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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](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

1
2 12. Plaintiff and Class Members are Apple iPhone users. Many Class Members are not
3 new to the iPhone franchise, but are loyal followers of Apple, having purchased various iterations of
4 the mobile device.

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

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

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

21
22
23 ² Jason Koebler, *Apple Throttles iPhones that Have Old Batteries (But Didn’t Tell You About It)*,
24 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).

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

26
27 ⁴ Matthew Panzarino, *Apple says IOS 10.2.1 has reduced unexpected iPhone 6s shutdown issues by*
28 *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
United States.

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

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 32. Plaintiff also has standing to challenge Defendants' unfair, unlawful and fraudulent
2 business practices on behalf of the public pursuant to California Business and Professions Code
3 § 17204, since she has suffered injury in fact and lost money or property as a result of such practices,
4 in the form of reduced value of the Legacy Device. Plaintiff purchased an iPhone 6 and upgraded to
5 iOS 10.2.1, causing her device performance to be artificially throttled. Apple did not inform her that
6 its software was the cause, and did not inform her that a simple change of battery could restore
7 performance. Plaintiff has also suffered reduced productivity as a result of Apple's practices.

8 33. On behalf of the proposed class, Plaintiff hereby seeks money damages and restitution
9 in an amount to be determined at trial.

10 34. On behalf of the proposed class, Plaintiff also hereby seeks entry of appropriate
11 equitable relief pursuant to California Business & Professions Code § 17203, including an injunction
12 prohibiting Defendant from engaging in the same or similar unfair business practices in the future,
13 civil penalties, restitution of money that may have been acquired by Defendants' unfair business
14 practices, and attorney's fees and costs of litigation. The entry of injunctive relief is of particular
15 importance, and necessary to secure a fair consumer marketplace.

SECOND CAUSE OF ACTION

(For Trespass to Chattels)

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17
18 35. Plaintiff incorporates the above allegations by reference as if set forth fully herein.

19 36. California common law prohibits the intentional intermeddling with personal property in
20 the possession of another, without consent, that results in either a) the deprivation of the use of the
21 personal property or b) the impairment of the condition, quality, or usefulness of the property.

22 37. Defendant impaired the condition, quality and usefulness of the Plaintiff's and Class
23 Members' Legacy Devices, or parts of them without their knowledge or consent. Such acts constituted
24 an intentional interference with the use and enjoyment of the devices.

25 38. Defendant acted intentionally, because it knew that Plaintiff and Class Members were
26 downloading computer software to their Legacy Devices that reduced the performance of the devices.
27 Plaintiff and the other Class Members only consented to the installation of software that would improve
28 performance, not diminish performance.

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

1
2 WHEREFORE, Plaintiff prays that the Court enter judgment and orders in their favor and
3 against Apple as follows:

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

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

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

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

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

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

16 DATED: December 22, 2017

Respectfully submitted,

KAPLAN FOX & KILSHEIMER LLP

17
18 By: /s/ Laurence D. King
Laurence D. King

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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

NICOLE GALLMANN, individually, and on behalf of all others similarly situated,

(b) County of Residence of First Listed Plaintiff San Francisco (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Laurence D. King / KAPLAN FOX & KILSHEIMER LLP 350 Sansome Street, Suite 400, San Francisco, CA 94104 (415) 772-4700; lking@kaplanfox.com

DEFENDANTS

APPLE, INC.

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.

Attorneys (If Known)

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)

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)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, 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. sec. 1332(d)

Brief description of cause: Violation of the Consumer Protection Act for false representations

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ 5,000,000.00

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE unassigned DOCKET NUMBER 3:17-cv-07274

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 12/22/2017

SIGNATURE OF ATTORNEY OF RECORD

/s/ Laurence D. King

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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.