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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

(1)	**DAVID PACKARD, Plaintiff, on behalf of himself and all others similarly situated**	§	**NO. 1:99CV713** BY Marilyn Lenz 1:99CV-713
VS.		§	**Class Action Complaint for Equitable Relief and Monetary Damages**
(1)	**eMACHINES, INC., Defendant**	§	

PLAINTIFF'S ORIGINAL CLASS COMPLAINT

Plaintiff, David Packard, files Plaintiff's Original Class Complaint and complains as follows:

PARTIES

1. David Packard (hereinafter "Plaintiff") is a resident of and has his domicile in the Eastern District of Texas. Plaintiff purchased computers, or similar devices, sold or manufactured by Defendant, or that contain floppy diskette drives ("FDDs"), floppy diskette controllers ("FDCs"), or FDC instructions or commands in the form of microcode that were designed, sold, manufactured, transmitted or created by Defendant. Plaintiff appears in this action on behalf of himself and as proposed class representative on behalf of all those that are similarly situated. This Plaintiff has used a FDD or other peripheral device controlled by a FDC to store and retrieve information.

2. Plaintiff, and all those similarly situated, rely on the integrity of data stored and retrieved by the computers they own and have a reasonable expectation that a properly designed and manufactured computer will store and retrieve data with 100% accuracy unless an error is reported to the user. Plaintiff, and all those similarly situated also rely on the integrity of data stored by and shared between computers to support many aspects of their lives including financial transactions; accurate and effective medical diagnosis and treatment; and the proper design and construction of automobiles, aircraft, bridges, dams, office buildings and other devices and structures vital to public safety.

3. Defendant eMachines, Inc. (hereinafter "Defendant") is a Delaware corporation doing business in the State of Texas, with no registered agent in the State of Texas. eMachines, Inc. can be served through the Texas Secretary of State pursuant to FRCP 4 and the Texas Civil Practice Remedies Code, Section 17.026 at its home address 14350 Myford Road, Irvine, California 92606-1002.

CLASS DEFINITIONS AND ALLEGATIONS

4. Plaintiff brings the claims alleged herein as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and seek certification of two proposed classes.

Nationwide Equitable Relief Class

5. The "Nationwide Equitable Relief Class," is defined as Plaintiff, David Packard, on behalf of himself and all those who (1) have purchased and own computers designed, manufactured, created, distributed, sold, marketed, or transmitted by Defendant, which computers may contain FDC microcode transmitted by Defendant, which microcode can cause the unreported corruption or loss of data; and (2) as a result of Defendant's transmission of FDC microcode have or will likely suffer loss or damage as defined by 18 USC §1030 or will likely suffer an irreparable injury for which there is no adequate remedy at law.

Nationwide Damages Class

6. The "Nationwide Damages Class," is defined as Plaintiff, David Packard, on behalf of himself and all those similarly situated who have purchased and own computers designed, manufactured, created, distributed, sold, marketed, or transmitted by Defendant, which computers may contain FDC microcode that can cause the unreported corruption or loss of data. If the facts and position of Defendant warrants, appropriate sub classes may be created. Based on Defendant's position and discovery to date, these sub classes may include: (1) those members who purchased Defendant's computers more recently and are eligible for refund of the purchase price pursuant to revocation of acceptance; (2) those members who have a claim for warranty repairs (or the cost of those repairs) under the applicable warranty period as extended by applicable statutes of limitation; and (3) those members who have neither a claim for refund of the purchase price nor for warranty repairs or damages. Plaintiff recognizes; however, that neither discovery nor even Defendant's initial

disclosures has begun. Accordingly, the precise definition of any subclasses may need to be modified by amendment or pursuant to the Court's inherent power to modify class and subclass definitions under Federal Rule 23.

7. Neither the Nationwide Damages Class nor the Nationwide Equitable Relief Class includes any person who claims consequential damage as the result of the actual loss or corruption of data.

