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Counsel for Plaintiff Nicole Gallmann

**BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION**

In re:

APPLE, INC. DEVICE PERFORMANCE
LITIGATION

MDL DKT. NO.: _____

**CORRECTED MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR
TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF CALIFORNIA AND
FOR CONSOLIDATION PURSUANT TO 28 U.S.C. § 1407**

Pursuant to 28 U.S.C. § 1407 and JPML Rule 6.2, Nicole Gallmann, plaintiff in the case styled *Gallmann v. Apple, Inc.*, U.S. District Court for the Northern District of California, Case No. 5:17-cv-07285, respectfully moves for an Order transferring the 19 currently-filed cases listed in the Schedule of Actions filed concurrently herewith (collectively, “the Actions”), as well as any tag-along cases subsequently filed involving similar facts or claims, to the U.S. District Court for the Northern District of California for coordination or consolidation. The Actions satisfy the requirements for consolidation and transfer pursuant to Section 1407, and for the reasons discussed below, the Northern District of California is the appropriate Transferee Court. In the alternative, Plaintiff requests transfer to the Northern District of Illinois.

I. Background of the Litigation

Movant is the plaintiff in one of 19 cases filed to date against Apple, Inc. (“Apple”) relating to the recently disclosed news that Apple had been quietly “throttling” the performance of older model iPhones for almost a year. On January 23, 2017, Apple, Inc. released an updated mobile operating system called iOS 10.2.1. The update ostensibly addressed aging batteries in iPhone models 6 (and 6 Plus), 6S (and 6S Plus), and SE (along with the iPhone 7, see footnote

below, the “Devices”),¹ and Apple expressly represented that the purpose was to prolong the useful life of the Devices. Apple also promised to “deliver the best experience for customers, which includes overall performance and prolonging the life of their devices.” For example, the update specifically sought to prevent the handset from shutting down if a performance spike drew too much power—i.e., turning off unexpectedly as if the phone was dead while the phone’s battery still had a charge.

While the battery issue was a minor reported problem at the time, the iOS update did far more than address shutdowns on those few phones that experienced shutdowns – it also surreptitiously throttled the performance speed on all Devices by as much as 70 percent. Furthermore, the update did not even fully address the purported battery “shutdown” issue: 20 percent of iPhone 6S and 30 percent of iPhone 6 devices that previously experienced unexpected shut down issues continued to experience those issues, according to a statement released by Apple.

Most importantly, Apple also promised consumers that for those who need it, a message will appear on the screen inside Settings if that phone’s “battery needs service.” Apple represented that such a message will “add a bit more transparency to people wondering when Apple considers the battery worn down enough to get swapped out.” Apple even offered consumers tips regarding when to swap out a battery. However, despite all of these disclosure opportunities, Apple never informed consumers that the 10.2.1 update reduced the small chance unexpected phone shutdowns by slowing all Devices’ performance dramatically. Worse, Apple broke its promise to notify consumers experiencing these issues that “the [device’s] battery needs

¹ The iPhone 7 was not initially impacted. However, the relevant feature at the center of the iOS 10.2.1 update was later extended to iPhone 7 with the release of iOS 11.2.

service.” Because Apple failed to inform consumers that the performance issues were artificially caused by the iOS update in conjunction with an older (but still perfectly functional) battery, consumers were denied the opportunity to make an informed decision regarding whether to upgrade their device or instead simply replace the battery.

Apple’s failure to disclose the impact of the iOS update 10.2.1 (and the later iOS 11.1) and remedy the issues it produced (and purported to resolve) has to date resulted in 19 separate class actions filed nationwide. While the claims asserted differ somewhat from complaint to complaint, all name Apple as a defendant, all relate to the identical facts, and all seek certification of a similar class of affected consumers. Consistent with the Panel’s course in recent data breach litigation, Plaintiff seeks the consolidation and transfer of the Actions to the United States District Court for the Northern District of California, San Jose Division, where Apple is headquartered. All of the class actions filed against Apple contain common questions of fact. Moreover, because Apple’s actions have received a great deal of publicity and just yesterday (December 28, 2017) Apple admitted the problem and offered an apology, see <https://www.apple.com/iphone-battery-and-performance/> (“We know that some of you feel Apple has let you down. We apologize.”), a number of tagalong cases will likely be filed in the future.

II. LEGAL STANDARD

Transfer and consolidation is appropriate when actions pending in different judicial districts involve similar questions of fact such that consolidating pretrial proceedings would “promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407. In relevant part, Section 1407 provides as follows:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any

district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

Id.; see also, e.g., *In re Nifedipine*, 266 F.Supp.2d 1382, 1382 (J.P.M.L. 2003).

III. ARGUMENT

A. The Litigation Satisfies the Requirements for Consolidation and Transfer Under 28 U.S.C. § 1407

Pretrial transfer and consolidation under section 1407 is appropriate and necessary here. The Actions involve identical facts, the same defendant, and same proposed class. The number of cases grows by the day. Unless these cases are consolidated, the parties will incur excessive costs due to duplicative discovery, and will face the risk of inconsistent rulings on a variety of matters.

1. *The Litigation Involves Common Questions of Fact*

In assessing the appropriateness of consolidation under Section 1407, the Panel looks to the pleadings to determine the extent to which common questions of fact are present. The Complaints in these cases clearly present common questions of fact. Each Complaint is based on allegations that Apple surreptitiously included code in its operating system that dramatically reduced Device performance, without informing customers for almost a year. In addition, the Complaints all seek certification of a national class. This Panel has consistently consolidated consumer class actions that involve common questions of fact and propose a national class. “[A] potential for conflicting or overlapping class actions presents one of the strongest reasons for transferring such related actions to a single district for coordinated or consolidated pretrial proceedings which will include an early resolution of such potential conflicts.” *In re Plumbing Fixtures*, 308 F. Supp. 242, 244 (J.P.M.L. 1970)).

2. *The Parties Face Duplicative Discovery Absent Transfer and Consolidation*

Transfer and consolidation of the Actions would promote efficiency and minimize the potential for duplicative discovery. *See, e.g., In re Foundry Resins*, 342 F. Supp. 2d 1346, 1347 (J.P.M.L. 2004). Because each Action is based upon the same facts, plaintiffs in each of the actions are, in turn, likely to seek overlapping discovery. *See In re Auto Body Shop*, 2014 WL 3908000, at *1-2 (J.P.M.L. 2014) (noting that transfer and consolidation were appropriate to eliminate duplicative discovery when the actions shared a common factual core). The Actions are also likely to involve complicated technical issues regarding the computer code behind the iOS updates that may result in expert reports and *Daubert* briefing and hearings. Should expert evidence be needed, therefore, these issues would be more efficiently handled in a consolidated proceeding. *See, e.g., In re Natrol, Inc. Glucosamine/Chondroitin*, 2014 WL 2616783, at *1 (J.P.M.L. 2014). Similarly, plaintiffs in each Action are likely to seek to depose many of the same Apple witnesses, which again favors centralization. *See, e.g., In re Auto Body Shop*, 2014 WL 3908000, at *1 (J.P.M.L. 2014) (transfer before a single judge was beneficial because he or she could “structure pretrial proceedings to accommodate all parties’ legitimate discovery needs while ensuring that common witnesses are not subjected to duplicative discovery demands”); *In re Enfamil Lipil*, 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) (“Centralizing the actions will allow for the efficient resolution of common issues and prevent unnecessary or duplicative pretrial burdens from being placed on the common parties and witnesses.”).

Given the similarity of the Actions and the potential for duplicative discovery, transfer and consolidation would inevitably conserve the resources of the parties. *See, e.g., In re Air Crash at Dallas/Fort Worth Airport*, 623 F. Supp. 634, 635 (J.P.M.L. 1985). It would also conserve the resources of the judiciary, as it would assign responsibility for overseeing a pretrial

plan to one judge as opposed to 19 different federal judges. *See, e.g., In re Pineapple*, 342 F.Supp.2d 1348, 1349 (J.P.M.L. 2004).

3. *Transfer and Consolidation Will Prevent Inconsistent Pretrial Rulings*

The Panel considers the possibility of inconsistent rulings on pretrial issues because of the possible res judicata or collateral estoppel effects on other cases. *See In re Enron Securities Derivative & ERISA Litig.*, 196 F. Supp. 2d 1375, 1376 (J.P.M.L. 2002) (granting a transfer in part to prevent inconsistent pretrial rulings, particularly with respect to questions of class certification). Because of the similarity of the allegations in the Complaints, and the likelihood that future filed actions will contain the same, the possibility of inconsistent rulings on pretrial motions is substantially increased. In addition, Apple is likely to present the same pretrial motions (including dispositive motions) in each action and assert the same discovery objections and privileges. Inconsistent rulings would pose a serious problem, in that the Actions seek to certify overlapping classes. In addition, Apple will likely assert the same defenses in opposition to Plaintiffs' claims, creating a substantial risk of inconsistent pretrial rulings. In light of this risk, it would be in the best interests of all involved—the parties, the witnesses and the Courts—to transfer and centralize the Actions. As the Panel has previously recognized, centralization is appropriate to prevent inconsistent pretrial rulings on common factual issues. *In re Dow Chem.*, 650 F. Supp. 187, 188 (J.P.M.L. 1986).

4. *There is a Sufficient Number of Actions to Support Transfer and Centralization*

As stated above, there are currently 19 cases pending and Plaintiff believes that many more will follow, given Apple's recent apology. The Panel has routinely ordered centralization of far fewer cases, some as few as three. *See In re Wireless Telephone Replacement Protection Programs Litig.*, 180 F. Supp. 2d 1381, 1382 (J.P.M.L. 2002) (granting transfer and

centralization of three consumer protection cases and determining that pending motions can be presented to and decided by the transferee judge); *In re Philadelphia Life Ins. Co. Sales Practices Litig.*, 149 F. Supp. 2d 937, 938 (J.P.M.L. 2001) (granting transfer of two deceptive insurance sales cases and finding that such transfer would promote the just and efficient conduct of the litigation). Given the substantial number of current and likely tag-along actions, transfer and centralization is appropriate.

B. The Northern District of California is an Appropriate Transferee Forum

The Panel can consider the nexus between the transferee forum and the parties to the litigation when resolving requests for transfer under 28 U.S.C. § 1407. A significant “nexus” exists when a party who is common to all actions (e.g., the sole defendant) is headquartered or has facilities that are located within the transferee court’s jurisdiction, such that relevant witnesses and documentary evidence common to all the actions are likely to be found there. *See, e.g., In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, 381 F.Supp.2d 1383, 1384 (J.P.M.L. 2005) (“relevant discovery will likely be found within this district, because Sears’s corporate headquarters and many of its documents and witnesses are located there”); *In re Google Inc. St. View Elec. Commc’ns Litig.*, 733 F.Supp.2d 1381, 1382 (J.P.M.L. 2010) (transferring to Northern District of California where “[t]he sole defendant, Google, is headquartered there, and most relevant documents and witnesses are likely located there.”); *St. Jude Med., Inc., Silzone Heart Valves Products Liab. Litig.*, MDL No. 1396, 2001 WL 36292052, at *2 (J.P.M.L. Apr. 18, 2001) (transferring litigation to district because “as the situs of the headquarters of the sole defendant in all actions, the district is likely to be a substantial source of witnesses and documents subject to discovery”).

In this instance, the Northern District of California has the strongest nexus to this litigation as Apple's headquarters are located within that district. As such, documents relevant to determining the key issues are within the Northern District of California, and the majority of witnesses regarding the same are also located there. It is therefore common practice for cases to be consolidated in the home district of the defendant. *See, e.g., In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 223 F. Supp. 3d 1353, 1354-55 (J.P.M.L. 2016) ("We conclude that the Northern District of California is an appropriate transferee district for this litigation. Defendant Yahoo's corporate headquarters is located within the district, and therefore relevant documents and witnesses are likely to be located there.").

In the alternative, recognizing that the caseload in the Northern District of California is heavy, Plaintiff in the alternative respectfully requests transfer to the Northern District of Illinois. The N.D. Ill. has a significantly larger number of Art. III judges as the N.D. Cal. (31 vs. 16) and yet far fewer MDLs (13 vs. 21). *See* United States JPML Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407, Fiscal Year 2017. The Northern District of Illinois is also geographically central because the plaintiffs are spread throughout the country.

IV. CONCLUSION

Plaintiff respectfully requests that the Panel grant her Motion for Transfer and Consolidation of all Related Actions, as well as any subsequently filed actions containing similar allegations, to the United States District Court for the Northern District of California.

**BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION**

In re:

APPLE, INC. DEVICE PERFORMANCE
LITIGATION

MDL NO.: _____

CORRECTED PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that on January 2, 2018 I caused to be electronically filed the following with the Clerk of the Court using the Judicial Panel on Multidistrict Litigation's CM/ECF system, which will serve notification of such filing to the email of all counsel of record in this action:

- (1) Plaintiff's Corrected Motion for Transfer of Actions to the Northern District of California and for Consolidation Pursuant to 28 U.S.C. § 1407;
- (2) Corrected Memorandum in Support of Plaintiff's Motion for Transfer of Actions to the Northern District of California and for Consolidation Pursuant to 28 U.S.C. § 1407; and
- (3) Corrected Schedule of Actions, including docket sheets and complaints for all related actions.

I further certify that copies of the foregoing were served on all counsel and on the Clerk of the Court of each proposed transferor court, by U.S. First Class Mail, postage pre-paid, and on counsel for Defendant Apple, Inc. via email and U.S. First Class Mail, as follows:

COURT CLERKS	
<p>Clerk of the Court U.S. District Court for the Northern District of California, San Jose Division 280 South 1st Street, Room 2112 San Jose, CA 95113</p>	<p>Clerk of the Court United States District Court for the Central District of California Western Division 312 N. Spring Street, Room G-8 Los Angeles, CA 90012</p>
<p>United States District Court Southern District of New York Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312</p>	<p>Clerk of the Court United States District Court for the Eastern District of New York 225 Cadman Plaza East Brooklyn, NY 11201</p>
<p>Clerk of the Court United States District Court for the Southern District of Indiana Birch Bayh Federal Bldg. & U.S. Courthouse 46 East Ohio Street Indianapolis, IN 46204</p>	<p>Clerk of the Court United States District Court for the Northern District of Illinois Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604</p>
<p>Clerk of the Court United States District Court for the Eastern District of Texas Sherman Division United States Courthouse 7940 Preston Road Room 101 Plano, Texas 75024</p>	<p>Clerk of the Court United States District Court for the District of South Carolina 85 Broad St Charleston, SC 29401</p>
<p>Clerk of the Court United States District Court for the Eastern District of Louisiana 500 Poydras Street Room C151 New Orleans, LA 70130</p>	<p>Clerk of the Court U.S. District Court for the Northern District of California, San Francisco Division 450 Golden Gate Avenue San Francisco, CA 94102-3489</p>
<p>Clerk of the Court United States District Court for the Southern District of California 221 West Broadway San Diego, CA 92101</p>	<p>Clerk of the Court United States District Court for the Southern District of Mississippi Dan M. Russell, Jr., United States Courthouse 2012 15th Street, Suite 403 Gulfport, MS 39501</p>

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Counsel for Plaintiff Nicole Gallmann

**BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION**

In re:

APPLE, INC. DEVICE PERFORMANCE
LITIGATION

MDL NO.: _____

CORRECTED SCHEDULE OF ACTIONS

No.	Parties	District Court	Civ. Action No.	Judge
1	Plaintiff(s): Nicole Gallmann Defendant(s): Apple, Inc.	U.S.D.C. Northern District of California, San Jose Division	5:17-cv-07285	Judge Edward J. Davila
2	Plaintiff(s): Keaton Harvey Defendant(s): Apple, Inc. Does 1 through 20	U.S.D.C. Northern District of California, San Jose Division	5:17-cv-07274	Magistrate Judge Nathanael M. Cousins
3	Plaintiff(s): Michael Hakimi Defendant(s): Apple, Inc.	U.S.D.C. Northern District of California, San Francisco Division	3:17-cv-07292	Judge Vince Chhabria
4	Plaintiff(s): Aniledis Batista Paul Sohayegh Defendant(s): Apple, Inc.	U.S.D.C. Northern District of California, San Jose Division	5:17-cv-07355	Magistrate Judge Nathanael M. Cousins
5	Plaintiff(s): Stefan Bogdanovich Dakota Speas Defendant(s): Apple, Inc. Does 1 through 10	U.S.D.C. Central District of California, Western Division - Los Angeles	2:17-cv-09138	Judge Philip S. Gutierrez Magistrate Judge Jacqueline Chooljian

6	Plaintiff(s): Violetta Mailyan Defendant(s): Apple, Inc.	U.S.D.C. Central District of California, Western Division - Los Angeles	2:17-cv-09192	Judge Stephen V. Wilson Magistrate Judge Frederick F. Mumm
7	Plaintiff(s): Thomas T. Cook Defendant(s): Apple, Inc. Does 1 through 10	U.S.D.C. Southern District of California, San Diego	3:17-cv-02579	Judge Roger T. Benitez Magistrate Judge Ruben B. Brooks
8	Plaintiff(s): Raisa Drantivy Defendant(s): Apple, Inc Does 1 through 10	U.S.D.C. Eastern District of New York, Brooklyn	1:17-cv-07480	Not Currently Assigned
9	Plaintiff(s): Benjamin Lazarus Jeffrey Aberman Stephen Margolis Sandy Brodsky Victoria Childs Defendant(s): Apple, Inc.	U.S.D.C. Eastern District of New York, Brooklyn	1:17-cv-07485	Judge Frederic Block Magistrate Judge Cheryl L. Pollak
10	Plaintiff(s): Eliezer Rabinovits Victor Mazzeo Defendant(s): Apple, Inc.	U.S.D.C. Southern District of New York, Foley Square	1:17-cv-10032	Judge Naomi Reice Buchwald Magistrate Judge Stewart D. Aaron
11	Plaintiff(s): Sam Mangano Lance Raphael Ala W. Abdulla Ryan Glaze Kirk Pedety Defendant(s): Apple, Inc.	U.S.D.C. Northern District of Illinois, Chicago	1:17-cv-09178	Judge Harry D. Leinenweber Magistrate Judge Daniel G. Martin

12	Plaintiff(s): Sean Neilan Defendant(s): Apple, Inc.	U.S.D.C Northern District of Illinois, Chicago	1:17-cv-09296	Judge Charles P. Kocoras Magistrate Judge Young B. Kim
13	Plaintiff(s): Peter A. Schroeder Defendant(s): Apple, Inc.	U.S.D.C Southern District of Indiana, Indianapolis	1:17-cv-04750	Judge Jane Magnus-Stinson Magistrate Judge Matthew P. Brookman
14	Plaintiff(s): Neill McInnis J. Scott Archer Defendant(s): Apple, Inc.	U.S.D.C. Southern District of Mississippi	1:17-cv-00358	Judge Louis Guirola, Jr Magistrate Judge Robert H. Walker
15	Plaintiff(s): Blake Brand Matt Hosking Defendant(s): Apple, Inc.	U.S.D.C. District of South Carolina, Charleston	2:17-cv-03453	Judge Richard M Gergel
16	Plaintiff(s): Mark Miller Chris Spearman Craig Stanford Defendant(s): Apple, Inc.	U.S.D.C. Eastern District of Texas, Sherman	4:17-cv-00889	Judge Amos L. Mazzant, III Magistrate Judge Kimberly C Priest Johnson
17	Plaintiff(s): Alfred LaNasa Defendant(s): Apple, Inc.	U.S.D.C. Eastern District of Louisiana, New Orleans	2:17-cv-17878	Judge Martin L.C. Feldman Magistrate Judge Daniel E. Knowles, III.

18	Plaintiff(s): Yael Aburos Defendant(s): Apple, Inc.	U.S.D.C. Southern District of Florida, Miami	1:17-cv-24712	Judge Darrin P. Gayles
19	Plaintiff(s): Kim Burton William C. Ellis Defendant(s): Apple, Inc.	U.S.D.C Western District of Missouri, Jefferson City	2:17-cv-04257	District Judge Nanette K. Laughrey

DATED: January 2, 2018

Respectfully submitted,

KAPLAN FOX & KILSHEIMER LLP

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Counsel for Plaintiff Nicole Gallmann

**U.S. District Court
California Northern District (San Jose)
CIVIL DOCKET FOR CASE #: 5:17-cv-07285-EJD**

Gallmann v. Apple, Inc.
Assigned to: Judge Edward J. Davila
Referred to: Judge Nathanael M. Cousins
Demand: \$5,000,000,000
Cause: 28:1332 Diversity-Contract Dispute

Date Filed: 12/22/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff**Nicole Gallmann**

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V.

Defendant**Apple, Inc.**

Date Filed	#	Docket Text
12/22/2017	<u>1</u>	COMPLAINT against Apple, Inc.. Filed by Nicole Gallmann. (Attachments: (\$400 filing fee receipt # 0971-11974024) (1) Civil Cover Sheet)(King, Laurence) (Filed on 12/22/2017) Modified on 12/22/2017 (haS, COURT STAFF). (Entered: 12/22/2017)
12/22/2017	<u>2</u>	Proposed Summons. (King, Laurence) (Filed on 12/22/2017) (Entered: 12/22/2017)
12/22/2017	3	Case assigned to Judge Nathanael M. Cousins. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit <i>E-Filing A New Civil Case</i> at http://cand.uscourts.gov/ecf/caseopening . Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges . Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 1/5/2018. (haS, COURT STAFF) (Filed on 12/22/2017) (Entered: 12/22/2017)
12/22/2017	<u>5</u>	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 3/21/2018. Initial Case Management Conference set for 3/28/2018 10:00 AM in Courtroom 7, 4th Floor, San Jose. (dhmS, COURT STAFF) (Filed on 12/22/2017) (Entered: 12/27/2017)

12/27/2017	<u>4</u>	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Nicole Gallmann.. (Choi, Mario) (Filed on 12/27/2017) (Entered: 12/27/2017)
12/27/2017	<u>6</u>	Summons Issued as to Apple, Inc.. (dhmS, COURT STAFF) (Filed on 12/27/2017) (Entered: 12/27/2017)
12/28/2017	<u>7</u>	CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because a party has not consented to the jurisdiction of a Magistrate Judge. You will be informed by separate notice of the district judge to whom this case is reassigned. ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED. <i>This is a text only docket entry; there is no document associated with this notice.</i> (lmh, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)
12/28/2017	<u>8</u>	ORDER REASSIGNING CASE. Case reassigned to Judge Beth Labson Freeman for all further proceedings. This case is assigned to a judge who participates in the Cameras in the Courtroom Pilot Project. See General Order 65 and http://cand.uscourts.gov/cameras. Magistrate Judge Nathanael M. Cousins remains as referral judge assigned to the case. Reassignment Order signed by Executive Committee on 12/28/2017. (Attachments: # <u>1</u> Notice of Eligibility for Video Recording) (bwS, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)
12/29/2017	<u>9</u>	ORDER OF RECUSAL. Signed by Judge Beth Labson Freeman on 12/29/2017. (blflc1S, COURT STAFF) (Filed on 12/29/2017) (Entered: 12/29/2017)
01/02/2018	<u>10</u>	ORDER REASSIGNING CASE. Case reassigned to Judge Edward J. Davila for all further proceedings pursuant to Order of Recusal. This case is assigned to a judge who participates in the Cameras in the Courtroom Pilot Project. See General Order 65 and http://cand.uscourts.gov/cameras. Judge Beth Labson Freeman no longer assigned to the case. (Attachments: # <u>1</u> Notice of Eligibility for Video Recording)(bwS, COURT STAFF) (Filed on 1/2/2018) (Entered: 01/02/2018)

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8 [Additional Counsel on Signature Page]

9
10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 Nicole GALLMANN, individually and on
13 behalf of others similarly situated,

14 Plaintiff,

15 vs.

16 APPLE INC.,

17 Defendant.

Case No. 5:17-cv-7285

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

1 Plaintiff Nicole Gallmann (“Plaintiff”) on behalf of herself and all other similarly situated, brings
2 this action against Apple Inc. (“Apple”) based upon personal knowledge of the facts pertaining to
3 herself, and upon information and belief as to all other matters, hereby alleges as follows:

4 **NATURE OF THE CASE**

5 1. This is a consumer protection action seeking injunctive relief and damages arising from
6 Defendant’s unlawful failure to inform consumers that updating their iPhone 6, 6S, SE or 7 (the “Legacy
7 Devices”) to iOS 10.2.1 (and/or later to iOS 11.2) would dramatically and artificially reduce the
8 performance of the Legacy Devices. Apple also failed to inform consumers that phone performance
9 would be restored – by as much as 70 percent – if affected individuals simply replaced the phone’s
10 lithium-ion battery. Replacing the battery at an Apple store costs less than \$100. The cost of the new
11 iPhone X is over \$1,000.

12 2. In the modern digital age, batteries “wear” over time. The lithium-ion battery used by
13 Apple slowly diminishes its ability to hold a charge with time and use. However, normal lithium-ion
14 battery wear does not reduce performance; a weakening battery has no effect on performance *unless*
15 there is software that links the two. And that is precisely what Apple did.

16 3. In rolling out iOS 10.2.1, Apple claimed to “bug fixes and improve[] the security of [the]
17 iPhone or iPad” and “improve[] power management during peak workloads to avoid unexpected
18 shutdowns on the iPhone.”¹ What Apple purposefully failed to disclose, however, was that the update
19 would act as a latent time-bomb that slowly eroded the phone’s performance to the frustration of the
20 user – the software update throttled the handset’s performance.

21 4. The effect of Apple’s actions was to a) purposefully reduce device performance with
22 time, and b) deprive consumers of material information concerning the cause of the decline in
23 performance of the Legacy Devices.

24 5. Plaintiff and the Class she seeks to represent in this lawsuit are consumers who purchased
25 the Legacy Devices and installed the relevant upgraded operating system software. This lawsuit is
26

27
28 ¹ Download iOS 10.0 – iOS 10.3.3 Information, Apple Inc., https://support.apple.com/kb/DL1893?locale=en_US.

1 brought to challenge Apple's unfair business practices under California's Unfair Competition Law, Cal.
2 Bus. & Prof. Code § 17200. Plaintiff also brings a claim for breach of the implied covenant of good
3 faith and fair dealing under California law. Plaintiff requests that the Court find Apple's business
4 practices constitute unfair competition and enjoin Apple from engaging in similar conduct in the future.
5 Plaintiff further requests that the Court order Defendant to: pay civil penalties pursuant to Cal. Bus. &
6 Prof. Code § 17206; provide restitution to the Class of all money that may have been acquired by means
7 of their unfair practice; and pay attorney's fees and costs of litigation.

8 **JURISDICTION AND VENUE**

9 6. This Court has jurisdiction over this action under the Class Action Fairness Act, 28
10 U.S.C. § 1332(d). The aggregated claims of the individual class members exceed the sum value of
11 \$5,000,000, exclusive of interests and costs, and this is a class action in which more than two-thirds of
12 the proposed plaintiff class, on the one hand, and Defendant, on the other, are citizens of different states.

13 7. This Court has personal jurisdiction over Defendant Apple, Inc. because Apple is
14 incorporated under the laws of the State of California and is headquartered in Cupertino, California.

15 8. Venue is proper in this district under 28 U.S.C. § 1391 because Apple resides in this
16 district and because the actions and unfair practices described in this complaint were conducted in and
17 orchestrated from this district by Apple.

18 **INTRADISTRICT ASSIGNMENT**

19 9. Assignment is proper to the San Jose division of this District under Local Rule 3-2(c)-
20 (e), as a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Santa
21 Clara County, where Apple is headquartered.

22 **PARTIES**

23 10. Plaintiff Nicole Gallmann is a resident of San Francisco County, California, and
24 purchased an iPhone 6. She upgraded to iOS 10.2.1 and has since suffered material and increasing
25 degradation in the performance of the iPhone.

26 11. Defendant Apple Inc. is a California corporation headquartered at 1 Infinite Loop,
27 Cupertino, California. Apple designs, manufacturers, and sells throughout the world a wide range of
28 products, including mobile devices such as iPhone.

FACTUAL ALLEGATIONS

12. Plaintiff and Class Members are Apple iPhone users. Many Class Members are not new to the iPhone franchise, but are loyal followers of Apple, having purchased various iterations of the mobile device.

13. On January 23, 2017, Apple released iOS 10.2.1. The update specifically addressed aging batteries, and expressly represented that the purpose was to prolong the useful life of the Device. Apple promised to “deliver the best experience for customers, which includes overall performance and prolonging the life of their devices.”²

14. For example, the update specifically sought to prevent the handset from shutting down if a performance spike drew too much power—i.e., turning off unexpectedly as if the phone was dead while the phone’s battery still had a charge. While the battery issue was a reported problem at the time,³ the iOS update did far more than address shutdowns on those few phones that experienced shutdowns – it also surreptitiously and purposefully throttled the performance speed on the iPhone 6, 6S, and SE’s by as much as 70 percent.

15. Furthermore, the update did not even fully address the purported battery “shutdown” issue on all devices: 20 percent of iPhone 6s and 30 percent of iPhone 6 devices that previously experienced unexpected shut down issues continued to experience those issues, according to a statement released by Apple.⁴ At the time the iPhone 7 was not impacted. However, it is now known that the feature at the center of the iOS 10.2.1 update was later extended to iPhone 7 with the release of iOS 11.2, and will be added to other products in the future.

² Jason Koebler, *Apple Throttles iPhones that Have Old Batteries (But Didn’t Tell You About It)*, Motherboard (Dec. 20, 2017) https://motherboard.vice.com/en_us/article/3k5bdw/apple-throttles-iphones-bad-batteries?utm_source=vicefbus (last visited Dec. 22, 2017).

³ A Message from Apple about iPhone and Unexpected Shutdowns, Apple, Inc. <https://support.apple.com/zh-cn/HT207414>.

⁴ Matthew Panzarino, *Apple says IOS 10.2.1 has reduced unexpected iPhone 6s shutdown issues by 80%*, Techcrunch (Feb. 23, 2017) <https://techcrunch.com/2017/02/23/apple-says-ios-10-2-1-has-reduced-unexpected-iphone-6s-shutdown-issues-by-80/> (last visited Dec. 22, 2017).

1 16. Apple also informed consumers that for those who need it, a message will appear on the
2 screen inside Settings if that phone’s “battery needs service.” Apple did this to “add a bit more
3 transparency to people wondering when Apple considers the battery worn down enough to get
4 swapped out.” Apple even offered consumers tips regarding when to swap out a battery.⁵

5 17. However, despite all of these disclosure opportunities, Apple never informed
6 consumers that the 10.2.1 update reduced unexpected phone shutdowns by slowing the device’s
7 performance dramatically.

8 18. Moreover, consumers experiencing these issues were never notified by Apple (as it
9 represented it would) that “the [device’s] battery needs service.”

10 19. Because Apple failed to inform consumers that the performance issues were
11 artificially caused by the iOS update in conjunction with an older (but still perfectly functional)
12 battery, consumers were denied the opportunity to make an informed decision regarding whether to
13 upgrade their device or instead simply replace the battery.

14 20. Apple’s failure to disclose the impact of the iOS update 10.2.1 (and the later iOS 11.1)
15 and remedy the issues it produced (and purported to resolve) constitutes an unfair trade practice and
16 breach of the covenant of good faith and fair dealing implied in Apple’s contracts with Plaintiff and
17 the class. Plaintiff and the class were harmed as a direct and proximate result of Apple’s actions.

18 **CLASS ACTION ALLEGATIONS**

19 21. Plaintiff brings this action on behalf of herself and others similarly situated, as
20 members of a class she preliminarily proposes be defined as follows:

21 All consumers who (a) reside in the United States, (b) owned Apple iPhone
22 6, 6S, SE or 7 models and upgraded to iOS 10.2.1 or a later version prior to
23 the date of this Complaint, and (c) who purchased that iPhone within the
24 United States.

25 Excluded from the proposed class are Defendant; any entity in which Defendant has or had a
26 controlling interest; any of Defendant’s officers, directors, legal representatives, heirs, successors, and
27

28 ⁵ Maximizing Battery Life and Lifespan, Apple Inc., <https://www.apple.com/batteries/maximizing-performance/>.

1 assigns; Plaintiff's counsel and anyone employed by Plaintiff's counsel; any Judge assigned to this
2 action and his or her immediate family; and anyone who timely requests exclusion from the class.

3 22. This action may be maintained on behalf of the class proposed above under the criteria
4 of Rule 23 of the Federal Rules of Civil Procedure.

5 23. **Numerosity.** The class as presently proposed consists of owners of various iPhones
6 described above. Upon information and belief, the number of proposed Class Member exceeds 1
7 million, and individual joinder of the purchasers of these computers would be impractical.

8 24. **Commonality and Predominance.** Common questions of law and fact exist as to
9 members of the class and predominate over questions affecting only individual class members. These
10 common questions include:

- 11 a. Whether iOS 10.2.1 in fact affected device performance;
- 12 b. Whether Apple purposefully designed iOS 10.2.1 to affect device performance
13 or otherwise did so knowingly;
- 14 c. The extent to which iOS 10.2.1 affected device performance;
- 15 d. Whether and to what extent Apple disclosed the effect of iOS 10.2.1 on device
16 performance;
- 17 e. Whether the aspects of iOS 10.2.1 affecting device performance were extended
18 to iOS 11.2; and
- 19 f. Whether Apple notified customers that the artificial reduction in device
20 performance could be remedied by simply replacing the battery.

21 25. **Typicality.** Plaintiff is a member of the proposed class and her claim is typical of the
22 claims of the other members of the class. Plaintiff and class members all purchased Apple Legacy
23 Devices and all upgraded to iOS 10.2.1 or a later version during 2017.

24 26. **Adequacy.** Plaintiff is an adequate representative of the class because her interests do
25 not conflict with the interests of the members of the class he seeks to represent. Plaintiff has retained
26 counsel competent and experienced in complex class action litigation, and Plaintiff intends to
27 prosecute this action vigorously. The interests of members of the Class will be fairly and adequately
28 protected by Plaintiff and her counsel.

1 27. **Superiority.** The class action device is superior to other available means for the fair
 2 and efficient adjudication of the claims of Plaintiff and the Class members. The relief sought per
 3 individual member of the Class is small given the burden and expense of individual prosecution of the
 4 potentially extensive litigation necessitated by the conduct of Defendant. Furthermore, it would be
 5 virtually impossible for the Class members to seek redress on an individual basis. Even if the Class
 6 members themselves could afford such individual litigation, the court system could not. Individual
 7 litigation of the legal and factual issues raised by the conduct of Defendant would increase delay and
 8 expense to all parties and to the court system. The Class action device presents far fewer management
 9 difficulties and provides the benefits of a single, uniform adjudication, economies of scale and
 10 comprehensive supervision by a single court. Given the similar nature of the Class members' claims
 11 and the absence of material differences in the state statutes and common laws upon which the Class
 12 members' claims are based, a nationwide Class will be easily managed by the Court and the parties.

FIRST CAUSE OF ACTION

(For Violation of California's Unfair Competition Law)

14 28. Plaintiff incorporates by reference the foregoing paragraphs.

15 29. Defendant's acts and practices, as alleged in this complaint, constitute unfair, unlawful
 16 and fraudulent business practices in violation of California's Unfair Competition Law, Cal. Bus. &
 17 Prof. Code § 17200, *et seq.*

18 30. Defendant has engaged and continues to engage in an unfair business practice by
 19 including code in iOS 10 (and now iOS 11) designed in part to materially diminish performance speed
 20 of Apple Legacy Devices, and by purposefully failing to disclose that performance could be restored
 21 by simply changing the battery.

22 31. Defendant's business practices are unscrupulous, unethical, and substantially injurious
 23 to consumers. There is no legitimate business reason for Apple's business practice such that the
 24 utility of its business practice outweighs the harm to consumers. Furthermore, Apple's business
 25 practice undermines this State's fundamental policy against unfair and sharp business practices that
 26 are likely to deceive or mislead consumers, and which undercut trust and fair competition in the
 27 consumer marketplace.
 28

1 39. Defendant engaged in deception to gain access to the Legacy Devices and install the new
2 computer software.

3 40. Plaintiff and other Class Members thus suffered actual damages as a result of
4 Defendant's actions in an amount to be determined at trial.

5 **THIRD CAUSE OF ACTION**

6 **(For Breach of Covenant of Good Faith and Fair Dealing)**

7 41. Plaintiff incorporates by reference the foregoing paragraphs

8 42. In every contract or agreement there is an implied promise of good faith and fair
9 dealing under California law.

10 43. In dealings between Apple and its customers, Apple has power affecting the rights of its
11 users.

12 44. Apple entered into a contract with Plaintiff and the Class at the time of purchase of
13 each Legacy Device, and at the time of download of iOS 10.2.1 and later iOS versions.

14 45. Apple contractually promised in the iOS 10.2.1 update and later updates to "deliver the
15 best experience for customers, which includes overall performance and prolonging the life of their
16 devices."

17 46. Plaintiff did all, or substantially all, of the things that the contracts required her to do.

18 47. Despite its contractual promises to prolong the life of the devices, Apple instead
19 purposefully took actions to reduce the life of the devices, and purposefully failed to notify customers
20 that replacing the battery would restore performance that had been artificially throttled by iOS 10.2.1
21 and later updates to iOS.

22 48. Apple's actions were objectively unreasonable given Apple's promises.

23 49. Apple's conduct evaded the spirit of the bargain made between Apple and the Plaintiff.

24 50. As a result of Apple's misconduct and breach of its duty of good faith and fair dealing,
25 Plaintiff and the Class suffered damages. Plaintiff and the Class members did not receive the benefit
26 of the bargain for which they contracted and for which they paid valuable consideration.
27
28

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment and orders in their favor and against Apple as follows:

A. An order certifying the proposed class, or an alternative class that the Court may find appropriate under Rule 23 of the Federal Rules of Civil Procedure, directing that Plaintiff’s claims proceed on a class-wide basis, and appointing Plaintiff and her counsel to represent the class;

B. An order and/or judgment enjoining Defendant from writing programs to throttle device performance;

C. An order and/or judgment requiring Defendant to transparently notify customers when device performance can be restored by the installation of a new battery;

D. An order and/or judgment requiring Defendants to make restitution to Plaintiff of money that may have been acquired by means of their unfair practices;

E. An order granting reasonable attorneys’ fees and costs, as well as pre- and post-judgment interest at the maximum legal rate; and

F. Such other and further relief as this Court may deem appropriate.

DATED: December 22, 2017

Respectfully submitted,

KAPLAN FOX & KILSHEIMER LLP

By: /s/ Laurence D. King
Laurence D. King

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Exhibit 2

**U.S. District Court
California Northern District (San Jose)
CIVIL DOCKET FOR CASE #: 5:17-cv-07274-NC**

Harvey v. Apple Inc.
Assigned to: Judge Nathanael M. Cousins
Cause: 28:1332 Diversity-Fraud

Date Filed: 12/21/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff

Keaton Harvey

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V.

Defendant

Apple Inc.

V.

Movant

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Date Filed	#	Docket Text
12/21/2017	1	*** FILED IN ERROR. SEE DOCKET 3 re COMPLAINT *** against Apple Inc. (Filing fee \$ 400, receipt number 0971-11972171.). Filed by Keaton Harvey. (Fazio, Jeffrey) (Filed on 12/21/2017) Modified on 12/22/2017 (bwS, COURT STAFF). (Entered: 12/21/2017)
12/22/2017		Electronic filing error. This filing will not be processed by the clerks office due to lack of Civil Cover Sheet Re: 1 Complaint filed by Keaton Harvey. Please file Civil Cover Sheet as

		a separate docket entry. (bwS, COURT STAFF) (Filed on 12/22/2017) (Entered: 12/22/2017)
12/22/2017	2	Civil Cover Sheet by Keaton Harvey . (Fazio, Jeffrey) (Filed on 12/22/2017) (Entered: 12/22/2017)
12/22/2017		Electronic filing error. This filing will not be processed by the clerks office due to Civil Case 10-1610 being on first page of Complaint as case number. Please remove case number and re-file in its entirety. Re: 1 Complaint filed by Keaton Harvey (bwS, COURT STAFF) (Filed on 12/22/2017) (Entered: 12/22/2017)
12/22/2017	3	AMENDED COMPLAINT against Keaton Harvey. Filed by Keaton Harvey. (Fazio, Jeffrey) (Filed on 12/22/2017) Modified on 12/22/2017 (bwS, COURT STAFF). (Entered: 12/22/2017)
12/22/2017	4	Case assigned to Judge Nathanael M. Cousins. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit <i>E-Filing A New Civil Case</i> at http://cand.uscourts.gov/ecf/caseopening . Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges . Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 1/5/2018. (bwS, COURT STAFF) (Filed on 12/22/2017) (Entered: 12/22/2017)
12/22/2017	5	Proposed Summons. (Fazio, Jeffrey) (Filed on 12/22/2017) (Entered: 12/22/2017)
12/22/2017	6	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Keaton Harvey.. (Fazio, Jeffrey) (Filed on 12/22/2017) (Entered: 12/22/2017)
12/22/2017	8	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 3/21/2018. Initial Case Management Conference set for 3/28/2018 10:00 AM in Courtroom 7, 4th Floor, San Jose. (dhmS, COURT STAFF) (Filed on 12/22/2017) (Entered: 12/27/2017)
12/27/2017	7	ADMINISTRATIVE MOTION To Consider Whether Cases Should Be Related Pursuant to Civil Local Rules 3-12 and 7-11 filed by Nicole Gallmann. Responses due by 1/2/2018. (Attachments: # 1 Declaration, # 2 Proposed Order)(Choi, Mario) (Filed on 12/27/2017) (Entered: 12/27/2017)
12/27/2017	9	Summons Issued as to Apple Inc.. (dhmS, COURT STAFF) (Filed on 12/27/2017) (Entered: 12/27/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 11:21:39			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	5:17-cv-07274-NC
Billable	2	Cost:	0.20

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5 Attorneys for Plaintiff
 Keaton Harvey, on behalf of himself
 6 and all others similarly situated

7
 8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**

10 KEATON HARVEY, on behalf of himself
 11 and all others similarly situated,

12 Plaintiff,

13
 14 vs.

15 APPLE INC., a California corporation,
 16 and DOES 1-20, inclusive,

17 Defendants.
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No. CV-10-01610

**COMPLAINT FOR DAMAGES
 AND FOR EQUITABLE RELIEF**

CLASS ACTION

JURY TRIAL DEMANDED

1 Plaintiff, Keaton Harvey, on behalf of himself and all others similarly
2 situated, allege as follows:

3 **PARTIES**

4 1. Plaintiff, Keaton Harvey, is a resident of New York, New York, who
5 owned an iPhone 6 before replacing it with a newer-model iPhone that he purchased
6 from Defendant Apple Inc.

7 2. Defendant Apple Inc. (“Apple”), is a corporation that was created under
8 the laws of the State of California, and has its principal place of business in
9 Cupertino, California.

10 3. Plaintiff is unaware of the true names and capacities of Does 1 through
11 100 and sues them by fictitious names. Plaintiff will amend this Complaint to
12 include these Doe defendants’ true names and capacities when they are ascertained.
13 Each Doe defendant is responsible in some manner, including without limitation, as
14 aiders and abettors, for the conduct alleged in this Complaint.

15 4. At all times mentioned in this Complaint, each and every defendant
16 was an agent, representative, or employee of each and every other defendant and in
17 doing the things alleged in this Complaint, each and every defendant was acting
18 within the course and scope of such agency, representation or employment and was
19 acting with the consent, permission and authorization of each of the remaining
20 defendants. Each defendant’s actions alleged in this Complaint were ratified and
21 approved by the other defendants and their respective officers, directors, or
22 managing agents.

23 **JURISDICTION AND VENUE**

24 5. This Court has diversity jurisdiction over the claims asserted herein on
25 behalf of a nationwide class pursuant to 28 U.S.C. section 1332, as amended in
26 February 2005 by the Class Action Fairness Act. Jurisdiction is proper because

27 a. the amount in controversy in this class action exceeds five million
28 dollars, exclusive of interest and costs, the proposed class includes

1 more than 100 members, more than one of whom reside in a state
2 other than California; and

3 b. Apple has purposefully availed itself of the privilege of conducting
4 business activities within the State of California, where Apple is
5 incorporated; has its principal place of business; where its officers
6 direct, control, and coordinate Apple’s corporate activities; where Apple
7 engaged in the unlawful conduct alleged in this Complaint by, *inter*
8 *alia*, designing and selling the iPhone 5C, iPhone 6, the iPhone 6 Plus,
9 the iPhone 6S, the iPhone 6S Plus, the iPhone 7, and the iPhone 7 Plus
10 (and possibly other) Apple smartphones (collectively, the “Affected
11 iPhones”) with software that causes Affected iPhones to operate more
12 slowly, and by implementing and executing the illegal, unfair,
13 fraudulent, and unconscionable corporate policies and practices alleged
14 herein; and by maintaining systematic and continuous business
15 contacts with the State, primarily through its Cupertino headquarters.

16 6. Venue is proper in this judicial district pursuant to 28 U.S.C. section
17 1391, and California Civil Code section 1780(d), because the conduct alleged in this
18 Complaint occurred in this judicial district.

19 **GENERAL ALLEGATIONS**

20 7. The iPhone is an internet and multimedia-enabled “smartphone”
21 designed and marketed by Apple. Apple introduced the original iPhone for sale in
22 the United States in or about June 2007. Since then, Apple has introduced a
23 succession of new models of the iPhone, including the Affected iPhones.

24 8. Each year, Apple, like its competitors, must find ways to encourage
25 prospective customers to purchase the latest model of its product. Plaintiff is
26 informed and believes that persuading consumers to replace their existing devices
27 with new ones becomes more difficult as consumers become familiar with iPhone
28 technology and more difficult to impress with new features. Plaintiff is also

1 informed and believes that consumers, including himself, will purchase a new
2 smartphone if they perceive problems with the performance of their current device.

3 9. Although he had cared for his Affected iPhone (an iPhone 6)
4 meticulously from the moment he purchased it, it was not without problems.
5 Plaintiff's Affected iPhone would shut down suddenly, even when its battery levels
6 were well over 50 percent. And, in addition to other performance problems, Plaintiff
7 began to observe that his Affected iPhone had begun to operate in an extremely
8 sluggish manner, making it difficult to perform basic functions on the device.
9 Ultimately, the problems Plaintiff continued to experience with his Affected iPhone
10 got to the point where he was compelled to replace it. Based on Apple's reputation
11 and the belief that the iPhone was superior to smartphones offered by competitors,
12 Plaintiff replaced his Affected iPhone with a new iPhone at a cost of more than
13 \$1,000.

14 10. Plaintiff is informed and believes that Apple was aware of a defect in
15 his Affected iPhone at the time he purchased a new one, and not only failed to
16 disclose what it knew, but made deliberately misleading statements that were
17 intended to conceal the nature and scope of that defect.

18 11. In or about November 2016, Apple announced that a "very small
19 number" of Affected iPhones (specifically, the iPhone 6S and iPhone 6S Plus) were
20 affected by a problem that caused those devices to shut down, suddenly and
21 unexpectedly, "for no apparent reason." Plaintiff is informed and believes that, in
22 actuality, Apple knew that the lithium-ion batteries that it installed in Affected
23 iPhones were causing the devices to shut down unexpected, notwithstanding that
24 their battery levels were at as much as 60 percent when the shut-down occurred.

25 12. Despite claiming that the shutdowns were occurring for "no apparent
26 reason," Apple also announced that it had initiated a battery-replacement program
27 that was limited to the iPhone 6S and the iPhone 6S Plus, and that neither the
28

1 shutdown problem nor the battery-replacement program would serve to extend the
2 applicable warranty.

3 13. Plaintiff is informed and believes that Apple's announcement was
4 misleading and that Apple knew it was misleading at the time it made the
5 announcement in November 2016. Apple admitted publicly that a "small number of
6 customers outside the affected range [(i.e., Affected iPhones other than the 6S and
7 the 6S Plus)] have also reported a shutdown." See Jeff John Roberts, "Why It's Time
8 for Apple to Come Clean About the iPhone Battery," *Fortune* (Dec. 27, 2016)
9 (available online at <http://fortune.com/2016/12/27/apple-iphone-6-battery-problem/>).
10 Apple went on to claim, however, that "[s]ome of these shutdowns can occur under
11 normal conditions for the iPhone to protect its electronics." *Id.*

12 14. Plaintiff is informed and believes that these statements were
13 deliberately misleading as well. In actuality, the lithium-ion batteries in all Affected
14 iPhones cause them to operate erratically and to shut down the device unexpectedly
15 due to the batteries' inability to handle the demand created by processor speeds (the
16 "battery defect").

17 15. Rather than curing the battery defect by providing a free battery
18 replacement for all Affected iPhones, Apple sought to mask the battery defect by
19 modifying the iPhone operating system ("iOS") so that it reduces Affected iPhones'
20 processing speeds in an effort to prevent their batteries from causing erratic
21 operation and unexpected shutdowns.

22 16. But modifying iOS not only allowed Apple to conceal the true nature
23 and scope of the battery defect and to avoid expending time, money, and effort on
24 correcting it, Apple's decision to modify iOS instead had an added benefit to Apple:
25 the modified iOS would slow the performance of Affected iPhones, which would
26 serve to compel consumers to replace them with new iPhones—just as Plaintiff did.

27 17. This is not mere speculation. Recently, a company that performed
28 laboratory testing of Affected iPhones discovered that After denying the existence of

1 a battery problem for over a year, Apple recently admitted that it modified iOS in a
2 manner that slowed the performance of Affected iPhones, but characterized this
3 effort as a “feature”:

4 Our goal is to deliver the best experience for customers, which
5 includes overall performance and prolonging the life of their
6 devices. Lithium-ion batteries become less capable of supplying peak
7 current demands when in cold conditions, have a low battery charge or
8 as they age over time, which can result in the device unexpectedly
9 shutting down to protect its electronic components.

10 Last year we released a feature for iPhone 6, iPhone 6s and
11 iPhone SE to smooth out the instantaneous peaks only when
12 needed to prevent the device from unexpectedly shutting down during
13 these conditions. We’ve now extended that feature to iPhone 7 with
14 iOS 11.2, and plan to add support for other products in the future.

15 Shara Tibiken, “Apple admits slowing older iPhones, says it’s to prevent battery
16 issues,” *C/Net* (Dec. 20, 2017) (available online at [https://www.cnet.com/news/apple-
17 slows-down-older-iphone-battery-issues/#ftag=CAD-09-10aai5b](https://www.cnet.com/news/apple-slows-down-older-iphone-battery-issues/#ftag=CAD-09-10aai5b)).

18 18. Notwithstanding the purported benefits of this “feature,” Apple focused
19 exclusively on the number of shutdowns it purportedly prevented, but said nothing
20 about the fact that it also slowed the performance of Affected iPhones until after the
21 iOS modification was discovered during independent laboratory testing. “The
22 statement from Apple came in response to a report from earlier this week from
23 Primate Labs, the company behind the Geekbench processor benchmark software.
24 John Pool, the founder of the organization, said . . . that processors in iPhones slow
25 down and decrease in performance as batteries age and lose capacity. Poole
26 explained that users expect their phones to perform the same regardless of how old
27 the battery is, but his tests indicated that wasn’t the case.” *Id.*

28 19. Plaintiff has brought this action on behalf of himself and all others
similarly situated to require Apple **(a)** to modify iOS in a manner that prevents it
from slowing the performance of Affected iPhones; **(b)** to provide owners of Affected
iPhones with notice that the slow performance of those devices is caused by
modifications Apple made to iOS; **(c)** reimburse current owners of Affected iPhones

1 with the purchase price they paid for those devices after Apple knew, but failed to
2 disclose, the existence of the battery defect and the slow performance caused by the
3 iOS modification; **(d)** to compensate current and form owners of Affected iPhones
4 for the costs they incurred in attempting to repair or replace their Affected iPhones
5 due to the battery defect and/or the slow performance caused by the iOS
6 modification; **(d)** to provide current owners of Affected iPhones with new batteries
7 for those devices free of charge; and **(e)** to compensate former owners of Affected
8 iPhones for the cost of replacing those devices prematurely or, alternatively, to
9 provide former owners with the opportunity to return their replacement iPhones in
10 exchange for a refund together with the model of Affected iPhone (with a new
11 battery) that they owned prior to replacing that device.

12 CLASS ALLEGATIONS

13 20. Plaintiff brings this class action pursuant to Federal Rule of Civil
14 Procedure 23 and, to the extent applicable, the provisions of and California Civil
15 Code section 1781, on behalf of himself and all other persons similarly situated.

16 21. The class that Plaintiff seeks to represent is defined as follows: All
17 persons who reside in the United States who **(a)** own an Affected iPhone or **(b)**
18 owned an Affected iPhone and replaced it with a new device.

19 22. Plaintiff also seeks to represent a subclass that includes each member
20 of the proposed class described in Paragraph 21, above, who is a “consumer,” as that
21 term is defined by California Civil Code section 1761(d), or purchased “goods” or
22 “consumer goods,” as those terms are defined by California Civil Code sections 1761(a)
23 and 1791(a), respectively (the “Consumer Subclass”).

24 23. Excluded from the class are the following:

25 a. Apple, its subsidiaries, affiliates, officers, directors, and
26 employees;

27

28

1 b. persons who have settled with and validly released Apple from
2 separate, non-class legal actions against Apple based on the conduct alleged
3 herein;

4 c. counsel, and the immediate families of counsel, who represent
5 Plaintiff in this action;

6 d. the judge presiding over this action;

7 e. jurors who are impaneled to render a verdict on the claims
8 alleged in this action; and

9 f. persons who purchased an Extended Warranty in Colorado or in
10 Florida and made a claim pursuant to the Extended Warranty.

11 24. Plaintiff are informed and believe that the proposed class comprises
12 millions of members. The class is, therefore, so numerous and geographically
13 dispersed that joinder of all members in one action is impracticable.

14 25. Apple has acted with respect to Plaintiff and members of the proposed
15 class in a manner generally applicable to each of them. There is a well-defined
16 community of interest in the questions of law and fact involved, which affect all
17 class members. The questions of law and fact common to the class predominate
18 over the questions that may affect individual class members, including the
19 following:

20 a. whether Apple modified iOS in a manner that slowed the
21 performance of Affected iPhones;

22 b. whether the representations Apple has made about the nature
23 and scope of the battery defect are false;

24 c. whether Apple made false representations about the nature and
25 scope of the battery defect for the purpose of concealing it and avoiding the
26 expense of recalling and replacing the batteries in Affected iPhones;

1 d. whether Apple used the iOS modification to profit from Plaintiff
2 and members of the proposed class by inducing them to buy a new
3 replacement for their Affected iPhones;

4 e. whether Apple is subject to liability for fraudulently concealing
5 material facts from Plaintiff and members of the proposed class;

6 f. whether Apple is subject to liability for violating the Consumers
7 Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750-1784;

8 g. whether Apple’s conduct has violated the Unfair Competition
9 Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200-17209;

10 h. whether Apple has been unjustly enriched as a result of its
11 fraudulent conduct, such that it would be inequitable for Apple to retain the
12 benefits conferred upon it by Plaintiff and the proposed class;

13 i. whether Plaintiff’s claims satisfy the criteria for class
14 certification under Federal Rule of Civil Procedure 23 and, to the extent
15 applicable, California Civil Code section 1781;

16 j. whether compensatory or consequential damages should be
17 awarded to Plaintiff and members of the proposed class;

18 k. whether punitive damages should be awarded to Plaintiff and
19 members of the proposed class;

20 l. whether restitution should be awarded to Plaintiff and members
21 of the proposed class;

22 m. whether other, additional relief is appropriate, and what that
23 relief should be.

24 26. Plaintiff’s claims are typical of the claims of all members of the class
25 they propose to represent in this action.

26 27. Plaintiff will fairly and adequately represent and protect the interests
27 of the class, and do not have interests that are antagonistic to or in conflict with
28 those they seek to represent.

1 28. Plaintiff have retained counsel who have extensive experience in the
2 prosecution of class actions and other forms of complex litigation.

3 29. In view of the complexity of the issues and the expense that an
4 individual plaintiff would incur if he or she attempted to obtain relief from a large,
5 transnational corporation such as Apple, the separate claims of individual class
6 members are monetarily insufficient to support separate actions. Because of the size
7 of the individual class members' claims, few, if any, class members could afford to
8 seek legal redress for the wrongs complained of in this Complaint.

9 30. The class is readily definable, and prosecution as a class action will
10 eliminate the possibility of repetitious litigation and will provide redress for claims
11 too small to support the expense of individual, complex litigation. Absent a class
12 action, class members will continue to suffer losses, Apple's violations of law will be
13 allowed to proceed without a full, fair, judicially supervised remedy, and Apple will
14 retain sums received as a result of its wrongdoing. A class action will provide a fair
15 and efficient method for adjudicating this controversy.

16 31. The prosecution of separate claims by individual class members would
17 create a risk of inconsistent or varying adjudications with respect to thousands of
18 individual class members, which would, as a practical matter, dispose of the
19 interests of the class members not parties to those separate actions or would
20 substantially impair or impede their ability to protect their interests and enforce
21 their rights.

22 32. The proposed class satisfies the certification criteria of Federal Rule of
23 Civil Procedure 23.

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CLAIMS FOR RELIEF

**FIRST CLAIM FOR RELIEF
(Fraudulent Concealment)**

33. Plaintiff realleges and incorporates by reference the allegations contained in preceding paragraphs of this Complaint.

34. At all times relevant herein, Apple made misrepresentations of material fact to Plaintiff and the proposed class regarding the true nature and scope of the battery defect, claiming that an “unknown” problem was causing certain Affected iPhones to shutdown unexpectedly. Apple also falsely represented the reason that it modified iOS (to prolong battery life) in Affected iPhones, knowing that the modification also substantially slowed the performance of Affected iPhones, which would cause consumers to replace those devices with new iPhones. Apple knew those representations were false when it made them, and did so for the purpose of diminishing the possibility that the facts described in Paragraphs 10 through 18 and 35 of this Complaint (which are incorporated herein by reference) would be discovered by Plaintiff and members of the proposed class.

35. Apple has concealed material facts from Plaintiff and the proposed class, including the following:

- a. the existence, nature, and scope of the battery defect;
- b. that modifying iOS for the ostensible purpose of prolonging battery life also caused Affected iPhones to perform substantially slower as their batteries aged, notwithstanding the iOS modification;
- c. that the battery defect could only be remedied by replacing the lithium batteries in Affected iPhones;
- d. that Apple concealed the foregoing facts from Plaintiff and members of the proposed class as a means of avoiding the expense involved with rectifying the battery defect.

1 36. Apple had a duty to disclose these facts, regardless of the existence of
2 privity (*see, e.g.*, Cal. Civ. Code § 1711), by virtue of **(a)** Apple’s exclusive knowledge
3 about the nature and scope of the battery defect, and that its modifications of iOS
4 caused Affected iPhones to perform poorly; **(b)** Apple’s awareness that Plaintiff and
5 members of the proposed class were not reasonably likely to discover these facts; **(c)**
6 Apple’s active concealment of those facts from Plaintiff and members of the class (by,
7 *inter alia*, making the false representations described in Paragraphs 10 through 18
8 and 34, above); and **(c)** Apple’s statutory and common-law obligations to disclose
9 material information to the consumers who own or formerly owned Affected
10 iPhones, as alleged herein. Plaintiff would have acted differently if Apple had
11 disclosed this information to him and allowed him to make a fully-informed decision
12 before he purchased a replacement for his Affected iPhone.

13 37. The facts Apple has concealed from consumers are material and
14 uniform to Plaintiff and to the members of the class he proposes to represent in this
15 action.

16 38. Apple made misrepresentations of material fact and concealed the
17 material facts alleged herein intentionally and/or recklessly, with the intention that
18 Plaintiff and members of the proposed class would rely on its misrepresentations.
19 Plaintiff and members of the proposed class would have acted differently had the
20 omitted facts been disclosed to them.

21 39. As a proximate result of Apple’s misrepresentations and concealment
22 and suppression of material facts, Plaintiff and the proposed class have sustained
23 damage by, *inter alia*, bearing the cost of purchasing new Affected iPhones; bearing
24 the cost of repairs due to the battery defect and/or problems resulting from the slow
25 performance caused by the iOS modification; and bearing the cost of purchasing
26 replacement devices as a result of the battery defect and/or the slow performance
27 caused by the iOS modification.

28

1 52. By committing the acts and practices alleged herein, Apple has
2 engaged in unlawful, fraudulent, and unfair business practices in violation of the
3 UCL:

4 a. **Unlawful Conduct:** As a result of engaging in the conduct
5 alleged in this Complaint, Apple has violated the UCL's proscription against
6 engaging in unlawful conduct by virtue of **(i)** its fraudulent and deceitful
7 conduct in violation of California Civil Code sections 1709 through 1711; and
8 **(ii)** its violations of the Consumers Legal Remedies Act, California Civil Code
9 sections 1770(a)(5), (a)(7), and (a)(9).

10 b. **Fraudulent Conduct:** Apple has violated the UCL's
11 proscription against fraud as a result of engaging in the fraudulent and
12 deceitful conduct alleged in paragraphs 10 through 18 of this Complaint.

13 c. **Unfair Conduct:** Apple has violated the UCL's proscription
14 against unfair conduct as a result of engaging in the conduct alleged in this
15 Complaint, which violates legislatively-declared policies articulated in, *inter*
16 *alia*, California Civil Code sections 1710, 1711, and 1770, subsections (a)(5),
17 (a)(7), and (a)(9).

18 53. Apple's violations of the UCL continue to this day. As a direct and
19 proximate result of Apple's violations of the UCL, Plaintiff has suffered actual
20 damage in that, *inter alia*, they paid more for their Affected iPhones than they
21 would have had Apple not concealed the existence of the battery defect and the
22 effects of its modification of iOS.

23 54. Pursuant to Section 17203 of the UCL, Plaintiff and the class seek an
24 order that requires Apple **(a)** to modify iOS in a manner that prevents it from
25 slowing the performance of Affected iPhones; **(b)** to provide owners of Affected
26 iPhones with notice that the slow performance of those devices is caused by
27 modifications Apple made to iOS; **(c)** reimburse current owners of Affected iPhones
28 with the purchase price they paid for those devices after Apple knew, but failed to

1 disclose, the existence of the battery defect and the slow performance caused by the
2 iOS modification; **(d)** to provide current owners of Affected iPhones with new
3 batteries for those devices free of charge; **(e)** to make full restitution of all moneys
4 wrongfully obtained from its violations of the UCL, as alleged in this Complaint;
5 and **(f)** requires Apple to pay the attorney fees and costs incurred by counsel for
6 Plaintiff and the proposed class in accordance with California Code of Civil
7 Procedure section 1021.5.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff, on behalf of themselves and all others similarly
10 situated, pray for relief in this Complaint as follows:

11 1. For an order certifying that the action may be maintained as a class
12 action, on behalf of the proposed class, the Consumer Subclass, and any other
13 subclass(es) the Court may deem appropriate;

14 **AS TO THE FIRST CLAIM FOR RELIEF**

15 1. For an award of monetary damages, including but not limited to,
16 compensatory, incidental and consequential damages commensurate with proof at
17 trial for the acts complained of herein;

18 2. For an award of punitive damages in an amount consistent with
19 applicable statutes and precedent;

20 **AS TO THE SECOND CLAIM FOR RELIEF**

21 3. For an order pursuant to California Civil Code section 1780(a)(2)
22 requiring Apple to **(a)** provide owners of Affected iPhones with notice that the slow
23 performance of those devices is caused by modifications Apple made to iOS; **(b)**
24 modify iOS in a manner that prevents it from slowing the performance of Affected
25 iPhones; and **(c)** provide current owners of Affected iPhones with new batteries for
26 those devices free of charge;

27 4. For an order awarding attorney fees and costs pursuant to California
28 Civil Code section 1780(e);

Exhibit 3

**U.S. District Court
California Northern District (San Francisco)
CIVIL DOCKET FOR CASE #: 3:17-cv-07292-VC**

Hakimi v. Apple Inc
Assigned to: Judge Vince Chhabria
Cause: 15:2301 Magnuson-Moss Warranty Act

Date Filed: 12/22/2017
Jury Demand: Plaintiff
Nature of Suit: 385 Prop. Damage Prod.
Liability
Jurisdiction: Federal Question

Plaintiff**Michael Hakimi**

represented by **Chaim Shaun Setareh**
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ATTORNEY TO BE NOTICED

V.

