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APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARC OPPERMAN, et al.,

Plaintiffs,

v.

KONG TECHNOLOGIES, INC., et al.,

Defendants.

CASE NO. 13-CV-00453-JST

DEFENDANT APPLE INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION RE FALSE ADVERTISING LAW AND RELATED CLAIMS

THE HONORABLE JON S. TIGAR

Date: May 31, 2017
Time: 9:30 a.m.

THIS DOCUMENT RELATES TO ALL CASES:

Opperman v. Path, Inc., No. 13-cv-00453-JST
Hernandez v. Path, Inc., No. 12-cv-1515-JST
Pirozzi v. Apple, Inc., No. 12-cv-1529-JST
Gutierrez v. Instagram, Inc., No. 12-cv-6550-JST

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I. INTRODUCTION

Plaintiffs ask this Court to certify a wildly overbroad class including anyone who bought designated models of Apple's iPhone, iPad, and iPod Touch prior to February 2012—a proposed class that includes tens of millions of people who never downloaded or used any of the eleven apps that allegedly committed the privacy violations at issue. Plaintiffs' class would thus be comprised, in the main, of people who never had their contacts improperly accessed or uploaded and who could never have suffered the claimed injury to privacy interests that Plaintiffs have long said drove this litigation. But Plaintiffs nonetheless swing for the fences, seeking to pursue class-wide claims on behalf of all Apple device purchasers, regardless of actual deception or injury. No such class should be certified.

Even if limited to users of the challenged apps, no class could be certified. Plaintiffs try to parlay the alleged misconduct of the App Defendants—the very same misconduct for which Plaintiffs will release Apple from liability as part of their settlements with the App Defendants—into false advertising claims against Apple. They argue that Apple communicated to the entirety of the proposed class, via a "long-term advertising campaign," uniform promises that two so-called security features—"sandboxing" and App Store curation—would ensure that unconsented user data intrusions by Apps could never happen on Apple mobile devices. That argument and Plaintiffs' Motion lack merit; they are unsupported by evidence.

This Court should decline to certify Plaintiffs' proposed class for four major, independent reasons:

1. **Individual issues of fact predominate (Rule 23(b)(3)).** Plaintiffs argue that they are entitled to an inference of reliance and materiality, because this Court previously held that they had adequately *pled* a long-term advertising campaign. But as this Court recently held in declining to certify a similar class, "the inquiry is no longer whether Plaintiffs have merely pleaded a plausible claim under Rule 12(b)(6), but rather whether they have shown the existence of such a campaign." *Todd v. Tempur-Sealy Int'l, Inc.*, 2016 WL 5746364, at *10 (N.D. Cal. Sept. 30, 2016). In *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012), the Ninth Circuit held that at the Rule 23 stage, to warrant a class-wide inference of reliance under a

Tobacco II theory, Plaintiffs must "affirmatively demonstrate" two critical facts: that *all or nearly all* class members were exposed to the alleged advertising; and that class members were *not* exposed to disparate information (i.e., information inconsistent with the alleged security promises). Plaintiffs' showing does neither.

Despite an alleged class period of less than five years, Plaintiffs insist that Apple's advertising of the two security features during this period was comparable to the "decades long" campaign by the tobacco companies. But years into this litigation, Plaintiffs' showing remains only a handful of statements per year, discussing security in a variety of contexts unrelated to the alleged intrusions at issue (e.g., physical device passcodes, credit card encryption for iTunes purchases, corporate network security). Conspicuously absent is anything resembling *actual Apple advertising* during the period—Plaintiffs identify no television commercials, no print advertisements, no radio, no billboards, no email blasts to consumers, no internet display advertising, and no signs, shelf or sales messages in Apple stores. Long on hyperbole that their messaging "examples" somehow reached "virtually every household in the United States," their motion falls short on proof: Plaintiffs depend on a contrived "buzz marketing" theory that, following months of discovery and years of investigation, continues to lack both evidentiary and legal support. Plaintiffs ultimately supply no evidence to demonstrate that all or nearly all class members were exposed to the supposed advertising campaign.

Just as important, Plaintiffs' own evidence (and their testimony) confirms that information contrary to the supposedly "uniform" advertising campaign was widely available during the putative class period. That contrary information—from Apple and others—disclosed exactly the information that Plaintiffs say was not disclosed: that third party apps could (and had) accessed user contact information on multiple occasions during the class period. Given the disparate information in the media, Plaintiffs have provided no evidentiary basis for a class-wide inference of reliance, necessary to satisfy Rule 23(b)'s predominance requirement.

2. **Damages (if any) could not be feasibly and efficiently calculated.** Plaintiffs fail *Comcast*'s requirement to demonstrate that class damages can be feasibly and efficiently calculated. Instead, they offer a declaration, by Elizabeth Howlett, that is so incomplete in its

analysis that it comprises no damages model at all. Howlett suggests she would conduct a survey testing attributes of the Apple devices at issue, but she has "not designed" the survey. She has not decided which attributes, or even how many attributes, to test, or decided how to describe the Apple products at issue. Her methodology, moreover—to the extent that it can be discerned—cannot calculate amounts consistent with Plaintiffs' liability theory. Her conjoint analysis methodology cannot determine the real-world market price difference in what class members actually paid and what they would have paid absent the alleged misrepresentations.

3. **Plaintiffs' proposed class contains uninjured class members.** A class that contains members who suffered no injury at all cannot be certified. ECF No. 761 at 19, citing *Mazza*, 666 F.3d at 594-95. Even putting aside the tens of millions of people who never used one of the relevant apps, and who could not have been injured in any respect, testimony from named Plaintiffs confirms their own lack of injury. Howlett, moreover, has testified that she does not care about the privacy of her own contacts data, and she agrees that many people "don't value their privacy at all." Yet she confirms that her methodology would award damages to these uninjured people, despite the fact that her survey would return a zero damages value for such individuals. Consistent with *Mazza* and this Court's prior rulings on the Path class certification motion, the proposed class cannot be certified.

4. **Individual issues of law predominate because the laws of fifty states apply (Rule 23(b)(3)).** Plaintiffs' claims arise under the laws of fifty states, with widely diverging requirements on scienter, reliance, materiality, injury, remedies and other critical issues. Plaintiffs do not show how, in this case, the conflicts of law analysis or result should be any different than the Ninth Circuit found in *Mazza*. No class can be certified.

II. BACKGROUND AND EVIDENCE

Plaintiffs seek class certification under Rule 23(b)(3) with respect to four of their California law-based claims: Count 3—False Advertising Law (FAL), Count 4—Consumers Legal Remedies Act (CLRA), Count 5—Deceit (Fraud), and Count 6—Unfair Competition Law (UCL). Plaintiffs propose a nationwide class, seeking restitutionary "damages" relief for all purchasers, prior to February 8, 2012, of the "iPhone 3G, iPhone 3GS, iPhone 4, iPhone 4s, iPad,

iPad 2 or the second through fourth generations of the iPod Touch." ECF No. 802 ("Mot.") at 1 (defining the referenced devices as the "Class Devices"). Five of fourteen named Plaintiffs in the action—Carter, Cooley, Green, Hodgins, and Hoffman—seek appointment as class representatives.[1]

A. The Gaps in Plaintiffs' Pleading-Stage *Tobacco II* Showing Have Not Been Remedied at Class Certification.

Arguing for dismissal of Plaintiffs' false advertising claims at the pleading stage, Apple described how Plaintiffs had identified only "a handful of advertisements per year" over an alleged span of five years—a period much shorter than the "decades long" advertising campaign at issue in *Tobacco II*. ECF No. 543 at 13. Accepting Plaintiffs' representation that the alleged statements were only "examples . . . and incomplete," *id*., the Court overruled Apple's motion on these claims, permitting Plaintiffs discovery and time to assemble evidence that might prove the existence of a campaign. The gaps in Plaintiffs' allegations were nonetheless considerable:

- Much of the alleged campaign consisted of broad statements regarding "security" and "privacy" that were "too general to support a 'specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact.'" *Id.* at 14. The Court allowed Plaintiffs to proceed, because Plaintiffs had identified a smaller subset of specific statements that, in the Court's view, "are capable of being proven false." *Id*.

- Many of the statements had only a tenuous (at best) connection to the alleged security failings. *Id.* at 15 ("Statements and advertising concerning corporate security networks and device passcodes . . . are not the most probative examples of the alleged advertising campaign.").

- A number of the alleged statements could not support a *Tobacco II* theory, because they were not "representations that consumers were likely to have viewed, as opposed to representations that were isolated or more narrowly disseminated, such as statements buried on a rarely-viewed webpage, or made on an investor phone conference." *Id.* at 9.

- For pleading purposes only, the Court credited Plaintiffs' amorphous "buzz marketing" allegations, i.e., that anything Apple said was "invariably reported by thousands of

[1] Plaintiffs' claims for injunctive relief have been dismissed with prejudice, ECF No. 543 at 26-27, and they do not seek certification under Rule 23(b)(2).

media outlets, dissected by pundits and bloggers, frequently posted on Apple's own website, and available on countless websites and social media platforms, and thus made available to virtually all potential consumers." ECF No. 478 ("SCAC") ¶ 62. But the Court expressly reserved judgment—pending fact discovery—as to the "precise relationship between Apple's [alleged] 'buzz marketing' and third party advertisements." ECF No. 543 at 16.

Thus, while Plaintiffs' allegations were "sufficient to survive Apple's motion to dismiss," *id.* at 18, the Court never held that the alleged "sample" represented a sufficient evidentiary showing for any purpose. *Cf.* Pl.'s Mot. at 4 n.2.

B. Plaintiffs' Showing Falls Far Short of Establishing the Claimed Advertising Campaign About Sandboxing and App Store Curation.

