hours or more. In addition, Gateway made express and
8 implied warranties that their repair program had adequate parts and trained personnel who could
9 and would make any repair necessary to a non-functioning GTW plasma television.

10 5. In reality, the televisions were defectively designed and/or manufactured with
11 defective electronic components which caused them to fail to meet their purported Lamp Life or
12 MTBF specifications. In addition, Gateway did not have adequately trained repair people or the
13 parts necessary to fix the failed GTWs notwithstanding their representations to the contrary.

14 6. As a result, the GTWs did not meet the same quality and performance standards
15 that Gateway had heavily advertised and promoted in connection with their sales and marketing
16 of these products. Gateway, in fact, misrepresented its ability to repair the GTWs and the
17 repairability of such products when they failed. Consumers rely on such representations when
18 deciding to purchase such products in that such representations relate to the longevity, durability,
19 and quality of such items. Upon information and belief, and thereupon alleged, most consumers
20 would not purchase a product they knew had latent defects which were unfixable and which
21 would render that product useless long before promised by the manufacturer.

22 7. Defendant knew, recklessly disregarded, or reasonably should have known that
23 their representations, as stated above, were false and deceptive.

24 8. Gateway is, therefore, in violation of a number of laws including but not limited
25 to California's Unfair Competition Laws ("UCL") and similar consumer protection statutes of
26 other states. In addition, Gateway is in violation of California's Consumers Legal Remedies Act
27 ("CLRA"), has breached common law express and implied warranties, and has violated
28 California's Song-Beverly Consumer Warranty Act. As a result, Plaintiffs, on behalf of

1 themselves and others similarly situated, seek relief for violations of the law, including but not
2 limited to:

- 3 a. Appropriate damages and/or restitution to Plaintiffs and all members of the Class
4 who have purchased a GTW series plasma television, including exemplary
5 damages under the CLRA, if appropriate;
- 6 b. Disgorgement from Gateway of all monies wrongfully obtained as a result of its
7 unlawful, unfair and deceptive business acts and practices as well as its untrue and
8 misleading advertising;
- 9 c. If appropriate, implementation of equitable and injunctive relief, including, *inter*
10 *alia*, institution of a trust and a court-supervised public information campaign
11 correcting the false and misleading information disseminated by Defendant; and,
- 12 d. Such other relief as the Court deems just and proper.

13 PARTIES

14 9. At all times material, Class Plaintiff Kim Koch was and is a resident of Rocky
15 Point, New York. On or about March 13, 2004, Class Plaintiff Koch purchased a new GTW-
16 P46M103 plasma television from Gateway's online website with the intent to use the same
17 primarily for personal use. She paid approximately \$3,509.96 for her GTW. Class Plaintiff
18 Koch had reviewed and relied on Gateway's statements of specifications and other
19 representations as to the quality and durability of its GTW product(s) including but not limited to
20 the MTBF and Lamp Life representations. Plaintiff Koch relied on advertisements presented in
21 media advertisements, product literature, Gateway sales staff, and/or the technical specifications
22 for the television, prior to making her purchase. She also relied on representations by Gateway
23 employees and marketing materials of the existence of a highly trained technical and repair staff
24 who could and would repair any problem that occurred in connection with the operation or
25 maintenance of Gateway GTW plasma televisions.

26 10. Notwithstanding Gateway's representations of quality and durability (to include
27 representations regarding the Lamp Life and MTBF of the televisions), Plaintiff Koch's
28 television failed to work as promised, ceasing to work altogether soon after purchase prior to the

1 expiration of one or more of the express warranties provided by Gateway, and/or one or more of
2 the implied warranties provided by law. As such, she has personally suffered harm in the form
3 of lost use, lost enjoyment, damages for breach of express and implied warranty, aggravation,
4 and repair costs. Within a reasonable period of time after the television's failure, Class Plaintiff
5 Koch submitted or attempted to submit her television for repair one or more times to Gateway
6 and/or Decision One, Gateway's designated authorized repair agent. Gateway was notified by
7 Koch at such time(s) of the television's failure(s), defects, and/or problems which were in
8 violation of the express and/or implied warranties related to the television. Neither Gateway nor
9 Decision One could or would repair her GTW. Koch's GTW was not repaired either because
10 Gateway demanded an unreasonably large fee for the repair and/or because Gateway and/or
11 Decision One could not repair the television.

12 11. At all times material, Class Plaintiff Malik Akram was and is a resident of San
13 Diego, California. In or about March 2004, Class Plaintiff Akram purchased a new GTW-
14 P46M103 plasma television from a Gateway Store in San Diego, California with the intent to use
15 the same primarily for personal use. Akram paid approximately \$3,999.00 plus sales tax for his
16 GTW. Class Plaintiff Akram reviewed and relied on Gateway's statements of specifications and
17 other representations as to the quality and durability of its GTW product(s) including but not
18 limited to the MTBF and Lamp Life representations. Akram relied on advertisements presented
19 in media advertisements, product literature, Gateway sales staff, and/or the technical
20 specifications for the television, prior to making his purchase. He also relied on representations
21 by Gateway employees and marketing materials of the existence of a highly trained technical and
22 repair staff who could and would repair any problem that occurred in connection with the
23 operation or maintenance of Gateway GTW plasma televisions.

24 12. Notwithstanding Gateway's representations of quality, including Lamp Life and
25 MTBF, Plaintiff Akram's television failed to work as promised, ceasing to work altogether soon
26 after purchase prior to the expiration of one or more of the express warranties provided by
27 Gateway, and/or one or more of the implied warranties provided by law. As such, he has
28 personally suffered harm in the form of lost use, lost enjoyment, damages for breach of express

1 and implied warranty, aggravation, and repair costs. Within a reasonable period of time after the
2 television's failure, Class Plaintiff Akram submitted or attempted to submit his television for
3 repair one or more times to Gateway and/or Decision One, Gateway's designated authorized
4 repair agent. Gateway was notified by Akram at such time(s) of the television's failure(s),
5 defects, and/or problems which were in violation of the express and/or implied warranties related
6 to the television. Neither Gateway nor Decision One could or would repair his GTW. Akram's
7 GTW was not repaired either because Gateway demanded an unreasonably large fee for the
8 repair and/or because Gateway and/or Decision One could not repair the television.

9 13. At all times material, Class Plaintiff Khola Herbert was and is a resident of San
10 Diego, California. On or about August 25, 2003, Class Plaintiff Herbert purchased a new GTW-
11 42M303 plasma television from the Gateway Store in San Diego, California with the intent to
12 use the same primarily for personal use. Hebert paid approximately \$3,999.00 plus sales tax for
13 his GTW. Class Plaintiff Hebert reviewed and relied on Gateway's statements of specifications
14 and other representations as to the quality and durability of its GTW product(s) including but not
15 limited to the MTBF and Lamp Life representations. Plaintiff Hebert relied on advertisements
16 presented in media advertisements, product literature, Gateway sales staff, and/or the technical
17 specifications for the television, prior to making his purchase. He also relied on representations
18 by Gateway employees and marketing materials of the existence of a highly trained technical and
19 repair staff who could and would repair any problem that occurred in connection with the
20 operation or maintenance of Gateway GTW plasma televisions.

21 14. Notwithstanding Gateway's representations of quality, including Lamp Life and
22 MTBF, Plaintiff Hebert's television failed to work as promised, ceasing to work altogether soon
23 after purchase prior to the expiration of one or more of the express warranties provided by
24 Gateway, and/or one or more of the implied warranties provided by law. As such, he has
25 personally suffered harm in the form of lost use, lost enjoyment, damages for breach of express
26 and implied warranty, aggravation, and repair costs. Herbert submitted or attempted to submit his
27 television for repair one or more times to Gateway and/or Decision One, Gateway's designated
28 authorized repair agent. Gateway was notified by Herbert at such time(s) of the television's

1 failure(s), defects, and/or problems which were in violation of the express and/or implied
2 warranties related to the television. Neither Gateway nor Decision One could or would repair his
3 GTW. Hebert's GTW was not repaired either because Gateway demanded an unreasonably large
4 fee for the repair and/or because Gateway and/or Decision One could not repair the television.

