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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARC OPPERMAN, et al.,

Plaintiffs,

v.

PATH, INC., et al.

Defendants.

Case No. 13-cv-00453-JST

CLASS ACTION

REDACTED VERSION OF PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION RE FALSE ADVERTISING LAW AND RELATED CLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

THIS DOCUMENT RELATES TO THE FOLLOWING CASES
Opperman v. Path, Inc., No. 13-cv-00453-JST
Hernandez v. Path, Inc., No. 12-cv-1515-JST
(collectively, the "Related Actions")

Date: November 15, 2016
Time: 9:30 a.m.
Judge: Honorable Jon S. Tigar

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TO THE COURT, ALL PARTIES, AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 15, 2016, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 9, 19th Floor of the United States District Courthouse, 450 Golden Gate Avenue, San Francisco, California, 94102, before the Honorable Jon S. Tigar, Plaintiffs Jason Green, Stephanie Cooley, Lauren Carter, Claire Hodgins and Gentry Hoffman (hereinafter, "Plaintiffs"), on their own and on behalf of the putative class (defined below), hereby move this Court for an Order: (1) granting class certification in the above-captioned action ("Action") against Defendant Apple, Inc. pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure; (2) appointing Plaintiffs as Class Representatives; and (3) appointing Plaintiffs' Interim Co-Lead Counsel (hereinafter, "Plaintiffs' Counsel") as Class Counsel.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the accompanying Declarations of Frank Busch, David M. Given, and Michael von Loewenfeldt and exhibits thereto (including written discovery responses and documents produced by Defendant Apple, Inc.), the respective declarations of Plaintiffs and the exhibits thereto, the papers and records on file in this Action, and such other written and oral arguments as may be presented at or before the hearing to the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs move to certify the following class against Defendant Apple, Inc. ("Apple"), on Plaintiffs' fraud-based False and Misleading Advertising Law (FAL), Consumer Legal Remedies Act (CLRA), deceit, and Unfair Competition Law (UCL) claims ("Claims") against Apple relating to its iPhone, iPod, and iPad (collectively, "iDevices") products:

All United States residents who, prior to February 8, 2012 (the "Class Period"), purchased an iDevice of the following models: iPhone 3G, iPhone 3GS, iPhone 4, iPhone 4s, iPad, iPad 2, or the second through fourth generations of the iPod Touch (the "Class Devices").

The above class definition identifies an objective, ascertainable, and numerous group of people.

Plaintiffs' Claims against Apple for violation of these laws is based on uniform conduct towards the entire class. Prior to the Class Period, Apple's mobile devices did not support third-party developed applications ("apps"). They included only Apple-developed apps, including the Contacts app, which acts like a digital address book, as well as others that stored private user data. Apple marketed these devices on the concept that this data was safe and secure.

When Apple launched the App Store in 2008, users could for the first time ever download apps developed by third party developers. To continue its message of security, Apple used extensive advertising and buzz marketing techniques to (falsely) represent that private data stored on Class Devices was eminently safe and secure. Moreover, Apple represented that the devices each came with two security features that would prevent third-party apps from taking private user data off the devices without consent, including data stored in the Contacts app. This advertising campaign was nationwide, ubiquitous and pervasive.

Privately, however, Apple knew that private user Contacts data stored on Class Devices was not safe and secure from malicious apps, and that the two features it prominently advertised were completely ineffective against this security problem. The first feature – "sandboxing" – did not prevent apps from accessing the data inside of the Contacts app, as Apple advertised. The second feature – the "curated" App Store – did not prevent these malicious apps from making

their way into the App Store [redacted] Instead, it encouraged apps to take user Contacts data without consent [redacted] Apple's consumer-facing messaging was the opposite, [redacted]

Apple's marketing strategy was so successful that when the public-at-large finally realized Apple's advertisements were false on or after February 8, 2012, Apple took a significant portion of the public blame. Apple's response exemplifies the value of its advertising campaign to its bottom line and consumer decision-making: Apple changed its ***devices***, not its message. Unlike the security flaw, that message persists today. Nonetheless, Plaintiffs and putative class members overpaid for their Class Devices based on Apple's misrepresentations that the Class Devices contained privacy protections Apple knew did not actually protect users' private Contacts data.

Because their respective Claims against Apple are typical of those of the class, Plaintiffs can and will adequately protect the interests of the proposed classes in a representative capacity. Plaintiffs therefore move to certify the above classes pursuant to Rule 23(a) and 23(b)(3), appoint Plaintiffs as Class Representatives, and appoint Plaintiffs' Counsel as Class Counsel pursuant to Rule 23(g)(1).

II. STATEMENT OF ISSUE TO BE DECIDED

Applying the Federal Rules of Civil Procedure, whether the Court will certify a class in this Action as proposed above.

III. STATEMENT OF CLASS-WIDE FACTS

The fact issues likely to resolve Plaintiffs' and the putative class members' Claims against Apple are common to each proposed class member.

A. THE LAUNCH OF THE "APP STORE" NECESSITATED NEW PRIVACY PROMISES TO ENSURE APPLE'S LONGSTANDING ADVERTISING MESSAGE STAYED CONSISTENT

The Class Devices at issue were designed by Apple in California and sold to individuals across the United States for a uniform price set by Apple. Each device included the pre-installed Contacts app designed by Apple, which acted like an address book for device owners, storing the names, addresses, phone numbers, e-mail addresses, and more for their contacts. Request for Judicial Notice ("RJN") ¶ 1, Exh. A. Prior to the launch of the App Store, iDevice owners could not download or otherwise install third-party apps. As such, Apple had no need to advertise that data on these devices were safe and secure from such apps. Nonetheless, even before the App Store was released, Apple had been consistently marketing its mobile devices as safe and secure instruments to store private user data. *See, e.g.*, RJN, ¶ 2-3, Exhs. B-C.