Defendant**Apple Inc**

Date Filed	#	Docket Text
12/22/2017	<u>1</u>	COMPLAINT against All Defendants (Filing fee \$ 400, receipt number 0971-11977603.). Filed by Apple Inc. (Attachments: # <u>1</u> Summons Summons, # <u>2</u> Civil Cover Sheet civil Cover Sheet)(Setareh, Chaim) (Filed on 12/22/2017) (Entered: 12/22/2017)

12/26/2017		Electronic filing error. Incorrect event used. [err101] The Summons should be filed under the Proposed Summons event not as an attachment to the complaint. Please re-file in its entirety. Re:[1-1] Summons filed by Apple Inc (jmlS, COURT STAFF) (Filed on 12/26/2017) (Entered: 12/26/2017)
12/26/2017	2	<p>Case assigned to Magistrate Judge Donna M. Ryu.</p> <p>Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit <i>E-Filing A New Civil Case</i> at http://cand.uscourts.gov/ecf/caseopening.</p> <p>Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 1/9/2018. (jmlS, COURT STAFF) (Filed on 12/26/2017) (Entered: 12/26/2017)</p>
12/27/2017	3	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Michael Hakimi.. (Setareh, Chaim) (Filed on 12/27/2017) (Entered: 12/27/2017)
12/27/2017	4	Proposed Summons. (Setareh, Chaim) (Filed on 12/27/2017) (Entered: 12/27/2017)
12/27/2017	5	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 3/28/2018. Initial Case Management Conference set for 4/4/2018 01:30 PM. (cpS, COURT STAFF) (Filed on 12/27/2017) (Entered: 12/27/2017)
12/28/2017	6	Summons Issued as to Apple Inc. (vlkS, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)
12/28/2017	7	<p>CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned.</p> <p>ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED.</p> <p><i>This is a text only docket entry; there is no document associated with this notice.</i> (vlkS, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)</p>
12/28/2017	8	ORDER REASSIGNING CASE. Case reassigned to Judge Sandra Brown Armstrong for all further proceedings. Magistrate Judge Donna M. Ryu no longer assigned to the case. Signed by the Executive Committee on 12/28/2017. (vlk, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)

12/28/2017	9	ORDER OF RECUSAL. Signed by Judge Sandra Brown Armstrong on 12/28/17. (dtmS, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)
12/28/2017	10	ORDER REASSIGNING CASE. Case reassigned to Judge Vince Chhabria for all further proceedings. Judge Sandra Brown Armstrong no longer assigned to the case. This case is assigned to a judge who participates in the Cameras in the Courtroom Pilot Project. See General Order 65 and http://cand.uscourts.gov/cameras. Signed by the Executive Committee on 12/28/2017. (Attachments: # 1 Notice of Eligibility for Video Recording)(vIk, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)

PACER Service Center			
Transaction Receipt			
01/02/2018 11:58:40			
PACER Login:	kaplanfox:2581070:0	Client Code:	Apple
Description:	Docket Report	Search Criteria:	3:17-cv-07292-VC
Billable Pages:	2	Cost:	0.20

**U.S. District Court
California Northern District (Oakland)
CIVIL DOCKET FOR CASE #: 4:17-cv-07292-DMR**

Hakimi v. Apple Inc
Assigned to: Magistrate Judge Donna M. Ryu
Cause: 15:2301 Magnuson-Moss Warranty Act

Date Filed: 12/22/2017
Jury Demand: Plaintiff
Nature of Suit: 385 Prop. Damage Prod.
Liability
Jurisdiction: Federal Question

Plaintiff**Michael Hakimi**

represented by **Chaim Shaun Setareh**
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Fax: 310-888-0109
Email: shaun@setarehlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant**Apple Inc**

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12/26/2017	2	Case assigned to Magistrate Judge Donna M. Ryu. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit <i>E-Filing A New Civil Case</i> at http://cand.uscourts.gov/ecf/caseopening . Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges . Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing

		(NEF) within two business days. Consent/Declination due by 1/9/2018. (jmlS, COURT STAFF) (Filed on 12/26/2017) (Entered: 12/26/2017)
12/27/2017	3	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Michael Hakimi.. (Setareh, Chaim) (Filed on 12/27/2017) (Entered: 12/27/2017)
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12/27/2017	5	Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 3/28/2018. Initial Case Management Conference set for 4/4/2018 01:30 PM. (cpS, COURT STAFF) (Filed on 12/27/2017) (Entered: 12/27/2017)
12/28/2017	6	Summons Issued as to Apple Inc. (vlkS, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)
12/28/2017	7	<p>CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned.</p> <p>ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED.</p> <p><i>This is a text only docket entry; there is no document associated with this notice.</i> (vlkS, COURT STAFF) (Filed on 12/28/2017) (Entered: 12/28/2017)</p>

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10
11

12 MICHAEL HAKIMI, on behalf of himself, all
13 others similarly situated,

14 *Plaintiff,*

15 vs.

16 APPLE INC., a California corporation; and
DOES 1 through 10, inclusive,

17 *Defendants.*
18
19
20
21
22
23

Case No.

CLASS ACTION

COMPLAINT

1. Strict Products Liability;
2. Negligence – Products Liability;
3. Violation of Consumer Legal Remedies Act;
4. Unfair Competition;
5. Breach of Written Warranty Pursuant to the Magnuson-Moss Warranty Act;
6. Breach of Express Warranty;
7. Breach of Implied Warranty of Merchantability;
8. Breach of the Implied Warranty of Fitness For a Particular Purpose;
9. Violation of California’s False Advertising Laws;
10. Fraud;
11. Unjust Enrichment

JURY TRIAL DEMANDED

1 COMES NOW, Plaintiff MICHAEL HAKIMI (“Plaintiff”), on behalf of himself and all
2 others similarly situated, complains and alleges against Defendant APPLE INC., a California
3 corporation (“Apple”); and DOES 1 through 50, inclusive (collectively referred to as
4 “Defendants”), as follows:

5 **INTRODUCTION**

6 1. Plaintiff brings this action individually and on behalf of all similarly situated persons
7 who purchased an iPhone 6, 6S, SE and 7 models (“Covered iPhones”).

8 2. Apple has now conceded that it pushed out software updates to consumers’ Covered
9 iPhones that limit the speed and performance of these devices thereby causing significant slow
10 performance, dropped calls, and excessive battery drain (the “Defect”). But this was never
11 disclosed to its consumers.

12 3. As a result of Apple’s conduct, millions of consumers may believe that the Covered
13 iPhones have become obsolete and deceived into upgrading to the newest iPhone models – the
14 iPhone 8 and/or iPhone X.

15 **PARTIES**

16 4. Plaintiff MICHAEL HAKIMI is, and at all relevant times mentioned herein, an
17 individual residing in the State of California.

18 5. Defendant APPLE INC. is, and at all relevant times mentioned herein, a corporation
19 organized under the laws of California and doing business in this state.

20 6. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as
21 DOES 1 through 50, inclusive, and therefore sue these defendants by such fictitious names.
22 Plaintiff will amend this Complaint to allege the true names and capacities of the DOE defendants
23 when ascertained. Plaintiff is informed and believes, and thereupon alleges that each of the
24 fictitiously named defendants are responsible in some manner for the occurrences, acts and
25 omissions alleged herein and that Plaintiff’s alleged damages were proximately caused by these
26 defendants, and each of them.

27 7. Plaintiff is informed and believes, and thereupon alleges that, at all relevant times
28 mentioned herein, some or all of the defendants were the representatives, agents, employees,

1 partners, directors, associates, joint venturers, principals or co-participants of some or all of the
2 other defendants, and in doing the things alleged herein, were acting within the course and scope of
3 such relationship and with the full knowledge, consent and ratification by such other defendants.

4 **JURISDICTION AND VENUE**

5 8. This Court has jurisdiction over this class action under the Class Action Fairness
6 Act, 28 U.S.C. section 1332(d). The aggregated claims of the individual Class Members exceed the
7 sum or value of \$5,000,000, exclusive of interest and costs, and this is a class action in which
8 Plaintiff and members of the class, on the one hand, and Apple, on the other, are citizens of
9 different states.

10 9. This Court has jurisdiction over Apple because Apple maintains its principal
11 headquarters in California, is registered to conduct business in California, and has sufficient
12 minimum contacts in California. Apple intentionally avails itself of the California consumer market
13 through the promotion, sale, marketing, and distribution of its products to California residents. As a
14 result, jurisdiction in this court is proper and necessary. Moreover, Apple's wrongful conduct, as
15 described herein, emanates from California and foreseeably affects consumers in California and
16 nationwide. Most, if not all, of the events complained of below occurred in or emanated from
17 Apple's corporate headquarters located in Cupertino, California. Plaintiff's counsel's Declaration,
18 as required under California Code of Civil Procedure section 1780(d), is attached as Exhibit 1.

19 10. Venue is proper in this District under 28 U.S.C. section 1391(a)-(c) because, inter
20 alia, substantial parts of the events or omissions giving rise to the claim occurred in the District
21 and/or a substantial part of property that is the subject of the action is situated in the District.

22 **CLASS ALLEGATIONS**

23 11. This action has been brought and may be maintained as a class action pursuant to
24 Federal Rules of Civil Procedure 23 because there is a well-defined community of interest among
25 the persons who comprise the readily ascertainable classes defined below and because Plaintiff is
26 unaware of any difficulties likely to be encountered in managing this case as a class action.

27 12. **Relevant Time Period:** The relevant time period is defined as the time period
28 beginning four years prior to the filing of this action until judgment is entered.

1 **National iPhone Class:** All persons and entities in the United States (including its
2 Territories and the District of Columbia) who currently or formerly owned an iPhone 6, 6S,
SE and 7 during the **Relevant Time Period**.

3 **California iPhone Sub-Class:** All **National iPhone Class** members who currently
4 or formerly resided in California.

5 13. Excluded from the class are: (1) Apple, its subsidiaries, and its legal representatives,
6 officers, directors, assigns and successors; and (2) all state and/or federal court judges who may
7 preside over this case, their staff, and their immediate family members.

8 14. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiff reserves the
9 right to amend or modify the class definitions with greater specificity, by further division into sub-
10 classes and/or by limitation to particular issues.

11 15. **Numerosity:** The class members are so numerous that the individual joinder of each
12 individual class member is impractical. While Plaintiff does not currently know the exact number
13 of class members, Plaintiff is informed and believes, and thereupon alleges that the actual number
14 exceeds the minimum required for numerosity under California law.

15 16. **Commonality and Predominance:** Common questions of law and fact exist as to
16 all class members and predominate over any questions which affect only individual class members.

17 These common questions include, but are not limited to:

- 18 A. Whether Defendants are liable under strict products liability for damages to
19 Plaintiff and the Class Members;
- 20 B. Whether Defendants are liable for negligence for products liability and
21 damages to Plaintiff and Class Members;
- 22 C. Whether Defendants reasonably should have notified consumers before it
23 implemented any kind of software update that limited the speed and/or
24 performance of consumers' iPhones;
- 25 D. Whether Defendants had a duty to disclose the nature of any defect to
26 Plaintiff and the Class Members;
- 27 E. Whether Defendants failed to disclose or concealed material information
28 concerning any defects;

- 1 F. Whether Defendants’ conduct and business practices violate the Consumer
- 2 Legal Remedies Act (“CLRA”) Civil Code section 1750 *et seq.*;
- 3 G. Whether Defendants’ conduct and business practices violate the Unfair
- 4 Competition Law (“UCL”) Business and Professions Code section 17200 *et*
- 5 *seq.*;
- 6 H. Whether Defendants breached any express or implied warranties;
- 7 I. Whether Defendants violated California false advertising laws;
- 8 J. Whether Defendants engaged in fraud;
- 9 K. Whether Defendants are liable for unjust enrichment to Plaintiff and the Class
- 10 Members;
- 11 L. Whether Plaintiff and the Class Members are entitled to relief, and the
- 12 amount and nature of such relief, including relief in the form of an injunction
- 13 and/or restitution.

14 17. **Typicality:** Plaintiff’s claims are typical of the other class members’ claims.
15 Plaintiff and all members of the Class have been damaged by the same wrongful conduct by
16 Defendants. Like the other Class Members, Plaintiff purchased a defective iPhone.

17 18. **Adequacy of Class Representative:** Plaintiff is an adequate class representative in
18 that he has no interests that are adverse to, or otherwise conflict with, the interests of absent class
19 members and is dedicated to vigorously prosecuting this action on their behalf. Plaintiff will fairly
20 and adequately represent and protect the interests of the other class members.

21 19. **Adequacy of Class Counsel:** Plaintiff’s counsel are adequate class counsel in that
22 they have no known conflicts of interest with Plaintiff or absent class members, are experienced in
23 complex class action litigation, and are dedicated to vigorously prosecuting this action on behalf of
24 Plaintiff and absent class members.

25 20. **Superiority:** A class action is vastly superior to other available means for fair and
26 efficient adjudication of the class members’ claims and would be beneficial to the parties and the
27 Court. Class action treatment will allow a number of similarly situated persons to simultaneously
28 and efficiently prosecute their common claims in a single forum without the unnecessary

1 duplication of effort and expense that numerous individual actions would entail. In addition, the
2 monetary amounts due to many individual class members are likely to be relatively small and would
3 thus make it difficult, if not impossible, for individual class members to both seek and obtain relief.
4 Moreover, a class action will serve an important public interest by permitting class members to
5 effectively pursue the recovery of monies owed to them. Further, a class action will prevent the
6 potential for inconsistent or contradictory judgments inherent in individual litigation.

7 **GENERAL ALLEGATIONS**

8 21. Plaintiff owns an iPhone and encountered many of the issues encountered by other
9 iPhone owners such as significantly slow performance, dropped calls and excessive battery drain
10 when using his device.

11 22. Apple designs, manufactures, distributes, and sells the iPhones. On information and
12 belief, Apple has sold, directly or indirectly through other retailers, millions of iPhones in
13 California, the United States and throughout the world.

14 23. The Covered iPhones are defective, including but not limited to the Defect in the
15 design and manufacture of the device causing it to shut down unexpectedly.

16 24. Apple responded with an official statement as follows:

17 Our goal is to deliver the best experience for customers, which includes overall performance and
18 prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current
19 demands when in cold conditions, have a low battery charge or as they age over time, which can result in
20 the device unexpectedly shutting down to protect its electronic components.

21 Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous
22 peaks only when needed to prevent the device from unexpectedly shutting down during these conditions.
23 We've now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in
24 the future.

22 **FIRST CAUSE OF ACTION**

23 **STRICT PRODUCTS LIABILITY**

24 25. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
25 fully alleged herein.

26 26. At all times mentioned herein, Defendants designed, manufactured, assembled,
27 analyzed, recommended, merchandised, advertised, promoted, distributed, supplied, and sold to
28 distributors and retailers for sale, smartphones known as "iPhones" and/or its component parts.

1 27. Defendants manufactured, designed, promoted and/or sold the Covered iPhones and
2 their component parts to the public, knowing that the Covered iPhones would be purchased or used
3 without inspection for defects by the general public, including Plaintiff and the Class Members.

4 28. The Covered iPhones were defective and did not function according to its intended
5 use by reason of defects in its manufacture, design, testing, components and constituents, so that it
6 would not properly serve its purpose, but would instead slow down significantly, drop calls, and
7 cause excessive battery drain because of the failure of Defendants to properly design and
8 manufacture the Covered iPhones.

9 29. Defendants designed and manufactured the Covered iPhones defectively, causing it
10 to fail to perform as an ordinary consumer would expect when used in an intended or reasonably
11 foreseeable manner.

12 30. Defendants knew or should have known of the defects that would arise in the
13 reasonably foreseeable use of the Covered iPhones, whose defective design, manufacturing, and
14 lack of sufficient warnings caused them to have an unreasonably propensity to suffer from
15 component failure, thereby causing significantly slow performance, dropped calls, and excessive
16 battery drain.

17 31. Defendants failed to adequately warn of the defects known or knowable at the time
18 of the defective Covered iPhones design, manufacture, and distribution.

19 32. Defendants failed to provide adequate warnings, instructions, guidelines or
20 admonitions to members of the consuming public, including Plaintiff and the Class Members, of the
21 design and manufacturing defects, which Defendants knew, or in the exercise of reasonable care
22 should have known, to have existed in the Covered iPhones, and its component parts.

23 33. Plaintiff and the Class Members were not aware of the aforementioned defects at any
24 time regarding the Covered iPhones prior to purchasing and/or upgrading to the newer iPhone 8
25 and/or iPhone X.

26 34. As a direct and proximate result of the aforementioned defects in the Covered
27 iPhones, Plaintiff and the Class Members sustained injures and damages in an amount according to
28 proof at trial.

SECOND CAUSE OF ACTION

NEGLIGENCE – PRODUCTS LIABILITY

1
2
3 35. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
4 fully alleged herein.

5 36. At all times mentioned, Defendants designed, manufactured, assembled, analyzed,
6 recommended, merchandised, advertised, promoted, distributed, supplied, and sold to distributors
7 and retailers for sale, smartphones known as “iPhones” and/or its component parts.

8 37. Defendants manufactured, designed, promoted and/or sold the Covered iPhones and
9 its component parts to the public, including to Plaintiff and the Class Members.

10 38. Defendants owed Plaintiff and the Class Members a duty to exercise reasonable care
11 in the design, testing, manufacture, assembly, sale, distribution and servicing of the Covered
12 iPhones, including a duty to assure that the Covered iPhones were free of defects and/or to repair
13 any defects that are discovered.

14 39. Defendants knew or should have known that the Covered iPhones were defectively
15 designed and manufactured and was therefore prone to problems under normal operating conditions,
16 potentially causing consumers to spend money for repairs and ultimately for replacing their devices.

17 40. Defendants failed to exercise ordinary care and breached its duty by, among other
18 things:

- 19 a. Failure to use due care in the manufacture, distribution, design, sale, testing,
20 and servicing of the Covered iPhones and its component parts in order to
21 avoid the aforementioned risks to individuals;
- 22 b. Failure to provide adequate warning of component failure, thereby causing
23 significantly slow performance, dropped calls, and excessive battery drain;
- 24 c. Failure to incorporate within the Covered iPhones and its design reasonable
25 safeguards and protections against component failure, thereby causing
26 significantly slow performance, dropped calls, and excessive battery drain;
- 27 d. Failure to make time correction to the design of the Covered iPhones to
28 correct the component failure, thereby causing significantly slow

- 1 performance, dropped calls, and excessive battery drain;
- 2 e. Failure to adequately identify and mitigate the hazards associated with
- 3 component failure, thereby causing significantly slow performance, dropped
- 4 calls, and excessive battery drain;
- 5 f. Such other acts of negligence as discovery shall reveal.

6 41. As a direct and proximate result of the aforementioned negligence, carelessness, and
7 other tortious, unlawful and wrongful acts and omissions of Defendants, and its respective agents,
8 servants, employees and authorized representatives as mentioned above, Plaintiff has suffered
9 damages in an amount to be proven at trial.

10 **THIRD CAUSE OF ACTION**
11 **VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**
12 **(Cal. Civ. Code § 1750 *et seq.*)**

13 42. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
14 fully alleged herein.

15 43. Apple is a “person” within the meaning of Civil Code sections 1761(d) and 1770,
16 and it provides “goods” within the meaning of Civil Code section 1761(a) and 1770.

17 44. Plaintiff and the Class Members are “consumers” who purchased an iPhone for
18 business purposes and personal, family, or household purposes within the meaning of California
19 Civil Code section 1761(d) and 1770. Plaintiff and the Class Member’s purchase of an iPhone
20 constitutes a “transaction” within the meaning of Civil Code section 1761(e) and 1770.

21 45. By failing to disclose and concealing the defects in the iPhones from Plaintiff and the
22 Class Members, Apple violated California Civil Code section 1770(a), as it represented that the
23 iPhones had characteristics and benefits they do not have and represented that the iPhones were of a
24 particular standard, quality, or grade when they were of another. See, Cal. Civ. Code § 1770(a)(5)
25 and (7).

26 46. Apple has engaged in business practices that violate the CLRA including, without
27 limitation, failing to disclose or concealing that the iPhones were manufactured with certain defects.
28 Apple’s unfair and deceptive acts or practices occurred repeatedly in Apple’s trade or business and

1 were capable of deceiving a substantial portion of the purchasing public.

2 47. Apple knew that the iPhones contained certain defects, yet it instead released
3 software updates that would slow down the speed and performance of iPhones without notifying its
4 consumers or obtaining their consent.

5 48. Apple has duty to Plaintiff and the Class Members to disclose the nature of any
6 defects along with the scope of software update it released to compensate for those defects because:

- 7 a. Apple was in a superior position to know the true state of facts about any
8 defects and the software updates it created to compensate for those defects;
9 b. Plaintiff and the Class Members could not reasonably have been expected to
10 learn or discover the true nature of any defects until they experienced the
11 defects without the software updates masking those defects;
12 c. Apple knew that Plaintiff and the Class Members could not reasonably have
13 been expected to learn about or discover the change made by the software
14 updates.

15 49. By failing to disclose the nature of the software updates and by limiting the speed
16 and performance of the Covered iPhones, Apple has knowingly and intentionally concealed
17 materials facts and breached its duty not to do so.

18 50. The facts concealed or not disclosed by Apple to Plaintiff and the Class Members are
19 material because a reasonable consumer would have considered them to be important in deciding
20 whether or not to replace their Covered iPhones with a newer model. Had Plaintiff and the Class
21 Members known that the speed and performance of the Covered iPhones were intentionally affected
22 by the software updates released by Apple, they would not have purchased a newer iPhone model
23 nor would they have upgraded to the iPhone 8 or X.

24 51. Plaintiff and the Class Members are reasonable consumers who do not expect the
25 speed and performance of their Covered iPhones to slow down with normal use. That is the
26 reasonable and objective consumer expectation for smartphones.

27 52. As a result of Apple's acts and practices alleged herein, Plaintiff and the Class
28 Members suffered actual damages in that their Covered iPhones are now slower and do not perform

1 as well as it otherwise would have absent the software updates imposed by Apple limiting the speed
2 and performance of the Covered iPhones.

3 53. Plaintiff and the Class Members are entitled to equitable relief.

4 54. Plaintiff has provided Apple with notice of its alleged violations of the CLRA
5 pursuant to California Civil Code section 1782(a). If, within 30 days of the date of the notification
6 letter, Apple fails to provide appropriate relief for its violation of the CLRA, Plaintiff will amend
7 this Complaint to seek monetary, compensatory, and punitive damages, in addition to the injunctive
8 and equitable relief that Plaintiff seeks now.

9 **FOURTH CAUSE OF ACTION**

10 **UNFAIR COMPETITION**

11 **(Bus. and Prof. Code § 17200 *et seq.*)**

12 55. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
13 fully alleged herein.

14 56. Apple knew the Covered iPhones' were defective and that it would ultimately cause
15 the Covered iPhones to slow down significantly, drop calls, cause excessive battery drain and shut
16 down unexpectedly.

17 57. In failing to disclose the Defect, Apple knowingly and intentionally concealed
18 material facts and breached its duty not to do so.

19 58. Apple was under a duty to Plaintiff and the Class Members to disclose the defective
20 nature of the Covered iPhones because:

- 21 d. Apple was in a superior position to know the true state of facts about the
22 Defect;
- 23 e. Apple made partial disclosures about the quality of the Covered iPhones
24 without revealing the defective nature of the Covered iPhones and the fact
25 that the device would become defective with normal use;
- 26 f. Apple actively concealed the defective nature of the Covered iPhones from
27 Plaintiff and the Class Members;
- 28 g. Apple knew that Plaintiff and the Class Members could not reasonably have

1 been expected to learn about or discover the Defect.

2 59. The facts concealed or not disclosed by Apple to Plaintiff and the Class Members are
3 material because a reasonable person would have considered them to be important in deciding
4 whether or not to purchase or upgrade to the newer iPhone 8 or X. Had Plaintiff and the Class
5 Members known that the Covered iPhones suffered from the Defect described in the Complaint,
6 they would not have purchased the Covered iPhones; and if they had already purchased a Covered
7 iPhones they would not have purchased or upgraded to the newer iPhone 8 or X.

8 60. Apple continued to conceal the defective nature of the Covered iPhones even after
9 Class Members began to report problems. Indeed, Apple continues to cover up and conceal the true
10 nature of the problem and deny valid warranty claims.

11 61. By this conduct, Apple has engaged in unfair competition and unlawful, unfair, and
12 fraudulent business practices.

13 62. Apple's unfair or deceptive acts or practices occurred repeatedly in Apple's trade or
14 business and were capable of deceiving a substantial portion of the purchasing public.

15 63. As a direct and proximate result of Apple's unfair and deceptive practices, Plaintiff
16 and the Class Members have suffered and will continue to suffer actual damages.

17 64. Apple has been unjustly enriched and should be required to make restitution to
18 Plaintiff and the Class Members pursuant to Bus. and Prof. Code sections 17203 and 17204.

19 **FIFTH CAUSE OF ACTION**

20 **BREACH OF EXPRESS WARRANTY UNDER THE**

21 **MAGNUSON-MOSS WARRANTY ACT**

22 **(15 U.S.C. § 2301 *et seq.*)**

23 65. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
24 fully alleged herein.

25 66. Plaintiff and the Class Members are "consumers" within the meaning of the
26 Magnuson-Moss Warranty Act, 15 U.S.C. section 2301(3).

27 67. Apple is a "supplier" and "warrantor" within the meaning of 15 U.S.C. sections
28 2301(4)-(5).

1 68. The Covered iPhones are “consumer products” within the meaning of 15 U.S.C.
2 section 2301(1).

3 69. Apple’s Warranty is a “written warranty” within the meaning of 15 U.S.C. section
4 2301(6).

5 70. Apple breached the Warranty by:

- 6 h. Extending a one-year limited warranty with the purchase of Covered iPhones,
7 thereby warranting to repair or replace Covered iPhones defective in material
8 or workmanship at no cost to the owner;
- 9 i. Selling the Covered iPhones with defective design and/or manufacture such
10 that the devices would shut down unexpectedly with normal use, requiring
11 repair or replacement within the warranty period;
- 12 j. Refusing to honor the express warranty by refusing to properly to properly
13 repair or replace the Covered iPhones with properly functioning devices,
14 instead pushing software updates which failed to repair the defect; and
- 15 k. Refusing to honor the express warranty by repairing or replacing the Covered
16 iPhones with non-defective parts.

17 71. Apple’s breach of the express warranty deprived Plaintiff and the Class Members of
18 the benefits of their bargains.

19 72. The amount in controversy of Plaintiff’s individual claim meets or exceeds the sum
20 or value of \$50,000. In addition, the amount in controversy meets or exceeds the sum or value of
21 \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in
22 this suit.

23 73. Apple has been afforded a reasonable opportunity to cure its breach of written
24 warranty, including when Plaintiff and the Class Members notified Apple of the defect and
25 requested a proper repair.

26 74. As a direct and proximate result of Apple’s breach of written warranty, Plaintiff and
27 the Class Members sustained damages and other losses in an amount to be determined at trial.
28 Apple’s conduct damaged Plaintiff and the Class Members, who are entitled to recover damages,

1 consequential damages, specific performance, diminution in value, costs, attorneys' fees, rescission,
2 and/or other relief as appropriate.

3 **SIXTH CAUSE OF ACTION**

4 **BREACH OF EXPRESS WARRANTY**

5 75. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
6 fully alleged herein.

7 76. Apple warranted that each Covered iPhones was free of defects when it sold the
8 devices to Plaintiff and the Class Members as described in this Complaint. Under the terms of
9 Apple's Warranty, each Covered iPhones came with an express Warranty that warrants that the
10 device will be free from defects in materials and workmanship under normal use during the
11 warranty period.

12 77. This Warranty because part of the basis of the bargain. Accordingly, Apple's
13 Warranty is an express warranty.

14 78. Apple breached the express warranty by:

- 15 l. Extending a one-year limited warranty with the purchase of a Covered
16 iPhones, thereby warranting to repair or replace devices defective in material
17 or workmanship at no cost to the owner;
- 18 m. Selling Covered iPhones with defective design and/or manufacture such that
19 the devices would develop battery issues with normal use, requiring repair or
20 replacement within the warranty period;
- 21 n. Refusing to honor the express warranty by repairing or replacing the Covered
22 iPhones free of charge, instead pushing out software updates that masked the
23 problem and which failed to repair the defect; and
- 24 o. Refusing to honor the express warranty by repairing or replacing the Covered
25 iPhones with non-defective parts.

26 79. Plaintiff provided Apple with timely notice of its breach of warranty. Apple was
27 also on notice of the Defect from the complaints and service requests it received from Class
28 Members, internet message boards and support forums maintained by Apple, and from published

1 product reviews.

2 80. As a direct and proximate result of Apple's breach of warranty, Plaintiff and each of
3 the Class Members have suffered damages and continue to suffer damages, including economic
4 damages at the point of sale, *i.e.*, the difference between the value of the Covered iPhones as
5 promised and the value of the devices as delivered. Additionally, Plaintiff and the Class Members
6 either have incurred or will incur economic damages at the point of repair in the form of the cost of
7 repair and/or the cost of purchasing a non-defective device to replace the Covered iPhones.

8 81. Plaintiff and the Class Members are entitled to legal and equitable relief against
9 Apple, including damages, consequential damages, specific performance, rescission, attorneys' fees,
10 costs of suit, and other relief as appropriate.

11 **SEVENTH CAUSE OF ACTION**

12 **BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY**

13 82. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
14 fully alleged herein.

15 83. Apple impliedly warranted to members of the general public, including Plaintiff and
16 the Class Members, that the Covered iPhones was of merchantable quality and safe for the use for
17 which it was intended by Defendants, namely, for the purpose of use as a mobile cellphone device
18 used to make calls, listening to music, accessing the internet, taking photos and videos, and for
19 other related activities.

20 84. The Covered iPhones were not merchantable and fit for its ordinary purpose, because
21 the battery used to power it had a propensity to degrade over time thereby causing the device to shut
22 down unexpectedly. The Covered iPhones were not of merchantable quality as warranted by
23 Defendant, in that it was defectively designed and manufactured, thereby causing it to shut down
24 and stop working.

25 85. In order resolve the Defects, Defendants pushed a software update that slowed down
26 the speed and performance of the Covered iPhones thereby concealing the deteriorated and
27 degraded batteries. From all outward appearances, consumers were led to believe that their
28 Covered iPhones were still operating albeit slower and with significantly less performance which

1 undoubtedly led millions of consumers to believe that their devices were obsolete and therefore they
2 should replace them with a newer iPhone model.

3 86. Plaintiff reasonably relied on Defendants' representations that the Covered iPhones
4 were free of defects.

5 87. As a direct and proximate result of the breach of the implied warranty of
6 merchantability, Plaintiff and the Class Members suffered damages herein and are therefore entitled
7 to damages in an amount according to proof at trial.

8 **EIGHTH CAUSE OF ACTION**

9 **BREACH OF IMPLIED WARRANTY OF FITNESS**

10 **FOR A PARTICULAR PURPOSE**

11 88. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
12 fully alleged herein.

13 89. Apple impliedly warranted to members of the general public, including Plaintiff and
14 the Class Members, that the Covered iPhones was fit for the particular purpose for which it was
15 intended by the Defendants, namely, for the purpose of use as a mobile cellphone device used to
16 make calls, listening to music, accessing the internet, taking photos and videos, and for other related
17 activities.

18 90. The Covered iPhones were not fit for the particular purpose for which it was
19 intended because the battery used to power it had a propensity to degrade over time thereby causing
20 the device to shut down unexpectedly. The Covered iPhones were not fit for the particular purpose
21 for which it was intended, in that it was defectively designed and manufactured, thereby causing it
22 to shut down and stop working.

23 91. In order resolve the Defects, Defendants pushed a software update that slowed down
24 the speed and performance of the Covered iPhones thereby concealing the deteriorated and
25 degraded batteries. From all outward appearances, consumers were led to believe that their
26 Covered iPhones were still operating albeit slower and with significantly less performance which
27 undoubtedly led millions of consumers to believe that their devices were obsolete and therefore they
28 should replace them with a newer iPhone model.

TENTH CAUSE OF ACTION

FRAUD

1
2
3 100. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
4 fully alleged herein.

5 101. Defendants made material misrepresentations that were false and that were either
6 known to be false when made or were asserted without knowledge of their truth. Defendants has in
7 the possession adverse incident reports, warranty work orders and other documentation about the
8 defects in the Covered iPhones yet made the following misrepresentations:

- 9 a. Misrepresentations regarding the existence, occurrence and frequency of
10 occurrences, severity and extent of the defects causing significantly slow
11 performance, dropped calls, and excessive battery drain;
12 b. Misrepresentations as to the root cause of the defects causing significantly
13 slow performance, dropped calls, and excessive battery drain;
14 c. Misrepresentations as to the nature, seriousness, severity of adverse incident
15 reports regarding significantly slow performance, dropped calls, and
16 excessive battery drain;

17 102. Defendants intended that these misrepresentations be relied upon by the general
18 consuming public, including Plaintiff and the Class Members. Plaintiff and the Class Members did
19 rely upon the misrepresentations that ultimately caused Plaintiff to purchase and/or upgrade to a
20 newer iPhone 8 and/or iPhone X.

21 103. Plaintiff is informed and believes and thereupon alleges that Defendants and each of
22 them in doing the things herein alleged acted willfully, maliciously, oppressively and despicably
23 with the full knowledge of the adverse effect of their actions on Plaintiff and the Class Members,
24 and with willful and deliberate disregard of the consequences to Plaintiff and the Class Members.
25 By reason thereof, Plaintiff and the Class Members are entitled to recover punitive and exemplary
26 damages from Defendants in an amount according to proof at trial.

27 ///

28 ///

ELEVENTH CAUSE OF ACTION

UNJUST ENRICHMENT

1
2
3 104. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
4 fully alleged herein.

5 105. Plaintiff and the Class Members conferred benefits on Defendants by purchasing the
6 Covered iPhones.

7 106. Defendants have been unjustly enriched in retaining the revenues derived from
8 Plaintiff and the Class Members' purchases of the defective devices that were improperly
9 manufactured, supplied, and/or distributed into the stream of commerce. Retention of those monies
10 under these circumstances is unjust and inequitable because Defendants misrepresented that the
11 Covered iPhones were of a quality fit for the purpose for which they were intended. These
12 misrepresentations caused injuries to Plaintiff and the Class Members because they would not have
13 purchased the Covered iPhones if the true facts had been known.

14 107. Because Defendants' retention of the benefits conferred on them by Plaintiff and the
15 Class Members is unjust and inequitable, Defendants must pay restitution to Plaintiffs and the Class
16 members for their unjust enrichment, as ordered by the Court.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- (1) An order certifying that this action may be maintained as a class action;
 - (2) An order that Plaintiff be appointed Class Representative;
 - (3) An order that Plaintiff’s counsel be appointed Class Counsel;
 - (4) For general and special damages, according to proof;
 - (5) For restitution and other equitable relief;
 - (6) For pre- and post-judgment interest, according to proof;
 - (7) For costs of suit, including reasonable attorneys’ fees, as permitted by law;
- and
- (8) For such other and further relief as the Court may deem just and proper.

DATED: December 22, 2017

SETAREH LAW GROUP

/s/ Shaun Setareh
 SHAUN SETAREH
 Attorneys for Plaintiff
 MICHAEL HAKIMI

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of California

MICHAEL HAKIMI, on behalf of himself, all others
similarly situated,

Plaintiff(s)

v.

APPLE INC., a California corporation; and DOES 1
through 10, inclusive,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) APPLE INC.
c/o CT CORPORATION SYSTEM
818 W Seventh Street, Suite 930
Los Angeles, California 90017

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

Shaun Setareh (SBN 204514)
SETAREH LAW GROUP
9454 Wilshire Boulevard, Suite 907
Beverly Hills, California 90212
Telephone (310) 888-7771
Facsimile (310) 888-0109

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS</p> <p>MICHAEL HAKIMI, on behalf of himself, all others similarly situated,</p> <p>(b) County of Residence of First Listed Plaintiff <u>Los Angeles</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys <i>(Firm Name, Address, and Telephone Number)</i> Shaun Setareh (SBN 204514) SETAREH LAW GROUP 9454 Wilshire Boulevard, Suite 907, Beverly Hills, CA 90212</p>	<p>DEFENDANTS</p> <p>APPLE INC.</p> <p>County of Residence of First Listed Defendant <u>Santa Clara</u> <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys <i>(If Known)</i></p>
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<p>II. BASIS OF JURISDICTION <i>(Place an "X" in One Box Only)</i></p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i></p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i></p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i></p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
	PTF	DEF		PTF	DEF																				
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4																				
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. NATURE OF SUIT *(Place an "X" in One Box Only)* Click here for: [Nature of Suit Code Descriptions.](#)

<p>CONTRACT</p> <p><input type="checkbox"/> 110 Insurance</p> <p><input type="checkbox"/> 120 Marine</p> <p><input type="checkbox"/> 130 Miller Act</p> <p><input type="checkbox"/> 140 Negotiable Instrument</p> <p><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><input type="checkbox"/> 152 Recovery of Defaulted Student Loans <i>(Excludes Veterans)</i></p> <p><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits</p> <p><input type="checkbox"/> 160 Stockholders' Suits</p> <p><input type="checkbox"/> 190 Other Contract</p> <p><input type="checkbox"/> 195 Tort Contract Product Liability</p> <p><input type="checkbox"/> 196 Franchise</p>	<p>TORTS</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers' Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p><input type="checkbox"/> 362 Personal Injury - Medical Malpractice</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 365 Personal Injury - Product Liability</p> <p><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</p> <p>PERSONAL PROPERTY</p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input checked="" type="checkbox"/> 385 Property Damage Product Liability</p>	<p>FORFEITURE/PENALTY</p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 690 Other</p> <p>LABOR</p> <p><input type="checkbox"/> 710 Fair Labor Standards Act</p> <p><input type="checkbox"/> 720 Labor/Management Relations</p> <p><input type="checkbox"/> 740 Railway Labor Act</p> <p><input type="checkbox"/> 751 Family and Medical Leave Act</p> <p><input type="checkbox"/> 790 Other Labor Litigation</p> <p><input type="checkbox"/> 791 Employee Retirement Income Security Act</p> <p>IMMIGRATION</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>	<p>BANKRUPTCY</p> <p><input type="checkbox"/> 422 Appeal 28 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p>PROPERTY RIGHTS</p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 835 Patent - Abbreviated New Drug Application</p> <p><input type="checkbox"/> 840 Trademark</p> <p>SOCIAL SECURITY</p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p>FEDERAL TAX SUITS</p> <p><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)</p> <p><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609</p>	<p>OTHER STATUTES</p> <p><input type="checkbox"/> 375 False Claims Act</p> <p><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 410 Antitrust</p> <p><input type="checkbox"/> 430 Banks and Banking</p> <p><input type="checkbox"/> 450 Commerce</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Sat TV</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 890 Other Statutory Actions</p> <p><input type="checkbox"/> 891 Agricultural Acts</p> <p><input type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 895 Freedom of Information Act</p> <p><input type="checkbox"/> 896 Arbitration</p> <p><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p>
<p>REAL PROPERTY</p> <p><input type="checkbox"/> 210 Land Condemnation</p> <p><input type="checkbox"/> 220 Foreclosure</p> <p><input type="checkbox"/> 230 Rent Lease & Ejectment</p> <p><input type="checkbox"/> 240 Torts to Land</p> <p><input type="checkbox"/> 245 Tort Product Liability</p> <p><input type="checkbox"/> 290 All Other Real Property</p>	<p>CIVIL RIGHTS</p> <p><input type="checkbox"/> 440 Other Civil Rights</p> <p><input type="checkbox"/> 441 Voting</p> <p><input type="checkbox"/> 442 Employment</p> <p><input type="checkbox"/> 443 Housing/Accommodations</p> <p><input type="checkbox"/> 445 Amer. w/Disabilities - Employment</p> <p><input type="checkbox"/> 446 Amer. w/Disabilities - Other</p> <p><input type="checkbox"/> 448 Education</p>	<p>PRISONER PETITIONS</p> <p>Habeas Corpus:</p> <p><input type="checkbox"/> 463 Alien Detainee</p> <p><input type="checkbox"/> 510 Motions to Vacate Sentence</p> <p><input type="checkbox"/> 530 General</p> <p><input type="checkbox"/> 535 Death Penalty</p> <p>Other:</p> <p><input type="checkbox"/> 540 Mandamus & Other</p> <p><input type="checkbox"/> 550 Civil Rights</p> <p><input type="checkbox"/> 555 Prison Condition</p> <p><input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement</p>		

V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District *(specify)* 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
15 U.S.C. section 2301

Brief description of cause:
breach of express warranty

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE: 12/22/2017 SIGNATURE OF ATTORNEY OF RECORD: /s/ Shaun Setareh

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

1 Shaun Setareh (SBN 204514)
shaun@setarehlaw.com
2 Thomas Segal (SBN 222791)
thomas@setarehlaw.com
3 SETAREH LAW GROUP
9454 Wilshire Boulevard, Suite 907
4 Beverly Hills, California 90212
Telephone (310) 888-7771
5 Facsimile (310) 888-0109

6 Attorneys for Plaintiff
MICHAEL HAKIMI

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

12 MICHAEL HAKIMI, on behalf of himself, all
13 others similarly situated,

14 *Plaintiff,*

15 vs.

16 APPLE INC., a California corporation; and
DOES 1 through 10, inclusive,

17 *Defendants.*

Case No.

CLASS ACTION

COMPLAINT

1. Strict Products Liability;
2. Negligence – Products Liability;
3. Violation of Consumer Legal Remedies Act;
4. Unfair Competition;
5. Breach of Written Warranty Pursuant to the Magnuson-Moss Warranty Act;
6. Breach of Express Warranty;
7. Breach of Implied Warranty of Merchantability;
8. Breach of the Implied Warranty of Fitness For a Particular Purpose;
9. Violation of California’s False Advertising Laws;
10. Fraud;
11. Unjust Enrichment

JURY TRIAL DEMANDED

1 COMES NOW, Plaintiff MICHAEL HAKIMI (“Plaintiff”), on behalf of himself and all
2 others similarly situated, complains and alleges against Defendant APPLE INC., a California
3 corporation (“Apple”); and DOES 1 through 50, inclusive (collectively referred to as
4 “Defendants”), as follows:

5 **INTRODUCTION**

6 1. Plaintiff brings this action individually and on behalf of all similarly situated persons
7 who purchased an iPhone 6, 6S, SE and 7 models (“Covered iPhones”).

8 2. Apple has now conceded that it pushed out software updates to consumers’ Covered
9 iPhones that limit the speed and performance of these devices thereby causing significant slow
10 performance, dropped calls, and excessive battery drain (the “Defect”). But this was never
11 disclosed to its consumers.

12 3. As a result of Apple’s conduct, millions of consumers may believe that the Covered
13 iPhones have become obsolete and deceived into upgrading to the newest iPhone models – the
14 iPhone 8 and/or iPhone X.

15 **PARTIES**

16 4. Plaintiff MICHAEL HAKIMI is, and at all relevant times mentioned herein, an
17 individual residing in the State of California.

18 5. Defendant APPLE INC. is, and at all relevant times mentioned herein, a corporation
19 organized under the laws of California and doing business in this state.

20 6. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as
21 DOES 1 through 50, inclusive, and therefore sue these defendants by such fictitious names.
22 Plaintiff will amend this Complaint to allege the true names and capacities of the DOE defendants
23 when ascertained. Plaintiff is informed and believes, and thereupon alleges that each of the
24 fictitiously named defendants are responsible in some manner for the occurrences, acts and
25 omissions alleged herein and that Plaintiff’s alleged damages were proximately caused by these
26 defendants, and each of them.

27 7. Plaintiff is informed and believes, and thereupon alleges that, at all relevant times
28 mentioned herein, some or all of the defendants were the representatives, agents, employees,

1 partners, directors, associates, joint venturers, principals or co-participants of some or all of the
2 other defendants, and in doing the things alleged herein, were acting within the course and scope of
3 such relationship and with the full knowledge, consent and ratification by such other defendants.

4 **JURISDICTION AND VENUE**

5 8. This Court has jurisdiction over this class action under the Class Action Fairness
6 Act, 28 U.S.C. section 1332(d). The aggregated claims of the individual Class Members exceed the
7 sum or value of \$5,000,000, exclusive of interest and costs, and this is a class action in which
8 Plaintiff and members of the class, on the one hand, and Apple, on the other, are citizens of
9 different states.

10 9. This Court has jurisdiction over Apple because Apple maintains its principal
11 headquarters in California, is registered to conduct business in California, and has sufficient
12 minimum contacts in California. Apple intentionally avails itself of the California consumer market
13 through the promotion, sale, marketing, and distribution of its products to California residents. As a
14 result, jurisdiction in this court is proper and necessary. Moreover, Apple's wrongful conduct, as
15 described herein, emanates from California and foreseeably affects consumers in California and
16 nationwide. Most, if not all, of the events complained of below occurred in or emanated from
17 Apple's corporate headquarters located in Cupertino, California. Plaintiff's counsel's Declaration,
18 as required under California Code of Civil Procedure section 1780(d), is attached as Exhibit 1.

19 10. Venue is proper in this District under 28 U.S.C. section 1391(a)-(c) because, inter
20 alia, substantial parts of the events or omissions giving rise to the claim occurred in the District
21 and/or a substantial part of property that is the subject of the action is situated in the District.

22 **CLASS ALLEGATIONS**

23 11. This action has been brought and may be maintained as a class action pursuant to
24 Federal Rules of Civil Procedure 23 because there is a well-defined community of interest among
25 the persons who comprise the readily ascertainable classes defined below and because Plaintiff is
26 unaware of any difficulties likely to be encountered in managing this case as a class action.

27 12. **Relevant Time Period:** The relevant time period is defined as the time period
28 beginning four years prior to the filing of this action until judgment is entered.

1 **National iPhone Class**: All persons and entities in the United States (including its
2 Territories and the District of Columbia) who currently or formerly owned an iPhone 6, 6S,
SE and 7 during the **Relevant Time Period**.

3 **California iPhone Sub-Class**: All **National iPhone Class** members who currently
4 or formerly resided in California.

5 13. Excluded from the class are: (1) Apple, its subsidiaries, and its legal representatives,
6 officers, directors, assigns and successors; and (2) all state and/or federal court judges who may
7 preside over this case, their staff, and their immediate family members.

8 14. **Reservation of Rights**: Pursuant to Rule of Court 3.765(b), Plaintiff reserves the
9 right to amend or modify the class definitions with greater specificity, by further division into sub-
10 classes and/or by limitation to particular issues.

11 15. **Numerosity**: The class members are so numerous that the individual joinder of each
12 individual class member is impractical. While Plaintiff does not currently know the exact number
13 of class members, Plaintiff is informed and believes, and thereupon alleges that the actual number
14 exceeds the minimum required for numerosity under California law.

15 16. **Commonality and Predominance**: Common questions of law and fact exist as to
16 all class members and predominate over any questions which affect only individual class members.

17 These common questions include, but are not limited to:

- 18 A. Whether Defendants are liable under strict products liability for damages to
19 Plaintiff and the Class Members;
- 20 B. Whether Defendants are liable for negligence for products liability and
21 damages to Plaintiff and Class Members;
- 22 C. Whether Defendants reasonably should have notified consumers before it
23 implemented any kind of software update that limited the speed and/or
24 performance of consumers' iPhones;
- 25 D. Whether Defendants had a duty to disclose the nature of any defect to
26 Plaintiff and the Class Members;
- 27 E. Whether Defendants failed to disclose or concealed material information
28 concerning any defects;

- 1 F. Whether Defendants’ conduct and business practices violate the Consumer
- 2 Legal Remedies Act (“CLRA”) Civil Code section 1750 *et seq.*;
- 3 G. Whether Defendants’ conduct and business practices violate the Unfair
- 4 Competition Law (“UCL”) Business and Professions Code section 17200 *et*
- 5 *seq.*;
- 6 H. Whether Defendants breached any express or implied warranties;
- 7 I. Whether Defendants violated California false advertising laws;
- 8 J. Whether Defendants engaged in fraud;
- 9 K. Whether Defendants are liable for unjust enrichment to Plaintiff and the Class
- 10 Members;
- 11 L. Whether Plaintiff and the Class Members are entitled to relief, and the
- 12 amount and nature of such relief, including relief in the form of an injunction
- 13 and/or restitution.

14 17. **Typicality**: Plaintiff’s claims are typical of the other class members’ claims.

15 Plaintiff and all members of the Class have been damaged by the same wrongful conduct by

16 Defendants. Like the other Class Members, Plaintiff purchased a defective iPhone.

17 18. **Adequacy of Class Representative**: Plaintiff is an adequate class representative in

18 that he has no interests that are adverse to, or otherwise conflict with, the interests of absent class

19 members and is dedicated to vigorously prosecuting this action on their behalf. Plaintiff will fairly

20 and adequately represent and protect the interests of the other class members.

21 19. **Adequacy of Class Counsel**: Plaintiff’s counsel are adequate class counsel in that

22 they have no known conflicts of interest with Plaintiff or absent class members, are experienced in

23 complex class action litigation, and are dedicated to vigorously prosecuting this action on behalf of

24 Plaintiff and absent class members.

25 20. **Superiority**: A class action is vastly superior to other available means for fair and

26 efficient adjudication of the class members’ claims and would be beneficial to the parties and the

27 Court. Class action treatment will allow a number of similarly situated persons to simultaneously

28 and efficiently prosecute their common claims in a single forum without the unnecessary

1 duplication of effort and expense that numerous individual actions would entail. In addition, the
2 monetary amounts due to many individual class members are likely to be relatively small and would
3 thus make it difficult, if not impossible, for individual class members to both seek and obtain relief.
4 Moreover, a class action will serve an important public interest by permitting class members to
5 effectively pursue the recovery of monies owed to them. Further, a class action will prevent the
6 potential for inconsistent or contradictory judgments inherent in individual litigation.

7 **GENERAL ALLEGATIONS**

8 21. Plaintiff owns an iPhone and encountered many of the issues encountered by other
9 iPhone owners such as significantly slow performance, dropped calls and excessive battery drain
10 when using his device.

11 22. Apple designs, manufactures, distributes, and sells the iPhones. On information and
12 belief, Apple has sold, directly or indirectly through other retailers, millions of iPhones in
13 California, the United States and throughout the world.

14 23. The Covered iPhones are defective, including but not limited to the Defect in the
15 design and manufacture of the device causing it to shut down unexpectedly.

16 24. Apple responded with an official statement as follows:

17 Our goal is to deliver the best experience for customers, which includes overall performance and
18 prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current
19 demands when in cold conditions, have a low battery charge or as they age over time, which can result in
20 the device unexpectedly shutting down to protect its electronic components.

21 Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous
22 peaks only when needed to prevent the device from unexpectedly shutting down during these conditions.
23 We've now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in
24 the future.

22 **FIRST CAUSE OF ACTION**

23 **STRICT PRODUCTS LIABILITY**

24 25. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
25 fully alleged herein.

26 26. At all times mentioned herein, Defendants designed, manufactured, assembled,
27 analyzed, recommended, merchandised, advertised, promoted, distributed, supplied, and sold to
28 distributors and retailers for sale, smartphones known as "iPhones" and/or its component parts.

1 27. Defendants manufactured, designed, promoted and/or sold the Covered iPhones and
2 their component parts to the public, knowing that the Covered iPhones would be purchased or used
3 without inspection for defects by the general public, including Plaintiff and the Class Members.

4 28. The Covered iPhones were defective and did not function according to its intended
5 use by reason of defects in its manufacture, design, testing, components and constituents, so that it
6 would not properly serve its purpose, but would instead slow down significantly, drop calls, and
7 cause excessive battery drain because of the failure of Defendants to properly design and
8 manufacture the Covered iPhones.

9 29. Defendants designed and manufactured the Covered iPhones defectively, causing it
10 to fail to perform as an ordinary consumer would expect when used in an intended or reasonably
11 foreseeable manner.

12 30. Defendants knew or should have known of the defects that would arise in the
13 reasonably foreseeable use of the Covered iPhones, whose defective design, manufacturing, and
14 lack of sufficient warnings caused them to have an unreasonably propensity to suffer from
15 component failure, thereby causing significantly slow performance, dropped calls, and excessive
16 battery drain.

17 31. Defendants failed to adequately warn of the defects known or knowable at the time
18 of the defective Covered iPhones design, manufacture, and distribution.

19 32. Defendants failed to provide adequate warnings, instructions, guidelines or
20 admonitions to members of the consuming public, including Plaintiff and the Class Members, of the
21 design and manufacturing defects, which Defendants knew, or in the exercise of reasonable care
22 should have known, to have existed in the Covered iPhones, and its component parts.

23 33. Plaintiff and the Class Members were not aware of the aforementioned defects at any
24 time regarding the Covered iPhones prior to purchasing and/or upgrading to the newer iPhone 8
25 and/or iPhone X.

26 34. As a direct and proximate result of the aforementioned defects in the Covered
27 iPhones, Plaintiff and the Class Members sustained injures and damages in an amount according to
28 proof at trial.

SECOND CAUSE OF ACTION

NEGLIGENCE – PRODUCTS LIABILITY

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2
3 35. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
4 fully alleged herein.

5 36. At all times mentioned, Defendants designed, manufactured, assembled, analyzed,
6 recommended, merchandised, advertised, promoted, distributed, supplied, and sold to distributors
7 and retailers for sale, smartphones known as “iPhones” and/or its component parts.

8 37. Defendants manufactured, designed, promoted and/or sold the Covered iPhones and
9 its component parts to the public, including to Plaintiff and the Class Members.

10 38. Defendants owed Plaintiff and the Class Members a duty to exercise reasonable care
11 in the design, testing, manufacture, assembly, sale, distribution and servicing of the Covered
12 iPhones, including a duty to assure that the Covered iPhones were free of defects and/or to repair
13 any defects that are discovered.

14 39. Defendants knew or should have known that the Covered iPhones were defectively
15 designed and manufactured and was therefore prone to problems under normal operating conditions,
16 potentially causing consumers to spend money for repairs and ultimately for replacing their devices.

17 40. Defendants failed to exercise ordinary care and breached its duty by, among other
18 things:

- 19 a. Failure to use due care in the manufacture, distribution, design, sale, testing,
20 and servicing of the Covered iPhones and its component parts in order to
21 avoid the aforementioned risks to individuals;
- 22 b. Failure to provide adequate warning of component failure, thereby causing
23 significantly slow performance, dropped calls, and excessive battery drain;
- 24 c. Failure to incorporate within the Covered iPhones and its design reasonable
25 safeguards and protections against component failure, thereby causing
26 significantly slow performance, dropped calls, and excessive battery drain;
- 27 d. Failure to make time correction to the design of the Covered iPhones to
28 correct the component failure, thereby causing significantly slow

- 1 performance, dropped calls, and excessive battery drain;
- 2 e. Failure to adequately identify and mitigate the hazards associated with
- 3 component failure, thereby causing significantly slow performance, dropped
- 4 calls, and excessive battery drain;
- 5 f. Such other acts of negligence as discovery shall reveal.

6 41. As a direct and proximate result of the aforementioned negligence, carelessness, and
7 other tortious, unlawful and wrongful acts and omissions of Defendants, and its respective agents,
8 servants, employees and authorized representatives as mentioned above, Plaintiff has suffered
9 damages in an amount to be proven at trial.

10 **THIRD CAUSE OF ACTION**
11 **VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**
12 **(Cal. Civ. Code § 1750 *et seq.*)**

13 42. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
14 fully alleged herein.

15 43. Apple is a “person” within the meaning of Civil Code sections 1761(d) and 1770,
16 and it provides “goods” within the meaning of Civil Code section 1761(a) and 1770.

17 44. Plaintiff and the Class Members are “consumers” who purchased an iPhone for
18 business purposes and personal, family, or household purposes within the meaning of California
19 Civil Code section 1761(d) and 1770. Plaintiff and the Class Member’s purchase of an iPhone
20 constitutes a “transaction” within the meaning of Civil Code section 1761(e) and 1770.

21 45. By failing to disclose and concealing the defects in the iPhones from Plaintiff and the
22 Class Members, Apple violated California Civil Code section 1770(a), as it represented that the
23 iPhones had characteristics and benefits they do not have and represented that the iPhones were of a
24 particular standard, quality, or grade when they were of another. See, Cal. Civ. Code § 1770(a)(5)
25 and (7).

26 46. Apple has engaged in business practices that violate the CLRA including, without
27 limitation, failing to disclose or concealing that the iPhones were manufactured with certain defects.
28 Apple’s unfair and deceptive acts or practices occurred repeatedly in Apple’s trade or business and

1 were capable of deceiving a substantial portion of the purchasing public.

2 47. Apple knew that the iPhones contained certain defects, yet it instead released
3 software updates that would slow down the speed and performance of iPhones without notifying its
4 consumers or obtaining their consent.

5 48. Apple has duty to Plaintiff and the Class Members to disclose the nature of any
6 defects along with the scope of software update it released to compensate for those defects because:

- 7 a. Apple was in a superior position to know the true state of facts about any
8 defects and the software updates it created to compensate for those defects;
- 9 b. Plaintiff and the Class Members could not reasonably have been expected to
10 learn or discover the true nature of any defects until they experienced the
11 defects without the software updates masking those defects;
- 12 c. Apple knew that Plaintiff and the Class Members could not reasonably have
13 been expected to learn about or discover the change made by the software
14 updates.

15 49. By failing to disclose the nature of the software updates and by limiting the speed
16 and performance of the Covered iPhones, Apple has knowingly and intentionally concealed
17 materials facts and breached its duty not to do so.

18 50. The facts concealed or not disclosed by Apple to Plaintiff and the Class Members are
19 material because a reasonable consumer would have considered them to be important in deciding
20 whether or not to replace their Covered iPhones with a newer model. Had Plaintiff and the Class
21 Members known that the speed and performance of the Covered iPhones were intentionally affected
22 by the software updates released by Apple, they would not have purchased a newer iPhone model
23 nor would they have upgraded to the iPhone 8 or X.

24 51. Plaintiff and the Class Members are reasonable consumers who do not expect the
25 speed and performance of their Covered iPhones to slow down with normal use. That is the
26 reasonable and objective consumer expectation for smartphones.

27 52. As a result of Apple's acts and practices alleged herein, Plaintiff and the Class
28 Members suffered actual damages in that their Covered iPhones are now slower and do not perform

1 as well as it otherwise would have absent the software updates imposed by Apple limiting the speed
2 and performance of the Covered iPhones.

3 53. Plaintiff and the Class Members are entitled to equitable relief.

4 54. Plaintiff has provided Apple with notice of its alleged violations of the CLRA
5 pursuant to California Civil Code section 1782(a). If, within 30 days of the date of the notification
6 letter, Apple fails to provide appropriate relief for its violation of the CLRA, Plaintiff will amend
7 this Complaint to seek monetary, compensatory, and punitive damages, in addition to the injunctive
8 and equitable relief that Plaintiff seeks now.

9 **FOURTH CAUSE OF ACTION**

10 **UNFAIR COMPETITION**

11 **(Bus. and Prof. Code § 17200 *et seq.*)**

12 55. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
13 fully alleged herein.

14 56. Apple knew the Covered iPhones' were defective and that it would ultimately cause
15 the Covered iPhones to slow down significantly, drop calls, cause excessive battery drain and shut
16 down unexpectedly.

17 57. In failing to disclose the Defect, Apple knowingly and intentionally concealed
18 material facts and breached its duty not to do so.

19 58. Apple was under a duty to Plaintiff and the Class Members to disclose the defective
20 nature of the Covered iPhones because:

21 d. Apple was in a superior position to know the true state of facts about the
22 Defect;

23 e. Apple made partial disclosures about the quality of the Covered iPhones
24 without revealing the defective nature of the Covered iPhones and the fact
25 that the device would become defective with normal use;

26 f. Apple actively concealed the defective nature of the Covered iPhones from
27 Plaintiff and the Class Members;

28 g. Apple knew that Plaintiff and the Class Members could not reasonably have

1 been expected to learn about or discover the Defect.

2 59. The facts concealed or not disclosed by Apple to Plaintiff and the Class Members are
3 material because a reasonable person would have considered them to be important in deciding
4 whether or not to purchase or upgrade to the newer iPhone 8 or X. Had Plaintiff and the Class
5 Members known that the Covered iPhones suffered from the Defect described in the Complaint,
6 they would not have purchased the Covered iPhones; and if they had already purchased a Covered
7 iPhones they would not have purchased or upgraded to the newer iPhone 8 or X.

8 60. Apple continued to conceal the defective nature of the Covered iPhones even after
9 Class Members began to report problems. Indeed, Apple continues to cover up and conceal the true
10 nature of the problem and deny valid warranty claims.

11 61. By this conduct, Apple has engaged in unfair competition and unlawful, unfair, and
12 fraudulent business practices.

13 62. Apple's unfair or deceptive acts or practices occurred repeatedly in Apple's trade or
14 business and were capable of deceiving a substantial portion of the purchasing public.

15 63. As a direct and proximate result of Apple's unfair and deceptive practices, Plaintiff
16 and the Class Members have suffered and will continue to suffer actual damages.

17 64. Apple has been unjustly enriched and should be required to make restitution to
18 Plaintiff and the Class Members pursuant to Bus. and Prof. Code sections 17203 and 17204.

19 **FIFTH CAUSE OF ACTION**

20 **BREACH OF EXPRESS WARRANTY UNDER THE**

21 **MAGNUSON-MOSS WARRANTY ACT**

22 **(15 U.S.C. § 2301 *et seq.*)**

23 65. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
24 fully alleged herein.

25 66. Plaintiff and the Class Members are "consumers" within the meaning of the
26 Magnuson-Moss Warranty Act, 15 U.S.C. section 2301(3).

27 67. Apple is a "supplier" and "warrantor" within the meaning of 15 U.S.C. sections
28 2301(4)-(5).

1 68. The Covered iPhones are “consumer products” within the meaning of 15 U.S.C.
2 section 2301(1).

3 69. Apple’s Warranty is a “written warranty” within the meaning of 15 U.S.C. section
4 2301(6).

5 70. Apple breached the Warranty by:

- 6 h. Extending a one-year limited warranty with the purchase of Covered iPhones,
7 thereby warranting to repair or replace Covered iPhones defective in material
8 or workmanship at no cost to the owner;
- 9 i. Selling the Covered iPhones with defective design and/or manufacture such
10 that the devices would shut down unexpectedly with normal use, requiring
11 repair or replacement within the warranty period;
- 12 j. Refusing to honor the express warranty by refusing to proper to properly
13 repair or replace the Covered iPhones with properly functioning devices,
14 instead pushing software updates which failed to repair the defect; and
- 15 k. Refusing to honor the express warranty by repairing or replacing the Covered
16 iPhones with non-defective parts.

17 71. Apple’s breach of the express warranty deprived Plaintiff and the Class Members of
18 the benefits of their bargains.

19 72. The amount in controversy of Plaintiff’s individual claim meets or exceeds the sum
20 or value of \$50,000. In addition, the amount in controversy meets or exceeds the sum or value of
21 \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in
22 this suit.

23 73. Apple has been afforded a reasonable opportunity to cure its breach of written
24 warranty, including when Plaintiff and the Class Members notified Apple of the defect and
25 requested a proper repair.

26 74. As a direct and proximate result of Apple’s breach of written warranty, Plaintiff and
27 the Class Members sustained damages and other losses in an amount to be determined at trial.
28 Apple’s conduct damaged Plaintiff and the Class Members, who are entitled to recover damages,

1 consequential damages, specific performance, diminution in value, costs, attorneys' fees, rescission,
2 and/or other relief as appropriate.

3 **SIXTH CAUSE OF ACTION**

4 **BREACH OF EXPRESS WARRANTY**

5 75. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
6 fully alleged herein.

7 76. Apple warranted that each Covered iPhones was free of defects when it sold the
8 devices to Plaintiff and the Class Members as described in this Complaint. Under the terms of
9 Apple's Warranty, each Covered iPhones came with an express Warranty that warrants that the
10 device will be free from defects in materials and workmanship under normal use during the
11 warranty period.

12 77. This Warranty because part of the basis of the bargain. Accordingly, Apple's
13 Warranty is an express warranty.

14 78. Apple breached the express warranty by:

- 15 l. Extending a one-year limited warranty with the purchase of a Covered
16 iPhones, thereby warranting to repair or replace devices defective in material
17 or workmanship at no cost to the owner;
- 18 m. Selling Covered iPhones with defective design and/or manufacture such that
19 the devices would develop battery issues with normal use, requiring repair or
20 replacement within the warranty period;
- 21 n. Refusing to honor the express warranty by repairing or replacing the Covered
22 iPhones free of charge, instead pushing out software updates that masked the
23 problem and which failed to repair the defect; and
- 24 o. Refusing to honor the express warranty by repairing or replacing the Covered
25 iPhones with non-defective parts.

26 79. Plaintiff provided Apple with timely notice of its breach of warranty. Apple was
27 also on notice of the Defect from the complaints and service requests it received from Class
28 Members, internet message boards and support forums maintained by Apple, and from published

1 product reviews.

2 80. As a direct and proximate result of Apple's breach of warranty, Plaintiff and each of
3 the Class Members have suffered damages and continue to suffer damages, including economic
4 damages at the point of sale, *i.e.*, the difference between the value of the Covered iPhones as
5 promised and the value of the devices as delivered. Additionally, Plaintiff and the Class Members
6 either have incurred or will incur economic damages at the point of repair in the form of the cost of
7 repair and/or the cost of purchasing a non-defective device to replace the Covered iPhones.

8 81. Plaintiff and the Class Members are entitled to legal and equitable relief against
9 Apple, including damages, consequential damages, specific performance, rescission, attorneys' fees,
10 costs of suit, and other relief as appropriate.

11 **SEVENTH CAUSE OF ACTION**

12 **BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY**

13 82. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
14 fully alleged herein.

15 83. Apple impliedly warranted to members of the general public, including Plaintiff and
16 the Class Members, that the Covered iPhones was of merchantable quality and safe for the use for
17 which it was intended by Defendants, namely, for the purpose of use as a mobile cellphone device
18 used to make calls, listening to music, accessing the internet, taking photos and videos, and for
19 other related activities.

20 84. The Covered iPhones were not merchantable and fit for its ordinary purpose, because
21 the battery used to power it had a propensity to degrade over time thereby causing the device to shut
22 down unexpectedly. The Covered iPhones were not of merchantable quality as warranted by
23 Defendant, in that it was defectively designed and manufactured, thereby causing it to shut down
24 and stop working.

25 85. In order resolve the Defects, Defendants pushed a software update that slowed down
26 the speed and performance of the Covered iPhones thereby concealing the deteriorated and
27 degraded batteries. From all outward appearances, consumers were led to believe that their
28 Covered iPhones were still operating albeit slower and with significantly less performance which

1 undoubtedly led millions of consumers to believe that their devices were obsolete and therefore they
2 should replace them with a newer iPhone model.

3 86. Plaintiff reasonably relied on Defendants' representations that the Covered iPhones
4 were free of defects.

5 87. As a direct and proximate result of the breach of the implied warranty of
6 merchantability, Plaintiff and the Class Members suffered damages herein and are therefore entitled
7 to damages in an amount according to proof at trial.

8 **EIGHTH CAUSE OF ACTION**

9 **BREACH OF IMPLIED WARRANTY OF FITNESS**

10 **FOR A PARTICULAR PURPOSE**

11 88. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
12 fully alleged herein.