Plaintiffs' Motion provides no evidence whatsoever to support the existence of a "long term advertising campaign," in which class members were exposed to uniform misrepresentations. In their attempts to do so and carry their burden on predominance, Plaintiffs rely on the same hodge-podge of statements attached to their last Complaint. Despite past assurances to the Court that the materials provided with their complaint were merely "examples"—and that Apple advertising was "pervasive" and "ubiquitous"—Plaintiffs have identified nothing new of substance following many months of discovery and fact investigation.[2]

Rather than provide new or additional evidence, Plaintiffs have instead, on this Motion, limited the focus of the alleged campaign. Each of the four claims that Plaintiffs seek to certify are now premised on much narrowed allegations of false advertising—that Apple falsely represented to the proposed class that the Class Devices "each came with *two security features*

[2] Plaintiffs identify only eight statements not referenced in the SCAC. Four of them date from 2016—approximately four years after the end of the putative class period—and could not have impacted the purchases at issue. ECF No. 803, Plaintiffs' Request for Judicial Notice ("RJN") Exs. N, O, P; ECF No. 802-5 ("Busch Decl.") Ex. AA. The fifth is a U.S. Patent by Apple (RJN Ex. 5), which can hardly be considered consumer advertising. The others confirm what Apple has been saying all along: the fact that third party applications could access (and had accessed) user contacts was repeatedly and publicly discussed during the putative class period. RJN Ex. K at 3 ("[T]here are known instances . . . in which a malicious application has passed the vetting process, only to be removed from the App Store later when Apple became aware of its offending behavior."; claiming to identify additional recent examples of address book uploading by Gowalla and twitericki apps); Busch Decl. Ex. Q (referencing blog disclosing Kik app's "silent uploading" of contacts); Ex. K (Apple statement that "if we ever find anything malicious," apps "can be removed from the App Store").

that would prevent third-party apps from taking private user data off their devices without consent, including data stored in the Contacts app." Mot. at 1 (emphasis added). According to Plaintiffs, Apple "prominently advertised" these two specific security features, i.e., "sandboxing" and the "curated" App Store, but the features "did not prevent apps from accessing the data inside the Contacts app, as Apple advertised." *Id.*

Plaintiffs' decision to focus on two discrete representations, instead of the amorphous "security and privacy" rubric they used to oppose pleadings motions, represents a material shift in their liability and damages theory. That shift resulted from a simple reality: evidence adduced in discovery did not support Plaintiffs' prior arguments. *See supra* at pp. 5-6. Plaintiffs' earlier suggestions that Apple somehow misrepresented the broader attributes of security or privacy in its products contradicted the testimony of multiple named Plaintiffs. They testified that privacy and security are broad, multifaceted concepts that have different meanings in different contexts, and that Apple products deserved praise for delivering privacy and security protections to its users. Plaintiff Cooley, for example, testified that she thought of virus protections and fingerprint ID and passcode protections, when she thought of "security" for her mobile devices, and she confirmed she was "happy" with Apple devices in those respects. Ex. 1 at 144:8-146: 4.[3] *See also* testimony from Plaintiffs Green, Paul, and Hoffman: Ex. 3 at 190:15-192:13 ("There's many different ways you can define security . . . ."); Ex. 4 at 220:18-24; 221:19-24 (security can "have a lot of meanings;" "smartphone [can] be secure in some ways but not in others"); Ex. 5 at 250:15-252:25 (security in mobile devices means "several things," e.g., protection against hacking, theft of device, malware, phishing, browser security).

Plaintiffs' expert, Elizabeth Howlett, concurs. She agrees that "security in the context of an Apple device is a broad concept, having multiple different sub-attributes" and "multiple possible meanings." Ex. 18 at 201-02. She identified numerous distinct aspects and sub-attributes, including protection from phone voice transmission, email security, texting security, virus protection, and others. *Id.* at 204-206. Howlett even acknowledged that it is "important in proposing a reliable damages methodology in this case to seek to value the *particular aspect of*

[3] All "Ex. _" references are to the Declaration of Stacy Hovan unless otherwise indicated.

security or privacy that plaintiffs are saying was misrepresented." *Id.* at 200 (emphasis added); *see also id.* at 151-52. As a result, most of the media statements and communications attached to Plaintiffs' Motion to evidence an "advertising campaign" are now beside the point.[4] That evidence does not show that the putative class was exposed to uniform misrepresentations about the "security features" that Plaintiffs now claim were misrepresented, sandboxing and App Store curation.

C. Record Evidence Confirms That There Was No Advertising Campaign; The Class Was Not Exposed to Any Uniform Misrepresentation.

Plaintiffs assert that Apple's "advertising" concerning the two specified security features was "well-disseminated." Mot. at 4. But the evidence is to the contrary.

1. Plaintiffs' Testimony and Evidence Shows Class Members Were Not Exposed to Uniform Misrepresentations.

Sandboxing: Plaintiffs identify a mere six sources that even arguably refer to sandboxing. Plaintiffs furnish no evidence that all or nearly all class members were exposed to these statements. For example, Plaintiffs' cited statements include (i) a purported "article," which is actually a third-party blog posting from 2011 (RJN Exs. GG and JJ) that discusses location tracking, not contacts access,[5] (ii) a single statement from Apple's website in June 2009 (RJN Ex. Y), (iii) a document entitled "Working Notes for the 2011 IJCAI Workshop on Intelligent Security" that Plaintiffs found on the web at www.tzi.de (RJN Ex. G); and (iv) a research paper presented at the 2010 Black Hat security conference (RJN Ex. II). None of the cited statements, moreover, says that sandboxing provided a guarantee of security for information stored on mobile devices. In fact, multiple cited journal articles argued the opposite. RJN Exs. G, II; *see also* RJN Ex. K at 3 ("With Apple iOS . . . there are not technical mechanisms that limit the access that an application has. Instead, users are protected by Apple's developer license agreement."). And

[4] For the most part, Plaintiffs' so-called "campaign"—on the evidence they submit—addresses entirely unrelated issues such as security for Web 2.0 applications, device passcodes, corporate network and intranet security, virus/malware protection, web browsing, SSL encryption for iTunes credit card purchases, protection of customer information provided *to Apple* in connection with purchases *from Apple*, location data, remote device wiping, device and network encryption, and other unrelated security issues. *See* RJN ¶ 39, Exs. A-B, E, T-U, W, Y-CC, EE-GG, JJ-KK, MM-NN; Busch Decl. Exs. I, BB. None is relevant to deception or damages here.

[5] In an apparent effort to inflate the number of purported examples of Apple "advertising," Plaintiffs cite two different iterations of the same blog from the same day.

while Plaintiffs also include a presentation by Steve Jobs, the statements there acknowledged that sandboxing was not the guarantee that Plaintiffs portray it as: "[W]e think we've put in good safeguards where, *if we miss something*, we'll be alerted to it real fast by users, and we'll just turn off the spigot so no more users have problems . . . ." RJN ¶40 at 7:12.

Testimony from the proposed class representatives also confirms, over and over, that the putative class was not exposed to uniform statements touting sandboxing as a security feature of Apple devices. *Four of the five* proposed class representatives had *no recollection* of being exposed to any Apple statements about "sandboxing" as a security feature for Apple devices. Neither Carter (Ex. 2 at 158:5-6)[6] nor Hodgins (Ex. 6 at 153:10-13) had any knowledge or recollection of the term "sandboxing" when asked in deposition. Cooley's testimony about sandboxing was: "Does not ring a bell." Ex. 1 at 148:17-20. And Green did not know what "sandboxing" meant; he was uncertain whether he had even ever heard the term. Ex. 3 at 189:16-190:3. Only *one* of the five proposed class representatives, Hoffman, had any recollection concerning messaging about sandboxing—and he, notably, considers himself "kind of a tech person" who reads "a lot about technology issues." Ex. 5 at 248:14-249:4.

As for damages expert Howlett, she had never seen or heard the term "sandboxing" during the class period and never in connection with Apple products. Ex. 18 at 43. She has no idea how many potential class members were exposed to statements about sandboxing. *Id.* at 48:2-10. In fact, she testified that she would never use the term in her proposed conjoint survey because it is her "expectation" and "intuition" that consumers would not understand it. *Id.* at 50-53. The evidence confirms: the proposed class was not exposed to misrepresentations or uniform messaging of any kind about sandboxing as a security measure for Apple products.

App Store Curation: With respect to App Store curation, Plaintiffs offer a scant nine sources that have any arguable relevance—including a technical blog ("All Things Digital"), Apple's App Store Review Guidelines directed to app developers (not consumers), a witness

[6] Carter did not purchase the iPhone she owned at the time of the alleged intrusion but, rather, received it as a gift. Ex. 2 at 20:11-21; 21:12-13. She does not fall within the proposed class, as Plaintiffs define it, Mot. at 1, and accordingly should be dismissed from the action. *See Philips v. Ford Motor Co.*, 2016 WL 7428810, at *8 (N.D. Cal. Dec. 22, 2016).

declaration filed in a patent lawsuit, and unpublished email threads. On this evidence, Plaintiffs ask the Court to infer that class members were exposed to an Apple guarantee that "apps that take address book data without consent would never make it into the App Store." Mot. at 7; *see also* ECF No. 818 at 20.

Plaintiffs likewise provide no evidence whatsoever that class members—or even their own five proposed class representatives—were exposed to uniform messaging regarding App Store curation. The majority of proposed class representatives have no knowledge or recollection of Apple advertising on this subject. Plaintiff Hodgins specifically disclaimed knowledge about what kind of app review process Apple had in place in 2010 and 2011. Ex. 6 at 170:19-171:4. Cooley did not see or hear anything during the class period (or any other time) from Apple about protecting data among apps:

> Q. . . . Have you ever seen or heard any statement about an Apple mobile device that an app on this device can't access data from another app?
>
> A. I don't recall seeing anything from app to app. I don't know. I think everything that I've seen has been pretty general, not specific like that.
>
> Q. Pretty general about security or privacy?
>
> A. Yes

Ex. 1 at 149:2-10.