On July 10, 2008, the nature of iDevices forever changed as Apple launched the App Store, a preinstalled app on iDevices that allowed users to browse through and download thousands of apps directly to their devices. With the launch of the App Store and new potential privacy threats posed by third-party apps, Apple sought to reassure the public that Class Devices remained just as secure as they previously were (though not to actually ***make*** the Class Devices equally secure). *See* footnote 2, *infra.* Indeed, Apple advertised[1] on a pervasive, wide scale that Class Devices provide "freedom from programs that steal your private data." *Id.*; RJN, ¶ 3, Exh. C. Apple knew that promises like these were "essential to building and maintaining a ***public reputation*** for providing a service that offers safe, secure software that protects the integrity, performance, and stability of users' mobile devices." RJN, ¶ 4, Exh. D (emphasis added). Apple's advertising campaign regarding the safety and security of private user data on Class

[1] Plaintiffs use the term "advertised" generally to include news articles that contain statements Apple released publicly as part of its "buzz media" campaign, or strategic efforts to keep Apple and its products in the news.

Devices was ubiquitous, pervasive, and nationwide.[2] [redacted] Busch Decl., ¶ 2, Exh. A.

Additionally, Apple also advertised that every Class Device came with two features preventing third-party apps from surreptitiously seeing and taking their private data without user consent, including their Contacts data. First, Apple advertised that each Class Device included a technology called "sandboxing" which would prevent apps from accessing the data inside other apps, including the Contacts app. *See*, § III.B.1, *infra*. Second, Apple advertised that the App Store available on each Class Device was curated – in other words, Apple regulated it rigorously so that no malicious apps seeking to surreptitiously obtain user data without consent would ever be approved for distribution. *See*, § III.B.2, *infra*. Each of these claims was false.

B. APPLE'S ADVERTISING REPRESENTATIONS WERE FALSE

1. Apple's Advertised Sandboxing Feature Did Not Actually Prevent Apps From Accessing Contacts Data Without Consent

Apple advertised its "sandboxing" security feature as a way Class Devices purportedly protected user data, including that stored in the Contacts app, from misappropriation by third-party apps. As represented by Apple, "Applications on the device are 'sandboxed' so they cannot access data stored by other applications. In addition, system files, resources, and the kernel are shielded from the user's application space." RJN, ¶ 5, Exh. E. This representation was well-disseminated. At Apple's 2011 shareholder meeting, an Apple executive touted that

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[2] This Court previously found that Plaintiffs alleged an adequate sample of representative advertising statements which are substantially similar to each other in the operative complaint. *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 981 (N.D. Cal. 2015). This Court stated, "the fifteen or twenty more-specific statements about sandboxing, protection of personal information, and consumer privacy Plaintiffs have identified, combined with the larger and more general campaign expressing Apple's concern with privacy and security, are sufficiently related to the alleged failing of the iDevices to satisfy *Tobacco II's* pleading requirements." *Opperman v. Path*, 84 F. Supp. 3d 962, 982–83 (N.D. Cal. 2015). Plaintiffs now enclose evidence supporting each of those alleged advertisements. RJN, ¶¶ 1, 3-9, 19-41, 43, Exhs. A, C-I, S-LL, NN; *see also*, Declaration of Frank Busch ("Busch Decl."), ¶¶ 36-37, Exhs. II-JJ.

the sandbox design prevents viruses or malware from "stealing contacts." RJN, ¶ 25, Exh. Y. Likewise, Apple's head of iTunes explained that these security mechanisms exist because Apple "want[s] to secure the user's data. Again, their E-mail, their contacts [sic], their pictures, et cetera." RJN, ¶ 7, Exh. G.

Class Devices, however, were never designed to prevent apps from taking user address book data without consent. [redacted] Busch Decl., ¶ 3, Exh. B. [redacted] Busch Decl., ¶¶ 4, 15, Exhs. C, N at 68:17-21. [redacted] Busch Decl., ¶ 3, Exh. B. [redacted] *Id.*

Just after the App Store launched, [redacted] *See, e.g.*, Busch Decl., ¶¶ 3, 5, Exhs. B, D. [redacted] Busch Decl., ¶ 3, Exh. B. [redacted] *See, e.g.*, Busch Decl., ¶ 5-6, Exhs. D (October, 2009), E (August, 2011). [redacted] Busch Decl., ¶ 7, Exh. F.

Apple refused to protect its iDevice users. [redacted] *Id.* [redacted]

[redacted]

[redacted] Busch Decl., ¶ 8, Exh. G.

Remarkably, there is no evidence that Apple began to take steps to ***remedy*** the privacy issues until [redacted]

[redacted] Busch Decl., ¶ 9, Exh. H.

2. Apple's Advertised "Curated" App Store Did Not Prevent The Availability of Apps That Surreptitiously Misappropriate Contacts Data

Apple advertised that the App Store was "curated" so that apps were only available for download if they met certain privacy standards. As Apple represented, "We take privacy extremely seriously. That's one of the reasons we have the curated apps store. We have rejected a lot of apps that want to take a lot of your personal data and suck it up into the cloud . . . ." RJN, ¶ 8, Exh. H. In other words, Apple represented that it "built a store for the most part that ***people can trust***." RJN, ¶ 9, Exh. I (emphasis added).