13 89. Apple impliedly warranted to members of the general public, including Plaintiff and
14 the Class Members, that the Covered iPhones was fit for the particular purpose for which it was
15 intended by the Defendants, namely, for the purpose of use as a mobile cellphone device used to
16 make calls, listening to music, accessing the internet, taking photos and videos, and for other related
17 activities.

18 90. The Covered iPhones were not fit for the particular purpose for which it was
19 intended because the battery used to power it had a propensity to degrade over time thereby causing
20 the device to shut down unexpectedly. The Covered iPhones were not fit for the particular purpose
21 for which it was intended, in that it was defectively designed and manufactured, thereby causing it
22 to shut down and stop working.

23 91. In order resolve the Defects, Defendants pushed a software update that slowed down
24 the speed and performance of the Covered iPhones thereby concealing the deteriorated and
25 degraded batteries. From all outward appearances, consumers were led to believe that their
26 Covered iPhones were still operating albeit slower and with significantly less performance which
27 undoubtedly led millions of consumers to believe that their devices were obsolete and therefore they
28 should replace them with a newer iPhone model.

1 92. Plaintiff reasonably relied on Defendants’ representations that the Covered iPhones
2 were free of defects.

3 93. As a direct and proximate result of the breach of the implied warranty of fitness for a
4 particular purpose, Plaintiff and the Class Members suffered damages herein and are therefore
5 entitled to damages in an amount according to proof at trial.

6 **NINTH CAUSE OF ACTION**

7 **VIOLATION OF CALIFORNIA’S FALSE ADVERTISING LAWS**

8 **(Cal. Bus. & Prof. Code §§ 17500 *et seq.*)**

9 94. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
10 fully alleged herein.

11 95. California Business and Professions Code section 17500 provides that it is unlawful
12 for a corporation “to induce the public to enter into any obligation relating thereto, to make or
13 disseminate or cause to be made or disseminated...from this state before the public in any state, in
14 any newspaper or other publication, or any advertising device, or by public outcry or proclamation,
15 or in any other manner or means whatever, including over the Internet, any statement...which is
16 untrue or misleading, and which is known, or which by the exercise of reasonable care should be
17 known, to be untrue or misleading...”

18 96. Defendants’ representations, including statements made in Defendants’ television,
19 radio, and print advertising, websites, brochures, and all other written and oral materials disseminated
20 by Defendants to promote its products constitute advertising for purposes of this action.

21 97. Such advertising contained statements which were false, misleading, or which
22 omitted material information which Defendants were under a duty to disclose and which were
23 known or should have been known to Defendants to be false, misleading, or deceptive.

24 98. The misleading advertising described herein presents a continuing threat to Plaintiff
25 and members of the public in that Defendants persist and continue to engage in these practices, and
26 will not cease doing so unless and until forced to do so by this Court.

27 99. As a direct and proximate result of Defendants’ misconduct and omissions, Plaintiff
28 sustained the damages in an amount according to proof at trial.

TENTH CAUSE OF ACTION

FRAUD

100. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if fully alleged herein.

101. Defendants made material misrepresentations that were false and that were either known to be false when made or were asserted without knowledge of their truth. Defendants has in the possession adverse incident reports, warranty work orders and other documentation about the defects in the Covered iPhones yet made the following misrepresentations:

- a. Misrepresentations regarding the existence, occurrence and frequency of occurrences, severity and extent of the defects causing significantly slow performance, dropped calls, and excessive battery drain;
- b. Misrepresentations as to the root cause of the defects causing significantly slow performance, dropped calls, and excessive battery drain;
- c. Misrepresentations as to the nature, seriousness, severity of adverse incident reports regarding significantly slow performance, dropped calls, and excessive battery drain;

102. Defendants intended that these misrepresentations be relied upon by the general consuming public, including Plaintiff and the Class Members. Plaintiff and the Class Members did rely upon the misrepresentations that ultimately caused Plaintiff to purchase and/or upgrade to a newer iPhone 8 and/or iPhone X.

103. Plaintiff is informed and believes and thereupon alleges that Defendants and each of them in doing the things herein alleged acted willfully, maliciously, oppressively and despicably with the full knowledge of the adverse effect of their actions on Plaintiff and the Class Members, and with willful and deliberate disregard of the consequences to Plaintiff and the Class Members. By reason thereof, Plaintiff and the Class Members are entitled to recover punitive and exemplary damages from Defendants in an amount according to proof at trial.

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ELEVENTH CAUSE OF ACTION

UNJUST ENRICHMENT

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3 104. Plaintiff incorporates by reference the preceding paragraphs of the Complaint as if
4 fully alleged herein.

5 105. Plaintiff and the Class Members conferred benefits on Defendants by purchasing the
6 Covered iPhones.

7 106. Defendants have been unjustly enriched in retaining the revenues derived from
8 Plaintiff and the Class Members' purchases of the defective devices that were improperly
9 manufactured, supplied, and/or distributed into the stream of commerce. Retention of those monies
10 under these circumstances is unjust and inequitable because Defendants misrepresented that the
11 Covered iPhones were of a quality fit for the purpose for which they were intended. These
12 misrepresentations caused injuries to Plaintiff and the Class Members because they would not have
13 purchased the Covered iPhones if the true facts had been known.

14 107. Because Defendants' retention of the benefits conferred on them by Plaintiff and the
15 Class Members is unjust and inequitable, Defendants must pay restitution to Plaintiffs and the Class
16 members for their unjust enrichment, as ordered by the Court.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- (1) An order certifying that this action may be maintained as a class action;
 - (2) An order that Plaintiff be appointed Class Representative;
 - (3) An order that Plaintiff’s counsel be appointed Class Counsel;
 - (4) For general and special damages, according to proof;
 - (5) For restitution and other equitable relief;
 - (6) For pre- and post-judgment interest, according to proof;
 - (7) For costs of suit, including reasonable attorneys’ fees, as permitted by law;
- and
- (8) For such other and further relief as the Court may deem just and proper.

DATED: December 22, 2017

SETAREH LAW GROUP

/s/ Shaun Setareh

 SHAUN SETAREH
 Attorneys for Plaintiff
 MICHAEL HAKIMI

Exhibit 4

U.S. District Court
California Northern District (San Jose)
CIVIL DOCKET FOR CASE #: 5:17-cv-07355

Batista et al v. Apple Inc.
Assigned to:
Cause: 28:1332 Diversity-Fraud

Date Filed: 12/28/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff**Aniledis Batista**

represented by **Nathan Michael Smith**
Brown Neri Smith and Khan
11601 Wilshire Blvd
Suite
Los Angeles, CA 90025
310-593-9890
Fax: 310-788-3399
Email: nate@bnsklaw.com
ATTORNEY TO BE NOTICED

Plaintiff**Paul Sohayegh**

represented by **Nathan Michael Smith**
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant**Apple Inc.**

Date Filed	#	Docket Text
12/28/2017	1	COMPLAINT against All Defendants (Filing fee \$ 400, receipt number 0971-11984430.). Filed by Aniledis Batista, Paul Sohayegh. (Attachments: # 1 Civil Cover Sheet)(Smith, Nathan) (Filed on 12/28/2017) (Entered: 12/28/2017)
12/28/2017	2	Proposed Summons. (Smith, Nathan) (Filed on 12/28/2017) (Entered: 12/28/2017)

PACER Service Center

Transaction Receipt

12/29/2017 07:26:03

PACER Login:	KaplanFox:2581070:0	Client Code:	Apple
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Description:	Docket Report	Search Criteria:	5:17-cv-07355
Billable Pages:	1	Cost:	0.10

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Attorneys for Plaintiff and the Putative Class

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

Aniledis Batista and Paul Sohayegh,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

Apple Inc.,

Defendant.

Civil Action No. _____

CLASS ACTION COMPLAINT

Jury Trial Demanded

1 Plaintiffs Aniledis Batista and Paul Sohayegh (collectively, “Plaintiffs”),
2 individually and on behalf of other similarly situated individuals, by and through their
3 undersigned attorneys, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP and Brown,
4 Neri, Smith & Khan, LLP, file this Class Action Complaint against Apple Inc. (“Apple” or
5 “Defendant”) and allege the following based on personal knowledge, the investigation of
6 counsel, information, and belief.
7

8 NATURE OF THE ACTION

9 1. Plaintiffs bring this action against Apple for deceptive trade practices and
10 false advertising in violation of New York General Business Law § 349 and § 350 and the
11 common law. Plaintiffs and other owners of Apple’s iPhone models 7, 6S, 6, and SE
12 (collectively, “older iPhones”) were harmed when their devices’ software or operating
13 systems (“iOS”) were updated to the then-newest version (“iOS updates”). The iOS
14 updates significantly slowed down their iPhones and interfered with the normal usage of
15 their devices, leaving Plaintiffs with a difficult choice: to continue using a slow and at time
16 inoperable device that disrupts everyday life, or spend hundreds of dollars to purchase a
17 new phone.
18

19 2. Apple explicitly represented to Plaintiffs and the public that its iOS updates
20 are compatible with and support older iPhones, as evidenced by the fact that Plaintiffs and
21 Class Members were prompted to install the iOS updates on their iPhones.
22

23 3. Following media traction of reports on Reddit, Geekbench, and various
24 technology news sites evidencing Apple’s planned obsolescence of older iPhones, on
25 December 20, 2017, Apple admitted that it has been deliberately slowing the performance
26 (formally referred to as the “CPU” or “CPU Frequency”) of older iPhones.
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1 downloaded the iPhone's updated iOS when prompted to do so. Mr. Sohayegh's family
2 members likewise downloaded the iOS updates on their iPhones (also purchased by Mr.
3 Sohayegh) when prompted to do so. Subsequently, Mr. Sohayegh and his family members
4 noticed that their iPhones' performances slowed drastically, that the operating systems
5 would often crash altogether, and that the iPhones would inexplicably shut down.
6 Likewise, Applications such as simple text messaging and phone call applications became
7 routinely inoperable. Thus, the iOS updates rendered Mr. Sohayegh's and his family
8 members' iPhones useless. The lack of functionality of their iPhones prompted Mr.
9 Sohayegh to purchase new iPhones for himself and his family members. Had it not been
10 for the problems promulgated by the update, Mr. Sohayegh would not have purchased new
11 iPhones for his family members or himself.

14 8. Defendant Apple Inc. is a California corporation with its headquarters and
15 principal place of business located at 1 Infinite Loop in Cupertino, California.

16 JURISDICTION AND VENUE

17 9. Subject matter jurisdiction in this civil action is authorized pursuant to 28
18 U.S.C. § 1332(d) because there are more than one hundred Class Members, a majority of
19 Class Members are citizens of states that are diverse from Apple, and the amount in
20 controversy exceeds \$5 million, exclusive of interest and costs.
21

22 10. This Court has personal jurisdiction over Apple because Apple was
23 incorporated in California, maintains its principal place of business in this District, is
24 registered to conduct business in California, and has sufficient minimum contacts with
25 California.

26 11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because
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1 Apple resides in this District and a substantial part of the events or omissions giving rise to
2 Plaintiffs' claims occurred in this District.

3
4 **FACTUAL BACKGROUND**

5 12. Over the course of the past year, Apple released various iOS updates that
6 intentionally and deceptively debilitated the functionality of older iPhones, causing the
7 devices to dramatically slow down and interfering with normal usage. The relevant iOS
8 updates include: iOS 10.2.1 (released on January 23, 2017); iOS 10.3 (released on March
9 27, 2017); iOS 10.3.1 (released on April 3, 2017); iOS 10.3.2 (released on May 15, 2017);
10 iOS 10.3.3 (released on July 19, 2017) (collectively, "iOS 10 update"); iOS 11.0.1
11 (released on September 26, 2017); iOS 11.0.2 (released on October 3, 2017); iOS 11.0.3
12 (released on October 11, 2017); iOS 11.1 (released on October 31, 2017); iOS 11.1.1
13 (released on November 9, 2017); iOS 11.1.2 (released on November 16, 2017); iOS 11.2
14 (released on December 2, 2017); and iOS 11.2.1 (released on December 13, 2017)
15 (collectively, "iOS 11 updates").

16
17 13. Apple represented and advertised that all of the various iOS updates are
18 compatible with and support older iPhones, as evidenced by the fact that Plaintiffs and
19 Class Members were prompted to install the iOS updates on their iPhones.
20

21 14. At or immediately preceding the time of download for each iOS update,
22 Apple represented and advertised that the iOS updates were designed to improve device
23 performance.

24 15. Notwithstanding, Plaintiffs and Class Members quickly noticed that, soon
25 after downloading the iOS updates, their iPhones were no longer operable for normal use.
26 Instead, Plaintiffs and Class Members experienced drastic performance slowdowns,
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1 delayed or non-responses to touch and voice interactions, software and application freezes
2 and crashes, and spontaneous shut downs.

3
4 16. The resultant problems permeated even the core functions of Plaintiffs' and
5 Class Members' devices, preventing them from making and receiving phone calls, text
6 messaging, and emailing.

7 17. Following media traction of reports on Reddit, Geekbench, and various
8 technology news sites substantiating speculation that Apple was engaging in planned
9 obsolescence of older iPhones,¹ on December 20, 2017, Apple released a statement in
10 which it admitted that it has been deliberately slowing the performance of older iPhones:

11
12 Our goal is to deliver the best experience for customers, which includes
13 overall performance and prolonging the life of their devices. Lithium-ion
14 batteries become less capable of supplying peak current demands when in
15 cold conditions, have a low battery charge or as they age over time, which
16 can result in the device unexpectedly shutting down to protect its electronic
17 components.

18 Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to
19 smooth out the instantaneous peaks only when needed to prevent the device
20 from unexpectedly shutting down during these conditions. We've now
21 extended that feature to iPhone 7 with iOS 11.2, and plan to add support for
22 other products in the future.²

23 18. Apple failed to inform and/or warn Plaintiffs and Class Members that it
24 engineered its iOS updates to slow down the performance of older iPhones and that

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26 _____
27 ¹ See, e.g., TeckFire, *PSA: iPhone slow? Try replacing your battery!*, REDDIT (Dec. 9,
28 2017), https://www.reddit.com/r/iphone/comments/7inu45/psa_iphone_slow_try_replacing_your_battery/; John Poole, *iPhone Performance and Battery Age*, GEEKBENCH (Dec. 18, 2017), <https://www.geekbench.com/blog/2017/12/iphone-performance-and-battery-age/>.

² Bill Chappell, *Apple Says It Slows Older iPhones To Save Their Battery Life*, NPR (Dec. 21, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/21/572538593/apple-says-it-slows-older-iphones-to-save-their-battery-life>.

1 installing the iOS updates would intentionally slow their devices and prevent older iPhones
2 from reaching their full processing power. Rather, Apple falsely and deceptively
3 represented and advertised that the iOS updates would improve performance.
4

5 19. While Apple asserts that the deliberate slowdowns were designed to
6 enhance functionality and performance, in part by prolonging battery life, Plaintiffs and
7 Class members have experienced reduced battery life as a direct result of the iOS 10 and
8 11 updates.

9 20. By failing to disclose that iOS updates were designed to intentionally
10 reduce the CPU on certain iPhone models, iPhone consumers would be more likely to
11 attribute degraded performance to the device rather than battery, prompting consumers to
12 believe it is necessary to upgrade their iPhones rather than simply replace the batteries.
13

14 21. Apple failed to inform Plaintiff and Class Members that the battery issues it
15 purportedly sought to delay could have been quickly and relatively inexpensively remedied
16 by simply replacing batteries. Indeed, iPhone owners with aging batteries could go to a
17 third-party repair shop and replace aged batteries with new ones for \$20 to \$70 (depending
18 on location and iPhone model),³ or to an Apple store and receive a battery replacement for
19 \$79 (with includes a one-year warranty).⁴
20

21 22. Upon information and belief, as a consequence of Apple's iOS updates,
22 consumers with older iPhones no longer have the option of battery replacement to restore
23

24 ³ Niraj Chokshi, *Is Apple Slowing Down Old iPhones? Questions and Answers*, N.Y.
25 TIMES (Dec. 21, 2017), [https://www.nytimes.com/2017/12/21/technology/iphone-battery-
26 problem-slow.html](https://www.nytimes.com/2017/12/21/technology/iphone-battery-problem-slow.html).

27 ⁴ TeckFire, *PSA: iPhone slow? Try replacing your battery!*, REDDIT (Dec. 9, 2017),
28 [https://www.reddit.com/r/iphone/comments/7inu45/psa_iphone_slow_try_replacing_your_
battery/](https://www.reddit.com/r/iphone/comments/7inu45/psa_iphone_slow_try_replacing_your_battery/).

1 device performance, as the performance degradations apply based on iPhone model rather
2 than extent of battery erosion.

3
4 23. Moreover, Apple represents and advertises that many of its iOS updates
5 include “bug fixes” or “improved security,” *i.e.*, the updated software patches security
6 risks that have since been discovered in the devices’ iOS.

7 24. When prompting iPhone owners to install updates for enhanced security or
8 fix bugs, Apple does not disclose that the iOS updates will also detrimentally impact
9 device functionality.

10 25. iPhone owners who receive prompts to install iOS updates that include
11 security enhancements will often download the iOS updates without hesitation, as refusing
12 the update would leave their devices and personal information vulnerable to digital security
13 risks such as hacking.

14 26. Apple does not permit iPhone owners to selectively download its security
15 improvements while rejecting other aspects of iOS updates.

16 27. Furthermore, Apple actively encourages consumers to install iOS updates
17 by repeatedly displaying reminders and notifications on consumers’ iPhone screens until
18 consumers agree to install the new iOS.
19

20 28. Apple does not allow iPhone owners to reverse or uninstall the iOS 10 or
21 iOS 11 updates and to use their prior, better-functioning iOS. Defendant does not warn the
22 consumer that its iOS updates are irreversible.
23

24 29. Apple intentionally concealed material information from Plaintiffs and
25 Class Members when failing to inform them that its iOS updates, purportedly designed to
26 extend battery life, were engineered to significantly slow their devices’ performance – so
27

1 much so that many iPhone owners would feel compelled to purchase a new phone all
2 together.

3 30. Apple intentionally concealed this information and encourages iOS updates
4 in order to increase profits at Plaintiffs' and Class Members' expenses, *i.e.*, by forcing
5 Plaintiffs and Class Members to purchase its newest devices. Indeed, Apple knows that
6 many iPhone consumers will prefer to purchase new iPhone phones rather than switch
7 manufacturers for various reasons. Consequently, Apple stands to benefit financially when
8 it damages the performance of older iPhones, which causes owners to purchase a new
9 phone.
10

11 **CLASS ALLEGATIONS**

12 31. Pursuant to Fed. R. Civ. P. 23, Plaintiffs bring this action against Apple as a
13 class action on behalf of themselves and all members of the following class of similarly
14 situated persons (the "Class" or "Class Members"):
15

16 "All individuals and entities in New York who own or owned an iPhone 7,
17 6S, 6, or SE, and installed one or more iOS 10 updates or iOS 11 updates."

18 32. Plaintiffs reserve the right to amend the above definition(s), or to propose
19 other or additional classes, in subsequent pleadings and/or motions for class certification.

20 33. Excluded from the Class are Defendant; any parent, subsidiary, or affiliate
21 of Defendant; any entity in which Defendant have or had a controlling interest, or which
22 Defendant otherwise controls or controlled; and any legal representative, predecessor,
23 successor, or assignee of Defendant.
24

25 34. This action satisfies the requirements for a class action under Rule 23.

26 35. Plaintiffs believe that the proposed Class as described above consists of
27 hundreds of thousands of members and can be identified through Apple's records, though
28

1 the exact number and identities of the Class Members are currently unknown. The Class is
2 therefore so numerous that joinder of all members, whether otherwise required or
3 permitted, is impracticable.
4

5 36. Common questions of fact and law exist for each cause of action and
6 predominate over questions affecting only individual Class Members. Common questions
7 include, but are not limited to, the following:

8 a. whether Defendant's representations and advertisements to older
9 iPhone owners concerning the iOS 10 and iOS 11 Updates constitute unfair or deceptive
10 business practices in violation of § 349 of New York General Business Law;

11 b. whether Defendant's use of iOS updates to deliberately reduce the
12 performance of older iPhones without the knowledge or consent of Plaintiffs and Class
13 Members constitutes unfair or deceptive business practices in violation of § 349 of New
14 York General Business Law;

15 c. whether Defendant's omissions concerning the adverse impacts of
16 the iOS updates constitute unfair or deceptive business practices in violation of § 349 of
17 New York General Business Law;

18 d. whether Defendant's omissions concerning alternate methods of
19 remedying battery life issues constitute unfair or deceptive business practices in violation
20 of § 349 of New York General Business Law;

21 e. whether Defendant's representations and advertisements to older
22 iPhone owners concerning the iOS 10 and iOS 11 Updates constitute unfair or deceptive
23 advertising in violation of § 350 of New York General Business Law;

24 f. whether Defendant's omissions concerning the adverse impacts of
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1 the iOS updates constitute unfair or deceptive advertising in violation of § 350 of New
2 York General Business Law;

3 g. whether Defendant’s omissions concerning alternate methods of
4 remedying battery life issues constitute unfair or deceptive advertising in violation of § 350
5 of New York General Business Law;

6 h. whether Defendant breached the implied covenant of good faith and
7 fair dealing by deliberately and secretly degrading the performance, quality, and
8 functionality of older iPhones through its iOS updates;

9 i. whether Defendant unjustly enriched itself at Plaintiffs’ and Class
10 Members’ expenses by deliberately and secretly degrading the performance, quality, and
11 functionality of older iPhones through its iOS updates;

12 37. The claims asserted by Plaintiffs are typical of the claims of the Members of
13 the Class they seek to represent because, among other things, Plaintiffs and Class Members
14 sustained similar injuries as a result of Apple’s uniform wrongful conduct; Apple owed the
15 same duty to each Class Member; and Class Members’ legal claims arise from the same
16 conduct by Apple.

17 38. Plaintiffs will fairly and adequately protect the interests of the proposed
18 Class. Plaintiffs’ interests do not conflict with the Class Members’ interests. Plaintiffs
19 have retained class counsel experienced in class action litigation to prosecute this case on
20 behalf of the Class.

21 39. Prosecuting separate actions by individual Class Members would create a
22 risk of inconsistent or varying adjudications with respect to individual Class Members that
23 would establish incompatible standards of conduct for Defendant.

1 40. A class action is superior to other available methods for the fair and
2 efficient adjudication of this controversy because Class Members number in the hundreds
3 of thousands and individual joinder is impracticable. The expense and burden of
4 individual litigation would make it impracticable or impossible for proposed Class
5 Members to prosecute their claims individually. Trial of Plaintiffs and Class Members'
6 claims on a class basis, however, is manageable. Unless the Class is certified, Defendant
7 will remain free to continue to engage in the wrongful conduct alleged herein without
8 consequence.

9
10 41. Certification of the Class is also appropriate under Fed. R. Civ. P. 23(b)(1)
11 because the prosecution of separate actions by individual Class Members would create a
12 risk of establishing incompatible standards of conduct for Apple.

13
14 42. Certification of the Class is also appropriate under FED. R. CIV. P. 23(b)(2)
15 because Apple has acted, or refused to act, on grounds generally applicable to the Class,
16 thereby making appropriate final injunctive relief or equitable relief with respect to the
17 Class as a whole.

18
19 43. Certification of the Class, therefore, is appropriate under Fed. R. Civ. P.
20 23(b)(3) because the above common questions of law or fact predominate over any
21 questions affecting individual Class Members and a class action is superior to other
22 available methods for the fair and efficient adjudication of this controversy.

23 44. Apple's wrongful actions and omissions are generally applicable to the
24 Class as a whole and, therefore, Plaintiffs also seek equitable remedies for the Class.

25 45. Apple's systemic policies and practices also make injunctive relief for the
26 Class appropriate.
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46. Absent a class action, Apple will retain the benefits of its wrongdoing despite its serious violations of the law and infliction of economic damages, injury, and harm on Plaintiffs and Class Members.

CAUSES OF ACTION
FIRST CAUSE OF ACTION
(New York General Business Law § 349)

47. Plaintiffs re-allege and incorporate by reference all preceding factual allegations as though fully set forth herein.

48. Plaintiffs bring this claim on behalf of themselves and the Class.

49. Defendant has engaged in, and continues to engage in, deceptive acts and practices in violation of N.Y. GEN. BUS. LAW § 349.

50. Defendant’s acts are willful, unfair, unconscionable, deceptive, and contrary to the public policy of New York, which aims to protect consumers.

51. Defendant’s misrepresentations and false, deceptive, and materially misleading statements, representations, and omissions with respect to the iOS updates, as described above, constitute deceptive practices in violation of N.Y. GEN. BUS. LAW § 349.

52. Defendant’s false, deceptive, and misleading statements, representations, and omissions would have been material to any older iPhone user.

53. Defendant knew at the time it promised enhanced and improved performance that its promise was false because at the time Defendant was deliberately engineering the iOS updates to reduce device performance.

54. Defendant’s intentional concealments were designed to deceive older iPhone users into installing iOS updates, which severely degrade device performance and effectively render their iPhones inoperable.

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55. By concealing the adverse impacts of the iOS updates, Defendant benefits from the purchase of newer iPhone models.

56. Defendant intentionally concealed that iOS updates were designed to reduce the effectiveness of the CPU on certain iPhone models so that iPhone consumers would believe it is necessary to purchase new iPhones.

57. Defendant's practices are unconscionable and outside the norm of reasonable business practices.

58. As a direct and proximate result of Defendant's unlawful deceptive acts and practices, Plaintiffs and Class Members installed iOS updates and suffered and continue to suffer an ascertainable loss of monies based on loss of functionality, loss in value, and irreversible destruction of their iPhones, and the costs of replacement batteries and phones. By reason of the foregoing, Defendant is liable to Plaintiffs and Class Members for trebled compensatory damages, attorneys' fees, and the costs of this suit.

59. Plaintiffs and Class Members further seek equitable relief against Defendant. Pursuant to N.Y. GEN. BUS. LAW § 349, this Court has the power to award such relief, including but not limited to, an order declaring Defendant's practices as alleged herein to be unlawful, an Order enjoining Defendant from undertaking any further unlawful conduct, an Order directing Defendant to refund to Plaintiffs and the Class all amounts wrongfully assessed, collected, or withheld, and an Order requiring Apple to issue an iOS update that reverses the damage done by prior updates.

60. Defendant knowingly and willfully deceptively induces consumers to install iOS updates that will significantly degrade performance so that it can reap outrageous profits to the direct detriment of New York consumers. Defendant is therefore additionally

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liable for triple damages.

**SECOND CAUSE OF ACTION
(New York General Business Law § 350)**

61. Plaintiffs re-allege and incorporate by reference all preceding factual allegations as though fully set forth herein.

62. Plaintiffs bring this claim on behalf of themselves and the Class.

63. Defendant has engaged in, and continues to engage in, false advertising in violation of N.Y. GEN. BUS. LAW § 350.

64. Defendant’s acts are willful, unfair, unconscionable, deceptive, and contrary to the public policy of New York, which aims to protect consumers.

65. Defendant’s advertisements and false, deceptive, and materially misleading statements, representations, and omissions with respect to the iOS updates, as described above, constitute deceptive practices in violation of N.Y. GEN. BUS. LAW § 350.

66. Defendant’s false, deceptive, and misleading advertisements, statements, representations, and omissions would have been material to any older iPhone user.

67. Defendant knew at the time it promised enhanced and improved performance that its promise was false because at the time Defendant was deliberately engineering the iOS updates to reduce device performance.

68. Defendant’s intentional concealments in its advertising were designed to deceive older iPhone users into installing iOS updates, which severely degrade device performance and effectively render their iPhones inoperable.

69. By concealing the adverse impacts of the iOS updates, Defendant benefits from the purchase of newer iPhone models.

70. Defendant intentionally concealed that iOS updates were designed to reduce

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the CPU on certain iPhone models so that iPhone consumers would believe it is necessary to purchase new iPhones.

71. Defendant’s practices are unconscionable and outside the norm of reasonable business practices.

72. As a direct and proximate result of Defendant’s unlawful deceptive acts and practices, Plaintiffs and Class Members installed iOS updates and suffered and continue to suffer an ascertainable loss of monies based on loss of functionality, loss in value, and irreversible destruction of their iPhones, and the costs of replacement batteries and phones. By reason of the foregoing, Defendant is liable to Plaintiffs and Class Members for trebled compensatory damages, attorneys’ fees, and the costs of this suit.

73. Plaintiffs and Class Members further seek equitable relief against Defendant. Pursuant to N.Y. GEN. BUS. LAW § 350, this Court has the power to award such relief, including but not limited to, an order declaring Defendant’s practices as alleged herein to be unlawful, an Order enjoining Defendant from undertaking any further unlawful conduct, and an order directing Defendant to refund to Plaintiffs and the Class all amounts wrongfully assessed, collected, or withheld.

74. Defendant knows full well that it deceptively induces consumers to install iOS updates that will significantly degrade performance so that it can reap outrageous profits to the direct detriment of New York consumers. As such, Defendant’s actions are unconscionable and actuated by bad faith, lack of fair dealing, actual malice, or accompanied by wanton and willful disregard for consumers’ well-being. Defendant is therefore additionally liable for punitive damages, in an amount to be determined at trial.

1
2 **THIRD CAUSE OF ACTION**
3 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

4 75. Plaintiffs re-allege and incorporate by reference all preceding factual
5 allegations as though fully set forth herein.

6 76. Plaintiffs bring this claim on behalf of themselves and the Class.

7 77. Every contract in New York contains an implied covenant of good faith and
8 fair dealing in the performance and enforcement of the contract. The implied covenant is
9 an independent duty and may be breached even if there is no breach of a contract's express
10 terms.

11 78. Upon prompting Plaintiffs and Class Members to install iOS updates,
12 Defendant represented that the upgrades were compatible with and support older iPhones
13 and would enhance performance.

14 79. Plaintiffs reasonably expected that the iOS updates were compatible with
15 and support their iPhones and would enhance performance. Plaintiffs also reasonably
16 expected that Apple would not recommend installing software that would significantly
17 diminish device capacity, performance, and functionality. Without these reasonable
18 expectations, Plaintiff and other Class Members would not have agreed to install the iOS
19 updates.
20

21 80. Defendant breached the implied covenant of good faith and fair dealing by
22 engaging in affirmative misrepresentations, concealments, and omissions in bad faith,
23 thereby frustrating Plaintiffs and other Class Members' reasonable expectations concerning
24 their iPhones and the iOS updates. Defendant also breached the implied covenant of good
25 faith and fair dealing by issuing an iOS update knowing that it would damage the
26 performance of iPhones to the extent that they did not perform as Plaintiffs and the public
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reasonably expected them to perform.

81. As a direct and proximate result of Defendant’s breach, Defendant is liable to Plaintiffs and Class Members for actual damages in an amount to be determined at trial.

**FOURTH CAUSE OF ACTION
(Unjust Enrichment)**

82. Plaintiffs re-allege and incorporate by reference all preceding factual allegations as though fully set forth herein.

83. Plaintiffs bring this claim on behalf of themselves and the Class.

84. Apple, by way of its affirmative actions and omissions, knowingly and deliberately enriched itself by deliberately and secretly slowing Class Members’ iPhones.

85. Apple consciously and opportunistically issued the iOS updates to increase its own profits at the expense of Plaintiffs and Class Members.

86. Apple continued to obtain the benefits conferred on it by Plaintiffs’ and Class Members’ business, including but not limited to purchase of new iPhones and applications from Apple’s App Store.

87. Plaintiffs and Class Members, on the other hand, suffered as a direct and proximate result. As a result of Apple’s decision to profit by rendering Plaintiffs’ and Class Members’ iPhones effectively useless, Plaintiffs and Class Members suffered and continue to suffer considerable injuries in the forms of, *inter alia*, loss of functionality, loss in value, and irreversible destruction of their iPhones, and the costs of replacement.

88. Accordingly, Plaintiffs, on behalf of themselves and the Class Members, respectfully request this Court award relief in the form of restitution and compensatory damages

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Class, respectfully request that the Court grant relief against Defendant as follows:

1. For an Order certifying the proposed Class pursuant to FED. R. CIV. P. 23(b)(1), (2) and/or (3), requiring notice thereto to be paid by Defendant, and appointing Plaintiffs and their counsel to represent the Class;
2. Adjudging and decreeing that Defendant has engaged in the conduct alleged herein;
3. For appropriate injunctive relief and/or declaratory relief, including an Order enjoining Defendant’s unlawful conduct;
4. For compensatory, statutory, general damages, trebled according to proof on certain causes of action;
5. For reimbursement, restitution, and disgorgement on certain causes of action;
6. For an Order awarding Plaintiffs and the Class reasonable attorney’s fees and expenses for the costs of this suit;
7. For both pre- and post-judgment interest at the maximum allowable rate on any amounts awarded; and
8. For any and all such other and further relief that this Court may deem just and proper, including but not limited to punitive or exemplary damages.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand trial by jury of all claims and causes of action in this lawsuit to which they are so entitled.

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Dated: December 28, 2017

Respectfully submitted,

/s/Nathan M. Smith

Nathan M. Smith
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Attorneys for Plaintiffs and the Putative Class

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Analedis Batista, Paul Sohayegh
(b) County of Residence of First Listed Plaintiff Suffolk County, New York
(c) Attorneys (Firm Name, Address, and Telephone Number)
Nathan M. Smith, 11601 Wilshire Blvd., Suite 2080, Los Angeles, CA 90025, 310.593.9890

DEFENDANTS
Apple, Inc.
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question
4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes categories like Personal Injury, Civil Rights, Habeas Corpus, etc.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing
Brief description of cause:
Violations of New York General Business Law Sections 349, 350, Breach of covenant of good faith, Unjust enrichment

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P.
DEMAND \$
JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY
JUDGE Donna M. Ryu
DOCKET NUMBER 4:17-cv-07292-DMR

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)
SAN FRANCISCO/OAKLAND
SAN JOSE
EUREKA-MCKINLEYVILLE

DATE 12/28/2017 SIGNATURE OF ATTORNEY OF RECORD /s/Nathan M. Smith

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)."
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Federal Rule of Civil Procedure 23.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: "the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated."
- Date and Attorney Signature.** Date and sign the civil cover sheet.

Exhibit 5

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:17-cv-09138-PSG-JC**

Stefan Bogdanovich et al v. Apple, Inc., et al
Assigned to: Judge Philip S. Gutierrez
Referred to: Magistrate Judge Jacqueline Chooljian
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 12/21/2017
Jury Demand: Plaintiff
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

Stefan Bogdanovich

*individually and on behalf of all others
similarly situated*

represented by **Colin Matthew Jones**
Wilshire Law Firm
3055 Wilshire Boulevard 12th Floor
Los Angeles, CA 90010
213-381-9988
Fax: 213-381-9989
Email: colin@wilshirelawfirm.com
ATTORNEY TO BE NOTICED

B Bobby Saadian

Wilshire Law Firm PLC
3055 Wilshire Boulevard 12th Floor
Los Angeles, CA 90010
213-381-9988
Fax: 213-381-9989
Email: bobby@wilshirelawfirm.com
ATTORNEY TO BE NOTICED

Plaintiff

Dakota Speas

*individually and on behalf of all others
similarly situated*

represented by **Colin Matthew Jones**
(See above for address)
ATTORNEY TO BE NOTICED

B Bobby Saadian

(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Apple, Inc.

a corporation

Defendant

Does

1 through 10, inclusive

Date Filed	#	Docket Text
------------	---	-------------

12/21/2017	1	COMPLAINT Receipt No: 0973-21003901 - Fee: \$400, filed by Plaintiffs Dakota Speas, Stefan Bogdanovich. (Attorney B Bobby Saadian added to party Stefan Bogdanovich(pty:pla), Attorney B Bobby Saadian added to party Dakota Speas(pty:pla)) (Saadian, B) (Entered: 12/21/2017)
12/21/2017	2	NOTICE OF ASSIGNMENT to District Judge Philip S. Gutierrez and Magistrate Judge Jacqueline Chooljian. (esa) (Entered: 12/21/2017)
12/21/2017	3	NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed. (esa) (Entered: 12/21/2017)
12/21/2017	4	NOTICE OF DEFICIENCIES in Attorney Case Opening. The following error(s) was found: The Civil Cover Sheet (CV-71)is missing or incomplete. All civil actions presented for filing must be accompanied by a completed Civil Cover Sheet. See Local Rule 3-1. Counsel must file a completed Civil Cover Sheet immediately. Failure to do so may be addressed by judicial action, including sanctions. See Local Rule 83-7. No Notice of Interested Parties has been filed. A Notice of Interested Parties must be filed with every partys first appearance. See Local Rule 7.1-1. Counsel must file a Notice of Interested Parties immediately. Failure to do so may be addressed by judicial action, including sanctions. See Local Rule 83-7. (esa) (Entered: 12/21/2017)
12/21/2017	5	STANDING ORDER REGARDING NEWLY ASSIGNED CASES by Judge Philip S. Gutierrez. (ji) (Entered: 12/21/2017)
12/21/2017	6	CIVIL COVER SHEET filed by Plaintiffs Stefan Bogdanovich, Dakota Speas. (Saadian, B) (Entered: 12/21/2017)
12/21/2017	7	NOTICE of Interested Parties filed by Plaintiffs Stefan Bogdanovich, Dakota Speas, (Saadian, B) (Entered: 12/21/2017)
12/21/2017	8	Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening), 1 filed by Plaintiffs Stefan Bogdanovich, Dakota Speas. (Saadian, B) (Entered: 12/21/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 11:20:10			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	2:17-cv-09138-PSG-JC End date: 12/28/2017
Billable Pages:	2	Cost:	0.20

1 Bobby Saadian, Esq. SBN: 250377
2 Colin M. Jones, Esq. SBN: 265628
3 WILSHIRE LAW FIRM
4 3055 Wilshire Blvd., 12th Floor
5 Los Angeles, California 90010
6 Tel: (213) 381-9988
7 Fax: (213) 381-9989

8 *Attorneys for Plaintiffs*

9 **UNITED STATES DISTRICT COURT**

10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 STEFAN BOGDANOVICH;
12 DAKOTA SPEAS;

13 Plaintiffs, on behalf of themselves
14 individually and all others similarly
15 situated,

16 vs.

17 APPLE, INC., a corporation; DOES 1
18 through 10, inclusive,

19 Defendant.

CASE NO.:

CLASS ACTION COMPLAINT

- 1. BREACH OF IMPLIED CONTRACT
- 2. TRESPASS TO CHATTEL

20 Plaintiffs identified below (collectively, “Plaintiffs”), individually, and on
21 behalf of the Classes defined below of similarly situated persons, file this Class
22 Action Complaint. Plaintiffs file suit against Apple, Inc. (“Defendants”).

23
24 **I. NATURE OF THE ACTION**

25 1. Plaintiffs and Class Members have owned iPhone 7, and iPhone 7s,
26 or have owned older iPhone models for the past years.

27 2. Plaintiffs and Class Members have notice that their older iPhone
28 models slows down when new models come out.

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1 3. On December 20, 2017, Defendant admitted to purposefully
2 slowing down older iPhone models.

3 4. Plaintiffs and Class Members never consented to allow Defendants to
4 slow their iPhones.

5 5. As a result of Defendant’s wrongful actions, Plaintiffs and Class
6 Members had their phone slowed down, and thereby it interfered with Plaintiffs’
7 and Class Members’ use or possession of their iPhones, Plaintiffs and Class
8 Members have otherwise suffered damages.

9 **II. THE PARTIES**

10 6. Plaintiff Stefan Bogdanovich is a California citizen residing in Los
11 Angeles, California.

12 7. Plaintiff Dakota Speas is a California citizen residing in Los
13 Angeles, California.

14 8. Plaintiffs bring this action on their own behalf and on behalf of all
15 others similarly situated, namely all other individuals who have owned iPhone
16 models prior to iPhone 8.

17 9. Upon information and belief, Defendant Apple is a corporation
18 organized and existing under the laws of the State of California with its principal
19 place of business at 1 Infinite Loop, Cupertino, California.

20 10. Plaintiffs are ignorant of the true names and capacities of
21 Defendants sued herein as Does 1 through 10, inclusive, and therefore sues these
22 Defendants by such fictitious names. Plaintiffs will amend this Complaint to
23 allege their true names and capacities when the same are ascertained. Plaintiffs
24 are informed and believe and thereon allege that each of the fictitiously named
25 Defendants are responsible in some manner for the occurrences and acts alleged
26 herein, and that Plaintiffs damages alleged herein were proximately caused by
27 these Defendants. When used herein, the term “Defendants” is inclusive of
28 DOES 1 through 10.

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1 11. Whenever and wherever reference is made in this Complaint to any
2 act by a Defendant or Defendants, such allegations and reference shall also be
3 deemed to mean the acts and failures to act of each Defendant acting
4 individually, jointly, and severally.

5 **III. JURISDICTION AND VENUE**

6 12. This Court has subject matter jurisdiction over the state law claims
7 asserted here pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2),
8 since some of the Class Members are citizens of a State different from the
9 Defendant and, upon the original filing of this complaint, members of the
10 putative Plaintiffs class resided in states around the country; there are more than
11 100 putative class members; and the amount in controversy exceeds \$5 million.

12 13. The Court also has personal jurisdiction over the Parties because
13 Defendant conducts a major part of their national operations with regular and
14 continuous business activity in California, with an advertising budget both not
15 exceeded in other jurisdictions throughout the United States.

16 14. Venue is appropriate because, among other things: (a) Plaintiffs are
17 resident and citizen of this District; (b) the Defendants had directed their
18 activities at residents in this District; (b) the acts and omissions that give rise to
19 this Action took place, among others, in this judicial district.

20 15. Venue is further appropriate pursuant to 28 U.S.C. § 1391 because
21 Defendant conducts a large amount of their business in this District, and
22 Defendant has substantial relationships in this District. Venue is also proper in
23 this Court because a substantial part of the events and omissions giving rise to the
24 harm of the Class Members occurred in this District.

25 **IV. SUBSTANTIVE ALLEGATIONS**

26 16. Plaintiffs and Class Members have used Apple iPhones for a number
27 of years.

28 17. Defendant alleges that its battery may retain up to 80 percent of their

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1 original capacity at 500 complete charge cycles.

2 18. Defendant alleges that it slows down iPhone processors when the
3 battery is wearing out.

4 19. Defendant never requested consent or did Plaintiffs at any time give
5 consent for Defendant to slow down their iPhones.

6 20. Plaintiffs and Class Members were never given the option to bargain
7 or choose whether they preferred to have their iPhones slower than normal.

8 21. Plaintiffs and Class Members suffered interferences to their iPhone
9 usage due to the intentional slowdowns caused by Defendant.

10 22. Defendant's wrongful actions directly and proximately caused the
11 interference and loss of value to Plaintiffs and Class Members' iPhones causing
12 them to suffer, and continue to suffer, economic damages and other harm for which
13 they are entitled to compensation, including:

- 14 a. Replacement of old phone;
- 15 b. Loss of use;
- 16 c. Loss of value;
- 17 d. Purchase of new batteries;
- 18 e. Ascertainable losses in the form of deprivation of the value of their
19 iPhone;
- 20 f. Overpayments to Defendant for iPhones in that a portion of the price
21 paid for such iPhone by Plaintiffs and Class Members to Defendant
22 was for Defendant to purposefully not interfere with the usage of their
23 iPhones, which Defendant and its affiliates purposefully interfered in
24 order to slow down its performance and, as a result, Plaintiffs and
25 Class Members did not receive what they paid for and were
26 overcharged by Defendant.

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1 **V. CLASS ACTION ALLEGATIONS**

2 23. Plaintiffs brings this action on their own behalf and pursuant to the
3 Federal Rules of Civil Procedure Rule 23(a), (b)(2), (b)(3), and (c)(4), Plaintiffs
4 seeks certification of a Nationwide class and a California class. The nationwide
5 class is initially defined as follows:

6 All persons residing in the United States who have owned
7 iPhone models older than iPhone 8 (the “Nationwide Class”).

8 The California class is initially defined as follows:

9 All persons residing in California who have owned iPhone
10 models older than iPhone 8 (the “California Class”).

11 24. Excluded from each of the above Classes are Defendant, including
12 any entity in which Defendant has a controlling interest, is a parent or subsidiary,
13 or which is controlled by Defendant, as well as the officers, directors, affiliates,
14 legal representatives, heirs, predecessors, successors, and assigns of Defendant.
15 Also excluded are the judges and court personnel in this case and any members of
16 their immediate families. Plaintiffs reserves the right to amend the Class
17 definitions if discovery and further investigation reveal that the Classes should be
18 expanded or otherwise modified.

19 25. *Numerosity.* Fed. R. Civ. P. 23(a)(1). The members of the Classes are
20 so numerous that the joinder of all members is impractical. While the exact number
21 of Class Members is unknown to Plaintiffs at this time, Defendant has
22 acknowledged to purposefully slow down older iPhone models. The disposition
23 of the claims of Class Members in a single action will provide substantial benefits
24 to all parties and to the Court. The Class Members are readily identifiable from
25 information and records in Defendant’s possession, custody, or control.

26 26. *Commonality.* Fed. R. Civ. P. 23(a)(2) and (b)(3). There are questions
27 of law and fact common to the Classes, which predominate over any questions
28

1 affecting only individual Class Members. These common questions of law and fact
2 include, without limitation:

- 3 a. Whether Defendant has an implied contractual obligation to not
4 purposefully slow down older iPhone models;
- 5 b. Whether Defendant has complied with any implied contractual
6 obligation to not purposefully slow down older iPhone models;
- 7 c. Whether Defendant interfered or otherwise lowered the use or value
8 of older iPhone models;
- 9 d. Whether Plaintiffs and the Class are entitled to damages, civil
10 penalties, punitive damages, and/or injunctive relief.

11 27. *Typicality*. Fed. R. Civ. P. 23(a)(3). Plaintiffs' claims are typical of
12 those of other Class Members because Plaintiffs' iPhones, like that of every other
13 Class Member, was misused by Defendant.

14 28. *Adequacy of Representation*. Fed. R. Civ. P. 23(a)(4). Plaintiffs will
15 fairly and adequately represent and protect the interests of the members of the
16 Class. Plaintiffs have retained competent counsel experienced in litigation of class
17 actions, including consumer class actions, and Plaintiffs intend to prosecute this
18 action vigorously. Plaintiffs' claims are typical of the claims of other members of
19 the Class and Plaintiffs has the same non-conflicting interests as the other Members
20 of the Class. The interests of the Class will be fairly and adequately represented
21 by Plaintiffs and their counsel.

22 29. *Superiority of Class Action*. Fed. R. Civ. P. 23(b)(3). A class action is
23 superior to other available methods for the fair and efficient adjudication of this
24 controversy since joinder of all the members of the Classes is impracticable.
25 Furthermore, the adjudication of this controversy through a class action will avoid
26 the possibility of inconsistent and potentially conflicting adjudication of the
27 asserted claims. There will be no difficulty in the management of this action as a
28 class action.

1 38. Defendant breached the implied contracts it made with Plaintiffs and
2 Class Members by purposefully slowing down older iPhone models when new
3 models come out and by failing to properly disclose that at the time of that the
4 parties entered into an agreement.

5 39. As a direct and proximate result of Defendant’s breaches of the
6 implied contracts between Defendant and Plaintiffs and Class Members, Plaintiffs
7 and Class Members sustained actual losses and damages as described in detail
8 above.

9 **COUNT II**

10 **Trespass to Chattel**

11 (On Behalf of Plaintiffs and the Nationwide and California Classes)

12 40. Plaintiffs repeats and fully incorporates the allegations contained in
13 each and every paragraph of this Complaint.

14 41. Plaintiffs owned or possessed the right to possess the above
15 mentioned iPhones.

16 42. Defendant intentionally interfered with Plaintiff and Class Members’
17 use or possession of their iPhone by purposefully slowing down their phones.

18 43. Plaintiffs and Class Members never consented to Defendant
19 interfering with their phones in order to slow their phones down.

20 44. Plaintiffs and Class Members have lost use, value, had to purchase
21 new batteries, and had to purchase new iPhones due to Defendant’s conduct.

22 45. Defendant’s conduct was a substantial factor in causing Plaintiffs and
23 Class Members to have to replace iPhones, buy new batteries, or loss of usage of
24 their iPhone.

25 **VI. PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs, individually and on behalf of all Class Members
27 proposed in this Complaint, respectfully requests that the Court enter judgment in
28 her favor and against Defendant as follows:

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Los Angeles, CA 90010-1137

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- A. For an Order certifying the Nationwide Class and California Class as defined here, and appointing Plaintiffs and her Counsel to represent the Nationwide Class and the California Class;
- B. For equitable relief enjoining Defendant from engaging in the wrongful conduct complained of here pertaining to the misuse of Plaintiffs and Class Members’ personal property;
- C. For equitable relief compelling Defendant to utilize appropriate methods and policies with respect to older iPhone models in respect to their batteries;
- D. For equitable relief requiring restitution and disgorgement of the revenues wrongfully retained as a result of Defendant’s wrongful conduct;
- E. For an award of actual damages and compensatory damages, in an amount to be determined;
- F. For an award of costs of suit and attorneys’ fees, as allowable by law; and
- G. Such other and further relief as this court may deem just and proper.

DEMAND FOR JURY TRIAL

Based on the foregoing, Plaintiffs, on behalf of themselves, and all others similarly situated, hereby demand a jury trial for all claims so triable.

Dated: December 21, 2017

Respectfully Submitted,

/s/ Colin M. Jones, Esq.

Colin M. Jones, Esq. SBN: 265628
Attorneys for Plaintiffs

Exhibit 6

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:17-cv-09192**

Mailyan v. Apple Inc.
Assigned to:
Cause: Civil Miscellaneous Case

Date Filed: 12/23/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff**Violetta Mailyan**

represented by **Armen Kiramijyan**
Kaass Law
313 East Broadway Suite 944
Glendale, CA 91209
310-943-1171
Fax: 310-943-1172
Email: consumerlitigationteam@kaass.com
ATTORNEY TO BE NOTICED

V.

Defendant**Apple Inc.**

Date Filed	#	Docket Text
12/23/2017	1	COMPLAINT Receipt No: 0973-21017184 - Fee: \$400, filed by Plaintiff Violetta Mailyan. (Attorney Armen Kiramijyan added to party Violetta Mailyan(pty:pla))(Kiramijyan, Armen) (Entered: 12/23/2017)
12/23/2017	2	COMPLAINT with filing fee previously paid (400 paid on 12/23/2017, receipt number 266OGCIE), filed by Plaintiff Violetta Mailyan.(Kiramijyan, Armen) (Entered: 12/23/2017)
12/23/2017	3	CIVIL COVER SHEET filed by Plaintiff Violetta Mailyan. (Kiramijyan, Armen) (Entered: 12/23/2017)
12/23/2017	4	Certificate and Notice of Interested Parties filed by Plaintiff Violetta Mailyan (Kiramijyan, Armen) (Entered: 12/23/2017)
12/23/2017	5	Summons in a Civil Case filed by Plaintiff Violetta Mailyan (Kiramijyan, Armen) (Entered: 12/23/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 11:27:40			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad

Description:	Docket Report	Search Criteria:	2:17-cv-09192 End date: 12/28/2017
Billable Pages:	1	Cost:	0.10

1 Armen Kiramijyan, Esq. (SBN 276723)
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3 313 East Broadway, #944
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4 Telephone: 310.943.1171
5 akiramijyan@kaass.com

6 Hovsep Hovsepyan, Esq. (SBN 308522)
Attorney for Plaintiff
7 KAASS LAW
8 313 East Broadway, #944
Glendale, California 91209
9 Telephone: 310.943.1171
10 hhovsepyan@kaass.com

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 VIOLETTA MAILYAN, an individual,) **Case No.:**
14 on behalf of herself and all others)
15 similarly situated;) **CLASS ACTION ALLEGATION**
) **COMPLAINT**
16 Plaintiffs,) **1. Fraud through Concealment**
) **2. Unfair Competition under**
17 v.) **California Business and Professions**
) **Code § 17200 et seq.**
18 APPLE INC., a California corporation;)
19 and DOES 1-100, inclusive;)
20)
21 Defendants.) **JURY TRIAL DEMANDED**
22)

23 Violetta Mailyan (collectively “Plaintiff”), individually and on behalf of a class
24 of all similarly situated (“Class”) asserts the following claims against Apple Inc.
25 (“Defendant”) and in support thereof, states as follows:

26 **PARTIES**

27 1. Plaintiff is an individual who at all times relevant herein resided in the
28 State of California, County of Los Angeles.

1 the performance of older iPhone models.

2 10. On December 20, 2017, Defendant admitted that it intentionally slowed
3 down the operating speed of older iPhones.

4 11. In its official statement Defendant declared:

5 “Our goal is to deliver the best experience for customers, which includes overall
6 performance and prolonging the life of their devices. Lithium-ion batteries
7 become less capable of supplying peak current demands when in cold
8 conditions, have a low battery charge or as they age over time, which can result
9 in the device unexpectedly shutting down to protect its electronic components.

10 Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth
11 out the instantaneous peaks only when needed to prevent the device from
12 unexpectedly shutting down during these conditions. We’ve now extended that
13 feature to iPhone 7 with iOS 11.2, and plan to add support for other products in
14 the future.”

15 12. Defendant’s statement was released in response to a report by Primate
16 Labs stating that the processors in iPhones slow down and decrease in performance as
17 batteries age and lose capacity.

18 13. Defendant’s iOS updates never informed Plaintiff and Class that
19 Defendant was purposefully slowing down the operation of their devices.

20 14. When Plaintiff and Class bought their iPhones they were expecting that
21 their iPhones would work properly, and that the performance of their iPhones would
22 not slow down for unapparent reasons.

23 15. Defendant’s iOS updates were engineered to intentionally slow down the
24 performance speed of older iPhone models.

25 16. Defendant’s iOS updates never disclosed that the slowdown in older
26 iPhone models might be remedied by replacing the battery in these devices or by
27 avoiding the download of iOS updates.

28 17. Plaintiff and Class noticed remarkable slowdowns in the operation of their

1 iPhones before and after downloading iOS updates.

2 18. Defendant's intentional slowdown of the performance of older models of
3 iPhones greatly diminished the effectiveness, usefulness and utility of these devices.

4 19. As a result of the slowdown of the performance of their older iPhone
5 models, Plaintiff and Class bought newer iPhone models in order to have a properly
6 functioning smartphone.

7 20. Plaintiff and Class lost value of older iPhone models because of the
8 slowdown of performance. Plaintiff and Class expended money to purchase newer
9 iPhone models in order to avoid the slowdown of their older iPhone models.

10 21. The slowdown of older iPhone models was material in impact, thus
11 prompting Plaintiff and Class to purchase newer iPhone models to avoid the
12 slowdown.

13 22. If Plaintiff and Class knew that the performance of their iPhones would
14 slow down after the introduction of a new iPhone model or an iOS update, they would
15 not purchase an iPhone.

16 23. If Plaintiff and Class knew that the slow performance of their iPhones
17 could be remedied by purchasing a new battery, they would buy a new battery instead
18 of a new iPhone model.

19 24. If Plaintiff and Class knew that the slow performance of their iPhone
20 could be avoided by refusing to download the iOS update, they would not buy a new
21 iPhone model.

22 25. Defendant knew and intentionally failed to disclose that it was
23 purposefully slowing down the performance of older iPhones models and that the
24 slowdown could be remedied by purchasing a new battery, by avoiding to download
25 the iOS update or otherwise.

26 26. Prior to the purchase of their newer iPhone models, Defendant never
27 informed Plaintiff and Class that the performance of their old iPhone models could by
28 improved by purchasing a new battery.

1 limited to, the following: whether Defendant intentionally slowed down the
2 performance of older iPhone models through iOS updates or otherwise; whether
3 Defendant intentionally concealed material information from Class members; whether
4 Defendant's conduct was the direct and proximate cause of the damages suffered by
5 Class members; whether the Plaintiff and Class suffered monetary damages as a result
6 of Defendant's conduct; whether Defendant violated California Business and
7 Professions Code §17200 et seq.; whether punitive damages should be awarded to
8 Plaintiff and Class.

9 37. Plaintiffs' claims are typical of the claims of the Class. Each member of
10 the Class had to buy a newer iPhone model because the performance of their older
11 iPhone model had slowed down as a result of Defendant's purposeful conduct. Each
12 member of Class was denied the use, utility and value of the older iPhone model
13 because of the slowdown of performance. The injuries of the Plaintiff and Class are
14 identical, and Plaintiff's claims for relief are based upon the same legal theories as the
15 claims of other Class members.

16 38. Plaintiff will fairly and adequately protect and represent the interests of
17 the Class because her claims are typical of the claims of the Class, she is represented
18 by locally respected attorneys who have experience handling consumer litigation, who
19 are qualified and competent, and who will vigorously prosecute this litigation, and her
20 interests are not antagonistic or in conflict with the interest of the Class.

21 39. A class action is superior to all other available methods for the fair and
22 efficient adjudication of this lawsuit because individual litigation of the other Class
23 members' claims is economically unfeasible and procedurally impracticable. Litigating
24 the claims of the Class together will prevent varying, inconsistent, or contradictory
25 judgments, and will prevent delay and unnecessary expense to the parties and the
26 courts. A class action will be an efficient method of adjudicating the claims of the
27 Class members who have suffered relatively small damages as a result of the same
28 conduct of Defendant.

FIRST COUNT

(Fraud through Concealment)

40. Plaintiff incorporates and realleges all allegations set forth in paragraphs 1 to 39.

41. Defendant intentionally failed to disclose to Plaintiff and similarly situated class members that Defendant was purposefully slowing down the performance of older iPhone models through iOS updates or otherwise.

42. Defendant intentionally failed to disclose that the slow performance of older iPhone models could be remedied by purchasing a new battery or otherwise.

43. Only Defendant knew that it was purposefully slowing down the performance of older iPhone models and that the slow performance of older iPhone models could be remedied by purchasing a new battery or otherwise.

44. Plaintiff and similarly situated Class members did not know and could not have discovered that Defendant was purposefully slowing down the performance of older iPhone models and that the slow performance of older iPhone models could be remedied by purchasing a new battery or otherwise.

45. Defendant intended to deceive Plaintiff and Class by concealing the fact that it was purposefully slowing down the performance of older iPhone models and that the slow performance of older iPhone models could be remedied by purchasing a new battery or otherwise.

46. If Defendant disclosed that it would purposefully slow down the performance of older iPhone models Plaintiff and Class would not buy these iPhone models. Further, if Defendant disclosed that the slow performance of older iPhone models could be remedied by purchasing a new battery, Plaintiff and similarly situated Class members would buy a new battery instead of buying a newer iPhone model.

47. Plaintiff and similarly situated Class members suffered damages because they bought newer iPhone models as a result of the slow performance of their older iPhones models caused by Defendant's conduct.

1 48. Defendant’s concealment of the fact that it was purposefully slowing
2 down the performance of older iPhone models and that the slow performance of older
3 iPhone models could be remedied by purchasing a new battery or by avoiding the
4 download of the iOS update was a substantial factor in causing damages to Plaintiff
5 and Class.

6 49. Defendant’s conduct was intentional and malicious, causing damages to
7 Plaintiff and Class.

8 **COUNT TWO**

9 **(Unfair Competition under**

10 **California Business and Professions Code § 17200 et seq.)**

11 50. Plaintiff incorporates and realleges all allegations set forth in paragraphs
12 1 to 39.

13 51. Pursuant to California Business and Professions Code § 17200, unfair
14 competition shall mean and include any unlawful, unfair or fraudulent business act or
15 practice.

16 52. Defendant’s above described conduct was unfair and fraudulent because
17 Defendant purposefully slowed down the performance of older iPhone models through
18 iOS updates or otherwise.

19 53. As a result of Defendant’s unfair and fraudulent business practices,
20 Plaintiff and Class suffered damages because they had to purchase a newer iPhone
21 model in order to replace their slow older model.

22 54. Defendant’s conduct was intentional and malicious.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff, individually and on behalf of the proposed Class,
25 respectfully request that the Court enter judgment in their favor as follows:

- 26 1. Certifying the Class under Fed. R. Civ. P. 23 and appointing Plaintiff and
27 her counsel to represent the class;
28 2. Awarding Plaintiff and the Class monetary damages as allowable by law;

- 1 3. Awarding Plaintiff and the Class appropriate equitable relief;
- 2 4. Awarding attorneys' fees, costs and litigation expenses, as allowable by
- 3 law;
- 4 5. Awarding punitive damages as allowable by law;
- 5 6. Awarding all such further relief as allowable by law.

6 **JURY TRIAL DEMANDED**

7 Plaintiff, on behalf of herself and the Class, demands a trial by jury on all
8 triable issues.

9 DATED: December 23, 2017

KAASS LAW

10
11 By: /s/ Armen Kiramijyan
12 Armen Kiramijyan, Esq.
13 Lead Attorney for Plaintiff

14 Hovsep Hovsepyan, Esq.
15 Attorney for Plaintiff

Exhibit 7

U.S. District Court
Southern District of California (San Diego)
CIVIL DOCKET FOR CASE #: 3:17-cv-02579-BEN-RBB

Cook v. Apple Inc. et al
Assigned to: Judge Roger T. Benitez
Referred to: Magistrate Judge Ruben B. Brooks
Cause: 28:1332 Diversity Action

Date Filed: 12/27/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff

Thomas T. Cook
on behalf of himself and all others
similarly situated

represented by **Phong L. Tran**
Johnson Fistel, LLP
600 West Broadway
Suite 1540
San Diego, CA 92101
(619) 230-0063
Fax: (619) 255-1856
Email: phongt@johnsonfistel.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Apple Inc.
a California Corporation

Defendant

Does 1 Through 10
inclusive

Date Filed	#	Docket Text
12/27/2017	<u>1</u>	COMPLAINT with Jury Demand against Apple Inc., Does 1 Through 10 (Filing fee \$ 400 receipt number 0974-10761396) filed by Thomas T. Cook. (Attachments: # <u>1</u> Civil Cover Sheet) The new case number is 3:17-cv-02579-BEN-RBB. Judge Roger T. Benitez and Magistrate Judge Ruben B. Brooks are assigned to the case. (Tran, Phong)(jrm) (sjt). (Entered: 12/28/2017)
12/28/2017	<u>2</u>	Summons Issued. Counsel receiving this notice electronically should print this summons and serve it in accordance with Rule 4, Fed.R.Civ.P and LR 4.1. (jrm) (Entered: 12/28/2017)

PACER Service Center			
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12/29/2017 07:57:43			
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

THOMAS T. COOK, on behalf of
himself and all others similarly situated,

Plaintiff,

v.

APPLE INC., a California Corporation;
DOES 1 through 10, inclusive,

Defendants.

Case No.: '17CV2579 BEN RBB

CLASS ACTION

COMPLAINT FOR:

- 1. Violations of the Consumers Legal Remedies Act, Cal. Civ. Proc. Code § 1750, et seq.**
- 2. Violations of California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq.**
- 3. Violation of California’s False and Misleading Advertising Law, Cal. Bus. & Prof. Code § 17500, et seq.**
- 4. Unjust Enrichment**

JURY TRIAL DEMANDED

1 Plaintiff Thomas T. Cook (“Plaintiff”) by and through their undersigned
2 attorneys, bring this class action against Apple Inc. (“Defendant” or “Apple”),
3 on behalf of themselves and a class of similarly situated persons (the “Class” or
4 “Class Members”). Plaintiff alleges the following upon his own knowledge, or
5 where there is no personal knowledge, upon the investigation of counsel and/or
6 upon information and belief:

7 **INTRODUCTION**

8 1. Plaintiff brings this class action on behalf of himself and all others
9 similarly situated who purchased or otherwise owned an iPhone 6 smartphone or
10 other older model iPhone manufactured and sold by Apple. Plaintiff and other
11 iPhone owners began experiencing significant slowdown and performance issues
12 with their phones when Apple updated the operating software of the phones to
13 iOS 10.2.1 earlier this year. Apple represented to the public that iOS 10.2.1 and
14 subsequent iOS updates were fully compatible with, and intended for use in,
15 iPhone 6 and other older iPhone models. Plaintiff and the other Class Members
16 were effectively compelled to update their iPhones to iOS 10.2.1 because Apple
17 claimed the update provided “bug fixes and improves the security” of their
18 phones.

19 2. However, after updating to iOS 10.2.1, Plaintiff and the other Class
20 Members, without any warning or notice, were left with phones that operated in
21 a sluggish manner and failed to perform at the normal, expected standard prior to
22 the update. Indeed, after the iOS update, iPhone owners experienced problems
23 and delays using mobile applications, or “Apps,” on their phones, slowdowns in
24 downloading data, battery drain, Wi-Fi and internet connectivity issues, and
25 inadvertent shutdowns, among other concerns. Plaintiff and the other Class
26 Members have therefore been harmed because they were forced to update their
27 iPhones with operating software that degraded the performance and functionality
28

1 of their phones, leaving them with phones that were significantly impaired in
2 value.

3 3. Very recently, as of December 20, 2017, Apple effectively
4 confirmed that the iOS 10.2.1 update was responsible for slowing down and
5 hindering the performance of the iPhone 6 and other older model iPhones. Apple
6 claims the batteries used in iPhone 6 models were prone to causing unexpected
7 shutdowns, and that the iOS 10.2.1 update was intended to prevent such
8 shutdowns. To address the battery issues purportedly affecting iPhone 6 models,
9 Apple used the iOS 10.2.1 update to “throttle,” or slow down, the processor
10 speeds of those phones. Thus, as part of this purported “fix,” Apple *intentionally*
11 caused the slowdown and impairment of its iPhone 6 and older model iPhones,
12 to the detriment of Plaintiff and other Class Members.

