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18 *the Proposed Class*

19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 SAN JOSE DIVISION

22 JOHN SOLAK, a New York resident, on behalf of
23 himself and all others similarly situated,

24 Plaintiff,

25 v.

26 APPLE INC., a California corporation,

27 Defendant.

No. 5:18-cv-123

28 CLASS ACTION COMPLAINT FOR
TRESPASS TO CHATTELS, VIOLATION
OF CALIFORNIA'S UNFAIR
COMPETITION LAW, FRAUDULENT
MISREPRESENTATION, AND
QUANTUM MERUIT TO RECOVER
SUMS BY WHICH DEFENDANT HAS
BEEN UNJUSTLY ENRICHED

DEMAND FOR JURY TRIAL

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1 For his complaint against Apple Inc., plaintiff alleges as follows on his own behalf and on
2 behalf of all similarly situated U.S. consumers:

3 **I. INTRODUCTION**

4 1. Apple markets its iPhones as premium products with remarkably fast processors and
5 epic performance. Each year, millions of American consumers bite—so many, in fact, that they have
6 made Apple the most valuable company in the world.

7 2. Like every vendor, Apple has duties of truthfulness and candor to its customers. It
8 also has the duty not to purposely degrade the performance of its customers' phones, and certainly
9 not without their knowledge or permission.

10 3. Yet Apple has violated these duties by arrogating to itself the right to throttle the
11 performance of millions of iPhones under at least three common conditions, such that its behavior
12 will likely affect millions of consumers. What's more, Apple acted by misrepresentation and
13 deception. Consumers did not know of, or consent, to Apple's decision to slow their devices.

14 4. In this nationwide proposed class action, plaintiff seeks at least the following relief on
15 his behalf and that of the putative class:

- 16 a. Monetary compensation for the unauthorized performance degradations to
17 their devices;
- 18 b. Monetary compensation for those consumers who bought new iPhones, often
19 at the urging of Apple representatives, because they thought their phones were
20 obsolete, not knowing that instead the slowdowns they noticed were caused by
21 Apple—and without knowing that they could have spent far less money on a
22 replacement battery instead;
- 23 c. Monetary compensation for consumers who bought new batteries at any price
24 for Affected Phones¹, and at any time, in an effort to avoid the performance
25 degradations that Apple caused without their knowledge or permission;
- 26

27 _____
28 ¹ These are the on iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus, and iPhone SE.

1 8. At Apple’s urging, Mr. Solak dutifully downloaded and installed each iOS update
2 presented to him. These updates have included iOS 10.2.1 and iOS 11.2. At no time did Apple
3 advise Mr. Solak that installing any of its iOS updates, including these two, would result in throttling
4 the performance of his phone under certain or any conditions. In fact, to Mr. Solak’s recollection,
5 the notices that he received on his device regarding these updates said nothing about performance-
6 throttling.² Nor did Mr. Solak give his consent to any such performance degradations.

7 9. Nonetheless, in or about June 2017, Mr. Solak began noticing significant slowdowns
8 of his phone’s performance. It was only in the last week or so that Mr. Solak first learned, thanks to
9 reports in the press, that Apple had intentionally caused this throttling without his knowledge or
10 permission.

11 **B. The defendant**

12 10. Apple, the designer, manufacturer, and vendor of iPhones, and the designer and
13 author of iOS and iOS updates, is a California corporation. It maintains its headquarters and
14 principal place of business in Cupertino, California. Upon information and belief, Apple’s head of
15 software (including iOS engineering), Craig Federighi,³ maintains his office at, and conducts
16 business from, its Cupertino headquarters.⁴ Also upon information and belief, Apple took all

17 ² Screenshots of these iOS update notices from Apple, which notices were displayed on Mr.
18 Solak’s phone screen and the screens of putative class members, are preserved online. (*See, e.g.*,
19 [https://www.forbes.com/sites/amitchowdhry/2017/01/23/apple-ios-10-2-1-is-now-available-what-is-
20 included-in-the-update/#1a726194488f](https://www.forbes.com/sites/amitchowdhry/2017/01/23/apple-ios-10-2-1-is-now-available-what-is-included-in-the-update/#1a726194488f) (screenshot of iOS 10.2.1 notice, stating: “iOS 10.2.1
21 includes bug fixes and improves the security of your iPhone or iPad. For information on the security
22 content of Apple software updates, please visit this website: <https://support.apple.com/HT201222>”)
23 (last accessed Jan. 5, 2018); [https://www.forbes.com/sites/amitchowdhry/2017/12/02/ios-11-2-
24 features/#20754f5c49ae](https://www.forbes.com/sites/amitchowdhry/2017/12/02/ios-11-2-features/#20754f5c49ae) screenshot of iOS 11.2 notice, stating: “iOS 11.2 introduces Apple Pay Cash
25 to send, request, and receive money from friends and family with Apple Pay. This update also
26 includes bug fixes and improvements. For information on the security content of Apple software
27 updates, please visit this website: <https://support.apple.com/kb/HT201222>”) (last accessed Jan. 5,
28 2018).)