5 15. At all times material, Class Plaintiff Sheryl DeMarco Gregorius was and is a
6 resident of Jacksonville, Florida. On or about March 16, 2004, Class Plaintiff Gregorius
7 purchased a new GTW-P46M103 series plasma television from the Gateway Store in
8 Jacksonville, Florida with the intent to use the same primarily for personal use. Gregorius paid
9 approximately \$3,999.00 plus sales tax for her GTW. Class Plaintiff Gregorius reviewed and
10 relied on Gateway's statements of specifications and other representations as to the quality and
11 durability of its GTW product(s) including but not limited to the MTBF and Lamp Life
12 representations. Plaintiff Gregorius relied on advertisements presented in media advertisements,
13 product literature, Gateway sales staff, and/or the technical specifications for the television, prior
14 to making her purchase. She also relied on representations by Gateway employees and
15 marketing materials of the existence of a highly trained technical and repair staff who could and
16 would repair any problem that occurred in connection with the operation or maintenance of
17 Gateway GTW plasma televisions.

18 16. Notwithstanding Gateway's representations of quality, including Lamp Life and
19 MTBF, Plaintiff Gregorius' television failed to work as promised, ceasing to work altogether
20 soon after purchase prior to the expiration of one or more of the express warranties provided by
21 Gateway, and/or one or more of the implied warranties provided by law. As such, she has
22 personally suffered harm in the form of lost use, lost enjoyment, damages for breach of express
23 and implied warranty, aggravation, and repair costs. Within a reasonable period of time after the
24 television's failure, Class Plaintiff Gregorius submitted or attempted to submit her television for
25 repair one or more times to Gateway and/or Decision One, Gateway's designated authorized
26 repair agent. Gateway was notified by Gregorius at such time(s) of the television's failure(s),
27 defects, and/or problems which were in violation of the express and/or implied warranties related
28 to the television. Neither Gateway nor Decision One could or would repair her GTW.

1 Gregorius' GTW was not repaired either because Gateway demanded an unreasonably large fee
2 for the repair and/or because Gateway and/or Decision One could not repair the television.

3 17. At all times material, Class Plaintiff David W. Mahy was and is a resident of New
4 York, New York. At the time of the allegations made herein, Class Plaintiff Mahy was a resident
5 of Texas. On or about October 18, 2003, Class Plaintiff Mahy purchased a new GTW-P50M203
6 plasma television from the Gateway Store located in Willowbrook Mall, Texas with the intent to
7 use the same primarily for personal use. Mahy paid approximately \$5,999 plus sales tax and
8 shipping for his GTW. Class Plaintiff Mahy reviewed and relied on Gateway's statements of
9 specifications and other representations as to the quality and durability of its GTW product(s)
10 including but not limited to the MTBF and Lamp Life representations. Plaintiff Mahy relied on
11 advertisements presented in media advertisements, product literature, Gateway sales staff, and/or
12 the technical specifications for the television, prior to making his purchase. He also relied on
13 representations by Gateway employees and marketing materials of the existence of a highly
14 trained technical and repair staff who could and would repair any problem that occurred in
15 connection with the operation or maintenance of Gateway GTW plasma televisions.

16 18. Notwithstanding Gateway's representations of quality, including Lamp Life and
17 MTBF, Plaintiff Mahy's television failed to work as promised, ceasing to work altogether soon
18 after purchase prior to the expiration of one or more of the express warranties provided by
19 Gateway, and/or one or more of the implied warranties provided by law. As such, he has
20 personally suffered harm in the form of lost use, lost enjoyment, damages for breach of express
21 and implied warranty, aggravation, and repair costs. Within a reasonable period of time after the
22 television's failure, Class Plaintiff Mahy submitted or attempted to submit his television for
23 repair one or more times to Gateway and/or Decision One, Gateway's designated authorized
24 repair agent. Gateway was notified by Mahy at such time(s) of the television's failure(s),
25 defects, and/or problems which were in violation of the express and/or implied warranties related
26 to the television. Neither Gateway nor Decision One could or would repair his GTW. Mahy's
27 GTW was not repaired either because Gateway demanded an unreasonably large fee for the
28 repair and/or because Gateway and/or Decision One could not repair the television.

1 19. At all times material, Class Plaintiff James Perkins was and is a resident of
2 Hamburg, New York. On or about January 15, 2004, Class Plaintiff Perkins purchased a new
3 GTW-P42 inch series plasma television from the Gateway online store/website, "Online
4 Gateway Direct," with the intent to use the same primarily for personal use. Perkins paid
5 approximately \$3,999.00 plus sales tax for his GTW. Class Plaintiff Perkins reviewed and relied
6 on Gateway's statements of specifications and other representations as to the quality and
7 durability of its GTW product(s) including but not limited to the MTBF and Lamp Life
8 representations. Perkins relied on advertisements presented in media advertisements, product
9 literature, Gateway sales staff, and/or the technical specifications for the television, prior to
10 making his purchase. He also relied on representations by Gateway employees and marketing
11 materials of the existence of a highly trained technical and repair staff who could and would
12 repair any problem that occurred in connection with the operation or maintenance of Gateway
13 GTW plasma televisions.

14 20. Notwithstanding Gateway's representations of quality, including Lamp Life and
15 MTBF, Plaintiff Perkins' television failed to work as promised, ceasing to work altogether soon
16 after purchase prior to the expiration of one or more of the express warranties provided by
17 Gateway, and/or one or more of the implied warranties provided by law. As such, he has
18 personally suffered harm in the form of lost use, lost enjoyment, damages for breach of express
19 and implied warranty, aggravation, and repair costs. Within a reasonable period of time after the
20 television's failure, Class Plaintiff Perkins submitted or attempted to submit his television for
21 repair one or more times to Gateway and/or Decision One, Gateway's designated authorized
22 repair agent. Gateway was notified by Perkins at such time(s) of the television's failure(s),
23 defects, and/or problems which were in violation of the express and/or implied warranties related
24 to the television. Neither Gateway nor Decision One could or would repair his GTW. Perkins
25 GTW was not repaired either because Gateway demanded an unreasonably large fee for the
26 repair and/or because Gateway and/or Decision One could not repair the television.

27 21. At all times material, Class Plaintiff Julie Lenz was and is a resident of Auburn,
28 California. On or about January 4, 2004, Class Plaintiff Lenz purchased a new GTW-P42M403

1 series plasma television from the Gateway Store located in Citrus Heights, California with the
2 intent to use the same primarily for personal use. Lenz paid approximately \$3,999.00 plus sales
3 tax for her GTW. Class Plaintiff Lenz reviewed and relied on Gateway's statements of
4 specifications and other representations as to the quality and durability of its GTW product(s)
5 including but not limited to the MTBF and Lamp Life representations. Plaintiff Lenz relied on
6 advertisements presented in media advertisements, product literature, Gateway sales staff, and/or
7 the technical specifications for the television, prior to making her purchase. She also relied on
8 representations by Gateway employees and marketing materials of the existence of a highly
9 trained technical and repair staff who could and would repair any problem that occurred in
10 connection with the operation or maintenance of Gateway GTW plasma televisions.

11 22. Notwithstanding Gateway's representations of quality, including Lamp Life and
12 MTBF, Plaintiff Lenz's television failed to work as promised, ceasing to work altogether soon
13 after purchase within the express warranties, ceasing to work altogether soon after purchase prior
14 to the expiration of one or more of the express warranties provided by Gateway, and/or one or
15 more of the implied warranties provided by law. As such, she has personally suffered harm in
16 the form of lost use, lost enjoyment, damages for breach of express and implied warranty,
17 aggravation, and repair costs. Within a reasonable period of time after the television's failure,
18 Class Plaintiff Lenz submitted or attempted to submit her television for repair one or more times
19 to Gateway and/or Decision One, Gateway's designated authorized repair agent. Gateway was
20 notified by Lenz at such time(s) of the television's failure(s), defects, and/or problems which
21 were in violation of the express and/or implied warranties related to the television. Neither
22 Gateway nor Decision One could or would repair her GTW. Lenz's GTW was not repaired
23 either because Gateway demanded an unreasonably large fee for the repair and/or because
24 Gateway and/or Decision One could not repair the television.