13 4. Notably, Apple did not disclose to the public at the time of the
14 iOS 10.2.1 update that it would be throttling the processor speeds of the iPhone 6
15 and other older model iPhones. Nor did Apple disclose at the time of the iOS
16 update that there were any issues surrounding the batteries in those iPhones.

17 5. A simple and easy fix of the purported shutdown problem would
18 have been to provide notice to iPhone users and offer to replace the batteries in
19 the iPhone 6 and other older-model phones. Apple, however, has never offered
20 its customers the option of replacing the batteries in those phones. As a result,
21 owners of the iPhone 6 and other older iPhone models have been stuck with
22 inferior, poorly-performing phones, or worse yet, feel compelled to spend
23 hundreds of dollars more to upgrade a newer model iPhone.

24 6. Based on the misconduct alleged herein, Plaintiff alleges violations
25 of California’s Consumers Legal Remedies Act, Cal. Civ. Proc. Code § 1750, *et*
26 *seq.*; violations of California’s Unfair Competition Law, Cal. Bus. & Prof. Code
27 § 17200, *et seq.*; violations of California’s False and Misleading Advertising
28 Law, Cal. Bus. & Prof. Code § 17500, *et seq.*; and unjust enrichment. Plaintiff

1 seeks, on behalf of himself and all Class Members nationwide, monetary
2 damages, restitution, injunctive relief, and all other relief deemed appropriate,
3 arising out of such misconduct.

4 **JURISDICTION AND VENUE**

5 7. This Court has jurisdiction over this matter pursuant to 28 U.S.C.
6 § 1332, as modified by the Class Action Fairness Act of 2005, because at least
7 one member of the Class is a citizen of a different state than Defendant, there are
8 more than 100 members in the Class, and the aggregate amount in controversy
9 exceeds \$5,000,000, exclusive of interests and costs.

10 8. Venue properly lies in this District pursuant to 28 U.S.C. § 1391(a),
11 because Plaintiff resides here, and Defendant has transacted substantial business
12 within the meaning of 28 U.S.C. § 1391(a), as defined in 28 U.S.C. § 1391(c),
13 and because a substantial part of the events giving rise to the claims alleged herein
14 occurred in the Southern District of California. Specifically, Defendant marketed
15 and sold numerous iPhones throughout this District, maintained retail outlets in
16 this District; and Plaintiff, as well as other members of the Class, purchased
17 Defendant's iPhones from retail outlets located within this District.

18 **PARTY ALLEGATIONS**

19 9. Plaintiff Thomas T. Cook resides in San Diego County, California.
20 Plaintiff Cook purchased and owns an iPhone 6.

21 10. Defendant Apple Inc. is a California corporation with its principal
22 executive offices at 1 Infinite Loop, Cupertino, California 95104.

23 **SUBSTANTIVE ALLEGATIONS**

24 11. In or around October 2014, Plaintiff purchased a new iPhone 6
25 (64 GB) from Verizon Wireless.

26 12. Prior to updating to iOS 10.2.1, Plaintiff's iPhone operated with
27 normal functionality and at normal processing speeds.

28

1 13. On or about December 12, 2016, Apple released iOS 10.2, which, at
2 that time, was intended as the operating system software update for iPhones,
3 including the iPhone 6 and other older iPhone models. The Software Update
4 provided by Apple to Plaintiff and the other Class Members described the
5 iOS 10.2 update as follows:

6 iOS 10.2 introduces new features including the TV app (US only), a
7 new and unified and experience for accessing your TV shows and
8 movies across multiple video apps. Emoji have been beautifully
9 redesigned to reveal even more detail and over 100 new emoji have
10 been added including new faces, food, animals, sports and
11 professions. This update also includes stability improvements and
12 bug fixes.

13 14. Just over a month later, on or about January 23, 2017, Apple released
14 iOS 10.2.1, which was presented to the public as a “minor update” to iOS 10.2.¹
15 Apple provided a cursory description of the Software Update for iOS 10.2.1,
16 stating only that it “includes bug fixes and improves the security of your iPhone
17 or iPad.” Further information about the security content of iOS 10.2.1 was
18 provided on Apple’s website, which indicated that iOS 10.2.1 was intended for
19 use by, and compatible with, “iPhone 5 and later [iPhone models],” including all
20 iPhone 6 models.²

21 15. In connection with the release of its iOS 10.2.1 update, Apple
22 provided no warning or notice to the public that the update would cause certain
23 iPhone models, including iPhone 6 models, to operate significantly slower and
24 would otherwise degrade the overall performance, functionality, and usability of
25 those phones. As discussed below, Apple was well aware at the time that the
26 iOS 10.2.1 update would cause adverse-performance issues with the iPhone 6 and
27 other older model iPhones. Apple, in fact, introduced the iOS 10.2.1 update with

28 ¹ See “Apple iOS 10.2.1 Is Now Available: What Is Included In The Update?”
<https://www.forbes.com/sites/amitchowdhry/2017/01/23/apple-ios-10-2-1-is-now-available-what-is-included-in-the-update/#163173fd488f>.

² See <https://support.apple.com/en-us/HT207482>.

1 the specific intention and plan to “throttle” or slow down the processing speeds
2 of the iPhone 6 and other older model phones.

3 16. Notably, Apple has long marketed and advertised its iPhones,
4 including the iPhone 6 and other older model iPhones, as being fully compatible
5 and working well with future iOS updates. For example, as part of its major
6 nationwide advertising campaign—“Why There’s Nothing Quite like iPhone”—
7 Apple assured iPhone users (including those with iPhone 6 and other older model
8 iPhones) that they had nothing to worry about when the iOS was updated, and
9 that their phones would continue to work “ridiculously well.” Indeed, Apple
10 touted the long-term, future compatibility of its iPhone models by stating:

11 It should have hardware and software that were designed to work
12 with each other. And enhance each other. By people who frequently
13 see each other. That’s how you make a phone work ridiculously
14 well.

15 And whenever there are shiny, new software updates with shiny,
16 new features, you should be able to sit back, relax, and know your
17 phone will get them. And be compatible with them. For years. For
18 free.

19 17. Plaintiff and the Class Members were subjected to the same false,
20 misleading, and deceptive statements made by Apple in promoting the use of its
21 iOS 10.2.1 software update. Plaintiff and the Class Members relied on Apple’s
22 false, misleading, and deceptive statements (including omissions) in updating to
23 iOS 10.2.1 with the fair and reasonable expectation of receiving equal or better
24 performance and/or new features and functionality.

25 18. With no prior warning from Apple concerning the adverse nature of
26 iOS 10.2.1, Plaintiff unwittingly updated the operating software of his iPhone 6
27 to iOS 10.2.1, and later, to subsequent versions of iOS that had the same problems
28 as iOS 10.2.1.

19. Immediately after updating to iOS 10.2.1, Plaintiff’s iPhone became
significantly impaired and failed to function normally. Indeed, the update caused
the operation and performance of Plaintiff’s iPhone to slow down dramatically.

1 For example, Plaintiff and other iPhones users experienced slower App launches,
2 slower web browsing and downloading of data, delayed touchscreen interaction,
3 and other performance issues, including crashes, freezes, battery drain, Wi-Fi and
4 internet connectivity issues, and home screen failure.

5 20. As a result of the iOS 10.2.1 update, the overall operations and
6 functionality of Plaintiff's iPhone was severely slowed down and degraded,
7 including core functions concerning the usage of the phone itself, emails, text
8 messaging, and App usage. Plaintiff was therefore left with a phone that was
9 severely impaired in value and had compromised functionality.

10 21. Many other iPhone users have observed and reported their phones
11 becoming slow and impaired after updating to iOS 10.2.1. For example, on
12 Apple's own "Support Communities Forum," an iPhone 6 user with the username
13 "stobloo" reported the following:

14 Q: iOS 10.2.1 iPhone 6 Plus - Very Slow

15 Since installing the iOS 10.2.1 update on my iPhone 6 Plus the
16 overall performance has become nearly unusable.

17 It constantly plays catch up when typing anything whether it is an
18 internet search, e-mail content or anything else. It feels like
19 something has a big memory leak and it's operating with any
20 available memory and struggling massively.

21 I have done all the 'usual' disabling of certain transparency effects
22 and background app refresh, forced reset, reboot; all to no avail.

23 I don't consider restoring it to factory settings an avenue to take as a
24 test as I cannot lose my text messages.

25 The only thing that's changed is the iOS update. Is anyone else
26 having problems?

27 *iPhone 6 Plus, iOS 10.2.1*

28 Posted on Mar 2, 2017 8:15 AM

See <https://discussions.apple.com/thread/7879711>.

1 22. As of December 26, 2017, 559 other users on Apple’s Support
2 Communities Forum indicated they had the same concerns raised by “stobloo”
3 about the update.

4 23. Another user on Apple’ Support Communities Forum, known as
5 “epurschke,” reported similar slowdown and performance problems after
6 updating to iOS 10.2.1, as follows:

7 Q: iPhone 6 running slow, won't download or update apps,
8 storage is wrong

9 I noticed the other day that my phone was starting to act slow in
10 response and download. I checked my usage and I was full. I deleted
11 all (15GB) of my music since I don't use it. It worked for the rest of
12 the day. Today it did the same thing, the only issue is my music is
13 not showing up in storage but the 15GB are back for some reason.

14 I've been trying to back up my phone since that first day and it will
15 start for about 3 minutes then it will say the phone is disconnected.

16 I'm doing everything I can without restoring the phone to factory
17 settings, but I'm running out of ideas.

18 *iPhone 6, iOS 10.2.1*

19 Posted on Mar 8, 2017 12:13 PM

20 See <https://discussions.apple.com/thread/7885326>.

21 24. As of December 26, 2017, 210 other users on Apple’s Support
22 Communities Forum indicated they had the same concerns raised by “epurschke”
23 about the update.

24 25. Other iPhone users have made similar complaints about the iOS
25 10.2.1 update on the iPhone Reddit forum.³ For example, Reddit user “Naxolyte”
26 complained that “iOS 10.2.1 made my iPhone SE noticeably slower.” Another
27 Reddit user, “ArchiveSQ,” echoed the sentiment, noting: “I was wondering about
28 this. Mine is noticeably slower too.” And, Reddit user “httr_barbarian”
remarked in the same thread: “installed 10.2.1 onto my iPhone5, and now my

³ https://www.reddit.com/r/iphone/comments/5qu6ek/ios_1021_made_my_iphone_se_noticeably_slower/#bottom-comments

1 battery drains before lunch time. [S]erious noticeable difference in battery life,
2 since updating to 10.2.1[,] considering reverting back to ios9. [T]his sucks.”

3 26. The slowdown and performance issues related to the iOS 10.2.1
4 update have also been widely documented by the media. In a *Forbes* article
5 entitled, “*Why Every iPhone Contains a Nasty Surprise,*” tech journalist Gordon
6 Kelly wrote that in connection with the iOS 10.2.1 update, Apple “deliberately
7 slows older iPhones.”⁴ In another article in *Newsweek* entitled “*The Apple*
8 *iPhone Slow Down is Real – Here’s Why,*” tech journalist Dana Dovey reported
9 that an analysis of iPhone data revealed that “iPhones perform worse with newer
10 iOS updates...”⁵ According to the *Newsweek* article, “[r]esults showed that the
11 iPhone 6S running on iOS 10.2 performed fine, but when the same phones were
12 upgraded to the iOS 10.2.1 in January 2017, they began to gradually perform
13 worse. The same downward performance trend was seen on iPhone 6S running
14 iOS 11.2, an update released in December 2017.” Lastly, in a *Wired* article
15 entitled “*Apple Had Way Better Options Than Slowing Down Your iPhone,*” tech
16 journalist Jordan McMahon noted that “Apple confirmed what many customers
17 have long suspected: The company has been slowing the performance of older
18 iPhones.”

19 27. Compounding the problems surrounding the iOS 10.2.1 update,
20 Apple actively prevents iPhone users from reverting back to older operating
21 software to avoid the problems in newer iOS updates. In a *Forbes* article entitled,
22 “*Apple iOS 10.2.1 Suddenly Becomes A Bigger Problem,*” tech journalist Gordon
23 Kelly explained: “Apple has decided to do what it normally does shortly after an
24 iOS release: it has stopped signing the previous version. This means any user
25 running the new iOS 10.2.1 upgrade cannot go back to iOS 10.2 because the
26

27 ⁴ <https://www.forbes.com/sites/gordonkelly/2017/12/21/apple-iphone-battery-life-slow-iphone-performance-ios11-battery/#15effc4a674b>

28 ⁵ <http://www.newsweek.com/why-do-old-iphones-slow-down-new-report-solves-mystery-752874>

1 checks (sign off) devices require before installing an update will be told by Apple
2 servers it is invalid.” Because of this onerous policy by Apple, Plaintiff and the
3 Class Members have effectively been denied the option of reverting back to using
4 a less problematic, better performing version of iOS.

5 28. Incredibly, Apple itself confirmed that iOS 10.2.1 and subsequent
6 iOS updates were, in fact, *intended* to slow down and hinder the performance of
7 the iPhone 6 and other older model iPhones. Apple revealed this information
8 after John Poole, founder of Primate Labs and developer at Geekbench, published
9 a blog post on December 18, 2017, documenting his in-depth examination of
10 iPhone 6 and 7 devices that were using different versions of iOS. As part of his
11 analysis, Poole compiled data from the performance tests of thousands of iPhones
12 and specifically looked at phones running iOS 10.2 and iOS 10.2.1.

13 29. Poole’s analysis revealed that iPhone 6 models were, in fact,
14 suffering from widespread slowdown after updating to iOS 10.2.1, and that “users
15 will experience reduced performance without notification” from such updates.
16 According to Poole, the slowdown in iPhone 6 performance from the iOS update
17 was intentional and planned, as “Apple introduced CPU slow-down” to address
18 a battery performance issue that Apple claimed was affecting older model
19 iPhones. Poole further remarked on the confusing and deceptive nature of the
20 upgrade, stating it “will also cause users to think, ‘my phone is slow so I should
21 replace it’ not, ‘my phone is slow so I should replace its battery.’”

22 30. Rather than deny Poole’s analysis, Apple basically confirmed his
23 findings and acknowledged that the slowdown in iPhone 6 performance was
24 caused by the iOS 10.2.1 software update. In a public statement released by
25 Apple, on or about December 20, 2017, Apple claimed the batteries in iPhone 6
26 models were prone to causing unexpected shutdowns, and that the iOS 10.2.1
27 update was ostensibly intended to prevent such shutdowns. To address the
28 battery issues that were purportedly affecting iPhone 6 models, Apple used the

1 iOS 10.2.1 update to “throttle,” or slow down, the processor speeds of those
2 phones. Apple therefore admitted that it was intentionally slowing down and
3 hindering the performance of iPhone 6 models as part of this purported fix.

4 31. Apple did not disclose to iPhone 6 owners at the time of the iOS
5 10.2.1 update that it would be throttling the processor speeds of those phones.
6 Nor did Apple disclose at the time that there were any issues with the battery in
7 iPhone 6 models.

8 32. A simple and easy fix to the purported shutdown problem would
9 have been to provide notice to iPhone users and offer to replace the batteries in
10 iPhone 6 models. Apple, however, has never offered its customers the option of
11 replacing the batteries in those phones. As a result, iPhone 6 owners (like
12 Plaintiff) are stuck with inferior, poorly performing phones, or worse yet, feel
13 compelled to spend hundreds of dollars more to upgrade to a newer model
14 iPhone.

15 33. As a result of Apple’s deceptive practices and wrongful conduct
16 described above, Plaintiff and other Class Members were harmed by losing the
17 normal use of their iPhone 6, or other older model iPhones, and/or being forced
18 to purchase a new smartphone. Indeed, through its conduct, Apple has compelled
19 many iPhone owners to “upgrade” to a newer iPhone model by leaving them with
20 the impression that their current phones are not working correctly, or are obsolete,
21 when in fact, it is Apple’s own software updates that are causing the adverse
22 performance issues. Apple, therefore, stands to benefit financially when older
23 iPhones are slowed down or otherwise degraded by its iOS updates, and owners
24 are forced to purchase a new phone.

25 **CLASS ALLEGATIONS**

26 34. Plaintiff brings this action pursuant to Fed. R. Civ. P. 23(a), (b)(2),
27 and (b)(3), individually, and as a class action on behalf of all individuals in the
28 United States who currently own, or owned, an iPhone smartphone that was

1 introduced prior to 2017 (including the following models: iPhone 7, iPhone 7
2 Plus, iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus, iPhone SE, iPhone 5s,
3 iPhone 5c, and iPhone 5), and which was updated to iOS 10.2.1 (hereinafter
4 referred to as “Older iPhones”).

5 35. Specifically excluded from the proposed Class are: Defendant and
6 its officers, directors, agents, trustees, parents, corporations, trusts,
7 representatives, employees, principals, partners, joint ventures, and entities
8 controlled by Defendant, Defendant’s heirs, successors, assigns, or other persons
9 or entities related to, or affiliated with, Defendant, the Judge(s) assigned to this
10 action, and any member of their immediate families.

11 36. Subject to additional information obtained through further
12 investigation and discovery, the foregoing definition of the Class may be
13 expanded or narrowed by amendment, amended complaint, or at class
14 certification proceedings.

15 37. Numerosity. There are reportedly tens of millions of iPhone users
16 nationwide, and therefore the members of the Class are so numerous that joinder
17 of all individual members is impracticable. The exact number and identities of
18 the Class Members are unknown to Plaintiff at this time, but can be ascertained
19 through appropriate discovery, including Defendant’ own records.

20 38. Commonality and Predominance. There are questions of law and
21 fact, of common and general interest that exist, as to Plaintiff and all Class
22 Members, and predominate over any questions solely affecting individual Class
23 Members. These questions include, *inter alia*:

- 24 a. whether Defendant released and implemented iOS updates,
25 including iOS 10.2.1, that slowed or otherwise impaired the performance
26 of Older iPhones;

1 b. whether Defendant falsely represented that its iOS updates,
2 including iOS 10.2.1, were compatible with, and intended for use in, Older
3 iPhones;

4 c. whether Defendant failed to disclose that its iOS updates,
5 including iOS 10.2.1, caused the slowdown or impairment in performance
6 of Older iPhones;

7 d. whether Defendant concealed problems concerning the
8 batteries used in Older iPhones;

9 e. whether Defendant violated the Consumers Legal Remedies
10 Act (“CLRA”), Cal. Civ. Proc. Code § 1750, *et seq.*;

11 f. whether Defendant violated the Unfair Competition Law
12 (“UCL”), Cal. Bus. & Prof. Code § 17200, *et seq.*;

13 g. whether Defendants violated the False and Misleading
14 Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500, *et seq.*;

15 h. whether Defendant’s actions proximately caused damages to
16 Plaintiff and the Class Members;

17 i. what the measure of damages suffered by Plaintiff and the
18 Class is; and

19 j. whether Defendant was unjustly enriched by the conduct
20 complained herein.

21 39. Typicality. The claims asserted by Plaintiff are typical of all other
22 Class Members. Plaintiff’s claims present class-wide legal and factual issues that
23 arise out of the same course of deceptive conduct by Defendant. Plaintiff, like
24 all other Class Members, was harmed by Defendant’s deceptive and misleading
25 statements, and its conduct in forcing iPhone users to update to an iOS that
26 adversely affected the functionality of their phones. All Class Members,
27 including Plaintiff, sustained similar economic damages arising out of
28 Defendant’ alleged common course of conduct.

1 40. Adequacy. Plaintiff will fairly and adequately protect the interests
2 of the Class Members and has no interests antagonistic to those of the Class
3 Members. Plaintiff has retained counsel experienced in the prosecution and
4 successful settlement of nationwide and statewide class actions.

5 41. Superiority (pursuant to Rule 23(b)(3)). A class action is superior
6 to all other available means for the fair and efficient adjudication of this
7 controversy. The damages or other financial detriment suffered by individual
8 Class Members are relatively small compared to the burden and expense that
9 would be entailed by individual litigation of their claims against Defendant. It
10 would thus be virtually impossible for Class Members, on an individual basis, to
11 obtain effective redress for the wrongs done to them. Furthermore, even if Class
12 Members could afford such individualized litigation, the court system could not.
13 Individualized litigation would create the danger of inconsistent or contradictory
14 judgments arising from the same set of facts. Individualized litigation would also
15 increase the delay and expense to all parties and the court system from the issues
16 raised by this action. By contrast, the class action device provides the benefits of
17 adjudication of these issues in a single proceeding, economies of scale,
18 comprehensive supervision by a single court, and presents no unusual
19 management difficulties under the circumstances here.

20 42. In the alternative, the Class may also be certified under Fed. R. Civ.
21 P. 23(b)(2) because:

22 a. the prosecution of separate actions by individual Class
23 Members would create a risk of inconsistent or varying adjudication, with
24 respect to individual Class Members, which would establish incompatible
25 standards of conduct for Defendant;

26 b. the prosecution of separate actions by individual Class
27 Members would create a risk of adjudications, with respect to them, that
28 would, as a practical matter, be dispositive of the interests of other Class

1 Members not parties to the adjudications, or substantially impair or impede
2 their ability to protect their interests; and/or

3 c. Defendant has acted or refused to act on grounds generally
4 applicable to the Class, thereby making appropriate final declaratory
5 and/or injunctive relief with respect to the members of the Class as a whole.

6 43. Defendant has acted on grounds generally applicable to the entire
7 Class with respect to the matters complained of herein, thereby making
8 appropriate the relief sought herein with respect to Class Members as a whole.

9 **COUNT I**

10 **Violations of The Consumers Legal Remedies Act,**
11 **Cal. Civ. Code § 1750, et seq.**
(On Behalf of Plaintiff and All Class Members)

12 44. Plaintiff incorporates the above allegations by reference as if fully
13 set forth herein.

14 45. This Count is brought pursuant to the Consumers Legal Remedies
15 Act, or CLRA. Plaintiff and the other Class Members are consumers as defined
16 by Cal. Civ. Proc. Code § 1761(d). Their purchases of Older iPhones constitute
17 transactions for the sale of “goods” within the meaning of Cal. Civ. Proc. Code
18 §§ 1770(a) and 1761.

19 46. Defendant, through its agents, employees, and/or subsidiaries,
20 violated the CLRA by engaging in the following practices, proscribed by Cal.
21 Civ. Proc. Code § 1770(a), in transactions that were intended to result in, and did
22 result in, the sale of the product in the State of California:

- 23 a. representing Older iPhones as having characteristics, uses,
24 and benefits, which they did not in fact have;
- 25 b. representing Older iPhones as being of a particular standard,
26 quality, or grade, which in fact, they were not;
- 27 c. advertising Older iPhones with the intent not to sell them as
28 advertised;

1 d. representing that transactions involving the sale and purchase
2 of Older iPhones conferred or involved certain rights and obligations,
3 when such transaction did not; and

4 e. representing Older iPhones as having been supplied in
5 accordance with previous representations when in fact, they were not.

6 47. Defendant knew, or should have known, that their representations
7 and advertisements regarding the Older iPhones were false and misleading.

8 48. Defendant' conduct is malicious, fraudulent, and wanton, and
9 provided misleading information to Plaintiff, the Class, and the general public.

10 49. By reason of the foregoing, Plaintiff and Class Members have been
11 irreparably harmed, entitling them to both injunctive relief and restitution. Thus,
12 pursuant to Cal. Civ. Proc. Code § 1782(d), Plaintiff seeks a Court order
13 enjoining the above-described wrongful acts and practices of Defendant and for
14 restitution and disgorgement.

15 50. Pursuant to § 1782 of the CLRA, Plaintiff has notified Defendant,
16 in writing, of the particular violations of § 1770 of the Act and demanded that
17 Defendant rectify the actions described above by providing complete monetary
18 relief, agreeing to be bound by their legal obligations and to give notice to all
19 affected customers of their intent to do so. Plaintiff sent this notice by certified
20 mail, return receipt requested, to Defendant's principal place of business.

21 51. Unless Defendant agrees to rectify the problems associated with the
22 actions detailed above or give notice to all affected consumers within 30 days of
23 the date of written notice pursuant to Cal. Civ. Proc. Code § 1782, Plaintiff will
24 amend this Complaint to seek an order awarding actual damages.

25 52. As a proximate result of Defendant's deceptive acts, Plaintiff and
26 the public, including the Class, have been damaged.

27 53. Plaintiff also seek injunctive relief for the violation of the CLRA.

28 54. Plaintiff further seeks attorneys' fees and costs as allowed by law.

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COUNT II

**Violations of California’s Unfair Competition Law,
Cal. Bus. & Prof. Code § 17200, *et seq.*
(On Behalf of Plaintiff and All Class Members)**

55. Plaintiff incorporates by reference and realleges each and every paragraph above as though fully alleged herein.

56. The UCL prohibits any “unlawful . . . business act or practice.” Defendants, through their agents, employees, and/or subsidiaries, violated the UCL’s prohibition against engaging in unlawful acts and practices by, *inter alia*: (a) engaging in fraudulent and deceitful conduct in violation of Cal. Civ. Proc. Code §§ 1709 through 1711; and (b) engaging in practices that resulted in transactions that violated the CLRA, as described above.

57. Plaintiff reserves the right to allege other violations of law, which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

58. The UCL also prohibits any “unfair or fraudulent business act or practice.” As described herein, Defendant engaged in unfair business acts and practices by: (i) mischaracterizing the adverse nature of iOS 10.2.1 and subsequent operating system updates, and failing to disclose that such updates were detrimental to the performance of Older iPhones; (ii) falsely representing that iOS 10.2.1 and subsequent operating system updates were fully compatible with, and intended for use in, Older iPhones; (iii) forcing Plaintiff and other Class Members to “update” their Older iPhones to iOS 10.2.1, and prohibiting them from using previous versions of the iOS that performed better and did not degrade their phones; (iv) intentionally throttling or slowing down the performance of Older iPhones by requiring the use iOS 10.2.1 and other software updates; and (v) concealing the existence of battery problems in Older iPhones.

59. Defendant’s acts, omissions, misrepresentations, practices, and non-disclosures alleged herein constitute “unfair” business acts and practices within

1 the meaning of the UCL in that Defendant’s conduct is substantially injurious to
2 consumers, offends public policy, and is immoral, unethical, oppressive,
3 unscrupulous, unconscionable, and/or substantially injurious, and the gravity of
4 the conduct outweighs any alleged benefits attributable to such conduct. There
5 were reasonably available alternatives to further Defendant’s legitimate business
6 interests, other than the conduct described herein.

7 60. Defendant’s claims, non-disclosures, and misleading statements, as
8 more fully set forth above, were false, misleading, and/or likely to deceive the
9 consuming public within the meaning of the UCL. Defendant’s conduct has
10 caused, and continues to cause, substantial injury to Plaintiff and other Class
11 Members. Plaintiff has suffered injury-in-fact and has lost money as a result of
12 Defendants’ unlawful and unfair conduct.

13 61. Plaintiff is informed and believes, and on that basis alleges, that the
14 unlawful and unfair practices alleged herein are continuing in nature and are
15 widespread practices engaged in and perpetrated by Defendants. Plaintiff
16 reserves the right to allege other unlawful or unfair business acts or practices.

17 62. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiff and the Class
18 Members are entitled to an Order that requires Defendant to, *inter alia*:

- 19 a. and desist the unlawful and unfair acts alleged herein;
- 20 b. repair or modify the iOS in a manner that returns full
21 processing speed and complete functionality to Older iPhones;
- 22 c. implement a robust marketing campaign to fully inform the
23 public that Defendant’s iOS updates are slowing down and impairing the
24 performance and functionality of Older iPhones;
- 25 d. provide owners of Older iPhones with new, fully-functioning
26 batteries free of charge;
- 27 e. provide full restitution of all moneys paid to Defendant for
28 the Older iPhones, or other amounts that were wrongfully acquired,

1 obtained, and collected from Plaintiff and the Class Members in
2 connection with such phones;

3 f. pay pre-judgment interest at the highest rate allowable by law;
4 and

5 g. pay attorneys' fees and costs incurred by counsel for Plaintiff
6 and the Class, pursuant to, inter alia, Cal. Civ. Proc. Code § 1021.5.

7 **COUNT III**

8 **Violation of California's False and Misleading Advertising Law,**
9 **Cal. Bus. & Prof. Code § 17500, *et seq.***
10 **(On Behalf of Plaintiff and All Class Members)**

11 63. Plaintiff incorporated the above allegations by reference as if fully
12 set forth herein.

13 64. Defendants' acts and practices, as described herein, have deceived
14 and/or are likely to continue to deceive Class Members and the public.
15 Defendants falsely advertised that iOS 10.2.1 and other subsequent iOS updates
16 were fully compatible, and intended for use, with Older iPhones, and that such
17 updates would not impair the operations or functionality of those phones. Also,
18 in the alternative, Defendant falsely advertised that Older iPhones would not be
19 impaired, or otherwise adversely impacted by, subsequent iOS updates, including
20 iOS 10.2.1.

21 65. By their actions, Defendant disseminated uniform advertising
22 concerning its iOS updates and impact of such updates on Older iPhones that, by
23 their very nature, are unfair, deceptive, untrue, or misleading within the meaning
24 of Cal. Bus. & Prof. Code § 17500, *et seq.* Such advertisements were likely to
25 deceive the consuming public for the reasons detailed herein.

26 66. The above-described false, misleading, and deceptive advertising
27 Defendants disseminated continues to have a likelihood to deceive in that
28 Defendants failed to disclose the true, adverse nature of iOS 10.2.1 and other iOS
updates, and their detrimental impact on the performance of Older iPhones.

1 Defendants failed to instigate a public information campaign to alert consumers
2 of the adverse nature of iOS 10.2.1 and other iOS updates, and their detrimental
3 impact on the performance of Older iPhones.

4 67. In making and disseminating the statements alleged herein,
5 Defendant knew, or should have known, their advertisements were untrue and
6 misleading in violation of Cal. Bus. & Prof. Code § 17500, *et seq.* Plaintiff and
7 the other Class Members based their decisions to purchase Older iPhones in
8 substantial part on Defendants' omitted material facts. The revenues to
9 Defendant attributable to products sold in those false and misleading
10 advertisements amount to hundreds of millions of dollars. Plaintiff and the Class
11 were injured in fact and lost money or property as a result.

12 68. The misrepresentations and non-disclosures by Defendant of the
13 material facts detailed above constitute false and misleading advertising and,
14 therefore, constitutes a violation of Cal. Bus. & Prof. Code § 17500, *et seq.*

15 69. As a result of Defendants' wrongful conduct, Plaintiff and the Class
16 lost money. Plaintiff and the Class are therefore entitled to restitution as
17 appropriate for this Cause of Action.

18 **COUNT IV**

19 **Unjust Enrichment**
20 **(On Behalf of Plaintiff and All Class Members)**

21 70. Plaintiff incorporates by reference and realleges each and every
22 paragraph above as though fully alleged herein.

23 71. As a direct, proximate, and foreseeable result of Defendants' acts
24 and otherwise wrongful conduct, Plaintiff and Class Members suffered damages.
25 Defendants profited and benefitted from the unjust sale of Older iPhones, which
26 caused Plaintiff and Class Members to incur losses and damages.

27 72. Defendants have voluntarily accepted and retained these profits and
28 benefits, derived from their customers, including Plaintiff and Class Members,

1 with full knowledge and awareness that retention of such profits and benefits is
2 wrong and unlawful.

3 73. By virtue of the conscious wrongdoing alleged in this Complaint,
4 Defendants have been unjustly enriched at the expense of Plaintiff and Class
5 Members, who are entitled to, and hereby seek, the disgorgement and restitution
6 of Defendants' wrongful profits, revenue, and benefits, to the extent and in the
7 amount, deemed appropriate by the Court, and such other relief as the Court
8 deems just and proper to remedy Defendants' unjust enrichment.

9 74. Unless successful on the preceding counts of this Complaint,
10 Plaintiff and the Class have no adequate remedy at law.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff, on behalf of himself and all others similarly
13 situated, prays for relief and judgment against Defendants as follows:

14 A. for an order certifying the Class under the appropriate
15 provisions of Fed. R. Civ. P. 23, as well as any appropriate subclasses, and
16 appointing Plaintiff and his legal counsel to represent the Class as Class
17 Counsel;

18 B. awarding actual, compensatory, and consequential damages;

19 C. awarding punitive and treble damages, as provided under
20 relevant laws;

21 D. awarding reimbursement, restitution, and disgorgement from
22 Defendants of the benefits unjustly conferred by Plaintiff and the Class;

23 E. awarding injunctive relief as appropriate;

24 F. awarding declaratory relief;

25 G. for pre- and post-judgment interest to the Class, at the highest
26 rate allowed by law;

27 H. awarding costs, including experts' fees and attorneys' fees
28 and expenses, and the costs of prosecuting this action; and

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I. granting such other and further relief as is just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury on all issues triable by a jury.

Dated: December 27, 2017

JOHNSON FISTEL, LLP
FRANK J. JOHNSON
PHONG L. TRAN

By: *s/Phong L. Tran*

PHONG L. TRAN

600 West Broadway, Suite 1540
San Diego, CA 92101
Telephone: (619) 230-0063
Facsimile: (619) 255-1856
FrankJ@johnsonfistel.com
PhongT@johnsonfistel.com

Attorneys for Plaintiff Thomas T. Cook

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

THOMAS T. COOK, on behalf of himself and all others similarly situated

(b) County of Residence of First Listed Plaintiff San Diego (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Johnson Fistel, LLP; Frank J. Johnson; Phong L. Tran 600 West Broadway, Suite 1540, San Diego, CA 92101 619-230-0063

DEFENDANTS

APPLE INC., a California Corporation; DOES 1 through 10, inclusive

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. 17CV2579 BEN RBB

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location (Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation).

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. §1332; 28 U.S.C. §1391(a) & (c)
Brief description of cause: Cal. Civ. Proc. Code §1750, et seq.; Cal. Bus. & Prof. Code §17200, et seq.; Cal. Bus. & Prof. Code §17500, et seq.; unjust enrichment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/27/2017 SIGNATURE OF ATTORNEY OF RECORD s/ Phong L. Tran

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

Exhibit 8

U.S. District Court
Eastern District of New York (Brooklyn)
CIVIL DOCKET FOR CASE #: 1:17-cv-07480

Drantivy v. Apple, Inc.
Assigned to:
Demand: \$100,000,000
Cause: 28:1332 Diversity-Other Contract

Date Filed: 12/23/2017
Jury Demand: Plaintiff
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

Raisa Drantivy
Plaintiff, on behalf of themselves
individually and all others similarly situated

represented by **Gregg A Pinto**
Law Offices of Gregg A. Pinto
225 Broadway, Suite 307
New York, NY 10007
(646) 328-2434
Fax: (212) 898-0117
Email: pinto@pintolawoffices.com
ATTORNEY TO BE NOTICED

V.

Defendant

Apple, Inc.
a corporation

Defendant

Does 1 through 10
inclusive

Date Filed	#	Docket Text
12/23/2017	1	COMPLAINT against Apple, Inc. filing fee \$ 400, receipt number 0207-10073921 Was the Disclosure Statement on Civil Cover Sheet completed -YES,, filed by RAISA DRANTIVY. (Pinto, Gregg) (Entered: 12/23/2017)
12/23/2017	2	Proposed Summons.Civil Cover Sheet.. by RAISA DRANTIVY (Attachments: # 1 Proposed Summons) (Pinto, Gregg) (Entered: 12/23/2017)
12/26/2017		Incorrect Case/Document/Entry Information. The Civil Cover Sheet was not filled out correctly - specifically on page 2 the NY-E Division of Business Rule 50.1(d)(2)section of the document; Question 1 indicates YES. However, this is not a removal from NYS Court. Counsel is directed to correct Civil Cover Sheet using the event Proposed Summons/Civil Cover Sheet in order to properly assign judicial officers; Please answer all questions. (Bowens, Priscilla) (Entered: 12/26/2017)
12/26/2017		Incorrect Case/Document/Entry Information. Counsel is advised Summons document is blank. Please fill out and resubmit Proposed Summons. (Bowens, Priscilla) (Entered: 12/26/2017)

Transaction Receipt			
12/28/2017 14:27:14			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	1:17-cv-07480
Billable Pages:	1	Cost:	0.10

THE LAW OFFICES OF GREGG A. PINTO

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jes@seidmanlegal.com

DRANTIVY LAW FIRM, PLLC

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Brooklyn, NY 11229
(718) 375-3750
askedwin@drantivylaw.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAISA DRANTIVY,
Plaintiff, on behalf of themselves individually and all
others similarly situated,

- against -

APPLE, INC., a corporation; DOES 1 through 10,
inclusive,

Defendants.

**CLASS ACTION
COMPLAINT**

ECF CASE

**CIVIL ACTION
INDEX NO.**

Plaintiffs identified below (collectively, “Plaintiffs”), individually, and on behalf of the Classes defined below of similarly situated persons, file this Class Action Complaint. Plaintiffs file suit against Apple, Inc. (“Defendants”).

NATURE OF THE ACTION

1. Plaintiffs and Class Members have owned iPhone 7, and iPhone 7s, or have owned any iPhone model prior to iPhone X.

2. Defendant produces, promotes, sells, and distributes the Apple iPhone (“hereinafter referenced to as the “iPhone”) in New York and all over the world.
3. The iPhone is a modern electronic smartphone device used to make phone calls, send texts, take pictures, film videos, and utilize thousands of applications in order to perform specific functions at high performance levels while maintaining technological mobility. Plaintiffs and Class Members have noticed that their older iPhone models operate more slowly when new iPhone models are released.
4. On December 20, 2017, Defendant admitted to purposefully causing older iPhone models to operate more slowly when new models are released.
5. Plaintiffs and Class Members never consented to allow Defendants to slow their iPhones.
6. As a result of Defendant’s wrongful actions, Plaintiffs and Class Members had their phone slowed down, and thereby it interfered with Plaintiffs’ and Class Members’ use or possession of their iPhones, Plaintiffs and Class Members have otherwise suffered damages.

THE PARTIES

7. Plaintiff Raisa Drantivy is a New York citizen residing in Kings County, New York.
8. Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated, namely all other individuals who have owned iPhone models prior to iPhone 8.
9. Upon information and belief, Defendant Apple is a corporation actively engaging in interstate commerce, organized under the laws of the State of Delaware, with its principal place of business in the State of California.

10. Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as Does 1 through 10, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiffs will amend this Complaint to allege their true names and capacities when the same are ascertained. Plaintiffs are informed and believe and thereon allege that each of the fictitiously named Defendants are responsible in some manner for the occurrences and acts alleged herein, and that Plaintiffs damages alleged herein were proximately caused by these Defendants. When used herein, the term “Defendants” is inclusive of DOES 1 through 10.
11. Whenever and wherever reference is made in this Complaint to any act by a Defendant or Defendants, such allegations and reference shall also be deemed to mean the acts and failures to act of each Defendant acting individually, jointly, and severally.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over the state law claims asserted here pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), since some of the Class Members are citizens of a State different from the Defendant and, upon the original filing of this complaint, members of the putative Plaintiffs class resided in states around the country; there are more than 100 putative class members; and the amount in controversy exceeds \$5 million.
13. The Court also has personal jurisdiction over the Parties because Defendant conducts a major part of their national operations, advertising, and sales through continuous business activity in New York.

14. Venue is appropriate because, among other things: (a) Plaintiffs are resident and citizen of this District; (b) the Defendants had directed their activities at residents in this District; (b) the acts and omissions that give rise to this Action took place, among others, in this judicial district.
15. Venue is further appropriate pursuant to 28 U.S.C. § 1391 because Defendant conducts a large amount of their business in this District, and Defendant has substantial relationships in this District. Venue is also proper in this Court because a substantial part of the events and omissions giving rise to the harm of the Class Members occurred in this District.

SUBSTANTIVE ALLEGATIONS

16. On or about September 15, 2008, Plaintiff purchased an iPhone 3G.
17. From July 2008 until March 2011, Defendant released and listed “updates” to the iPhone 3G’s operating system.
18. Defendant’s “update” descriptions expressly specified and recommended that Plaintiff and other iPhone users should download and install the “updates” to “fix bugs and issues” as well as “increase performance” on the iPhone 3G.
19. Plaintiff and other iPhone users routinely downloaded and installed Defendant’s “updates” to the iPhone 3G.
20. On or about July 15, 2009, Plaintiff noticed that the performance of her iPhone 3G had diminished in speed and efficiency due to an “update.”
21. On or about September 15, 2010, Plaintiff purchased an iPhone 4.
22. From June 2010 until September 2014, Defendant released and listed “updates” to the iPhone 4’s operating system.

23. Defendant's "update" descriptions expressly specified and recommended that Plaintiff and other iPhone users should download and install the "updates" to "fix bugs and issues" as well as "increase performance" on the iPhone 4.
24. Plaintiff routinely downloaded and installed Defendant's "updates" to the iPhone 4.
25. On or about July 15, 2012, Plaintiff noticed that the performance of her iPhone 4 had diminished in speed and efficiency due to an "update."
26. On or about October 1, 2012, Plaintiff purchased an iPhone 5.
27. From September 2012 until September 2017, Defendant released and listed "updates" to the iPhone 5's operating system.
28. Defendant's "update" descriptions expressly specified and recommended that Plaintiff and other iPhone users should download and install the "updates" to "fix bugs and issues" as well as "increase performance" on the iPhone 5.
29. Plaintiff routinely downloaded and installed Defendant's "updates" to the iPhone 5.
30. On or about July 15, 2013, Plaintiff noticed that the performance of her iPhone 5 had diminished in speed and efficiency due to an "update."
31. On or about October 1, 2014, Plaintiff purchased an iPhone 6.
32. Since September 2014, Defendant released, listed, and continues to release and list "updates" to the iPhone 6's operating system.
33. Defendant's "update" descriptions expressly specified and recommended that Plaintiff and other iPhone users should download and install the "updates" to "fix bugs and issues" as well as "increase performance" on the iPhone 6.
34. Plaintiff routinely downloaded and installed Defendant's "updates" to the iPhone 6.

35. On or about July 15, 2015, Plaintiff noticed that the performance of her iPhone 6 had diminished in speed and efficiency due to an “update.”
36. On or about October 1, 2016, Plaintiff purchased an iPhone 7.
37. Since September 2016, Defendant released, listed, and continues to release and list “updates” to the iPhone 7’s operating system.
38. Defendant’s “update” descriptions expressly specified and recommended that Plaintiff and other iPhone users should download and install the “updates” to “fix bugs and issues” as well as “increase performance” on the iPhone 7.
39. Plaintiff routinely downloaded and installed Defendant’s “updates” to the iPhone 7.
40. On or about July 15, 2017, Plaintiff noticed that the performance of her iPhone 7 had diminished in speed and efficiency due to an “update.”
41. Plaintiffs and Class Members have owned and used defendant Apple’s product, iPhones, for a number of years.
42. Defendant alleges that its battery may retain up to 80 percent of their original capacity at 500 complete charge cycles.
43. Defendant alleges that it slows down iPhone processors when the battery is wearing out.
44. Defendant never requested consent or did Plaintiffs at any time give consent for Defendant to slow down their iPhones.
45. Plaintiffs and Class Members were never given the option to bargain or choose whether they preferred to have their iPhones slower than normal.

46. Plaintiffs and Class Members suffered interferences to their iPhone usage due to the intentional slowdowns caused by Defendant.

47. Defendant's wrongful actions directly and proximately caused the interference and loss of value to Plaintiffs and Class Members' iPhones causing them to suffer, and continue to suffer, economic damages and other harm for which they are entitled to compensation, including:

- a. Replacement of old phone;
- b. Loss of use;
- c. Loss of value;
- d. Purchase of new batteries;
- e. Ascertainable losses in the form of deprivation of the value of their iPhone;
- f. Overpayments to Defendant for iPhones in that a portion of the price paid for such iPhone by Plaintiff and Class Members to Defendant was for Defendant to purposefully not interfere with the usage of their iPhones, which Defendant and its affiliates purposefully interfered with in order to slow down its performance and, as a result, Plaintiffs and Class Members did not receive what they paid for and were overcharged by Defendant.

CLASS ACTION ALLEGATIONS

48. Plaintiffs brings this action on their own behalf and pursuant to the Federal Rules of Civil Procedure Rule 23(a), (b)(2), (b)(3), and (c)(4), Plaintiffs seek certification of a

Nationwide class and a New York class. The nationwide class is initially defined as follows:

All persons residing in the United States who have owned iPhone models older than iPhone X (the “Nationwide Class”).

The New York class is initially defined as follows:

All persons residing in New York who have purchased and owned iPhone models older than iPhone X in New York (the “New York Class”).

49. Excluded from each of the above Classes are Defendant, including any entity in which Defendant has a controlling interest, is a parent or subsidiary, or which is controlled by Defendant, as well as the officers, directors, affiliates, legal representatives, heirs, predecessors, successors, and assigns of Defendant. Also excluded are the judges and court personnel in this case and any members of their immediate families. Plaintiffs reserve the right to amend the Class definitions if discovery and further investigation reveal that the Classes should be expanded or otherwise modified.

50. *Numerosity*. Fed. R. Civ. P. 23(a)(1). The members of the Classes are so numerous that the joinder of all members is impractical. While the exact number of Class Members is unknown to Plaintiffs at this time, Defendant has acknowledged to purposefully slow down older iPhone models. The disposition of the claims of Class Members in a single action will provide substantial benefits to all parties and to the Court. The Class Members are readily identifiable from information and records in Defendant’s possession, custody, or control.

51. *Commonality*. Fed. R. Civ. P. 23(a)(2) and (b)(3). There are questions of law and fact common to the Classes, which predominate over any questions affecting only individual Class Members. These common questions of law and fact include, without limitation:

- a. Whether Defendant has an implied contractual obligation to not purposefully slow down older iPhone models;
- b. Whether Defendant has complied with any implied contractual obligation to not purposefully slow down older iPhone models;
- c. Whether Defendant interfered or otherwise lowered the use or value of older iPhone models;
- d. Whether Plaintiffs and the Class are entitled to damages, civil penalties, punitive damages, and/or injunctive relief.

52. *Typicality*. Fed. R. Civ. P. 23(a)(3). Plaintiffs' claims are typical of those of other Class Members because Plaintiffs' iPhones, like that of every other Class Member, was misused by Defendant.

53. *Adequacy of Representation*. Fed. R. Civ. P. 23(a)(4). Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class. Plaintiffs have retained competent counsel experienced in litigation of class actions, including consumer class actions, and Plaintiffs intend to prosecute this action vigorously. Plaintiffs' claims are typical of the claims of other members of the Class and Plaintiffs

has the same non-conflicting interests as the other Members of the Class. The interests of the Class will be fairly and adequately represented by Plaintiffs and their counsel.

54. *Superiority of Class Action.* Fed. R. Civ. P. 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all the members of the Classes is impracticable. Furthermore, the adjudication of this controversy through a class action will avoid the possibility of inconsistent and potentially conflicting adjudication of the asserted claims. There will be no difficulty in the management of this action as a class action.

55. Damages for any individual class member are likely insufficient to justify the cost of individual litigation so that, in the absence of class treatment, Defendant's violations of law inflicting substantial damages in the aggregate would go un-remedied.

56. Class certification is also appropriate under Fed. R. Civ. P. 23(a) and (b)(2), because Defendant has acted or has refused to act on grounds generally applicable to the Classes, so that final injunctive relief or corresponding declaratory relief is appropriate as to the Classes as a whole.

FIRST CAUSE OF ACTION
Breach of Implied Contract

(On Behalf of Plaintiffs and the Nationwide and New York Classes)

57. Plaintiffs incorporate the substantive allegations contained in each and every paragraph of this Complaint.

58. Defendant solicited and invited Plaintiffs and the members of the Class to buy new iPhones. Plaintiffs and Class Members accepted Defendant's offers and bought iPhones from Defendant.
59. When Plaintiffs and Class Members bought iPhones from Defendant, they paid for their iPhones. In so doing, Plaintiffs and Class Members entered into implied contracts with Defendant to which Defendant agreed to not purposefully interfere with Plaintiffs and Class Members' usage or speed of the device.
60. Each purchase made with Defendant by Plaintiffs and Class Members was made pursuant to the mutually agreed-upon implied contract with Defendant under which Defendant agreed to not purposefully interfere with Plaintiffs and Class Members' usage or value of their iPhones.
61. Plaintiffs and Class Members would not have bought iPhones from Defendant in the absence of the implied contract between them and Defendant.
62. Plaintiffs and Class Members fully performed their obligations under the implied contracts with Defendant.
63. Defendant breached the implied contracts it made with Plaintiffs and Class Members by purposefully slowing down older iPhone models when new models come out and by failing to properly disclose that at the time of that the parties entered into an agreement.
64. As a direct and proximate result of Defendant's breaches of the implied contracts between Defendant and Plaintiffs and Class Members, Plaintiffs and Class Members sustained actual losses and damages in a sum to be determined at trial but in no event less than \$100,000,000.00, together with interest thereon, for which sum Defendants are liable to Plaintiffs and Class Members.

SECOND CAUSE OF ACTION

Trespass to Chattel

(On Behalf of Plaintiffs and the Nationwide and New York Classes)

65. Plaintiffs repeats and fully incorporates the allegations contained in each and every paragraph of this Complaint.
66. Plaintiffs owned or possessed the right to possess the above mentioned iPhones.
67. Defendant intentionally interfered with Plaintiff and Class Members' use or possession of their iPhone by purposefully slowing down their phones.
68. Plaintiffs and Class Members never consented to Defendant interfering with their phones in order to slow their phones down
69. Plaintiffs and Class Members have lost use, value, had to purchase new batteries, and had to purchase new iPhones due to Defendant's conduct.
70. Defendant's conduct was a substantial factor in causing Plaintiffs and Class Members to have to replace iPhones, buy new batteries, or loss of usage of their iPhone, thus causing Plaintiffs and Class Members to sustain actual losses and damages in a sum to be determined at trial but in no event less than \$100,000,000.00, together with interest thereon, for which sum Defendants are liable to Plaintiffs and Class Members.

THIRD CAUSE OF ACTION

Fraud

(On Behalf of Plaintiffs and the Nationwide and New York Classes)

71. Plaintiff repeats and fully incorporates the allegations contained in each and every paragraph of this Complaint.

72. On or about December 20, 2017, Defendant admitted that sometimes its “updates” actually cause a downgrade in iPhone performance.
73. On or about December 20, 2017, Defendant admitted that it intentionally slowed performance of iPhones through “updates” without notification to its customers despite having knowledge of the “update’s” downgrade capability.
74. Between June 2007 and December 2017, Defendant, by admission, had a clear intent to deceive Plaintiff and other iPhone users between June 2007 and December 2017.
75. Between September 2008 and December 2017, Plaintiff relied on Defendant’s recommendations to download and install the “updates” because she believed that the “updates” were an upgrade to the previous operating system and she, in fact, downloaded and installed the “updates.”
76. As with the Plaintiff, similarly situated Class Members also relied on Defendant’s recommendations and suffered the same loss of iPhone performance.
77. Between September 2008 and December 2017, Plaintiff and Class Members sustained damages as a result of their reliance on Defendant’s assertions and recommendations to download and install “updates,” thus causing Plaintiffs and Class Members to sustain actual losses and damages in a sum to be determined at trial but in no event less than \$100,000,000.00, together with interest thereon, for which sum Defendants are liable to Plaintiffs and Class Members.

FOURTH CAUSE OF ACTION
Misrepresentation
(On Behalf of Plaintiffs and the Nationwide and New York Classes)

78. Plaintiff repeats and fully incorporates the allegations contained in each and every paragraph of this Complaint.
79. Defendant is a market leader in the smartphone industry and is one of the largest corporations in the world.
80. Apple, Inc. management refers to the help staff at Apple stores as “Apple Geniuses.”
81. Apple Geniuses possess unique or specialized expertise and each help staff member is in a special position of confidence and trust such that a special duty is created not to mislead help customers.
82. Apple Geniuses recommended the download and installation of “updates” following Plaintiff’s purchases of iPhones.
83. Defendant breached its duty to Plaintiff when it promoted an upgrade to the iPhone’s performance level with knowledge that the upgrade was actually a downgrade.
84. Defendant knew or should have known that its “updates” and accompanying “update” descriptions would be relied on by Plaintiff and other iPhone users in order for users to monitor and maintain iPhone speed, efficiency, and overall performance.
85. Plaintiff and other iPhone users relied on Defendant’s multiple “updates” and “update” descriptions in furtherance of monitoring and maintaining iPhone speed, efficiency, and overall performance.
86. On or about December 20, 2017, Defendant admitted that sometimes its “updates” actually cause a downgrade in iPhone performance by slowing down the iPhone’s processor.

87. On or about December 20, 2017, Defendant admitted that it failed to provide adequate notification to customers of the “update’s” downgrade capability following download and installation.
88. Between September 2008 and December 2017, Plaintiff and other iPhone users relied on Defendant’s recommendations to download and install the “updates” because users believed that the “updates” were an upgrade to the previous operating system and users, in fact, downloaded and installed the “updates.”
89. Between September 2008 and December 2017, Plaintiff and other iPhone users sustained damages as a result of reliance on Defendant’s assertions and recommendations to download and install “updates.”
90. Between September 2008 and December 2017, Plaintiff and other iPhone users relied on Defendant’s recommendations to download and install the “updates” because users believed that the “updates” were an upgrade to the previous operating system and she, in fact, downloaded and installed the “updates.”
91. Between September 2008 and December 2017, Plaintiff and other iPhone users sustained damages as a result of reliance on Defendant’s assertions and recommendations to download and install “updates.”
92. Defendants knew or should have known that Plaintiff’s reliance was foreseeable here because Defendant routinely sends all its users downloadable updates throughout the lifespan of iPhones and until the respective support cutoff dates.
93. Plaintiff and Class Members sustained damages as a result of their reliance on Defendant’s misrepresentations, thus causing Plaintiffs and Class Members to sustain actual losses and damages in a sum to be determined at trial but in no event less than

\$100,000,000.00, together with interest thereon, for which sum Defendants are liable to Plaintiffs and Class Members.

FIFTH CAUSE OF ACTION
Deceptive Business Acts and Practices
(On Behalf of Plaintiffs and the Nationwide and New York Classes)

94. Plaintiff repeats and fully incorporates the allegations contained in each and every paragraph of this Complaint.
95. From June 2007 until December 20, 2017, Defendant promoted and provided routine “updates” to its customers’ iPhones with knowledge that the “updates” were actually downgrades despite being promoted and described as upgrades.
96. Defendant’s deceptive acts and practices occurred in the course and furtherance of its business and thus are wholly unlawful.
97. Plaintiff and Class Members sustained damages as a result of Defendant’s deceptive acts and practices, thus causing Plaintiffs and Class Members to sustain actual losses and damages in a sum to be determined at trial but in no event less than \$100,000,000.00, together with interest thereon, for which sum Defendants are liable to Plaintiffs and Class Members.
98. Pursuant to NY General Business Law §349, Plaintiff is entitled to and is seeking attorney fees in the event she prevails in this matter.

SIXTH CAUSE OF ACTION
False Advertising
(On Behalf of Plaintiffs and the Nationwide and New York Classes)

99. Plaintiff repeats and fully incorporates the allegations contained in each and every paragraph of this Complaint.
100. Defendant promoted and provided updates to Plaintiff's devices by offering descriptions of those updates prior to download and installation.
101. Defendant knew or should have known that its labeled "updates" and accompanying "update" descriptions would be relied on by Plaintiff and other iPhone users in order for users to monitor and maintain iPhone speed, efficiency, and overall performance.
102. Plaintiff and other iPhone users relied on Defendant's multiple "updates" and "update" descriptions in furtherance of monitoring and maintaining iPhone speed, efficiency, and overall performance.
103. On or about December 20, 2017, Defendant admitted that sometimes its "updates" actually cause a downgrade in iPhone performance.
104. Defendant promoted an upgrade to the iPhone's performance level with knowledge that the upgrade was actually a downgrade and such baseless promotion is misleading to Plaintiff and other iPhone users in a material respect.
105. Defendant's false advertising occurred in the course and furtherance of its business and thus is wholly unlawful.
106. Plaintiff and Class Members sustained damages as a result of Defendant's false advertising, thus causing Plaintiffs and Class Members to sustain actual losses and damages in a sum to be determined at trial but in no event less than \$100,000,000.00, together with interest thereon, for which sum Defendants are liable to Plaintiffs and Class Members.

107. Pursuant to NY General Business Law §350, Plaintiff is entitled to and is seeking attorney fees in the event she prevails in this matter.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all Class Members proposed in this Complaint, respectfully requests that the Court enter judgment in her favor and against Defendant as follows:

- A. For an Order certifying the Nationwide Class and New York Class as defined here, and appointing Plaintiffs and her Counsel to represent the Nationwide Class and the New York Class;
- B. For equitable relief enjoining Defendant from engaging in the wrongful conduct complained of here pertaining to the misuse of Plaintiffs and Class Members' personal property;
- C. For equitable relief compelling Defendant to utilize appropriate methods and policies with respect to older iPhone models in respect to their batteries;
- D. For equitable relief requiring restitution and disgorgement of the revenues wrongfully retained as a result of Defendant's wrongful conduct;
- E. For an award of actual damages and compensatory damages, in an amount to be determined at trial but in no event less than \$100,000,000.00, together with interest thereon;
- F. For an award of costs of suit and attorneys' fees, as allowable by law; and
- G. Such other and further relief as this court may deem just and proper.

JURY DEMAND

Based on the foregoing, Plaintiffs, on behalf of themselves, and all others similarly situated, hereby demand a jury trial for all claims so triable.

Plaintiffs reserve the right to supplement this Complaint should new information become available.

Dated: December 21, 2017
New York, NY

Respectfully submitted,

/s/ Gregg Pinto
Gregg A. Pinto
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Attorneys for Plaintiffs

ATTORNEY'S VERIFICATION

GREGG A. PINTO, an attorney duly admitted to practice law in the State of New York, affirms the following: I am the attorney for plaintiff RAISA DRANTIVY, I have read the annexed Complaint and know the contents thereof, and the same are true to my knowledge, except those matters which are stated to be based on information and belief and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon facts, records, and other pertinent information contained in my files. This verification is made by me because Plaintiff does not reside in the County wherein I maintain my law offices.

Dated: December 21, 2017
New York, NY

Respectfully submitted,

The Law Offices of Gregg A. Pinto

By: /s/ Gregg A. Pinto
Gregg A. Pinto
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New York, NY 10007
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Attorneys for Plaintiffs

Exhibit 9

**U.S. District Court
Eastern District of New York (Brooklyn)
CIVIL DOCKET FOR CASE #: 1:17-cv-07485-FB-PK**

Lazarus et al v. Apple, Inc.
Assigned to: Judge Frederic Block
Referred to: Magistrate Judge Peggy Kuo
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 12/26/2017
Jury Demand: Plaintiff
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Plaintiff**Benjamin Lazarus**

represented by **Melissa Robin Emert**
Stull, Stull & Brody
6 East 45th Street
New York, NY 10017
(212)687-7230
Fax: (212)490-2022
Email: memert@bellsouth.net
ATTORNEY TO BE NOTICED

Plaintiff**Jeffrey Aberman**

represented by **Melissa Robin Emert**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff**Stephen Margolis**

represented by **Melissa Robin Emert**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff**Sandy Brodsky**

represented by **Melissa Robin Emert**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff**Victoria Childs**

represented by **Melissa Robin Emert**
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant**Apple, Inc.**

Date Filed	#	Docket Text
12/26/2017	1	COMPLAINT against Apple, Inc. filing fee \$ 400, receipt number 0207-10074900 Was the Disclosure Statement on Civil Cover Sheet completed -yes,, filed by Benjamin Lazarus,

		Sandy Brodsky, Stephen Margolis, Jeffrey Aberman, Victoria Childs. (Attachments: # 1 Civil Cover Sheet, # 2 Proposed Summons) (Emert, Melissa) (Entered: 12/26/2017)
12/26/2017		Case assigned to Judge Frederic Block and Magistrate Judge Cheryl L. Pollak. Please download and review the Individual Practices of the assigned Judges, located on our website . Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. (Bowens, Priscilla) (Entered: 12/26/2017)
12/26/2017	2	Summons Issued as to All Defendants. (Bowens, Priscilla) (Entered: 12/26/2017)
12/26/2017	3	In accordance with Rule 73 of the Federal Rules of Civil Procedure and Local Rule 73.1, the parties are notified that if all parties consent a United States magistrate judge of this court is available to conduct all proceedings in this civil action including a (jury or nonjury) trial and to order the entry of a final judgment. Attached to the Notice is a blank copy of the consent form that should be filled out, signed and filed electronically only if all parties wish to consent. The form may also be accessed at the following link: http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO085.pdf . You may withhold your consent without adverse substantive consequences. Do NOT return or file the consent unless all parties have signed the consent. (Bowens, Priscilla) (Entered: 12/26/2017)
12/26/2017	4	This attorney case opening filing has been checked for quality control. See the attachment for corrections that were made, if any. (Bowens, Priscilla) (Entered: 12/26/2017)
12/27/2017		ORDER REASSIGNING CASE. Case reassigned to Magistrate Judge Peggy Kuo for all further proceedings. Magistrate Judge Cheryl L. Pollak no longer assigned to case Please download and review the Individual Practices of the assigned Judges, located on our website . Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Ordered by Chief Judge Dora Lizette Irizarry on 12/27/2017. (Bowens, Priscilla) (Entered: 12/27/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 14:28:16			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	1:17-cv-07485-FB-PK
Billable Pages:	2	Cost:	0.20

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

BENJAMIN LAZARUS, JEFFREY
ABERMAN, STEPHEN MARGOLIS,
SANDY BRODSKY and VICTORIA
CHILDS, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

APPLE, INC.,

Defendant.

Case No. _____

JURY TRIAL DEMANDED

PLAINTIFFS' CLASS ACTION COMPLAINT

Plaintiffs Benjamin Lazarus, Jeffrey Aberman, Stephen Margolis, Sandy Brodsky and Victoria Childs, (hereinafter, "Plaintiffs"), individually and on behalf of the Classes defined below, allege the following against Apple, Inc. ("Apple") based upon personal knowledge with respect to themselves and on information and belief derived from, among other things, investigation of counsel and review of public documents as to all other matters:

NATURE OF THE CASE

1. Plaintiffs bring this class action case against Apple for its failure to disclose that Apple has been purposely slowing down the processor of its iPhone 5, iPhone 6 and certain iPhone 7 models through operating system software updates. On December 20, 2017, Apple confirmed that the company has been slowing the performance of these iPhone devices.

2. Apple disregarded the rights of Plaintiffs and members of the proposed class and sub-classes by its failure to have previously disclosed that it was intentionally slowing down performance of older devices to compensate for battery degradation in order to push people to

upgrade their iPhones faster and failed to provide iPhone owners with better ways to accomplish the same goal such as replacing the batteries of an older iPhone model.

3. As a result of Defendant's wrongful actions, Plaintiffs and members of the proposed class and sub-classes have been injured.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). The amount in controversy exceeds \$5 million exclusive of interest and costs. There are more than 100 putative class members. And, at least some members of the proposed Class have a different citizenship from Apple.

5. This Court has personal jurisdiction over Apple because Plaintiff Benjamin Lazarus resides in this District.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because Apple does substantial business in the State of New York and within this District and advertises in this District and a substantial part of the events, acts, and omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

7. Plaintiff Benjamin Lazarus ("Lazarus") is a resident of the State of New York. Prior to purchasing an iPhone 7, Lazarus owned and operated an iPhone 6. Over time, Lazarus noticed significant slowdowns of the speed in the operation of his iPhone 6 as well as other operational issues that negatively affected the performance of his iPhone 6 after certain iOS updates were issued to his phone. As a result of the diminished performance of his iPhone 6, Lazarus purchased the iPhone 7. Presently, his iPhone 7 is experiencing the same slowdowns and operational issues that he experienced with his iPhone 6.

8. Plaintiff Jeffrey Aberman (“Aberman”) is a resident of the State of New Jersey. Aberman owns and operates an iPhone 6s. Over time, Aberman has noticed significant slowdowns of the speed in the operation of his iPhone 6s as well as other operational issues that negatively affect the performance of his iPhone 6s.

9. Plaintiff Stephen Margolis (“Margolis”) is a resident of the State of Florida. Prior to purchasing an iPhone 7, Margolis owned and operated an iPhone 6. Over time, Margolis noticed significant slowdowns of the speed in the operation of his iPhone 6 as well as other operational issues that negatively affected the performance of his iPhone 6 after certain iOS updates were issued to his phone. As a result of the diminished performance of his iPhone 6, Margolis purchased the iPhone 7. Presently, his iPhone 7 is experiencing the same slowdowns and operational issues that he experienced with his iPhone 6.

10. Sandy Brodsky (“Brodsky”) is a resident of the State of Florida. Prior to purchasing an iPhone 7 Plus, Brodsky owned and operated an iPhone 6 Plus. Over time, Brodsky noticed significant slowdowns of the speed in the operation of his iPhone 6 Plus as well as other operational issues that negatively affected the performance of her iPhone 6 Plus after certain iOS updates were issued to her phone. As a result of the diminished performance of her iPhone 6 Plus, Brodsky purchased the iPhone 7 Plus.

11. Plaintiff Victoria Childs (“Childs”) is a resident of the State of Florida. Prior to purchasing an iPhone 8, Childs owned and operated an iPhone 7. Over time, Childs noticed significant slowdowns of the speed in the operation of her iPhone 7 as well as other operational issues that negatively affected the performance of her iPhone 7 after certain iOS updates were issued to her phone. As a result of the diminished performance of her iPhone 7, Childs purchased the iPhone 8.

12. Defendant Apple is a corporation that was created under the laws of the State of California and has its principal place of business in Cupertino, California.

STATEMENT OF FACTS

13. In early 2017 Apple iPhone owners of the iPhone 5, 6, 6s, and 6s Plus and 7 devices complained to Apple that their phones were spontaneously shutting down, even though they had sufficient battery. This usually occurred when the user was using your phone for something that required a burst of power — like in the middle of a game, or when downloading an app. In order to fix this bug, Apple introduced an update to its operating system software, iOS 10.2.1. This update fixed the shutdown issue in some cases but also slowed those iPhones down significantly causing Plaintiffs and members of the proposed class and sub-classes to experience issues such as delays in typing in messages and the lag in the loading of emails to name just a few.