24 ³ <https://www.apple.com/leadership/craig-federighi/> (“Craig Federighi is Apple’s senior vice
25 president of Software Engineering, reporting to CEO Tim Cook. Craig oversees the development of
26 iOS, macOS, and Siri. His teams are responsible for delivering the software at the heart of Apple’s
27 innovative products, including the user interface, applications and frameworks.” (last accessed Jan.
28 5, 2018).

27 ⁴ *See, e.g.*, <https://www.macrumors.com/2017/12/01/craig-federighi-face-id-touch-id-email/>
28 (indicating that Mr. Federighi answered an email on behalf of the company via Apple’s servers
located at its Cupertino, California headquarters) (last accessed Jan. 5, 2018).

1 decisions and actions complained of herein at or near its corporate headquarters in Cupertino,
2 California, or elsewhere in the state of California.

3 11. Apple transacts substantial business throughout California, including by way of
4 designing its products and operating system updates, devising and implementing policies regarding
5 operating system updates, devising and implementing its service and marketing strategies and
6 policies, and dispersing its iOS software updates from or via its California headquarters. It is
7 believed, and therefore alleged, that substantially all of the misconduct alleged in this complaint
8 occurred in or emanated from California.

9 **V. FACTUAL ALLEGATIONS**

10 12. In or about 2016, reports began to surface of random, unexpected, sudden, and
11 extremely disruptive shutdowns of certain iPhones. Many such shutdowns seemed to occur when the
12 battery indicator on these iPhones reported that the charge level had reached approximately 30%.⁵
13 Some reports focused on the iPhone 6s. But other reports, including some citing Chinese consumer
14 authorities and some in certain press outlets, referred to a range of iPhone 6 and 6s devices with
15 serious issues.⁶

16 13. Where American consumers were concerned, Apple also focused on the iPhone 6s. In
17 November 2016 it posted an article to its American website in which it offered a battery replacement
18 program for a limited number of these particular devices.⁷ In that article it stated opaquely: “Apple
19 has determined that a very small number of iPhone 6s devices may unexpectedly shut down. This is
20 not a safety issue and only affects devices within a limited serial number range that were
21 manufactured between September and October 2015.” To reiterate, only those particular phones
22 were eligible to have their batteries replaced free of charge.

23
24 _____
25 ⁵ See, e.g., <http://www.businessinsider.com/apple-statement-on-iphone-shutdown-issue-2016-12>
(last accessed Jan. 2, 2018).

26 ⁶ See, e.g., *id.*; see also, e.g., <http://fortune.com/2017/01/25/apple-iphone-6-battery-recall/> (last
accessed Jan. 3, 2018).

27 ⁷ See <https://www.apple.com/support/iphone6s-unexpectedshutdown/> (last accessed January 2,
28 2018). Apple posted this article to its American website in or about November 2016.

1 14. Rather than offering more information to its American consumers, Apple chose
2 instead to offer a bit more detail on its Chinese-language website after Chinese authorities announced
3 investigations of its iPhone products. In two messages dated December 1 and December 6, 2016,
4 Apple advised Chinese consumers that it had heard of a “limited number of reports of unexpected
5 shutdown with iPhones”; that it had investigated and “found a small number of iPhone 6s devices
6 made in September and October 2015 contained a battery component that was exposed to controlled
7 ambient air longer than it should have been before being assembled into battery packs; and that it
8 was “replacing batteries in affected devices” worldwide.⁸

9 15. Apple also revealed to its Chinese customers that “[a] small number of customers
10 outside of the affected range have also reported an unexpected shutdown.”⁹ It told them it was
11 gathering more information on the problem. And it told them:

12 We also want our customers to know that an iPhone is actually designed to shut down
13 automatically under certain conditions, such as extremely cold temperature. To an
14 iPhone user, some of these shutdowns might seem unexpected, but they are designed
to protect the device’s electronics from low voltage.¹⁰

15 It also told that while it was looking for other factors that could “cause an iPhone to shut down
16 unexpectedly,” it had not yet found any.¹¹

17 16. Fast forward to December 2017. Reports surfaced on December 18, 2017, that a
18 Primate Labs researcher, John Poole, had found evidence that Apple had embedded performance-
19 degrading features into certain iOS updates, likely as a means to prevent shutdowns of Affected
20 Phones.¹² Mr. Poole’s research was spurred by a post the week before from a Reddit poster,
21 Teckfire, which stated in part: “From what I can tell, Apple slows down phones when their battery
22 gets too low, so you can still have a full days charge. This also means your phone might be very slow
23

24 ⁸ See <https://support.apple.com/zh-cn/HT207414> (last accessed Jan. 2, 2017).