25 23. At all times material, Class Plaintiff Dusty K. Brower was and is a resident of
26 Pryor, Oklahoma. On or about February 24, 2004, Class Plaintiff Brower purchased a new
27 GTW-P46M103 plasma television from the Gateway Store "Online Gateway Direct," with the
28 intent to use the same primarily for personal use. Brower paid approximately \$3,999.00 plus

1 sales tax for her GTW. Class Plaintiff Brower reviewed and relied on Gateway's statements of
2 specifications and other representations as to the quality and durability of its GTW product(s)
3 including but not limited to the MTBF and Lamp Life representations. Plaintiff Brower relied on
4 advertisements presented in media advertisements, product literature, Gateway sales staff, and/or
5 the technical specifications for the television, prior to making her purchase. She also relied on
6 representations by Gateway employees and marketing materials of the existence of a highly
7 trained technical and repair staff who could and would repair any problem that occurred in
8 connection with the operation or maintenance of Gateway GTW plasma televisions.

9 24. Notwithstanding Gateway's representations of quality, including Lamp Life and
10 MTBF, Plaintiff Brower's television failed to work as promised, ceasing to work altogether soon
11 after purchase prior to the expiration of one or more of the express warranties provided by
12 Gateway, and/or one or more of the implied warranties provided by law. As such, she has
13 personally suffered harm in the form of lost use, lost enjoyment, damages for breach of express
14 and implied warranty, aggravation, and repair costs. Within a reasonable period of time after the
15 television's failure, Class Plaintiff Brower submitted or attempted to submit her television for
16 repair one or more times to Gateway and/or Decision One, Gateway's designated authorized
17 repair agent. Gateway was notified by Brower at such time(s) of the television's failure(s),
18 defects, and/or problems which were in violation of the express and/or implied warranties related
19 to the television. Neither Gateway nor Decision One could or would repair her GTW. Brower's
20 GTW was not repaired either because Gateway demanded an unreasonably large fee for the
21 repair and/or because Gateway and/or Decision One could not repair the television.

22 25. Each Plaintiff brings this Action in their individual capacity, each having
23 personally suffered harm, and on behalf of all other similarly situated purchasers of Gateway
24 GTW series Plasma televisions. Each of the Plaintiffs specifically alleges that they have each
25 personally suffered the harm(s) alleged herein.

26 26. At all times material, Defendant Gateway, Inc. (NYSE: GTW) was and is a
27 Delaware corporation with its principal offices in Irvine, California. Gateway is a national
28 manufacturer, marketer and distributor of consumer electronics, including the defective plasma

1 televisions at issue herein. Gateway promotes itself as being a personal technology company
2 that improves people's lives through a combination of the latest and best hardware,
3 communication tools, applications, and training and service. Gateway claims that it takes a
4 "localized approach" to its business, utilizing its website, call centers, and nationwide network of
5 Gateway retail stores to build direct relationships with consumers.

6 27. Gateway caused the defective GTW televisions to be placed into the stream of
7 commerce throughout the United States by selling its products to consumers through its stores,
8 over the telephone, and/or over the internet. Gateway owns and operates an online website
9 where consumers can purchase the GTW televisions from any location in the United States
10 including but not limited to San Diego, California. At all relevant times, Gateway's wrongful
11 conduct was conceived, prepared, approved and implemented by Gateway from its San Diego
12 and/or Irvine, California headquarters.

13 28. Indeed, all of the advertisements and marketing materials used by Gateway to
14 market and sell its plasma televisions were designed, prepared, authorized for use, and
15 distributed by Gateway from its California offices.

16 CLASS ACTION ALLEGATIONS

17 29. Plaintiffs bring this Action on behalf of themselves and all others similarly
18 situated persons nationwide, or such states as the Court may determine to be appropriate for
19 Class certification treatment, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b). The
20 Class of persons which the Plaintiffs seek to represent is defined as:

21 All persons residing within the United States, who, within the
22 applicable statute of limitations, purchased, other than for purposes
23 of re-sale, a GTW series plasma television set manufactured,
marketed, distributed and sold by Gateway, Inc.

24 Excluded from the Class are any parent, subsidiary or affiliate of the Defendant, any entity in
25 which the Defendant has a controlling interest, and the respective officers, directors, employees,
26 agents, legal representatives, heirs, predecessors, successors, and assigns of such excluded
27 persons or entities.

28 30. The Class is composed of thousands of persons geographically dispersed

1 throughout California and other parts of the United States, the joinder of whom in one Action is
2 impracticable, and the disposition of their claims in a Class Action will provide substantial
3 benefits to both the parties and the Court. The Class is sufficiently numerous, since it is
4 estimated that thousands of GTW series plasma televisions were sold in the United States since
5 their introduction in 2001. Because these products are sold and distributed directly by Gateway
6 both through the Internet and its nationwide retail distribution network, and since Gateway issues
7 a warranty and distributes warranty information cards to all purchasers of its products, the names
8 and addresses of the Class members are readily obtainable from Defendant or its affiliates or
9 distributors.

10 31. There is no plain, speedy or adequate remedy other than by maintenance of this
11 Class Action because the respective damages for Plaintiffs and each member of the Class are
12 relatively small, making it economically infeasible for Class members to pursue their remedies
13 individually.

14 32. Further, a Class Action is superior to other available methods for the fair and
15 efficient adjudication of the controversies herein in that: (a) individual claims by Plaintiffs or
16 Class members are impractical as the costs of pursuit far exceed what Plaintiffs or any one Class
17 member has at stake; (b) as a result, although some Class Actions have been filed, there has been
18 very little individual litigation over the controversies herein, and individual members of the Class
19 have no interest in prosecuting and controlling separate Actions; (c) it is desirable to concentrate
20 litigation of the claims herein in this forum; and, (d) the proposed Class Action is manageable.

21 33. Judicial determination of the common legal and factual issues essential to this
22 case would be far more efficient and economical as a Class Action rather than in piecemeal,
23 individual determinations. The prosecution of separate Actions by individual Class members,
24 even if theoretically possible, would create a risk of inconsistent or varying adjudications with
25 respect to individual Class members against Defendant and would establish impractical standards
26 of conduct for Defendant.

27 34. There is a well-defined community of interest in the questions of law and fact
28 involved affecting the parties to be represented. These and other similar factual and legal

1 questions common to the Class predominate over individual factual or legal questions, and
2 include the following:

- 3 a. Whether Gateway committed acts of unfair competition through its sale of its
4 GTW series plasma televisions;
- 5 b. Whether Gateway knew, recklessly disregarded or reasonably should have
6 known that the display screen qualities, Lamp Life, and MTBF of its GTW
7 series plasma televisions were not as they represented;
- 8 c. Whether Gateway knew, recklessly disregarded or reasonably should have
9 known that it did not have adequate repair parts, facilities, or personnel to
10 make repairs to GTW series plasma televisions notwithstanding
11 representations to the contrary;
- 12 d. Whether the acts and practices of Defendant violated, *inter alia*, the consumer
13 protection statutes enacted in California and other States;
- 14 e. Whether Gateway caused the distribution and sale of its GTW series under
15 misleading and deceptive pretenses by concealing potentially adverse
16 information about its GTW series plasma televisions, *i.e.*, that the display
17 screen was of inferior quality, that Lamp Life was not what was promised,
18 and/or that the MTBF was no where near what was represented and, thereby,
19 not in conformity with its advertised features, attributes and/or not in
20 conformity with respect to standards for other similar products of like kind
21 and character; and,
- 22 f. Whether the Class has been damaged and/or suffered irreparable harm and, if
23 so, the extent of such damages and/or the nature of the equitable and
24 injunctive relief, statutory damages or punitive damages to which Plaintiffs
25 and each member of the Class are entitled.