14. In a Reddit post, in and around the second week in December, an iPhone user suggested that the iPhone battery might be to blame for the slowness problems. He stated the following:

My iPhone 6S has been very slow these past few weeks, and even after updating multiple times, it was still slow. Couldn't figure out why, but just thought that iOS 11 was still awful to me. Then I used my brother's iPhone 6 Plus and his was... faster than mine? This is when I knew something was wrong. So, I did some research, and decided to replace my battery. Wear level was somewhere around 20% on my old battery. I did a Geekbench score, and found I was getting 1466 Single and 2512 Multi. This did not change whether I had low power mode on or off. After changing my battery, I did another test to check if it was just a placebo. Nope. 2526 Single and 4456 Multi. From what I can tell, Apple slows down phones when their battery gets too low, so you can still have a full days charge. This also means your phone might be very slow for no discernible reason. Check your Geekbench scores and see what you get if your phone is still slow!

15. Following this Reddit post, John Poole, founder of Primate Labs and Geekbench developer, analyzed data of approximately 100,000 phones with different iOS versions. He looked at the versions before Apple fixed the bug and at versions after Apple fixed the bug and discovered

that the phone processors slowed down after the system update and that the problem was widespread and “likely to get worse as phones (and their batteries) continue to age.”

16. It took a viral Redditt post and an independent investigation by Poole for Apple to finally admit that Apple had intentionally slowed the performance of older iPhones stating the following on December 20, 2017:

Our goal is to deliver the best experience for customers, which includes overall performance and prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age over time, which can result in the device unexpectedly shutting down to protect its electronic components.

Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous peaks only when needed to prevent the device from unexpectedly shutting down during these conditions. We’ve now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in the future.

17. In other words, Apple slowed down the processors in order to avoid overloading the batteries. While Apple’s battery explanation may be legitimate, Apple was anything but forthcoming about the slower speeds until December 20, 2017 and failed to disclose that this diminished performance could be remedied by replacing the battery in older iPhone models.

18. Apple purposefully concealed, fraudulently omitted and/or failed to disclose the fact that a battery replacement would improve the performance of older iPhones to require consumers to purchase newer iPhone models.

19. Had Plaintiffs been informed by Apple that a simple battery replacement would have improved the performance of their iPhones, Plaintiffs would have chosen to replace their batteries which was clearly a more cost effective method rather than upgrading to a new iPhone that was extremely costly.

20. In addition, Apple has failed now and in the past to give any explanation as to why their older iPhones become a lot more sluggish after a new iPhone model comes out. Apple's admission's was evidence of Apple's practice to get iPhone users to upgrade to a new phone.

21. In addition to Apple's failure to inform Plaintiffs and members of the proposed class and sub-classes that a simple battery replacement would improve their iPhone's performance, Plaintiffs and the other members of the proposed classes were never given the option to choose whether they preferred to have their iPhones slower than normal and never gave consent for Apple to slow down their iPhones.

22. Apple's wrongful actions directly and proximately caused the interference and loss of value to Plaintiffs and members of the proposed class and sub-classes' iPhones causing them to suffer economic harm as well as other harm for which they are entitled to compensation for, including replacement of old iPhone; loss of use; loss of value; purchase of new batteries; ascertainable losses in the form of deprivation of the value of their iPhone; and overpayment of their iPhones in that Plaintiffs and members of the proposed class and sub-classes did not get what they paid.

CLASS ALLEGATIONS

23. Plaintiffs seek relief on behalf of themselves and as representatives of all others who are similarly situated. Pursuant to Fed. R. Civ. P. 23(a), (b)(2), (b)(3) and (c)(4), Plaintiffs seek certification of a Nationwide class defined as follows:

All persons residing in the United States who (1) own or have owned an iPhone model older than the iPhone 8 that is or was experiencing performance problems as a result of Apple's iOS updates or (2) have owned iPhone models older than the iPhone 8 and have replaced them with a new device because they were experiencing performance problems as a result of Apple's iOS updates (the "Nationwide Class").

24. Pursuant to Fed. R. Civ. P. 23, and in the alternative to claims asserted on behalf of the Nationwide Class, Plaintiffs assert claims under the laws of the individual States, and on behalf of separate statewide sub-classes, defined as follows:

All persons residing in New York who (1) own or have owned an iPhone model older than the iPhone 8 that is or was experiencing performance problems as a result of Apple's iOS updates or (2) have owned iPhone models older than the iPhone 8 and have replaced them with a new device because they were experiencing performance problems as a result of Apple's iOS updates (the "Statewide Classes").

All persons residing in New Jersey who (1) own or have owned an iPhone model older than the iPhone 8 that is or was experiencing performance problems as a result of Apple's iOS updates or (2) have owned iPhone models older than the iPhone 8 and have replaced them with a new device because they were experiencing performance problems as a result of Apple's iOS updates (the "Statewide Classes").

All persons residing in Florida who (1) own or have owned an iPhone model older than the iPhone 8 that is or was experiencing performance problems as a result of Apple's iOS updates or (2) have owned iPhone models older than the iPhone 8 and have replaced them with a new device because they were experiencing performance problems as a result of Apple's iOS updates (the "Statewide Classes").

25. Excluded from each of the above Classes are any of Apple's officers, directors and board members; all persons who make a timely election to be excluded from the Class; and the judges to whom this case is assigned and their immediate family.

26. Plaintiffs hereby reserve the right to amend or modify the class definition with greater specificity or division after having had an opportunity to conduct discovery.

27. Each of the proposed Classes meets the criteria for certification under Federal Rule of Civil Procedure 23(a), (b)(2), (b)(3) and (c)(4).

28. **Numerosity. Fed. R. Civ. P. 23(a)(1).** Consistent with Rule 23(a)(1), the members of the Class are so numerous and geographically dispersed that the joinder of all members is impractical. While the exact number of Class members is unknown to Plaintiffs at this time, Plaintiffs believe the proposed Class comprises millions of members. Class members may be

identified through objective means. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, internet postings, and/or published notice.

29. **Commonality. Fed. R. Civ. P. 23(a)(2) and (b)(3).** Consistent with Fed. R. Civ. P. 23(a)(2) and with 23(b)(3)'s predominance requirement, this action involves common questions of law and fact that predominate over any questions affecting individual Class members. The common questions include:

- a. Whether Apple failed to disclose that its iOS updates caused slowdowns in older iPhone model's performance;
- b. Whether Apple interfered or otherwise lowered the use or value of older iPhone models; and
- c. Whether Apple's iOS modifications were implemented in order to profit from Plaintiffs and other members of the proposed classes by inducing them to purchase new iPhones to replace their older iPhone models;
- e. Whether Apple is subject to liability for fraudulently concealing material facts from Plaintiffs and other members of the proposed classes;
- f. Whether Apple's conduct constituted deceptive trade practices under state law;
- g. Whether Apple was unjustly enriched as a result of its fraudulent conduct, such that it would be inequitable for Apple to retain benefits conferred upon it by Plaintiffs and other members of the proposed classes;
- h. Whether Plaintiffs and the other members of the proposed classes were injured and suffered damages or other acceptable losses because of Apple's fraudulent behavior; and,

i. Whether Plaintiffs and other members of the proposed classes are entitled to relief.

30. **Typicality. Fed. R. Civ. P. 23(a)(3).** Consistent with Fed. R. Civ. P. 23(a)(3), Plaintiffs' claims are typical of those of the other Class members. Plaintiffs' damages and injuries are akin to the other Class members and Plaintiffs seek relief consistent with the relief of the Class.

31. **Adequacy. Fed. R. Civ. P. 23(a)(4).** Consistent with Fed. R. Civ. P. 23(a)(4), Plaintiffs are adequate representatives of the Class because Plaintiffs are members of the Class and are committed to pursuing this matter against Apple to obtain relief for the Class. Plaintiffs have no conflict of interest with the Class. Plaintiffs' Counsel are competent and experienced in litigating class actions, including privacy litigation. Plaintiffs intend to vigorously prosecute this case and will fairly and adequately protect the Class' interests.

32. **Superiority. Fed. R. Civ. P. 23(b)(3).** Consistent with Fed. R. Civ. P. 23(b)(3), a class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The quintessential purpose of the class action mechanism is to permit litigation against wrongdoers even when damages to individual plaintiffs may not be sufficient to justify individual litigation. Here, the damages suffered by Plaintiffs and the other members of the Classes are relatively small compared to the burden and expense required to individually litigate their claims against Apple, and thus, individual litigation to redress Apple's wrongful conduct would be impracticable. Individual litigation by each Class member would also strain the court system. Individual litigation creates the potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of a single adjudication, economies of scale, and comprehensive supervision by a single court.

33. **Injunctive and Declaratory Relief.** Class certification is also appropriate under Fed. R. Civ. P. 23(b)(2) and (c). Defendant, through its uniform conduct, has acted or refused to act on grounds generally applicable to the Class as a whole, making injunctive and declaratory relief appropriate to the Class as a whole.

34. Likewise, particular issues under Rule 23(c)(4) are appropriate for certification because such claims present only particular, common issues, the resolution of which would advance the disposition of this matter and the parties' interests therein.

35. Finally, all members of the proposed Classes are readily ascertainable by records maintained by Apple. Using this information, the members of the Class can be identified and their contact information ascertained for purposes of providing notice to the Class.

COUNT I

FRAUDULENT CONCEALMENT

(ON BEHALF OF PLAINTIFFS AND THE NATIONWIDE CLASS, OR, ALTERNATIVELY, PLAINTIFFS AND THE STATE CLASSES)

36. Plaintiffs incorporate and re-allege the allegations contained in the preceding paragraphs as if fully set forth herein.

37. Prior to and at the time that Plaintiffs and members of the proposed class and sub-classes decided to purchase an upgraded iPhone device, the Defendant knew and had full knowledge and information that its iOS updates would slow down the performance of their older model iPhone and that a simple battery replacement would improve the performance.

38. At all relevant times herein the Defendant, who had a duty to disclose the above information, intentionally concealed and/or failed to disclose the aforementioned material facts to the Plaintiffs and members of the proposed class and sub-classes.

39. Plaintiffs and members of the proposed class and sub-classes did in fact rely on the Defendant to disclose this information which the Plaintiffs and members of the proposed classes were unaware of at the time of the purchase of their upgraded iPhone device.

40. Had Defendant disclosed that their old iPhones could have easily been fixed with a replacement battery, Plaintiffs and members of the proposed class and sub-classes would not have purchased new iPhones devices.

41. As a direct and proximate cause of the Defendant's material omissions, Plaintiffs and members of the proposed class and sub-classes suffered ascertainable losses consisting of the purchase price of new iPhone devices.

COUNT II

BREACH OF IMPLIED CONTRACT (ON BEHALF OF PLAINTIFFS AND THE NATIONWIDE CLASS, OR, ALTERNATIVELY, PLAINTIFFS AND THE STATE CLASSES)

42. Plaintiffs incorporate and re-allege the allegations contained in the preceding paragraphs as if fully set forth herein.

43. Plaintiffs' and members of the proposed class and sub-classes entered into implied contracts with Apple, when they purchased their iPhones, to which Apple agreed to not purposefully interfere with Plaintiffs and members of the proposed class and sub-classes' usage or speed.

44. Plaintiffs and members of the proposed class and sub-classes fully performed their obligations under the implied contracts with Apple.

45. Defendant breached the implied contracts it had made with the Plaintiffs and members of the proposed class and sub-classes by purposefully slowing down older iPhone models when new models came out and by failing to properly disclose that at the time the parties entered into an agreement.

46. The damages to Plaintiffs and members of the proposed class and sub-classes as described herein were the direct and proximate result of the Defendants' breaches of these implied contracts.

COUNT III

**VIOLATIONS OF NEW YORK'S CONSUMER PROTECTION LAWS
(ON BEHALF OF PLAINTIFF LAZURAS AND THE NEW YORK SUB-
CLASS)**

47. Lazarus incorporates and re-alleges the allegations contained in paragraphs 1-35 as if fully set forth herein.

48. Lazarus and the other members of the New York Sub-Class have been injured and suffered damages by violations of section 349(a) of New York General Business Law (the "GBL"), which states: deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

49. Defendant engaged in acts and practices in the State of New York that were deceptive or misleading in a material way, and that injured Lazarus and the other members of the New York Sub-Class.

50. Such acts and practices were likely to mislead a reasonable consumer acting reasonably under the circumstances existing at the time.

51. Defendant's deceptive acts include Defendant's failure to disclose that (a) it was purposefully slowing down the performance speed of older iPhone models and/or that (b) a battery replacement would improve the iPhone performance.

52. Lazarus and the other members of the New York Sub-Class have been damaged by Defendant's violations of Section 349 of the GBL, for which they seek recovery of the actual damages they suffered because of Defendant's willful and wrongful violations of section 349, in an amount to be determined at trial.

53. Plaintiff and the other members of the New York Sub-Class seek treble damages and an award of reasonable attorney's fees pursuant to Section 349(h) of the GBL.

COUNT IV

**VIOLATION OF NEW JERSEY'S CONSUMER FRAUD ACT,
N.J. STAT. ANN. § 56:8-1, *ET SEQ.***

(ON BEHALF OF PLAINTIFF ABERMAN AND THE NEW JERSEY SUB-CLASS)

54. Plaintiff Aberman incorporates and re-alleges the allegations contained in paragraphs 1-35 as if fully set forth herein.

55. As alleged in this Complaint, Apple, engaged in unconscionable commercial practices, deception, misrepresentation, and the knowing concealment, suppression, and omission of material facts with intent that others rely on such concealment, suppression, and omission, in connection with the sale or advertisement of any merchandise, in violation of N.J. Stat. Ann. § 56:8-2. This includes, but is not limited to Defendant's failure to disclose that (a) it was purposefully slowing down the performance speed of older iPhone models and/or that (b) a battery replacement would improve the iPhone performance.

56. As a direct and proximate result of Apple's violation of the New Jersey Consumer Fraud Act, Plaintiff and other members of the New Jersey Sub-Class each suffered an ascertainable loss of money as a result of Defendant's use of the unconscionable business practice and material omissions described herein.

57. Plaintiff Aberman brings this action on behalf of himself and other members of the New Jersey Sub-Class for the relief requested above and for the public benefit in order to promote the public interests in the provision of truthful, fair information to allow consumers to make informed purchasing decisions and to protect Plaintiff and other members of the New Jersey Sub-Class from Apple's unfair methods of competition and unfair, deceptive, fraudulent,

unconscionable and unlawful practices. Apple's wrongful conduct as alleged in this Complaint has had widespread impact on the public at large.

58. Plaintiff Aberman and other members of the New Jersey Sub-Class also seek actual damages, injunctive and/or other equitable relief and treble damages, and attorney's fees and costs pursuant to Federal Rule of Civil Procedure 23 and N.J. Stat. Ann. § 56:8-19.

COUNT V

**VIOLATION OF FLORIDA'S UNFAIR TRADE PRACTICES ACT,
FLA. STAT. § 501.201, *ET SEQ.***

**(ON BEHALF OF PLAINTIFFS MARGOLIS, BRODSKY AND CHILDS AND THE
FLORIDA SUB-CLASS)**

59. Margolis, Brodsky and Childs (the "Florida Plaintiffs") incorporate and re-allege the allegations contained in paragraphs 1-35 as if fully set forth herein.

60. At all relevant times, the Florida Plaintiffs and the other members of the Florida Sub-Class members were "consumers" within the meaning of FDUPTA.

61. Apple engaged in trade and commerce in Florida.

62. As alleged herein this Complaint, Apple engaged in unfair or deceptive acts or practices in the conduct of consumer transactions, in violation of the FDUTPA by failing to disclose that (a) it was purposefully slowing down the performance speed of older iPhone models and/or that (b) a battery replacement would improve the iPhone performance.

63. As a direct and proximate result of Apple's violation of the FDUTPA, the Florida Plaintiffs and the other members of the Florida Sub-Class suffered damages.

64. The Florida Plaintiffs bring this action on behalf of themselves and the other members of the Florida Sub-Class for the relief requested above and for the public benefit in order to promote the public interests in the provision of truthful, fair information to allow consumers to make informed purchasing decisions and to protect Plaintiffs and other members of the Florida Sub-

Class and the public from Apple's unfair methods of competition and unfair, deceptive, fraudulent, unconscionable and unlawful practices. Apple's wrongful conduct as alleged in this Complaint has had widespread impact on the public at large.

65. The Florida Plaintiffs and the other members of the Florida Sub-Class seek actual damages under Fla. Stat. § 501.211 (2) and all fees, costs, and expenses allowed by law, including attorney's fees and costs, pursuant to Federal Rule of Civil Procedure 23 and Fla. Stat. §§ 501.2105 and 501.211, to be proven at trial.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all members of the proposed classes in this Complaint, respectfully requests that the Court enter judgment in their favor and against Apple as follows:

- a. For an Order certifying the Classes, as defined herein, and appointing Plaintiffs and their Counsel to represent the Nationwide Class, or in the alternative the separate Statewide Classes;
- b. For an award of damages, as allowed by law in an amount to be determined;
- c. For an award of attorneys' fees costs and litigation expenses, as allowable by law;
- d. For prejudgment interest on all amounts awarded; and
- e. Such other and further relief as this court may deem just and proper.

JURY TRIAL DEMAND

Plaintiffs demand a jury trial on all issues so triable.

Dated: December 26, 2017

Respectfully Submitted,

s/ Melissa R. Emert

STULL, STULL & BRODY

6 East 45th Street

New York, NY 10017

Tel. (212) 687-7230

Fax (212) 490-2022

memert@ssbny.com

Attorney for Plaintiffs

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Benjamin Lazarus, Jeffrey Aberman, Stephen Margolis, Sandy Brodsky and Victoria Childs.

(b) County of Residence of First Listed Plaintiff New York (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Stull, Stull & Brody, 6 East 45th St., NY, NY 10017 212-687-7230

DEFENDANTS

Apple, Inc.

County of Residence of First Listed Defendant California (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. 1332 (d)(2)

Brief description of cause: Fraudulent Concealment, Breach of Implied contract, violation of consumer statutes

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE DOCKET NUMBER

DATE 12/26/2017 SIGNATURE OF ATTORNEY OF RECORD /s/ Melissa R. Emert

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, Melissa R. Emert, counsel for Benjamin Lazarus, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- the complaint seeks injunctive relief,
- the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? Yes No
- 2.) If you answered "no" above:
 - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? Yes No
 - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes No
 - c) If this is a Fair Debt Collection Practice Act case, specify the County in which the offending communication was received: _____

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? Yes No

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

Yes No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

Yes (If yes, please explain) No

I certify the accuracy of all information provided above.

Signature: Melissa R. Emert

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

BENJAMIN LAZARUS, JEFFREY ABERMAN,
STEPHEN MARGOLIS, SANDY BRODSKY and
VICTORIA CHILDS, individually and on behalf of all
others similarly situated

Plaintiff(s)

v.

Apple, Inc.

Defendant(s)

Civil Action No.

17-cv-07485

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Apple, Inc., 1 Infinite Loop Cupertino, CA 95014

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Melisa R. Emert
Stull, Stull & Brody
6 E. 45th St.-5th floor
New York, NY 10017

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DOUGLAS C. PALMER
CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Exhibit 10

**U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:17-cv-10032-NRB**

Rabinovits et al v. Apple INC.
Assigned to: Judge Naomi Reice Buchwald
Cause: 28:1332dtp Diversity - Deceptive Trade Practices

Date Filed: 12/22/2017
Jury Demand: Plaintiff
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff**Eliezer Rabinovits**

represented by **Stanley D Bernstein**
Bernstein Liebhard, LLP
10 East 40th Street
New York, NY 10016
(212) 779-1414
Fax: (212) 779-3218
Email: bernstein@bernlieb.com
ATTORNEY TO BE NOTICED

Plaintiff**Victor Mazzeo**

*on behalf of themselves and all others
similarly situated*

represented by **Stanley D Bernstein**
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant**Apple INC.**

Date Filed	#	Docket Text
12/22/2017	1	COMPLAINT against APPLE INC.. (Filing Fee \$ 400.00, Receipt Number 0208-14508831) Document filed by ELIEZER RABINOVITS, VICTOR MAZZEO.(Bernstein, Stanley) (Entered: 12/22/2017)
12/22/2017	2	REQUEST FOR ISSUANCE OF SUMMONS as to APPLE INC., re: 1 Complaint. Document filed by VICTOR MAZZEO, ELIEZER RABINOVITS. (Bernstein, Stanley) (Entered: 12/22/2017)
12/22/2017	3	CIVIL COVER SHEET filed. (Bernstein, Stanley) (Entered: 12/22/2017)
12/22/2017	4	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by VICTOR MAZZEO, ELIEZER RABINOVITS.(Bernstein, Stanley) (Entered: 12/22/2017)
12/26/2017		***NOTICE TO ATTORNEY REGARDING PARTY MODIFICATION. Notice to attorney Stanley D Bernstein. The party information for the following parties has been modified: Eliezer Rabinovits, Victor Mazzeo, Apple INC. The information for the parties has been modified for the following reasons: party name was entered in all caps; party text was omitted. (pne) (Entered: 12/26/2017)

12/26/2017	<p>***NOTICE TO ATTORNEY REGARDING CIVIL CASE OPENING STATISTICAL ERROR CORRECTION: Notice to attorney Stanley D Bernstein. The following case opening statistical information was erroneously selected/entered: Citizenship Defendant code 2 (Citizen of Another State); County code New York. The following corrections have been made to your case entry: the Citizenship Defendant code has been modified to 5 (Incorporated/Principal Place of Business-Other State); the County code has been modified to Kings. (pne) (Entered: 12/26/2017)</p>
12/26/2017	<p>CASE OPENING INITIAL ASSIGNMENT NOTICE: The above-entitled action is assigned to Judge Naomi Reice Buchwald. Please download and review the Individual Practices of the assigned District Judge, located at http://nysd.uscourts.gov/judges/District. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Please download and review the ECF Rules and Instructions, located at http://nysd.uscourts.gov/ecf_filing.php. (pne) (Entered: 12/26/2017)</p>
12/26/2017	<p>Magistrate Judge Stewart D. Aaron is so designated. Pursuant to 28 U.S.C. Section 636(c) and Fed. R. Civ. P. 73(b)(1) parties are notified that they may consent to proceed before a United States Magistrate Judge. Parties who wish to consent may access the necessary form at the following link: http://nysd.uscourts.gov/forms.php. (pne) (Entered: 12/26/2017)</p>
12/26/2017	<p>Case Designated ECF. (pne) (Entered: 12/26/2017)</p>
12/26/2017	<p>5 ELECTRONIC SUMMONS ISSUED as to Apple INC. (pne) (Entered: 12/26/2017)</p>

PACER Service Center			
Transaction Receipt			
12/28/2017 14:25:14			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	1:17-cv-10032-NRB
Billable Pages:	2	Cost:	0.20

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

----- x

ELIEZER RABINOVITS and VICTOR MAZZEO
on behalf of themselves and all others similarly
situated,

Case No. _____

CLASS ACTION COMPLAINT

Plaintiff,

DEMAND FOR JURY TRIAL

-against-

APPLE INC.,

Defendant.

----- x

Plaintiffs Eliezer Rabinovits and Victor Mazzeo (“Plaintiffs”), individually and on behalf of a class of all those similarly situated as defined herein, alleges the following upon information and belief, except as to those allegations concerning Plaintiffs, which are alleged upon personal knowledge. Plaintiffs’ information and belief are based upon, among other things, their undersigned counsel’s investigation. Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

SUMMARY OF THE ACTION

1. This is a class action on behalf of owners of all versions of the iPhone 6 and/or iPhone 7 who were harmed when their devices’ software was updated to any of the following: iOS 10.2.1 (released on January 23, 2017); iOS 10.3 (released on March 27, 2017); iOS 10.3.1 (released on April 3, 2017); iOS 10.3.2 (released on May 15, 2017); iOS 10.3.3 (released on July 19, 2017) (collectively referred to as the “iOS 10 Update”); iOS 11.0.1 (released on September 26, 2017); iOS 11.0.2 (released on October 3, 2017); iOS 11.0.3 (released on October 11, 2017); iOS 11.1 (released on October 31, 2017); iOS 11.1.1 (released on November 9, 2017); iOS

11.1.2 (released on November 16, 2017); iOS 11.2 (released on December 2, 2017); and iOS 11.2.1 (released on December 13, 2017) (collectively referred to as “iOS 11 Update”). The iOS 10 and iOS 11 Updates caused Plaintiffs’ and class members’ devices to be significantly slower and interfered with the normal usage of the phones.

2. Plaintiffs allege that Defendant Apple Inc. (“Apple” or “Defendant”) engaged in deceptive trade practices and false advertising in violation of New York General Business Law § 349 and § 350 when it represented that the iOS 10 and iOS 11 Updates were compatible with and support iPhone 6s and iPhone 7s. Specifically, Apple failed to warn iPhone 6 and iPhone 7 owners that the iOS 10 and iOS 11 Updates could significantly and negatively interfere with their phones’ performance. To the contrary, Apple specifically touted the increased phone performance that would result from the iOS 10 and iOS 11 updates. Apple has since admitted however that, through the iOS 10 and iOS 11 Updates, Apple deliberately prevents chips in iPhone 6s and iPhone 7s from reaching their full processing power. In other words, instead of enhancing the performance of iPhone 6s and iPhone 7s as Apple represented, the iOS 10 and iOS 11 Updates were designed to limit the devices’ performance in certain circumstances.

3. Having updated their phones, Plaintiffs and owners of iPhone 6s and iPhone 7s must either continue using devices that experience significant lag time that interferes with their ordinary use, or purchase a new phone for hundreds of dollars.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) because (1) there are more than 100 class members, (2) the aggregate amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and (3) at least one member of the putative class is a citizen of a State other than that of the citizenship of Defendant. Further, more than two-thirds of the putative Class reside in states other than the State in which

Defendant is domiciled, such that any exceptions to jurisdiction under 28 U.S.C. § 1332(d) do not apply.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and § 1391(c) because Defendant engaged in deceptive trade practices in this District, has caused harm to the Class in this District, provides a substantial volume of goods to this District, and does a substantial amount of business within this District, and thus has purposefully availed itself of the privileges of conducting business within the State of New York and this District.

PARTIES

6. Plaintiff Eliezer Rabinovits resides in Brooklyn, New York and is the owner of an iPhone 6S.

7. Plaintiff Victor Mazzeo resides in New York, New York and is the owner of an iPhone 7.

8. Defendant Apple Inc. is a California corporation with its principal offices at 1 Infinite Loop, Cupertino, CA 95014.

SUBSTANTIVE ALLEGATIONS

9. Plaintiff Eliezer Rabinovits owns an iPhone 6S. His iPhone's software was updated to iOS 10 and iOS 11 after Apple released each update to the public.

10. Plaintiff Victor Mazzeo owns an iPhone 7. His iPhone's software was updated to iOS 10 and iOS 11 after Apple released each update to the public.

11. After the updates, Plaintiffs' phones slowed down significantly, with delayed responses to touch interactions, application ("App" or "Apps") launches (Apple and third party Apps), and many experienced other problems with the phones' performance.

12. After the updates, Plaintiffs' devices were no longer functional for normal use, as Plaintiffs experienced slow and buggy response time during ordinary use.

13. The updates caused performance problems in all aspects of the iPhone's functionality, including core functions like the phone, email, text messages, contacts, etc.

14. Besides slowing down, the latest update caused Plaintiff Mazzeo's iPhone 7 to crash, erasing all of the data stored on the device.

15. Upon information and belief, other class members experienced similar functionality issues with their iPhone 6s and iPhone 7s after downloading the iOS 10 and iOS 11 Updates.

16. Upon information and belief, Defendant does not allow iPhone owners to revert their iOS 10 or iOS 11 software to previous, better functioning versions of iOS. However, Defendant does not warn the consumer that the update is irreversible.

17. Further, Plaintiffs and other class members had no choice but to update their devices' software to iOS 10 and iOS 11. First, Defendant's software constantly reminded Plaintiffs and class members through pop-up messages that appear on the devices' home screens that the devices' software needed to be updated and that an upgrade was available for download. These reminders were constant and disruptive (e.g., the reminders would not disappear until the user took the affirmative step of responding to the message) and the reminders did not cease until the owner had updated the software as directed.

18. Further, even if an iPhone owner tried to ignore the constant reminders, eventually they were forced to update the software because the Apps on the devices would ultimately be outdated and could not be updated unless the iPhone was running the latest iOS software.

19. Plaintiffs and class members are forced to either use a buggy slow iPhone, or pay hundreds of dollars for a new phone.

20. Defendant's deceptive practices and misleading advertising caused harm and economic loss to the Plaintiffs and the class who lost use of functional iPhones. Some class members have been forced to purchase new smartphones.

21. Plaintiffs were subjected to Defendant's deceptive practices and misleading advertising described below.

22. Defendant knew that the iPhone 6's and iPhone 7's functionality and/or performance was going to be negatively affected by the iOS 10 and iOS 11 Updates before the updates were released to the public. Responding to a report on the sluggish iPhones, on December 20, 2017, Apple publicly admitted that the iOS 10 and iOS 11 Updates deliberately slowed down older iPhones, such as the iPhone 6 and the iPhone 7, without warning consumers:

Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous peaks only when needed to prevent the device from unexpectedly shutting down during these conditions. We've now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in the future.

23. While Apple claims that the deliberate slow-down in functionality was designed to offset shut-down issues with older batteries, Plaintiffs have experienced *reduced* battery life since the iOS 10 and iOS 11 Updates.

24. More importantly, Defendant did not warn iPhone 6 or iPhone 7 owners of the potential consequences of downloading the iOS 10 and iOS 11 Updates until months after the updates were released to the public.

25. To the contrary, Defendant consistently touted the necessity of the updates and the improvements of the new software to the previous version. For example, when advertising for Apple's security updates on its website, Defendant emphasizes the necessity of the updates, stating "Keeping your software up to date is one of the most important things you can do to maintain your Apple product's security." (<https://support.apple.com/en-us/HT201222>).

26. Furthermore, in the constant advertising of the pop-up messages, Defendant failed to disclose the negative aspects of the updates. For example:

27. The iOS 10.2.1 update promised improved security: “includes bug fixes and improves the security of your iPhone or iPad.”

28. The iOS 10.3 and 10.3.1 updates promised new functionality: “iOS 10.3 introduces new features including the ability to locate AirPods using Find my iPhone and more ways to use Siri with payment, ride booking and automaker [caremaker] apps.”

29. The iOS 10.3.2 and 10.3.3 updates promised enhancements to security: “iOS 10.3.2 includes bug fixes and improves the securities of your iPhone or iPad.”

30. The iOS 11.0.1 update promised functional improvements to the iPhone: “iOS 11.0.1 includes bug fixes and improvements for your iPhone or iPad.”

31. The iOS 11.0.2 update promised additional features and improvements: “iOS 11.0.2 brings hundreds of new features to iPhone and iPad including an all new App Store, a more proactive and intelligent Siri, improvements to Camera and Photos, and augmented reality technologies to enable immersive experiences.”

32. The iOS 11.0.3 promised to fix certain problems on iPhone 6 and iPhone 7 devices, noting that the update fixes “an issue where audio and haptic feedback would not work on some iPhone 7 and 7 Plus devices” and “addresses an issue where touch input was unresponsive on some iPhone 6s displays. . . .”

33. The iOS 11.1 promised both “bug fixes and improvements.”

34. The iOS 11.1.1 update promised to address certain bugs, including “fixes an issue with keyboard auto-correct” and fixes an issue where Hey Siri stops working.”

35. The iOS 11.1.2 update promised to address certain issues affecting phones, such as “an issue where the iPhone X screen becomes temporarily unresponsive to touch” and “an issue that could cause distortion in Live Photos.”

36. The iOS 11.2.1 update promised enhancements: “fixes bugs including an issue that could disable remote access to shared users of the Home app.”

37. *Nowhere did Apple disclose that the updates will negatively affect the iPhones and their functionality.*

CLASS ACTION ALLEGATIONS

38. This action is brought on behalf of the named Plaintiffs and as a Class Action pursuant to Rule 23(b)(1),(2),(3) and 23(c) of the Federal Rules of Civil Procedure on behalf of the following proposed “Class” or “Class Members”:

All individuals and entities in New York who currently own or have owned an iPhone 6 and/or iPhone 7 that was updated to any of the following: iOS 10.2.1 (released on January 23, 2017); iOS 10.3 (released on March 27, 2017); iOS 10.3.1 (released on April 3, 2017); iOS 10.3.2 (released on May 15, 2017); iOS 10.3.3 (released on July 19, 2017); iOS 11.0.1 (released on September 26, 2017); iOS 11.0.2 (released on October 3, 2017); iOS 11.0.3 (released on October 11, 2017); iOS 11.1 (released on October 31, 2017); iOS 11.1.1 (released on November 9, 2017); iOS 11.1.2 (released on November 16, 2017); iOS 11.2 (released on December 2, 2017) and iOS 11.2.1 (released on December 13, 2017).

39. The Class is so numerous that joinder of all the members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are at least thousands of members in the putative Class.

40. Common 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. Among the questions of law and fact common to the Class are:

- a. whether Defendant's statements and advertisements to iPhone 6 and iPhone 7 owners concerning the iOS 10 and iOS 11 Updates constitute an unfair or deceptive business practice in violation of § 349 of New York General Business Law;
- b. whether Defendant engaged in unfair or deceptive business practices in violation of § 349 of New York General Business Law by using the iOS 10 and iOS 11 Updates to limit the performance of iPhone 6s and iPhone 7s.
- c. whether Defendant engaged in unfair or deceptive business practices in violation of § 349 of New York General Business Law when it failed to disclose/omitted facts and/or disclaimers to owners of iPhone 6s and iPhone 7s regarding the adverse effect of the iOS 10 and iOS 11 Updates on the performance of the devices;
- d. whether Defendant engaged in unfair or deceptive business practices in violation of § 349 of New York General Business Law when it made the iOS 10 and iOS 11 Updates available for download to iPhone 6 and iPhone 7 owners.
- e. whether Defendant's statements and advertisements to iPhone 6 and iPhone 7 owners concerning the iOS 10 and iOS 11 Updates constitute an unfair or deceptive advertising in violation of § 350 New York's General Business Law;
- f. whether Defendant engaged in unfair or deceptive advertising in violation of § 350 New York's General Business Law when it failed to

disclose/omitted facts and/or disclaimers to owners of iPhone 6s and iPhone 7s regarding the adverse effect of the iOS 10 and iOS 11 Updates on the performance of the devices;

41. Plaintiffs' claims are typical of the claims of the members of the Class as all Class Members are similarly affected by Defendant's deceptive conduct. Plaintiffs and other Class Members were harmed by Defendant's statements, advertisements, and the degraded functionality of their devices. All Class Members have been harmed by Defendant's failure to disclose or warn iPhone 6 and iPhone 7 owners that the iOS 10 and iOS 11 Updates would significantly impact the performance of their devices.

42. Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs' claims are coextensive with, and not antagonistic to, the claims of other Class Members. Plaintiffs are willing and able to prosecute this action on behalf of the Class and have retained counsel competent and experienced in class action litigation.

43. A class action 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 may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually seek redress for the wrongs done to them. There will be no difficulty in the management of this action as a class action.

44. Plaintiffs bring this action pursuant to Rule 23(b)(3) because common questions of law and fact predominate over issues that are individual to members of the Class. The proposed Class is sufficiently cohesive to warrant class and representative treatment. Upon information and belief, Defendant has the ability and the records that would permit Plaintiffs a

plausible class-wide method for proving the case. Certification under Rule 23(b)(3) is also appropriate because a class action is superior to other available methods for the fair and efficient adjudication of this action. The expense of litigating each Class Members' claim individually would be so cost prohibitive as to deny Class Members a viable remedy. Plaintiffs do not anticipate any difficulty in the management of the action as a class action.

45. Plaintiffs also bring this action pursuant to Rule 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to all Class Members, thereby making final injunctive relief concerning the Class as a whole appropriate. In the absence of appropriate injunctive relief, Defendant will continue its unfair and deceptive practices. Defendant's uniform conduct towards Plaintiffs and other Class Members makes certification of a Rule 23(b)(2) class appropriate.

FIRST CAUSE OF ACTION

(Violation of New York General Business Law § 349)

46. Plaintiffs incorporate by reference and realleges each and every allegation contained above, as though fully set forth herein.

47. Defendant's conduct was consumer oriented because Defendant falsely advertised, made materially misleading statements, and negligently, recklessly or knowingly omitted/failed to disclose material information to consumers throughout New York regarding the performance of its products and software.

48. By reason of the foregoing, and as a result of Defendant's conduct, Plaintiffs and the Class have been harmed economically and by losing use of a functional iPhone. Plaintiffs and the Class are entitled to damages and attorneys' fees pursuant to N.Y. G.B.L. § 349.

SECOND CAUSE OF ACTION

(Violation of New York General Business Law § 350)

49. Plaintiffs incorporate by reference and realleges each and every allegation contained above, as though fully set forth herein.

50. Defendant's advertisements were false and misleading in a material way, as Defendant made affirmative statements and omissions concerning the positive effects of the iOS 10 and iOS 11 Updates without disclosing or warning that Plaintiffs and the Class of the negative effects of the iOS 10 and iOS 11 Update, including significant slowdowns and decreased functionality.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class respectfully pray for judgment and relief in their favor against the Defendant, as follows:

- A. Awarding Plaintiffs and the Class damages, trebled, or the maximum amount allowed;
- B. Awarding reasonable attorneys' fees;
- C. Enjoining Apple's unlawful practices; and
- D. Granting such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED

Dated: December 22, 2017

BERNSTEIN LIEBHARD LLP

/s/ Stanley D. Bernstein

Stanley D. Bernstein (bernstein@bernlieb.com)

U. Seth Ottensoser (ottensoser@bernlieb.com)

Stephanie M. Beige (beige@bernlieb.com)

10 East 40th Street

New York, NY 10016

Telephone: (212) 779-1414

Facsimile: (212) 779-3218

Attorneys for Plaintiffs in the Class

Exhibit 11

United States District Court
Northern District of Illinois - CM/ECF LIVE, Ver 6.2.1 (Chicago)
CIVIL DOCKET FOR CASE #: 1:17-cv-09178

Mangano et al v. Apple, Inc.
Assigned to: Honorable Harry D. Leinenweber
Demand: \$999,000
Cause: 28:1331 Federal Question

Date Filed: 12/20/2017
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

Sam Mangano

represented by **James C. Vlahakis**
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ATTORNEY TO BE NOTICED

Plaintiff

Lance A. Raphael

represented by **James C. Vlahakis**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Ahmad Tayseer Sulaiman
(See above for address)
ATTORNEY TO BE NOTICED

Mohammed Omar Badwan
(See above for address)
ATTORNEY TO BE NOTICED

Nathan Charles Volheim
(See above for address)
ATTORNEY TO BE NOTICED

Omar Tayseer Sulaiman
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Plaintiff

Ala Abdulla

represented by **James C. Vlahakis**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Ahmad Tayseer Sulaiman
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Nathan Charles Volheim
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ATTORNEY TO BE NOTICED

Omar Tayseer Sulaiman
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Kirk Pedelty

represented by **James C. Vlahakis**
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ATTORNEY TO BE NOTICED

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(See above for address)
ATTORNEY TO BE NOTICED

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Nathan Charles Volheim
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Omar Tayseer Sulaiman
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ATTORNEY TO BE NOTICED

Plaintiff

Ryan Glaze

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Ahmad Tayseer Sulaiman
(See above for address)
ATTORNEY TO BE NOTICED

Mohammed Omar Badwan
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Nathan Charles Volheim
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Omar Tayseer Sulaiman
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Apple, Inc.

Date Filed	#	Docket Text
12/21/2017	1	ATTORNEY Appearance for Plaintiffs Sam Mangano, Lance Raphael by James C. Vlahakis (Vlahakis, James) (Entered: 12/21/2017)

12/21/2017	2	COMPLAINT <i>Filing Fee \$400, receipt # 0752-13937139</i> filed by Sam Mangano, Lance Raphael; Jury Demand. (Vlahakis, James) (Entered: 12/21/2017)
12/21/2017	3	CIVIL Cover Sheet (Vlahakis, James) (Entered: 12/21/2017)
12/21/2017	4	ATTORNEY Appearance for Plaintiffs Sam Mangano, Lance Raphael by Ahmad Tayseer Sulaiman (Sulaiman, Ahmad) (Entered: 12/21/2017)
12/21/2017	5	ATTORNEY Appearance for Plaintiffs Sam Mangano, Lance Raphael by Mohammed Omar Badwan (Badwan, Mohammed) (Entered: 12/21/2017)
12/21/2017	6	ATTORNEY Appearance for Plaintiffs Sam Mangano, Lance Raphael by Nathan Charles Volheim (Volheim, Nathan) (Entered: 12/21/2017)
12/21/2017	7	ATTORNEY Appearance for Plaintiffs Sam Mangano, Lance Raphael by Omar Tayseer Sulaiman (Sulaiman, Omar) (Entered: 12/21/2017)
12/21/2017		CASE ASSIGNED to the Honorable Harry D. Leinenweber. Designated as Magistrate Judge the Honorable Daniel G. Martin. (meg,) (Entered: 12/21/2017)
12/27/2017		SUMMONS Issued as to Defendant Apple, Inc. (jp,) (Entered: 12/27/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 13:15:49			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	1:17-cv-09178
Billable Pages:	4	Cost:	0.40

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ALA ABDULLA, LANCE A. RAPHAEL,
SAM MANGANO, KIRK PEDELTY, and
RYAN GLAZE,

Plaintiffs,

v.

APPLE, INC.,

Defendant.

CIVIL ACTION

Case no. 17-cv-9178

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

NOW COME the named Plaintiffs, by and through one of their attorneys, James C. Vlahakis of Sulaiman Law Group, Ltd., and bring this civil action as Class Action Complaint on behalf of themselves, and various classes of similarly situated individuals, pursuant to Federal Rule of Civil Procedure (“FRCP”) 23(a), 23(b)(2) and 23(b)(3) against Defendant APPLE, INC.:

Jurisdiction, Parties and Venue

1. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. 1332(d)(2) because the amount in controversy exceeds \$5,000,000, in the aggregate (exclusive of interest and costs) and least one member of the class is a citizen of a different state than Defendant Apple, Inc.

2. The amount in controversy easily exceeds \$5,000,000, because tens of thousands of similarly situated putative class members into purchasing newer model iPhones based upon Defendant Apple, Inc.’s (“Apple”) fraudulent scheme.

3. Plaintiff Ala W. Abdulla is a resident of the State of Illinois.

4. Plaintiff Lance Raphael is a resident of the State of Illinois.

5. Plaintiff Sam Mangano is a resident of the State of Ohio.
6. Plaintiff Ryan Glaze is a resident of the State of Indiana.
7. Plaintiff Kirk Pedelty is a resident of the State of North Carolina.
8. Apple is a California corporation with a principal place of business in Cupertino, California.
9. Venue is proper in this district because a substantial part of the events or omissions giving rise to the claim occurred in this District.
10. Venue is also proper in this district because Apple authorized to conduct business in this District, has intentionally availed itself of the laws and markets within this District, does substantial business in this District, and is subject to personal jurisdiction in this District.

General Facts Supporting the Causes of Action

11. As discussed below, Apple purposefully and knowingly released operating system software updates to iPhone 5, iPhone 6 and certain iPhone 7 phones that slowed the performance speeds of the central processing units (“CPUs”) of these devices.
12. Apple’s software updates purposefully slowed or “throttled down” the performance speeds iPhone 5, iPhone 6, certain iPhone 7 phones and as yet unknown versions of iPhones because operating system software updates (at times “iOS updates”) wreaked havoc on batteries within these model devices.
13. Apple’s iOS updates were engineered to purposefully slowdown or “throttle down” the performance speeds of the above devices which cause users of these devices to experience significant slowdowns in device performance.
14. Apple’s iOS updates purposefully neglected to explain that the slowdowns in older model device performance and resulting lost or diminished operating performance could be remedied by replacing the batteries of these devices.

15. Apple's iOS updates purposefully neglected to explain that its purposeful throttling down of older model devices and resulting lost or diminished operating performance could be remedied by replacing the batteries of these devices.

16. Instead, Apple's decision to purposefully slowdown or throttle down these devices was undertaken to fraudulently induce consumers to purchase the latest iPhone versions of the iPhone 7, as well as new phones such as the iPhone 8 and iPhone X.

Allegations Specific to Each Plaintiff

17. Prior to purchasing an iPhone X, Plaintiff Abdulla owned and utilized an iPhone 6.

18. Over time, Abdulla noticed appreciable slowdowns in the operation of her iPhone 6 after certain iOS updates were issued to her device.

19. Frustrated by the performance speed of her iPhone 6, Abdulla purchased an iPhone 7 Plus.

20. If Apple had publically explained that it was purposefully throttling down the performance speed of iPhone 6 devices, and that performance speed of iPhone 6 devices could be improved by a replacement battery, Abdulla would not have purchased an iPhone X to replace her iPhone 6.

21. Prior to purchasing an iPhone 7 Plus, Plaintiff Raphael owned and utilized an iPhone 6.

22. Over time, Raphael noticed appreciable slowdowns in the operation of his iPhone 6 after certain iOS updates were issued to his device.

23. Frustrated by the performance speed of his iPhone 6, Raphael purchased an iPhone 7 Plus.

24. If Apple had publically explained that it was purposefully throttling down the performance speed of iPhone 6 devices, and that performance speed of iPhone 6

devices could be improved by a replacement battery, Raphael would not have purchased an iPhone 7 plus to replace his iPhone 6.

25. Prior to purchasing an iPhone 7 Plus, Plaintiff Glaze owned and utilized an iPhone 6 Plus.

26. Over time, Glaze noticed appreciable slowdowns in the operation of his iPhone 6 Plus after certain iOS updates were issued to his device.

27. Frustrated by the performance speed of his iPhone 6 Plus, Glaze purchased an iPhone 7 Plus.

28. If Apple had publically explained that it was purposefully throttling down the performance speed of iPhone 6 devices, and that performance speed of iPhone 6 devices could be improved by a replacement battery, Glaze would not have purchased an iPhone X to replace his iPhone 6 Plus.

29. Prior to purchasing an iPhone 8, Plaintiff Pedelty owned and utilized an iPhone 7.

30. Over time, Pedelty noticed appreciable slowdowns in the operation of this iPhone 7 after certain iOS updates were issued to his device.

31. Frustrated by these slowdowns, Pedelty repeatedly contacted Apple customer support to help fix the performance of his phone.

32. Nobody from Apple customer support suggested that he replace his battery to improve the performance of his iPhone.

33. Instead, Apple issued Pedelty a replacement iPhone 7.

34. This replacement device suffered from significant slowdowns after certain iOS downloads.

35. Frustrated by slowdowns and intermittent shutdowns of his iPhone 7, Pedelty purchased an iPhone 8.

36. If Apple had publically explained that it was purposefully throttling down the performance speed of iPhone 7 devices, and that performance speed of iPhone 7 devices could be improved by a replacement battery, Pedelty would not have purchased an iPhone 8 to replace his iPhone 7.

37. Prior to purchasing an iPhone 7 for himself, Plaintiff Mangano owned and utilized an iPhone 6.

38. Prior to purchasing an iPhone 7 for his two minor children, Plaintiff Mangano owned and his minor children each utilized an iPhone 5c device.

39. Over time, Mangano and his minor children noticed appreciable slowdowns in the operation of their devices after certain iOS updates were issued to their devices.

40. Frustrated by the slower operating speeds of their devices, Mangano purchased three iPhones 7 (one for himself and one for each minor).

41. If Apple had publically explained that it was purposefully throttling down the performance speed of iPhone older devices, and that performance speed of iPhone 6 and 5c devices could be improved by a replacement battery, Mangano would not have purchased the above mentioned iPhone 7s.

Additional Allegations as to Apple's Misconduct and Fraudulent Concealment

42. On information and belief, owners of iPhone 5, iPhone 6 and early model iPhone noticed similar slowdowns in operating performance and operating speeds.

43. During each iOS update issued by Apple, Apple purposefully determined that it would not explain to Plaintiffs and other similarly situated consumers (with older iPhones) why (a) appreciable device slowdowns were taking place after various iOS updates, (b) that Apple was purposefully slowing/throttling down operating speeds of

older devices and (c) that device performance could be improved with replacement batteries.

44. Apple purposefully declined to make these disclosures because it knew that consumers would, more likely than not, purchase a new device out of (a) loyalty to Apple and/or (b) because Apple knew that its consumers desired to have devices performing at optimal speed that they had previously be used to.

45. Although Apple could have sent an alert to consumers informing consumers that the speed and performance older iPhones could be improved by installing new batteries, Apple declined to issue such an alert.

46. On December 20, 2017, Apple finally explained that it was purposefully slowing down the operating speed of older iPhone devices to conserve battery life.

47. According to Apple:

Our goal is to deliver the best experience for customers, which includes overall performance and prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age over time, which can result in the device unexpectedly shutting down to protect its electronic components.

Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous peaks only when needed to prevent the device from unexpectedly shutting down during these conditions. We've now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in the future.

48. Prior to this statement, Apple knowingly and purposefully decided that it would not inform consumers that the performance speeds of iPhone 5s, 6s and 7s would improve if consumers replaced their device's battery.

49. As a result of Apple purposefully failing to explain to consumers that a replacement battery will improve operating performance of older iPhones, Plaintiffs and

thousands of other consumers became frustrated with the performance of their devices and purchased new devices.

50. As alleged above, Apple's purposeful slowdown of the performance times of the iPhones used by the named Plaintiffs greatly reduced the effectiveness and usefulness of the subject telephones.

51. Apple's decision to not inform consumers that they could improve the performance speed of their devices by replacing their device's batteries reduced the effectiveness and usefulness of the subject telephones.

52. As a result of Apple's conduct, the named Plaintiffs incurred unnecessary expenses through the purchase of the new iPhones.

53. Additionally, Plaintiff Pedelty was unable to accept or make business related calls with his iPhone was inoperable as a result of its diminished performance and random shutdowns.

54. Prior to the purchase of their newer model iPhones, the named Plaintiffs tried, without success, to contact live Apple technical/customer service support staff and/or search Apple's website to discovery how to remedy and improve the operating speed of their iPhone devices.

55. Prior to the purchase of their newer model iPhones, none of the named Plaintiff learned or where told by Apple's website or live technical/customer service support staff that they could have improved the performance of their iPhone devices by replacing the batteries of their devices.

56. Prior to the purchase of their newer model iPhones, Apple's website and its technical/customer service support staff did not inform Plaintiffs that they could have improved the performance of their iPhone devices by replacing the batteries of their devices.

57. Prior to the purchase of their newer model iPhones, no Apple update disclosed to Plaintiff that they could have improved device performance by replacing the batteries of their devices.

58. Apple knew that battery replacements would have improved the performance of the types of older devices owned by Plaintiffs.

59. Had Plaintiffs been informed by Apple or its technical/customer service support staff that a battery replacement would have improved the performance of the above devices, they would have opted to replace the batteries instead of purchasing new phones.

60. Replacing batteries in the above devices would have been cheaper than purchasing new devices.

61. Apple purposefully concealed, fraudulently omitted and/or failed to disclose the fact that a battery replacement would improve the performance of older iPhones to require consumers to purchase newer device models.

62. Informing consumers that a batter replacement would improve iPhone performance was an important piece of information to a reasonable consumer who wanted to improve the performance of his or her older model iPhone.

63. Informing consumers that a battery replacement would improve iPhone performance was an important piece of information to a reasonable consumer who wanted to improve the performance of his or her older model iPhone in the most cost effective manner.

64. Withholding this information caused Plaintiffs and consumers to spend more money through the purchase of brand new iPhones.

65. Apple's failure to inform consumers that performance slowdowns on older iPhones was a result of Apple purposefully slowing down operating speed of iPhones constitutes a purposeful withholding of material information.

66. Apple's failure to inform consumers that performance slowdowns on older iPhones could be improved by the replacement of a battery constitutes a purposeful withholding of material information.

67. Additionally, Apple provided consumers with substandard chargers that resulted in diminished battery life, which worsened the effectiveness of older model iPhones.

68. Apple failed to inform consumers that the use of substandard chargers would result in diminished battery life, which worsened the effectiveness of older model iPhones.

Count I – Illinois Consumer Fraud and Deceptive Business Practices Act

69. Plaintiffs restate and reallege the above paragraphs as through fully set forth herein.

70. The Illinois Consumer Fraud and Deceptive Business Practices Act (“IFCFA”) states:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

815 ILCS 505/2.

71. Plaintiffs Abdulla and Raphael are each a “person” and a “consumer” as defined in ICFA, 815 ILCS 505/ (c) and (e) respectively

72. Apple was and is engaged in commerce in the State of Illinois with regard to Plaintiffs Abdulla and Raphael.

73. Apple’s above conduct in failing to inform Plaintiff Raphael and others that (a) it was purposefully throttling back the performance speeds of older model iPhones and/or that (b) a battery replacement would improve iPhone performance to violated 815 ILCS 505/2 because its conduct constituted an unfair or deceptive act and/or practice under 815 ILCS 505/2.

74. Apple’s above conduct violated 815 ILCS 505/2 because its above conduct constituted the use or employment of deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of a series of material facts.

75. Apple’s above conduct is against public policy because it needlessly subjects consumers to purchasing newer and more expensive iPhones when a replacement battery could have allowed consumers to continue to use their older iPhones.

76. Thousands of Illinois consumers have been harmed by Apple’s above conduct.

77. An award of punitive damages is appropriate because Apple’s conduct described above was outrageous, willful and wanton, showed a reckless disregard for the rights of Plaintiffs and other consumers.

78. The proposed class can be defined to include: all Illinois Residents (a) who replaced iPhone 5c, iPhone 5s, iPhone 6s and early model iPhone 7s (b) because the

slow performance of their phones led them to believe (c) that they had to purchase to a new model iPhone 7, iPhone 8 or iPhone X and (d) these persons were not told by Apple that a battery replacement would improve performance time and (d) these persons were not told by Apple that a battery replacement would improve performance time.

WHEREFORE, Plaintiffs Abdulla and Raphael request that this Honorable Court:

- a. Enter judgment in favor of Plaintiffs Abdulla and Raphael, the proposed class and against Apple;
- b. Award damages in an amount to be determined at trial;
- c. Award punitive damages in an amount to be determined at trial; and
- d. Award Plaintiffs reasonable attorney's fees and costs pursuant to 815 ILCS 505/10a(c).

Count II – Indiana's Deceptive Consumer Sales Act

79. Plaintiffs restate and reallege the above paragraphs as through fully set forth herein.

80. The purpose of the Indiana Deceptive Consumer Sales Act, IN ST § 24-5-0.5-2, *et seq.*, is to “protect consumers from suppliers who commit deceptive and unconscionable sales acts” and to “encourage the development of fair consumer sales practices.” I.C. 24-5-0.5-1(b).

81. Section 3 of the DCSA sets out particular conduct that constitutes “deceptive acts” under the statute. I.C. 24-5-0.5-3(a) generally states that a “supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction.”

82. A “supplier” is defined as a “seller ... or other person who regularly engages in or solicits consumer transactions, including soliciting a consumer transaction by

using a telephone facsimile machine to transmit an unsolicited advertisement" I.C. 24-5-0.5-3(a)(3). A supplier "includes a manufacturer, wholesaler, or retailer, whether or not the person deals directly with the consumer." I.C. 24-5-0.5-2(a)(3).

83. Apple is a supplier, manufacturer and retailer under the DCSA.

84. The DCSA defines a "consumer transaction" as "a sale, lease, assignment, award by chance, or other disposition of an item of personal property, . . . to a person for purposes that are primarily personal" I.C. 24-5-0.5-2(a)(1).

85. I.C. 24-5-0.5-3(a) prohibits deceptive acts in connection with consumer transactions.

86. Apple's above described conduct violates I.C. 24-5-0.5-3(a).

87. Apple's conduct is an "incurable deceptive act" because the above described misconduct and deceptive act were undertaken by Apple "as part of a scheme, artifice, or device within intent to defraud or mislead . . ." consumers. I.C. 24-5-0.5-2(a)(8).

88. Thousands of Indiana consumers have been harmed by Apple's conduct.

89. The proposed class can be defined to include: all Indiana residents (a) who replaced iPhone 5s, iPhone 6s and early model iPhone 7s (b) because the slow performance of their phones led them to believe (c) that they had to purchase to a new model iPhone 7, iPhone 8 or iPhone X and (d) these persons were not told by Apple that a battery replacement would improve performance time.

WHEREFORE, Plaintiff Glaze requests that this Honorable Court:

- a. Enter judgment in favor of Plaintiff Glaze and proposed class and against Apple;
- b. Award damages in an amount to be determined at trial;
- c. Award treble damages in an amount to be determined;
- d. Award punitive damages in an amount to be determined; and

- e. Award attorney's fees and costs pursuant to I.C. 24-5-0.5-4(a).

Count III – North Carolina Unfair and Deceptive Trade Practices Act

90. Plaintiffs restate and reallege the above paragraphs as through fully set forth herein.

91. The purpose of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen Stat. § 75-1.1, *et seq.* ("NCUDTPA") is provide a private right of action for aggrieved consumers.

92. The elements of a claim under the NCUDTPA require: (a) an unfair or deceptive act or practice; (b) in or affecting commerce; which (c) proximately caused actual injury to the claimant or his business.

93. An act or practice is deceptive under the meaning of §75-1.1 if it has the capacity or tendency to deceive.

94. An act or practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers

95. Apple's above described conduct was deceptive, immoral, unethical, oppressive, unscrupulous and/or substantially injurious to customers

96. Thousands of North Carolina consumers have been harmed by Apple's above conduct.

97. The proposed class can be defined to include: all North Carolina residents (a) who replaced iPhone 5s, iPhone 6s and early model iPhone 7s (b) because the slow performance of their phones led them to believe (c) that they had to purchase to a new model iPhone 7, iPhone 8 or iPhone X and (d) these persons were not told by Apple that a battery replacement would improve performance time.

WHEREFORE, Plaintiff Pedelty requests that this Honorable Court:

- f. Enter judgment in favor of Pedelty and the proposed class and against Apple;
- g. Award damages in an amount to be determined at trial;
- h. Award treble damages in an amount to be determined;
- i. Award punitive damages in an amount to be determined; and
- j. Award attorney's fees and costs based upon Apple's willful conduct.

Count IV – Common Law Fraud – Nationwide Class

98. Plaintiffs restate and reallege the above paragraphs as through fully set forth herein.

99. The above allegations set forth a common law cause of action for fraud, and in particular, fraudulent concealment.

100. Tens of thousands of consumers nationwide have been harmed by Apple's conduct.

101. The proposed class can be defined to include: a nationwide class of persons (a) who replaced iPhone 5s, iPhone 6s and early model iPhone 7s (b) because the slow performance of their phones led them to believe (c) that they had to purchase to a new model iPhone 7, iPhone 8 or iPhone X and (d) these persons were not told by Apple that a battery replacement would improve performance time.

WHEREFORE, Plaintiffs request that this Honorable Court:

- a. Enter judgment in the proposed class and against Apple;
- b. Award damages in an amount to be determined at trial; and
- c. Award punitive damages in an amount to be determined at trial.

Count V – Unfair and Deceptive Business Practices – Nationwide Class

102. Plaintiffs restate and reallege the above paragraphs as through fully set forth herein.

103. Plaintiffs bring this Count on behalf of all similarly situated residents of each of the 50 States and the District of Columbia, for violations of the respective statutory consumer protection laws, as follows:

- a. the Alabama Deceptive Trade Practices Act, Ala.Code 1975, § 8-19-1, *et seq.*;
- b. the Alaska Unfair Trade Practices and Consumer Protection Act, AS § 45.50.471, *et seq.*;
- c. the Arizona Consumer Fraud Act, A.R.S §§ 44-1521, *et seq.*;
- d. the Arkansas Deceptive Trade Practices Act, Ark.Code §§ 4-88-101, *et seq.*;
- e. the Colorado Consumer Protection Act, C.R.S.A. §6-1-101, *et seq.*;
- f. the Connecticut Unfair Trade Practices Act, C.G.S.A. § 42-110, *et seq.*;
- g. the Delaware Consumer Fraud Act, 6 Del. C. § 2513, *et seq.*;
- h. the D.C. Consumer Protection Procedures Act, DC Code § 28-3901, *et seq.*;
- i. the Florida Deceptive and Unfair Trade Practices Act, FSA § 501.201, *et seq.*;
- j. the Georgia Fair Business Practices Act, OCGA § 10-1-390, *et seq.*;
- k. the Hawaii Unfair Competition Law, H.R.S. § 480-1, *et seq.*;
- l. the Idaho Consumer Protection Act, I.C. § 48-601, *et seq.*;
- m. the Iowa Private Right of Action for Consumer Frauds Act, Iowa Code Ann. § 714H.1, *et seq.*;
- n. the Kansas Consumer Protection Act, K.S.A. § 50-623, *et seq.*;
- o. the Kentucky Consumer Protection Act, KRS 367.110, *et seq.*;
- p. the Louisiana Unfair Trade Practices and Consumer Protection Law, LSA-R.S. 51:1401, *et seq.*;
- q. the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A, *et seq.*;
- r. the Maryland Consumer Protection Act, MD Code, Commercial Law, § 13-301, *et seq.*;
- s. the Massachusetts Regulation of Business Practices for Consumers Protection Act, M.G.L.A. 93A, *et seq.*;

- t. the Michigan Consumer Protection Act, M.C.L.A. 445.901, *et seq.*;
- u. the Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68, *et seq.*;
- v. the Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1, *et seq.*;
- w. the Missouri Merchandising Practices Act, V.A.M.S. § 407, *et seq.*;
- x. the Montana Unfair Trade Practices and Consumer Protection Act of 1973, Mont. Code Ann. § 30-14-101, *et seq.*;
- y. the Nebraska Consumer Protection Act, Neb.Rev.St. §§ 59-1601, *et seq.*;
- z. the Nevada Deceptive Trade Practices Act, N.R.S. 41.600, *et seq.*;
- aa. the New Hampshire Regulation of Business Practices for Consumer Protection, N.H.Rev.Stat. § 358-A:1, *et seq.*;
- bb. the New Jersey Consumer Fraud Act, N.J.S.A. 56:8, *et seq.*;
- cc. the New Mexico Unfair Practices Act, N.M.S.A. §§ 57-12-1, *et seq.*;
- dd. the New York Consumer Protection from Deceptive Acts and Practices, N.Y. GBL (McKinney) § 349, *et seq.*;
- ee. the North Dakota Consumer Fraud Act, N.D. Cent.Code Chapter 51-15, *et seq.*;
- ff. the Ohio Consumer Sales Practices Act, R.C. 1345.01, *et seq.*;
- gg. the Oklahoma Consumer Protection Act, 15 O.S.2001, §§ 751, *et seq.*;
- hh. the Oregon Unlawful Trade Practices Act, ORS 646.605, *et seq.*;
- ii. the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*;
- jj. the Rhode Island Deceptive Trade Practices Act, G.L.1956 § 6-13.1-5.2(B), *et seq.*;
- kk. the South Carolina Unfair Trade Practices Act, SC Code 1976, §§ 39-5-10, *et seq.*;
- ll. the South Dakota Deceptive Trade Practices and Consumer Protection Act, SDCL § 37-24-1, *et seq.*;
- mm. the Tennessee Consumer Protection Act, T.C.A. § 47-18-101, *et seq.*;
- nn. the Texas Deceptive Trade Practices-Consumer Protection Act, V.T.C.A., Bus. & C. § 17.41, *et seq.*;
- oo. the Utah Consumer Sales Practices Act, UT ST § 13-11-1, *et seq.*;
- pp. the Vermont Consumer Fraud Act, 9 V.S.A. § 2451, *et seq.*;
- qq. the Virginia Consumer Protection Act of 1977, VA ST § 59.1-196, *et seq.*;

- rr. the Washington Consumer Protection Act, RCWA 19.86.010, *et seq.*;
- ss. the West Virginia Consumer Credit And Protection Act, W.Va.Code § 46A-1-101, *et seq.*;
- tt. the Wisconsin Deceptive Trade Practices Act, WIS.STAT. § 100.18, *et seq.*; and
- uu. the Wyoming Consumer Protection Act, WY ST § 40-12-101, *et seq.*

104. As set forth above, thousands of consumers bought newer model iPhones because of Apple's misconduct, deceptive practices and omissions.

105. Accordingly, Apple's conduct violated the above statutory consumer protection laws.

106. An award of punitive damages is appropriate (where allowed under state law) because Apple's conduct described above was outrageous, willful and wanton, showed a reckless disregard for the rights of Plaintiffs and other consumers.

107. The proposed class can be defined to include: Residents from above identified states and the District of Columbia who (a) who replaced iPhone 5s, iPhone 6s and early model iPhone 7s (b) because the slow performance of their phones led them to believe (c) that they had to purchase to a new model iPhone 7, iPhone 8 or iPhone X and (d) these persons were not told by Apple that a battery replacement would improve performance time.

WHEREFORE, Plaintiff requests that this Honorable Court:

- a. Enter judgment in the proposed class(es) and against Apple;
- b. Award damages in an amount to be determined at trial;
- c. Award punitive damages in an amount to be determined at trial;
and
- d. Award Plaintiff his reasonable attorney's fees and costs pursuant any applicable state statute.

The Elements of FRCP 23 Can Be Met

108. Numerosity is satisfied because thousands of consumers bought newer model iPhones as a result of Apple's misconduct, deceptive practices and omissions.