25 ⁹ *Id.*

26 ¹⁰ *Id.*

27 ¹¹ *Id.*

28 ¹² See <https://www.geekbench.com/blog/2017/12/iphone-performance-and-battery-age/> (last
accessed Jan. 3, 2018).

1 for no discernible reason.”¹³ Later, 9TO5Mac reported that “Developer Guilherme Rambo has
2 discovered the software system, powerd (short for power daemon), that Apple put in place in iOS
3 10.2.1. powerd controls CPU/GPU speed and power. It also responds to thermal pressure and helps
4 iPhones from catching fire.”¹⁴ Mr. Rambo’s Twitter post was dated December 18, 2017, the same as
5 Mr. Poole’s report.¹⁵

6 17. All of this reporting caused Apple to acknowledge—sort of—that it had embedded a
7 throttling feature into two iOS updates. As it stated to *TechCrunch* on December 20, 2017:

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

13 Last year we released a feature for iPhone 6, iPhone 6s and iPhone SE to smooth out the
14 instantaneous peaks only when needed to prevent the device from unexpectedly shutting
15 down during these conditions. We’ve now extended that feature to iPhone 7 with iOS 11.2,
16 and plan to add support for other products in the future.¹⁶

17 18. This acknowledgment, of course, caused much gnashing of teeth among Apple
18 consumers. So about a week later, Apple published an apology letter further acknowledging and
19 explaining its actions.¹⁷ As the defendant blandly put it:

20 About a year ago in iOS 10.2.1, we delivered a software update that improves power
21 management during peak workloads to avoid unexpected shutdowns on iPhone 6, iPhone 6
22 Plus, iPhone 6s, iPhone 6s Plus, and iPhone SE. With the update, iPhone dynamically
23 manages the maximum performance of some system components when needed to prevent a
24 shutdown. While these changes may go unnoticed, in some cases users may experience
25 longer launch times for apps and other reductions in performance.

26 ¹³ <https://pastebin.com/JergYngQ> (last accessed Jan. 2, 2018).

27 ¹⁴ <https://9to5mac.com/2017/12/18/iphone-battery-performance-issues/> (last accessed Jan. 4,
28 2018).

¹⁵ https://twitter.com/_inside/status/942847979991523328 (last accessed Jan. 4, 2018).

¹⁶ <https://techcrunch.com/2017/12/20/apple-addresses-why-people-are-saying-their-iphones-with-older-batteries-are-running-slower/> (last accessed Jan. 2, 2018).

¹⁷ <https://www.apple.com/iphone-battery-and-performance/> (last accessed Jan. 2, 2018).

1 19. In a nutshell, then, Apple admitted that it had instituted performance throttling on
2 Affected Phones. Its stated reason was to prevent shutdowns when a battery's voltage fell to a
3 certain level under three circumstances: "[w]ith a low battery state of charge, a higher chemical age,
4 or colder temperatures."¹⁸ Implicitly, it also admitted that it had not asked permission from its
5 customers to do this, nor had it informed them previously of exactly what it had done.

6 20. Also on December 28, 2017, in its "iPhone Battery and Performance" paper, Apple
7 identified seven ways in which its so-called and hidden "power management" could affect
8 performance of the phones on which it was installed.¹⁹

9 21. Coupled with these explanations and apologies, Apple announced that it would
10 "reduc[e] the price of an out-of-warranty iPhone battery replacement by \$50—from \$79 to \$29—for
11 anyone with an iPhone 5 or later whose battery needs to be replaced" through the end of 2018.²⁰
12 Importantly, Apple acknowledged for the first time in its apology letter that replacing an Affected
13 Phone's "chemically aged" battery would do away with the voltage issues that would cause the
14 performance throttling to occur (unless the phone were used in non-standard conditions).²¹

15 22. Apple also stated that it was working on an iOS software update, to be issued in early
16 2018, "with new features that give users more visibility into the health of their iPhone's battery, so
17 they can see for themselves if its conditions is affecting performance."²² This is a further admission
18 that Apple had not given iPhone customers key information as to what was causing the performance

19 ¹⁸ See <https://support.apple.com/en-us/HT208387> (last accessed Jan. 4, 2018). This is an article
20 entitled "iPhone Battery and Performance" that Apple issued on December 28, 2017,
21 contemporaneously with its apology letter.

22 ¹⁹ See *id.*

23 ²⁰ See <https://www.apple.com/iphone-battery-and-performance/>. Later, at least according to
24 certain press reports, it began allowing this discount for all such iPhone battery replacements—not
25 only for those phones "whose battery needs to be replaced" according to its own testing. (See, e.g.,
26 <https://techcrunch.com/2018/01/02/you-can-get-that-29-battery-replacement-regardless-of-your-iphones-health/>
27 (last accessed Jan. 4, 2018).) But its official offer remains unchanged as of the date
28 of this complaint.