26 35. By purchasing a GTW series plasma television without knowledge of the
27 misleading nature of the claims made by Defendant as expressed above, Plaintiffs are asserting
28 claims that are typical of the claims of the entire Class, and Plaintiffs will fairly and adequately

1 represent and protect the interests of the Class. In particular, Plaintiffs have no interests
2 antagonistic to those of the other members of the Class and have retained counsel who is
3 competent and experienced in the prosecution of consumer electronics Class Action litigation.

4 36. Plaintiffs and the members of the Class have all suffered irreparable harm and
5 damages as a result of Defendant's unlawful and wrongful conduct. Absent a Class Action,
6 Gateway will likely retain millions of dollars received as a result of its wrongdoing and such
7 misleading conduct shall go un-remedied and uncorrected. Absent a Class Action, the Class
8 members will not receive restitution, will continue to suffer losses and allow these violations of
9 law to proceed without remedy and allow Gateway to retain the proceeds of its ill-gotten gains.

10 STATEMENT OF FACTS

11 37. HDTV and EDTV refer to High-Definition and Enhanced-Definition televisions
12 as a method of displaying television images in high resolution, with a high degree of picture
13 detail and accuracy. These televisions sell for much higher prices than conventional Cathode
14 Ray Tube (CRT) televisions. Purchasers of High-Definition and Enhanced-Definition
15 televisions therefore purchase a higher quality product and are, as a result, willing to pay a higher
16 price for the higher resolution picture offered in High Definition and Enhanced-Definition
17 televisions.

18 38. Gateway promoted a line of High-Definition and Enhanced-Definition plasma
19 televisions, commonly referred to as their GTW series televisions, claiming that they offered the
20 consumer "Exceptional Value and Brilliant Picture Quality." Gateway also advertised these
21 GTW series televisions as enabling the consumer "to toss their bulky old televisions and enjoy
22 all the viewing and space-saving benefits of Plasma" televisions. Gateway, through its General
23 Manager of digital television products, Dave Russell, represented to consumers at large through
24 the Company's advertisements that the "Gateway Plasma televisions set new standards for
25 quality and value."

26 39. Gateway made and continues to make other representations concerning the
27 durability and quality of its televisions. In its marketing materials, product materials and
28 technical specifications, Gateway makes representation concerning the long life of their GTW

1 series televisions. In particular, Gateway represents that the average time before a GTW series
2 televisions should fail is after 20,000 hours or more of use. This statement of fact relates to
3 Gateway's other representations of quality and durability. This particular statement is set forth
4 in, among other places, the technical specifications of all GTW series televisions as the
5 "reliability requirement." Within the plasma television industry, plasma television
6 manufacturers define the durability and reliability of their products in terms of this reliability
7 requirement. The reliability requirement is expressed in terms of hours as the Mean Time
8 Between Failures (hereafter "MTBF"). Gateway specifies that their GTW plasma televisions
9 have a MTBF of 20,000 hours which, in lay terms, means that if a typical GTW is operated for
10 eight (8) hours a day, everyday, it should run 6.85 years before a failure.

11 40. Gateway's GTW televisions, however, consistently fail to meet the stated MTBF
12 reliability requirement in that they fail on average much sooner than promised by Gateway.
13 Within the plasma televisions industry, the standard MTBF is 18,000 – 24,000 hours. Gateway
14 GTW plasma series televisions not only fail to meet the standard specifications set out by
15 Gateway in its product literature; they fail to meet industry MTBF standards for televisions of
16 like character and quality.

17 41. Additionally, Gateway represents and warrants that the GTW series televisions
18 have a "Lamp Life" of a minimum of 25,000 hours. This representation by Gateway is made in
19 its advertisements, marketing materials, product literature, and technical specifications, as well
20 as in product details provided on the Amazon.com website, an online consumer product website.

21 42. Gateway's GTW televisions, however, consistently fail to meet their stated Lamp
22 Life reliability requirement. In particular, the GTW plasma televisions routinely fail within a
23 short period of time after purchase well short of the represented Lamp Life specification. Within
24 the plasma televisions industry, the standard Lamp Life of plasma television panels is 24,000 –
25 26,000 hours. Gateway GTW plasma series televisions not only fail to meet the standard
26 specifications set out by Gateway in its product literature; they fail to meet industry Lamp Life
27 standards for televisions of like character and quality.

28 43. Plaintiffs also believe, on information and belief, and thereupon allege that the

1 Gateway GTW series televisions fail to meet other technical specifications set forth by Gateway
2 in its product literature and as accepted within the plasma television industry for products of like
3 kind and quality.

4 44. Additionally, Gateway made a number of representations in its product literature
5 and through authorized representatives that it had the ability and would be able to provide
6 service and repair for its GTW series plasma televisions after consumers purchase these
7 products. Gateway also represented that the GTW televisions were capable of being fixed
8 should any defect or problem arise with their use.

9 45. Gateway also represented to the Plaintiffs and those similarly situated that GTW
10 series televisions would be free from manufacturer's defects. Gateway further warranted that, in
11 the event of a failure, its factory-trained service technicians would have the know-how and
12 materials to remedy any such failure. These representations were not true. In fact, Gateway did
13 not have a factory trained staff of repair technicians. It out-sourced repairs to a company known
14 as "Decision One." Gateway failed to provide Decision One any training or technical
15 information concerning the GTW series plasma televisions to assist them with repairs. In
16 addition, neither Gateway nor Decision One stocked the repair parts necessary to fix or remedy
17 the type of defects exhibited by the GTW series plasma televisions after they were sold.

18 46. Gateway's GTW series televisions were and are defective, notwithstanding
19 Gateway's claims of quality, MTBF, Lamp Life, durability, and clarity. These televisions
20 manifest their defects by failing within a short time after purchase and are unfixable by either
21 Gateway or Decision One.

22 47. The named Class Plaintiffs and other consumers similarly situated have found that
23 the GTW series televisions soon after purchase begin to emit popping sounds and a burning odor.
24 Soon thereafter, a permanent failure of the television occurs. This condition interferes with and
25 prevents the use and enjoyment of the television rendering it completely useless for the purpose
26 for which was intended. This failure occurs well short of the 20,000 MTBF promised by
27 Gateway in its technical specifications, marketing materials, and product literature for the
28 televisions in question.

1 48. Upon information and belief, Plaintiffs suspect that one of the problems with the
2 GTW series televisions is related to faulty component parts and/or latent defects within the
3 televisions, including but not limited to the design and/or manufacture of its power
4 amplifier/supply units, which, upon such failure, require the complete replacement of the entire
5 television. To date, there have been numerous consumer complaints and demands made upon
6 Gateway to resolve the problem with the GTW series plasma televisions. Gateway has failed,
7 notwithstanding these numerous and repeated demands, to find a solution for these product
8 failures and has not made good on its commitment to its customers to repair or otherwise replace
9 the product.

10 49. Many consumers, including the Plaintiffs, find that they receive the "run around"
11 when they contact Gateway's technical service support staff and have, in fact, been informed that
12 there is no way to fix the problem. Other consumers, such as Class Plaintiff Brower, have been
13 forced to have their television replaced several times over, often with refurbished televisions
14 and/or televisions which have already demonstrated the same defects.

15 50. In such cases where a GTW series plasma television is not repairable, certain
16 customers, including the Plaintiffs, have demanded a complete refund from Gateway. These
17 demands have been largely ignored by Gateway.

18 51. In its limited warranties and/or extended service plans, Gateway warrants that any
19 repair services provided will be performed in a "professional, workmanlike" manner. Gateway
20 further warrants that it will pay all costs, including shipping costs, to repair or replace defective
21 products to include the GTW.

22 52. Gateway, however, fails to stock and provide consumers with replacement parts
23 for the GTW series televisions, notwithstanding its knowledge of certain existing defects in the
24 GTW series plasma television. In addition, Gateway refuses to provide independent television
25 repair shops with the electronic schematics for its plasma televisions so as to enable its
26 customers to seek repairs elsewhere. As a result, consumers are required to obtain television
27 repair services exclusively through Gateway and/or its authorized repair agent, Decision One.