109. The joinder of all members of the Class is impracticable.

110. Commonality and predominance are satisfied because Apple acted in a common manner toward Plaintiff and the proposed class members

111. As set forth above, there are questions of law and fact common to Plaintiffs and the proposed class members such and these common questions predominate over any potential individual issues.

112. Plaintiffs' claims are typical of the claims of the proposed class members, claims all arise from the same operative facts and are based on the same legal causes of action.

113. As set forth above, common questions of proof predominate over any potential individual issues.

114. Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have no interest antagonistic to those of the Class and Defendants do not have any defenses unique to Plaintiffs.

115. Plaintiffs' lead attorney (James C. Vlahakis) is an experienced consumer class action litigator who has defended over a hundred consumer-based claims.

116. In conjunction with counsel for the class members, Mr. Vlahakis obtained Court approval has obtained approval of various TCPA class actions. *See, e.g., In Re Capital One Telephone Consumer Protection Act Litigation*, 2012-cv-10064 (N.D. Ill.) (\$75 million dollar ATDS based settlement); *Prater v. Mediacredit, Inc.*, 2014-cv-0159 (\$6.3 million dollar ATDS wrong party settlement); *INSPE Associates v. CSL Biotherapries, Inc.* (N.D. Ill.) (\$3.5 million fax based settlement).

117. Based upon nearly twenty years of experience, Mr. Vlahakis understands the defense typically utilized by creditors and debt collectors in TCPA litigation. For example, Mr. Vlahakis has successfully defeated a TCPA based class certification motion in *Jamison v. First Credit Services, Inc.*, 290 F.R.D. 92 (N.D. Ill. Mar. 28, 2013), reconsideration denied, 2013 U.S. Dist. LEXIS 105352 (N.D. Ill. July 29, 2013). As an additional example, Mr. Vlahakis also decertified a previously certified TCPA class action in *Pesce v. First Credit Services, Inc.*, 2012 U.S. Dist. LEXIS 188745 (N.D. Ill. June 6, 2012).

118. Additionally, Mr. Vlahakis (as a former consumer class action defense attorney) has gained court approval of dozens of class action settlements. As a former consumer class action defense attorney, Mr. Vlahakis has a vast level of knowledge that will assist him in advocating *for* Plaintiffs and the putative class members. Additionally, Mr. Vlahakis has successfully ascertained the identities of putative class members individually and in conjunction with industry experts.

119. Plaintiffs' other counsel are highly competent and experienced class action attorneys.

120. In summary, a class action is an appropriate method for the fair and efficient adjudication of this controversy, and superior to other available methods for the fair and efficient adjudication of this controversy. Simply stated, the common questions of law and fact enumerated above predominate over questions affecting only individual Class members. The likelihood that individual Class members will prosecute separate actions is remote due to the extensive time and considerable expense necessary to conduct such litigation, as well as the absence of a fee shifting mechanism.

Plaintiffs demand trial by a jury.

Dated: December 21, 2017

Respectfully Submitted,

/s/ James Vlahakis
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Exhibit 12

**United States District Court
Northern District of Illinois - CM/ECF LIVE, Ver 6.2.1 (Chicago)
CIVIL DOCKET FOR CASE #: 1:17-cv-09296**

Neilan v. Apple Inc.
Assigned to: Honorable Charles P. Kocoras
Demand: \$9,999,000
Cause: 28:1331 Federal Question

Date Filed: 12/27/2017
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

Sean Neilan
*individually and on behalf of all others
similarly situated*

represented by **Ben Barnow**
Barnow and Associates, P.C.
One North LaSalle Street
Suite 4600
Chicago, IL 60602
(312) 621-2000
Email: b.barnow@barnowlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Apple Inc.
a California corporation

Date Filed	#	Docket Text
12/27/2017	1	COMPLAINT filed by Sean Neilan; Jury Demand. Filing fee \$ 400, receipt number 0752-13948596.(Barnow, Ben) (Entered: 12/27/2017)
12/27/2017	2	CIVIL Cover Sheet (Barnow, Ben) (Entered: 12/27/2017)
12/27/2017	3	ATTORNEY Appearance for Plaintiff Sean Neilan by Ben Barnow (Barnow, Ben) (Entered: 12/27/2017)
12/28/2017		CASE ASSIGNED to the Honorable Charles P. Kocoras. Designated as Magistrate Judge the Honorable Young B. Kim. (cc,) (Entered: 12/28/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 13:30:53			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	1:17-cv-09296
Billable Pages:	1	Cost:	0.10

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

SEAN NEILAN, individually and on behalf
of all others similarly situated,

Plaintiff,

Case No. 17-9296

APPLE INC., a California corporation,

Defendant.

CLASS ACTION COMPLAINT

Sean Neilan (“Plaintiff”), individually and on behalf of all others similarly situated, upon personal knowledge of facts pertaining to him and on information and belief as to all other matters, by and through undersigned counsel, brings this class action complaint against Apple Inc. (“Apple”).

NATURE OF THE ACTION

1. To induce consumers to purchase newer model iPhones, Apple purposefully throttled the processing speed of iPhone 6, iPhone 6 Plus, iPhone 6S, iPhone 6S Plus, iPhone SE, iPhone 7 and iPhone 7 Plus (“Affected iPhones”), intentionally making the phones unnecessarily slow at ordinary tasks like opening apps, updating apps, loading webpages, and responding to inputs like scrolling and swiping.

2. The slowness is tied, at least in part, to diminishing battery condition, which is a function of the iPhone’s age and use, the quality of design and manufacturing, and external conditions such as temperature. As Apple is aware, consumers do not ordinarily associate diminishing battery condition with slower processing speeds. And iPhone users do not address the real issue by replacing the battery, a solution that Apple intentionally obscures and deters. Instead,

they purchase the new model iPhone that seemingly runs a lot faster and smoother—that is, until the battery’s condition triggers the software to throttle the phone again. Apple deprived owners of the Affected iPhones of the performance to which they are entitled.

3. Plaintiff brings this class action on behalf of buyers of Affected iPhones, and alleges claims for Apple’s violation of Illinois’ and others states’ consumer protection laws and prohibitions on unfair and deceptive business practices, trespass to chattels, breach of the covenant of good faith and fair dealing, and its violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, to recover damages stemming from Apple’s unlawful, unconscionable, and intentional sabotage of older model iPhones.

JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiff asserts claims arising under the laws of the United States. The Court also has subject matter jurisdiction under 28 U.S.C. § 1332(d) because the proposed Class consists of more than 100 members, the amount in controversy exceeds \$5 million, exclusive of interest and costs, and Plaintiff and Defendant are diverse parties. The Court also has personal jurisdiction over Defendant because Plaintiff’s claims arise out of Defendant’s contacts with the State of Illinois.

5. At all relevant times, Defendant conducted substantial business in the Northern District of Illinois. A substantial part of the events and omissions giving rise to Plaintiff’s claims occurred in this District.

PARTIES

6. Plaintiff Sean Neilan is an Illinois citizen and resides in Chicago, Illinois. Plaintiff purchased an iPhone 6 at an AT&T store in Northbrook, Illinois in May 2015. Prior to purchasing his iPhone 6, Neilan visited Apple’s website and discussed the phone with a representative from

the AT&T store. Ever since his phone was updated with iOS software version 10.2.1 in or around January 2017, his phone has exhibited significantly slower processing speeds, apps take longer to open and update, the phone responds slowly to inputs and lags, and the overall performance has deteriorated substantially.

7. Defendant Apple Inc. is a California corporation headquartered in Cupertino, California. Defendant sells its iPhones in its own retail stores located throughout the country, online, and also through third parties, such as AT&T. Defendant engineers and licenses to iPhone users iOS software, the only operating system Apple permits on its devices.

FACTUAL BACKGROUND

8. Apple purposefully planted software designed to inhibit the performance of older model iPhones after new iPhone models were introduced as part of a strategy to induce its customers to purchase newer iPhones.

9. Apple's iPhone 6 and iPhone 6 Plus were released on September 19, 2014. At the time of launch, the iPhone 6 was available to those committing to a 2-year service contract for \$199 (16GB variant), \$299 (64GB variant), and \$399 (128 GB variant), and was available off-contract for \$649.92 (16GB variant), \$749.91 (64GB variant), and \$849.90 (128 GB variant). The iPhone 6 Plus was available to those committing to a 2-year service contract for \$299 (16GB variant), \$399 (64GB variant), and \$499 (128 GB variant), and off-contract for \$749.76 (16GB variant), \$849.99 (64GB variant), and \$949.99 (128 GB variant).

10. Apple's iPhone 6S and iPhone 6S Plus were released on September 25, 2015. At the time of launch, the iPhone 6S cost \$649 (16GB variant), \$749 (64GB variant), and \$849 (128GB variant), and the iPhone 6S Plus cost \$749 (16GB variant), \$849 (64GB variant), and \$949 (128 GB variant).

11. Apple's iPhone 7 and iPhone 7 Plus were released on September 16, 2016. At the time of launch, the iPhone 7 cost \$649 (32GB variant), \$749 (128GB variant), and \$849 (256GB variant), and the iPhone 7 Plus cost \$749 (32GB variant), \$849 (128GB variant), and \$949 (256GB variant).

12. iOS is the operating system installed on iPhones.

13. On January 23, 2017—four months after the launch of the iPhone 7 and iPhone 7 Plus—Apple released iOS version 10.2.1. Shortly thereafter, iPhone users were notified that an update to iOS was available. Apple represented as follows regarding the update:



iOS 10.2.1

Apple Inc.

72.1 MB

iOS 10.2.1 includes bug fixes and improves the security of your iPhone or iPad.

For information on the security content of Apple software updates, please visit this website:

<https://support.apple.com/en-gb/HT201222>

14. Unbeknownst to iPhone 6, iPhone 6 Plus, iPhone 6S, and iPhone 6 Plus owners, Apple inserted code into the iOS version 10.2.1 that dramatically slowed down the processing performance of these phones by linking each phone's processing performance with its battery health. Absent the malicious code inserted by Apple, the reduced battery capacity of these phones would not have negatively affected processing performance.

15. Apple's iPhone 8 and iPhone X were released on September 22, 2017, and November 3, 2017, respectively.

16. On December 2, 2017, iOS version 11.2.0 was released. Shortly thereafter, iPhone users were notified that an update to iOS was available. Apple represented as follows regarding the update:



iOS 11.2
Apple Inc.
430.7 MB

iOS 11.2 introduces Apple Pay Cash to send, request and receive money from friends and family with Apple Pay. This update also includes bug fixes and improvements.

For information on the security content of Apple software updates, please visit this website:

<https://support.apple.com/en-gb/HT201222>

17. Unbeknownst to iPhone 6, iPhone 6 Plus, iPhone 6S, iPhone 6S Plus, iPhone 7, and iPhone 7 Plus owners, Apple inserted code into the iOS version 11.2.0 that dramatically slowed down the processing performance of these phones by linking each phone's processing performance with its battery health.

18. John Poole, co-founder of Primate Labs, connected Affected iPhone's slow CPU performance to battery capacity in certain iOS software versions. Poole found that the performance deterioration arose when iOS software version 10.2.1 (or later) was installed in iPhone 6, iPhone 6 Plus, iPhone 6S, iPhone 6S Plus, and iPhone SE. Poole also found performance deterioration arose when iOS software version 11.2 (or later) was installed in iPhone 7 or iPhone 7 Plus.

19. Only after Poole's revelation did Apple admit that it had been developing and introducing code to its customers intended to throttle the processing speed of older versions of iPhones.

20. iPhones are powered by lithium-ion batteries. By nature, the capacity of lithium-ion batteries degrades over time.

21. The processing speed of iPhones should not normally diminish as a function of battery capacity. As Poole observes, “While we expect battery capacity to decrease as batteries age, we expect processor performance to stay the same.” On account of Apple’s intentional conduct, once the battery condition of Affected iPhones reaches a certain state, processing speeds slow dramatically.

22. Apple secretly and without authorization diminishes the performance of Plaintiff’s and the Class members’ phones to induce them to buy newer models. This triggering of older model iPhones with a switch that slows processor speed to a crawl is but one of the many ways Apple achieves this end. Apple employs other means of accomplishing this end by delivering software updates that in other ways unjustifiably diminishes the performance of older model iPhones. This course of conduct is unfair, deceptive, in bad faith, and injures Plaintiff and the other Class members, and unjustly enriches Apple at their expense.

23. Plaintiff installed iOS 10.2.1 on his iPhone 6, and as a result, his iPhone’s performance deteriorated substantially. Apps take unduly long to open, update, and respond to inputs such as swiping and scrolling lag. Websites crash and take too long to load. Plaintiff had not experienced such deterioration until installing the update. The performance of Plaintiff’s iPhone 6 has not improved with subsequent software installations. Plaintiff’s iPhone 6 now runs iOS 11.2.0, and it still performs in a deficient and deteriorated manner.

CLASS ACTION ALLEGATIONS

24. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action against Apple as a national class action, on behalf of himself and members of a Class defined as follows:

All persons in the United States who purchased any one of the following models of iPhone: iPhone 6, iPhone 6 Plus, iPhone 6S, iPhone 6S Plus, iPhone SE, iPhone 7 and iPhone 7 Plus.

Excluded from the Class are Defendant, its parents, affiliates, subsidiaries, and entities in which Defendant has a controlling interest, as well as Defendant’s officers, directors, legal representatives, heirs, predecessors, successors, and assigns, and the judicial officers presiding over the case.

25. Pursuant to Rule 23 of the Federal Rules of Civil Procedure and Illinois law, Plaintiff also brings this action against Apple, on behalf of itself and members of a Sub-Class defined as follows:

All residents of Illinois who purchased any one of the following models of iPhone: iPhone 6, iPhone 6 Plus, iPhone 6S, iPhone 6S Plus, iPhone SE, iPhone 7 and iPhone 7 Plus.

Excluded from the Class are Defendant, its parents, affiliates, subsidiaries, and entities in which Defendant has a controlling interest, as well as Defendant’s officers, directors, legal representatives, heirs, predecessors, successors, and assigns, and the judicial officers presiding over the case.

26. The proposed Nationwide Class and Illinois Sub-Class consist of thousands and possibly millions of geographically dispersed members, the joinder of which is impracticable. The precise number and identities of Class Members are currently unknown to Plaintiff, but can easily be derived from records maintained by Apple.

27. Apple violated the rights of each Class Member in the same way by its above-described uniform wrongful actions, inaction, omissions, and deceptive conduct.

28. There are questions of law and fact common to the proposed Nationwide Class and Illinois Sub-Class as a whole that predominate over any questions affecting individual Class members, including, *inter alia*:

a. whether Apple intentionally hinders performance of its products with the installation of certain software;

b. whether a reasonable consumer would expect the performance of their smartphone not to drastically deteriorate with new software updates;

c. the extent of the damages and harm suffered by Plaintiff and the other Class members;

d. whether Apple's above-described uniform wrongful actions, inaction, omissions, and deceptive conduct caused Plaintiff and the other Class Members to suffer damages;

e. whether injunctive relief in the form of a software update removing the code that causes the processor performance deterioration is appropriate;

f. whether injunctive relief in the form of corrective advertising is appropriate;

g. whether Plaintiff and the other Class Members are entitled to recover actual damages, consequential damages, incidental damages, statutory damages, punitive damages, pre- and post-judgment interest, attorneys' fees, litigation expenses, and court costs and, if so, the amount of the recovery.

29. Plaintiff's claims are typical of Class members' claims because they are all victims of Apple's above- uniform wrongful actions, inaction, omissions, and deceptive conduct.

30. Plaintiff and his counsel will fairly and adequately represent the interests of Class members. Plaintiff has no interests antagonistic to, or in conflict with, those of any absent Class member. Plaintiff's counsel are experienced in leading and prosecuting class actions on behalf of consumers.

31. A class action is superior to all other available methods for fairly and efficiently adjudicating Plaintiff's and the other Class members' claims. Plaintiff and the other Class members have been (and will continue to be) harmed as a direct and proximate result of Apple's above-described uniform wrongful actions, inaction, omissions, and deceptive conduct. Litigating this case as a class action is appropriate because (i) it will avoid a multiplicity of suits and the corresponding burden on the courts and parties, (ii) it would be virtually impossible for all Class Members to intervene in this action, (iii) it will allow numerous entities with claims too small to adjudicate on an individual basis because of prohibitive litigation costs to obtain redress for their injuries, and (iv) it will provide court oversight of the claims process once Apple's liability is adjudicated.

32. Class members are readily ascertainable since they all have continuing relationships with Apple, and Apple possesses contact information for all Class members.

33. Certification, therefore, is appropriate under Fed. R. Civ. P. 23(b)(3) because the above-described common questions of law or fact predominate over any questions affecting individual Class members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

34. Certification also is appropriate under Fed. R. Civ. P. 23(b)(2) because Apple has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or equitable relief with respect to the Class as a whole.

35. Apple's above-described uniform wrongful actions, inaction, omissions, and deceptive conduct are applicable to the Class as a whole, for which Plaintiff seeks, *inter alia*, damages, injunctive relief, and other equitable remedies.

36. Absent a class action, Apple will retain the benefits of its wrongdoing despite seriously violating the law and inflicting substantial damages and other actual injury and harm on Plaintiff and the other Class members.

CLAIMS

COUNT I (ILLINOIS CLASS)

ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

37. Plaintiff repeats and realleges all of the foregoing paragraphs as if fully set forth herein.

38. The Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/2, prohibits unfair methods of competition and unfair or deceptive acts or practices.

39. Apple's conduct, described above, in purposefully hampering the speed and performance of older iPhones, was unfair and deceptive. Apple unilaterally hampered performance of Plaintiff's and the other Illinois Class members' iPhones without warning, notice, or the ability to opt out.

40. When Apple provided the software update with the inhibitory software, it omitted this material fact from Plaintiff and the other Illinois Class members.

41. Apple's omission was material and deceptive. Reasonable consumers consider the processor speed of their iPhones to be a material aspect of their decision whether to buy a smartphone.

42. Apple's conduct was also unfair. Apple's conduct was immoral, unethical, oppressive, and unscrupulous, and substantially injured Plaintiff and the other Illinois Class members.

43. Plaintiff and the other Illinois Class members suffered damage as a result of Apple's deceptive and unfair conduct. Their phones' processing speed has been significantly reduced, apps and programs perform poorly. Plaintiff and the other Illinois Class members have been deprived of the benefit of their bargain and are left with substandard iPhones that perform worse than they should.

COUNT II (ILLINOIS CLASS)
TRESPASS TO CHATTELS

44. Plaintiff repeats and realleges all of the foregoing paragraphs as if fully set forth herein.

45. Apple's conduct described above, in purposefully hampering the speed and performance of older iPhones, constitutes a trespass to chattels.

46. Apple purposefully installed software or a computer program intended to hamper the speed and performance of Plaintiff's and the other Illinois Class members' Affected iPhones.

47. Apple's conduct in hampering the speed and performance of Affected iPhones was without consent or exceeded the consent given by Plaintiff and the other Illinois Class members.

48. Plaintiff and the other Illinois Class members suffered damage as a result of Apple's trespass. Their Affected phones' processing speed has been significantly reduced, apps and programs perform poorly.

COUNT III (ILLINOIS CLASS)
BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

49. Plaintiff repeats and realleges all of the foregoing paragraphs as if fully set forth herein.

50. Plaintiff and the other Illinois Class members and Apple entered into contracts.

51. Plaintiff and the other Illinois Class members have fully performed their obligations under the contracts.

52. Under Illinois law a covenant of good faith and fair dealing is implied into every contract.

53. Apple breached the covenant of good faith and fair dealing by engaging in the above described conduct, purposefully hampering the speed and performance of Illinois Class members' Affected iPhones.

54. Apple's conduct was willful and intentional and committed with a purpose of slowing down Affected iPhones to induce Plaintiff and the other Illinois Class members to buy new iPhones. Apple's conduct was unfair, deceptive, and in bad faith. It gave iPhone users no notice and left them with no reasonable alternatives.

55. Plaintiff and the other Illinois Class members suffered damage as a result of Apple's breach of the covenant of good faith and fair dealing. Their phones' processing speed has been significantly reduced, apps and programs perform poorly. Plaintiff and the other Illinois Class members have been deprived of the benefit of their bargain and are left with substandard iPhones that perform worse than they should.

COUNT IV (NATIONAL CLASS)
COMPUTER FRAUD AND ABUSE ACT

56. Plaintiff repeats and realleges all of the foregoing paragraphs as if fully set forth herein.

57. Apple's conduct described above, in purposefully hampering the speed and performance of Affected iPhones, constitutes a violation of the Consumer Fraud and Abuse Act.

58. Apple's conduct described above constitutes the intentional transmission of a program, information, code, or command that damaged Affected iPhones.

59. Plaintiff and the other Class members suffered damage or loss by reason of Apple's violation of the Act because of the impairment to the integrity and availability of data, program, systems, and information that resulted from Apple's conduct. As a result of Apple's intentional acts, their Affected iPhones' processing performance has been significantly reduced, and apps and other programs perform poorly. Plaintiff and the other Class members have been deprived of the benefit of their bargain and are left with substandard iPhones that perform worse than they should.

COUNT V (ILLINOIS CLASS)
ILLINOIS COMPUTER CRIME PREVENTION LAW

60. Plaintiff repeats and realleges all of the foregoing paragraphs as if fully set forth herein.

61. Apple's conduct described above, in purposefully hampering the speed and performance of Affected iPhones, constitutes a violation of the Illinois Computer Crime Prevention Law, 720 Ill. Comp. Stat. 5/17-51 because Apple, without authorization, or in excess of the authorization granted by Plaintiff and the other Illinois Class members, inserted or attempted to insert a program into their computers or computer programs knowing or having reason to know that such program contains information or commands that will or may: (A) damage or destroy that

computer; (B) alter, delete, or remove a computer program or data from that computer; or (C) cause loss to the users of that computer.

62. Plaintiff and the other Illinois Class members suffered loss by reason of Apple's above described conduct. Their phones' processing speed has been significantly reduced, apps and programs perform poorly. Plaintiff and the other Illinois Class members have been deprived of the benefit of their bargain and are left with substandard iPhones that perform worse than they should.

RELIEF REQUESTED

WHEREFORE, Plaintiff, individually and on behalf of all other Class Members, respectfully requests that the Court enter an Order:

- a. Certifying the Classes under Fed. R. Civ. P. 23 as requested herein, appointing Plaintiff as Representative Plaintiff, and Plaintiff's counsel as Class Counsel;
- b. Awarding Plaintiff and the other Class Members actual, consequential, and incidental damages to be determined by the trier of fact;
- c. Awarding Plaintiff punitive damages;
- d. Awarding Plaintiff and the other Class Members injunctive relief;
- e. Awarding Plaintiff and the other Class Members pre- and post-judgment interest on all amounts awarded;
- f. Awarding attorneys' fees, litigation expenses, and costs of suit incurred through the trial and any appeals of this case; and
- g. Granting such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a jury on all claims so triable.

Dated: December 27, 2017

Respectfully Submitted,

s/ Ben Barnow

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Counsel for Plaintiffs and the Class

Exhibit 13

U.S. District Court
Southern District of Indiana (Indianapolis)
CIVIL DOCKET FOR CASE #: 1:17-cv-04750-JMS-MPB

SCHROEDER v. APPLE, INC.
Assigned to: Judge Jane Magnus-Stinson
Referred to: Magistrate Judge Matthew P. Brookman
Cause: 28:1332 Diversity-Contract Dispute

Date Filed: 12/28/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff

PETER A SCHROEDER

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V.

Defendant**APPLE, INC.**

Date Filed	#	Docket Text
12/28/2017	1	COMPLAINT against APPLE, INC., filed by PETER A SCHROEDER. (Filing fee \$400, receipt number 0756-4688289) (Attachments: # 1 Civil Cover Sheet, # 2 Proposed Summons)(Shevitz, Richard) (Entered: 12/28/2017)
12/28/2017	2	NOTICE of Appearance by Richard E. Shevitz on behalf of Plaintiff PETER A SCHROEDER. (Shevitz, Richard) (Entered: 12/28/2017)
12/28/2017	3	NOTICE of Appearance by Irwin B. Levin on behalf of Plaintiff PETER A SCHROEDER. (Levin, Irwin) (Entered: 12/28/2017)
12/28/2017	4	NOTICE of Appearance by Vess Allen Miller on behalf of Plaintiff PETER A SCHROEDER. (Miller, Vess) (Entered: 12/28/2017)
12/28/2017	5	NOTICE of Appearance by Lynn A. Toops on behalf of Plaintiff PETER A SCHROEDER. (Toops, Lynn) (Entered: 12/28/2017)

Case #: 1:17-cv-04750-JMS-MPB

PACER Service Center			
Transaction Receipt			
12/28/2017 14:31:48			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	1:17-cv-04750-JMS-MPB
Billable Pages:	2	Cost:	0.20

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

PETER A. SCHROEDER , individually)	JURY TRIAL DEMANDED
and on behalf of all others similarly)	
situated,)	CLASS ACTION COMPLAINT
)	
Plaintiff,)	
)	
vs.)	No. 1:17-cv-4750
)	
APPLE INC. ,)	
)	
Defendant.)	

CLASS ACTION COMPLAINT

Plaintiff, Peter A. “Pete” Schroeder, by counsel, individually and on behalf of all others similarly situated, alleges as follows:

NATURE OF THIS ACTION

1. This is a class action seeking injunctive relief and damages arising from Defendant Apple Inc.’s unlawful failure to inform consumers that updating their iPhone versions prior to the iPhone 8 (the “Legacy Devices”) to iOS 10.2.1 (and/or later to iOS 11.2) would dramatically and artificially reduce the performance of the Legacy Devices. Apple also failed to inform consumers that phone performance would be restored—by as much as 70 percent—if affected individuals simply replaced the phone’s lithium-ion battery. Replacing the battery at an Apple store costs approximately \$79. The cost of the new iPhone X is over \$1,000.

2. Batteries “wear” over time. The lithium-ion battery used by Apple slowly diminishes its ability to hold a charge with time and use. However, normal

lithium-ion battery wear does not reduce performance; a weakening battery has no effect on performance unless there is software that links the two. And that is precisely what Apple did.

3. In rolling out iOS 10.2.1, Apple claimed to provide “bug fixes and improve[] the security of [the] iPhone or iPad” and “improve[] power management during peak workloads to avoid unexpected shutdowns on the iPhone.”¹ What Apple purposefully failed to disclose, however, was that the update would act as a latent time-bomb that slowly eroded the phone’s performance to the frustration of the user—the software update throttled the iPhone’s performance.

4. The effect of Apple’s actions was to a) purposefully reduce device performance with time, and b) deprive consumers of material information concerning the cause of the decline in performance of the Legacy Devices.

5. Plaintiff and the Class he seeks to represent in this lawsuit are consumers who purchased the Legacy Devices and installed the relevant upgraded operating system software. This lawsuit is brought to challenge Apple’s deceptive consumer sales practices, trespass to chattels, breach of the duty of good faith and fair dealing, and breach of implied contract.

PARTIES

6. Plaintiff Peter A. “Pete” Schroeder is a citizen of Indiana, and lives in Indianapolis. He purchased a Legacy Device. Mr. Schroeder upgraded to iOS 10.2.1

¹ Download iOS 10.0 – iOS 10.3.3 Information, Apple Inc., https://support.apple.com/kb/DL1893?locale=en_US (last visited Dec. 27, 2017).

and has since suffered material and increasing degradation in the performance of his iPhone.

7. Defendant Apple Inc. (“Apple”) is a California resident, being a California corporation headquartered at 1 Infinite Loop, Cupertino, California. Apple designs, manufacturers, and sells a wide range of products, including mobile devices such as iPhones, throughout the world.

JURISDICTION

8. This Court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), because this is a civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which at least one member of a class of plaintiffs is a citizen of a State different from any defendant.

9. This Court has personal jurisdiction over Apple because: (1) Apple has systematic and continuous contacts within this State because it systematically and continuously does business in this state and communicates via telephone, mail, and the internet with persons in this State in furtherance of its activities; and (2) Apple consummated the transactions at issue in this case within this State thereby purposefully availing itself of the privilege of conducting business within this State, and Plaintiff’s and Class members’ claims arise out of Apple’s in-State activities.

FACTUAL ALLEGATIONS

10. Plaintiff and Class Members are Apple iPhone users. Many Class Members are not new to the iPhone franchise, but are loyal followers of Apple, having purchased various iterations of the mobile device.

11. On January 23, 2017, Apple released iOS 10.2.1. The update specifically addressed aging batteries, and expressly represented that the purpose was to prolong the useful life of the Device. Apple promised to “deliver the best experience for customers, which includes overall performance and prolonging the life of their devices.”²

12. For example, the update specifically sought to prevent the handset from shutting down if a performance spike drew too much power—i.e., turning off unexpectedly as if the phone was dead while the phone’s battery still had a charge. While the battery issue was a reported problem at the time,³ the iOS update did far more than address shutdowns on those few phones that experienced shutdowns – it also surreptitiously and purposefully throttled the performance speed on Legacy Devices by as much as 70 percent.

13. Furthermore, the update did not even fully address the purported battery “shutdown” issue on all devices: 20 percent of iPhone 6s and 30 percent of iPhone 6 devices that previously experienced unexpected shut down issues continued to experience those issues, according to a statement released by Apple.⁴

² Jason Koebler, *Apple Throttles iPhones that Have Old Batteries (But Didn’t Tell You About It)*, Motherboard (Dec. 20, 2017), https://motherboard.vice.com/en_us/article/3k5bdw/apple-throttles-iphones-bad-batteries?utm_source=vicefbus (last visited Dec. 27, 2017).

³ A Message from Apple about iPhone and Unexpected Shutdowns, Apple, Inc. (June 12, 2016), <https://support.apple.com/zh-cn/HT207414> (last visited Dec. 27, 2017)

⁴ Matthew Panzarino, *Apple says IOS 10.2.1 has reduced unexpected iPhone 6s shutdown issues by 80%*, Techcrunch (Feb. 23, 2017), <https://techcrunch.com/2017/02/23/apple-says-ios-10-2-1-has-reduced-unexpected-iphone-6s-shutdown-issues-by-80/> (last visited Dec. 27, 2017).

At the time the iPhone 7 was not impacted. However, it is now known that the feature at the center of the iOS 10.2.1 update was later extended to iPhone 7 with the release of iOS 11.2, and will be added to other products in the future.

14. Apple also informed consumers that for those who need it, a message will appear on the screen inside Settings if that phone's "battery needs service." Apple did this to "add a bit more transparency to people wondering when Apple considers the battery worn down enough to get swapped out." Apple even offered consumers tips regarding when to swap out a battery.⁵

15. However, despite all of these disclosure opportunities, Apple never informed consumers that the 10.2.1 update reduced unexpected phone shutdowns by slowing the device's performance dramatically.

16. Moreover, consumers experiencing these issues were never notified by Apple (as it represented it would) that "the [device's] battery needs service."

17. Because Apple failed to inform consumers that the performance issues were artificially caused by the iOS update in conjunction with an older (but still perfectly functional) battery, consumers were denied the opportunity to make an informed decision regarding whether to upgrade their device or instead simply replace the battery.

18. Apple's failure to disclose the impact of the iOS update 10.2.1 (and the later iOS 11.1) and remedy the issues it produced (and purported to resolve)

⁵ *Maximizing Battery Life and Lifespan*, Apple Inc., <https://www.apple.com/batteries/maximizing-performance/> (last visited Dec. 27, 2017).

constitutes a deceptive consumer sales practice and breach of the covenant of good faith and fair dealing implied in Apple's contracts with Plaintiff and the class. Plaintiff and the class were harmed as a direct and proximate result of Apple's actions.

CLASS ACTION ALLEGATIONS

19. Plaintiff brings this action individually and on behalf of all others similarly situated, as members of a nationwide class preliminarily defined as:

All consumers who (a) reside in the United States, (b) owned an Apple Legacy Device and upgraded to iOS 10.2.1 or a later version prior to the date of this Complaint, and (c) who purchased that iPhone within the United States.

In addition, Plaintiff brings this action on behalf of an Indiana sub-Class preliminarily defined as:

All consumers who (a) reside in the Indiana, (b) owned an Apple Legacy Device and upgraded to iOS 10.2.1 or a later version prior to the date of this Complaint, and (c) who purchased that iPhone within the United States.

20. This action is properly maintainable as a class action under Federal Rule of Civil Procedure 23.

21. The class consists of hundreds of thousands or more persons, such that joinder of all Class members is impracticable.

22. There are questions of law and fact that are common to the Class members that relate to Apple's uniform conduct.

23. The claims of the Plaintiff are typical of the claims of the proposed Class because they are based on the same legal theories, and Plaintiff has no interests that are antagonistic to the interests of the Class members.

24. The Plaintiff is an adequate representative of the Class and has retained competent legal counsel experienced in class actions and complex litigation.

25. The questions of law and fact common to the Class predominate over any questions affecting only individual Class members, particularly because the focus of the litigation will be on the conduct of Apple. The predominant questions of law and fact in this litigation include, but are not limited to:

- a. Whether iOS 10.2.1 in fact affected device performance;
- b. Whether Apple purposefully designed iOS 10.2.1 to affect device performance or otherwise did so knowingly;
- c. The extent to which iOS 10.2.1 affected device performance;
- d. Whether and to what extent Apple disclosed the effect of iOS 10.2.1 on device performance;
- e. Whether the aspects of iOS 10.2.1 affecting device performance were extended to iOS 11.2; and
- f. Whether Apple notified customers that the artificial reduction in device performance could be remedied by simply replacing the battery.

26. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, as the pursuit of hundreds of individual lawsuits would not be economically feasible for individual Class members, and certification as a class action will preserve judicial resources by allowing the

common issues of the Class members to be adjudicated in a single forum, avoiding the need for duplicative hearings and discovery in individual actions that are based on an identical set of facts.

27. This proposed class action does not present any unique management difficulties.

**FIRST CAUSE OF ACTION
VIOLATIONS OF INDIANA’S DECEPTIVE CONSUMER SALES ACT**

28. Plaintiff incorporates the preceding paragraphs of this Complaint as if fully set forth below.

29. The purposes and policies of the Indiana Deceptive Consumer Sales Act (the “DCSA” or the “Act”), Indiana Code § 24-5-0.5-1 to -12, are to:

- (1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices;
- (2) protect consumers from suppliers who commit deceptive and unconscionable consumer sales practices; and
- (3) encourage the development of fair consumer sales practice.

Ind. Code § 24-5-0.5-1(b).

30. The Indiana General Assembly has instructed courts to construe the DCSA liberally to promote these purposes and policies. Ind. Code § 24-5-0.5-1(a).

31. Apple is a “supplier” as defined in the DCSA because it is a seller or other person who regularly engages in or solicits consumer transactions, which are defined to include sales of personal property, services, and intangibles that are primarily for a personal, familial, or household purpose, such as those at issue in this action. Ind. Code § 24-5-0.5-2(1), (3).

32. The DCSA provides that “[a] supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction. Such an act, omission, or practice by a supplier is a violation of [the DCSA] whether it occurs before, during, or after the transaction. An act, omission, or practice prohibited by this section includes both implicit and explicit misrepresentations.” Ind. Code § 24-5-0.5-3(a).

33. Apple committed deceptive acts as described above, including but not limited to surreptitiously affecting the performance of the Legacy Devices after purchase.

34. Apple’s violations were willful and were done as part of a scheme, artifice, or device with intent to defraud or mislead, and therefore are incurable deceptive acts under the DCSA. The violations were formulated and carried out by Apple as part of a business model focused on driving sales of newer model iPhones and other products.

35. The DCSA provides that “[a] person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act or five hundred dollars (\$500), whichever is greater. The court may increase damages for a willful deceptive act in an amount that does not exceed the greater of: (1) three (3) times the actual damages of the consumer suffering the loss; or (2) one thousand (\$1,000). Ind. Code § 24-5-0.5-4(a)

36. The DCSA provides that “[a]ny person who is entitled to bring an action under subsection (a) on the person’s own behalf against a supplier for

damages for a deceptive act may bring a class action against such supplier on behalf of any class of persons of which that person is a member” Ind. Code § 24-5-0.5-4(b).

**SECOND CAUSE OF ACTION
TRESPASS TO CHATTELS**

37. Plaintiff incorporates the preceding paragraphs of this Complaint as if fully set forth below.

38. State common law prohibits the intentional intermeddling with personal property in the possession of another, without consent, that results in either the impairment of the condition, quality, or value of the personal property or the deprivation of use of the personal property for a substantial time.

39. Defendant impaired the condition, quality and usefulness of the Plaintiff’s and Class Members’ Legacy Devices, or parts of them, without their knowledge or consent. Such acts constituted an intentional interference with the use and enjoyment of the devices.

40. Defendant acted intentionally, because it knew that Plaintiff and Class Members were downloading computer software to their Legacy Devices that reduced the performance of the devices. Plaintiff and the other Class Members only consented to the installation of software that would improve performance, not diminish performance.

41. Defendant engaged in deception to gain access to the Legacy Devices and install the new computer software.

42. Plaintiff and other Class Members thus suffered actual damages as a result of Defendant's actions in an amount to be determined at trial.

**THIRD CAUSE OF ACTION
BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

43. Plaintiff incorporates the preceding paragraphs of this Complaint as if fully set forth below.

44. In every contract or agreement there is an implied promise of good faith and fair dealing under common law.

45. In dealings between Apple and its customers, Apple has power affecting the rights of its users.

46. Apple entered into a contract with Plaintiff and the Class at the time of purchase of each Legacy Device, and at the time of download of iOS 10.2.1 and later iOS versions.

47. Apple contractually promised in the iOS 10.2.1 update and later updates to "deliver the best experience for customers, which includes overall performance and prolonging the life of their devices."

48. Plaintiff did all, or substantially all, of the things that the contracts required him to do.

49. Despite its contractual promises to prolong the life of the devices, Apple instead purposefully took actions to reduce the life of the devices, and purposefully failed to notify customers that replacing the battery would restore performance that had been artificially throttled by iOS 10.2.1 and later updates to iOS.

50. Apple's actions were objectively unreasonable given Apple's promises.

51. Apple's conduct evaded the spirit of the bargain made between Apple and the Plaintiff.

52. As a result of Apple's misconduct and breach of its duty of good faith and fair dealing,

53. Plaintiff and the Class suffered damages. Plaintiff and the Class members did not receive the benefit of the bargain for which they contracted and for which they paid valuable consideration.

**FOURTH CAUSE OF ACTION
BREACH OF IMPLIED CONTRACT**

54. Plaintiffs incorporate the substantive allegations contained in each and every paragraph of this Complaint.

55. Defendant solicited and invited Plaintiff and the members of the Class to buy new iPhones. Plaintiff and Class Members accepted Defendant's offers and bought iPhones from Defendant.

56. When Plaintiff and Class Members bought iPhones from Defendant, they paid for their iPhones. In so doing, Plaintiff and Class Members entered into implied contracts with Defendant to which Defendant agreed to not purposefully interfere with Plaintiff and Class Members' usage or speed of the device.

57. Each purchase made with Defendant by Plaintiffs and Class Members was made pursuant to the mutually agreed-upon implied contract with Defendant under which Defendant agreed to not purposefully interfere with Plaintiffs and Class Members' usage or value of their iPhones.

58. Plaintiffs and Class Members would not have bought iPhones from Defendant in the absence of the implied contract between them and Defendant.

59. Plaintiffs and Class Members fully performed their obligations under the implied contracts with Defendant.

60. Defendant breached the implied contracts it made with Plaintiff and Class Members by purposefully slowing down older iPhone models when new models come out and by failing to properly disclose that at the time of that the parties entered into an agreement.

61. As a direct and proximate result of Defendant's breaches of the implied contracts between Defendant and Plaintiff and Class Members, Plaintiff and Class Members sustained actual losses and damages as described in detail above.

REQUEST FOR RELIEF

WHEREFORE, the Plaintiff, individually and on behalf of all others similarly situated, respectfully requests:

A. Certification of the Class requested above and appointment of the Plaintiff as the Class Representative and his counsel as Class Counsel;

B. An order and/or judgment enjoining Defendant from writing programs to throttle device performance without disclosure;

C. An order and/or judgment requiring Defendant to transparently notify customers when device performance can be restored by the installation of a new battery;

D. An order and/or judgment requiring Defendant to make restitution to Plaintiff of money that may have been acquired by means of Defendant's unfair practices;

E. An order and/or judgment awarding Plaintiff and the Class Members all statutory and/or punitive damages permitted by law;

F. An order granting reasonable attorneys' fees and costs, as well as pre- and post-judgment interest at the maximum legal rate; and

G. Such other and further relief as the Court finds just and proper.

JURY DEMAND

Plaintiffs, by counsel, demand trial by jury.

Dated: December 28, 2017

Respectfully submitted,

/s/ Richard E. Shevitz
Irwin B. Levin, No. 8786-49
Richard E. Shevitz, No. 12007-49
Vess A. Miller, No. 26495-53
Lynn A. Toops, No. 26386-49A
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
Fax: (317) 636-2593
ilevin@cohenandmalad.com
rshevitz@cohenandmalad.com
vmiller@cohenandmalad.com
ltoops@cohenandmalad.com

***Counsel for the Plaintiff and
Proposed Class***

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

PETER A. SCHROEDER, individually and on behalf of all others similarly situated,

(b) County of Residence of First Listed Plaintiff Marion County, IN (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Irwin B. Levin, Richard E. Shevitz, Vess A. Miller, Lynn A. Toops Cohen & Malad, LLP, One Indiana Square, Suite 1400, Indianapolis, IN 46204; (317) 636-6481

DEFENDANTS

APPLE INC.

County of Residence of First Listed Defendant Santa Clara, CA (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location. Includes categories like Citizen of This State, Citizen of Another State, and Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, LABOR, IMMIGRATION, FORFEITURE/PENALTY, BANKRUPTCY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 1332(d)(2)
Brief description of cause: Violations relating to the deliberate throttling of iPhone Legacy Device performance through software updates

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/28/2017 SIGNATURE OF ATTORNEY OF RECORD /s/ Richard E. Shevitz

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Indiana

PETER A. SCHROEDER, individually and on behalf of all others similarly situated,

Plaintiff(s)

v.

APPLE INC.,

Defendant(s)

Civil Action No. 1:17-cv-4750

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Apple Inc.
CT Corporation System
150 West Market Street, Suite 800
Indianapolis, IN 46204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Irwin B. Levin, Richard E. Shevitz, Vess A. Miller, Lynn A. Toops
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, Indiana 46204

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 1:17-cv-4750

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Exhibit 14

**U.S. District Court
Southern District of Mississippi (Southern)
CIVIL DOCKET FOR CASE #: 1:17-cv-00358-LG-RHW**

McInnis et al v. Apple, Inc.
Assigned to: District Judge Louis Guirola, Jr
Referred to: Magistrate Judge Robert H. Walker
Cause: 28:1332 Diversity-Fraud

Date Filed: 12/28/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff

Neill McInnis
*on behalf of themselves individually and all
others similarly situated*

represented by **Kenneth C. Johnston**
JOHNSTON PRATT, PLLC
1717 Main Street, Suite 3000
Dallas, TX 75201-4335
214-974-8000
Fax: 972-474-1750
Email: kjohnston@johnstonpratt.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

J. Scott Archer
*on behalf of themselves individually and all
others similarly situated*

represented by **Kenneth C. Johnston**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Apple, Inc.

Date Filed	#	Docket Text
12/28/2017	1	COMPLAINT against Apple, Inc. (Filing fee \$ 400; receipt number 0538-3604119), filed by Neill McInnis, J. Scott Archer. Jury trial requested by Plaintiffs. (Attachments: # 1 Civil Cover Sheet)(JCH) (Entered: 12/28/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 13:31:14			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	1:17-cv-00358-LG-RHW
Billable	1	Cost:	0.10

Pages:				
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
GULFPORT DIVISION

NEILL MCINNIS and J. SCOTT
ARCHER, on behalf of themselves
individually and all others similarly
situated,

Plaintiffs,

v.

APPLE, INC.,

Defendant.

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Case No. 1:17-cv-358-LG-RHW

CLASS ACTION COMPLAINT

CLASS ACTION COMPLAINT

Plaintiffs, individually and on behalf of the Classes defined below, file this Class Action Complaint against Apple, Inc. as follows:

NATURE OF THE ACTION

1. Apple promised that its recent iOS 10 and iOS 11 software updates to the iPhone 6 and iPhone 7 models would improve those devices’ performance and it strongly encouraged its customers to accept those updates. But Apple didn’t tell its customers that it had intentionally designed those software updates to slow the devices’ processing speed to correct a battery defect. Apple then happily took its customers’ money when the customers, dissatisfied with their now-slower devices, purchased new and more expensive iPhones. Apple came clean only this month under public pressure, admitting its software updates slowed processor speed. Now Plaintiffs and Class Members must either purchase new phones for hundreds, if not thousands, of dollars or continue to struggle with their slowed devices.

2. Plaintiffs specifically assert a class action on behalf of owners of the iPhone SE, iPhone 6, iPhone 6s, iPhone 6 Plus, iPhone 6s Plus (collectively, the “iPhone 6”), and the iPhone 7 and iPhone 7 Plus (collectively, the “iPhone 7”) whose devices were harmed by Apple’s updating of their devices’

software to iOS 10.2.1, 10.3, 10.3.1, 10.3.3 (the “iOS 10 Update”) and to iOS 11.0.1, 11.0.2, 11.0.3, 11.1.1, 11.1.2, 11.2, and 11.2.1 (the “iOS 11 Update,” and collectively, the “iOS 10 and iOS 11 Updates”)—those updates were released between January 23, 2017 and December 13, 2017.

THE PARTIES

3. Plaintiff Neill McInnis is a Mississippi citizen residing at 2306 Broadmoor Place, Gulfport, Harrison County, Mississippi 39501.

4. Plaintiff J. Scott Archer is a Mississippi citizen residing at 1823 Bellewood Drive, Jackson, Hinds County, Mississippi 39211.

5. Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated, namely all other individuals who have purchased the iPhone SE, iPhone 6, or iPhone 7 and received the iOS 10 Update or iOS 11 Updates.

6. Defendant Apple, Inc. is a corporation organized and existing under the laws of the State of California with its principal place of business at 1 Infinite Loop, Cupertino, California.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over the state law claims asserted herein pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), because some of the Class Members are citizens of states different from the Defendant’s; upon the Complaint’s filing, the putative class members reside in numerous states around the country; more than 100 putative class members exist; and the amount in controversy exceeds \$5 million.

8. The Court also has personal jurisdiction over the Parties because Defendant conducts a major part of its national operations with regular and continuous business activity in Mississippi.

9. Venue is appropriate because, among other things: (a) one or more of the Plaintiffs are residents and citizens of this District; (b) Defendant has directed its activities at residents in this

District; and (c) the acts and omissions that gave rise to this Action took place, among others, in this judicial district.

10. Venue is also appropriate pursuant to 28 U.S.C. § 1391 because Defendant conducts a large amount of its business in this District and Defendant has substantial relationships in this District. Venue is also appropriate in this Court because a substantial part of the events and omissions giving rise to the harm of the Class Members occurred in this District.

SUBSTANTIVE ALLEGATIONS

The Core of Apple's Business: New Smartphone Sales

11. Apple generates the majority of its sales from the iPhone. Sales from new iPhones alone accounted for 55 percent of total net sales during the third quarter of 2017, and 64 percent of total net sales for the first nine months of 2017.

12. Journalists have recognized the iPhone's importance to Apple's business, stating that Apple's "success is derived from selling brand-new high-end smartphones consistently month after month" and describing it as "the single most important product for the company."

Apple's iPhone 6 was Plagued with Unexpected Shutdown Issues

13. Despite the iPhone's importance, Apple has struggled with problems in its flagship product.

14. Over the past two years, Apple's iPhone 6 users have suffered from their devices shutting down unexpectedly, despite displaying sufficient battery levels. Admitted defects in the iPhone 6's and iPhone 6s' batteries caused those shutdown issues.

15. Consumers worldwide complained of the unexpected shutdown. In November 2016, a Chinese consumer association requested that Apple investigate "a considerable number" of reports by iPhone 6 and iPhone 6s users that the devices were shutting off despite displaying high battery levels and in room temperature environments.

16. Just a few weeks later, Apple acknowledged that “a very small number of iPhone 6s devices may unexpectedly shut down” due to battery issues. It admitted, on its Chinese-language website only, that this problem had been caused by “a battery component’s” unduly long exposure to “controlled ambient air” during manufacture between September and October 2015.

17. Apple offered to replace batteries for a limited number of iPhone 6s manufactured between September and October 2015. To obtain those replacement batteries, Apple required its customers to back up their data, erase the “data and setting on their devices,” bring their phones to instore locations, and pay to repair other unrelated damage to the phones. Apple did not extend its warranty for the repaired phones.

18. Despite Apple’s claims that this battery defect affected only “a very small number” of devices, Apple employees reported to journalists that they were “seeing anywhere from 15 to 30 battery replacements every day” in late 2016—*Fortune* magazine described the iPhone 6 and iPhone 6s “battery issue” as “endemic.”

19. Not surprisingly, Apple’s limited battery replacement did not resolve the unexpected shutdown problem. iPhone 6 and iPhone 6s owners continued to suffer from unexpected shutdowns, including owners who purchased devices manufactured outside of September through October 2015.

20. On January 23, 2017, Apple released its iOS 10.2.1 software update for iPhone 5 and later generations.

21. Apple did not immediately disclose to consumers that it intended the iOS 10.2.1 update to fix the shutdown problem. It waited until February 2017 to disclose that the update had “made improvements to reduce occurrences of unexpected shutdowns.”

22. But Apple kept hidden what exactly those “improvements” were.

Apple Admitted its iOS 10 and iOS 11 Updates Slowed the iPhone's Processing Speed

23. iPhone owners with the iOS 10 and 11 Updates repeatedly complained that the devices were running more slowly after the updates.

24. Spurred by those complaints, in late December 2017, PrimateLabs, a company that creates software to measure computer processing speed, released the results of tests on the iPhone 6s and the iPhone 7. Those tests showed that the introduction of iOS 10.2.1 on the iPhone 6s and iOS 11.2.1 on the iPhone 7 caused those devices' processing speed to slow compared to earlier operating systems.

25. Upon information and belief, the introduction of each iOS Update after iOS 10.2.1 similarly caused the iPhone SE, iPhone 6, and iPhone 7 to operate more slowly.

26. In response, Apple publicly admitted that the iOS10 and iOS11 Updates slowed down the iPhone 6 and iPhone 7, stating:

Our goal is to deliver the best experience for customers, which includes overall performance and prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age over time, which can result in the device unexpectedly shutting down to protect its electronic components.

Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous peaks only when needed to prevent the device from unexpectedly shutting down during these conditions. We've now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in the future.

27. In short, Apple had "improved" its iPhone SE, iPhone 6 and iPhone 7 by slowing down their processing speeds to prevent unexpected shutdowns—shutdowns caused by problems in Apple's battery.

28. Notably, Apple made this "improvement" to the iPhone 7 even though there had not been extensive complaints about unexpected shutdowns of the iPhone 7.

29. Upon information and belief, replacing the battery in the iPhone SE, iPhone 6, and iPhone 7 prevents the processing speed from slowing because the iOS 10 and iOS 11 Updates only slow processing speed when battery condition decreases past a certain point.

30. Apple has not disclosed that battery replacement will prevent slower processing speed.

31. And, until its recent admission, Apple had never previously disclosed that the iOS 10 Updates and iOS 11 Updates would slow down its customers' iPhones. In fact, Apple had promised the opposite.

Apple Promised its iOS 10 and iOS 11 Updates Would Improve the User's iPhone.

32. A key component of the iPhone is its operating system, which Apple regularly updates.

33. Apple represents to its customers that those updates will benefit their iPhones.

34. Apples claims that its current iOS 11 operating system “makes iPhone better than before” and that with “iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they’ve ever been.”

35. Apple previously claimed that the iOS 10 operating system “make[s] everything you love about your iPhone and iPad even better.”

36. Apple, incredibly, promised that “in iOS 10, accessing the information you need is *easier and quicker* than ever”—even though Apple admittedly designed iOS 10.2.1 to slow processing speeds.

37. Apple further touted the benefits of each iteration of those operating systems.

38. Specifically, Apple represented that:

- a. iOS 10.2.1 “includes bug fixes and improves the security of your iPhone . . .” and also “improves power management during peak workloads to avoid unexpected shutdowns on iPhones.” Nowhere did Apple disclose that avoiding unexpected shutdowns required slower processors.
- b. iOS 10.3.1. offered “new features” and improvements to various applications.

- c. iOS 10.3.2 and 10.3.3 included “bug fixes” and improved “the security of your iPhone”
- d. iOS 11.0.1, iOS 11.0.2, and iOS 11.0.3 included “bug fixes” and “improvements” to various iPhone functions.
- e. iOS 11.1, iOS 11.1.1, iOS 11.1.2, iOS 11.2, and iOS 11.2.1 similarly include numerous “bug fixes” and improvements in iPhone functionality.

39. In addition to proclaiming the software updates’ benefits, Apple also made it very difficult for its customers to avoid the iOS 10 Updates and iOS 11 Updates.

40. The iPhone SE, iPhone 6, and iPhone 7 devices repeatedly reminded Plaintiffs and class members to Update their software until the owner agreed to accept the updates.

41. Additionally, if Plaintiffs and class members did not update, applications for their devices would ultimately become unusable.

Plaintiffs Suffered Damages from the iOS 10 and iOS 11 Updates.

42. Plaintiffs and Class Members own or have previously owned iPhone SE, iPhone 6s, or iPhone 7s during the time Apple released the iOS 10 and iOS 11 Updates.

43. As a result of the iOS 10 and iOS 11 Updates, Plaintiffs’ iPhones operated more slowly and their functionality was materially impaired. The iPhones suffered problems with applications freezing, forced rebooting, and delayed response time.

44. Plaintiffs attempted to address those problems by purchasing new iPhones, at the cost of hundreds of dollars.

45. Plaintiffs were unaware of the slowed processing speed caused by the iOS10 and iOS 11 Updates.

46. Had they been aware of the decreased processing speed caused by those updates, Plaintiffs would have purchased different, non-Apple, phones, refused to accept the updates, or purchased new batteries to avoid the processing speed slowdown.

47. Defendant's wrongful actions directly and proximately caused the loss of value to Plaintiffs' and Class Members' iPhones causing them to suffer, and continue to suffer, economic damages and other harm for which they are entitled to compensation, including:

- a. Replacement of old phone;
- b. Loss of use;
- c. Loss of value;
- d. Purchase of new batteries;
- e. Ascertainable losses in the form of deprivation of value of their iPhones; and
- f. Overpayments to Defendant for iPhones in that a portion of the price paid for each such iPhone by Plaintiffs and Class Members to Defendant was for Defendant to purposefully not interfere with the usage of their iPhones.

CLASS ACTION ALLEGATIONS

48. Plaintiffs bring this action on their own behalf and pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), (b)(3), and (c)(4), Plaintiffs seek certification of a nationwide class and a Mississippi class (each a "Class" and, collectively, "the Classes").

49. The nationwide class is initially defined as follows:

All persons residing in the United States who have owned the iPhone SE, iPhone 6, and iPhone 7 that received any of the iOS 10 or iOS 11 Updates.

50. The Mississippi class is initially defined as follows:

All persons residing in Mississippi who have owned the iPhone SE, iPhone 6, or iPhone 7 that received any of the iOS10 or iOS 11 Updates.

51. Excluded from each of the above Classes are Defendant, including any entity in which Defendant has a controlling interest, is a parent or subsidiary, or which is controlled by Defendant, as well as the officers, directors, affiliates, legal representatives, heirs, predecessors, successors, and assigns of Defendant. Also excluded are the judges and court personnel in this case and any members

of their immediate families. Plaintiffs reserve the right to amend the Class definitions if discovery and further investigation reveal that the Classes should be expanded or otherwise modified.

52. **Numerosity.** Fed. R. Civ. P. 23(a)(1). The members of the Classes (the “Class Members”) are so numerous that the joinder of all members is impractical. While the exact number of Class Members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are thousands of Class Members, at least. Class Members are readily identifiable from information and records in Defendants’ possession, custody or control.

53. **Commonality.** Fed. R. Civ. P. 23(a)(2) and (b)(3). There are questions of law and fact common to the Classes, which predominate over any questions affecting only individual Class Members. These common questions of law and fact include, without limitation:

- a. Whether Defendant’s failure to disclose the iOS 10 and iOS 11 Updates’ decreases of iPhone processing speed while touting those Updates’ benefits constitutes fraudulent omission;
- b. Whether Defendant’s failure to disclose the iOS 10 and iOS 11 Updates’ decreases of iPhone processing speed while touting those Updates’ benefits constitutes negligent omissions;
- c. Whether Defendant intentionally and tortuously interfered with the use or value of the iPhone SE, iPhone 6, or iPhone 7 devices;
- d. Whether Defendant fraudulently concealed their tortious interference with the use or value of the iPhone SE, iPhone 6, or iPhone 7 devices; and
- e. Whether Plaintiffs and the Classes are entitled to damages, civil penalties, punitive damages, and/or injunctive relief.

54. **Typicality.** Fed. R. Civ. P. 23(a)(3). Plaintiffs’ claims are typical of those of other Class Members. Each Class Member suffered damages from the loss of use and value of the iPhone SE, iPhone 6, or iPhone 7 device because of the performance slowdowns. The injuries of the Plaintiff and Class are identical and Plaintiffs’ claims for relief are based upon the same legal theories as the claims of other Class Members.

55. ***Adequacy of Representation.*** Fed. R. Civ. P. 23(a)(4). Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class. Plaintiffs have retained competent counsel experienced in litigation of class actions and complex civil litigation who will vigorously prosecute this litigation. Plaintiffs' interests are not antagonistic or in conflict with the Class Members' interests.

56. ***Superiority of Class Action.*** Fed. R. Civ. P. 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all the members of the Classes is economically and procedurally impracticable. Additionally, resolving this controversy through a class action will avoid the possibility of inconsistent or conflicting adjudications of the asserted claims. Further, damages for any individual Class Member will be likely insufficient to justify the cost of litigation so, without class treatment, Defendant's violations of law inflicting substantial aggregate damages would be un-remedied.

CAUSES OF ACTION

COUNT ONE Fraudulent Omission

57. Plaintiffs incorporate and reallege the allegations contained in each and every paragraph of the Complaint.

58. Plaintiffs incorporate and reallege the substantive allegations contained in each and every paragraph of this Complaint.

59. Defendant failed to disclose facts within its knowledge to the Plaintiffs and Class Members, namely that the iOS 10 and iOS 11 Updates would cause the iPhone SE, iPhone 6, and iPhone 7 (the "Affected Phones") to run more slowly and that the decrease in processing speed could be avoided by the purchase of a new battery (the "Concealed Facts").

60. Defendant had a duty to disclose the Concealed Facts because they made Defendant's earlier representations misleading or untrue. Specifically, Defendant represented that iOS 10 operating

system “make[s] everything you love about your iPhone and iPad even better,” that and “in iOS 10, accessing the information you need is easier and quicker than ever before.” Defendant’s subsequent iOS 10.2.1 update, however, slowed the Affected Phones’ processing speed, making “accessing the information you need” slower than before.

61. Additionally, Defendant represented that its iOS 11 operating system “makes iPhone better than before” and that with “iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they’ve ever been.” But Defendant’s subsequent iOS 11.2 update weakened the Affected Phones’ processing power.

62. Defendant had a duty to disclose the Concealed Facts because Defendant made a partial disclosure and conveyed a false impression, giving rise to the duty to speak. Specifically, Defendant represented that iOS 10.2.1 “improves power management during peak workloads to avoid unexpected shutdowns on iPhones” but failed to disclose the “improvement” was to reduce the Affected Phones’ processing speed.

63. The Concealed Facts were material because the decrease in processing speed significantly impacted the functionality of Plaintiff’s and Class Members’ iPhones.

64. Defendant was deliberately silent when it had a duty to speak and by failing to disclose the Concealed Facts, upon information and belief, intended to induce Plaintiffs and Class Members to purchase newer iPhone models, rather than simply purchase new batteries for their devices.

65. Plaintiffs and similarly situated Class Members relied on Defendants’ non-disclosure of the Concealed Facts and were injured as a result of acting without that knowledge. Specifically, Plaintiffs and similarly situated Class Members unnecessarily purchased newer iPhone models, purchased other Apple accessories in an attempt to restore processing speed, or suffered unnecessarily prolonged loss of the use and function of their devices which could have been remedied by the purchase of a new battery.

COUNT TWO
Negligent Misrepresentation/Omission

66. Plaintiffs fully incorporate and reallege the substantive allegations contained in each and every paragraph of this Complaint.

67. Defendants made representations about the Affected Phones in the course of its business or in a transaction in which it had a pecuniary interest, namely in the sale of iPhones.

68. Defendants provided false information about the Affected Phones for the guidance of Plaintiffs and Class Members. Specifically, Defendant represented that iOS 10 operating system “make[s] everything you love about your iPhone and iPad even better,” that and “in iOS 10, accessing the information you need is easier and quicker than ever before.” Defendant’s subsequent iOS 10.2.1 update, however, slowed the Affected Phones’ processing speed, making “accessing the information you need” slower than before.

69. Additionally, Defendant represented that its iOS 11 operating system “makes iPhone better than before” and that with “iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they’ve ever been.” But Defendant’s subsequent iOS 11.2 update weakened the Affected Phones’ processing power.

70. Defendant represented that iOS 10.2.1 “improves power management during peak workloads to avoid unexpected shutdowns on iPhones” but, in fact, the update did not improve power management but reduced processing speed.

71. Defendant did not exercise reasonable care or competence in obtaining or communicating the information because Defendant claimed that the iOS 10 and iOS 11 Updates would improve the Affected Phones while knowing those updates reduced the Affected Phones’ processing speed.

72. Plaintiff and Class Members relied on Defendants’ representations and were injured as a result of so relying. Specifically, Plaintiffs and similarly situated Class Members unnecessarily

purchased newer iPhone models, purchased other Apple accessories in an attempt to restore processing speed, or suffered unnecessarily prolonged loss of their devices' loss of use and function which could have been remedied by the purchase of a new battery.

**COUNT THREE
TRESPASS TO CHATTEL**

73. Plaintiffs incorporate and reallege the substantive allegations contained in each and every paragraph of this Complaint.

74. Plaintiffs and Class Members own or previously owned the Affected Phones during the time Apple released the iOS 10 and iOS 11 Updates.

75. Defendant intentionally and tortuously interfered with Plaintiffs' and Class Members' use and enjoyment of their iPhones by materially impairing their iPhones' performance and by decreasing their processing speeds.

76. Plaintiffs and Class Members never authorized Defendant to interfere with their iPhones.

77. Defendant's acts caused Plaintiffs and Class Members economic damages and other harm, including, but not limited to, loss of use and enjoyment of their iPhones, loss of value, and losses in the form of costs to upgrade or otherwise replace their iPhones.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all Class Members proposed in this Complaint, respectfully requests that the Court enter judgment in their favor against Defendant as follows:

- A. For an Order certifying the Nationwide Class and Mississippi Class as defined herein, and appointing Plaintiffs and their counsel to represent the Nationwide Class and the Mississippi Class;
- B. For an award of actual damages and compensatory damages, in an amount to be determined;

- C. For an award of costs of suit and attorneys' fees, as allowable by law; and
- D. Such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Based on the foregoing, Plaintiffs, of behalf of themselves and all others similarly situated, hereby demand a jury trial for all claims so triable.

Dated: December 27, 2017.

Respectfully submitted,

JOHNSTON PRATT PLLC

By: s/ Kenneth C. Johnston

Kenneth C. Johnston

Texas Bar No. 00792608

Mississippi Bar No. 8971

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Attorneys for Plaintiffs

OF COUNSEL:

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Dallas, Texas 75201

(214) 974-8000 Tel.

To be admitted Pro Hac Vice

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Neill McInnis and J. Scott Archer, on behalf of themselves individually and all others similarly situated,

(b) County of Residence of First Listed Plaintiff Harrison County, MS (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Kenneth C. Johnston | Johnston Pratt PLLC 1717 Main Street, Suite 3000, Dallas, TX 75201 Tel. 214-974-8000 | kjohnston@johnstonpratt.com

DEFENDANTS

Apple Inc.

County of Residence of First Listed Defendant Santa Clara, CA (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location (Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation).

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 USC 1332. Brief description of cause: Consumer fraud; unfair business practices.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/27/2017 SIGNATURE OF ATTORNEY OF RECORD s/ Kenneth C. Johnston

FOR OFFICE USE ONLY

RECEIPT # AMOUNT \$400.00 APPLYING IFP JUDGE MAG. JUDGE #0538-3604119

Exhibit 15

**U.S. District Court
 District of South Carolina (Charleston)
 CIVIL DOCKET FOR CASE #: 2:17-cv-03453-RMG**

Brand et al v. Apple Inc
 Assigned to: Honorable Richard M Gergel
 Cause: 28:1332 Diversity-Other Contract

Date Filed: 12/22/2017
 Jury Demand: Plaintiff
 Nature of Suit: 190 Contract: Other
 Jurisdiction: Diversity

Plaintiff

Blake Brand
*Individually And On Behalf of All Others
 Similarly Situated*

represented by **Aaron Cole Mayer**
 Mayer Law LLC
 18 Carolina Street
 Suite B
 Charleston, SC 29403
 843-225-7240
 Email: aaron@mayerlawpractice.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Matt Hosking
*Individually And On Behalf of All Others
 Similarly Situated*

represented by **Aaron Cole Mayer**
 (See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Apple Inc

Date Filed	#	Docket Text
12/22/2017	1	COMPLAINT against Apple Inc (Filing fee \$ 400 receipt number 0420-7528735.), filed by Blake Brand, Matt Hosking. Service due by 3/22/2018(sshe,) (Entered: 12/27/2017)
12/22/2017	2	Local Rule 26.01 Answers to Interrogatories by Blake Brand, Matt Hosking.(sshe,) (Entered: 12/27/2017)
12/22/2017	3	Summons Issued as to Apple Inc. (sshe,) (Entered: 12/27/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 14:22:24			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad

Description:	Docket Report	Search Criteria:	2:17-cv-03453-RMG
Billable Pages:	1	Cost:	0.10

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

**Blake Brand, and Matt Hosking,
Individually And On Behalf of All Others
Similarly Situated,**

Plaintiffs,

vs.