Similarly, aside from a television commercial about viruses, Plaintiff Carter recalled no Apple advertisements in 2011 or before that referenced smartphones or iPads and security. Ex. 2 at 162:1-20; 164:1-5. And Plaintiff Hodgins testified she could not recall any printed ads or "anything online" she saw prior to 2012 concerning security or privacy of Apple products. Ex. 6 at 137:21-138: 6. She recalled nothing from Apple's website concerning security or privacy; she also as a general matter did not read the few, obscure sources that Plaintiffs assert contained misrepresentations about App Store curation or sandboxing—nothing from Apple Developer conferences, nothing from "All Things Digital," and nothing from App Store Guidelines or Apple's testimony before Congress. *Id.* at 154:2-157:19.[7]

[7] Even Plaintiffs' damages expert Howlett had scant knowledge of App Store curation, pleading ignorance of what the curation process consists of, who does it, what they look for, or whether the process is any different today than it was in 2008 or 2009. Ex. 18 at 45:6-23; 226:2- 227:6. Despite living through the class period and working with Plaintiffs' counsel on this case, she says she has no idea what putative class members were told about the particulars of App Store curation during the class period, how many consumers were exposed to Apple statements on the subject,

Even assuming some of the putative class saw or heard the identified statements on app store curation, the "guarantee" claimed by Plaintiffs is nowhere to be found. To the contrary, *Apple acknowledged the possibility that offending apps may make it into the App Store*, and discussed measures for dealing with offenders if they violated Apple guidelines after release. *See, e.g.*, Busch Decl. Ex. K ("We also check the identities of every developer and if we ever find anything malicious, the developer will be removed from the iPhone Developer Program and their apps can be removed from the App Store"); RJN Ex. V at 47 ("They get an electronic certificate. If they write a malicious app, we can track them down and tell their parents."); SCAC ¶ 78(vi) (Apple will "yank" apps collecting private user data without consent). In sum, Plaintiffs fail to show that the proposed class was exposed to any uniform misrepresentation about App Store curation—or any relevant "security feature."[8]

Testimony from the other named Plaintiffs: Notably, Plaintiffs choose only five named Plaintiffs, among the fourteen suing Apple for false advertising, to propose as class representatives.[9] *Not proposed* as a class representative is Ms. Pirozzi—the sole Plaintiff suing Apple who does not claim to have had her Contacts downloaded. Ex. 7 at 38:23-39:2; 74:7-10. But as a member of Plaintiffs' proposed class, her testimony is devastating to Plaintiffs' assertions that the class was exposed to uniform misrepresentations and relevant advertising. She was unaware of App Store curation and did not know that Apple reviewed apps before posting them in the App Store. *Id.* at 40:17-24. She also has no recollection about "sandboxing" and no

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or whether the substance of those statements was uniform. *Id.* at 59:3-14.

[8] Plaintiffs insist that Apple should have done more to prevent security violations, citing internal discussions and "radars" about implementing a pop-up consent screen. Mot. at 8-10. These issues have no bearing on the central question posed now—whether Plaintiffs were exposed to a uniform, misleading advertising campaign. But in any event, Plaintiffs mischaracterize the evidence. Far from showing intent to deprive Apple device users of privacy, the cited documents show careful, informed discussion of competing considerations and very real costs—in terms of usability and engineering challenges within iOS—of implementing pop-ups or other technical solutions. If the Court desires additional information on these issues, Apple respectfully refers the Court to its discussion at pages 6-7 of its Path summary judgment reply brief. ECF No. 845.

[9] Those five claim to have downloaded one or more apps by Defendant App Developers, accused of improperly accessing Contacts data. This fact distinguishes the proposed class representatives from the great bulk of the proposed class—consumers who have no reason to believe their contacts were improperly accessed and whose contacts were not in fact accessed. Whatever the size of Plaintiffs' so-called Intrusion class, the number of purchasers of "class devices" greatly exceeds that. *See* RJN Ex. D at ¶ 9.

understanding of it with respect to iPhone security. *Id.* at 39:15-22.

When she purchased her iPhone 4 in 2011, Pirozzi was also unaware of Apple's App Store Guidelines and its agreements with developers, and had not seen presentations by Steve Jobs, congressional testimony by Apple employees or summaries thereof, or the other types of "media" sources comprising Plaintiffs' supposed advertising campaign. *Id.* at 56:7-25; 57:10-16, 58:17-21; 61:7-16, 65:4-25. Pirozzi confirmed that she *never heard or saw* "any statement about the iPhone made by Apple that [she] now believe[s] was untrue or misleading." *Id.* at 72:23-73:2.

The testimony of other named Plaintiffs (all members of the proposed class, though not now proposed as class representatives) likewise undermines—*indeed disproves*—Plaintiffs' claims that the class was exposed to uniform misrepresentations. Plaintiff Moses could not recall "any specific statement by Apple that was false with regard to protecting the data" on her phone. Ex. 8 at 150:9-14. She likewise had no recollection of "any advertisements or articles or blogs or anything else about Apple's policies for reviewing apps . . . offered at the App Store," no recollection of seeing reference to "sandboxing," and no understanding of the word. *Id.* at 184:3-8; 186:2-21; 187:12-188:5. *See also* Ex. 9 at 292:21-293:8 (between 2007 and 2012, Plaintiff Dean was unaware of App Store curation or review of apps); Ex. 10 at 269:8-270:9; 272:11-17 (Plaintiff Biondi unsure if she ever visited Apple website; only recollection of security-related statements from Apple concerned Apple ID, password feature and virus protection); Ex. 11 at 269:8-16 (Plaintiff Varner does not know what the term "sandboxing" means); Ex. 12 at 64:1-65:24; 93:7-16; 94:3-14 (Plaintiff Beuershausen has no recollection of reading anything from Apple about App Store review process; no recollection of "sandboxing" being used with respect to Apple or particular company); Ex. 13 at 394:15-23 (first time Plaintiff Mandalaywala heard term "sandboxing" was in deposition); Ex. 4 at 222:8-15; 224:21-225:10 (first time Plaintiff Paul heard of sandboxing was from her attorneys in this case; she recalls nothing about sandboxing from Apple).

2. <u>Class Members Were Exposed to Information Acknowledging Limitations in Apple Mobile Device Security.</u>

The evidence shows more than just an absence of exposure to Apple's alleged misrepresentations. Testimony from the proposed class representatives proves that they, like the

general public, were, during the putative class period, exposed to information demonstrating that *sandboxing and App Store curation did not provide ironclad security* for user data. For example, Plaintiff Green testified that that he heard in 2010 that apps might be taking contacts data without permission. Ex. 3 at 67:10-68:4. He admitted that he understood that Apple never represented that its devices had "perfect security," as he "would have been suspect to that." *Id.* at 190:4-13. Hoffman had a similar understanding and view. Ex. 5 at 254:21-255:2; 281:12-22. *See also* Ex. 8 at 193:21-25 (Plaintiff Moses did not expect perfection or invulnerability, that "everything has a hole, right"). Hoffman also recalled reading about Apple delisting the Aurora Feint App Ex. 5 at 284:15-285:6. Plaintiff Carter, too, was exposed to information inconsistent with Plaintiffs' claims; *she read Apple's privacy policy* (Ex. 2 at 45:2-5; 158:25-159:8), which specifically advised users that apps may collect Contacts data. Ex. 1 at 153:17-154:8; 155:5-15.

III. ARGUMENT

A. Plaintiffs Have Not Demonstrated That Common Issues of Fact Predominate with Respect to Reliance.

Plaintiffs' proposed damages classes fail Rule 23's commonality and predominance requirements.[10] "[C]ommonality requires that the class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke.'" *Mazza*, 666 F.3d at 588 (quoting *Dukes*, 131 S. Ct. at 2551). Although it overlaps with commonality, the predominance test under Rule 23(b)(3) is "'far more demanding' . . . and asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) (quoting *Mazza*, 666 F.3d at 589). A plaintiff must "demonstrate the superiority of maintaining a class action and show 'that the questions of law and fact common to class members predominate over any questions affecting only individual members.'" *Berger v.*

[10] "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). Departure from the usual rule requires a class plaintiff to "affirmatively demonstrate" through evidentiary proof that she has met all requirements of Rule 23. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Rule 23 requires a court to "probe behind the pleadings" and to conduct a "rigorous analysis" of the evidence bearing on certification. *Id.* at 1432. "[A] district court *must* consider the merits" if they overlap with Rule 23 requirements. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011).

Home Depot USA, Inc., 741 F.3d 1061, 1067 (9th Cir. 2014).

1. Plaintiffs Must Affirmatively Demonstrate That All Class Members Were Exposed to Uniform Misrepresentations.

Plaintiffs argue that they are entitled to an "inference" of reliance and/or materiality because they successfully alleged a "long-term advertising campaign" at the pleading stage. Mot. at 4 n.2. In *Mazza*, however the Ninth Circuit made clear that a class-wide inference of reliance, necessary to satisfy Rule 23's predominance requirement, required plaintiffs to "affirmatively demonstrate" that *all or nearly all* class members were exposed to *uniform* misrepresentations. 666 F.3d at 588. Specifically, the Court observed that *Tobacco II* had permitted an inference of reliance only "in the context of a 'decades long' tobacco advertising campaign where there was little doubt that almost every class member had been exposed to defendants' misleading statements, and defendants were not just denying the truth but representing the opposite." *Id.* at 596. The *Mazza* Court ruled that plaintiffs had made no such showing in that case at class certification. It vacated a certification order where plaintiffs had failed to demonstrate with evidence that challenged television commercials and product brochures were sufficiently extensive to support existence of a long-term advertising campaign.

