

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION**

WALTER E. KLINGER on behalf of himself)	
and all persons similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. RWT-04-3551
)	
MOTOROLA, INC.)	
)	
Defendant.)	
)	

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff, by his undersigned counsel, on behalf of himself and all persons similarly situated who purchased Motorola StarTac series model cellular telephones, allege as follow for this First Amended Class Action Complaint:

SUMMARY OF THE ACTION

This action involves conduct by the Defendant, its agents and employees, arising out of the design, manufacturing, marketing, distribution, sale and service of a wireless personal communication telephone, by defendant. Defendant, its agents and employees, engaged in an ongoing, intentional, deceptive course of business conduct with respect to the design, manufacture, marketing, distribution, sales and servicing of Motorola cellular telephones as alleged in detail below. As a result, the Plaintiff and Class members sustained damages in an aggregate amount that is not presently determinable but will be proven at the trial of the within Action.

JURISDICTION AND VENUE

1. Jurisdiction and venue are properly vested in this Court because a substantial portion of the acts, events, and/or failure to act giving rise to the claims alleged herein occurred in this judicial district. In addition, the defendant has substantial business contacts with the State of Maryland.

2. This action is brought pursuant to 28 U.S.C. §1332 and §1367. Jurisdiction is vested in this Court in that there is complete diversity among the parties, and the amount in controversy exceeds the required jurisdictional limits of this Court.

3. Venue is proper pursuant 28 U.S.C. §1391.

PARTIES

4. Plaintiff Walter E. Klinger (hereinafter “Plaintiff Klinger“), resides at 822 Quince Orchard Boulevard, Gaithersburg, MD 20878 in the County of Montgomery. On or about June 9, 2000, Plaintiff Klinger started using a Motorola StarTac cellular telephone (“Motorola StarTac” or “StarTac”).

5. Defendant Motorola, Inc. (hereinafter “Motorola”) is, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 1303 East Algonquin Road, Schaumburg, IL 60196. At all relevant times, Motorola carried on, had and continues to have substantial business contact with the State of Maryland. Defendant Motorola can sue and be sued in this Court.

CLASS ACTION ALLEGATIONS

6. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action individually and on behalf of a class of all persons and entities who purchased Motorola

StarTac series cellular telephones in the State of Maryland and the United States (the “Class”).

7. This action is properly maintainable as a class action. The Class is so numerous that joinder of all members is impracticable. On information and belief, there are in excess of hundreds of thousands of members of the Class.

8. There are questions of law or fact common to the Class. These questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. The questions of law and fact include but are not limited to:

- a. Whether the Defendant’s conduct breached the material terms of the contracts entered into with Class members, with specific regard to defects in design, manufacturing and servicing, as alleged herein;
- b. Whether Defendant expressly or impliedly warranted Motorola StarTac series cellular telephones at the times Class members purchased said cellular telephones and, if so, whether any such warranties were breached;
- c. Whether Defendant violated the covenants of good faith and fair dealing implied in its contract with the Class members;
- d. Whether Defendant actions amount to willful and wanton misconduct; and
- e. Whether Plaintiff and the Class sustained damages, and if so, the proper measure thereof.

9. Plaintiff’s claims are typical of the claims of all other Class members inasmuch as all members of the Class are similarly affected by defendant’s wrongful conduct complained of herein.

10. Plaintiff will fairly and adequately protect the interests of the Class and has retained counsel experienced in complex class litigation and consumer class motions.

Accordingly, Plaintiff foresees no difficulty in managing this action as a class action.

11. A class action in this instance is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual class members are relatively small, the expense and burden of individual litigation make it impossible or impracticable for the Class to individually address the wrongs done to them.

12. Plaintiff further states that the prosecution of the separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class. In addition, individual adjudications with respect to individual members of the Class would, as a practical matter, contravene the interest of the other members not parties to the adjudications and/or would substantially impair or impede their ability to protect their interests.