APPLE, INC.;

Defendant.

C/A No.: 2:17-cv-3453-RMG

CLASS ACTION COMPLAINT

INTRODUCTION

1. Plaintiffs Blake Brand and Matt Hoskings bring this action, individually and on behalf of a class of similarly situated owners of Apple’s iPhone 6, 6S and SE and iPhone 7 (together, the “iPhones”), and prior models which similar prior undisclosed/concealed conduct by Apple similarly degraded performance as set forth below. This action arises from Apple’s deliberate limitation of the performance of the older iPhone models to coincide with the release of newer models in an attempt to get users to purchase newer devices.

PARTIES, JURISDICTION & VENUE

2. Plaintiff Blake Brand is a citizen and resident of the State of South Carolina. On or about mid 2016, Ms. Brand purchased a new iPhone 6. Around November and/or December 2017, Ms. Brand updated the iOS software, and shortly thereafter she noticed her phone began experiencing slower processing, longer wait times for applications, slower scrolling and other degraded performance.

3. Plaintiff Matt Hoskings is a citizen and resident of the State of South Carolina. On or about early 2016, Mr. Hoskings purchased a new iPhone 6. Around November and/or

December 2017, Mr. Hoskings updated the iOS software, and shortly thereafter she noticed her phone began experiencing slower processing, longer wait times for applications, slower scrolling and other degraded performance.

4. Defendant Apple, Inc. is a corporation formed under the laws of California with its principal place of business located in Cupertino, California.

5. Apple sold and distributed iPhones and iOS software nationwide through its stores and through third-party vendors, such as Verizon, AT&T, etc.

6. This Court has subject-matter jurisdiction over this action pursuant to: (a) Title 28, United States Code, Section 1331; and (b) The Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. Sections 1332(a) and (d), because the amount in controversy exceeds \$5,000,000.00 exclusive of interest and costs, and more than two thirds of the members of the Class are citizens of states different from those of Defendants.

7. Under CAFA, the federal courts have exclusive jurisdiction over all actions with an amount in controversy in excess of \$5,000,000. Here, the statutory claims alone have a value far in excess of that amount, which establishes jurisdiction.

8. This Court has person jurisdiction over Apple because it conducts business in South Carolina, has one or more retail stores in South Carolina, and updates software to Apple phones across South Carolina.

9. Venue is proper in South Carolina because that is where a substantial part of the events or omissions giving rise to the claims occurred: the Plaintiffs resided when the harm occurred, began occurring, and continues occurring.

GENERAL ALLEGATIONS

10. In December 2017, independent researchers identified computer code in the October 2017, Apple software update that intentionally slowed down the operation of the phone.

11. Apple has admitted to deliberately adding the above-mentioned code as a “feature” that limits the performance of older devices that would cause them to turn off suddenly. Apple claims the new software updates for the older phones are designed to “smooth out” peak power demands and prevent surprise shutdowns.

12. Apple’s admission applies to prior software updates, not only the 2017 update(s).

13. These software updates that slow down the older phones coincide with the release of newer iPhone models, causing users to believe their phone is failing and that they need to purchase a new device.

14. In reality, the problem could be resolved by replacing just the battery, a far less expensive option than upgrading to the next phone model, a fact which is unknown to many iPhone users.

15. As a result of Apple’s unfair, deceptive and/or fraudulent business practices, owners of the iPhones – including Plaintiffs – have needlessly replaced their older phones for newer, more pricey models.

16. New Apple iPhone models have at all times relevant to this action sold for more than \$100.00 per phone.

17. Now, it seems, Apple wishes to dictate to its consumers: Upgrade again or face the difficulties involved in changed to a different platform (i.e. android, etc.).

18. Defendant Apple designs, manufactures, markets and sells the iPhone series of smartphones. At issue in this Complaint are following models: iPhone 6, 6S and SE and the iPhone 7.

19. Unbeknownst to consumers, the iOS updates on the iPhone models in question reorders incoming commands to make sure that not all of them are done in parallel.

20. As a result, there is an inherent slowdown of the average response times by the system.

21. Apple has stated that the “feature” is designed to prolong the life of the batteries. The older iPhone batteries struggle to supply the required maximum current needed to power the phone processor at full speed, causing it to shut down unexpectedly. By slowing the performance, the phone does not meet maximum current and will no longer shut off without warning.

22. Upon information belief, if Apple’s real concern was truly battery life, that can be fixed with a \$79 replacement battery from Apple, a fact unknown to many users.

23. The timing of the iOS updates tends to coincide with the release of a newer model, prompting the user to upgrade their entire phone rather than the simple, cheaper option of replacing the battery.

24. This bad-faith business practice has tricked hundreds of thousands, if not millions, of consumers in the past, and did indeed trick the Plaintiffs in the past.

CLASS REPRESENTATION ALLEGATIONS

25. The named Plaintiffs bring this action on behalf of themselves and all others who are similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure.

26. There are two proposed classes: The first is defined as all South Carolina resident individuals or businesses who have owned iPhones subjected to Apple’s propagation of an intentionally degrading iOS – this includes the current iOS software and also previous iOS

software versions that have functionally sabotaged the performance of iPhone models older than whatever model was current at the time of that iOS software release.

27. The second class is defined as all United States of America resident individuals or businesses who have owned iPhones subjected to Apple's propagation of an intentionally degrading iOS – this includes the current iOS software and also previous iOS software versions that have functionally sabotaged the performance of iPhone models older than whatever model was current at the time of that iOS software release.

28. Pursuant to Rule 23, F.C.R.C.P., Defendant Apple has acted and refused to act on grounds generally applicable to all the members of the class, thereby making appropriate final injunctive relief, declaratory relief, and damages relief concerning the class as a whole.

29. The class is so numerous that joinder of all members is impracticable. Although a more precise number of class members will be better established as part of class notification, upon information and belief, the number of potential members consists of hundreds of thousands of individuals. Class members may be notified of the pendency of this action by email, regular mail and also by published notice if the Court determines that published notice is a necessary supplement.

30. There are questions of law and fact that are common to the class which predominate over any questions effecting individual members. These common legal and factual questions include:

- a. Determination of the facts concerning Apple's intent to deceive consumers;
- b. Determination of the facts concerning Apple's intent to defraud consumers;
- c. Determination of the facts concerning Defendants' failure to adopt and/or enforce policies and procedures to screen its charges for these preventable cancers;
- d. Determination of Defendant's liability;

- e. Determination of Defendant's willfulness, recklessness, intentionality, carelessness;
- f. Determination of whether, and the extent to which, relief should be entered.

31. The claims asserted by Plaintiffs are typical of the claims of the members of the class in that they involve the same facts of new software degrading an existing iPhone, arise from the same practices or course of conduct that gives rise to the claims of all other class members, and are based on the same legal theories.

32. Plaintiffs is an adequate representative of the class because his interests are consistent with the interests of the class and do not conflict with the interests of the class they seek to represent; Plaintiffs adequately and truly represents the interests of the absent class members; Plaintiffs have common claims with each class member based on the same essential facts; they have retained counsel competent and experienced in class action and complex class action litigation, and he intends to prosecute this action vigorously. The interests of the class will be fairly and adequately protected by Plaintiffs and their counsel.

33. The class, as defined, involves only class members for whom the amount in controversy exceeds one hundred dollars (\$100.00).

34. This class action is maintainable under Rule 23, F.C.R.C.P. Common questions of fact and law relating to liability predominate over any questions affecting only individual class members. Defendant's common course of alleged conduct includes Apple and its agents, servants, or employees intentional design of software meant to slow-down, or otherwise degrade the performance of prior model iPhones, Defendant's failure to inform consumers of this effect in calculated expectation that it would prompt a sooner-than-otherwise upgrade by consumers.

35. Moreover, class action treatment is a superior method for the fair and efficient adjudication of the controversy. The members of the class have little or no interest in

individually controlling prosecution of separate claims. It is highly desirable from the standpoint of manageability and resources to concentrate the litigation pertaining to the class claims in a single forum. To the extent class members have to try individual damages cases, this can be done in small group trial settings, far more efficiently and economically if class-wide issues, such as liability, are first resolved on a large group basis, i.e., through class trial. Whatever difficulties may exist in the management of the class action will be greatly outweighed by the class procedure, including, but not limited to:

a. Other available means of adjudicating the claims of Plaintiff and members of the class, such as dozens of individual actions brought separately and pursued independently in state or federal courts, are impracticable and inefficient;

b. This action will cause an orderly and expeditious administration of the class claims, economics of time, effort and expense will be fostered and uniformity of decisions ensured;

c. Without a class action, members will continue to suffer damages and Defendant's tortuous and wrongful conduct will proceed without remedy while Apple continues to retain and reap the proceeds and profits of its wrongful, fraudulent conduct;

d. Management of this action poses no unusual difficulties that would impede its management by the Court as a class action; and

e. The claims brought by Plaintiff and members of the class are not now, nor have they been, the subject of another class action to the best of Plaintiff's knowledge.

36. The Defendant has acted and refused to act on grounds generally applicable to the class, and are the direct and proximate causes of the Plaintiffs' damages described in this complaint.

FOR A FIRST CAUSE OF ACTION: FRAUD

37. The foregoing and following paragraphs are hereby incorporated as if fully stated.

38. Apple leads iPhone users to believe that new releases of iOS will improve the phones' uses and efficiencies. Apple does this in a variety of ways, perhaps most commonly touting features of the new iOS that it believes consumers want, all to induce consumers to "upgrade" to the current version of an iOS.

39. Apple's assertions that new versions of iOS are superior for not-new phones was premeditatedly false.

40. Apple iPhone customers and users of not-new iPhones relied on Apple's technical expertise and statements, and believed that the new versions of iOS would improve their user experiences.

41. Apple's misrepresentations were material, in that reasonable people may rely on a technology company's statement of "upgraded" software and Apple did intend for Plaintiffs and other consumers to act upon these representations. Specifically, Apple intended for Plaintiffs and consumers to install the new iOS software, become dissatisfied with the then-undermined performance of their iPhones (be too complacent to change platforms to Android) and then buy new near \$1,000 iPhones.

42. Plaintiffs did rely on this falsity, and as a direct and proximate result, incurred damaged or diminished iPhone performance, the expense and hassle of upgrading to a new version of the iPhone

43. For this malfeasance, Plaintiffs seek actual, consequential, treble and exemplary damages.

FOR A SECOND CAUSE OF ACTION: UNFAIR, DECEPTIVE ACTS AND PRACTICES

44. The foregoing and following paragraphs are hereby incorporated as if fully stated.

45. Apple's above-described practices intentionally deceived consumers, unfairly costing each consumer hundreds of dollars.

46. Apple's practice described herein is unethical, and not commercially sound.

47. For this malfeasance, Plaintiffs seek actual, consequential, treble and exemplary damages.

FOR A THIRD CAUSE OF ACTION: NEGLIGENCE

48. The foregoing and following paragraphs are hereby incorporated as if fully stated.

49. Apple had a duty to inform its existing iPhone users that if a software modification / "upgrade" would degrade the performance of the iPhone. Apple also had a duty not to intentionally sabotage its customers' use of its products after they were purchased.

50. Apple breached these duties by intentionally and covertly propagating software to diminish the performance of its users iPhones.

51. These breaches directly and proximately caused Plaintiffs' harms and damages.

52. For this malfeasance, Plaintiffs seek actual, consequential, treble and exemplary damages.

PRAYER FOR RELIEF

WHEREFORE, having fully set forth the grounds of his complaint, Plaintiff asks this Court for judgment against the Defendants, both jointly and severally for INJUNCTIVE, ACTUAL, CONSEQUENTIAL and PUNITIVE DAMAGES, together with costs of this action, and for such other and further relief as this Court may deem fit, just and proper.

MAYER LAW PRACTICE, LLC

/s/ Aaron Mayer

Aaron Mayer, Esq.
MAYER LAW PRACTICE
2000 Sam Rittenberg Blvd. Ste. 2011
Charleston, SC 29407
T: (843) 225-7240
F: (888) 446-3963
aaron@mayerlawpractice.com

December 21, 2017
Charleston, SC

ATTORNEY FOR PLAINTIFFS

Exhibit 16

U.S. District Court [LIVE]
Eastern District of TEXAS (Sherman)
CIVIL DOCKET FOR CASE #: 4:17-cv-00889-ALM-KPJ

Miller et al v. Apple, Inc.
Assigned to: District Judge Amos L. Mazzant, III
Referred to: Magistrate Judge Kimberly C Priest Johnson
Cause: 28:1332 Diversity-Fraud

Date Filed: 12/27/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff

Mark Miller

*on behalf of themselves individually and all
others similarly situated*

represented by **Robert W. Gifford**
Johnston Pratt PLLC
1717 Main Street, Suite 3000
Dallas, TX 75201
214-974-8000
Fax: 972-474-1750
Email: rgifford@johnstonpratt.com
ATTORNEY TO BE NOTICED

Kenneth Craig Johnston
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1717 Main Street, Suite 3000
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214-974-8000
Fax: 972-474-1750
Email: kjohnston@johnstonpratt.com
ATTORNEY TO BE NOTICED

Plaintiff

Chris Spearman

*on behalf of themselves individually and all
others similarly situated*

represented by **Robert W. Gifford**
(See above for address)
ATTORNEY TO BE NOTICED

Kenneth Craig Johnston
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Craig Stanford

*on behalf of themselves individually and all
others similarly situated*

represented by **Robert W. Gifford**
(See above for address)
ATTORNEY TO BE NOTICED

Kenneth Craig Johnston
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Apple, Inc.

Date Filed	#	Docket Text
12/27/2017	1	COMPLAINT against Apple Inc. (Filing fee \$ 400 receipt number 0540-6602157.), filed by Mark Miller, Craig Stanford, Chris Spearman.(Johnston, Kenneth) (Entered: 12/27/2017)
12/27/2017	2	Additional Attachments to Main Document - CIVIL COVER SHEET: 1 Complaint.. (Johnston, Kenneth) (Entered: 12/27/2017)
12/28/2017		Case ASSIGNED to District Judge Amos L. Mazzant, III and REFERRED to Magistrate Judge Kimberly C Priest Johnson. (baf,) (Entered: 12/28/2017)
12/28/2017		In accordance with the provisions of 28 USC Section 636(c), you are hereby notified that a U.S. Magistrate Judge of this district court is available to conduct any or all proceedings in this case including a jury or non-jury trial and to order the entry of a final judgment. The form Consent to Proceed Before Magistrate Judge is available on our website. All signed consent forms, excluding pro se parties, should be filed electronically using the event <i>Notice Regarding Consent to Proceed Before Magistrate Judge</i> . (baf,) (Entered: 12/28/2017)

PACER Service Center			
Transaction Receipt			
12/28/2017 13:28:59			
PACER Login:	KaplanFox:2581070:0	Client Code:	Apple Upgrad
Description:	Docket Report	Search Criteria:	4:17-cv-00889-ALM-KPJ
Billable Pages:	2	Cost:	0.20

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

**MARK MILLER, CHRIS SPEARMAN,
and CRAIG STANFORD, on behalf of
themselves individually and all others
similarly situated,**

Plaintiffs,

v.

APPLE, INC.,

Defendant.

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Case No. _____

CLASS ACTION COMPLAINT

CLASS ACTION COMPLAINT

Plaintiffs, individually and on behalf of the Classes defined below, file this Class Action Complaint against Apple, Inc. as follows:

NATURE OF THE ACTION

1. Apple promised that its recent iOS 10 and iOS 11 software updates to the iPhone 6 and iPhone 7 models would improve those devices’ performance and it strongly encouraged its customers to accept those updates. But Apple didn’t tell its customers that it had intentionally designed those software updates to slow the devices’ processing speed to correct a battery defect. Apple then happily took its customers’ money when the customers, dissatisfied with their now-slower devices, purchased new and more expensive iPhones. Apple came clean only this month under public pressure, admitting its software updates slowed processor speed. Now Plaintiffs and Class Members must either purchase new phones for hundreds, if not thousands, of dollars or continue to struggle with their slowed devices.

2. Plaintiffs assert a class action on behalf of owners of the iPhone SE, iPhone 6, iPhone 6s, iPhone 6 Plus, iPhone 6s Plus (collectively, the “iPhone 6”), and the iPhone 7 and iPhone 7 Plus (collectively, the “iPhone 7”) whose devices were harmed by Apple’s updating of their devices’

software to iOS 10.2.1, 10.3, 10.3.1, 10.3.3 (the “iOS 10 Update”) and to iOS 11.0.1, 11.0.2, 11.0.3, 11.1.1, 11.1.2, 11.2, and 11.2.1 (the “iOS 11 Update,” and collectively, the “iOS 10 and iOS 11 Updates”)—those updates were released between January 23, 2017 and December 13, 2017.

THE PARTIES

3. Plaintiff Mark Miller is a Texas citizen residing at 300 Grove Park Place, McKinney, Collin County, Texas 75071.

4. Plaintiff Chris Spearman is a Texas citizen residing at 10307 Vistadale Drive, Dallas, Dallas County, Texas 75238.

5. Plaintiff Craig Stanford is a Texas citizen residing at 2014 County Road 1514, Grand Saline, Van Zandt County, Texas.

6. Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated, namely all other individuals who have purchased the iPhone SE, iPhone 6, or iPhone 7 and received the iOS 10 Update or iOS 11 Update.

7. Defendant Apple, Inc. is a corporation organized and existing under the laws of the State of California with its principal place of business at 1 Infinite Loop, Cupertino, California.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over the state law claims asserted herein pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), because some of the Class Members are citizens of states different from the Defendant’s; upon the Complaint’s filing, the putative class members reside in numerous states around the country; more than 100 putative class members exist; and the amount in controversy exceeds \$5 million.

9. The Court also has personal jurisdiction over the Parties because Defendant conducts a major part of its national operations with regular and continuous business activity in Texas.

10. Venue is appropriate because, among other things: (a) one or more of the Plaintiffs are residents and citizens of this District; (b) Defendant has directed its activities at residents in this District; and (c) the acts and omissions that gave rise to this Action took place, among others, in this judicial district.

11. Venue is also appropriate pursuant to 28 U.S.C. § 1391 because Defendant conducts a large amount of its business in this District and Defendant has substantial relationships in this District. Venue is also appropriate in this Court because a substantial part of the events and omissions giving rise to the harm of the Class Members occurred in this District.

SUBSTANTIVE ALLEGATIONS

The Core of Apple's Business: New Smartphone Sales

12. Apple generates the majority of its sales from the iPhone. Sales from new iPhones alone accounted for 55 percent of total net sales during the third quarter of 2017 and 64 percent of total net sales for the first nine months of 2017.

13. Journalists have recognized the iPhone's importance to Apple's business, stating that Apple's "success is derived from selling brand-new high-end smartphones consistently month after month" and describing it as "the single most important product for the company."

Apple's iPhone 6 was Plagued with Unexpected Shutdown Issues

14. Despite the iPhone's importance, Apple has struggled with problems in its flagship product.

15. Over the past two years, Apple's iPhone 6 users have suffered from their devices shutting down unexpectedly, despite displaying sufficient battery levels. Admitted defects in the iPhone 6's and iPhone 6s' batteries caused those shutdown issues.

16. Consumers worldwide complained of the unexpected shutdown. In November 2016, a Chinese consumer association requested that Apple investigate "a considerable number" of reports

by iPhone 6 and iPhone 6s users that the devices were shutting off despite displaying high battery levels and in room temperature environments.

17. Just a few weeks later, Apple acknowledged that “a very small number of iPhone 6s devices may unexpectedly shut down” due to battery issues. It admitted, on its Chinese-language website only, that this problem had been caused by “a battery component’s” unduly long exposure to “controlled ambient air” during manufacture between September and October 2015.

18. Apple offered to replace batteries for a limited number of iPhone 6s manufactured between September and October 2015. To obtain those replacement batteries, Apple required its customers to back up their data, erase the “data and setting on their devices,” bring their phones to instore locations, and pay to repair other unrelated damage to the phones. Apple did not extend its warranty for the repaired phones.

19. Despite Apple’s claims that this battery defect affected only “a very small number” of devices, Apple employees reported to journalists that they were “seeing anywhere from 15 to 30 battery replacements every day” in late 2016—*Fortune* magazine described the iPhone 6 and iPhone 6s “battery issue” as “endemic.”

20. Not surprisingly, Apple’s limited battery replacement did not resolve the unexpected shutdown problem. iPhone 6 and iPhone 6s owners continued to suffer from unexpected shutdowns, including owners who purchased devices manufactured outside of September through October 2015.

21. On January 23, 2017, Apple released its iOS 10.2.1 software update for iPhone 5 and later generations.

22. Apple did not immediately disclose to consumers that it intended the iOS 10.2.1 update to fix the shutdown problem. It waited until February 2017 to disclose that the update had “made improvements to reduce occurrences of unexpected shutdowns.”

23. But Apple kept hidden what exactly those “improvements” were.

Apple Admitted its iOS 10 and iOS 11 Updates Slowed the iPhone's Processing Speed

24. iPhone owners with the iOS 10 and 11 Updates repeatedly complained that the devices were running more slowly after the updates.

25. Spurred by those complaints, in late December 2017, PrimateLabs, a company that creates software to measure computer processing speed, released the results of tests on the iPhone 6s and the iPhone 7. Those tests showed that the introduction of iOS 10.2.1 on the iPhone 6s and iOS 11.2.1 on the iPhone 7 caused those devices' processing speed to slow compared to earlier operating systems.

26. Upon information and belief, the introduction of each iOS update after iOS 10.2.1 similarly caused the iPhone SE, iPhone 6, and iPhone 7 to operate more slowly.

27. In response, Apple publicly admitted that the iOS10 and iOS11 Updates slowed down the iPhone 6 and iPhone 7, stating:

Our goal is to deliver the best experience for customers, which includes overall performance and prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age over time, which can result in the device unexpectedly shutting down to protect its electronic components.

Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous peaks only when needed to prevent the device from unexpectedly shutting down during these conditions. We've now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in the future.

28. In short, Apple had "improved" its iPhone SE, iPhone 6 and iPhone 7 by slowing down their processing speeds to prevent unexpected shutdowns—shutdowns caused by problems in Apple's battery.

29. Notably, Apple made this "improvement" to the iPhone 7 even though there had not been extensive complaints about unexpected shutdowns of the iPhone 7.

30. Upon information and belief, replacing the battery in the iPhone SE, iPhone 6, and iPhone 7 prevents the processing speed from slowing because the iOS 10 and iOS 11 Updates only slow processing speed when battery condition decreases past a certain point.

31. Apple has not disclosed that battery replacement will prevent slower processing speed.

32. And, until its recent admission, Apple had never previously disclosed that the iOS 10 Updates and iOS 11 Updates would slow down its customers' iPhones. In fact, Apple had promised the opposite.

Apple Promised its iOS 10 and iOS 11 Updates Would Improve the User's iPhone.

33. A key component of the iPhone is its operating system, which Apple regularly updates.

34. Apple represents to its customers that those updates will benefit their iPhones.

35. Apples claims that its current iOS 11 operating system “makes iPhone better than before” and that with “iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they’ve ever been.”

36. Apple previously claimed that the iOS 10 operating system “make[s] everything you love about your iPhone and iPad even better.”

37. Apple, incredibly, promised that “in iOS 10, accessing the information you need is *easier and quicker* than ever”—even though Apple admittedly designed iOS 10.2.1 to slow processing speeds.

38. Apple further touted the benefits of each iteration of those operating systems.

39. Specifically, Apple represented that:

- a. iOS 10.2.1 “includes bug fixes and improves the security of your iPhone . . .” and also “improves power management during peak workloads to avoid unexpected shutdowns on iPhones.” Nowhere did Apple disclose that avoiding unexpected shutdowns required slower processors.
- b. iOS 10.3.1. offered “new features” and improvements to various applications

- c. iOS 10.3.2 and 10.3.3 included “bug fixes” and improved “the security of your iPhone”
- d. iOS 11.0.1, iOS 11.0.2, and iOS 11.0.3 included “bug fixes” and “improvements” to various iPhone functions.
- e. iOS 11.1, iOS 11.1.1, iOS 11.1.2, iOS 11.2, and iOS 11.2.1 similarly include numerous “bug fixes” and improvements in iPhone functionality.

40. In addition to proclaiming the software updates’ benefits, Apple also made it very difficult for its customers to avoid the iOS 10 Updates and iOS 11 Updates.

41. The iPhone SE, iPhone 6, and iPhone 7 devices repeatedly reminded Plaintiffs and class members to update their software until the owner agreed to accept the updates.

42. Additionally, if Plaintiffs and class members did not update, applications for their devices would ultimately become unusable.

Plaintiffs Suffered Damages from the iOS 10 and iOS 11 Updates.

43. Plaintiffs and Class Members own or have previously owned iPhone SE, iPhone 6s, or iPhone 7s during the time Apple released the iOS 10 and iOS 11 Updates.

44. As a result of the iOS 10 and iOS 11 Updates, Plaintiffs’ iPhones operated more slowly and their functionality was materially impaired. The iPhones suffered problems with applications freezing, forced rebooting, and delayed response time.

45. Plaintiffs attempted to address those problems by purchasing new iPhones, at the cost of hundreds of dollars, and by purchasing accessory equipment, such as new chargers, in an attempt to fix their devices’ issues.

46. Plaintiffs were unaware of the slowed processing speed caused by the iOS10 and iOS 11 Updates.

47. Had they been aware of the decreased processing speed caused by those updates, Plaintiffs would have purchased different, non-Apple, phones, refused to accept the updates, or purchased new batteries to avoid the processing speed slowdown.

48. Defendant's wrongful actions directly and proximately caused the loss of value to Plaintiffs' and Class Members' iPhones causing them to suffer, and continue to suffer, economic damages and other harm for which they are entitled to compensation, including:

- a. Replacement of old phone;
- b. Loss of use;
- c. Loss of value;
- d. Purchase of new batteries;
- e. Ascertainable losses in the form of deprivation of value of their iPhones; and
- f. Overpayments to Defendant for iPhones in that a portion of the price paid for each such iPhone by Plaintiffs and Class Members to Defendant was for Defendant to purposefully not interfere with the usage of their iPhones.

CLASS ACTION ALLEGATIONS

49. Plaintiffs bring this action on their own behalf and pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), (b)(3), and (c)(4), Plaintiffs seek certification of a nationwide class and a Texas class (each a "Class" and, collectively, "the Classes").

50. The nationwide class is initially defined as follows:

All persons residing in the United States who have owned the iPhone SE, iPhone 6, and iPhone 7 that received any of the iOS 10 or iOS 11 Updates.

51. The Texas class is initially defined as follows:

All persons residing in Texas who have owned the iPhone SE, iPhone 6, or iPhone 7 that received any of the iOS10 or iOS 11 Updates.

52. Excluded from each of the above Classes are Defendant, including any entity in which Defendant has a controlling interest, is a parent or subsidiary, or which is controlled by Defendant, as well as the officers, directors, affiliates, legal representatives, heirs, predecessors, successors, and assigns of Defendant. Also excluded are the judges and court personnel in this case and any members

of their immediate families. Plaintiffs reserve the right to amend the Class definitions if discovery and further investigation reveal that the Classes should be expanded or otherwise modified.

53. **Numerosity.** Fed. R. Civ. P. 23(a)(1). The members of the Classes (the “Class Members”) are so numerous that the joinder of all members is impractical. While the exact number of Class Members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are thousands of Class Members, at least. Class Members are readily identifiable from information and records in Defendants’ possession, custody or control.

54. **Commonality.** Fed. R. Civ. P. 23(a)(2) and (b)(3). There are questions of law and fact common to the Classes, which predominate over any questions affecting only individual Class Members. These common questions of law and fact include, without limitation:

- a. Whether Defendant’s failure to disclose the iOS 10 and iOS 11 Updates’ decreases of iPhone processing speed while touting those Updates’ benefits constitutes fraudulent omission;
- b. Whether Defendant’s failure to disclose the iOS 10 and iOS 11 Updates’ decreases of iPhone processing speed while touting those Updates’ benefits constitutes negligent omissions;
- c. Whether Defendant tortuously interfered with the use or value of the iPhone SE, iPhone 6, or iPhone 7 devices; and
- d. Whether Plaintiffs and the Classes are entitled to damages, civil penalties, or punitive damages.

55. **Typicality.** Fed. R. Civ. P. 23(a)(3). Plaintiffs’ claims are typical of those of other Class Members. Each Class Member suffered damages from the loss of use and value of the iPhone SE, iPhone 6, or iPhone 7 device because of the performance slowdowns. The injuries of the Plaintiff and Class are identical and Plaintiffs’ claims for relief are based upon the same legal theories as the claims of other Class Members.

56. **Adequacy of Representation.** Fed. R. Civ. P. 23(a)(4). Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class. Plaintiffs have retained

competent counsel experienced in litigation of class actions and complex civil litigation who will vigorously prosecute this litigation. Plaintiffs' interests are not antagonistic or in conflict with the Class Members' interests.

57. ***Superiority of Class Action.*** Fed. R. Civ. P. 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all the members of the Classes is economically and procedurally impracticable. Additionally, resolving this controversy through a class action will avoid the possibility of inconsistent or conflicting adjudications of the asserted claims. Further, damages for any individual Class Member will be likely insufficient to justify the cost of litigation so, without class treatment, Defendant's violations of law inflicting substantial aggregate damages would be un-remedied.

CAUSES OF ACTION

COUNT ONE Fraudulent Omission

58. Plaintiffs incorporate and reallege the substantive allegations contained in each and every paragraph of this Complaint.

59. Defendant failed to disclose facts within its knowledge to the Plaintiffs and Class Members, namely that the iOS 10 and iOS 11 Updates would cause the iPhone SE, iPhone 6, and iPhone 7 (the "Affected Phones") to run more slowly and that the decrease in processing speed could be avoided by the purchase of a new battery (the "Concealed Facts").

60. Defendant had a duty to disclose the Concealed Facts because they made Defendant's earlier representations misleading or untrue. Specifically, Defendant represented that iOS 10 operating system "make[s] everything you love about your iPhone and iPad even better," that and "in iOS 10, accessing the information you need is easier and quicker than ever before." Defendant's subsequent iOS 10.2.1 update, however, slowed the Affected Phones' processing speed, making "accessing the information you need" slower than before.

61. Additionally, Defendant represented that its iOS 11 operating system “makes iPhone better than before” and that with “iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they’ve ever been.” But Defendant’s subsequent iOS 11.2 update weakened the Affected Phones’ processing power.

62. Defendant had a duty to disclose the Concealed Facts because Defendant made a partial disclosure and conveyed a false impression, giving rise to the duty to speak. Specifically, Defendant represented that iOS 10.2.1 “improves power management during peak workloads to avoid unexpected shutdowns on iPhones” but failed to disclose the “improvement” was to reduce the Affected Phones’ processing speed.

63. The Concealed Facts were material because the decrease in processing speed significantly impacted the functionality of Plaintiffs’ and Class Members’ iPhones.

64. Defendant was deliberately silent when it had a duty to speak and by failing to disclose the Concealed Facts, upon information and belief, intended to induce Plaintiffs and Class Members to purchase newer iPhone models, rather than simply purchase new batteries for their devices.

65. Plaintiffs and similarly situated Class Members relied on Defendants’ non-disclosure of the Concealed Facts and were injured as a result of acting without that knowledge. Specifically, Plaintiffs and similarly situated Class Members unnecessarily purchased newer iPhone models, purchased other Apple accessories in an attempt to restore processing speed, or suffered unnecessarily prolonged loss of the use and function of their devices which could have been remedied by the purchase of a new battery.

COUNT TWO
Negligent Misrepresentation/Omission

66. Plaintiffs fully incorporate and reallege the substantive allegations contained in each and every paragraph of this Complaint.

67. Defendants made representations about the Affected Phones in the course of its business or in a transaction in which it had a pecuniary interest, namely in the sale of iPhones.

68. Defendants provided false information about the Affected Phones for the guidance of Plaintiffs and Class Members. Specifically, Defendant represented that iOS 10 operating system “make[s] everything you love about your iPhone and iPad even better,” that and “in iOS 10, accessing the information you need is easier and quicker than ever before.” Defendant’s subsequent iOS 10.2.1 update, however, slowed the Affected Phones’ processing speed, making “accessing the information you need” slower than before.

69. Additionally, Defendant represented that its iOS 11 operating system “makes iPhone better than before” and that with “iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they’ve ever been.” But Defendant’s subsequent iOS 11.2 update weakened the Affected Phones’ processing power.

70. Defendant represented that iOS 10.2.1 “improves power management during peak workloads to avoid unexpected shutdowns on iPhones” but, in fact, the update did not improve power management but reduced processing speed.

71. Defendant did not exercise reasonable care or competence in obtaining or communicating the information because Defendant claimed that the iOS 10 and iOS 11 Updates would improve the Affected Phones while knowing those updates reduced the Affected Phones’ processing speed.

72. Plaintiff and Class Members relied on Defendants’ representations and were injured as a result of so relying. Specifically, Plaintiffs and similarly situated Class Members unnecessarily

purchased newer iPhone models, purchased other Apple accessories in an attempt to restore processing speed, or suffered unnecessarily prolonged loss of their devices' loss of use and function which could have been remedied by the purchase of a new battery.

COUNT THREE
TORTIOUS INTERFERENCE WITH PROPERTY RIGHTS

73. Plaintiffs incorporate and reallege the substantive allegations contained in each and every paragraph of this Complaint.

74. Plaintiffs and Class Members own or have previously owned the Affected Phones during the time Apple released the iOS 10 and iOS 11 Updates.

75. Defendant intentionally and tortuously interfered with Plaintiffs' and Class Members' peaceful use and enjoyment of their iPhones by materially impairing their iPhones' performance and functionality by reducing the Affected Phones' processing speed.

76. Plaintiffs and Class Members never consented to Defendant interfering with their iPhones and, indeed, could not so consent, because Defendant never informed them that the iOS 10 and iOS 11 Update would decrease their phones' processing speed. Defendant's interference was done with neither just cause nor legal excuse.

77. Defendant's acts caused Plaintiffs and Class Members economic damages and other harm, including, but not limited to, loss of use and enjoyment of their iPhones, loss of value, and losses in the form of costs to upgrade or otherwise replace their iPhones.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all Class Members proposed in this Complaint, respectfully requests that the Court enter judgment in their favor against Defendant as follows:

- A. For an Order certifying the Nationwide Class and Texas Class as defined herein, and appointing Plaintiffs and their counsel to represent the Nationwide Class and the Texas Class;
- B. For an award of actual damages and compensatory damages, in an amount to be determined;
- C. For an award of costs of suit and attorneys' fees, as allowable by law; and
- D. Such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Based on the foregoing, Plaintiffs, of behalf of themselves and all others similarly situated, hereby demand a jury trial for all claims so triable.

Dated: December 27, 2017.

Respectfully submitted,

JOHNSTON PRATT PLLC

By: s/ Kenneth C. Johnston

Kenneth C. Johnston

Texas Bar No. 00792608

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Robert W. Gifford

Texas Bar No. 24093543

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Dallas, Texas 75201

Telephone: (214) 974-8000

Facsimile: (972) 474-1750

Attorneys for Plaintiffs

Exhibit 17

U.S. District Court
Eastern District of Louisiana (New Orleans)
CIVIL DOCKET FOR CASE #: 2:17-cv-17878-MLCF-DEK

LaNasa v. Apple, Inc.
Assigned to: Judge Martin L.C. Feldman
Referred to: Magistrate Judge Daniel E. Knowles, III
Cause: 28:1332 Diversity-Fraud

Date Filed: 12/28/2017
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff

Alfred LaNasa
*on behalf of himself individually and all
others similarly situated*

represented by **Bruce W. Steckler**
Steckler Law, LLP
12720 Hillcrest Road
Suite 1045
Dallas, TX 75230
972-387-4040
Fax: 972-387-4041
Email: bruce@stecklerlaw.com
ATTORNEY TO BE NOTICED

V.

Defendant**Apple, Inc.**

Date Filed	#	Docket Text
12/28/2017	<u>1</u>	COMPLAINT with jury demand against Apple, Inc. (Filing fee \$ 400 receipt number 053L-6568164) filed by Alfred LaNasa. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Summons)Attorney Bruce W. Steckler added to party Alfred LaNasa(pty:pla).(Steckler, Bruce) (Entered: 12/28/2017)
12/28/2017	2	Initial Case Assignment to Judge Martin L.C. Feldman and Magistrate Judge Daniel E. Knowles, III. (djg) (Entered: 12/28/2017)

PACER Service Center**Transaction Receipt**

12/28/2017 14:52:58

PACER Login:	KaplanFox:2581070:0	Client Code:	
Description:	Docket Report	Search Criteria:	2:17-cv-17878-MLCF-DEK

Billable Pages:	1	Cost:	0.10
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

**ALFRED LANASA, on behalf of himself
individually and all others similarly
situated,**

Plaintiff,

v.

APPLE, INC.,

Defendant.

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Case No. 2:17-cv-17878

CLASS ACTION COMPLAINT

CLASS ACTION COMPLAINT

Plaintiff, individually and on behalf of the Classes defined below, files this Class Action Complaint against Apple, Inc. as follows:

NATURE OF THE ACTION

1. Apple promised that its recent iOS 10 and iOS 11 software updates to the iPhone 6 and iPhone 7 models would improve those devices’ performance and it strongly encouraged its customers to accept those updates. But Apple didn’t tell its customers that it had intentionally designed those software updates to slow the devices’ processing speed to correct a battery defect. Apple then happily took its customers’ money when the customers, dissatisfied with their now-slower devices, purchased new and more expensive iPhones. Apple came clean only this month under public pressure, admitting its software updates were slowing processor speed. Now Plaintiff and Class Members must either purchase new phones for hundreds, if not thousands, of dollars or continue to struggle with their slowed devices.

2. Plaintiff asserts a class action on behalf of owners of the iPhone SE, iPhone 6, iPhone 6s, iPhone 6 Plus, iPhone 6s Plus (collectively, the “iPhone 6”), and the iPhone 7 and iPhone 7 Plus (collectively, the “iPhone 7”) whose devices were harmed by Apple’s updating of their devices’

software to iOS 10.2.1, 10.3, 10.3.1, 10.3.3 (the “iOS 10 Update”) and to iOS 11.0.1, 11.0.2, 11.0.3, 11.1.1, 11.1.2, 11.2, and 11.2.1 (the “iOS 11 Update,” and, collectively, the “iOS 10 and iOS 11 Updates”). Those updates were released between January 23, 2017 and December 13, 2017.

THE PARTIES

3. Plaintiff Alfred LaNasa is a Louisiana citizen residing at 5523 Hawthorne Place, New Orleans, Orleans Parish, Louisiana 70124.

4. Plaintiff brings this action on his own behalf and on behalf of all others similarly situated, namely all other individuals who have purchased the iPhone SE, iPhone 6, or iPhone 7 and received the iOS 10 Update or iOS 11 Update.

5. Defendant Apple, Inc. is a corporation organized and existing under the laws of the State of California with its principal place of business at 1 Infinite Loop, Cupertino, California.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the state law claims asserted herein pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), because some of the Class Members are citizens of states different from the Defendant’s; upon the Complaint’s filing, the putative class members reside in numerous states around the country; more than 100 putative class members exist; and the amount in controversy exceeds \$5 million.

7. The Court also has personal jurisdiction over the Parties because Defendant conducts a major part of its national operations with regular and continuous business activity in Louisiana.

8. Venue is appropriate because, among other things: (a) Plaintiff is a resident and citizen of this District; (b) Defendant has directed its activities at residents in this District; and (c) the acts and omissions that gave rise to this Action took place, among others, in this judicial district.

9. Venue is also appropriate pursuant to 28 U.S.C. § 1391 because Defendant conducts a large amount of its business in this District and Defendant has substantial relationships in this

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14. Consumers worldwide complained of the unexpected shutdown. In November 2016, a Chinese consumer association requested that Apple investigate "a considerable number" of reports by iPhone 6 and iPhone 6s users that the devices were shutting off despite displaying high battery levels and in room temperature environments.

15. Just a few weeks later, Apple acknowledged that "a very small number of iPhone 6s devices may unexpectedly shut down" due to battery issues. It admitted, on its Chinese-language website only, that this problem had been caused by "a battery component's" unduly long exposure to "controlled ambient air" during manufacture between September and October 2015.

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Our goal is to deliver the best experience for customers, which includes overall performance and prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age over time, which can result in the device unexpectedly shutting down to protect its electronic components.

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 - c. iOS 10.3.2 and 10.3.3 included “bug fixes” and improved “the security of your iPhone”
 - d. iOS 11.0.1, iOS 11.0.2, and iOS 11.0.3 included “bug fixes” and “improvements” to various iPhone functions.
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41. Plaintiff and Class Members own or have previously owned iPhone SE, iPhone 6s, or iPhone 7s during the time Apple released the iOS 10 and iOS 11 Updates.

42. As a result of the iOS 10 and iOS 11 Updates, Plaintiff's iPhone operated more slowly and its functionality was materially impaired. His iPhone suffered problems with applications freezing and delayed response time.

43. Plaintiff attempted to address those problems by purchasing new iPhones, at the cost of hundreds of dollars.

44. Plaintiff was unaware of the slowed processing speed caused by the iOS10 and iOS 11 Updates.

45. Had he been aware of the decreased processing speed caused by those updates, Plaintiff would have purchased different, non-Apple, phones, refused to accept the updates, or purchased new batteries to avoid the processing speed slowdown.

46. Defendant's wrongful actions directly and proximately caused the loss of value to Plaintiff's and Class Members' iPhones causing them to suffer, and continue to suffer, economic damages and other harm for which they are entitled to compensation, including:

- a. Replacement of old phone;
- b. Loss of use;
- c. Loss of value;
- d. Purchase of new batteries;
- e. Ascertainable losses in the form of deprivation of value of their iPhones; and

- f. Overpayments to Defendant for iPhones in that a portion of the price paid for each such iPhone by Plaintiff and Class Members to Defendant was for Defendant to purposefully not interfere with the usage of their iPhones.

CLASS ACTION ALLEGATIONS

47. Plaintiff brings this action on his own behalf and pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), (b)(3), and (c)(4), Plaintiff seeks certification of a nationwide class and a Louisiana class (each a “Class” and, collectively, “the Classes”).

48. The nationwide class is initially defined as follows:

All persons residing in the United States who have owned the iPhone SE, iPhone 6, and iPhone 7 that received any of the iOS 10 or iOS 11 Updates.

49. The Louisiana class is initially defined as follows:

All persons residing in Louisiana who have owned the iPhone SE, iPhone 6, or iPhone 7 that received any of the iOS10 or iOS 11 Updates.

50. Excluded from each of the above Classes are Defendant, including any entity in which Defendant has a controlling interest, is a parent or subsidiary, or which is controlled by Defendant, as well as the officers, directors, affiliates, legal representatives, heirs, predecessors, successors, and assigns of Defendant. Also excluded are the judges and court personnel in this case and any members of their immediate families. Plaintiff reserves the right to amend the Class definitions if discovery and further investigation reveal that the Classes should be expanded or otherwise modified.

51. **Numerosity.** Fed. R. Civ. P. 23(a)(1). The members of the Classes (the “Class Members”) are so numerous that the joinder of all members is impractical. While the exact number of Class Members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that there are thousands of Class Members, at least. Class Members are readily identifiable from information and records in Defendants’ possession, custody or control.

52. **Commonality.** Fed. R. Civ. P. 23(a)(2) and (b)(3). There are questions of law and fact

common to the Classes, which predominate over any questions affecting only individual Class Members. These common questions of law and fact include, without limitation:

- a. Whether Defendant's failure to disclose the iOS 10 and iOS 11 Updates' decreases of iPhone processing speed while touting those Updates' benefits constitutes fraudulent omission;
- b. Whether Defendant's failure to disclose the iOS 10 and iOS 11 Updates' decreases of iPhone processing speed while touting those Updates' benefits constitutes negligent omissions;
- c. Whether Defendant intentionally and improperly used, altered, or destroyed Plaintiff's or Class Members' iPhone SE, iPhone 6, or iPhone 7 devices;
- d. Whether Plaintiffs and the Classes are entitled to damages, civil penalties, punitive damages, and/or injunctive relief.

53. **Typicality.** Fed. R. Civ. P. 23(a)(3). Plaintiff's claims are typical of those of other Class Members. Each Class Member suffered damages from the loss of use and value of the iPhone SE, iPhone 6, or iPhone 7 device because of the performance slowdowns. The injuries of the Plaintiff and Classes are identical and Plaintiff's claims for relief are based upon the same legal theories as the claims of other Class Members.

54. **Adequacy of Representation.** Fed. R. Civ. P. 23(a)(4). Plaintiff will fairly and adequately represent and protect the interests of the members of the Class. Plaintiff has retained competent counsel experienced in litigation of class actions and complex civil litigation who will vigorously prosecute this litigation. Plaintiff's interests are not antagonistic or in conflict with the Class Members' interests.

55. **Superiority of Class Action.** Fed. R. Civ. P. 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all the members of the Classes is economically and procedurally impracticable. Additionally, resolving this controversy through a class action will avoid the possibility of inconsistent or conflicting adjudications of the asserted claims. Further, damages for any individual Class Member will be likely

insufficient to justify the cost of litigation so, without class treatment, Defendant's violations of law inflicting substantial aggregate damages would be un-remedied.

CAUSES OF ACTION

COUNT ONE Fraudulent Omission

56. Plaintiffs incorporate and reallege the substantive allegations contained in each and every paragraph of this Complaint.

57. Defendant failed to disclose facts within its knowledge to the Plaintiffs and Class Members, namely that the iOS 10 and iOS 11 Updates would cause the iPhone SE, iPhone 6, and iPhone 7 (the "Affected Phones") to run more slowly and that the decrease in processing speed could be avoided by the purchase of a new battery (the "Concealed Facts").

58. Defendant had a duty to disclose the Concealed Facts because they made Defendant's earlier representations misleading or untrue. Specifically, Defendant represented that iOS 10 operating system "make[s] everything you love about your iPhone and iPad even better," that and "in iOS 10, accessing the information you need is easier and quicker than ever before." Defendant's subsequent iOS 10.2.1 update, however, slowed the Affected Phones' processing speed, making "accessing the information you need" slower than before.

59. Additionally, Defendant represented that its iOS 11 operating system "makes iPhone better than before" and that with "iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they've ever been." But Defendant's subsequent iOS 11.2 update weakened the Affected Phones' processing power.

60. Defendant had a duty to disclose the Concealed Facts because Defendant made a partial disclosure and conveyed a false impression, giving rise to the duty to speak. Specifically, Defendant represented that iOS 10.2.1 "improves power management during peak workloads to avoid

unexpected shutdowns on iPhones” but failed to disclose the “improvement” was to reduce the Affected Phones’ processing speed.

61. The Concealed Facts were material because the decrease in processing speed significantly impacted the functionality of Plaintiff’s and Class Members’ iPhones.

62. Defendant was deliberately silent when it had a duty to speak and by failing to disclose the Concealed Facts, upon information and belief, intended to induce Plaintiffs and Class Members to purchase newer iPhone models, rather than simply purchase new batteries for their devices.

63. Plaintiffs and similarly situated Class Members relied on Defendants’ non-disclosure of the Concealed Facts and were injured as a result of acting without that knowledge. Specifically, Plaintiffs and similarly situated Class Members unnecessarily purchased newer iPhone models, purchased other Apple accessories in an attempt to restore processing speed, or suffered unnecessarily prolonged loss of the use and function of their devices which could have been remedied by the purchase of a new battery.

COUNT TWO
Negligent Misrepresentation/Omission

64. Plaintiffs fully incorporate and reallege the substantive allegations contained in each and every paragraph of this Complaint.

65. Defendants made representations about the Affected Phones in the course of its business or in a transaction in which it had a pecuniary interest, namely in the sale of iPhones.

66. Defendants provided false information about the Affected Phones for the guidance of Plaintiffs and Class Members. Specifically, Defendant represented that iOS 10 operating system “make[s] everything you love about your iPhone and iPad even better,” that and “in iOS 10, accessing the information you need is easier and quicker than ever before.” Defendant’s subsequent iOS 10.2.1 update, however, slowed the Affected Phones’ processing speed, making “accessing the information you need” slower than before.

67. Additionally, Defendant represented that its iOS 11 operating system “makes iPhone better than before” and that with “iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they’ve ever been.” But Defendant’s subsequent iOS 11.2 update weakened the Affected Phones’ processing power.

68. Defendant represented that iOS 10.2.1 “improves power management during peak workloads to avoid unexpected shutdowns on iPhones” but, in fact, the update did not improve power management but reduced processing speed.

69. Defendant had a legal duty to supply correct information to Plaintiff, but did not exercise reasonable care or competence in obtaining or communicating the information because Defendant claimed that the iOS 10 and iOS 11 Updates would improve the Affected Phones while knowing those updates reduced the Affected Phones’ processing speed.

70. Plaintiff and Class Members relied on Defendants’ representations and were injured as a result of so relying. Specifically, Plaintiffs and similarly situated Class Members unnecessarily purchased newer iPhone models, purchased other Apple accessories in an attempt to restore processing speed, or suffered unnecessarily prolonged loss of their devices’ loss of use and function which could have been remedied by the purchase of a new battery.

COUNT THREE CONVERSION

71. Plaintiff incorporates and realleges the substantive allegations contained in each and every paragraph of this Complaint.

72. Plaintiff and Class Members own or have previously owned the Affected Phones during the time Apple released the iOS 10 and iOS 11 Updates.

73. The owned or previously-owned Affected Phones constituted Plaintiff’s and Class Members’ movable property.

74. Defendants intentionally and improperly used, altered or destroyed Plaintiff's and Class' Members' iPhones by reducing their processing speed.

75. Plaintiff and Class Members never authorized Defendant to use or otherwise interfere with their iPhones.

76. Defendant's tortious conduct resulted in the derogation of Plaintiff's possessory rights.

77. Defendant's acts caused Plaintiff and Class Members economic damages and other harm, including, but not limited to, loss of use and enjoyment of their iPhones, loss of value, and losses in the form of costs to upgrade or otherwise replace their iPhones.

COUNT FOUR
VIOLATION OF LOUISIANA CIVIL CODE ART. 2315

78. Plaintiff incorporates and realleges the substantive allegations contained in each and every paragraph of this Complaint.

79. Defendant's acts caused Plaintiff and Class Members economic damages and other harm, including, but not limited to, loss of use and enjoyment of their iPhones, loss of value, and losses in the form of costs to upgrade or otherwise replace their iPhones.

80. By reason of the foregoing, Plaintiff and Class Members are entitled to relief pursuant to La. Civ. Code Ann. art. 2315(a).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all Class Members proposed in this Complaint, respectfully requests that the Court enter judgment in his favor against Defendant as follows:

- A. For an Order certifying the Nationwide Class and Louisiana Class as defined herein, and appointing Plaintiff and his counsel to represent the Nationwide Class and the Louisiana Class;
- B. For an award of actual damages and compensatory damages, in an amount to be determined;

- C. For an award of costs of suit and attorneys' fees, as allowable by law; and
- D. Such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Based on the foregoing, Plaintiff, of behalf of himself and all others similarly situated, hereby demands a jury trial for all claims so triable.

Dated: December 28, 2017.

Respectfully submitted,

STECKLER GRESHAM COCHRAN PLLC

/s/ Bruce W. Steckler

Bruce W. Steckler

Louisiana Bar No. 33657

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rgifford@johnstonpratt.com

Attorneys for Plaintiffs

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Alfred LaNasa, on behalf of himself individually and all others similarly situated, (b) County of Residence of First Listed Plaintiff Orleans Parish, LA (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Bruce W. Steckler | Steckler Gresham Cochran PLLC 12720 Hillcrest Rd - Suite 1045, Dallas, TX 75230 Tel. 972-387-4040 | bruce@stecklerlaw.com

DEFENDANTS

Apple Inc. County of Residence of First Listed Defendant Santa Clara, CA (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and business location. Includes categories like Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, LABOR, IMMIGRATION, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal codes and descriptions.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 USC 1332. Brief description of cause: Consumer fraud; unfair business practices.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 12/28/2017 SIGNATURE OF ATTORNEY OF RECORD s/ Bruce W. Steckler

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Louisiana

ALFRED LaNASA, on behalf of himself individually
and all others similarly situated

Plaintiff(s)

v.

APPLE, INC.

Defendant(s)

Civil Action No. 2:17-cv-17878

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

Apple, Inc.
c/o CT Corporation System (registered agent)
3867 Plaza Tower Drive
Baton Rouge, LA 70816

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Bruce Steckler
Steckler Gresham Cochran PLLC
12720 Hillcrest Road, Suite 1045
Dallas, TX 75230

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Exhibit 18

**U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:17-cv-24712-DPG**

Aburos v. Apple Inc.
Assigned to: Judge Darrin P. Gayles
Cause: 28:1332 Diversity-(Citizenship)

Date Filed: 12/28/2017
Jury Demand: Plaintiff
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff**Yael Aburos**

represented by **Richard Brian Rosenthal**
Richard B. Rosenthal
1581 Brickell Avenue
Suite 1408
Miami, FL 33129
305-992-6089
Fax: 305-675-8053
Email: rbr@rosenthalappeals.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Stephen Frederick Rosenthal
Podhurst Orseck Josefsberg et al
SunTrust International Center
1 SE 3rd Avenue
Suite 2700
Miami, FL 33131-1715
305-358-2800
Fax: 305-358-2382
Email: srosenthal@podhurst.com
ATTORNEY TO BE NOTICED

V.

Defendant**Apple Inc.**

Date Filed	#	Docket Text
12/28/2017	1	COMPLAINT against Apple Inc.. Filing fees \$ 400.00 receipt number 113C-10289996, filed by Yael Aburos. (Attachments: # 1 Exhibit A - iOS Software License Agreement, # 2 Civil Cover Sheet)(Rosenthal, Stephen) (Entered: 12/28/2017)

12/28/2017	2	<p>Clerks Notice of Judge Assignment to Judge Darrin P. Gayles.</p> <p>Pursuant to 28 USC 636(c), the parties are hereby notified that the U.S. Magistrate Judge Alicia M. Otazo-Reyes is available to handle any or all proceedings in this case. If agreed, parties should complete and file the Consent form found on our website. It is not necessary to file a document indicating lack of consent. (pes) (Entered: 12/29/2017)</p>
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PACER Service Center			
Transaction Receipt			
12/29/2017 10:54:07			
PACER Login:	KaplanFox:2581070:0	Client Code:	
Description:	Docket Report	Search Criteria:	1:17-cv-24712-DPG
Billable Pages:	1	Cost:	0.10

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. _____

Yael Aburos, individually and
on behalf of others similarly-situated,

Plaintiff,

v.

Apple Inc.

Defendant.

CLASS ACTION

COMPLAINT

Plaintiff, Yael Aburos, individually and on behalf of others similarly situated, brings this class action lawsuit against Defendant, Apple Inc. (“Apple”), for its unlawful conduct in pushing a software “upgrade” onto existing iPhone device owners which seriously degraded the battery life of the device, dramatically reducing its use as a mobile device.

NATURE OF THE ACTION

1. This action is brought on behalf of owners of Apple iPhone devices who accepted Apple’s invitation to download one or more iOS 11 Software Updates onto their existing iPhone device which had the effect of seriously degrading the battery life on their device.

2. As a result of the deleterious effect of the iOS 11 “upgrade,” many such owners, like Plaintiff, junked their existing iPhone and purchased newly available iPhone 8 or X series devices in order to have a reliable mobile device.

3. Apple knew or should have known of the serious negative impact iOS 11 would have on the battery life of existing iPhones, yet the company took no action to warn owners

against downloading the software update, nor to provide a fix such as allowing a downgrade to purge the offending iOS 11 software from affected devices.

PARTIES

4. Plaintiff, Yael Aburos, is a resident of the Town of Bay Harbor Islands, located in Miami-Dade County, Florida.

5. Defendant, Apple Inc., is a California corporation headquartered in Cupertino, California, which designs and markets its iPhone devices throughout the United States.

JURISDICTION AND VENUE

6. This is a class action, on behalf of more than one hundred putative class members, for damages that exceed \$5,000,000.00, exclusive of interest and costs.

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d).

8. Defendant is subject to personal jurisdiction in Florida because it directed its flawed iOS 11 Software Update to existing iPhone device owners whom it knew were located in Florida, with the intent that the software “update” Plaintiff’s iPhone in Florida – an unlawful act – and because Apple engages in substantial, continuous, systematic, and non-isolated business activity within the state of Florida.

9. Venue is proper within this District because a substantial part of the events giving rise to the claims occurred in this District, namely that Apple pushed its iOS 11 Software Update to Plaintiff’s iPhone in Florida.

GENERAL ALLEGATIONS

10. Beginning sometime in 2016, by its own recent admission, Apple secretly began including a feature which had the effect of throttling the performance of iPhone devices in the iOS Software Updates, also known as “Apple security updates,” that it offered to iPhone users.

11. When Defendant releases a new operating system, it pushes the software directly to the customers' iPhones through a red signal that notifies users of the existence of an available "software update." Within minutes, device owners can click on the prompt and download the new operating system.

12. Apple knew of the adverse effects its throttling software had on iPhone performance but did not disclose its existence until December 20, 2017, well after Plaintiff, along with millions of other users, downloaded the software.

13. At all times material, Apple's push messages and other product information was disseminated by Apple from its corporate headquarters in California.

A. Apple's iOS 11 contains a concealed battery-life killer.

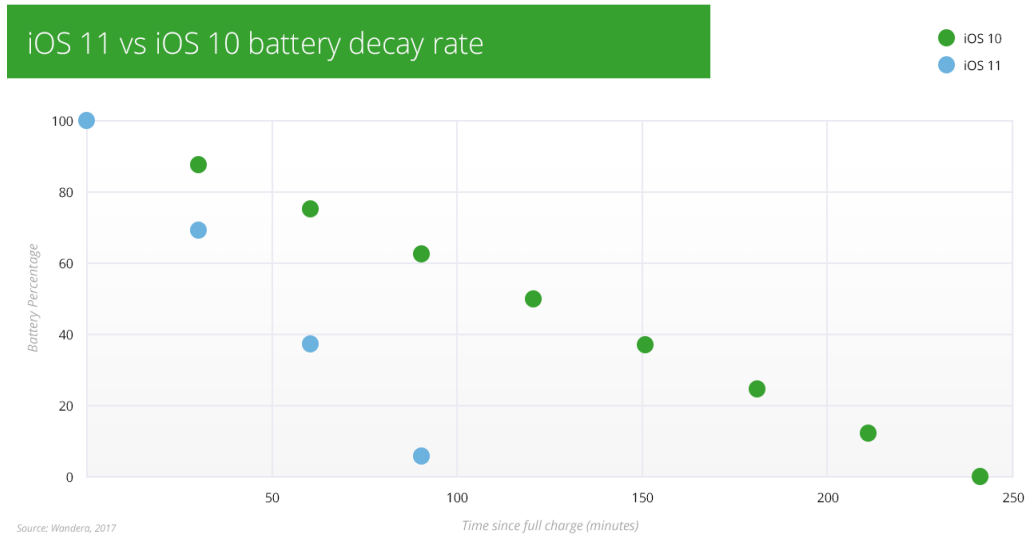
14. Apple released iOS 11 on September 19, 2017.

15. Apple represented on its website, and generally, that "iOS 11 is compatible with" the following iPhone devices which predated the release of iOS11: iPhone 5s, iPhone SE, iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus, iPhone 7, and iPhone 7 Plus. <https://support.apple.com/en-us/KM207938> (last visited December 21, 2017). (These iPhone devices shall be referred to as "existing iPhones.")

16. On or about September 15, 2017, Apple began accepting orders for its latest generation of iPhone devices, the iPhone 8 and iPhone 8 Plus. Those devices were first made available for sale on or about September 22, 2017. Apple released the iPhone X for sale on or about November 3, 2017.

17. Immediately upon downloading iOS 11, existing iPhone users, like Plaintiff, began to experience a marked decrease in battery life on their devices.

18. One study of thousands of iPhone users within a monitored network compared the relative battery life of existing iPhones operating on iOS 10 versus iOS 11. The chart below shows the rate at which an iPhone with a fully charged battery loses battery power:



Source: <https://wandera.com/blog/ios-11-battery-drain/>.

19. This study revealed that existing iPhones operating on the iOS 10 software on average drained to 0% battery after 240 minutes (4 hours), whereas those operating on iOS 11 on average drained to 0% battery after only 96 minutes (just over 1½ hours). In other words, iOS 11 reduced the average iPhone’s battery life by more than 60%.

20. Apple’s brief description of the software update for iOS 11 said nothing about the effect of the update on battery life. Apple did not disclose this serious adverse effect iOS 11 would have on the battery life of existing iPhones.

21. In fact, during the relevant time period, Apple misleadingly represented that its operating system updates would *improve* iPhone battery life.

22. Apple maintained on its website, at all relevant times, the following “Performance Tip” for “Maximizing Battery Life and Lifespan”:

Update to the latest software.

Apple software updates often include advanced *energy-saving technologies*, so always make sure your device is using the latest version of iOS . . .

<https://www.apple.com/batteries/maximizing-performance/> (last visited December 21, 2017)

(emphasis added).

23. Apple knew, or should have known, that iOS 11 would have the exact opposite effect on existing iPhones.

24. Shortly after the release of iOS11, complaints from existing iPhone users mounted about newfound, terrible battery life.

25. On information and belief, Apple was aware of these complaints, yet did not admit to the software problem.

26. Nor did Apple notify users of the option of purchasing a new battery for their existing iPhone, at a typical cost of \$79.

27. Instead, Apple welcomed owners of existing iPhones to upgrade to a new iPhone 8 or X, at a cost between \$699 to over \$1000.

28. Apple subsequently released several subsequent versions of its iOS 11 software update: iOS 11.0.1 on September 26, 2017; iOS 11.0.2 on October 3, 2017; iOS 11.0.3 on October 11, 2017; iOS 11.1 on October 31, 2017; iOS 11.1.1 on November 9, 2017; iOS 11.1.2 on November 16, 2017; iOS 11.2 on December 2, 2017; and iOS 11.2.1 on December 13, 2017.

29. On information and belief, the battery-life problem which iOS 11 caused in existing iPhones is the same or similar for the subsequently released versions of iOS 11. Therefore, all references in this Complaint to “iOS 11” also include these subsequent versions of the operating software.

30. Apple prevented owners of existing iPhones from escaping the problem caused by iOS 11 by removing the option of downgrading the operating system back to iOS 10.3.3. While that solution was feasible, Apple stopped “signing” code for iOS 10.3.3, thereby blocking the software escape route from iOS 11.

B. Plaintiff’s similar experience.

31. Plaintiff Yael Aburos’s experience was consistent with that depicted in the study referenced above.

32. In 2017, she owned an iPhone 6. Prior to accepting Apple’s iOS 11 software update, the battery on her iPhone 6 could charge to 100% and lasted for hours before losing its charge.

33. After downloading the iOS 11 software, however, the battery life on her iPhone 6 dropped precipitously. Her iPhone would now only charge to 80% capacity, and the battery would plummet during the course of a single phone call down to 0% and “die.”

34. As a result of the inconvenience of not having a reliable cellular telephone, Plaintiff felt compelled to purchase a new iPhone 8 Plus, at a cost of around \$800.

35. Plaintiff was content with the functionality of her iPhone 6 prior to downloading iOS 11 and would not have purchased the iPhone 8 Plus but for the battery-life problems caused by iOS 11.

CLASS ACTION ALLEGATIONS

Class Definitions

36. Under Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure, Plaintiff bring this action on behalf of herself and a class of all those similarly situated defined as follows:

National Class: All owners or former owners of existing iPhone devices in the United States who downloaded iOS 11, or a subsequent version thereof.

37. Plaintiff also brings this action on behalf of herself and all those similarly situated within the following subclasses:

Florida Subclass: All Florida-resident owners or former owners of existing iPhone devices who downloaded iOS 11, or a subsequent version thereof.

National Unjust Enrichment Subclass: All former owners of existing iPhone devices in the United States who downloaded iOS 11, or a subsequent version thereof, and then purchased a replacement iPhone 8, iPhone 8 Plus, or iPhone X.

38. Excluded from the Class and Subclasses are Apple and its employees, officers, directors, legal representatives, successors and wholly or partly owned subsidiaries or affiliated companies; class counsel and their employees; and the judicial officers and their immediate family members and associated court staff assigned to this case.

39. The Class and Subclasses can be readily identified from Apple's records of iPhone owners. For instance, when iPhones are activated, and when various functions are performed on them, including downloading an iOS Software Update, the device transmits and Apple receives, collects and maintains, both a "unique hardware identifier" for the iPhone as well as "unique account identifiers" associated with the owner's Apple ID. *See, e.g.*, Ex. A at 2, § 2(b).

Numerosity

40. There are millions of existing iPhone device owners in the United States. As of December 4, 2017, according to Apple, 59% of all Apple devices are running iOS 11. *See* <https://developer.apple.com/support/app-store/> (last visited December 27, 2017).

41. Consequently, the number of Class members is great enough that joinder is impracticable.

Typicality

42. Plaintiff's claims are typical of the claims of the Class and the Subclasses. Like members of the Class, Plaintiff owned an existing iPhone and downloaded iOS 11. Like all members of the Class, Plaintiff then experienced a reduction in the battery life of her iPhone.

43. Like all members of the Florida Subclass, Plaintiff suffered actual damages when the functionality of her existing iPhone was severely impaired by downloading iOS 11 in Florida.