As an independent basis for its holding, the Court also pointed to information communicated to the class, which was contrary to the defendant's allegedly false representations:

> [W]hile Honda might have been more elaborate and diligent in disclosing the limitations of the CMBS system, its advertising materials do not deny that limitations exist. A presumption of reliance does not arise when class members "were exposed to quite disparate information from various representatives of the defendant."

Id. at 596 (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011)). Thus, as the Ninth Circuit elaborated in a subsequent decision, a class-wide inference of reliance depends on "two crucial facts": 1) the duration and extensiveness of the advertising campaign at issue, and 2) uniform content. *See Home Depot*, 741 F.3d at 1068.[11]

[11] The standard is the same for each of Plaintiffs' claims. *See Philips*, 2016 WL 7428810, at *16 (CLRA); *Vasquez v. Super. Ct.*, 4 Cal.3d 800, 812 (1971) (deceit; inference of reliance available only where the defendant's salespeople memorized a standard statement containing the representations, which in turn were "recited by rote to every member of the class"). As to the deceit claim (Count V), Plaintiffs' proposed class fails for an additional reason. In *Vasquez*, the California Supreme Court held that even where a presumption of reliance otherwise arises, defendant is entitled to rebut that presumption at trial. Because that would necessarily involve individual inquiries and would require "require the separate adjudication of each class member's

Here, Plaintiffs simply fail to carry their burden on either of these facts. They present no supporting evidence to document extensiveness **or** uniformity of the claimed deceptive messaging. Record evidence—including the *testimony of lead Plaintiffs*—affirmatively shows that class members were not exposed to any campaign of misrepresentations regarding the relevant security features. A majority of the named Plaintiffs testified that they have no knowledge or recollection of statements on either subject, admitted that they were aware of security limitations or vulnerabilities in Apple devices, or had no expectation of perfect security to begin with. *Supra* Section II.C.1. In addition, as Plaintiffs' own "examples" confirm, public statements regarding sandboxing and App Store curation were few and far between, often appeared (when they appeared at all) in out-of-the way places with limited consumer reach, and in terms of substance frequently contradicted any notion of perfect security. Accordingly, Plaintiffs cannot satisfy the standard applied in *Mazza* and *Home Depot*.

2. Plaintiffs Provide No Evidence of Class-Wide Exposure.

Plaintiffs' alleged advertising "examples" are insufficient. Plaintiffs identify a handful of statements per year, describe them as "examples," and then assert (without evidentiary support) that Apple advertising was "pervasive" and known to "virtually every consumer in the United States." This falls well short of Rule 23 requirements.

In *Todd v. Tempur-Sealy International, Inc.*, 2016 WL 5746364 (N.D. Cal. Sept. 30, 2016), this Court held that evidence that defendant had produced more than 300 million pages of direct mail each year, more than 25 million website page views per year, and a total of 4.3 billion consumer impressions per month was insufficient to demonstrate class-wide exposure. Among other things, plaintiffs provided no evidence as to which representations, if any, led to these "consumer impressions"; they failed to "apportion out which of these impressions were based on the alleged health-related misrepresentations, as opposed to the myriad of other claims that Defendants made in advertising their products—such as those related to comfort, durability, support, customer recommendations, and so forth"; and they made no attempt to estimate how many of the "impressions" actually led to a purchase of a Tempur-Pedic product, "such that they

individual claim or defense," *Williams v. Oberon Media, Inc.*, 2010 WL 8453723, at *7 (C.D. Cal. Apr. 19. 2010), no fraud class can be certified.

could be relevant to a class that consists only of customers who ultimately bought one of Defendants' products." *Id.* at *11. Critically, the Court distinguished the campaign from one "challenging advertising directly on the product packaging, such that one could infer anyone who bought that product also viewed the package," and denied class certification, because Plaintiffs failed to show that the class was actually exposed to the challenged representations. *Id.* at *12.

Plaintiffs here provide considerably less than the unsuccessful plaintiffs in *Tempur-Sealy*. They offer virtually nothing as far as true Apple advertising (e.g., specific television spots, internet display advertising, print advertising, etc.) and consequently provide *no evidence of consumer reach* with such advertising (e.g., broadcast frequency, audience measurement, publication circulation, or number of impressions). They point to third-party blogs such as "Daring Fireball," "Engadget," "ValleyBeat," and "AppleInsider," but offer no evidence as to the reach or audience for those sources. After months of discovery, they furnish no evidence as to how many consumers (if any) clicked on cited Apple webpages, read Apple product user manuals prior to purchase, reviewed Apple patents, pulled witness declarations filed with ECF, or followed presentations at Apple investor meetings.[12] They offer no media survey, no analysis or data regarding consumer reactions, no expert opinion—*no* evidentiary basis whatsoever to support their oft-repeated assertion that the advertising in question was "pervasive" and "well-disseminated." In denying Apple's motion to dismiss, the Court credited Plaintiffs' argument that their cited statements were merely examples. ECF No. 543 at 13. Now, facing the burden to come forward with *proof* of something more, Plaintiffs provide nothing.

Even assuming *arguendo* Plaintiffs could otherwise prove the existence of a campaign, it would not apply to significant portions of the alleged class period. "Representations made prior to purchase are relevant to a plaintiff's claim; ones made after are not." ECF No. 471 at 31. At the time of putative class members' purchases of Apple device in 2008 or 2009,[13] the "media

[12] Plaintiffs never address the fact that many of the advertising campaign "examples" they rely on are not likely to have been seen by all or any large portion of the putative class. *See* ECF No. 471 at 28-29; *see In re Myford Touch Consumer Litig.*, 2016 WL 7734558 (N.D. Cal. Sept. 14, 2016), *on reconsideration in part*, 2016 WL 6873453 (N.D. Cal. Nov. 22, 2016) (rejecting campaign predicated on statements in Ford's 2009 Annual Report, noting "this item is not even marketing material").

[13] Four proposed class representatives, Cooley, Hodgins, Green and Hoffman, made one of their

campaign," as based on Plaintiffs' evidence, implicates a mere seven statements that even arguably applied to security of personal data with respect to third party applications—two of which announced that third party apps had uploaded user contacts information. *See* RJN Exs. Q, J, S, U, V, Y; *id.*¶40. According to Plaintiffs, then, the deceptive messaging (which ultimately comprised the alleged long-term advertising campaign) *began*, at the earliest, just prior to the 2008 launch of Apple's App Store. But Plaintiffs contend that the long-term advertising campaign had sprung into existence, *effective* from *day one* of the class period, to expose all class members to the alleged uniform misrepresentations. Their assertion defies the evidence and common sense. Plaintiffs do not show that class members were exposed, *during the entire class period or any part of it*, to uniform misrepresentations—as part of a long-term advertising campaign or otherwise.

Evidence about Apple advertising spending does not carry Plaintiffs' burden. Plaintiffs try to salvage the campaign by asserting that between 2008 and 2012, Apple spent very large sums of money advertising the iPhone and the iPad. Mot. at 4. But that says nothing about sums spent to disseminate the allegedly *false statements at issue*. Apple advertises a wide variety of features, including ease of use, interface, style, camera, music playback and others. *See Tempur-Sealy*, 2016 WL 5746364 at *11 (declining certification where plaintiffs failed to "apportion out" consumer impressions based on the alleged misrepresentations, as opposed to other advertising claims); *cf. Delacruz v. Cytosport, Inc.*, 2012 WL 2563857, at **5, 9 (N.D. Cal. June 28, 2012) (allegation that Cytosport spent tens of millions advertising—internet, website, magazines, billboards, paid endorsements, tradeshows, other media outlets—insufficient to plead long-term advertising campaign).

Assertions about "buzz marketing" do not show a campaign. Lacking evidence of relevant Apple advertisements, Plaintiffs rely exclusively, then, on their theory of a long term advertising campaign based entirely on "buzz marketing." To certify a class predicated on third party statements, however, Plaintiffs must show that third parties *actually implemented* an Apple

class period iPhone purchases—on which they seek damages—during 2008, shortly after the opening of the App Store, in the first year of the supposed long-term advertising campaign. Exs. 14-17 (responses to Interrogatory 5).

marketing campaign. *See Tempur-Sealy*, 2016 WL 5746364, at *12. This is consistent with well-established requirements for CLRA, UCL and FAL claims, necessitating proof that Apple personally participated in and exercised unbridled control over the alleged advertising. *See Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 820-21 (9th Cir. 2007) (UCL and FAL); *In re Jamster Mktg. Litig.*, 2009 WL 1456632, at *9 (S.D. Cal. May 22, 2009) (CLRA); *Yordy v. Plimus, Inc.*, 2014 WL 1466608, at *3 (N.D. Cal. Apr. 15, 2014) (CLRA, UCL and FAL).

Although the Court accepted buzz marketing allegations at the pleading stage, Plaintiffs have failed to substantiate them with evidence at class certification. Aside from an insufficient showing of class-wide reach of the cited messaging, *supra*, [14] Plaintiffs offer no evidence supporting an inference that Apple exercised unbridled control, *or any control*, over the claimed legions of bloggers, pundits, social media posters, websites, journalists or others who commented on Apple products. Nor have Plaintiffs offered evidence showing that third parties disseminated Apple's own marketing messages, at Apple's behest or otherwise. To the contrary, many of the alleged statements on their face set out (often critical) third-party views.[15] *E.g.*, ECF No. 362 ("CAC") ¶ 219; SCAC ¶ 76(ix) & Ex. Z; Busch Decl. Ex. Q; RJN Exs. G, EE.

3. Class Members Were Exposed to Disparate Information

No class can be certified because class members were exposed to widely disparate information. For starters, all users of the App Store had to agree to Apple's Privacy Policy *before* downloading any App. For much of the alleged class period, that policy expressly disclosed:

> Our products and services may also use or offer products or services from third parties—for example, a third-party iPhone app. Information collected by third parties, which may include such things as location data or contact details, is governed by their privacy practices. We encourage you to learn about the privacy practices of those third parties.