SUBSTANTIVE ALLEGATIONS

13. Defendant Motorola is, and at all times mentioned in this Amended Complaint was, in the business of, *inter alia*, designing, manufacturing, assembling, inspecting, marketing, distributing, selling and servicing various types of electronic equipment, including what are commonly known as “cellular telephones” or “mobile telephones.”

14. Upon information and belief, at all times relevant hereto, Defendant Motorola designed, manufactured, assembled, inspected, marketed, distributed, sold and serviced at retail and for resale the Motorola StarTac series cellular telephones.

15. Motorola marketed and promoted Motorola’s cellular telephones, such as the Motorola StarTac series cellular telephones, to the public at large throughout the State of Maryland and the United States.

Motorola StarTac Phone

16. In or about January 1996 Defendant Motorola began to produce market and sell the Motorola StarTac cellular telephone to the public directly and through its authorized resellers.

17. Upon information and belief, the Motorola StarTac cellular telephone was a tremendous sales success for Defendant Motorola because of its small size, and sleek design.

18. The Motorola StarTac phone is what is commonly referred to as a “flip phone” and also has an “external” as opposed to an “internal” antenna.

19. In addition to utilizing an “external” antenna, the antenna system that defendant Motorola designed, manufactured and incorporated (or caused to be designed, manufactured and incorporated) into the Motorola StarTac cellular telephone is retractable from the Motorola StarTac handset, enabling the antenna to be extended from the handset (“retractable external antenna”).

20. The retractable external antenna designed, manufactured and incorporated into the StarTac by defendant Motorola is defective and not fit for the particular purpose for which it was designed. The retractable external antenna has an unacceptable rate of failure in that it breaks off of the cellular phone resulting in the need for the consumer to spend his/her time and money, to replace the antenna at his/her expense, and to his/her damage.

21. On or about June 9, 2000, Plaintiff Klinger started using a Motorola StarTac cellular telephone that had been designed, manufactured, assembled, inspected, marketed, distributed and sold by Defendant Motorola. Since such time, while using the StarTac cellular telephone as intended by Defendant Motorola the retractable external antenna on Plaintiff’s StarTac cellular telephone broke four (4) times, causing Plaintiff Klinger to replace the antenna

at the cost of approximately \$10 per antenna failure, to the plight and detriment of Plaintiff Klinger and Class Members.

22. Defendant knew or should have known about the design and manufacturing defect of the StarTac cellular phone but despite such knowledge, the defendant failed and/or refused to recall said phones, or replace said phones for free or to replace the broken antennas for free.

COUNT I

(BREACH OF CONTRACT)

23. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth set forth herein.

24. Plaintiff, and all other similarly situated Class members, contracted to purchase Motorola StarTac cellular telephones.

25. Plaintiff and all other Class members purchased a StarTac cellular telephone handset unit as set forth herein.

26. In order to provide the bargained for consideration, the Defendant was required to, *inter alia*, provide for purchase to Plaintiff and Class members a cellular telephone that was free of design defects and that would operate and function as intended.

27. Defendant breached its agreements with Plaintiff and Class members by, *inter alia*, selling a defective cellular telephone product to plaintiff and Class members.

28. Plaintiff and all other Class members have, as a direct and proximate result, been damaged due to Defendant's misconduct as alleged herein.

COUNT II

(BREACH OF EXPRESS WARRANTY)

29. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth

herein.

30. By and through the representations of fact and guarantees alleged herein, the defendant, its agents and employees, expressly warranted to the plaintiff and the Class that the Motorola StarTac cellular telephones they purchased were of good, merchantable quality and would be free from defects in the manner represented by the Defendant.

31. Plaintiff and all other members of the Class relied upon the defendant's representations and guarantees which formed a material part of the Plaintiff's and Class' bargain when they, in reliance thereon, purchased the Motorola StarTac cellular telephones from the defendant.

32. Notwithstanding the Defendant's guarantees and express warranties, the Defendant failed to provide the Motorola StarTac cellular telephones as expressly warranted, represented and agreed and, as a direct, proximate and foreseeable result thereof, Plaintiff and the Class are now the owners of cellular telephones which are defective.