Apple made this message very clear, even in the face of government scrutiny. In 2009, for example, Apple posted a page on its website (which is still there[3]) to house its response to questions posed by the FCC "regarding Apple's App Store and its application approval process." Busch Decl., ¶ 10, Exh. I. In that public response posted for its buzz marketing impact, Apple explained that it "created an approval process that reviews every application submitted to Apple for the App Store in order to protect consumer privacy[.]" *Id.* It further explained, "Apple provides guidelines to developers in our developer agreement as well as on its web site regarding prohibited categories of applications. These materials also contain numerous other provisions regarding technical and legal requirements that applications must comply with, and Apple uses these standards in considering whether or not to approve applications. Apple developed a comprehensive review process that looks at every iPhone application that is submitted to Apple."

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[3] RJN, ¶ 17, Exh. Q.

Id. Included in this list of "requirements" is App Store Review Guideline 17.1, which purports to state that no apps in the App Store can take private data without consent. Busch Decl., ¶ 11, Exh. J at p. 16 of 19.

In 2010, Apple again explained this process: [redacted] Busch Decl., ¶ 12, Exh. K (emphasis added). In 2011, Apple again explained: [redacted] Busch Decl., ¶ 13, Exh. L (emphasis added).

Apple's advertisements representing that apps that take user address book data without consent would never make it into the App Store were false. [redacted] During the Class Period, Apple's App Store Review Team reviewed and approved numerous apps for distribution in the App Store despite that they were accessing and/or uploading user address book data without consent. *See, e.g.*, Busch Decl., ¶ 14, Exh. M. It was not until February of 2012, when the media revealed that these and a swarm of other apps were violating privacy in this way, and the resulting outcry threatened damage to Apple's safety- and security-focused branding, that Apple's App Store Review Team stepped in and required these apps to obtain express user consent. *Id.*

Moreover, during the relevant period, [redacted] Busch Decl., ¶¶ 15-16, Exhs. N at 105:4-11, O. [redacted]

[redacted] Busch Decl., ¶ 15, Exh. N at 164:3-16. [redacted] *Id.* at 161:4-19. [redacted] Busch Decl., ¶ 17, Exh. P at 174:13 – 177:9. [redacted] Busch Decl., ¶ 15, Exh. N at 133:2-4. [redacted] RJN, ¶ 10, Exh. J; Busch Decl., ¶ 17, Exh. P at 212:3 – 215:4. Apple didn't fix the problem. [redacted] Busch Decl., ¶ 18, Exh. Q. That same year, researchers claimed they submitted evidence of Gowalla's misconduct but were ignored. RJN, ¶ 11, Exh. K at p. 13 of 16. Before the February 2012 public backlash, [redacted] Busch Decl., ¶ 19, Exh. R.[4] After, [redacted] Busch Decl., ¶ 20, Exh. S.

3. Apple not only knew Class Devices lacked the advertised security features; it encouraged apps to take user Contacts data without consent

[redacted] because it was instead encouraging app developers to do exactly what Apple advertised could not be done – take user Contacts data without consent. In Human Interface Guidelines (the "HIG"), which was written for developer

[4] [redacted]

use, and was mandatory for app developers, Apple advised: "Get information from iOS, when appropriate. People store lots of information on their devices. ***When it makes sense, don't force people to give you information you can easily find for yourself, such as their contacts or calendar information***." Busch Decl., ¶ 21, Exh. T at p. 51 of 171 (emphasis added). The HIG also stated, "If your application requires a lot of user input before anything useful happens, that input slows people down and can discourage them from using your app." *Id*. And consistent with [redacted] (Busch Decl., ¶ 7, Exh. F), the HIG also instructs, "A user interface that is unattractive, convoluted, or illogical can make even a great application seem like a chore to use." Busch Decl., ¶ 21, Exh. T at p. 22 of 171. [redacted] Busch Decl., ¶ 15, Exh. N at 74:3-75:13.

Apple engaged in this false advertising campaign without regard to user privacy for selfish reasons. It wanted to spur the growth of the user bases of App Store apps, [redacted] Apple explained the precise value proposition of address book data to app growth when it filed a patent for a social graph application: "Matching algorithms can then use the profile or data provided to match members with members who are deemed compatible by the algorithms, under the assumption, for example, that matching people's interests and values can lead to successful new friendships or relationships ***within the social network***." RJN, ¶ 42, Exh. MM (U.S. Patent No. 8,386,620 col.1 (filed Dec. 15, 2009) (emphasis added).)

[redacted] Busch Decl., ¶ 22, Exh. U (emphasis added.)

[redacted] Busch Decl., ¶ 2, Exh. A. [redacted]

[redacted] Busch Decl., ¶ 17, Exh. P at 165:12 – 167:13. [redacted]

[redacted]

C. APPLE'S PRIVACY MESSAGE IS SO INTEGRAL TO ITS BRAND THAT WHEN THE PUBLIC-AT-LARGE LEARNED IT WAS FALSE, APPLE OPTED TO CHANGE THE PRODUCT, NOT THE ADVERTISING

In February of 2012, at the end of the Class Period, the public-at-large learned that App Store apps like Path, Twitter, Yelp, and others were uploading user Contacts data without consent. RJN, ¶¶ 12-13, Exhs. L-M. Media outlets across the country expressed disappointment over the revelation, and Congress and the Federal Trade Commission opened investigations into Apple's practices. *Id.*; Busch Decl., ¶¶ 23-25, Exhs. V-X.

With the issue now very public, Apple was forced to respond by either changing its advertising or changing its iDevices. Given that the user privacy message had been so successful for Apple and was so deeply ingrained into its image, Apple finally chose to fix its product.