28 53. On or about, December 8, 2005, Plaintiffs sent Defendant a written Notice of

1 Violation of Consumers Legal Remedies Act and Demand for Remedy, attached to this
2 complaint as Exhibit A and incorporated by reference to. This notice and demand notified
3 Defendant of its above-mentioned violations of the law that resulted in the sale of the GTW
4 series plasma televisions to Plaintiffs and those similarly situated. It also indicated that Plaintiffs
5 are representing the specified Class in this Class Action and demanded that Defendant remedy
6 the violations.

7 54. Within 30 days of the receipt of the notice and demand, attached as Exhibit A,
8 Defendant failed to correct, repair, replace, or otherwise rectify the problems with the GTW
9 televisions, and has failed to agree to correct, repair, replace, or otherwise rectify, within a
10 reasonable time, the above-mentioned violations of the CLRA, California Civil Code §§ 1750, et
11 seq., and specifically §§ 1770(e), (f), (g), (i), (n) and (p).

12 55. By reason of the above-mentioned violations of the Civil Code, Plaintiffs and
13 each member of the Class of consumers of which Plaintiffs are a member have suffered damages
14 in the estimated amount of \$2,500 to \$7,000 or more apiece which is based upon the purchase
15 price of the defective goods at the time of purchase.

16 56. Defendant continues to engage in the above-described deceptive practices and
17 unless enjoined from doing so by this Court, will continue to do so, all to the damage of
18 consumers.

19 57. The aforementioned violations of the Civil Code by Defendant were willful,
20 oppressive, fraudulent, and/or malicious. Plaintiffs and each member of the Class of consumers
21 of which Plaintiffs are members are therefore entitled to punitive damages.

22 **FIRST CAUSE OF ACTION**

23 **(Violations of California's Consumers Legal Remedies Act)**

24 58. Plaintiffs hereby incorporate by reference the allegations contained in ¶¶ 1
25 through 57 of the Complaint.

26 59. This cause of Action is brought pursuant to the California Consumers Legal
27 Remedies Act, California Civil Code §§ 1750, et seq. (the "CLRA").

28 60. The policies, acts and practices heretofore described were intended to result in the

1 sale of Gateway's GTW series High-Definition and Enhanced-Definition televisions to the
2 consuming public. These Actions violated and continue to violate the CLRA in at least the
3 following respects:

- 4 a. In violation of § 1770(e) of the CLRA, Defendant's acts and practices
5 constitute representations that the goods in question have characteristics,
6 benefits or uses which they do not have;
- 7 b. In violation of § 1770(g) of the CLRA, Defendant's acts and practices
8 constitute representations that the goods in question are of a particular
9 standard, quality or grade, when they are of another; and,
- 10 c. In violation of § 1770(i) of the CLRA, Defendant is selling their goods
11 with the intent not to sell them as advertised.

12 61. Pursuant to § 1782 of the CLRA, prior to filing this Second Amended Complaint,
13 while the first filed Complaint is an appropriate notice of violation, Plaintiffs notified Defendant
14 in writing of the particular violations of § 1770 of the CLRA and demanded that Gateway repair,
15 replace or otherwise remedy the problems associated with the misrepresentations detailed above,
16 which are Actions in violation of § 1770 of the CLRA, and give notice to all affected consumers
17 of Defendant's intent to so act. Plaintiffs sent this notice by certified mail, return receipt
18 requested to Defendant's principal place of business in Irvine, California.

19 62. Gateway failed to respond to Plaintiffs' demand within 30 days of the letter,
20 pursuant to § 1782 of the CLRA. Plaintiffs, as such, have amended this Complaint so as to
21 include a request for actual damages, plus punitive damages, interest and attorney fees.
22 Regardless of such amendment to seek damages, however, Plaintiffs seek and are entitled to,
23 pursuant to § 1780(a)(2) of the CLRA, an order enjoining the above-described wrongful acts and
24 practices of Defendant, plus costs and attorney fees, and any other relief which the Court deems
25 proper.

26 **SECOND CAUSE OF ACTION**

27 **(Unlawful, Unfair and Deceptive Business Practices)**

28 63. Plaintiffs hereby incorporate by reference the allegations contained in ¶¶1 through

1 62 of the Complaint.

2 64. In marketing and selling defective plasma televisions to the Plaintiffs and
3 members of the Class as described above, the Defendant engaged in unlawful, deceptive and
4 unfair business acts and deceptive and misleading advertising within the meaning of Cal. Bus. &
5 Prof. Code §§17200, *et seq.*, and the similar statutory enactments of the other States, including
6 consumer protection and consumer sales practices acts prohibiting unlawful, deceptive and unfair
7 business practices and acts of unfair competition.

8 65. Defendant's misrepresentations and omissions of the material facts set forth above
9 misled Plaintiffs, members of the Class and the general public in violation of California Civil
10 Code §§ 1572, 1709 and 1710, as well as principles of common law. Accordingly, Defendant
11 has violated Business and Professions Code § 17200's proscription against engaging in an
12 unlawful business act or practice.

13 66. In making the representations of fact described herein to Plaintiffs, Class
14 members and the general public, Gateway has also violated, *inter alia*, California Civil Code §§
15 1572(a) and 1710(2) by failing to fulfill its duty to disclose the material facts set forth above.
16 Accordingly, Defendant has violated Business and Professions Code § 17200's proscription
17 against engaging in an unlawful business act or practice.

18 67. The policies, acts and practices alleged herein were intended to result in the sale
19 of GTW series plasma televisions to the consuming public and violated and continue to violate
20 the CLRA, California Civil Code §§ 1750, *et seq.*, and specifically §§ 1770(e), (f), (g), (i), (n)
21 and (p).

22 68. Defendant has violated Business and Professions Code § 17500 and numerous
23 state and federal precedents, statutes, regulations and industry standards which require Defendant
24 not to sell products through advertised representations including stated specifications and
25 capabilities when, in fact, they do not.

26 69. As detailed in the preceding paragraphs, the misrepresentations and
27 nondisclosures by Defendant of the material facts detailed above constitute an unfair business act
28 or practice within the meaning of Business and Professions Code § 17200. Defendant has or

1 should have been aware at all relevant times throughout the development, manufacture,
2 distribution and sale of its GTW series televisions that these products were represented to enable
3 the consumer to own a High-Definition or Enhanced-Definition television free from design
4 defects, in fact, the product failed to conform to these minimum requirements. In addition,
5 Gateway knew or reasonably should have known that consumers believed this product would
6 perform as advertised and, thereby, were induced to purchase the GTW televisions. Gateway
7 made these representations even though it was aware that the material defects alleged above
8 existed and made a complete use of the product impossible.

9 70. The justification for failing to make such disclosures and the business
10 consequences of such disclosures were and are vastly outweighed by the adverse ramifications
11 such conduct created, particularly when considering that there may be reasonably available
12 alternatives Defendant could have utilized or disclosed.

13 71. Defendant's statutory violations as alleged herein and misrepresentations made
14 through their promotional advertising, marketing and sales campaign as particularized above
15 were misleading and had a tendency to deceive the consuming public because, as detailed more
16 fully above, they materially misrepresented the quality, nature and effectiveness of the GTW
17 series television.

18 72. Such conduct is ongoing and continues to this date. Plaintiffs and the members of
19 the Class are therefore entitled to the relief described below.

20 73. Accordingly, Defendant has violated Cal. Bus. & Prof. Code §17200's
21 proscription against engaging in unfair and unlawful business practices, and similar statutory
22 enactments in other States, and Plaintiffs and Class members are entitled to injunctive and
23 equitable relief in the form of restitution and disgorgement of all earnings, profits, compensation
24 and benefits Defendant obtained as a result of such unfair and unlawful business practices.