²¹ See <https://www.apple.com/iphone-battery-and-performance/> ("Of course, when a chemically
aged battery is replaced with a new one, iPhone performance returns to normal when operated in
standard conditions."). Evidently this means in "a low state of charge" or "in a cold temperature
environment." See <https://support.apple.com/en-us/HT208387>.

²² See <https://www.apple.com/iphone-battery-and-performance/>.

1 degradations that so many of them, including the plaintiff, were experiencing due to its battery issues
2 and its decision to throttle performance in order to prevent shutdowns.

3 23. Apple's subterfuge in installing throttling software, and its lack of candor until forced
4 to explain itself by press reports and customer uproar, undoubtedly resulted in many sales and
5 purchases of new iPhones due to consumers' belief—and Apple sales representatives' urgings—that
6 their phones were essentially obsolete, hence the degradations of performance.²³ And, no doubt,
7 many owners of Affected Phones bought batteries at \$79 while fishing in the dark for a solution to
8 their performance issues. Plaintiff considered both of these options before Apple finally admitted
9 what was actually happening with his phone, and why.

10 24. Whether Apple had good reason to install performance-throttling software on certain
11 iPhone models is debatable to say the least. Its key competitors Samsung, LG, HTC, and Motorola
12 say that they do not throttle CPU performance in devices with older batteries.²⁴

13 25. In fact, Apple's decision to engineer and install throttling features without the
14 knowledge or consent of its customers speaks to a design, manufacturing, or marketing flaw, or some
15 combination of these flaws. Such shutdowns should not be occurring on premium devices in
16 particular. Perhaps there is a mismatch between Apple's batteries and the hardware they are meant
17 to power. Or perhaps Apple's insistence on thinner phones and more powerful processors do not jibe
18 with available battery technology—or battery technology for which it was willing to pay.

19 26. In any event, Apple had no right to foist this throttling software on customers without
20 their knowledge or consent. Further, these customers could not reasonably figure out what Apple
21 had done; a reasonable consumer would at most expect his battery life to shorten over time, not that
22

23 ²³ See Comments to “Apple Will Replace the Battery in Your iPhone 6 or Later Even if it Passes
24 a Genius Bar Diagnostic Test,” dated Jan. 2, 2018 (available at
25 <https://www.macrumors.com/2018/01/02/apple-replaces-iphone-batteries-that-pass-tests/> (last
26 accessed Jan. 4, 2018)) (e.g., “Too little too late. Apple genius denied the iphone [*sic*] 6 (of a family
member) the \$79 out of warranty battery replacement back in September and suggested a hardware
upgrade instead.”).

27 ²⁴ <https://www.cultofmac.com/521005/samsung-lg-dont-throttle-phones-like-apple/> (last accessed
28 Jan. 4, 2018); [https://www.androidauthority.com/htc-motorola-iphone-throttle-cpu-performance-
android-826193/](https://www.androidauthority.com/htc-motorola-iphone-throttle-cpu-performance-android-826193/) (last accessed Jan. 4, 2018).

1 it would lead to degraded performance,²⁵ and especially not to degraded performance that Apple
2 caused intentionally.

3 **VI. CLASS ALLEGATIONS**

4 27. Plaintiff brings this action pursuant to the provisions of Fed. R. Civ. P. 23(a), (b)(2),
5 and (b)(3), on behalf of himself and the following proposed class:

6 All U.S. persons or entities who own or owned an iPhone 6, iPhone 6 Plus, iPhone 6s,
7 iPhone 6s Plus, iPhone SE, iPhone 7, or iPhone 7 Plus, and who installed iOS 10.2.1
8 or 11.2 on his, her, or its iPhone.

9 28. Excluded from the proposed class are Apple, its employees, officers, directors, legal
10 representatives, heirs, successors, subsidiaries and affiliates, and the judicial officers and their
11 immediate family members and associated court staff assigned to this case, as well as all persons
12 who make a timely election to be excluded from the proposed classes.

13 29. Certification of plaintiff's claims for classwide treatment is appropriate because
14 plaintiff can prove the elements of his claims on a classwide basis using the same evidence as would
15 be used to prove those elements in individual actions alleging the same claims.