8. The proposed classes are properly maintainable in this action because the requisites of Federal Rule of Civil Procedure 23 have been met. First, the classes consist of thousands of persons making the members so numerous that joinder of all members of any of the classes would be impracticable.

9. Second, there are questions of law and fact common to the members of the classes. The common questions include, among others (1) whether Defendant transmitted floppy disk controller microcode, which microcode can cause the unreported corruption or loss of data; (2) whether plaintiff's and class members computers incorporate said microcode, (3)whether said microcode will in fact cause the unreported corruption or loss of data; (4) whether continued transmission of said microcode is a violation of 18 USC §1030; (5) whether past transmission of said microcode would be a violation of 18 USC §1030; (6) whether injunctive or other equitable relief is appropriate under 18 USC §1030 or otherwise; (7) whether incorporation of said microcode as part of the computer hardware makes refund of the purchase price available after a revocation of acceptance; (8) whether the presence of said microcode as part of the computer hardware constitutes a breach of express warranty or the implied warranty of merchantability by Defendant.

10. Third, the claims of the identified Plaintiff representative are typical of the claims of the proposed classes, and the identified Plaintiff representative will fairly and adequately represent and protect the interests of the proposed classes. The identified Plaintiff has no interests antagonistic to those of the other members of the proposed classes. The Plaintiff's attorneys are qualified, experienced and able to conduct this litigation.

11. Fourth, Defendant has acted or refused to act on grounds generally applicable to all members of the proposed classes, thereby making injunctive relief with respect to the classes as a whole an effective remedy.

12. Fifth, the questions of law and fact common to members of the proposed classes predominate over any questions affecting only individual members.

13. Sixth, a class action is superior to other methods for the fair and efficient adjudication of the claims here asserted, and no unusual difficulties are likely to be encountered in the management of this class action.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction pursuant to 28 USC §1331 in that this civil action arises under the laws of the United States, including 18 USC §1030. This Court also has subject matter jurisdiction pursuant to 28 USC §1332. This Court may also exercise subject matter

jurisdiction over all of Plaintiff's claims that do not arise under federal law pursuant to the Court's ancillary jurisdiction. Venue is proper in this Court pursuant to 28 USC §1391.

COMMON FACTUAL ALLEGATIONS

15. Defendant is or was engaged in the business of designing, manufacturing, creating, distributing, selling, transmitting and marketing FDCs; or microcode incorporated into FDCs and used to control the operation of FDCs; or computers or computer components or other devices that contain FDCs.

16. An FDC is a semiconductor device or hardware component that controls data transfer to and from certain storage and retrieval devices.

17. Defendant designed, manufactured, created, distributed, sold, transmitted and marketed FDCs or computers or other devices, which contain FDCs as components. FDCs may be purchased separately, as part of single- or multi-function computer components or devices, or, as may more often be the case, may be purchased as part of a computer system.

18. Defendant transmitted FDCs in interstate commerce for use in computers that were (1) sold in interstate commerce and (2) used or intended for use in interstate commerce.

19. Many computer systems manufactured or sold by Defendant include an FDC, and every computer system manufactured or sold by Defendant is capable of sharing data with other computers by a disk, modem, network, Internet, or otherwise.

20. All or a significant portion of the FDCs designed, manufactured, created, distributed, sold, or marketed by Defendant and transmitted by Defendant fails to detect a specific type of error which failure causes the corruption or destruction of data written to storage devices without any notice to the computer user that any error has occurred.

21. An FDC designed and manufactured pursuant to relevant specifications will detect data errors and allow the control program to rewrite the affected data correctly. The FDCs at issue in this case, instead, fail to detect the error, resulting in the storage of corrupt data or the destruction of data without the user's knowledge.

22. Defendant was aware, or should have been aware, that the design of many FDCs manufactured, distributed, created, sold, or marketed by Defendant and transmitted by Defendant is incapable of detecting certain boundary error conditions. A properly designed and manufactured FDC that meets manufacturer specifications, however, will detect the boundary error conditions and assert an error status, which triggers the control program to rewrite the affected data correctly. Because of defective microcode, Defendant's defective FDCs instead verify the erroneous data as correct without an error status, resulting in the storage of corrupt

data or the destruction of data without notice to the control program or operating system and without the operator's knowledge.