25 74. As a result of the conduct described above, Defendant has been and will be
26 unjustly enriched at the expense of Plaintiffs and Class members. Specifically, Defendant has
27 been unjustly enriched by receiving substantial monies and profits from the sale of its defective
28 plasma televisions which were promoted and sold through advertisements which affirmatively

1 misrepresent, either directly or by implication, the true quality and durability of such products for
2 purchase by Plaintiffs and other Class members. Further, the Plaintiffs and other Class members
3 have been deprived of money or property as a result of Defendant's wrongful conduct and
4 unlawful acts and practices and, therefore, have sustained injury in fact.

5 75. Pursuant to Cal. Bus. & Prof. Code §17203, and the similar relief provided for
6 under the statutory enactments in other States, Plaintiffs seek a Court Order requiring Defendant
7 to immediately cease such acts of unfair competition and enjoining them from continuing to
8 deceptively advertise or conduct business via the unlawful or unfair business acts and practices
9 and deceptive and misleading advertising complained of herein. Plaintiffs also request an order
10 requiring Defendant to engage in a corrective advertising campaign.

11 76. Plaintiffs additionally request an Order requiring Defendant to disgorge its ill-
12 gotten gains as described above and awarding Plaintiffs and Class members full restitution of all
13 monies and property wrongfully acquired by Defendant by means of such unlawful business
14 practices, acts of unfair competition and false advertising, plus interest and attorneys' fees, so as
15 to restore any and all monies to Plaintiffs and Class members which were acquired and obtained
16 by means of such deceptive, unfair or unlawful business practices. Plaintiffs further request an
17 award of monetary and exemplary damages as may permitted by law under California law and
18 similar statutory enactments in the other States.

19 THIRD CAUSE OF ACTION

20 (False and Misleading Advertising)

21 77. Plaintiffs hereby incorporate by reference the allegations contained in ¶¶ 1
22 through 76 of the Complaint.

23 78. Cal. Bus. & Prof. Code §§17500, et seq., and similar statutory enactments in other
24 Market States, prohibit unfair, deceptive and misleading advertising.

25 79. Defendant's uniform sales materials, product literature, marketing materials, and
26 technical specifications deceived and misled Plaintiffs and other members of the Class as to the
27 quality and durability of the GTW series plasma televisions they purchased from Gateway and
28 thus also constitute deceptive or misleading advertising in violation of, *inter alia*, Cal. Bus. &

1 Prof. Code §§17500, et seq., and similar statutory enactments prohibiting unfair, deceptive and
2 misleading advertising in other States.

3 80. Defendant used various forms of media to advertise, call attention to, and
4 otherwise publicize the qualities of the GTW televisions by, *inter alia*, misleadingly and
5 deceptively representing that its plasma televisions are of high quality, have a certain Lamp Life,
6 have a certain MTBF, are long lasting, and are durable. The representations made by Gateway,
7 as more fully described above, were false. At the time Gateway made the misrepresentations
8 herein alleged, Gateway had no reasonable grounds for believing the representations to be true.

9 81. Defendant made the representations herein alleged with the intention of inducing
10 the public to purchase Gateway's GTW series plasma televisions. Plaintiffs and those similarly
11 situated relied upon those representations in deciding whether to purchase Gateway's televisions.
12 In reliance upon these representations, Plaintiffs and those similarly situated were induced to
13 purchase Gateway GTW series plasma televisions. Had Plaintiffs known the falsity of the
14 representations made, they would not have been induced to act as they did, namely purchasing
15 the GTW televisions.

16 82. Gateway's promotions and advertisements of its GTW televisions constitute
17 unfair competition and unfair, untrue or misleading advertising within the meaning of Cal. Bus.
18 & Prof. Code §§17500, et seq., and similar statutory enactments in other States, which
19 advertisements are likely to have deceived and continue to deceive the consuming public.
20 Defendant either knew or recklessly disregarded the fact that such advertising was deceptive,
21 misleading or otherwise inadequate. Such conduct also constitutes a violation of Cal. Bus. &
22 Prof. Code §§17200, et seq., and similar statutory enactments in other States.

23 83. The above-described unfair, unlawful, deceptive and misleading advertising and
24 business acts conducted by the Defendant still continue to this day and present a threat to Class
25 members and the general public in that Gateway has failed to publicly acknowledge its
26 wrongdoing or publicly issue adequate corrective notices and advertising to purchasers of
27 Defendant's plasma televisions and to the public generally.

28 84. Defendant's use of various forms of media to advertise, call attention to or give

1 publicity to the sale of goods or merchandise which are represented in a manner that is false,
2 deceptive and confusing to consumers violates constitutes false and misleading advertising under
3 California law and the laws of market states.

4 85. Among other things, Gateway deceptively represents that the screen and other
5 attributes of its GTW series plasma televisions possess certain performance characteristics and
6 qualities to include representations that its televisions will have a mean durability run before
7 failure of a minimum of 20,000 hours (MTBF) and will have a Lamp Life of a minimum of
8 25,000 hours. In fact, the display screen equipment and component parts utilized in
9 manufacturing the product fail far earlier than the 20,000 and 25,000 hour specifications
10 represented by Gateway. As such, the GTWs do not perform as advertised and often fail very
11 shortly after purchase.

12 86. Gateway also represents by and through its technical staff, its authorized repair
13 dealers, its sales staff, its website, and/or its agents that the defects in question can be repaired
14 and/or that Gateway's authorized repair dealer(s) are reputable business entities which will not
15 gouge consumers by overcharging them to fix an unfixable problem. This, in fact, is not correct.
16 Upon information and belief and thereupon alleged, the defect(s) in question cannot be repaired
17 as they are inherent defects which Gateway lacks the technology, knowledge, or know-how to
18 fix.

19 87. These actions constitute unfair competition as well as unfair, deceptive, untrue
20 and/or misleading advertising within the meaning of Business and Professions Code §§ 17500, *et*
21 *seq.*, in that said advertisements and representations are likely to have deceived and continue to
22 deceive the consuming public. Defendant either knew, recklessly disregarded or reasonably
23 should have known that such advertising was untrue and/or misleading. Such conduct also
24 constitutes a violation of Business and Professions Code §§ 17200, *et seq.*

25 88. As a result of the conduct described above, Defendant has been and will be
26 unjustly enriched at the expense of Plaintiffs and the members of the Class. Specifically,
27 Defendant has been unjustly enriched by the receipt of millions of dollars in monies and profits
28 from the sales of its GTW series plasma televisions, both in California and throughout the United

1 States, which is promoted and sold through advertisements which affirmatively misrepresent,
2 either directly or by implication, that the Company's High-Definition and Enhanced-Definition
3 plasma televisions would possess display screen attributes and performance capabilities. As
4 such, Gateway concealed the true facts regarding the product's performance, or lack thereof, as
5 described herein from both the Class and the general public.

6 89. Pursuant to Business and Professions Code §§ 17203 and 17535 and the similar
7 laws against false and deceptive advertisement of products enacted in other States, Plaintiffs and
8 the members of the Class and the general public seek an order of this Court ordering Gateway to
9 immediately cease such acts of unfair competition and enjoining Defendant from continuing to
10 falsely advertise or conduct business via the unlawful, unfair or deceptive business acts and
11 practices and untrue and misleading advertising complained of herein and to require Gateway to
12 fully disclose the true nature of its misrepresentations, and engage in a corrective advertising
13 campaign to disclose that the GTW series plasma televisions do not perform in the manner
14 previously represented in order to correct the misperception currently in the market created by its
15 conduct.

16 90. Plaintiffs additionally request an order requiring Defendant to disgorge its ill-
17 gotten gains and award Plaintiffs and the members of the Class full restitution of all monies
18 wrongfully acquired by Defendant by means of such acts of unfair competition and false
19 advertising, plus interest and attorneys' fees pursuant to, *inter alia*, Code of Civil Procedure §
20 1021.5, so as to restore any and all monies to Plaintiffs and the members of the Class and the
21 general public which were acquired and obtained by means of such unfair competition and
22 untrue and misleading advertising, and which ill-gotten gains are still retained by Gateway. Both
23 the Plaintiffs and the members of the Class may be irreparably harmed and/or denied an effective
24 and complete remedy if such an order is not granted.