44. And like the members of the Unjust Enrichment Subclass, Plaintiff responded to the newfound battery problem caused by iOS 11 by junking her existing iPhone and purchasing a new one from Apple, conferring upon Apple an unjustly earned monetary benefit.

Adequacy of Representation

45. Plaintiff will fairly and adequately protect the Class and Subclasses' interests and has retained counsel competent and experienced in class-action litigation. Plaintiffs' interests are coincident with, and not antagonistic to, absent Class and Subclass members' interests because by proving her individual claims, she will necessarily prove the liability of Apple to the Class and Subclasses as well. Plaintiff is also cognizant of, and determined to, faithfully discharge her fiduciary duties to the absent Class and Subclass members as their representative.

46. Plaintiffs' counsel have substantial experience in prosecuting class actions. Plaintiff and counsel are committed to vigorously prosecuting this action, have the financial resources to do so, and do not have any interests adverse to the Class or Subclasses.

Commonality and Predominance

47. There are numerous questions of law and fact the answers to which are common to each Class and Subclass and predominate over questions affecting only individual members, including the following:

- a) Whether iOS 11 degraded the battery life of all existing iPhones;
- b) Whether Apple breached its iOS Software License Agreement by providing a software “update” that degraded the battery life of existing iPhones to the point that they could not reasonably be used as mobile devices;
- c) Whether Apple’s pushing of iOS 11 to owners of existing iPhone devices constitutes a breach of the covenant of good faith and fair dealing;
- d) Whether Apple’s pushing of iOS 11 to owners of existing iPhones constitutes an unfair or deceptive act or practice;
- e) Whether Apple’s failure to warn owners of existing iPhones that acceding to Apple’s push to iOS 11 would substantially degrade the battery life of existing iPhones constitutes a deceptive, unfair, or unlawful business practice proscribed by Florida and/or California law;
- f) Whether Apple’s failure to notify owners of existing iPhones who downloaded iOS 11 that replacing the battery on their device offers a cheaper remedy than purchasing a new iPhone constitutes an unfair or deceptive act or practice;
- g) Whether Apple’s decision to preclude owners of existing iPhone devices who downloaded iOS 11 to downgrade their devices back to iOS 10.3.3. constitutes an unfair or deceptive act or practice; and
- h) Whether Plaintiff and the National Unjust Enrichment Subclass members are entitled to disgorgement or restitution of the monies paid to Apple for the purchase of a replacement iPhone which they would not otherwise have purchased but for the deleterious effect of iOS 11 on their then-existing iPhones.

Superiority and Manageability

48. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all the individual Class and Subclass members is impracticable. Likewise, because the damages suffered by each individual Class member are relatively small, the expense and burden of individual litigation would make it very difficult or impossible for individual Class or Subclass members to redress the wrongs done to each of them individually, and the burden imposed on the judicial system would be enormous.

49. The prosecution of separate actions by the individual Class or Subclass members would also create a risk of inconsistent or varying adjudications. The conduct of this action as a class action presents far fewer management difficulties, conserves judicial resources and the parties' resources, and protects the rights of each Class or Subclass member.

COUNT I

Violation of the Florida Deceptive and Unfair Trade Practices Act

50. Plaintiff repeats and re-alleges the allegations in paragraphs 1 to 49 above as if fully set forth herein.

51. The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") prohibits persons from engaging in "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.204(1).

52. Apple's pushing of its iOS 11 software update to owners of existing iPhones constitutes an "unfair," "deceptive," and/or "unconscionable" act or practice in violation of Fla. Stat. § 501.204.

53. Specifically, Apple’s conduct was “unfair,” “deceptive,” and/or “unconscionable”

in one or more of the following ways:

- a) Pushing a software “upgrade” on owners of existing iPhones that renders their device effectively useless because the software so markedly degrades its battery life;
- b) Despite knowing, of being in a position where it should have known, of this harmful effect of iOS 11, Apple did not warn owners of existing iPhones of the risk that the their device’s battery life would be severely impaired by downloading the software update;
- c) Affirmatively misrepresenting that its operating system updates have “energy-saving technologies,” so that to “[m]aximize [b]attery [l]ife,” owners of existing iPhones should “always make sure [their] device is using the latest version of iOS,” when that is not true for iOS 11;
- d) Blocking owners of existing iPhone devices who downloaded iOS 11 from escaping the deleterious effects of iOS 11 on their device’s battery through a downgrade back to iOS 10.3.3; and
- e) Marketing new iPhone 8 and X devices without also marketing the availability of replacement batteries as a cheaper fix for an adversely affected existing iPhone.

54. The above-referenced statements and/or omissions would be material to a reasonable person, like Plaintiff, and would likely affect their decisions to accept Apple’s suggestion to download iOS 11 and/or to purchase a new iPhone as a replacement. As a result, Apple has engaged in deceptive acts or practices in violation of the FDUTPA.

55. Based on the foregoing, Apple’s actions or omissions caused or are likely to cause substantial injury to persons that they could not reasonably avoid themselves and that is not outweighed by countervailing benefits to persons or competition; or Apple’s actions or omissions offend established public policy and are unethical, oppressive, unscrupulous or substantially

injurious to persons. As a result, Apple has engaged in unfair acts or practices in violation of the FDUTPA.

56. As a result of Apple's unfair, deceptive and/or unconscionable practices, Plaintiff and the Class and Subclass members have been aggrieved and have suffered, or will suffer, actual damages resulting from their loss of use of their existing iPhones and subsequent purchase of a new replacement iPhone.

57. In addition to their actual monetary damages, Plaintiff and the Class are also entitled, pursuant to Fla. Stat. § 501.211(1), to the following non-monetary relief:

- a) a permanent injunction to prevent Apple from continuing to push iOS 11 to existing iPhone device owners without appropriate warnings concerning the deleterious effect on battery life;
- b) a permanent injunction to compel Apple to notify owners of existing iPhones that the battery problem caused by iOS 11 can be remedied by replacing the existing battery;
- c) a declaratory judgment that Apple's conduct violates the FDTUPA.

58. Plaintiff and members of the Class and Subclasses are entitled to actual damages and all other relief allowable under the FDUTPA, including the recovery of costs and reasonable attorneys' fees in pursuing these claims.

COUNT II

Unjust Enrichment

59. Plaintiff repeats and re-alleges the allegations in paragraphs 1 to 49 above as if fully set forth herein.

60. When Plaintiff and members of the National Unjust Enrichment Subclass purchased a new iPhone as a replacement for their existing device that was ruined by downloading iOS 11, they conferred a benefit upon Apple.

61. Apple accepted and retained this benefit.

62. Under the circumstances described above, it would be inequitable for Apple to be permitted to retain the benefit of the revenue it has received from the same of replacement iPhones to Plaintiff and members of the National Unjust Enrichment Subclass.

63. Accordingly, Plaintiff and the National Unjust Enrichment Subclass seek disgorgement and/or restitution of these unjustly conferred financial benefits.

COUNT III

Breach of Contract

64. Plaintiff repeats and re-alleges the allegations in paragraphs 1 to 49 above as if fully set forth herein.

65. Apple requires everyone who downloads iOS 11 to agree to the terms of a contract: its iOS Software License Agreement. *See* Exhibit A.

66. In the iOS Software License Agreement, Apple permits the iPhone device owner “to use the iOS Software on a single Apple-branded iOS Device.” Ex. A at 1, § 2(a) (emphasis added). In addition to Apple’s promise that the software can be “use[d]” on the iPhone device, which is in part a “mobile phone[,]” Apple also promises that the iOS Software Updates will “update or restore the software” on the iPhone device. *Id.* at 2, §§ 2(b), (j).

67. Plaintiff performed her obligations under the iOS Software License Agreement for iOS 11.

68. Apple breached its iOS Software License Agreement for iOS 11 by providing software that could not be “used” as intended since the operating system software killed the battery life of the device, rendering it effectively inoperable, particularly as a “mobile” device.

69. Apple further breached its iOS Software License Agreement for iOS 11 by providing software that could did not “restore” the software on existing iPhones. Rather, the iOS 11 software degraded the software on the existing iPhones, rendering the devices incapable of retaining a charge for any reasonable amount of time.

70. As a result of Apple’s breach of its promises in the iOS Software License Agreement, Plaintiff, and all those similarly situated, have suffered damages in the form of the loss of the value of their existing iPhone.

71. Accordingly, Plaintiff, and all those similarly situated, seek damages for Apple’s breach of contract.

COUNT IV

Breach of the Covenant of Good Faith and Fair Dealing

72. Plaintiff repeats and re-alleges the allegations in paragraphs 1 to 49 above as if fully set forth herein.

73. Apple requires everyone who downloads iOS 11 to agree to the terms of a contract, its iOS Software License Agreement.

74. In the iOS Software License Agreement, Apple promised to provide a software “update” that would facilitate the “use” of existing iPhones.

75. Implied in every such contract, as a matter of law, is a covenant of good faith and fair dealing, by which parties to the contract promise not to violate the spirit of the bargain or to act in such a way that denies the other party the expected the benefit of the contract.

76. Implied in the iOS Software License Agreement is a promise by Apple that the software update will improve the performance of the existing iPhone device or at least not seriously harm its functionality.

77. iOS 11 seriously degraded the functionality of existing iPhones to the point of rendering them virtually useless as a mobile device.

78. Accordingly, Plaintiff seeks damages, for herself and all those similarly situated.

COUNT V

Violation of California Business & Professions Code § 17200 et seq.

79. Plaintiff repeats and re-alleges the allegations in paragraphs 1 to 49 above as if fully set forth herein.

80. Plaintiff asserts this cause of action on behalf of herself and the Nationwide Class.

81. Plaintiff, as a non-California resident, is entitled to assert this cause of action for Apple's violations of California Business and Professions Code § 17200 et seq. because Apple is a California corporation whose violations of this consumer protection law occurred in California, resulting in harm to Plaintiff and other members of the Nationwide Class outside of California, as well as harm to numerous members of the Nationwide Class within California.

82. California Business & Professions Code § 17200 et seq. (the "UCL") prohibits unfair competition that is any unfair, unlawful, or a fraudulent business practice.

83. Apple violated the "unlawful" prong of the UCL by making material misrepresentations, or by making material omissions of facts, that, if downloaded, Apple's iOS 11 update would not impair or degrade the functioning of existing iPhones, when in fact Apple knew that such impairment or degradation would result, in violation of California's Consumer Legal Remedies Act, Cal. Civ. Code § 1750 et seq.

84. Apple's conduct violated the "unfair" prong of the UCL because it was immoral, unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to Plaintiff

and members of the Nationwide Class. Apple's practice was also contrary to legislatively declared and public policy and the harm it caused to consumers outweighed its utility, if any.

85. Apple violated the "fraudulent" prong of the UCL by making material misrepresentations and actively concealing material information regarding its practice that, if downloaded, Apple's iOS 11 update would not impair or degrade the functioning of existing iPhones, when in fact Apple knew that such impairment or degradation would result. These material misrepresentations and nondisclosures were likely to mislead consumers.

86. Apple's misrepresentations and nondisclosures deceive or have a tendency to deceive the general public.

87. Apple's misrepresentations and nondisclosures are material, in that a reasonable person would attach importance to the information and would be induced to act on the information in making purchase and product-updating decisions.

88. Plaintiff and the Nationwide Class members reasonably relied on Apple's material misrepresentations and/or nondisclosures, in that, had they known the truth, they would not have elected to download the iOS 11 update and/or would not have purchased new or additional iPhone items after their existing iPhone had been impaired and degraded by having downloaded the iOS 11 update.

89. As a direct and proximate result of Apple's unfair, unlawful, and fraudulent conduct, Plaintiff and the members of the Nationwide Class have lost money and/or property. Specifically, as a proximate result of Apple's violations, Plaintiff and the members of the Nationwide Class have, among other things, paid more for their affected iPhones than they would have had Apple not engaged in its violative conduct, and/or have purchased new or

additional iPhones or related battery-life products that they would not have otherwise purchased had Apple not engaged in its violative conduct.

90. Apple's conduct caused substantial injury to Plaintiff and the members of the Nationwide Class. Accordingly, Plaintiff seeks an order enjoining Apple from committing such unlawful, unfair, and fraudulent business practices immediately and in the future; to provide all potentially-affected iPhone owners with reasonable notice that the poor performance of those devices is caused by Apple's own modifications; to reimburse all Nationwide Class members the full purchase price they paid for those affected and potentially-affected devices; to provide all class members with new iPhone batteries for those devices, free of charge; and/or to make full restitutionary disgorgement of profits wrongfully obtained, including all applicable pre- and post-judgment interest. Plaintiff also seek attorneys' fees and costs, for herself and the Nationwide Class members, under Cal. Code Civ. Proc. § 1021.5.

COUNT VI

Violation of California Business & Professions Code § 17500 et seq.

91. Plaintiff repeats and re-alleges the allegations in paragraphs 1 to 49 above as if fully set forth herein.

92. Plaintiff asserts this cause of action on behalf of herself and the Nationwide Class.

93. Plaintiff, as a non-California resident, is entitled to assert this cause of action for Apple's violations of California Business and Professions Code § 17500 et seq. because Apple is a California corporation whose violations of this consumer protection law occurred in California, resulting in harm to Plaintiff and other members of the Nationwide Class outside of California, as well as harm to numerous members of the Nationwide Class within California.

94. Apple has committed acts of untrue and misleading advertising, as defined by California Business and Professions Code § 17500 et seq., including by making material misrepresentations that battery life would not be impaired or degraded if a customer downloaded Apple's iOS 11 update on his or her existing iPhone, and by failing to disclose and/or actively concealing material information regarding the battery-life effect of a customer downloading the operating system update.

95. Apple's misrepresentations and nondisclosures deceive or have a tendency to deceive the general public.

96. Apple's misrepresentations and nondisclosures are material, in that a reasonable person would attach importance to the information and would be induced to act on the information in making the decision whether to download an operating system update and/or whether to make subsequent iPhone-related purchase decisions from Apple.

97. Plaintiff and members of the Nationwide Class reasonably relied on Apple's material misrepresentations and/or nondisclosures, and had they known the truth, would not have elected to download iOS 11 and/or would not have purchased new or additional iPhone items after their existing iPhone had been impaired and degraded by their having downloaded the operating system update on their existing iPhone.

98. As a direct and proximate result of Apple's conduct, Plaintiff and the members of the Nationwide Class lost money or property.

99. Apple's conduct caused substantial injury to Plaintiff and members of the Nationwide Class. Accordingly, Plaintiff seeks an order enjoining Apple from committing such unlawful, unfair, and fraudulent business practices immediately and in the future; to provide all potentially-affected iPhone owners with reasonable notice that the poor battery-life of their

devices is caused by Apple's own modifications; to reimburse all Nationwide Class members the full purchase price they paid for those affected and potentially-affected devices; to provide all class members with new iPhone batteries for those devices, free of charge; and/or to make full restitutionary disgorgement of profits wrongfully obtained; including all applicable pre- and post-judgment interest. Plaintiff also seeks attorneys' fees, for herself and the Nationwide Class, and costs under Cal. Code Civ. Proc. § 1021.5.

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, hereby demands:

- a) certification of the proposed Class and Subclasses;
- b) appointment of the Plaintiff as a representative of the Class and Subclasses;
- c) appointment of the undersigned counsel as class counsel;
- d) an order enjoining Apple from engaging any further in the unlawful conduct set forth herein;
- e) a declaration that Apple's actions described above violate the FDUPTA;
- f) restitutionary disgorgement of all profits wrongfully obtained;
- g) an award to Plaintiff, the Class and Subclasses of all damages, including attorneys' fees, recoverable under applicable law;
- h) such other relief as this Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all applicable claims.

Dated: December 28, 2017.

Respectfully submitted,

s/ Richard B. Rosenthal

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ENGLISH

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- B. APPLE PAY SUPPLEMENTAL TERMS**
- C. NOTICES FROM APPLE**

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(a) The software (including Boot ROM code, embedded software and third party software), documentation, interfaces, content, fonts and any data that came with your iOS Device (“Original iOS Software”), as may be updated or replaced by feature enhancements, software updates or system restore software provided by Apple (“iOS Software Updates”), whether in read only memory, on any other media or in any other form (the Original iOS Software and iOS Software Updates are collectively referred to as the “iOS Software”) are licensed, not sold, to you by Apple Inc. (“Apple”) for use only under the terms of this License. Apple and its licensors retain ownership of the iOS Software itself and reserve all rights not expressly granted to you. You agree that the terms of this License will apply to any Apple-branded app that may be built-in on your iOS Device, unless such app is accompanied by a separate license, in which case you agree that the terms of that license will govern your use of that app.

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(c) To the extent that Apple has preinstalled Apple-branded apps from the App Store on your iOS Device at the time of purchase ("Preinstalled Apps"), you will need to log into the App Store and associate these Preinstalled Apps with your App Store account in order to use them on your iOS Device. When you associate a Preinstalled App with your App Store account, you will at the same time be automatically associating all other Preinstalled Apps on your iOS Device. By choosing to associate the Preinstalled Apps with your App Store account, you agree that Apple may transmit, collect, maintain, process and use both the Apple ID used by your App Store account and a unique hardware identifier collected from your iOS Device, as unique account identifiers for the purpose of verifying the eligibility of your request and providing you access to the Preinstalled Apps through the App Store. If you do not wish to use a Preinstalled App, you can delete it from your iOS Device at any time.

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(f) You agree to use the iOS Software and the Services (as defined in Section 5 below) in compliance with all applicable laws, including local laws of the country or region in which you reside or in which you download or use the iOS Software and Services. Features of the iOS Software and the Services may not be available in all languages or regions, some features may vary by region, and some may be restricted or unavailable from your service provider. A Wi-Fi or cellular data connection is required for some

features of the iOS Software and Services.

(g) Use of the App Store requires a unique user name and password combination, known as an Apple ID. An Apple ID is also required to access app updates and certain features of the iOS Software and Services.

(h) You acknowledge that many features, built-in apps, and Services of the iOS Software transmit data and could impact charges to your data plan, and that you are responsible for any such charges. You can view and control which applications are permitted to use cellular data and view an estimate of how much data such applications have consumed under Cellular Data Settings. For more information, please consult the User Guide for your iOS Device.

(i) If you choose to allow automatic app updates, your iOS Device will periodically check with Apple for updates to the apps on your device and, if one is available, the update will automatically download and install onto your device. You can turn off the automatic app updates altogether at any time by going to Settings, tap iTunes & App Store, and under Automatic Downloads, turn off Updates.

(j) Using your iOS Device in some circumstances can distract you and may cause a dangerous situation (for example, avoid typing a text message while driving a car or using headphones while riding a bicycle). By using your iOS Device you agree that you are responsible for observing rules that prohibit or restrict the use of mobile phones or headphones (for example, the requirement to use hands-free options for making calls when driving).

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4. Consent to Use of Data. When you use your device, your phone number and certain unique identifiers for your iOS Device are sent to Apple in order to allow others to reach you by your phone number when using various communication features of the iOS Software, such as iMessage and FaceTime. When you use iMessage, Apple may hold your messages in encrypted form for a limited period of time in order to ensure their delivery. You may turn off FaceTime or iMessage by going to the FaceTime or Messages settings on your iOS Device. Certain features like Analytics, Location Services, Siri, and Dictation may require information from your iOS Device to provide their respective functions. When you turn on or use these features, details will be provided regarding what information is sent to Apple and how the information may be used. You can learn more by visiting <http://www.apple.com/privacy/>. At all times your information will be treated in accordance with Apple's Privacy Policy, which can be viewed at: <http://www.apple.com/legal/privacy/>.

5. Services and Third Party Materials.

(a) The iOS Software may enable access to Apple's iTunes Store, App Store, iBooks Store, Game Center, iCloud, Maps and other Apple and third party services and web sites (collectively and individually, "Services"). Such Services may not be available in all languages or in all countries. Use of these Services requires Internet access and use of certain Services may require an Apple ID, may require you to accept additional terms and may be subject to additional fees. By using this software in connection with an Apple ID, or other Apple Service, you agree to the applicable terms of service for that Service, such as the latest Apple Media Services Terms and Conditions for the country in which you access such Services, which you may access and review at <http://www.apple.com/legal/internet-services/itunes/>

ww/ .

(b) If you sign up for iCloud, certain iCloud features like “iCloud Photo Library”, “My Photo Stream”, “iCloud Photo Sharing”, “Back Up” and “Find My iPhone” may be accessed directly from the iOS Software. You acknowledge and agree that your use of iCloud and these features is subject to the latest terms and conditions of the iCloud service, which you may access and review at: <http://www.apple.com/legal/internet-services/icloud/ww/>.

(c) News App Content. Your use of content accessed through the News application is limited solely to personal, noncommercial use, does not transfer any ownership interest to you in the content, and specifically excludes, without limitation, any commercial or promotional use rights in such content. Furthermore, you are prohibited from republishing, retransmitting and reproducing any images accessed through News as a stand-alone file.

(d) Maps. The maps service and features of the iOS Software (“Maps”), including map data coverage, may vary by region. When you use any location-based features within Maps, such as turn-by-turn navigation, traffic and local search, various location-related and usage information may be sent to Apple, including the real-time geographic location of your iOS Device, in order to process your request and help improve Maps. Such location and usage data is collected by Apple in a form that does not personally identify you. **By using Maps, you agree and consent to Apple’s and its subsidiaries’ and agents’ transmission, collection, maintenance, processing, and use of this information, to provide and improve the Maps features and service, and other Apple products and services.** Apple may also provide such information, in either an aggregated or non personally identifiable form, to its partners and licensees to help improve their map and location-based products and services. You may disable the location-based functionality of Maps by going to the Location Services setting on your iOS Device and turning off the individual location setting for Maps. Certain Maps features will however be unavailable if you disable the Location Services setting, such as turn-by-turn navigation.

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EA1491
07/12/2017

Apple Pay Supplemental Terms and Conditions

These Apple Pay Supplemental Terms and Conditions (the “Supplemental Terms”) supplement the iOS Software License Agreement (the “License”); both the terms of the License and these Supplemental Terms govern your use of the Apple Pay feature, which shall be deemed a “Service” under the License. Capitalized terms used in these Supplemental Terms have the meanings set forth in the License.

1 Overview and Use Restrictions

Apple Pay allows you to store virtual representations of credit, debit and prepaid cards, including store credit, debit and prepaid cards, which are supported by the Apple Pay feature (“Supported Payment Cards”) and use supported iOS Devices to make contactless payments in select locations, or within apps or websites. Apple Pay also allows you to use rewards and gift cards that are saved in Wallet (“Apple Pay-Enabled Cards”, and together with Supported Payment Cards, “Supported Cards”) to make contactless rewards and gift card transactions in select stores as part of a contactless payment using Apple Pay. The Apple Pay features of the iOS Software may only be available in select regions, with select card issuers, and with select merchants. Features may vary by region, issuer, and merchant.

In order to use Apple Pay, you must have a card supported by the Apple Pay feature. Supported Cards may change from time to time. Supported Payment Cards are associated with an active iCloud account in order to use this feature. Supported Cards are only available to individuals aged 13 years or older, and may be subject to additional age-based restrictions imposed by iCloud or the Supported Card which you are trying to provision.

Apple Pay is intended for your personal use and you may only provision your own Supported Cards. If you are provisioning a supported corporate card, you represent that you are doing so with the authorization of your employer and you are authorized to bind your employer to these terms of use and all transactions effected by use of this feature.

You agree not to use Apple Pay for illegal or fraudulent purposes, or any other purposes which are prohibited by the License and these Supplemental Terms. You further agree to use Apple Pay in accordance with applicable law and regulation. You agree not to interfere with or disrupt the Apple Pay service (including accessing the service through any automated means), or any servers or networks connected to the service, or any policies, requirements or regulations of networks connected to the service (including any unauthorized access to, use or monitoring of data or traffic thereon).

2 Apple’s Relationship With You

Apple Pay enables you to create a virtual representation of your Supported Cards on your supported iOS Device, however Apple does not process payments or other non-payment card transactions (such as reward accrual and redemption), or have any other control over payments, returns, refunds, rewards, value, discounts or other commerce activity that may arise out of your use of this feature. The terms of cardholder agreements you may have in place with your card issuer will continue to govern your use of your Supported Payment Cards and their use in connection with Apple Pay. Similarly, your participation in any merchant rewards or gift card programs and your use of Apple Pay-Enabled Cards in connection with Apple Pay will be subject to such merchant’s terms and conditions. Nothing in the License or these Supplemental Terms modifies the terms of any cardholder or merchant agreement, and such terms will govern your use of the applicable Supported Card and its virtual representation on your iOS Device.

You agree that Apple is not a party to your cardholder or merchant agreements, nor is Apple responsible for the (a) content, accuracy or unavailability of any payment cards, rewards cards, gift cards, commerce activities, transactions or purchases while using Apple Pay functionality; (b) issuance of credit or assessing eligibility for credit; (c) accrual or redemption of rewards or stored value under a merchant's program; or (d) funding or reloading of prepaid cards. For all disputes or questions about payment cards, rewards cards, gift cards, or associated commerce activity, please contact your issuer or the applicable merchant.

3 Privacy

Apple Pay requires some information from your iOS Device in order to offer the full experience. You can find more information on the data collected, used or shared as part of your use of Apple Pay by reading About Apple Pay and Privacy (which can be accessed by going to Wallet & Apple Pay on your iOS Device, or within the Watch app on a paired iOS Device) or by visiting <http://www.apple.com/privacy>. By using Apple Pay, you agree and consent to Apple's and its subsidiaries' and agents' transmission, collection, maintenance, processing, and use of all of the foregoing information, to provide Apple Pay functionality.

4 Security; Lost or Disabled Devices

Apple Pay stores virtual representations of your Supported Cards and should be protected as you would protect your physical credit, debit, prepaid, rewards and gift cards. Providing your device passcode to a third party or allowing a third party to add their fingerprint to use Touch ID may result in their ability to make payments and receive or redeem rewards or credit using Apple Pay on your device. You are solely responsible for maintaining the security of your device and of your passcode. You agree that Apple does not have any responsibility if you lose or share access to your device. You agree that Apple does not have any responsibility if you make unauthorized modifications to iOS (such as by way of a "jailbreak").

If your device is lost or stolen and you have Find My iPhone enabled, you can use Find My iPhone to attempt to suspend the ability to pay with the virtual Supported Payment Cards on the device by putting it into Lost Mode. You can also erase your device, which will attempt to suspend the ability to pay with the virtual Supported Payment Cards on the device and will also attempt to remove the Apple Pay-Enabled Cards. You should also contact the issuer of your Supported Payment Cards and the merchant who issued your Apple Pay-Enabled Cards in order to prevent unauthorized access to your virtual Supported Cards.

If you report or Apple suspects fraudulent or abusive activity, you agree to cooperate with Apple in any investigation and to use any fraud prevention measures we prescribe.

5 Limitation of Liability

IN ADDITION TO THE DISCLAIMERS OF WARRANTIES AND LIMITATION OF LIABILITY SET FORTH IN THE LICENSE, APPLE DOES NOT ASSUME ANY LIABILITY FOR PURCHASES, PAYMENTS, TRANSACTIONS, OR OTHER COMMERCE ACTIVITY MADE USING THE APPLE PAY FEATURE, AND YOU AGREE TO LOOK SOLELY TO AGREEMENTS YOU MAY HAVE WITH YOUR CARD ISSUER, PAYMENT NETWORK, OR MERCHANT TO RESOLVE ANY QUESTIONS OR DISPUTES RELATING TO YOUR SUPPORTED CARDS, VIRTUAL SUPPORTED CARDS AND ASSOCIATED COMMERCE ACTIVITY.

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CIVIL COVER SHEET

JS 44 (Rev. 06/17) FLSD Revised 06/01/2017

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.) **NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.**

I. (a) PLAINTIFFS Yael Aburos, individually and on behalf of others **DEFENDANTS** Apple Inc.
similarly-situated

(b) County of Residence of First Listed Plaintiff **Miami-Dade County**
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant **California**
(IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Podhurst Orseck, P.A., One S.E. 3rd Avenue, Suite 2300, Miami,
Florida 33131; Tel. 305-358-2800; Fax 305-358-2382

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)
Stephen F. Rosenthal

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
 3 Federal Question (U.S. Government Not a Party)
 2 U.S. Government Defendant
 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|---------------------------------------|---------------------------------------|---|----------------------------|---------------------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input checked="" type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

- | | | | | |
|--|---|--|--|--|
| CONTRACT | TORTS | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES |
| <input type="checkbox"/> 110 Insurance
<input type="checkbox"/> 120 Marine (Excl. Veterans)
<input type="checkbox"/> 130 Miller Act
<input type="checkbox"/> 140 Negotiable Instrument
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment
<input type="checkbox"/> 151 Medicare Act
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits
<input type="checkbox"/> 160 Stockholders' Suits
<input checked="" type="checkbox"/> 190 Other Contract
<input type="checkbox"/> 195 Contract Product Liability
<input type="checkbox"/> 196 Franchise | PERSONAL INJURY
<input type="checkbox"/> 310 Airplane
<input type="checkbox"/> 315 Airplane Product Liability
<input type="checkbox"/> 320 Assault, Libel & Slander
<input type="checkbox"/> 330 Federal Employers' Liability
<input type="checkbox"/> 340 Marine
<input type="checkbox"/> 345 Marine Product Liability
<input type="checkbox"/> 350 Motor Vehicle
<input type="checkbox"/> 355 Motor Vehicle Product Liability
<input type="checkbox"/> 360 Other Personal Injury
<input type="checkbox"/> 362 Personal Injury - Med. Malpractice | PERSONAL INJURY
<input type="checkbox"/> 365 Personal Injury - Product Liability
<input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability
<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability
PERSONAL PROPERTY
<input type="checkbox"/> 370 Other Fraud
<input type="checkbox"/> 371 Truth in Lending
<input type="checkbox"/> 380 Other Personal Property Damage
<input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881
<input type="checkbox"/> 690 Other
LABOR
<input type="checkbox"/> 710 Fair Labor Standards Act
<input type="checkbox"/> 720 Labor/Mgmt. Relations
<input type="checkbox"/> 740 Railway Labor Act
<input type="checkbox"/> 751 Family and Medical Leave Act
<input type="checkbox"/> 790 Other Labor Litigation
<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | <input type="checkbox"/> 422 Appeal 28 USC 158
<input type="checkbox"/> 423 Withdrawal 28 USC 157
PROPERTY RIGHTS
<input type="checkbox"/> 820 Copyrights
<input type="checkbox"/> 830 Patent
<input type="checkbox"/> 835 Patent - Abbreviated New Drug Application
<input type="checkbox"/> 840 Trademark
SOCIAL SECURITY
<input type="checkbox"/> 861 HIA (1395ff)
<input type="checkbox"/> 862 Black Lung (923)
<input type="checkbox"/> 863 DIWC/DIWW (405(g))
<input type="checkbox"/> 864 SSID Title XVI
<input type="checkbox"/> 865 RSI (405(g))
FEDERAL TAX SUITS
<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 |
| REAL PROPERTY
<input type="checkbox"/> 210 Land Condemnation
<input type="checkbox"/> 220 Foreclosure
<input type="checkbox"/> 230 Rent Lease & Ejectment
<input type="checkbox"/> 240 Torts to Land
<input type="checkbox"/> 245 Tort Product Liability
<input type="checkbox"/> 290 All Other Real Property | CIVIL RIGHTS
<input type="checkbox"/> 440 Other Civil Rights
<input type="checkbox"/> 441 Voting
<input type="checkbox"/> 442 Employment
<input type="checkbox"/> 443 Housing/Accommodations
<input type="checkbox"/> 445 Amer. w/Disabilities - Employment
<input type="checkbox"/> 446 Amer. w/Disabilities - Other
<input type="checkbox"/> 448 Education | PRISON PETITIONS
Habeas Corpus:
<input type="checkbox"/> 463 Alien Detainee
<input type="checkbox"/> 510 Motions to Vacate Sentence
Other:
<input type="checkbox"/> 530 General
<input type="checkbox"/> 535 Death Penalty
<input type="checkbox"/> 540 Mandamus & Other
<input type="checkbox"/> 550 Civil Rights
<input type="checkbox"/> 555 Prison Condition
<input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement | IMMIGRATION
<input type="checkbox"/> 462 Naturalization Application
<input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 375 False Claims Act
<input type="checkbox"/> 376 Qui Tam (31 USC 3729 (a))
<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 896 Arbitration
<input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision
<input type="checkbox"/> 950 Constitutionality of State Statutes |

V. ORIGIN (Place an "X" in One Box Only)
 1 Original Proceeding 2 Removed from State Court 3 Re-filed (See VI below) 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation Transfer 7 Appeal to District Judge from Magistrate Judgment 8 Multidistrict Litigation - Direct File 9 Remanded from Appellate Court

VI. RELATED/RE-FILED CASE(S) (See instructions): a) Re-filed Case YES NO **JUDGE:** b) Related Cases YES NO **DOCKET NUMBER:**

VII. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):
Consumer class action: unfair/deceptive trade practices and common law claims.
LENGTH OF TRIAL via 10 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** 5,000,001.00 **CHECK YES only if demanded in complaint:** **JURY DEMAND:** Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE
DATE December 28, 2017 SIGNATURE OF ATTORNEY OF RECORD 

FOR OFFICE USE ONLY
RECEIPT # AMOUNT IFP JUDGE MAG JUDGE

Exhibit 19

U.S. District Court
Western District of Missouri (Jefferson City)
CIVIL DOCKET FOR CASE #: 2:17-cv-04257-NKL

Burton et al v. Apple Inc.
Assigned to: District Judge Nanette K. Laughrey
Cause: 28:1332 Diversity-Tort/Non-Motor Vehicle

Date Filed: 12/28/2017
Jury Demand: Plaintiff
Nature of Suit: 385 Prop. Damage Prod.
Liability
Jurisdiction: Diversity

Plaintiff

Kim Burton
Plaintiff

represented by **Bradford B. Lear**
Lear & Werts, LLP
2003 W. Broadway
Ste. 107
Columbia, MO 65203
(573) 875-1991
Fax: (573) 875-1985
Email: lear@learwerts.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Todd C. Werts
Lear & Werts, LLP
2003 W. Broadway
Ste. 107
Columbia, MO 65203
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Fax: (573) 875-1985
Email: werts@learwerts.com
ATTORNEY TO BE NOTICED

Plaintiff

William C. Ellis
Plaintiff

represented by **Bradford B. Lear**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Todd C. Werts
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Apple Inc.
Defendant

Date Filed	#	Docket Text
12/28/2017	<u>1</u>	COMPLAINT against Apple Inc. filed by Todd C. Werts on behalf of All Plaintiffs. Filing fee \$400, receipt number 0866-5574891. Service due by 3/28/2018 unless otherwise directed by the court. (Attachments: # <u>1</u> Civil Cover Sheet)(Werts, Todd) (Entered: 12/28/2017)
12/28/2017	<u>2</u>	NOTICE of appearance by Bradford B. Lear on behalf of All Plaintiffs (Attorney Bradford B. Lear added to party Kim Burton(pty:pla), Attorney Bradford B. Lear added to party William C. Ellis(pty:pla))(Lear, Bradford) (Entered: 12/28/2017)
12/29/2017	<u>3</u>	NOTICE OF INCLUSION FOR MEDIATION AND ASSESSMENT PROGRAM (MAP). REVIEW NOTICE AND MAP GENERAL ORDER CAREFULLY FOR IMPORTANT CHANGES, DEADLINES AND REQUIREMENTS. Notice of MAP assignment to an outside mediator. (Attachments: # <u>1</u> MAP General Order)(Lock, Tania) (Entered: 12/29/2017)

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**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

KIM BURTON and WILLIAM ELLIS, on
behalf of themselves and those similarly
situated in Missouri,

Plaintiffs,

v.

APPLE INC.,
Serve: CT Corporation System
120 South Central Ave.
St. Louis, MO 63105

Defendant.

Case No.:

CLASS ACTION

JURY TRIAL DEMAND

COMPLAINT

COME NOW Plaintiffs Kim Burton and William Ellis, by and through their undersigned counsel, for their claims against Defendant Apple Inc. ("Apple") on behalf of themselves and those similarly situated in Missouri, and state as follows:

Parties, Jurisdiction, and Venue

1. Plaintiff Kim Burton is a citizen and resident of Columbia, Boone County, Missouri.
2. Plaintiff William Ellis is a citizen and resident of Columbia, Boone County, Missouri.
3. Plaintiffs assert a class action on behalf of owners of the iPhone 5, iPhone 5s, iPhone SE, iPhone 6, iPhone 6s, iPhone 6 Plus, iPhone 6s Plus, iPhone 7, iPhone 7 Plus as well as those versions of the iPad (including the iPad Mini 2) whose devices were harmed by Apple's updating of their devices' software to iOS 10.2.1, 10.3, 10.3.1, 10.3.3 (the "iOS 10

Update”) and to iOS 11, 11.0.1, 11.0.2, 11.0.3, 11.1.1, 11.1.2, 11.2, and 11.2.1 (the “iOS 11 Update,” and collectively, the “iOS 10 and iOS 11 Updates”)—those updates were released between January 23, 2017 and December 13, 2017 (collectively, the “Affected iPhones and iPads” or “Affected Devices”).

4. Defendant Apple Inc. is a California corporation, headquartered in Cupertino, California that routinely conducts business in Missouri. Defendant sells its iPhones and iPads in its own retail stores located throughout the country, online, and also through third parties, such as AT&T. Defendant engineers and licenses to iPhone and iPad users iOS software, the only operating system Apple permits on its devices.

5. The Court has subject matter jurisdiction under 28 U.S.C. § 1332(d) because the proposed Classes consists of more than 100 members, the amount in controversy exceeds \$5 million, exclusive of interest and costs, and both Plaintiffs and Apple are diverse parties. The Court also has personal jurisdiction over Apple because Plaintiffs’ claims arise out of Defendant’s contacts with the State of Missouri.

6. At all relevant times, Defendant conducted substantial business in the State of Missouri as well as within the Western District of Missouri.

7. Venue is proper in the Central Division of the Western District of Missouri pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this Division of the District, and/or a substantial part of property that is the subject of the action is situated in this Division of the District.

8. Apple has intentionally availed itself of the laws and markets Missouri, does substantial business in this District and is subject to personal jurisdiction in this District.

9. The Court also has personal jurisdiction over the Parties because Defendant conducts a major part of its national operations with regular and continuous business activity in Missouri.

Factual Background

10. The iPhone is an internet and multimedia-enabled “smartphone” designed and marketed by Apple. Apple introduced the original iPhone for sale in the United States in or about June 2007. Since then, Apple has introduced a succession of new models of the iPhone, including the Affected iPhones.

11. The iPad is an internet and multimedia-enabled tablet computer designed and marketed by Apple. Apple introduced the original iPad for sale in the United States in or about April 2010. Since then, as with the iPhone, Apple has introduced a succession of new models of the iPad, including the Affected iPads.

12. Apple generates the majority of its sales from the iPhone. And the iPhone’s importance to Apple’s business has been recognized in the media where it has been stated that Apple’s “success is derived from selling brand-new high-end smartphones consistently month after month.” *See* Statt, N., “Why Apple and other tech companies are fighting to keep devices hard to repair,” *The Verge* (Aug. 3, 2017) (available online at www.theverge.com/2017/8/3/16087628/apple-e-waste-environmental-standards-ieee-right-to-repair).

13. Apple represented that its recent iOS 10 and iOS 11 software updates to the Affected iPhones and iPads would improve those devices’ performance and it strongly encouraged its customers to accept those updates. But Apple did not tell its customers that it had intentionally designed those software updates to slow the devices’ processing speed

to address an issue with the phones' battery. Apple admitted its intentional and surreptitious action only this month under public pressure, admitting its software updates slowed processor speed. Now Plaintiffs and Class Members must either purchase new batteries for their devices, replace their devices for hundreds, if not thousands, of dollars or continue to struggle with their slowed devices.

14. Although Plaintiff Kim Burton was reasonable in her use of both her Affected iPhone (an iPhone 5s) and her Affected iPad (an iPad Mini 2) since she purchased them, they would both shut down suddenly and/or experience precipitous declines in their battery levels. And, in addition to other performance problems, Plaintiff Kim Burton began to observe that both her Affected iPhone and iPad had begun to operate in an extremely sluggish manner.

15. Plaintiff William Ellis also was reasonable in his use of his Affected iPhone (an iPhone 7) since he purchased it but began to experience performance problems with the phone, including that it began to operate sluggishly, as well as diminished battery life.

16. Plaintiff Burton installed iOS 10.2.1 on her Affected Devices, and as a result, the performance of the devices deteriorated substantially. Apps take unduly long to open, update, and respond to inputs such as swiping and scrolling lag. Websites are prone to crashing and take too long to load. The battery of these devices quickly depletes and the devices report having low battery and shutting down much more quickly than when they were initially purchased and running operating earlier operating systems. Upon information and belief, Plaintiff had not experienced such deterioration until installing the update. The performance of Plaintiff's Affected Devices has not improved with subsequent software installations.

17. Plaintiffs are informed and believe that Apple was aware of a defect in their Affected iPhones and iPads at the time they purchased them, and not only failed to disclose what it knew, but made deliberately misleading statements that were intended to conceal the nature and scope of that defect. Likewise, Apple was aware that the software updates it encouraged Plaintiffs to install on their Affected Devices would reduce the performance of the devices and, again, concealed that fact from Plaintiffs.

18. In November 2016, following consumer complaints, a Chinese consumer association requested that Apple investigate “a considerable number” of reports by iPhone 6-series users that the devices were shutting off despite displaying high battery levels and in room temperature environments.

19. Thereafter, Apple acknowledged that “a very small number of iPhone 6s devices may unexpectedly shut down” due to battery issues. It admitted, on its Chinese-language website only, that this problem had been caused by “a battery component’s” unduly long exposure to “controlled ambient air” during manufacture between September and October 2015.

20. Near the same time, in or about November 2016, Apple announced to its English-speaking audience that a “very small number” of Affected iPhones (specifically, the iPhone 6S and iPhone 6S Plus) were affected by a problem that caused those devices to shut down, suddenly and unexpectedly, “for no apparent reason.” Plaintiff is informed and believes that, in actuality, Apple knew that the lithium-ion batteries that it installed in Affected iPhones were causing the devices to shut down unexpectedly, notwithstanding that their battery levels were at as much as 60 percent when the shut-down occurred.

21. Despite claiming that the shutdowns were occurring for “no apparent reason,” Apple also announced that it had initiated a battery-replacement program that was limited to the iPhone 6S and the iPhone 6S Plus, and that neither the shutdown problem nor the battery-replacement program would serve to extend the applicable warranty.

22. Plaintiffs are informed and believes that Apple’s announcement was misleading and that Apple knew it was misleading at the time it made the announcement in November 2016. Apple admitted publicly that a “small number of customers outside the affected range [(i.e., Affected iPhones other than the 6S and the 6S Plus)] have also reported a shutdown.” *See* Roberts, J., “Why It’s Time for Apple to Come Clean About the iPhone Battery,” *Fortune* (Dec. 27, 2016) (available online at <http://fortune.com/2016/12/27/apple-iphone-6-battery-problem/>). Apple went on to claim, however, that “[s]ome of these shutdowns can occur under normal conditions for the iPhone to protect its electronics.” *Id.*

23. Plaintiff is informed and believes that these statements were deliberately misleading as well. In actuality, the lithium-ion batteries in all Affected iPhones cause them to operate erratically and to shut down the device unexpectedly due to the batteries’ inability to handle the demand created by processor speeds (the “battery defect”).

24. Rather than curing the battery defect by providing a free battery replacement for all Affected iPhones and iPads, Apple sought to mask the battery defect by modifying the iPhone operating system (“iOS”) so that it reduces Affected iPhones’ processing speeds in an effort to prevent their batteries from causing erratic operation and unexpected shutdowns.

25. Apple did not immediately disclose to consumers that it intended the iOS 10.2.1 update to fix the shutdown problem. It waited until February 2017 to disclose that the update had “made improvements to reduce occurrences of unexpected shutdowns.”

26. But modifying iOS not only allowed Apple to conceal the true nature and scope of the battery defect and to avoid expending time, money, and effort on correcting it, Apple’s decision to modify iOS instead had an added benefit to Apple: the modified iOS would slow the performance of Affected iPhones, which would serve to compel consumers to replace them with new iPhones, or unknowingly suffer with partially disabled phones.

27. Apple’s limited battery replacement did not resolve the unexpected shutdown problem. iPhone 6 and iPhone 6s owners continued to suffer from unexpected shutdowns, including owners who purchased devices manufactured outside of September through October 2015.

28. Defendant Apple released iOS updates to the Affected iPhones that slowed or throttled down the performance speeds of the processing units of these phones by linking each phone’s processing performance with its battery health. These updates were released because other iOS updates were over-using or over-draining the batteries.

29. Apple also released iOS updates to its other “i” products, including iPads, that similarly slowed or throttled down the performance speeds of the processing units of these phones by linking each phone’s processing performance with its battery health. These updates were released because other iOS updates were over-using or over-draining the batteries.

30. Apple slowed down the operating speeds of the Affected iPhones and iPads which caused users of these devices to experience significant slowdowns in device performance and speed.

31. Apple's failure to inform or explain to its consumers and customers, including but not limited to Plaintiffs, that the slow-downs in the Affected iPhones and iPads performances and resulting lost or diminished performance could be remedied by replacing the batteries of these devices.

32. Rather, Apple represented to Plaintiffs and similarly situated consumers and customers that the iOS updates were necessary for optimal usage and operation of the Affected iPhones, when they knew that it would slow or throttle down the speeds of the Affected iPhones and iPads. Indeed, Apple claimed that its current iOS 11 operating system "makes iPhone better than before" and that "[w]ith iOS 11, iPhone and iPad are the most powerful, personal, and intelligent devices they've ever been." (Available online at www.apple.com/ios/ios-11/).

33. Apple had previously claimed that the iOS 10 operating system "make[s] everything you love about your iPhone and iPad even better." (Available online at www.apple.com/newsroom/2016/06/apple-previews-ios-10-biggest-ios-release-ever/).

34. Apple also stated that "in iOS 10, accessing the information you need is easier and quicker than ever"—even though Apple designed iOS 10.2.1 to slow processing speeds.
Id.

35. In addition to proclaiming the software updates' benefits, Apple also made it very difficult for its customers to avoid the iOS 10 Updates and iOS 11 Updates.

36. The Affected iPhones repeatedly reminded Plaintiffs and class members to update their software until the owner agreed to accept the updates.

37. Additionally, if Plaintiffs and class members did not update, applications for their devices would ultimately become unusable.

38. John Poole, of Primate Labs, published the results of his research that connected Affected iPhone's slow CPU performance to battery capacity in certain iOS software versions. Poole found that the performance deterioration arose when iOS software version 10.2.1 (or later) was installed in the iPhone 6S. Poole also found performance deterioration arose when iOS software version 11.2 (or later) was installed in iPhone 7.

39. iPhones are powered by lithium-ion batteries. By their nature, the capacity of lithium- ion batteries degrade over time.

40. But the processing speed of iPhones should not normally diminish as a function of battery capacity. As Poole observed, "While we expect battery capacity to decrease as batteries age, we expect processor performance to stay the same." On account of Apple's intentional conduct, once the battery condition of Affected iPhones reached a certain state, processing speeds were dramatically slowed.

41. Apple secretly and without authorization diminished the performance of Plaintiffs' and the Class Members' Affected iPhones and iPads. Apple employs other means of accomplishing this end by delivering software updates that in other ways unjustifiably diminishes the performance of older model iPhones. This course of conduct is unfair, deceptive, in bad faith, and injures Plaintiffs and the other Class Members, and unjustly enriches Apple at their expense.

42. Only after Poole's publication did Apple admit that it had been developing and introducing code to its customers intended to throttle the processing speed of older versions of iPhones without informing consumers those issues.

43. On December 20, 2017, Apple finally disclosed that it was and had been purposefully, knowingly and admittedly slowing or throttling down the operating speed of Affected iPhones.

44. On December 20, 2017, Apple stated the following:

Our goal is to deliver the best experience for customers, which includes overall performance and prolonging the life of their devices. Lithium-ion batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age over time, which can result in the device unexpectedly shutting down to protect its electronic components.

Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the instantaneous peaks only when needed to prevent the device from unexpectedly shutting down during these conditions. We've now extended that feature to iPhone 7 with iOS 11.2, and plan to add support for other products in the future.

45. Apple did not inform Plaintiffs and/or similarly situated individuals that they could improve their Affected Devices' performance by replacing the batteries of said Affected iPhones, as opposed to purchasing a new iPhone or other phone.

46. Apple knew that replacing the batteries, as opposed to purchasing a new device, would have improved the performances of the Affected Devices owned by Plaintiffs and similarly situated individuals.

47. Apple knowingly concealed and failed to disclose the fact that a battery replacement would improve the performance of Affected Devices.

48. Apple concealed and failed to disclose the fact that iOS updates were causing Affected iPhones and iPads to slow or throttle down and not perform effectively.

49. Replacing batteries for Affected iPhones is less expensive than purchasing new iPhones or devices.

50. Plaintiffs and Class Members own or have previously owned the Affected Devices during the time Apple released the iOS 10 and iOS 11 Updates.

51. As a result of the iOS 10 and iOS 11 Updates, Plaintiffs' iPhones operated more slowly, and their functionality was materially impaired. The iPhones suffered problems with applications freezing, forced rebooting, and delayed response time.

52. Plaintiffs were unaware of the slowed processing speed caused by the iOS10 and iOS 11 Updates.

53. Defendant's wrongful actions directly and proximately caused the loss of value to Plaintiffs' and Class Members' iPhones causing them to suffer, and continue to suffer, economic damages and other harm for which they are entitled to compensation, including: the replacement of the Affected Device; compensation for loss of use; compensation for loss of value; and/or the purchase of new (non-defective) batteries.

Class Action Allegations

54. Plaintiffs brings this class action pursuant to Fed. R. Civ. Proc. 23.

55. The class that Plaintiffs seek to represent is defined as follows: All persons who reside in the State of Missouri who (a) own an Affected iPhone or iPad or (b) owned an Affected iPhone or iPad and replaced it with a new device.

56. Plaintiffs also seek to represent a subclass that includes each member of the proposed class described above who primarily used their Affected iPhone or iPad for personal, family, or household use as that term is used within the Missouri Merchandise Practices Act (“MMPA”).

57. Excluded from the class are the following:

- a. Apple, its subsidiaries, affiliates, officers, directors, and employees;
- b. Plaintiffs in separate, non-class legal actions against Apple based on the conduct alleged herein;
- c. Counsel, and the immediate families of counsel, who represent plaintiffs in this action; and
- d. The judge presiding over this action, those working in the judge’s chambers and their immediate families.

58. Plaintiffs are informed and believe that the proposed class comprises thousands of members. While the exact number of Class Members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are thousands of Class Members, at least. Class Members are readily identifiable from information and records in Defendants’ possession, custody or control.

59. Apple has acted with respect to Plaintiff and members of the proposed class in a manner generally applicable to each of them. There is are common questions of law and fact involved, which affect all class members. The questions of law and fact common to the class predominate over the questions that may affect individual class members, including the following:

- a. whether Apple modified iOS in a manner that slowed the performance of Affected iPhones and iPads;
- b. whether the representations Apple has made about the nature and scope of the battery defect are false;
- c. whether Apple made false representations about the nature and scope of the battery defect for the purpose of concealing it and avoiding the expense of recalling and replacing the batteries in Affected iPhones and iPads;
- d. whether Apple used the iOS modification to inducing Plaintiffs and Class Members to buy a new replacement for their Affected iPhones;
- e. whether Apple is subject to liability for concealing material facts from Plaintiff and members of the proposed class;
- f. whether Apple is subject to liability for violating the MMPA, the Missouri Computer Tampering Act, or Missouri's prohibition against malicious trespass to personal property;
- g. whether compensatory or consequential damages should be awarded to Plaintiffs and members of the proposed class;
- h. whether punitive damages should be awarded to Plaintiff and members of the proposed class;
- i. whether other, additional relief is appropriate, and what that relief should be.

60. Plaintiffs' claims are typical of the claims of all members of the class they propose to represent in this action. Each Class Member suffered damages from the loss of use and value of the Affected Devices because of the performance slowdowns. The injuries

of the Plaintiff and Class are substantially similar and Plaintiffs' claims for relief are based upon the same legal theories as the claims of other Class Members.

61. Plaintiffs will fairly and adequately represent and protect the interests of the class, and do not have interests that are antagonistic to or in conflict with those they seek to represent.

62. Plaintiffs have retained counsel who are experienced in the prosecution of class actions and other forms of complex litigation.

63. In view of the complexity of the issues and the expense that an individual plaintiff would incur if he or she attempted to obtain relief from a large, multinational corporation such as Apple, the separate claims of individual class members are monetarily insufficient to support separate actions. Because of the size of the individual class members' claims, few, if any, class members could afford to seek legal redress for the wrongs complained of in this Complaint.

64. The class is readily definable, and prosecution as a class action will eliminate the possibility of repetitious litigation and will provide redress for claims too small to support the expense of individual, complex litigation. Absent a class action, class members will continue to suffer losses, Apple's violations of law will be allowed to proceed without a full, fair, judicially supervised remedy, and Apple will retain sums received as a result of its wrongdoing. A class action will provide a fair and efficient method for adjudicating this controversy.

65. The prosecution of separate claims by individual class members would create a risk of inconsistent or varying adjudications with respect to thousands of individual class members, which would, as a practical matter, dispose of the interests of the

class members not parties to those separate actions or would substantially impair or impede their ability to protect their interests and enforce their rights.

66. The proposed class satisfies the certification criteria of Federal Rule of Civil Procedure 23.

Claims for Relief

COUNT I

Violation of Missouri Merchandising Practices Act (“MMPA”)

67. Plaintiffs incorporate herein by reference the allegations contained above as if fully set forth herein.

68. The MMPA prohibits unfair methods of competition and unfair or deceptive acts or practices.

69. Apple’s conduct, described above, in purposefully slowing the speed and performance of Affected iPhones and iPads, was unfair and deceptive. Apple unilaterally slowed performance of Plaintiffs’ and the other Class Members’ Affected iPhones and iPads without warning, notice, or the ability to opt out.

70. When Apple provided the software update with the inhibitory software, it omitted this material fact from Plaintiff and the other Class Members.

71. Apple’s omission was material and deceptive. Reasonable consumers consider the processor speed of their iPhones to be a material aspect of their decision whether to buy a smartphone.

72. Apple’s conduct was also an unfair practice that injured Plaintiff and the other Class Members.

73. Plaintiffs purchased their Affected iPhones and iPad from Apple primarily for personal use.

74. Apple's conduct was outrageous because of its evil motive or reckless indifference to the rights of Plaintiffs and similarly situated individuals.

75. As a result of Apple's conduct, Plaintiffs and similarly situated individuals have incurred and will continue to incur legal expenses and attorneys' fees related to the prosecution of this action.

WHEREFORE, Plaintiffs, individually and on behalf of similarly situated individuals prays this Court enter judgment in its favor and against Apple as follows:

- a. Awarding an amount to be determined at trial that will fairly compensate Plaintiffs, individually and on behalf of similarly situated individuals, for the harms they have suffered,
- b. Awarding Plaintiffs, individually and on behalf of similarly situated individuals punitive damages in an amount sufficient to deter Apple and others from such conduct in the future, and
- c. Awarding Plaintiffs, individually and on behalf of similarly situated individuals, their costs incurred herein, post-judgment interest, reasonable attorneys' fees, expenses and for such other and further relief as the Court may deem just and proper under the circumstances.

COUNT II
Trespass to Chattels

76. Plaintiffs incorporate herein by reference the allegations contained above as if fully set forth herein.

77. Apple's conduct described above, in purposefully slowing the speed and performance of Affected iPhones and iPads, constitutes a trespass to chattels.

78. Apple purposefully installed software or a computer program intended to hamper the speed and performance of Plaintiffs' and the other Class Members' Affected iPhones and iPads.

79. Apple's conduct in slowing the speed and performance of Affected iPhones and iPads was without consent or exceeded the consent given by Plaintiffs and the other Class members.

80. Plaintiffs and the other Class members suffered damage as a result of Apple's trespass. Their Affected phones' processing speed has been significantly reduced, apps and programs perform poorly.

WHEREFORE, Plaintiffs, individually and on behalf of similarly situated individuals prays this Court enter judgment in its favor and against Apple as follows:

- a. Awarding an amount to be determined at trial that will fairly compensate Plaintiffs, individually and on behalf of similarly situated individuals, for the harms they have suffered,
- b. Awarding Plaintiffs, individually and on behalf of similarly situated individuals punitive damages in an amount sufficient to deter Apple and others from such conduct in the future, and

- c. Awarding Plaintiffs, individually and on behalf of similarly situated individuals, their costs incurred herein, post-judgment interest, and for such other and further relief as the Court may deem just and proper under the circumstances.

Count III

Violation of Missouri's Prohibition Against Malicious Trespass to Personalty

81. Plaintiffs incorporates herein by reference the allegations contained above as if fully set forth herein.

82. Apple's conduct described above constitutes a malicious or wanton damage to Plaintiffs' and the Class Members' personal property, goods, and chattels under Mo. Rev. Stat. § 537.330.

83. As a result of Apple's malicious or wanton conduct, Plaintiffs and the Class Members are entitled to double the value of their Affected iPhones or iPads.

WHEREFORE, Plaintiffs, individually and on behalf of similarly situated individuals prays this Court enter judgment in its favor and against Apple as follows:

- a. Awarding Plaintiffs, individually and on behalf of similarly situated individuals, for double the value of their Affected iPhones or iPads, and
- b. Awarding Plaintiffs, individually and on behalf of similarly situated individuals, their costs incurred herein, post-judgment interest, and for such other and further relief as the Court may deem just and proper under the circumstances.

Count IV
Violation of Missouri's Computer Tampering Law

84. Plaintiffs incorporate herein by reference the allegations contained above as if fully set forth herein.

85. As described above, Apple knowing and without authorization, or reasonable grounds to believe it had authorization, modified programs existing internal to the computer system on Plaintiffs' Affected iPhones and iPads.

86. Alternatively, Apple knowing and without authorization, or reasonable grounds to believe it had authorization, modified or damaged the equipment used in the computer system on Plaintiffs' Affected iPhones and iPads.

87. Accordingly, Apple's conduct violated Sections 569.095 and 569.097 of the Revised Missouri Statutes.

88. As a result of Apple's above-described conduct, Plaintiffs and the Class Members were damaged.

89. Section 537.525 of the Revised Missouri Statutes affords Plaintiffs and the Class Members a civil cause of action to remedy violations of §§ 569.095, .097, including the recovery of compensatory damages and reasonable attorney's fees.

WHEREFORE, Plaintiffs, individually and on behalf of similarly situated individuals prays this Court enter judgment in its favor and against Apple as follows:

- a. Awarding an amount to be determined at trial that will fairly compensate Plaintiffs, individually and on behalf of similarly situated individuals, for the harms they have suffered,

- b. Awarding Plaintiffs, individually and on behalf of similarly situated individuals punitive damages in an amount sufficient to deter Apple and others from such conduct in the future, and
- c. Awarding Plaintiffs, individually and on behalf of similarly situated individuals, their costs incurred herein, post-judgment interest, reasonable attorneys' fees, expenses and for such other and further relief as the Court may deem just and proper under the circumstances.

Count V
Breach of the Covenant of Good Faith and Fair Dealing

90. Plaintiffs incorporate herein by reference the allegations contained above as if fully set forth herein.

91. Plaintiffs and the other Class members and Apple entered into contracts.

92. Plaintiffs and the other Class members have fully performed their obligations under the contracts.

93. Under Missouri law a covenant of good faith and fair dealing is implied into every contract.

94. Apple breached the covenant of good faith and fair dealing by engaging in the above described conduct, purposefully slowing the speed and performance of Class Members' Affected iPhones and iPads.

95. Apple's conduct was willful and intentional and committed with a purpose of slowing down Affected iPhones and iPads to induce Plaintiffs and the other Class members to buy new devices. Apple's conduct was unfair, deceptive, and in bad faith. It gave iPhone and iPad users no notice and left them with no reasonable alternatives.

96. Plaintiffs and the other Class Members suffered damage as a result of Apple's breach of the covenant of good faith and fair dealing. Their phones' processing speed has been significantly reduced, apps and programs perform poorly. Plaintiffs and the other Class Members have been deprived of the benefit of their bargain and are left with substandard iPhones that perform worse than they should.

WHEREFORE, Plaintiffs, individually and on behalf of similarly situated individuals prays this Court enter judgment in its favor and against Apple as follows:

- a. Awarding an amount to be determined at trial that will fairly compensate Plaintiffs, individually and on behalf of similarly situated individuals, for the harms they have suffered, and
- b. Awarding Plaintiffs, individually and on behalf of similarly situated individuals, their costs incurred herein, post-judgment interest, and for such other and further relief as the Court may deem just and proper under the circumstances.

Count VI
Breach of Implied Warranty of Merchantability

97. Plaintiffs incorporate herein by reference the allegations contained above as if fully set forth herein.

98. Apple sold Affected iPhones and iPads to Plaintiffs and the Class Members.

99. When Apple sold Affected iPhones and iPads to Plaintiffs and the Class Members the Affected iPhones and iPads were not fit for their ordinary purpose in that the Affected iPhones and iPads had inadequate batteries and Apple slowed down and their performance through iOS updates.

100. Apple was notified that the Affected iPhones and iPads were not being fit for their ordinary purpose.

101. Because the Affected iPhones and iPads were unfit for their ordinary purpose, Plaintiffs and the other Class Members have been deprived of the benefit of their bargain and are left with substandard iPhones that perform worse than they should.

WHEREFORE, Plaintiffs, individually and on behalf of similarly situated individuals prays this Court enter judgment in its favor and against Apple as follows:

- a. Awarding an amount to be determined at trial that will fairly compensate Plaintiffs, individually and on behalf of similarly situated individuals, for the harms they have suffered, and
- b. Awarding Plaintiffs, individually and on behalf of similarly situated individuals, their costs incurred herein, post-judgment interest, and for such other and further relief as the Court may deem just and proper under the circumstances.

Count VII
Breach of Implied Warranty of Fitness for a Particular Purpose

102. Plaintiffs incorporate herein by reference the allegations contained above as if fully set forth herein.

103. Apple sold Affected iPhones and iPads to Plaintiffs and the Class Members.

104. Apple knew or should have known at the time it sold the Affected iPhones and iPads to Plaintiffs and the Class Members that the subject device was intended to be used as a fully functioning smartphone or tablet.

105. Apple knew or should have known at the time it sold the Affected iPhones and iPads to Plaintiffs and the Class Members that they would rely upon Apple's experience and/or representations in selecting for purchase the Affected iPhones and iPads.

106. Plaintiffs and the Class Members reasonably relied on Apple's experience and/or representations in purchasing the Affected iPhones and iPads.

66. When Apple sold the Affected iPhones and iPads to Plaintiffs and the Class Members, the Affected iPhones and iPads were not fit for their ordinary purpose in that the Affected iPhones and iPads had inadequate batteries, they were purposefully being slowed down, and iOS was not fit for the particular purpose for which the Affected iPhones and iPads were sold.

107. Because the Affected iPhones and iPads were unfit for the particular purpose for which they were sold, Plaintiff and the other Class Members have been deprived of the benefit of their bargain and are left with substandard iPhones that perform worse than they should.

WHEREFORE, Plaintiffs, individually and on behalf of similarly situated individuals prays this Court enter judgment in its favor and against Apple as follows:

- a. Awarding an amount to be determined at trial that will fairly compensate Plaintiffs, individually and on behalf of similarly situated individuals, for the harms they have suffered, and
- b. Awarding Plaintiffs, individually and on behalf of similarly situated individuals, their costs incurred herein, post-judgment interest, and for such other and further relief as the Court may deem just and proper under the circumstances.

Dated: December 28, 2017

LEAR WERTS LLP

Respectfully submitted,

/s/Todd C. Werts

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JS 44 (Rev 09/10)

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

CIVIL COVER SHEET

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

The completed cover sheet must be saved as a pdf document and filed as an attachment to the Complaint or Notice of Removal.

Plaintiff(s):**First Listed Plaintiff:**

Kim Burton ;
1 Citizen of This State;
County of Residence: Boone County

Defendant(s):**First Listed Defendant:**

Apple Inc. ;
5 Incorporated and Principal Place of Business in Another State; California
County of Residence: Outside This District

Additional Plaintiff(s):

William Ellis ;
1 Citizen of This State;

County Where Claim For Relief Arose: Boone County

Plaintiff's Attorney(s):

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Defendant's Attorney(s):

Bradford B. Lear (William Ellis)
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Basis of Jurisdiction: 4. Diversity of Citizenship

Citizenship of Principal Parties (Diversity Cases Only)

Plaintiff: 1 Citizen of This State

Defendant: 5 Incorporated and Principal Place of Business in Another State

Origin: 1. Original Proceeding

Nature of Suit: 385 Personal Property Damage Product Liability

Cause of Action: 28 USC sec. 1332(d); A class action complaint on behalf of two individuals who seek to represent a class of Missouri residents in their common claims for (1) violation of the Missouri Merchandising Practices Act; (2) Trespass to Chattels; (3) Violation of Missouri's Prohibition Against Malicious Trespass to Personalty; (4) Violation of Missouri's Computer Tampering Law; (5) Breach of the Covenant of Good Faith and Fair Dealing; (6) Breach of Implied Warranty of Merchantability; and (7) Breach of Implied Warranty of Fitness for a Particular Purpose.

Requested in Complaint

Class Action: Class Action Under FRCP23

Monetary Demand (in Thousands): TBD

Jury Demand: Yes

Related Cases: Is NOT a refile of a previously dismissed action

Signature: Todd C. Werts

Date: 12/28/17

If any of this information is incorrect, please close this window and go back to the Civil Cover Sheet Input form to make the correction and generate the updated JS44. Once corrected, print this form, sign and date it, and submit it with your new civil action.