[redacted] Busch Decl., ¶ 26, Exh. Y (emphasis added.)[5] Thereafter, Apple made three key changes. First, [redacted] Busch Decl., ¶ 27, Exh. Z. Second, [redacted] Busch Decl., ¶¶ 19-20, Exhs. R-S. Third, the HIG now prohibits apps from taking user Contacts data without consent. Busch Decl., ¶ 28, Exh. AA. After, Apple amended them to discuss the problem, providing suggestions that could have been easily implemented in response to any of the prior security breaches.

[5] [redacted]

Having fixed the product to save the message, Apple continues to this day to advertise the safety of private user data on iDevices. Recently, in a widely publicized brief filed in the Central District of California in which Apple explained why it was refusing to help the FBI crack the San Bernardino terrorist's iPhone, Apple proclaimed the need to protect user data on iDevices, including Contacts data. RJN, ¶ 14, Exh. N. Apple repeated its privacy-based arguments on its websites and in interviews. RJN, ¶ 15, Exh. O. Apple's website currently reads, "Every iPhone we've made – and we mean every single one – was built on the same belief. [T]here's one [thing] you definitely don't [want]: malware . . . that tries to sneak into your devices for the purpose of doing sneaky things . . . Now, this is the part where we'd normally geek out about . . . the rock-solid security features we build into the iPhone like . . . sandboxing." RJN, ¶ 16, Exh. P. Clearly, Apple's message of user privacy – which pre-existed the launch of the App Store and is still disseminated today – is an integral part of Apple's brand, and its strategy to sell iDevices.[6]

IV. STATEMENT OF FACTS SPECIFIC TO PLAINTIFFS

The named Plaintiffs each purchased a Class Device during the Class Period (except for Carter, whose parents purchased hers at her request). Busch Decl., ¶¶ 30-34, Exhs. CC at 15:14-16, DD at p. 13-14 of 15, EE at 127:2-11, FF at 16:22-17:3, GG at 20:17-21, HH at 255:3- 280:8.

Additionally, each of the Plaintiffs heard and relied on Apple's false advertisements. Plaintiff Green recalled, "I was told through marketing campaigns, 'Hey, this is a safe place to be. You don't have to worry.'" Busch Decl., ¶ 30, Exh. CC at 28:4-19. Plaintiff Hodgins was led to believe that, "basically you could trust putting all this information on your phone because it was going to be safe and protected." Busch Decl., ¶ 32, Exh. EE at 129:21-137:20. Plaintiff Cooley recalled Steve Jobs stating during a keynote speech, "'This is going to be secure. This is going to be private. We're going to make everybody sign a certificate that does business with us so we can track them down if there -- if they do anything malicious to,' you know, 'our users.'" Busch Decl., ¶ 33, Exh. FF at 119:6-120:16. The advertising campaign left Plaintiff Carter with

[6] Moreover, Apple agrees that "user privacy is important to Apple and always has been." Busch Decl., ¶ 29, Exh. BB.

"the overall feeling was that this is a device that is the most secure on the market and the most tech-advanced, period." Busch Decl., ¶ 34, Exh. GG at 161:4-164:5. Plaintiff Hoffman recalls advertisements, press releases, specific statements on Apple's website, and more which touted the privacy of user data on Class Devices, and he meticulously recalled messages about the interworking of the sandbox technology and its relationship to the privacy of user data. Busch Decl., ¶ 35, Exh. HH at 255:3- 280:8.

V. PROCEDURAL BACKGROUND

On June 27, 2014, Plaintiffs filed their operative pleading against Apple, Path, and additional App Developers. ECF no. 478. On March 23, 2015, following extensive briefing, the Court issued its Order denying various motions to dismiss and finding, among other things, that Plaintiffs adequately pled their Claims (UCL, FAL, CLRA, and deceit) under *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009). ECF no. 543 at 8-18.

On July 15, 2016, the Court issued an order granting class certification with respect to a class of Path App users against both Path and Apple. ECF No. 761 (the "Path Cert. Order.")

VI. ARGUMENT

A. APPLICABLE LEGAL STANDARDS.

The Court has set out the applicable legal standard for the present motion, which Plaintiffs adopt here. Path Cert. Order, at 5.

B. THE REQUIREMENTS OF RULE 23(A) ARE MET

The proposed classes both meet all of the requirements for class certification, satisfying numerosity, commonality, typicality, adequacy, and ascertainability. Fed. R. Civ. P. 23(a).

1. Numerosity is Satisfied

Plaintiffs satisfy the numerosity requirement under Rule 23(a)(1) because the proposed class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

The proposed class includes by definition all purchasers of Class Devices in the U.S. during the Class Period, which will likely total in the millions, if not greater. *See, e.g.*, RJN, ¶ 18, Exh. R.

2. Commonality is Satisfied.

As the Supreme Court has recognized, Rule 23(a)(2)'s commonality requirement is "subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997). For the reasons demonstrated below in connection with predominance, Plaintiffs satisfy the commonality requirement under Rule 23(a)(2) as to each proposed class.

3. Typicality is Satisfied.

Plaintiffs satisfy the typicality requirement under Rule 23(a)(3), which is met where "the claims or defenses of the representative [plaintiffs] are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is not a demanding standard in false advertising cases as the focus should be on Apple's conduct and Plaintiffs' legal theory. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 734 (9th Cir. 2007); *Tobacco II*, 46 Cal. 4th at 328; *Astiana v. Kashi Co.*, 291 F.R.D. 493, 502 (S.D. Cal. 2013); *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 892-93 (N.D. Cal. 2015). Moreover, for present purposes, class members' claims need not be identical, or even substantially so. Under Rule 23(a)'s "permissive standards," representative plaintiffs are typical if their claims are "reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citation omitted).