25 **FOURTH CAUSE OF ACTION**

26 **(Breach of Express Warranty)**

27 91. Plaintiffs hereby incorporate by reference the allegations contained in ¶¶ 1
28 through 90 of the complaint.

1 92. The advertisements, descriptions, technical specifications, product literature,
2 marketing literature, models, and samples established or disseminated by Gateway regarding its
3 GTW series plasma televisions and the ability to fix any defect/problem with them were express
4 representations regarding the actual television sets sold to Plaintiffs and other Class members as
5 well as the ability to fix those televisions after they failed.

6 93. According to U.C.C. §§ 2-313(1)(a), (b) and (c), any affirmation of fact,
7 description of the goods, or sample or model which is made part of the "basis of the bargain"
8 creates an express warranty that the whole of the goods shall conform to that affirmation,
9 description, sample or model.

10 94. It is not necessary that a seller of consumer products such as televisions use
11 formal language such as "warrant" or "guarantee" or similar words, or that the seller has an
12 intention to create such a warranty, in order to create a valid express warranty.

13 95. Gateway, through its agents, advertisements, and product descriptions, made
14 affirmations regarding its plasma television sets' quality, Lamp Life, MTBF and life span,
15 including the durability of its power supply unit, as well as the ability to repair televisions that
16 failed.

17 96. Such affirmations created one or more express warranties that the televisions set,
18 as a whole, would confirm to that quality, or at the least, would conform to a working television
19 set of similar design and construction and normal product life span. Such affirmations further
20 created one or more express warranties as to the viability of any repairs performed on the GTW
21 televisions and that said repairs would fix any defect/problem with the televisions in question.

22 97. Plaintiffs and other Class members relied on these express affirmations of fact in
23 determining which television set to purchase and ultimately decided to purchase a Gateway
24 plasma television based on such affirmations. Plaintiffs and other Class members such as Class
25 Plaintiff Brower relied on these express affirmations of fact in determining whether to pay repair
26 and replacement costs when their GTW televisions failed. Plaintiffs and other Class members
27 such as Class Plaintiff Brower submitted or attempted to submit their televisions to Gateway for
28 repair within a reasonable time after failure prior to the expiration of one or more the express

1 and/or implied warranties provided by Gateway for the televisions. Gateway was unable and/or
2 unwilling to repair the defects of the televisions of Plaintiffs and other Class members such as
3 Class Plaintiff Brower after one or more attempts at doing so and was notified of this failure to
4 repair accordingly.

5 98. Privity exists between the Plaintiffs, Gateway and other members of the Class
6 because, among other things: (1) Gateway had direct written communications with Plaintiffs and
7 other members of the Class concerning its plasma television sets in the form of standardized
8 warranty forms, registration cards, technical specifications and other similar documents; (2)
9 Gateway has had direct communications with Plaintiffs and other members of the Class with
10 regard to its plasma television sets via television and Internet representations and/or
11 advertisements; (3) Gateway had direct communications with Plaintiffs and other members of the
12 Class who have called and/or visited Gateway customer service technicians seeking help
13 regarding the defective televisions; (4) Gateway had direct communications with Plaintiffs or
14 those similarly situated, through its retail stores and other outlets, which are specifically listed on
15 Gateway's Internet website as Gateway retailers and/or dealers, that sold the Gateway plasma
16 television sets to Plaintiffs and other members of the Class; (5) Gateway communicated with the
17 Plaintiffs or those similarly situated through its authorized repairmen who have attempted to
18 repair the defective television sets; and, (6) Gateway has entered into written purchase orders and
19 written warranty contracts.

20 99. Plaintiffs and other members of the Class are, therefore, entitled to repayment of
21 the money that they spent to purchase and/or repair their GTW series plasma televisions or actual
22 damages resulting from the diminished value and use of their defective televisions.

23 FIFTH CAUSE OF ACTION

24 (Breach of Implied Warranty)

25 100. Plaintiffs hereby incorporate by reference the allegations contained in ¶¶ 1
26 through 99 of the complaint.

27 101. Gateway impliedly warranted that its GTW series plasma televisions were free
28 from defects, merchantable, and fit for their ordinary purpose. The also impliedly warranted that

1 the GTW series television sets conformed to the nature and quality of the industry standards for
2 products of like kind and character. Gateway also impliedly warranted that their authorized
3 repair facilities were well trained and that they had the parts and tools to repair the televisions
4 should they fail. Gateway breached each of these implied warranties.

5 102. While marketed as being reliable, long-lasting, and dependable, Gateway's
6 plasma television sets failed because they did not conform to the standards of other plasma
7 televisions of like kind and character. Further, the GTW series plasma televisions were sold with
8 defective components and/or other defects which ultimately rendered the televisions unusable.
9 As such the GTW series plasma television sets are not fit for their ordinary purpose.

10 103. Gateway knew or should have known that its affirmations, descriptions, and
11 misrepresentations would induce consumers to purchase its GTW series plasma television sets.
12 Plaintiffs and other Class members were, thereby, induced to purchase GTW series televisions.
13 Had Plaintiffs been aware of truth, they would have not purchased a Gateway plasma television.

14 **SIXTH CAUSE OF ACTION**

15 **(Violations of The Song-Beverly Consumer Warranty Act)**

16 104. Plaintiffs hereby incorporate by reference the allegations contained in ¶¶ 1
17 through 103 of the complaint.

18 105. Under the Song-Beverly Consumer Warranty Act, Plaintiffs and Class members
19 are "buyers" of "consumer goods," namely purchasers of Gateway plasma television sets. *See*,
20 Cal. Civ. Code §§ 1791(a), (b). Gateway is a "distributor," and "manufacturers" of GTW series
21 plasma televisions. *See id.*, §1791 (e), (j).

22 106. The Song-Beverly Consumer Warranty Act provides that, under the implied
23 warranty of merchantability, consumer goods "must conform to the promises or affirmations of
24 fact made on the container or label" and must "pass without objection in the trade under the
25 contract description." *Id.* § 1791.1(a)(4), (1).

26 107. Defendant's plasma television sets were not of merchantable quality, as warranted
27 by Gateway, because the affirmations of fact on the marketing materials, advertisements and
28 purchase contracts did not comport with the actual quality and durability of the television sets,

1 including its power supply units manufactured, marketed and sold by Gateway.

2 108. Defendant's affirmations of fact, promises and/or descriptions of the attributes
3 and characteristics of its plasma television sets were part and parcel of the contract description
4 upon which Plaintiffs and other Class members purchased the sets. However, Defendant's
5 plasma televisions were not of merchantable quality, as warranted by Gateway because they
6 would not pass without objection in the trade under the contract description because they
7 defective components that were of poor quality and, thus, more prone to failure than as described
8 in the purchase contract.

9 109. As a direct and proximate result of Defendant's breach of implied warranty,
10 Plaintiffs and Class members sustained damages and other losses in an amount to be determined
11 at trial. Defendant's conduct caused the Plaintiffs and other Class members to sustain damages
12 and, accordingly, Plaintiffs and Class members are entitled to recover damages, civil penalties
13 and other legal and equitable remedies as permitted by law.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs, on behalf of themselves and on behalf of the members of the
16 Class defined herein, pray for judgment and relief on all Causes of Action as follows as is
17 appropriate for each particular Cause of Action:

- 18 1. An order certifying that the Action may be maintained as a Class Action;
- 19 2. Compensatory damages, general damages, and punitive damages as permitted
20 under the CLRA in an amount to be proven at trial, including any damages as may be
21 provided for by statute;
- 22 3. A temporary, preliminary and/or permanent order providing for equitable and
23 injunctive relief;
- 24 4. An Order enjoining Defendant from pursuing the policies, acts and practices
25 complained of herein;
- 26 5. An Order requiring Defendant to provide a public notice of the above-described
27 limitations of its GTW series televisions; and/or
- 28 6. An Order enjoining the above-described wrongful acts and practices of the

Defendant, including, but not limited to, if warranted, an order requiring Gateway to pay for the costs, including materials, of providing new High-Definition and Enhanced - Definition Plasma televisions to Plaintiffs and all other Class members that conform to the representations originally made by Defendant;