ECF No. 502-7, Apple's Request for Judicial Notice ("Apple RJN"), Ex. G at 4; *see also* ECF No. 147-1.

In a similar case, Judge Koh recently held:

[14] To wit, given class representatives' unfamiliarity with "sandboxing" described above, even if such buzz marketing existed, it didn't reach them.

[15] Plaintiffs identify two emails sent by Apple in response to media inquiries, Busch Decl. Exs. K, L, but supply no evidence that either was publicly disseminated. Nor would two emails over the course of five years demonstrate Apple's "personal participation and unbridled control" over the media.

> Class members were not exposed to uniform representations. Most importantly, as Ford points out, a warning about sudden EPAS system failure was present in the owner's manuals for all class vehicles, and it would require extensive individualized inquiries to know which class members had the opportunity to read these portions of the owner's manuals before purchasing their vehicles.

Philips, 2016 WL 7428810, at *16. Because "reliance is a matter that would vary from consumer to consumer," Judge Koh declined to certify a class on CLRA and fraudulent concealment claims. *Id. See also Darisse v. Nest Labs, Inc.*, 2016 WL 4385849, at *6 (N.D. Cal. Aug. 15, 2016) ("The representations were not uniform, and not all of them were misrepresentations."); *Mazza*, 666 F.3d at 596 (no certification where Honda advertising materials "do not deny that limitations exist"); *Knapp v. AT&T Wireless Servs., Inc.*, 195 Cal. App. 4th 932, 942-43 (2011) (no certification for common law fraud where complaint acknowledged that disparate information was presented to class members in different media).

In addition, Plaintiffs' own allegations and evidence confirm that consumers were told, throughout the alleged class period, that certain apps could access (and had accessed) data on Apple mobile devices without permission—including address book information—despite Apple's efforts:

- In July 2008, media reports revealed that the Aurora Feint App—distributed to hundreds of thousands of Apple mobile devices—was transmitting owners' contacts database to the developer's servers without asking if it could do so, leading Apple to delist the App. CAC ¶ 219; RJN Ex. J.
- August 28, 2008: Apple disclosed a security flaw in the iPhone "that gives unauthorized access to contacts and e-mails." Apple acknowledged: "We are aware of this bug." SCAC ¶76(ix); RJN Ex. X.
- In an August 21, 2009 article published on its website, Apple acknowledged that the Google Voice App had transferred iPhone users' entire Contacts database to Google's servers. Apple identified three other Apps with the same issues. RJN Ex. Q.
- In 2010, media reports cited the Kik app's "silent uploading" of Contacts information. Busch Decl. Ex. Q. The media also discussed that App Store review was not infallible: "It's also a credit to Apple for finding out the mistake and shutting it down. . . some stuff like this still slipped through [Apple's app review] because it's pretty much unfeasible to test each application to make sure they're not sending out your private data." *Id.*
- A 2010 Wall Street Journal article reported that Apple mobile device privacy protections could be "skirted" and that more than half of popular Apps tested transmitted private information. RJN Ex. EE.
- In 2010, a scientific journal reported that "[d]espite Apple's claims, any applications

> downloaded from the App store to a standard iPhone can access a significant quantity of personal data … These data include the phone number, email accounts settings (except passwords), keyboard cache entries, Safari searches and the most recent GPS location." It also said that malicious applications "could be written to "pass the mandatory App Store review unnoticed and harvest data through officially sanctioned Apple APIs," and discussed several apps that had engaged in "personal data harvesting," including Aurora Feint, MogoRoad, and Storm8. SCAC Ex. II.
>
> - In July 2011, a journal reported that "there are ways to run software on a smartphone that bypasses [sandboxing] restrictions. In this regard, the security mechanisms intended to protect the device from malicious software turn into limitations that prevent the detection and elimination of such software." RJN Ex. G.

See also Mot. at 8 (acknowledging public disclosures regarding Aurora Feint, Kik and Gowalla); RJN ¶40; RJN Ex. V; Busch Decl. Ex. K.

Plaintiffs cannot have it both ways in relying on "buzz marketing." According to Plaintiffs, information about sandboxing and App Store curation was well known to Apple customers and consumers generally. Plaintiffs cannot depend on "buzz marketing" to argue that statements by or about Apple were known to "virtually the entire population of this country," SCAC ¶34, but then, when it suits their purposes, pick which Apple or third party statements they want to rely on, dismiss the remainder as irrelevant, and contend that they were unknown to consumers.

In sum, Plaintiffs are not entitled to an inference of materiality or reliance. They have failed to carry their burden to show that common issues of fact predominate.

B. Plaintiffs Fail *Comcast*: They Make No Showing That Class Damages Can Be Feasibly or Reliably Measured.

Rule 23(b)(3) certification is improper unless a plaintiff establishes that damages are "capable of measurement on a classwide basis." *Comcast*, 133 S. Ct. at 1433. A court can certify a Rule 23(b)(3) damages class under *Comcast* only where the plaintiff makes an evidentiary showing that damages could be feasibly and efficiently calculated once liability issues are resolved. *Lilly v. Jamba Juice Co.*, 2014 WL 4652283, at *10 (N.D. Cal. Sept. 18, 2014); *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013); ECF No. 761 at 23 (this Court applying *Comcast* in ruling that Plaintiffs' Intrusion upon Seclusion damages claims not suitable for class certification).

To address their *Comcast* burden, Plaintiffs submit a declaration from Elizabeth Howlett, who states that she would survey consumers who purchased the class devices, testing features or attributes of those devices to "determine a full price premium attributable to Apple's false claims." Mot. at 22; ECF No. 802-3 ("Howlett Decl."), ¶¶ 12-13, 22-27. Howlett's declaration defines two "Security Features" or attributes, which she asserts correspond to Apple statements about "sandboxing" and the "curated" App Store. Mot. at 1-2. Plaintiffs claim that Dr. Howlett's conjoint study will "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 23. Howlett's declaration, however, cannot carry Plaintiffs' burden.

1. Dr. Howlett Has Designed No Survey and Proposed No Methodology.

Plaintiffs' proposed damages approach fails at the most basic level: Dr. Howlett has not designed the core elements of her "planned" conjoint analysis or the consumer survey on which it depends. When questioned about her approach—the survey questions (i.e., attributes to be tested) product descriptions and data she intends use—Howlett responded, with few exceptions, that she did not know. She simply had *not done the work* necessary to answer the questions.

- She has made no determination whatsoever concerning the Apple device attributes that would be the subject of her survey. Ex. 18 at 144:6-11 (Q. "What attribute or attributes are you going to be testing in this case? . . . A. I don't know."); 53:18-21 ("I did not do any in-depth analysis of the different kinds of attributes to be looking at."); 145:20-146:16 ("[I]t was too early" to decide; she does not know whether she would use "like a sandbox attribute and a curated attribute" or some broader attribute). She gave these answers, despite acknowledging that "selection of attributes is very important" to a conjoint-based methodology; if one important attribute is missed, "your data will not be reliable." *Id*. at 191:25-193:15. Nor does Howlett know even how many separate surveys would be required. *Id*. at 172:2-173:3 ("I don't know the actual products well enough to know if I would have to do nine [surveys] or if I could get away with fewer.") *See* Hitt Decl. ¶¶ 11, 17.

- Howlett reached no decision whether to test both, or either, of Plaintiffs' "Security Features" (i.e., App Store curation and Sandboxing) referenced in paragraph 12 of her declaration

(the wording of which she simply took from Plaintiffs' counsel). Ex. 18 at 165:25-169:16 ("*I haven't designed the study*. I don't know what I'm going to use. . . .One might test them [the two defined attributes in Paragraph 12], yes. Will I? I'm not sure."); *id.* at 209:11-15.

- She also admitted: "I really don't have a clue" about *how many attributes* to test in the survey (*id.* at 187:22-188:9)—despite declaration testimony that a conjoint survey "should include six or fewer attributes" to avoid "unreliable results." Howlett Decl. at ¶24. *See* Hitt Decl. ¶¶ 19-20.

- Howlett has made no determination whether her survey would include the "price of Apple devices," or a "price premium" attribute, or what levels of price or price premium she might test. Ex. 18 at 95:12-17 ("I'm not sure yet."); 142:24-144:4 ("haven't decided" about price premium; cannot say what she "would need to find out to make that determination"); *see also id.* at 96:7-11. She does not know what source(s) would have the pricing data she needs for Apple devices. *Id.* at 65:12-66:10 ("[A:] I didn't get that far in this work.").

- Howlett was unable to say how she would *describe* the Apple products at issue to conjoint survey respondents. *Id.* at 183:18-21 ("Q: And you don't know what product description you would use for your conjoint surveys in this case, do you? A: No."). She admitted this, despite testifying that product description is "important to the reliability" of the survey methodology. *Id.* at 81:16-82:2, 183:14-17. *See* Hitt Decl. ¶ 17.