Here, each Plaintiff purchased a Class Device (except for Carter, whose parents purchased hers at her request), heard Apple's advertising campaign, and were influenced thereby. *See*, § IV. Each is typical of the putative class members.

4. Adequacy is Satisfied.

The adequacy prong of Rule 23(a)(4) is satisfied where Plaintiffs show they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The requisite showing is three-fold. *Brown v. Hain Celestial Grp., Inc.*, No. C 11-03082 LB, 2014 WL 6483216, at *14 (N.D. Cal. Nov. 18, 2014). Class counsel must be qualified and competent; Plaintiffs and Class counsel must both show an absence of any apparent conflicts of interest with other Class Members; and Plaintiffs and Class counsel must show they will "prosecute the action

vigorously" on behalf of the class. See *id* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

a) Plaintiffs' Counsel is Adequate.

To evaluate the adequacy of counsel, the Court "must" consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(a). Here, Plaintiffs' Counsel satisfies all of the requirements. Plaintiffs' Counsel has invested a substantial amount of time to identify and investigate, and litigate the claims in this action, successfully brief and argue multiple rounds of motions to dismiss and motions for summary judgment, engage in discovery, and has retained and worked closely with competent, knowledgeable experts. See Declaration of Attorney David M. Given ("Given Decl."); Declaration of Michael von Loewenfeldt ("MVL Decl."). The Court has also already found Plaintiffs' counsel adequate in Plaintiffs' prior motion for class certification regarding the Path app. *Opperman v. Path, Inc.*, No. 13-cv-00453-JST, 2016 WL 3844326, at *6 (N.D. Cal. July 15, 2016).

b) Plaintiffs Are Adequate Class Representatives.

As Plaintiffs' Claims are typical of the Class, they have no conflicts with Class Members. Rule 23(a)(4)'s adequacy requirement evaluates whether "the named plaintiff's claim and the class claims are so interrelated that the interests of the Class Members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 & n.13 (1982). Moreover, merely speculative conflicts will not affect adequacy. *Rodriguez v. West Publ'g*, 563 F.3d 948, 961 & n.6 (9th Cir. 2009). Plaintiffs' Claims are identical to those of the other putative class members. Each Plaintiff was exposed to Apple's advertising, including representations about the devices' security, and obtained an Apple iDevice based in part on those representations.

c) Plaintiffs Will Prosecute Class Claims Vigorously.

Plaintiffs' Counsel have dedicated the full resources of their and the other PSC firms to

this Action, including the time and efforts of their senior attorneys, associates, paralegals, and administrative support staff, and will continue to do so. Given Decl., ¶ 10; MVL Decl., ¶ 10. Likewise, Plaintiffs are prepared to continue representing the proposed classes competently and diligently in their Claims against Apple, both through trial and appeal if necessary. Plaintiffs and their counsel have demonstrated their commitment to prosecuting this action on behalf of all putative class members. Accordingly, they satisfy the adequacy requirement.

5. Ascertainability is Satisfied.

a) Verifying Class Members

Plaintiffs have proposed a precise, objective, and presently (and easily) ascertainable class definition that satisfies Rule 23(a). Ascertainability requires objective criteria to define the Class but does not require positive identification of Class Members. See *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 238 (N.D. Cal. 2014). The cornerstone of ascertainability is a class definition that gives notice to putative members. *Id.*

Apple should possess records showing the purchase of every Class Device during the Class Period. Apple also has records showing the activation of every Class Device during the Class Period. Even if Apple's records are incomplete as to purchases, all former and present users of the iTunes store will receive Notice sent to their Apple ID email addresses. That notice provides an opportunity for correction of incomplete records for people who claim Class membership. See *Lilly*, 308 F.R.D. at 238-40 (responses to class notice that rely on applicant's "self-identification" do not preclude ascertainability finding).

b) Notice and Administration

The proposed class is ideally suited to provide for adequate notice and administration. Adequate notice is "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.'" *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Courts in this District have approved email as an appropriate form of direct notice. *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2012 WL 2598819, at *4 (N.D. Cal. July 5, 2012) ("Email notice is especially appropriate here given the online nature of Netflix's business and the

fact that Settlement Class members had to provide a valid email address when creating their Netflix accounts."); *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971, at *4 (N.D. Cal. Nov. 16, 2007) ("Email notice was particularly suitable in this case, where settlement Class Members' claims arise from their visits to Defendants' Internet websites.").

For those individuals who do not receive direct email notice, publication notice will ensure the "best practicable" alternative notice. *Id*. The Court can ascertain class membership status without unreasonable effort or cost. *Keilholtz, v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 336 (N.D. Cal. 2010) (citation omitted) ("[A] class definition is sufficient if the description of the class is 'definite enough so that it is administratively feasible for the court to ascertain whether an individual is a class member.'")

Purchase records of iDevices and subsequent activations of the iDevices with Apple, each of which requires an Apple ID, will allow the Court to ascertain whether an individual is a member of the Class. (Should it become necessary, mailing postal addresses can be confirmed by official or other reliable data sources.)

As it turns out, the Apple App Store is an extraordinarily robust platform for class notice and claims administration in cases of this kind. The technology associated with downloads of Apps from the iTunes App Store allows for effective, direct notification and payment to members of the proposed classes; Apple itself has agreed to employ it in settlement of other class cases involving users of their iDevices, vouching for its efficacy especially in the event of so-called "micropayments." See, e.g., *In re Electronic Books Antitrust Litig.*, Case No. 1:11-md-02293-DLC (S.D.N.Y.), ECF Nos. 642-1 ("Settlement Agreement by and Among Apple, Inc., Plaintiff States and Class Plaintiffs") & 647-2 ("Plaintiffs' Consumer Distribution Plan").