16 30. This action meets all applicable standards of Fed. R. Civ. P. 23 for class certification.
17 More specifically, plaintiff can demonstrate:

18 31. Numerosity. The members of the proposed class are so numerous and geographically
19 dispersed that individual joinder of all proposed class members is impracticable. *See* Fed. R. Civ. P.
20 23(a)(1). While plaintiff believes that there are hundreds of thousands, if not millions, of

21 ²⁵ What's more, blazing fast performance is a feature that Apple regularly touts when marketing
22 its devices. *See, e.g.*, <https://web.archive.org/web/20141001022732/http://www.apple.com/iphone-6/technology> ("The all-new A8 chip is our fastest yet. Its CPU and graphics performance are faster
23 than on the A7 chip, even while powering a larger display and incredible new features. And because
24 it's designed to be so power efficient, the A8 chip can sustain higher performance—so you can play
25 graphics-intensive games or enjoy video at higher frame rates for longer than ever.") (last accessed
26 Jan. 2, 2018); <https://web.archive.org/web/20150926133013/http://www.apple.com:80/iphone-6s/technology/> ("The A9 chip brings a new level of performance and efficiency to iPhone 6s. Not
only a faster experience, but a better one. . . . It sits at the cutting edge of mobile chips, improving
overall CPU performance by up to 70 percent compared to the previous generation. . . .") (last
accessed Jan. 2, 2018).

27 Plaintiff recalls seeing similar if not identical advertising, and being impressed by it, prior to
28 purchasing his iPhone 6. He looked forward to enjoying that power and speed unimpeded by
performance throttling.

1 members of the proposed class,²⁶ the precise number of class members is unknown to them, but may
2 be ascertained from Apple's books and records. Class members may be notified of the pendency of
3 this action by recognized, court-approved notice dissemination methods, which may include U.S.
4 Mail, electronic mail, Internet postings, and/or published notice.

5 32. Commonality and Predominance. This action involves common questions of law and
6 fact, which predominate over any questions affecting individual class members. *See* Fed. R. Civ. P.
7 23(a)(2) and (b)(3). These include, without limitation:

- 8 a. Whether Apple engaged in the conduct alleged in this complaint;
- 9 b. Whether Apple designed, advertised, marketed, distributed, sold, or otherwise
10 placed Affected Phones into the stream of commerce in the United States;
- 11 c. Whether Apple designed, programmed, manufactured, marketed, and
12 distributed the referenced iOS software updates;
- 13 d. Whether Apple advised owners of Affected Phones (including plaintiff and
14 putative class members) of the throttling features it intentionally included in
15 the referenced iOS software updates when it presented them for installation on
16 affected devices;
- 17 e. Whether Apple obtained real or informed consent from owners of Affected
18 Phones (including plaintiff and putative class members) to install throttling
19 features on their affected devices;
- 20 f. Whether Affected Phones, their batteries, or their operating systems contain
21 marketing, design, or manufacturing defects;
- 22 g. Whether Apple knew about the defect(s), and, if so, for how long;
- 23 h. Whether Apple marketed iPhones as high-performance devices that were both
24 powerful and speedy;

25
26 _____
27 ²⁶ *See, e.g.*, <https://www.finder.com/iphone-sales-statistics> (setting forth year of release of
28 iPhones since the iPhone 4s, as well as the enormous U.S. sales of iPhones per year) (last accessed
Jan. 4, 2018).

- 1 i. Whether Apple’s conduct, including but not limited to its alleged deceptive
2 conduct, violates California consumer protection statutory or other laws as
3 asserted herein;
- 4 j. Whether plaintiff and members of the proposed class are entitled to damages,
5 as well as punitive, exemplary, or multiple damages, due to Apple’s conduct
6 as alleged in this complaint, and if so, in what amounts; and
- 7 k. Whether plaintiff and other putative class members are entitled to equitable
8 relief, including, but not limited to, restitution or injunctive relief as requested
9 in this complaint.

10 33. Typicality. Plaintiff’s claims are typical of the putative class members’ claims
11 because, among other things, all such class members were comparably injured through Apple’s
12 wrongful conduct as described above. *See* Fed. R. Civ. P. 23(a)(3).

13 34. Adequacy. Plaintiff is an adequate proposed class representative because his interests
14 do not conflict with the interests of the other members of the proposed class he seeks to represent;
15 because he has retained counsel competent and experienced in complex class action litigation; and
16 because he intends to prosecute this action vigorously. The interests of the proposed class will be
17 fairly and adequately protected by plaintiff and his counsel. *See* Fed. R. Civ. P. 23(a)(4).

18 35. Declaratory and Injunctive Relief. Apple has acted or refused to act on grounds
19 generally applicable to plaintiff and the other members of the proposed class, thereby making
20 appropriate final injunctive relief and declaratory relief, as described below, with respect to the
21 proposed class as a whole. *See* Fed. R. Civ. P. 23(b)(2).

22 36. Superiority. A class action is superior to any other available means for the fair and
23 efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in
24 the management of this class action. The damages or other financial detriment suffered by plaintiff
25 and putative class members are relatively small compared to the burden and expense that would be
26 required to individually litigate their claims against Apple, so it would be impracticable for members
27 of the proposed classes to individually seek redress for Apple’s wrongful conduct. Moreover, even if
28

1 class members could afford individual litigation, the court system could not. Individualized
2 litigation creates a potential for inconsistent or contradictory judgments, and it increases the delay
3 and expense to all parties and the court system. By contrast, the class action device presents far
4 fewer management difficulties and provides the benefits of single adjudication, economy of scale,
5 and comprehensive supervision by a single court. *See* Fed. R. Civ. P. 23(b)(3).