Howlett's explanation for her lack of analysis is that Plaintiffs' assignment was "very narrow" (Ex. 18 at 13:2-14:5, 256:18-23)—so much so that she admittedly failed to complete "a number of necessary steps to designing [her] surveys." *Id.* at 255:6-11; 53:9-24. As candid as she may be in this admission, the result of Howlett's incomplete work is that Plaintiffs' showing on damages consists of little more than reciting the words "conjoint analysis" and adding a few broad conjoint survey principles. Even Howlett's few examples of possible survey questions and attributes are all hypothetical, illustrative—only to suggest how a conjoint damages methodology *might* be constructed. *Id*. at 253:16-255:5 (example attributes have "no relevance"—"just to explain the method").[16]

[16] Whatever the other causes, the inadequacy of her "proposed methodology" is a necessary result of her lack of understanding of Plaintiffs' claims and the underlying facts. Though she has

The evidentiary showing and "rigorous" analysis required to show compliance with Rule 23 and *Comcast* are, therefore, absent here. In that regard, the situation here is like that in *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 552-53 (C.D. Cal. 2014), where Judge Morrow refused to consider plaintiffs' proposed damages approach on class certification. The court ruled that plaintiffs' expert had provided "no damages model at all," *id*. at 552, because—much like Howlett in this case—he had failed to identify the specific variables he intended to build into his model and did not "identify any data presently in his possession to which the models can be applied." *Id. See Wolf v. Hewlett Packard Co.*, 2016 WL 7743692, at *7 (C.D. Cal. Sept. 1, 2016) (striking expert damages testimony on class certification, where expert failed to describe survey methodology, beyond describing steps leading to commissioning of the survey); *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *20 (N.D. Cal. June 13, 2014) (no adequate damages model where expert provided no defined list of variables, and had not determined comparator products or whether needed data needed existed); *Miller v. Fuhu, Inc.*, 2015 WL 7776794, at *21-22 (C.D. Cal. Dec. 12, 2015) (because plaintiffs' expert had not yet created the class member survey and provided few concrete details on conducting it, *Comcast* burden unmet); *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 25-27 (D.D.C. 2012) (proposed damages methodology "not sufficiently developed to meet Plaintiffs' burden of showing that common questions predominate").[17]

Specifically in the context of conjoint-based damages models, Howlett's inability to define or even predict the number and substance of the *attributes* for her conjoint survey(s), in itself, establishes that she has not proposed a sufficient methodology. *See Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *6 (C.D. Cal. Dec. 18, 2014) (plaintiff had "yet to design" conjoint

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no expertise on privacy and had never designed a conjoint study to value a privacy-related attribute (Ex. 18 at 26:22-27:9; 233:1-4), she spent no more than 15-20 hours reviewing case materials, conceiving her approach, and writing her declaration (*id.* at 9:23-25); she neither asked for nor reviewed any available discovery materials (no Apple documents or personnel depositions, no plaintiff depositions) (*id.* at 13:7-15:21); she does not understand Plaintiffs' theory of liability (*id.* at 98:2-99:3), what class members were told about sandboxing or App Store curation during the class period (*id.* at 55:21-24; 227:3-6), or why the proposed class period ends in 2012 (*id.* at 226:2-15).

[17] *See also Pedroza v. PetSmart, Inc.*, 2013 WL 1490667, at *2 (C.D. Cal. Jan. 28, 2013); *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *8 (S.D.N.Y. Aug. 5, 2010).

survey and had not "decided which attributes will be included;" ruling plaintiffs had "advanced 'no damages model at all'"); *see also Oracle Am., Inc. v. Google Inc.*, 2012 WL 850705, at *10 (N.D. Cal. Mar. 13, 2012) (court rejected conjoint analysis concerning smartphone attributes: exclusion of important attributes (e.g., battery life and Wi-Fi) and inclusion of arguably unimportant features (i.e., voice dialing) "inappropriately focused [survey respondents] on artificially-selected features"). Here, Howlett has provided no model at all. Hitt Decl. ¶ 11 (Howlett "has provided little or no information regarding the actual structure and essential elements of her proposed survey").

2. Howlett's Approach Cannot Determine Damages Consistent with Plaintiffs' Theory of Liability.

Plaintiffs' failure to meet *Comcast's* requirements goes beyond the failure adequately to define a methodology. It is also clear from Howlett's deposition testimony that, however she intends to implement her methodology, it would not yield results consistent with Plaintiffs' theory of liability, *Comcast*, 133 S. Ct. at 1432. As an initial matter, Howlett acknowledged that she lacks the necessary basic understanding of Plaintiffs' claims. Ex. 18 at 98:2-18 ("Q: You don't have an understanding of how consumers were damaged, according to Plaintiff's theory in this case, their theory of liability? . . . [A:] That's correct . . ."); 84:5-15; 111:20-25 (no understanding whether she will be proposing "a restitutionary as opposed to some other" damages measure).

Equally damning, there is compelling *affirmative* evidence that Howlett's (inadequately described) conjoint approach would not accord with Plaintiffs' theory of liability and damage. Specifically, Plaintiffs—having defined the security features they contend Apple misrepresented ("sandboxing" and "the curated App Store," Mot. at 1)—assert that Howlett's approach will determine, through conjoint survey(s), "the *market value* of *the security features* Apple falsely promised and calculate the damages required as *restitution* to class members who *overpaid* . . . ." Mot. at 23-24 (emphasis added). But in contrast to Plaintiffs' promises, Howlett denied that her proposed methodology would "calculate the market value of the security features, that according to plaintiffs, Apple falsely promised." Ex. 18 at 109:25-111:5. She could take no other position, after all: she is not an economist (*id.* at 18:14-15), and she confirmed that her methodology "does not determine what the actual sales pricing of Apple devices would have been in a but-for world."

Id. at 73:22-74:5. Her model does not purport to determine or predict real-world, market pricing. *Id.* at 111:6-15.

One reason is that conjoint analysis, focused exclusively on consumer preference, considers only demand-side factors, while pricing or market value inquiries necessarily involve supply-side factors. Howlett admits as much. *Id.* at 68:21-25. Howlett testified: the number of Apple devices sold is not considered in, or relevant to, her methodology (Ex. 18 at 61:17-20); she does not know whether all class members paid the same price for a given Apple device (*id.* at 66:12-19); she has "no idea" what factors determined the actual pricing for the iPhone (*id.* at 66:20-68:5); and her methodology would not take into account Apple's competition for smart phones (*id.* at 120:24-121:3). The "value" that Howlett would seek to calculate has no necessary correlation to real-world price. *Id.* at 73:2-15; *see also id.* at 88:19-21 ("Q: So market value is the same as market price? A: I don't know."). *See* Hitt Decl. ¶ 34 ("Dr. Howlett's proposed damages methodology completely ignores supply-related factors, and the plaintiffs have not proposed any method for determining the effects of supply and competition, which, together with demand-related factors, determine market prices.").

In deciding similar challenges to proposed conjoint analyses, other courts have held that regardless whether the approach may suffice for establishing market demand for an alleged product or attribute,[18] it is not reliable to determine *price* premium or market value damages. For example, in *In re NJOY, Inc. Consumer Class Action Litigation* (cited by Plaintiffs), the court held that the proposed conjoint analysis "did not satisfy *Comcast*," because it focused on "a

[18] This is consistent with how Apple used conjoint analysis in *Apple, Inc. v. Samsung Electronics Co.*, 2014 WL 976898, at *13 (N.D. Cal. Mar. 6, 2014). Apple used conjoint survey results there to establish that "demand for the patented product exists, not the degree of demand." *Id.* (citation and internal quotation marks omitted). Plaintiffs' citation of *Samsung* (Mot. at 23) as support for Howlett's approach is therefore misplaced. The same is true for other decisions on conjoint analysis cited by Plaintiffs: *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1025 (C.D. Cal. 2015) (price premium calculated using hedonic regression; conjoint used only to apportion premium); *Guido v. L'Oreal, USA*, 2014 WL 6603730, at *5 (C.D. Cal. July 24, 2014) (not deciding or discussing any challenge based on conjoint's exclusive focus on demand); *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 539 (S.D. Fla. 2015) (same); *In re Whirlpool, etc. Prod. Liab. Litig.*, 45 F. Supp. 3d 724, 753-54 (N.D. Ohio 2014) (same); *TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006 (N.D. Cal. 2013) (patent case—not involving price premium class action damages theory); *Khoday v. Symantec Corp.*, 93 F. Supp. 3d 1067, 1082-1086 (D. Minn. 2015) (on summary judgment, conjoint analysis admissible as combined with testimony from separate expert economist).

consumer's subjective valuation and . . . [did] not permit the court to calculate the *true market price*" of the product at issue. 2016 WL 787415, at **6-7 (C.D. Cal. Feb. 2, 2016) (emphasis in original). Stated differently, conjoint analysis converts "what is properly an objective evaluation of relative fair market values into a seemingly subjective inquiry of what an average consumer wants." *Id.* at *6. Likewise, in *Saavedra*, 2014 WL 7338930, at *5, the court declined to certify a damages class, in part, because plaintiffs' conjoint model "look[ed] only to consumer demand while ignoring supply"; the court found no authority that "a consumer may recover based on consumers' willingness to pay irrespective of what would happen in a functioning market . . . ." Howlett's methodology could not produce a result corresponding to an alleged overpayment or price premium that Plaintiffs claim as the measure of restitutionary damages.

There is another reason that Howlett's methodology would not measure damages arising from Plaintiffs' theory of liability. She repeatedly testified that her methodology would measure the value of security or privacy *broadly* in a smartphone, rather than seek to value the two allegedly misrepresented "security features," identified by Plaintiffs and in Howlett's declaration:

> My assignment was to prepare methodology to—to assess how much consumers—the importance of protecting their privacy is worth. . . . Here's the situation. You assume that your phone is protected. It's not. How much is that attribute worth to you? . . . . You bought a phone. You assume it was 100 percent safe and protected, and it wasn't.

Ex. 18 at 51:5-18. *See also id.* at 57:3-58:8 (people thought "they were purchasing a product that protected their personal information. They did not. . . . End of story."). Howlett denied she was focused on Plaintiffs' two identified, allegedly misrepresented "Security Features." *Id.* at 58:10-17 ("Q: And it doesn't matter to your analysis whether the consumer expectation was that sandboxing would protect their information, or App Store curation would protect their information, or it was some other technique or approach . . . ; that's irrelevant to your analysis, correct? A: As of today, yes."). She "would never use . . . [the term 'sandboxing'] with consumers"; she would "find it very surprising if they understood what sandboxing meant." *Id.* at 50:9-20; 52:22-53:7. *See also id.* at 230:4-19 (does not know whether consumers would understand concept of a curated App Store).