C. THE REQUIREMENTS OF RULE 23(B) ARE SATISFIED.

The Court has set out the applicable legal standard for predominance and superiority under Rule 23(b), which Plaintiffs adopt here. Path Cert. Order, at 9.

1. Predominance is Satisfied.

a) Choice of Law

This Court has set out the applicable legal standard for choice of law. Path Cert. Order, at 9-12. Plaintiffs satisfy those requirements.

First, Apple's choice of law provision necessitates finding that California law should apply to this nationwide class. The same Terms and Conditions that this Court relied upon to find California law applicable for the claim for aiding and abetting against Apple necessitate the same conclusion for Plaintiffs' current Claims. Each version of the Terms and Conditions applicable during the Class Period contain the identical choice of law provision: "This License will be governed by and construed in accordance with the laws of California, excluding its conflict of laws principles." Busch Decl., ¶ 29, Exh. BB. The License effectively governs all uses of the Class Devices, and a user is deemed to agree to it simply by using it: "By using your iPhone or downloading this software update, as applicable, you are agreeing to be bound by the terms of this License, unless you return the iPhone in accordance with Apple's return policy." *Id.* [7] Indeed, the only apparent way to opt out of this provision is to stop using and return the Class Device immediately: "If you do not agree to the terms of the license, you may return the iPhone within the return period . . . If you have recently purchased an iPhone and you do not agree to the terms of service of the License, you may return the iPhone within the return period." *Id.*

Regardless, to the extent California's three-step governmental interest test applies, the Court should still find that California is a proper forum. Path Cert. Order, at 12 *et seq*. Under that test, Plaintiffs bear the initial burden to show California has significant contact to the Claims of each class member, to satisfy constitutional due process concerns. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589-90 (9th Cir. 2012). Apple has its principal place of business in

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[7] In later Class Period versions of its Terms and Conditions, the document title is changed from "iPhone Software License Agreement" to "iOS Software License Agreement" and the term "iPhone" is changed to "iOS device." *Id.*

California, where it designed the Class Devices, originated its [redacted] advertising campaign, and reviewed the apps that it approved despite the fact they were designed to misappropriate user Contacts data from Class Devices. *See*, Path Cert. Order, at 12. As discussed in Plaintiffs' motion for class certification against Path, each app that appears on the App Store – including those that uploaded user address book data without consent – does so through a contractual relationship with Apple that selects California law. *See* ECF No. 670-1, at 21. Moreover, this Court has already found that California law applies to the aiding and abetting claim against Apple and the intrusion upon seclusion claim against Path in this lawsuit. Path Cert. Order, at 12.

Applying the *Mazza* choice of law standard, the burden then shifts to Apple (the party opposing nationwide application of California law) to establish first, that there is a material difference in state laws on Plaintiffs' Claims, and second, that the material difference implicates specific state interests outside of this State. Plaintiffs are unaware of any significant differences between their Claims and the law of other states, and similar actions applying California law outside its borders have been certified numerous times since *Mazza*. *See Allen v. Hyland's Inc.*, 300 F.R.D. 643, 672 (C.D. Cal. 2014); *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 543 (C.D. Cal. 2012) (refusing to decertify false advertising class post-*Mazza*); *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *4 (C.D. Cal. Apr. 9, 2014) ("*Mazza* did not 'categorically rule out application of California law to out-of-state class members'"); *Won Kyung Hwang v. Ohso Clean, Inc.*, No. C-12-06355 JCS, 2013 WL 1632697, at *21 (N.D. Cal. Apr. 16, 2013) (refusing to apply *Mazza* to false advertising cases on a bright line basis).

The third step of the *Mazza* choice of law standard requires the Court to scrutinize the comparable state interests at stake if it applies California law nationwide. Given the Court's decision on the Path App motion, Plaintiffs anticipate Apple will need to show "how the application of California state law would frustrate the interests of any foreign state." See Path Cert. Order, at 15. But states outside of California would appear to have no legitimate interest in applying their laws in a manner that protects Apple from misconduct centered in California from liability outside of California when Apple (1) has required all putative class members, wherever

located, to be bound by California law, and (2) can offer no evidence that Apple's advertisements or Class Devices vary on a state-by-state basis (they don't).

Even assuming that some state's materially different false advertising law manifests a genuinely-expressed interest in competing with California to attract Apple to open an office there or select that state's law for its choice of law provisions in the future, Apple must make that business case with reference to "the facts and circumstances of *this* case." See Path Cert. Order, at 15 (quoting *Forcellati*, 2014 WL 1410264, at *2). Any state interest weighed against California's interest in *this* case must account for the realities of Apples' business model.

That model is centered in the State of California, where the App Store is based, and the app developers do not target their respective offerings to residents located in any particular state. No foreign state has a genuine interest in attracting more App Store business, and any such goal would directly contradict the fact that Apple distributes the same product nationwide.

Nor can Apple show that it operated in a manner in "reasonable reliance" on any specific foreign state law that it claims would have established materially different results here. *Kearney v. Salomon Smith Barney*, 39 Cal. 4th 95, 101 (2006). As noted above, Apple entered into an agreement with each of its customers and each app developer, calling for application of California law and the choice of a California forum for effectively every business move related to the App Store.

b) Injury and Damages

This Court previously explained the elements the Plaintiffs must fulfill in order to adequately plead their Claims. *Opperman*, 84 F. Supp. 3d at 976. In denying Apple's motion to dismiss the operative complaint, this Court ruled that Plaintiffs' allegations were sufficient for each element. *Id.* at 983. The evidence now presented herein is sufficient for this Court to grant class certification on all Claims.