33. Defendant breached their express warranties when they sold these defective cellular telephones.

34. As a direct and proximate result of the Defendant's breaches, Plaintiff and the Class have been damaged in an amount to be determined at trial.

COUNT III

(BREACH OF IMPLIED WARRANTY)

35. Plaintiff repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

36. By and through the representations and guarantees alleged herein, Defendant impliedly warranted to the Plaintiff and the Class that the Motorola StarTac cellular telephones

that were offered, advertised, sponsored, promoted, and sold to Plaintiff and the Class would be capable of performing as represented and were of good, merchantable quality and would be free from defects in the manner represented by the Defendant.

37. Plaintiff and the Class, relying upon Defendant's guarantees and implied warranties, purchased Motorola StarTac series cellular telephones for good and valuable consideration.

38. Notwithstanding Defendant's guarantees and implied warranties, the Motorola StarTac series cellular telephones purchased by Plaintiff and the Class were not as warranted and were defective. Accordingly, Defendant breached its implied warranties to the Plaintiff and to the Class.

39. As a direct, proximate and foreseeable result of the Defendant's breaches, the Plaintiff and the Class have been damaged in an amount to be determined at trial.

COUNT IV

(NEGLIGENCE)

40. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

41. Defendant had a duty to exercise reasonable care in the design, manufacture, assembly, sale and/or distribution of their StarTac series cellular telephones into the stream of commerce, including, but not limited to, a duty to assure that their product was free of defects.

42. Defendant failed to exercise ordinary care in the design, manufacture, assembly sale, testing, quality control, quality assurance, and/or distribution of its StarTac series cellular telephones in that the Defendant knew or should have known that the external retractable antenna is defective and not fit for the particular purpose it was designed for as it has an unacceptable

rate of failure. Specifically, the external retractable antenna easily breaks off of the cellular phone handset during its normal and intended use, resulting in the need for the consumer to replace the antenna at his/her expense, and to his/her damage.

43. Defendant was negligent in the design, manufacture, testing, advertising, marketing and sale of their StarTac series cellular telephones in that, among other things, they
- a. Failed to use due care in designing and manufacturing the external retractable antenna used on the StarTac series cellular telephones;
 - b. Failed to warn, or adequately warn, Plaintiff and the Class, about the high rate of failure of the external retractable antenna used on the StarTac series cellular telephones; and
 - c. Were otherwise careless and negligent.

44. Despite Defendant's knowledge of the defective nature, and high rate of failure, of external retractable antenna used on the StarTac series cellular telephones, Defendant continued to market the StarTac series cellular telephones to consumers, including the Plaintiff and class, and charging plaintiff and the Class for replacement antennas, all to their damage.

45. As a direct and proximate cause of Defendant's negligence, Plaintiff and the Class have been damages as alleged herein, and as will proven at the trial of this matter.

COUNT V

(NEGLIGENT MISREPRESENTATION)

46. Plaintiff repeats and realleges each of the foregoing paragraphs as if fully set forth herein.

47. The Defendant represented to the Plaintiff and the Class that the StarTac series cellular telephone was free from all defects and designed fit for the particular purpose for which

it was intended.

48. The Defendant's representations as alleged herein were made uniformly and identically to the Plaintiff and to all members of the Class. The Defendant's representations were transmitted to and reached the Plaintiff and the Class via a massive advertising campaign through television, radio, newspapers, and similar media channels, and said representations were persuasive and made under circumstances creating an inference that such representations reached each and every member of the Class and were relied upon by the Plaintiff and the Class when purchasing the product and services from defendant.

49. Said misrepresentations and omissions included, but are not limited to that the StarTac series telephone was free from design and manufacturing defects.

50. The Defendant knew or should have known that the statements regarding the quality of the StarTac series cellular telephone were false and misleading.