6 **VII. CAUSES OF ACTION**

7 **COUNT I**

8 **TRESPASS TO CHATTELS**

9
10 37. Plaintiff realleges and incorporates by reference all paragraphs as though fully set
11 forth herein.

12 38. Plaintiff and members of the proposed class owned or own one or more of the
13 following iPhones: the iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus, iPhone SE, iPhone 7, or
14 iPhone 7 Plus. At Apple's urging, plaintiff and members of the proposed class installed either iOS
15 10.2.1, 11.2, or both, on their iPhones, without knowing that Apple had secretly included
16 performance-throttling features in each of those iOS updates. Because they were unaware of the
17 inclusion of this secret feature, they did not consent to installation of it on their devices.

18 39. Defendant Apple intentionally interfered with, and committed trespass to, plaintiff's
19 and putative class members' property, *i.e.*, their iPhones, by installing performance-throttling
20 software on their phones without their knowledge. To reiterate: because Apple did not inform them
21 of, or seek their consent to installation of, performance-throttling software when presenting them
22 with the iOS 10.2.1 or 11.2 updates, or both of them, plaintiff and the putative class members did not
23 consent to Apple's interference.

24 40. Apple's interference was the actual, direct, and proximate cause of injury to the
25 plaintiff and his fellow putative class members because it actually and substantially slowed, and
26 therefore harmed, the functioning of the devices in at least the seven ways that Apple has now
27

1 admitted.²⁷ This harm to the functioning of the Affected Phones, which plaintiff and putative class
2 members have experienced, significantly impaired the devices' condition, quality, and value.

3 41. Apple's trespass and interference was malicious and oppressive—in order to stave off
4 shutdowns that should not have been occurring in the first place, and without informing plaintiff and
5 putative class members, Apple hid performance-degrading software in iOS updates, and it said
6 nothing about this feature, nor did it obtain the permission of the affected persons to trespass on or
7 interfere with their devices. Apple knew and intended that its conduct would cause injury to plaintiff
8 and members of the putative class, including by way of diminishing the performance of their
9 expensive, premium phones. Apple thus acted despicably and with conscious disregard of the rights
10 of plaintiff and that putative class.

11 42. As a result of Apple's trespass to, and interference with, their devices, plaintiff and
12 the members of the proposed class are entitled to recover the actual damages they suffered in
13 amounts to be determined at trial, as well as punitive damages in an amount that also will be
14 determined at trial.

15 **COUNT II**

16 **VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW**
17 **(CAL. BUS. & PROF. CODE § 17200, *et seq.*)**

18 43. Plaintiff realleges and incorporates by reference all paragraphs as though fully set
19 forth herein.

20 44. Plaintiff brings this count on behalf of himself and the proposed class.

21 45. California's Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE § 17200, *et*
22 *seq.*, proscribes acts of unfair competition, including "any unlawful, unfair or fraudulent business act
23 or practice and unfair, deceptive, untrue or misleading advertising."

24 46. Apple's choices, policies, conduct, and actions were undertaken or performed in, and
25 therefore emanated from, California.

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27

²⁷ See <https://support.apple.com/en-us/HT208387>.

1 **A. Unfair prong**

2 47. Apple's conduct violates the unfair prong of the UCL in at least the following ways:

- 3 a. Apple systematically installed performance-throttling software on Affected
4 Phones without the knowledge or consent of plaintiff or putative class
5 members. By doing this, Apple deprived these iPhone owners of the
6 performance which Apple promised them but which it consciously degraded
7 under at least the circumstances it has admitted;
- 8 b. Apple's subterfuge outweighs any potential benefits from its unilateral action;
9 and
- 10 c. Apple chose an unfair, and therefore unlawful, course of action when other,
11 lawful courses were available. For example, it could and should have given
12 plaintiff and putative class members the right to opt in and out of the throttling
13 feature at their election.

14 48. Apple also behaved as alleged in order to gain unfair commercial advantage over its
15 competitors, even if it meant disregarding the rights and expectations of its customers. Apple's
16 actions reveal that it wanted to deal with its iPhone shutdown issue as quietly as possible, so as not to
17 injure sales or its reputation. It not only withheld critical information from plaintiff and the putative
18 class, but also from its competitors and the marketplace at large, all to its unfair competitive
19 advantage.

20 49. Apple's behavior as alleged herein, which emanated from its headquarters in
21 California, caused harm to the plaintiff and putative class as alleged in this complaint. Had plaintiff
22 and putative class members known that Apple would engage in this unfair behavior, they would not
23 have purchased their iPhones, or they would not have purchased these Affected Phones at the prices
24 they paid (*i.e.*, they would only have purchased them at lesser prices), and/or they would have
25 purchased less expensive phones.