Plaintiffs continue to satisfy the requirements set forth in the Court's prior order. *Id.* First, the named Plaintiffs each actually saw Apple's advertising campaign. *Id.*; § IV, *supra*. Second, Apple's national advertising campaign that leveraged various national media sources and notable public events, and which started before the launch of the App Store, continued

throughout the Class Period, and continues today, is clearly sufficiently lengthy in duration, and widespread in dissemination, that it would be unrealistic to require the plaintiff to plead each misrepresentation she saw and relied upon. *Opperman*, 84 F. Supp. 3d at 983; § III., *supra.* Third, as they did in the operative complaint, Plaintiffs again have described and attached a representative sample of the advertisements and representations at issue. *Id.*; footnote 2. Fourth, Plaintiffs have demonstrated that the misrepresentations within the advertising campaign were similar to each other. *Id.* Fifth, each named Plaintiff has explained, with particularity, and separately, their exposure to the advertising campaign. *Opperman,* 84 F. Supp. 3d at 983; § IV, *supra*. In fact, in their depositions, many of them recalled nearly verbatim some of Apple's advertising promises and messages. *Id.* Finally, each Plaintiff testified that he or she relied on Apple's advertising campaign representations to purchase (or direct the purchase of) their Class Devices. *Id.*

In addition to the factors identified by the Court in its motion to dismiss, the Plaintiffs can satisfy any other applicable elements of their Claims. First, Plaintiffs can demonstrate that a reasonable consumer would likely be deceived by Apple's misrepresentations. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). The California Supreme Court has recognized that this test can be satisfied not only by "advertising which is false" and also "advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Leoni v. State Bar*, 39 Cal. 3d 609, 626 (1985). A "reasonable consumer" is "the ordinary consumer acting reasonably under the circumstances," and "is not versed in the art of inspecting and judging a product, in the process of its preparation or manufacture." *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1125 (C.D. Cal. 2010). In other words, "the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). Here, *any* consumer would be misled because Apple blatantly misrepresented the privacy features of the Class Devices. *See,* § III.B., *supra*.

Second, Plaintiffs can establish causation and reliance on a classwide basis. "Causation, on a class-wide basis, may be established by *materiality*. If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class." *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011). "It is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class." *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 814 (1971). Thus, the Ninth Circuit has stated, "restitution is available to absent class members without individualized proof of deception, reliance, or injury." *Mazza*, 666 F.3d at 595.[8] Further, "[a] misrepresentation of fact is material if it induced the plaintiff to alter his position to his detriment. [Citation.] Stated in terms of reliance, materiality means that without the misrepresentation, the plaintiff would not have acted as he did." *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1294 (2002), *as modified on denial of reh'g* (May 29, 2002) ("*Mass Mutual*") (holding presumption of reliance could be presumed where insurer privately felt rates were too high) (citation omitted). However, "Some cases 'hold materiality is a mixed question of law and fact that can be decided as a matter of law *if* reasonable minds could not disagree on the materiality of the misrepresentations.'" *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 667 n.18 (1993) (citations omitted). Here, Apple's misrepresentations were clearly material. It advertised the privacy of Class Devices relentlessly, despite knowing its messages were false, and that the message was so important that when Apple's deception became broadly-known it changed its devices to preserve its message. *See*, § III., *supra*.

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[8] To the extent the *Mazza* Court discussed these requirements in the context of standing, the Ninth Circuit has held, "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007); *Ehret*, 148 F. Supp. 3d at 903; *Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579, 584 (C.D. Cal. 2012); *see also, Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 476 (S.D. Cal. 2013) (noting that *Mazza* "seems to set a rather low bar for standing" because "[s]imply spending money on something that doesn't do what it claims to do is all the injury absent class members need").

Moreover, the deposition testimony from the named Plaintiffs clearly demonstrates the materiality of the misstatements. *See*, § IV., *supra*. Regardless, that "a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all." *Mass Mutual*, 97 Cal. App. 4th at 1292 (citation omitted).

Finally, Plaintiffs also can satisfy their low burden of proof on damages (i.e. restitution) for purposes of class certification. *See Mazza*, 666 F.3d at 595. To do so, Plaintiffs present a feasible model based on conjoint analysis to determine the amount of damages on a classwide basis. *See*, Declaration of Elizabeth Howlett, Ph.D ("Howlett Decl.") As this Court previously recognized, "damage calculations alone cannot defeat class certification." *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). Just ten weeks ago, the Ninth Circuit confirmed that "the need for individual damages calculations does not, alone, defeat class certification." *Vaquero v. Ashley Furniture Indus., Inc.*, No. 13-56606, 2016 WL 3190862, at *4 (9th Cir. June 8, 2016); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). Nonetheless, Plaintiffs can satisfactorily demonstrate that their proposed model can be "feasibly and efficiently calculated once the common liability questions are adjudicated." *Id.*; *Comcast Corp.v. Behrend*, 133 S. Ct. 1426, 1433 (2013); *Pulaski & Middleman, LLC v. Google*, 802 F.3d 979, 986-88 (9th Cir. 2015).