51. Plaintiff and the Class, without knowledge of the falsity of the Defendant's statements and representations, justifiably relied upon them and, as a result, paid valuable consideration for the StarTac series cellular telephone.

52. Had the Plaintiff and the Class members been made aware of the true nature of the misrepresentations of the Defendant, they would not have paid valuable consideration in exchange therefore.

53. As a direct and proximate result of the wrongful misrepresentations and concealment, the Plaintiff and the Class sustained damages in an amount to be determined at trial.

COUNT VI

(VIOLATIONS OF MARYLAND CONSUMER PROTECTION ACT)

54. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

55. By engaging in the conduct described herein, defendant has violated the Maryland Consumer Protection Act, Md. Com. Law Code Ann. §§ 13-101 *et seq.*, by, among other things:

- a. Engaging in unfair or deceptive trade practices as defined in section 13-301(1) by making false and misleading oral and written statements and other representations that had, and have, the capacity, tendency, or effect of deceiving or misleading Maryland consumers, including, but not limited to, statements concerning the Defendant's knowledge that the StarTac cellular telephone were free from design and manufacturing defects.
- b. Engaging in unfair or deceptive trade practices as defined in section 13-301(2)(i) by making representations that the StarTac series cellular telephone have a use and benefit which was superior in its design and function which they knew, or should known, it does not when used by Maryland consumers.
- c. Engaging in unfair or deceptive trade practices as defined in section 13-301(3) by failing to state material facts the omission of which deceived or tended to deceive, including, but not limited to, facts relating to the design and/or manufacturing defects associated with the external retractable antenna used on the StarTac series cellular telephones.
- d. Engaging in unfair or deceptive trade practices as defined in section 13-301(9)(i) through their deception, fraud, misrepresentation and knowing concealment, suppression and omission of material facts with the intent that Maryland consumers

rely upon the same in connection with the promotion or sale of the StarTac series cellular telephone, including but not limited to, the facts relating to the high rate of failure of the external retractable antenna used on the StarTac series cellular telephone and the design and/or manufacturing defects associated with these cellular telephone models.

- e. Engaging in unfair or deceptive trade practices including, but not limited to, continuing to promote, sell and market the StarTac series cellular telephone to consumers, including the Plaintiff and the Plaintiff Class.

56. To remedy these violations of the Consumer Protection Act, the Plaintiff and the Plaintiff Class requests that this Court award damages in an amount to be proven at trial and enter an Order for general restitution, for civil penalties pursuant to §13-410 of the Consumer Protection Act, for costs of this action (including, but not limited to, attorney's fees) pursuant to §13-410 of the Consumer Protection Act, and for the injunctive relief requested below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class members, request judgment against the Defendant as follows:

1. A declaration that this action is properly maintainable as a class action and certifying the Plaintiffs as representative of the Class and their counsel as Class Counsel;
2. Awarding compensatory damages against Defendant in an amount to be determined at trial;
3. Awarding punitive or exemplary damages against Defendant according to proof at trial;
4. Awarding prejudgment interest at the maximum rate allowable by law;

5. Awarding Plaintiff and the Class their costs and disbursements and reasonable allowances of fees for Plaintiff's counsel and experts and reimbursement of expenses;
6. Awarding restitution as permitted by law;
7. Ordering the Defendant to forthwith refrain from the further marketing and the sale of the defectively designed and/or manufactured and/or assembled and/or tested equipment;
8. Ordering the recall of all previously manufactured, sold and defectively designed StarTac telephones;
9. Leave to amend this Complaint as interests of justice may allow; and
10. Granting any and all such further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff and the Class by counsel hereby request a trial by jury as to all issues.

October 27, 2005

Respectfully submitted,

HEIDEMAN NUDELMAN & KALIK P.C.

/s/ Richard D. Heideman

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CERTIFICATE OF SERVICE

This will hereby certify that on this the 27th day of October a copy of the forgoing First Amended Class Action Complaint was electronically served through the United States District Court for the District of Maryland's ECF system on the following counsel for the defendants:

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