23. Local area network interface cards and sound cards are two examples of common DMA devices.

24. If a defective FDC is made to wait for data a few microseconds too long, because of competition for DMA, the defective FDC can cause corruption of data written to the attached device. If the wait for data is longer, a defective FDC can write the delayed data as the first byte of the next physically adjacent data sector of a floppy diskette and destroy or "zero out" the remainder of the data in that sector -- all without reporting any error or notifying the control program or computer operator that data has been corrupted or destroyed.

25. Non-defective FDCs notify the control program of the error, which in turn triggers the correction of any errors that occur when there is competition for DMA. The FDCs manufactured by Defendant, however, are incapable of detecting certain boundary error conditions. Therefore, Defendant's FDCs are not capable of notifying the control program of data corruption. Worse yet, defective FDCs write corrupted data to the disk or other storage device and report to the computer operator that the data transfer was performed successfully.

26. The advent of multitasking computers, such as the multimedia computers, which are now common, has aggravated the severity of the problem caused by defective FDCs. A multi-tasking

operating system can start several tasks on different DMA devices, which, if the hardware allows it, can cause DMA competition and delay of data transfer to the FDC.

27. As a result of the defective FDCs designed, manufactured, created, distributed, sold and marketed by Defendant and transmitted by Defendant, Plaintiffs have suffered loss and damages.

28. The proposed Class does not include any person who claims consequential damages as the result of the actual loss or corruption of data (i.e. the proposed Class does not seek to recover any consequential damages as the result of the actual loss or corruption of data).

29. Defendant's insidious scheme has likely already done tremendous damage and must be stopped before it can do further harm. FDCs affect all of us. Devices incorporating FDCs, including, without limitation, computer systems, are used in our homes, schools, businesses, doctor's offices, hospitals, banks, government installations, air traffic control systems, and medical laboratories. We depend on such devices to accurately store and retrieve data. We use that data to protect our health; to design our bridges, office buildings, dams and skyscrapers; to find energy reserves; to design and pilot our planes and spacecraft; to provide government services; and to pay our bills and taxes. In the United States, computers and the data they store touch every aspect of our lives. To function today, we must trust computers and the data they store 100% of the time. Defendant must be held accountable for the damage it has done to that trust.

FIRST CAUSE OF ACTION

(Injunctive Relief)

30. The Nationwide Equitable Relief Class, on behalf of themselves and all others similarly situated, reallege, as if fully set fourth, each and every allegation contained in paragraphs 1 to 29 above and further allege:

31. Any further transmission, sale, or distribution of the code or instructions contained in defective FDCs would constitute a violation of 18 USC §1030.

32. Such a criminal violation would cause the class members to suffer further irreparable harm and would create the likelihood that the class would suffer irreparable injury.

33. The class members have no adequate remedy at law to restore them in the face of this conduct by Defendant.

34. The damage caused by the FDCs' faulty microcode would include an impairment of the integrity or availability of data, or information that impairs or potentially impairs the medical examination, diagnosis, treatment, or care of one or more individuals or threatens the public health or safety. When doctors cannot trust the medical data in their computers or the test results they receive from the lab; when engineers cannot depend on the data they use to design our

bridges, skyscrapers, dams, and commercial airliners, Defendant poses a clear risk to public health and safety.

35. An injunction issued by this Court requiring Defendant to advise all potential purchasers that computers they have manufactured can corrupt and destroy data without warning is a vital first step.

SECOND CAUSE OF ACTION

(Federal Statutory Damages)

36. The Nationwide Damage Class, on behalf of themselves and all others similarly situated, reallege, as if fully set fourth, each and every allegation contained in paragraphs 1 to 35 above and further allege:

37. The conduct of Defendant in distributing, selling, or otherwise transmitting the defective microcode at issue in this case is a violation of 18 USC §1030.