But Howlett's testimony confirms, at the same time, the obvious flaw with a methodology that would value the broad concepts of security and privacy. She agrees that security and privacy for Apple devices are indeed "broad concept[s]" with "multiple different meanings, multiple different sub-attributes." *Id.* at 201:25-202:21. She considers protection of contacts information only one of multiple sub-attributes of security (*id.* at 203:19-24); she acknowledges a high level attribute like security encompasses a wide variety of sub-attributes, including email security, text security, virus protection, password protection, spy-ware protection, location data security, web browsing history protection, security for credit card information, and protection from hacking, and voice transmission interception. *Id.* at 204:5-208:4. And notwithstanding her testimony quoted above—that her approach would seek to value security and privacy broadly—Howlett ultimately admitted that it is "*important in proposing a reliable damages methodology* in this case to seek to value the particular aspect of security or privacy that plaintiffs are saying was misrepresented." *Id.* at 200:11-17 (emphasis added). But her model does not do this.

There is, therefore, a clear mismatch between Howlett's proposed methodology and Plaintiffs' proclaimed liability theory, focused on two allegedly misrepresented "Security Features." Her methodology would, at a minimum, overstate Plaintiffs' damages. In *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 1024-25 (C.D. Cal. 2015), the court rejected the plaintiffs' regression-based damages methodology because of the same logical flaw that infects Howlett's approach. In *ConAgra*, plaintiffs' expert sought to determine the "price premium attributable to the '100% Natural' label" on the product at issue, even though plaintiffs' theory of liability was that they were erroneously led to believe (because of the "100% Natural" label) that the product contained no GMO ingredients. Plaintiffs' proposed methodology there failed to "segregate the price premium attributable to a consumer's" specific alleged misunderstanding. *Id.* *See* Hitt Decl. ¶ 22 ("Dr. Howlett's results would at best capture preferences for all aspects of data security and privacy on Apple Devices (such as geolocation data security, credit card information security, or password protection), not just security of contacts data against access by third party apps without consent. Inclusion of an attribute that broadly relates to data security could also bias survey results.").

These Plaintiffs, likewise, do not allege that Apple devices were ineffective in providing privacy or security generally—in all of the areas Howlett acknowledged as relevant. Merely calculating the price premium of "privacy" or "security" generally does not comport with these Plaintiffs' theory of liability—that class members were deprived of the promised security features of "sandboxing" and a "curated App Store"—i.e., security for apps accessing Contacts data without permission. In the end, Howlett offered no real resistance to the argument that her approach is misaligned with Plaintiffs' theory of liability and damages. *Id.* at 198:15-200:17.

Finally, the accompanying declaration of Professor Lorin Hitt outlines additional flaws with Plaintiffs' damages approach and Dr. Howlett's proposed methodology, further demonstrating that Plaintiffs have failed to satisfy *Comcast's* requirement. In addition to his opinions concerning the incompleteness of Dr. Howlett's methodology, Professor Hitt testifies that: "Dr. Howlett's proposed methodology is inconsistent with plaintiffs' theory of damages" (Hitt Decl. ¶¶ 14, 19-21, 25-26, 30-31); Dr. Howlett's choice to use a price attribute would "likely [] generate biases" (*id*. at ¶¶ 23-24); Dr. Howlett cannot account for changes in consumer preferences for privacy over time or differences based on their prior knowledge and experience (*id*. at ¶ 27); Dr. Howlett's methodology cannot assess harm based on market prices or values, because, among other things, of an inability to consider supply-side factors and competition (*id*. at ¶¶ 32-43).

C. The Proposed Class Contains Uninjured Members and Cannot Be Certified.

A class that contains members who suffered no injury at all cannot be certified. ECF No. 761 at 19, citing *Mazza*, 666 F.3d at 594-95. The proposed class here fails for this reason alone: Howlett's testimony confirms that Plaintiffs' proposed class contains uninjured class members.[19]

[19] Testimony from named Plaintiffs independently confirms there are uninjured members in the proposed class. Pirozzi has always felt she had gotten her "money's worth"—both with respect to the iPhone 3, iPhone 4 and the iPads she purchased. Ex. 7 at 16:6-21; 20:15-20, 29:2-6. She replied with an unequivocal "no" when asked if she knew of "anything that Apple has done that has caused you injury of any kind." *Id.* at 84:13-19. Cooley testified that even with prior knowledge of what later happened with apps accessing her contacts without her permission, "it wouldn't have affected my decision to buy." Ex. 1 at 142:10-20. *See also* Ex. 12 at 57:23-58:1; 135:12-17 (Plaintiff Beuershausen got his money's worth for iPhones purchased in past, including iPhone 3G).

To begin, she generally agrees with Plaintiffs' other damages expert, Dr. Fishkind, that "variation" exists "across individuals concerning their attitude toward and willingness to protect privacy." Ex. 18 at 238:3-18. Critically, she agrees that "there's some people who don't value their privacy at all." *Id.* at 238:14-18, 240:6-18. Howlett, moreover, does not value the privacy of her own phone contacts information: "So I don't care what app, who has access to my personal records, my contacts. Fine with me. I don't want my credit card information being shared." *Id*. at 201:25-202:11; *see also id.* at 156:6-15 (Howlett not concerned whether Twitter ever accessed her contacts data). Without more, Howlett's testimony establishes that—consistent with *Mazza* and the Court's prior ruling in this case—Plaintiffs' proposed class should not be certified, because it contains uninjured members. *See* Hitt Decl. ¶ 45 ("Dr. Howlett would allocate damages to unharmed individuals . . . ").

Even if the presence of uninjured class members were, in itself, not a barrier to class certification, Howlett's damages approach would necessarily "overcompensate some class members, while undercompensating others." ECF No. 761 at 22. Howlett testified that for consumers (such as herself) who "did not value the privacy of their contacts," her methodology would return "a value of zero for a price premium." Ex. 18 at 163:19-24. But rather than accounting for such differences, her approach would average them out. *Id.* at 243:23-246:2. She explained with an example:

> [L]et's say that because preferences do vary across the population, let's say that the distribution turns out that the premium that consumers associate with privacy of your contact information is $50. That's the number that you find. There may be some consumers who have—who value it at 100, and there may be some consumers that value it at zero. . . . There's people who valued at 100 that get 50, and *there's people that value it at zero get 50*. And it all, at the broad market level, evens out.

Id. at 246:19-247:7 (emphasis added). *See* Hitt Decl. ¶ 46 (Dr. Howlett "argues, without any scientific basis or evidence, that such aggregate price premium 'is going to balance everybody out.' These statements make no sense from an economics standpoint."). Howlett knows of "no practical way" to allocate the aggregate damages value (e.g. $50) to individuals to reflect each class member's level of injury. *Id.* at 247:24-248:13. She thus admits her model would both over- and under-compensate class members. *Id.* at 244:10-18 ("[B]ecause there are differences in

preferences across the population, some people in the settlement may get less than they're willing to pay, and some will get more, yes.").

D. Material Differences in State Law Preclude Any Finding of Predominance.

Plaintiffs seek to avoid the effects of law variations on their proposed nationwide class by asserting that California law should apply to all claims asserted. They argue initially that "Apple's choice of law provision necessitates finding that California law should apply to this nationwide class," relying on a version of Apple's iPhone Software License Agreement. Mot. at 17-18. But Plaintiffs are incorrect.[20] The choice of law provision on which they rely (Busch Decl. Ex. BB), on its face, does not support that result. Rather, the language states, in relevant part, that "This License will be governed by and construed in accordance with the laws of the State of California . . . ." *Id.*

Because Plaintiffs' claims now at issue do not arise from Apple's iPhone License, the referenced choice-of-law language does not control Plaintiffs' claims. Notwithstanding *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464-65 (1992) (upholding application of a choice-of-law clause for breach of fiduciary duty claims arising from the contract at issue), federal courts decline to give force to choice-of-law language like that at issue here, *when the claims at issue do not arise from contract*. *E.g.*, *Darisse*, 2016 WL 4385849, at *8 (choice-of-law provision did not cover false advertising claims, which arose from reliance on advertising, not license); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1064 (N.D. Cal. 2014); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 964-65 (S.D. Cal. 2012); *Broida v. Sirius XM Radio, Inc.*, 2011 WL 6013588, at *3 (S.D. Cal. Dec. 1, 2011). *See also In re Apple iPhone 3G & 3GS MMS Mktg. & Sales Practices Litig.*, 864 F. Supp. 2d 451, 464-65 (E.D. La. 2012) ("Plaintiffs' argument [to apply California law] is based on the choice-of-law provision contained in the two Apple contracts referenced . . . [but] these contracts are irrelevant to Plaintiffs' claims and the instant issue, and therefore provide no basis for applying California law.").

[20] This Court has not previously decided what state law or laws should govern Plaintiffs' false advertising claims. The Court's ruling that California law governed Plaintiffs' Intrusion upon Seclusion claim involved a different claim, a different choice-of-law provision, and a different Apple agreement. *See* ECF No. 761 at 11.

1. California's Three-Step Governmental Interest Test

Plaintiffs' argument to apply California false advertising law to their proposed nationwide class thus depends on the outcome of California's governmental interest test. *See* ECF No. 761 at 12; *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 602 (N.D. Cal. 2015). The first step is to determine whether relevant laws of other states are materially different than California law. ECF No. 761 at 13.

Material Differences in Law—State Consumer Protection Statutes: Three of Plaintiffs' claims now at issue, the UCL, FAL and CLRA counts, are consumer protection statutes; courts recognize that such statutes vary in material ways among states. *E.g.*, *Mazza*, 666 F.3d at 591 (noting material differences in scienter and reliance requirements); *Darisse*, 2016 WL 4385849, at *9 (concluding "49 states' consumer protection statutes differ significantly from California's UCL, FAL, and CLRA"); *Mullins v. Premier Nutrition Corp.*, 2016 WL 3440600, at *1 (N.D. Cal. June 20, 2016). As set forth in the text and notes below, material differences exist in consumer protection law among the states.