7. An order requiring disgorgement of the Defendant's ill-gotten gains and to pay restitution to Plaintiffs and all members of the Class and to restore to the public all funds acquired by means of any act or practice declared by this Court to be an unlawful, fraudulent or unfair business act or practice, a violation of laws, statutes or regulations, or constituting unfair competition or false, untrue or misleading advertising;

8. Reasonable attorneys' fees pursuant to, *inter alia*, Code of Civil Procedure §1021.5;

9. Costs of this suit;

10. Pre-and post-judgment interest; and,

11. Such other and further relief as the Court may deem necessary or appropriate.

HANDAL & ASSOCIATES

Dated: 5-12-06

By: Pamela C. Chalk

Anton N. Handal, Esq.
Pamela C. Chalk, Esq.
Anas A. Akel, Esq.
1200 Third Avenue, Suite 1321
San Diego, CA 92101
Tel: 619/544-6400
Fax: 619/696-0323
Attorneys for Plaintiffs

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1 Defendant, including, but not limited to, if warranted, an order requiring Gateway to
2 pay for the costs, including materials, of providing new High-Definition and Enhanced -
3 Definition Plasma televisions to Plaintiffs and all other Class members that conform to
4 the representations originally made by Defendant;

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6 restitution to Plaintiffs and all members of the Class and to restore to the public all
7 funds acquired by means of any act or practice declared by this Court to be an unlawful,
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9 or constituting unfair competition or false, untrue or misleading advertising;

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11 §1021.5;

12 9. Costs of this suit;

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16 Dated: 5-12-06

HANDAL & ASSOCIATES

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EXHIBIT "A"

HANDAL & ASSOCIATES

LAWYERS AND COUNSELORS AT LAW

December 8, 2005

Mr. Wayne R. Inouye, President of Gateway
Gateway Inc.
7565 Irvine Center Drive
Irvine, CA 92618

cc: KEVIN SHELLY
California Secretary of State

Re: KOCH, et al. v. Gateway
United States District Court Case Number: 05CV2229 W AJB

Dear Mr. Inouye:

Our office represents Kim Koch, Malik Akram, Khola Herbert, and all other consumers similarly situated in the above action against Gateway Inc. (hereinafter "Gateway"). Attached hereto you will find a courtesy copy of the class action complaint filed in this case on December 7, 2005. As you will see, this matter arises out of certain unfair, unlawful, fraudulent or deceptive business practices and acts, and untrue and misleading misrepresentations and advertisements undertaken and perpetrated by Gateway upon members of the general public as well as consumers who purchased one or more GTW Series plasma television (the "GTW televisions").

More specifically, for the past few years, Gateway has advertised both in print media as well as on product packaging that the GTW televisions possess certain quality and workmanship which they do not, in fact, possess. These advertisements and product labeling were false and misleading.

In actuality, the entire line of GTW televisions suffer from a common defect which causes them to incessantly fail within a short time of purchase and cease to operate as consumers expect. This condition manifests itself by emitting a popping sound and a burning odor, rendering the GTW televisions unusable.

Our clients, who purchased one or more GTW televisions, were induced to do so after reviewing Gateway's false and misleading advertisements regarding the low power usage and quality of manufacture of Gateway products. Our clients have been damaged by their reliance on Gateway's misrepresentations.

Gateway's advertising and marketing practices constitute violations of California Civil Code §§ 1770 (a), under, *inter alia*, the following subdivisions:

(4) Using deceptive representations . . . , in connection with goods or services;

(5) Representing that goods or services have . . . characteristics, . . . uses, [or] benefits . . . which they do not have . . . ;

* * *

(9) Advertising goods or services with the intent not to sell them as advertised; and

* * *

(17) Representing that the consumer will receive a[n] . . . economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

Pursuant to California Civil Code § 1782, I hereby demand on behalf of our clients and all other consumers similarly situated that Gateway immediately provide an adequate correction remedy or relief to rectify these violations of California Civil Code § 1770 by ceasing to falsely advertise and market its GTW televisions, and fully refund to our clients and all other class members the full purchase price, plus all sales taxes and, to the extent applicable, any shipping and handling charges incurred by such consumers in connection with their Gateway television purchases together with interest, costs of suit and reasonable attorney fees.

My clients will, after thirty (30) days from the date of this letter, file an amendment to the Complaint without leave of Court, as permitted by Civil Code § 1782, to include claims for actual and punitive damages against Gateway (as may be appropriate), plus \$5,000 per senior citizen, if a full and adequate response to this letter is not received. Thus, to avoid further litigation, it is in the interest of all parties concerned that Gateway address this problem immediately.

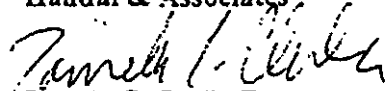
Gateway must undertake all of the following actions to satisfy the requirements of California Civil Code § 1782(c):

- a) Identify or make a reasonable attempt to identify all purchasers of its affected GTW series plasma televisions;
- b) Notify all such persons so identified that, upon their request, Gateway will offer an appropriate correction, replacement, or other remedy for its wrongful acts and conduct, or otherwise offer an adequate correction, replacement or other remedy at no cost, plus interest, costs of suit and reasonable attorneys fees;
- c) Undertake (or promise to undertake within a reasonable time if it cannot be done immediately) the actions described above for all affected purchasers of the Gateway televisions who so request; and

- d) Cease from issuing further false or misleading advertisements or product representations with respect to the affected GTW televisions.

I look forward to hearing from you soon.

Sincerely,
Handal & Associates


Pamela C. Chalk, Esq.

cc: Hon. Kevin Shelly
Enc. As stated

Handal & Associates
1200 Third Avenue, Suite 1321
San Diego, CA 92101
619.544.6400
619.696.0323 Fax

ORIGINAL

PROOF OF SERVICE

Kim Koch, et al. v. Gateway, Inc.

Case No. 05 CV 2229 W AJB
District Court – Southern District

I, Pamela C. Chalk, declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1200 Third Avenue, Suite 1321, San Diego, CA 92101, which is located in the county where the service described below took place.

I caused to be served the following document(s):

- 1) CLASS ACTION: SECOND AMENDED COMPLAINT;
- 2) Proof of Service.

on the Person(s) and in the manner listed below:

On , I placed a true copy of each above-listed document for deposit in the United States Postal Service in a sealed envelope, with postage fully prepaid, to each addressee named hereafter, addressed to each such addressee, respectively, listed below; and that each envelope was placed for collection and mailing on that date following ordinary business practices. I further declare that I am readily familiar with the business practice for collection and processing of correspondence and pleadings for mailing with the United States Postal Service. Correspondence and pleadings so collected and processed are deposited with the United States Postal Service the same day in the ordinary course of business.

xxx On May 12, 2006, deposited in a box or other facility regularly maintained by California Overnight, or delivered to a courier or driver authorized by said express service carrier to receive the above-listed documents, together with a signed copy of this declaration, in an envelope designated by the said express service carrier, with delivery fees paid or provided for, addressed to the Person(s) served.

 On , I personally delivered copies of the above-listed documents to the Person(s) served.

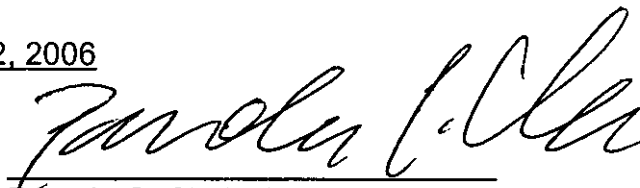
 On , I left, during usual office hours, copies of the above-listed documents in the office of the Person(s) served with the person who was at the front desk, or in charge.

PERSON(S) SERVED:

**Jeffrey D. McFarland
Scott L. Watson
Stan Karas
Quinn, Emanuel, Urquhart, Oliver, & Hedges LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100**

I certify and declare under penalty of perjury of the laws of the State of California,
that the foregoing is true and correct.

EXECUTED May 12, 2006



Pamela C. Chalk, Esq.