26 50. Accordingly, plaintiff and other putative class members have suffered injury in fact,
27 including lost money or property, as a result of Apple's unfair behavior.

1 51. Plaintiff and the putative class seek to enjoin further unfair acts or practices by Apple
2 under CAL. BUS. & PROF. CODE § 17200.

3 **B. Fraudulent prong**

4 52. Additionally, Apple procured the installation of iOS 10.2.1 and 11.2 by way of false
5 and fraudulent statements and omissions as to the contents of those software updates. This led to
6 sales of new iPhones and batteries to putative class members who would not have bought them had
7 they known the real truth (*i.e.*, that performance slowdowns were caused by Apple, and that even so,
8 a new battery might suffice to restore the performance of their current phones), and it kept plaintiff
9 and putative class members from seeking full or partial refunds for devices whose performance was
10 intentionally throttled by Apple.

11 53. Also, after designing and releasing its performance-throttling software for Affected
12 Phones, it sold such phones to certain customers who were buying phones anew (*i.e.*, not for
13 replacement purposes). In order to sell these phones, it made its usual representations as to the stellar
14 performance that could be expected from these phones, even though it knew that its throttling feature
15 would degrade that performance under several circumstances.

16 54. Accordingly, plaintiff and other putative class members have suffered injury in fact,
17 including lost money or property, as a result of Apple's fraudulent behavior.

18 55. Plaintiff and the putative class seek to enjoin further fraudulent acts or practices by
19 Apple under CAL. BUS. & PROF. CODE § 17200

20 56. In sum, plaintiff and the putative class ask that this Court enter such orders or
21 judgments as may be necessary to enjoin Apple from continuing its unfair and fraudulent practices as
22 described herein, and to restore to plaintiff and members of the putative class all money that it
23 acquired or retained by way of unfair or fraudulent competition and activities, including restitution
24 and/or restitutionary disgorgement, as provided in CAL. BUS. & PROF. CODE §§ 17203 and 3345, and
25 for such other relief as is requested in this complaint or that is otherwise appropriate.
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COUNT III

FRAUDULENT MISREPRESENTATION

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2
3 57. Plaintiff realleges and incorporates by reference all paragraphs as though fully set
4 forth herein.

5 58. Plaintiff brings this count on behalf of himself and the proposed class.

6 59. Apple made material misrepresentations concerning the content and intended and
7 expected effects of the iOS updates referenced in this complaint, as well as the performance of
8 Affected Phones and their batteries.

9 60. More specifically, Apple's representations were false in that they mis-described the
10 contents of these updates. It told its customers that its iOS updates had only specific positive
11 features, but this was not true, as Apple knew, because iOS 10.2.1 and 11.2 also contained features
12 that intentionally degraded the performance of Affected Phones in at least the seven ways it has now
13 identified, such that these owners thought they needed a new phone or battery when Apple knew
14 better. Instead, Apple sold members of the putative class new products when they otherwise would
15 not have bought them.

16 61. Also, Apple deceived certain putative class members when it sold them new Affected
17 Phones with representations of high levels of performance and speed even though, after the
18 introduction of the complained-of features in iOS 10.2.1, 11.2, or both, it knew that these devices
19 would be subject to performance degradation due to performance-throttling features contained in
20 those iOS updates. Under these circumstances, its representations as to performance and speed were
21 knowingly false.

22 62. Apple behaved in these ways in order to boost or maintain sales of its iPhones, and in
23 order to falsely assure purchasers of the iPhone that Apple is a reputable manufacturer and that its
24 phones are reliable and able to perform as promised. The false representations were material to
25 consumers because the representations played a significant role in the value of the iPhones they
26 purchased.

1 63. Plaintiff and proposed class members read the release notes accompanying the subject
2 iOS updates, which said nothing about the performance-throttling features that Apple had installed in
3 them. They had no way of knowing that Apple's representations as to the contents of the subject iOS
4 updates were gravely misleading. Plaintiff and proposed class members did not and could not
5 unravel Apple's deception on their own.

6 64. Apple had a duty to ensure the accuracy of release statements it published with
7 respect to its iOS updates, and to ensure the accuracy of performance promises and representations it
8 made in order to induce sales of new phones. But it did not fulfill these duties, to the detriment of
9 plaintiff and members of the putative class.

10 65. Apple actively misrepresented material facts, in whole or in part, to pad and protect its
11 profits and to maintain and burnish its reputation as a premier designer and vendor of phones, which
12 perception would enhance the brand's image and garner Apple more money. But it did so at the
13 expense of plaintiff and the putative class.

14 66. Plaintiff and the putative class were unaware of these material misrepresentations, and
15 they would not have acted as they did if they had known the truth. Plaintiff's and the putative class
16 members' actions were justified given Apple's misrepresentations. Apple was in exclusive control
17 of the material facts, and such facts were not known to the public, plaintiff, or the proposed class.