Conjoint analysis is an appropriate model for calculating restitution in false advertising cases like this one. "Conjoint analysis has been used for decades as a way of estimating the market's willingness to pay for various product features." *Guido v. L'Oreal, USA, Inc.*, No. 2:11-CV-01067-CAS (JCx), 2014 WL 6603730, at *5 (C.D. Cal. July 24, 2014); *TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1022 (N.D. Cal. 2013) (holding conjoint analysis "*is* accepted by the relevant community."); *Khoday v. Symantec Corp.*, 93 F. Supp. 3d 1067, 1082 (D. Minn. 2015), *as amended* (Apr. 15, 2015) ("conjoint analysis is generally a permissible method for calculating damages"); *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 539 (S.D. Fla. 2015) (finding proposed conjoint survey appropriate because it was

"sufficiently tied to Plaintiff's legal theory and her proffered evidence"); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 45 F. Supp. 3d 724, 753–54 (N.D. Ohio 2014) ("While 'there will be occasions when the proffered [conjoint] survey is so flawed as to be completely unhelpful to the trier of fact and therefore inadmissible, such situations will be rare.'") (citation omitted); *In re NJOY, Inc. Consumer Class Action Litig.*, No. CV 14-428-JFW (JEMx), 2016 WL 787415, at *6 (C.D. Cal. Feb. 2, 2016) ("Conjoint analysis is a statistical technique capable of using survey data to determine how consumers value a product's attributes—often called the market's willingness to pay.") (citation omitted); *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2012 WL 850705, at *10 (N.D. Cal. Mar. 13, 2012) ("Consumer surveys are not inherently unreliable for damages calculation.").

Indeed, Apple has relied on conjoint analysis to isolate the value of specific smartphone features. *Apple, Inc. v. Samsung Elecs. Co.*, No. 12-cv-00630-LHK, 2014 WL 794328, at *16 (N.D. Cal. Feb. 25, 2014) (approving Apple's use of a "choice-based conjoint survey to quantify decrease in demand for the product absent the patented feature"). Plaintiffs' proposed use is directly analogous to the use Apple made of a conjoint survey in that litigation, where it sought to calculate a single number representing the impact of removing patented features from Samsung's devices. *Id.*

Plaintiffs need not present their model in detail to prevail on class certification. *Guido*, 2014 WL 6603730, at *5 (finding proposed but not yet performed conjoint study sufficient for class certification); *Morales v. Kraft Foods Grp., Inc.*, No. LA CV14-04387 JAK (PJWx), 2015 WL 10786035, at *10 (C.D. Cal. June 23, 2015) (same). Nonetheless, Plaintiffs have retained Dr. Elizabeth Howlett, Ph.D to perform this survey, who has previously been qualified as an expert on conjoint analysis. *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 953 (C.D. Cal. 2015). Dr. Howlett's planned conjoint analysis study will use a Choice-based Conjoint analysis designed to identify the value of specific attributes, including the security features Apple falsely promised. *See* Howlett Decl. at ¶¶ 17-27. Dr. Howlett will perform the survey through a reputable, national online survey company using attributes qualified through a pretest process to ensure valid results. *Id.* at ¶¶ 28-32. She will then use these results to calculate the market value

of the security features Apple falsely promised and calculate the damages required as restitution to class members who overpaid for insecure iDevices. *Id.* at ¶¶ 33-43.

2. Superiority is Satisfied.

This class action is superior to other available methods of adjudication for this case. To determine whether a class action is superior to individual actions, the "matters pertinent" under Rule 23(b)(3) include "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)-(D). "[C]ertification pursuant to Rule 23(b)(3) ... is appropriate 'whenever the actual interests of the parties can be served best by settling their differences in a single action.'" *Lilly*, 308 F.R.D. at 241 (citation omitted).

This case is well suited to a nationwide class action because Plaintiffs can demonstrate clear misrepresentations by Apple to its national consumer base. "Because the UCL is intended to deter unfair business practices expeditiously and the scope of remedies under it is limited, relief under the UCL is available without individualized proof of deception, reliance and injury." *Allen*, 300 F.R.D. at 667 (internal quotations omitted). "To state a claim under the UCL based on false advertising or promotional practices, a plaintiff need only show that members of the public are likely to be deceived by the defendant's conduct." *Id.* (internal quotations omitted).

Here, each factor weighs in favor of class action treatment. As of this time, in each of the related actions, none of the Plaintiffs are seeking to individually control a separate action. Indeed, given "the small size of each class member's claims in this situation, class treatment is not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the present action." *Dei Rossi v. Whirlpool Corp.*, No. 2:12-CV-00125-TLN-CKD, 2015 WL 1932484, at *11 (E.D. Cal. Apr. 28, 2015). Concentrating the litigation in this forum creates maximum efficiency, and avoids the specter of millions of people bringing claims in courts throughout the State of California. *Id.* ("each member of the class pursuing a claim individually

would burden the judiciary, which is contrary to the goals of efficiency and judicial economy advanced by Rule 23") (citation omitted).

Finally, Plaintiffs are aware of no unique procedural or substantive difficulties inherent in managing this class action. Notice can be accomplished by "direct" email notice to the Class Members, and by court-approved publication notice. Indeed, "[g]iven that common questions predominate [], 'certification will not generate any complexities from a case management perspective.'" *Rai v. Santa Clara Valley Transp. Auth.*, 308 F.R.D. 245, 266 (N.D. Cal. 2015) (citation omitted).

VII. CONCLUSION

Plaintiffs' fraud-based, Claims against Apple for deceit and violation of the FAL, UCL, and CLRA satisfy each of the requirements of Rule 23(a) and the requirements of Rule 23(b)(3). Plaintiffs' motion for class certification should be granted. Plaintiffs should be appointed as Class Representatives and Plaintiffs' Counsel should be appointed as Class Counsel. Plaintiffs also respectfully request that should the Court grant the instant motion, that it set a case management conference within 30 days of its Order to resolve a plan for class notice and trial of the Action against Apple.

Dated: August 23, 2016

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