38. As a result of Defendant's violations the class members have suffered loss or damage, without limitation, in that their computers cannot store and retrieve data with 100% accuracy.

39. Pursuant to 18 USC §1030 the class members are entitled to recover monetary damages to compensate them for their loss or damage. Specifically, each class member seeks monetary damages equal to the cost of repair, replacement, or a refund of the purchase price.

THIRD CAUSE OF ACTION

(Revocation of Acceptance)

40. The Nationwide Damage Class on behalf of themselves and all others similarly situated, reallege, as if fully set fourth, each and every allegation contained in paragraphs 1 to 39 above and further allege:

41. The computer components, computers, and other devices containing defective FDCs are goods as defined by the UCC.

42. The transactions by which the members of the Nationwide Damages Class purchased computer components, computers, or other devices containing defective FDCs were transactions for the sale of goods and are governed by the UCC.

43. The presence of the defective FDCs in the computer components, computers, and other devices purchased by the Nationwide Damages Class substantially impairs the value of those computer components, computers, and other devices. Moreover, the presence of the defective

FDCs render the computer components, computers, and other devices non-conforming goods as contemplated by UCC § 2.608.

44. The defective FDCs are inherently difficult to identify. Moreover, Defendant has affirmatively concealed the existence of the defective FDCs. Accordingly, the proposed representative Plaintiff only recently discovered the existence of the defective FDCs in the computer components, computers, and other devices they own.

45. The members of the Nationwide Damages class seek to revoke acceptance of the non-conforming computer components, computers, and other devices and to recover the purchase price paid for those goods.

FOURTH CAUSE OF ACTION

(Breach of Contract and Express and Implied Warranties)

46. The Nationwide Damages Class on behalf of themselves and all others similarly situated, reallege, as if fully set fourth, each and every allegation contained in paragraphs 1 to 45 above and further allege:

47. Supplying defective FDCs or computer components, computers, or other devices containing defective FDCs is a breach of contract and a breach of the express warranty against

defects in materials and workmanship. This conduct is also breach of the implied warranty of merchantability.

48. Accordingly, the Nationwide Damages Class seek specific performance of the warranty or in the alternative recovery of repair costs, expenses and attorney fees.

FIFTH CAUSE OF ACTION

(Declaratory Relief)

49. The Nationwide Equitable Relief Class and the Nationwide Damage Class on behalf of themselves and all others similarly situated reallege, as if fully set fourth, each and every allegation contained in paragraphs 1 to 48 above and further allege:

50. The Nationwide Equitable Relief Class and the Nationwide Damage Class seek a declaratory judgment that the past and continuing conduct of Defendant in transmitting, distributing, and selling the defective microcode in the FDCs at issue in this case is a violation of 18 USC § 1030.

51. The Nationwide Equitable Relief Class and the Nationwide Damage Class seek a declaratory judgment that the presence of a FDC containing the defective microcode at issue in this case in an eMachines computer constitutes a breach of the manufacturers express warranty and the implied warranty of merchantability.

52. The Nationwide Equitable Relief Class and the Nationwide Damage Class seek a declaratory judgment that any eMachines computer that incorporates a FDC containing the defective microcode at issue in this case is a non-conforming good making revocation of acceptance and refund of the purchase price an available remedy pursuant to the requirement of UCC § 2-608.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, pray for judgments against Defendant as follows:

1. For an order certifying the classes and any appropriate subclasses thereof under Federal Rule of Civil Procedure 23, and appointing Plaintiff and his counsel to represent the class;
2. For an order requiring Defendant to be financially responsible for notifying all class members.
3. For all injunctive and declaratory relief requested in Plaintiff's First and Fifth Causes of Action.
4. For damages as the evidence may show proper;
5. For attorneys' fees in an amount deemed sufficient to cover the prosecution of this action;
6. For all costs of these proceedings and interest from date of judicial demand; and,

7. For all equitable or other relief the Court may deem just and proper.

Respectfully submitted,

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