18 67. Because of Apple's misrepresentations, plaintiffs and the putative class sustained
19 injury due to the throttling of their phones without their knowledge. They are entitled to recover full
20 or partial refunds for iPhones or batteries they purchased due to Apple's misrepresentations, or they
21 are entitled to damages for the diminished value of their Affected Phones, which no longer perform
22 as promised and expected due to Apple's behavior as alleged in this complaint.

23 68. Accordingly, Apple is liable to plaintiff and the proposed class for damages in an
24 amount to be proven at trial.

25 69. Further, Apple's acts were done maliciously, oppressively, deliberately, with intent to
26 defraud, and in reckless disregard of plaintiff's and the putative class members' rights and well-
27 being, and as part of efforts to enrich itself in California at the expense of consumers. Apple's acts

1 also were done in order to gain commercial advantage over its competitors, and to drive consumers
2 away from consideration of competitor devices as alleged in this complaint. Apple's conduct
3 warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the
4 future, which amount is to be determined according to proof.

5 **COUNT IV**

6 **QUANTUM MERUIT TO RECOVER SUMS RECEIVED BY UNJUST ENRICHMENT**

7 70. Plaintiff realleges and incorporates by reference all paragraphs as though fully set
8 forth herein.

9 71. Plaintiff brings this claim on behalf of himself and the proposed class.

10 72. In the event that no adequate legal remedy is available, plaintiff brings this count in
11 quasi contract on his behalf and that of his fellow putative class members, in order to pursue
12 restitution based on Apple's unjust enrichment.

13 73. Apple has unjustly received and retained monetary benefits from plaintiff and the
14 class, and inequity has resulted.

15 74. More specifically, Apple sold plaintiff and putative class members iPhones marketed
16 to have a premium level of performance. These iPhones' prices reflected their promised premium
17 performance. Once Apple consciously throttled their performance as alleged herein, including by
18 way of false inducements to get them to agree to install the iOS updates at issue, the value of these
19 devices to plaintiff and the proposed class dropped. Yet Apple has retained all the funds they paid.
20 Further, Apple has induced sales of new iPhones and batteries due to its throttling that putative class
21 members mis-interpreted as obsolescence. Again, Apple has retained these monetary benefits that it
22 obtained as a consequence of the wrongful practices identified in this complaint.

23 75. Thus, all proposed class members conferred a benefit on Apple.

24 76. It is inequitable under the circumstances described in this complaint for Apple to
25 retain these benefits.

26 77. Plaintiff and the class were not aware of the true facts about the Affected Phones and
27 did not benefit from Apple's conduct.

1 78. Apple, on the other hand, knowingly accepted, and has retained, the benefits of its
2 unjust conduct.

3 79. As a result of Apple's conduct, the sum of its unjust enrichment should be disgorged
4 as restitution under the theory of quantum meruit or otherwise, in amounts according to proof.

5 **VIII. REQUEST FOR RELIEF**

6 WHEREFORE, plaintiff respectfully requests that the Court enter judgment in his favor and
7 that of the proposed class, and against defendant, as follows:

8 A. Certification of the proposed nationwide class as requested, including appointment of
9 plaintiff's counsel as class counsel;

10 B. Damages, including punitive damages; restitution; penalties; and disgorgement in
11 amounts to be determined at trial;

12 C. An order requiring Apple to pay both pre- and post-judgment interest on any amounts
13 awarded;

14 D. An award of costs, expenses, and attorneys' fees;

15 E. Orders temporarily and then permanently enjoining Apple from continuing the unfair
16 and deceptive business practices alleged in this complaint, in particular the throttling of any Affected
17 Phone without the consent of the phone's owner, and orders effecting the correction or mitigation of
18 the unfair and deceptive practices alleged herein; and

19 F. Such other or further relief as may be appropriate.

20 **IX. DEMAND FOR JURY TRIAL**

21 Plaintiff hereby demands a jury trial for all claims so triable.

22
23 Dated: January 5, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Shana E. Scarlett

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Attorneys for Plaintiff and the Proposed 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 JOHN SOLAK

(b) County of Residence of First Listed Plaintiff Broome County, New York (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, 715 Hearst Ave., Ste. 202, Berkeley, CA 94710; (510) 725-3000

DEFENDANTS APPLE, INC.

County of Residence of First Listed Defendant Santa Clara County (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)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS (PERSONAL INJURY, 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. 1332(d)

Brief description of cause:

Class Action Fairness Act of 2005

VII. REQUESTED IN COMPLAINT:

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

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

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

JUDGE

DOCKET NUMBER

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

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

DATE 01/05/2018

SIGNATURE OF ATTORNEY OF RECORD

/s/ Shana E. Scarlett

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.