Specifically, many states do not permit class actions under their consumer protection laws[21]; others restrict class actions to state residents or have other limitations that would be outcome determinative here. [22] In addition, states have different injury and deception requirements. Most states require proof of an injury, but some do not,[23] and some have no deception requirement.[24] Beyond the injury and deception requirements, at least nine states require some degree of scienter,[25] while others do not.[26] California requires named plaintiffs to

[21] *E.g.*, Ga. Code Ann. § 10-1-399; La. Rev. Stat Ann. § 51:1409(A); Miss. Code Ann. § 75-24-15; Mont. Code Ann. § 30-14-133(1); S.C. Code Ann. § 39-5-140(a); Tenn. Code Ann. § 47-18-109(a)(1); Va. Code Ann. § 59.1-204(A); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174-75 (5th Cir. 2004); *Arnold v. Microsoft Corp.*, No. 00-CI-00123, 2001 WL 193765, at *6 (Ky. Cir. Ct. July 21, 2000), *aff'd*, No. 2000-CA-002144-MR, 2001 WL 1835377 (Ky. Ct. App. Nov. 21, 2001).

[22] Ala. Code § 8-19-10(f); Conn. Gen. Stat. Ann. § 42-110g(b); 815 Ill. Comp. Stat. 505/10a; Iowa Code § 714H.7; Kan. Stat. Ann. § 50-634(d).

[23] Del. Code Ann. tit. 6, § 2513(a); D.C. Code Ann. § 28-3904; *Odom v. Fairbanks Mem'l Hosp.*, 999 P.2d 123, 131-32 (Alaska 2000).

[24] Del. Code Ann. tit. 6, § 2513(a); Md. Code Ann., Com. Law § 13-302; Minn. Stat. §§ 325F.69(1)-325F.70; *Telcom Directories, Inc. v. Commonwealth of Ky. Ex. rel. Cowan*, 833 S.W.2d 848, 850 (Ky. Ct. App. 1991); *State ex rel. Kidwell v. Master Distribs., Inc.*, 615 P.2d 116, 122-23 (Idaho 1980).

demonstrate reliance; some other states' consumer protection statutes do not.[27] And while some states permit recovery of damages,[28] other states limit remedies to equitable or restitutionary relief, as with California's UCL and FAL. Some states do not permit punitive damages,[29] and statutes of limitations vary. *See Darisse*, 2016 WL 4385849, at *9.

Material Differences in Law—Fraud/Deceit: States' laws vary substantially—from the law of California and among themselves—on scienter and injury. *See id.* at *13 (material variations "exist among the states' laws regarding common law fraud"). Many jurisdictions furnish no presumption of reliance or causation for fraud.[30] In addition, there is a split as to whether a defendant must have knowledge of falsity, as in California, *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 974 (1997), or whether reckless disregard of the truth is sufficient.[31] There are also significant state differences regarding standards of proof and damages.

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[25] Del. Code Ann. tit. 6, § 2513(a); Colo. Rev. Stat. Ann. § 6-1-105(l)(e), (g), (u); Ga. Code Ann. § 10-1-373; Kan. Stat. Ann. § 50-626(a), (b)(2)-(4); Miss. Code Ann. § 75-24-5(i), (j); Nev. Rev. Stat. § 598.0915, 598.0923(2); S.D. Codified Laws § 37-24-6(1); Utah Code Ann. § 13-11-4(2); Wyo. Stat. Ann. § 40-12-105(a); *Lambert v. Downtown Garage, Inc.*, 553 S.E.2d 714, 718 (Va. 2001); *Tietsworth v. Harley Davidson*, 677 N.W.2d 233, 239 (Wis. 1999).

[26] *Calandro v. Allstate Ins. Co.*, 778 A.2d 212, 221 (Conn. App. Ct. 2001); *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973-74 (Fla. Ct. App. 2000); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 155 (Pa. Super. Ct. 2002).

[27] *F.T.C. v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003) (Alabama); *Izzarelli v. R.J. Reynolds Tobacco Co.*, 117 F. Supp. 2d 167, 176 (D. Conn. 2000); *Sebago, Inc. v. Beazer E., Inc.*, 18 F. Supp. 2d 70, 103 (D. Mass. 1998); *Stutman v. Chem. Bank*, 731 N.E. 2d 608, 611-12 (N.Y. 2000); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Egwuatu v. South Lubes, Inc.*, 976 So.2d 50, 53 (Fla. App. 2008); *Dabush v. Mercedes Benz USA, Inc.*, 874 A.2d 1110, 1121 (N.J. Super. Ct. App. Div. 2005).

[28] Alaska Stat. § 45.50.531(a); Cal. Civ. Code § 1780(a); Haw. Rev. Stat. § 480-13(c)(1); Ind. Code Ann. § 24-5-0.5-4; Mass. Gen. Laws ch. 93A, § 9(3); N.H. Rev. Stat. Ann. § 358-A:10-a; R.I. Gen. Laws § 6-13.1-5.2(a), (d); S.D. Codified Laws § 37-24-31; Tex. Bus. & Com. Code § 17.50(b), (d); 815 Ill. Comp. Stat. 505/2S, 10a; *Holeman v. Neils*, 803 F. Supp. 237, 242 (D. Ariz. 1992).

[29] Cal. Bus. & Prof. Code §§ 17203, 17536; Md. Code Ann., Com. Law § 13-408(a); S.D. Codified Laws § 37-24-31; *Tousley v. N. Am. Van Lines, Inc.*, 752 F.2d 96, 104-05 (4th Cir. 1985); *Taylor v. Phillip Morris, Inc.*, 2001 WL 1710710, at *7 (Me. Super. Ct. May 29, 2001); *Paty v. Herb Adcox Chevrolet Co.*, 756 S.W.2d 697, 699 (Tenn. Ct. App. 1988).

[30] *Darisse*, 2016 WL 4385849, at *13 (citations omitted); *see also McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 549 (5th Cir. 2003) (rejecting class-wide inference because "[r]eliance may not be presumed under Texas law"); *Garcia v. Medved Chevrolet, Inc.*, 240 P.3d 371, 380 (Colo. Ct. App. 2009), *aff'd*, 263 P.3d 92 (Colo. 2011) (rejecting "theory of presumed reliance" under Colorado law); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 456 (D.N.J. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220-21 (E.D. La. 1998) ("the vast majority of states have never adopted a rule allowing reliance to be presumed in common law fraud cases").

[31] *Excel Constr., Inc. v. HKM Eng'g, Inc.*, 228 P.3d 40, 48-49 (Wyo. 2010); *Bortz v. Noon*, 729

Compare California, *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 754-55 (1980) (preponderance of evidence) with other states, requiring proof of fraud by "clear and convincing evidence."[32] Compare California's "benefit of the bargain" damages measure with other states' "out of pocket" standard.[33] Statutes of limitations also vary. *See Darisse*, 2016 WL 4385849, at *14.

2. Application of California Law Would Impair the Interests of Other States in Applying Their Laws to Their Residents.

In this case, as in *Mazza*, the Court should find that other states' interests in applying their laws would be more impaired (if their law were not applied) than California's interests in applying its laws (were its law not applied). 666 F. 3d at 594. Although California has an interest in regulating conduct within its borders, California's interest in applying its laws to residents of foreign states is "attenuated." *Id.* On the other hand, other states have strong interests in balancing regulation and promotion of products within their borders with the protection of their own consumers. *See Mazza*, 666 F.3d at 592-93; *see also* ECF No. 761 at 14. As in *Mazza*, "[t]hese interests are squarely implicated in this case." 666 F.3d at 593.

Based on the "facts and circumstances of *this* case, and *these* Plaintiffs' allegations," ECF No. 761 at 15, applying the "more comprehensive consumer protection laws" of California would substantially impair the interests of other states concerned with shielding out-of-state businesses from what might be considered "excessive litigation." *Mazza*, 666 F.3d at 592. Plaintiffs' claims here—asserting, at best, ephemeral damages and dependent on a presumption of reliance arising from *Tobacco II*—surely cross the boundary of what many states would consider "excessive litigation."

A.2d 555, 561 (Pa. 1999); *Patch v. Arsenault*, 139 N.H. 313, 319 (1995); *McGregor v. Landmark Chevrolet, Inc.*, 596 So. 2d 909, 911 (Ala. 1992); *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992); *Hizer v. Holt*, 937 N.E.2d 1, 5 (Ind. Ct. App. 2010); *Wagner v. Ohio State Univ. Med. Ctr.*, 934 N.E.2d 394, 402 (Ohio Ct. App. 2010); *Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840, 849-50 (Tex. Ct. App. 2010).

[32] *See Darisse*, 2016 WL 4385849, at *13 and authorities cited therein; *see also, e.g.*, *Kuhn v. Coldwell Banker Landmark, Inc.*, 245 P.3d 992, 1002 (Idaho 2010); *Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 580-81 n.16 (Ky. 2004); *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 719 (Va. 2000); *Ficor, Inc. v. McHugh*, 639 P.2d 385, 396 (Colo. 1982).

[33] *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988); *Kaddo v. King Serv., Inc.*, 250 A.D.2d 948, 949 (N.Y. 3d Dep't 1998).

Further, "California recognizes that 'with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.'" *Id.* at 593 (citing *Hernandez v. Burger*, 102 Cal. App. 3d 795, 802 (1980)). In this case, the place of the alleged wrong—i.e., the alleged deception of class members and their purchases of Apple devices in reliance on Apple advertising—occurred in the states of class members' residence. On this point, *Mazza* is again instructive: "the last events necessary for liability as to the foreign class members—communication of the advertisements to the claimants and their reliance thereon in purchasing [products]—took place in the various foreign states." 666 F.3d at 594; *see also Darisse*, 2016 WL 4385849, at *15; *Zinn v. Ex-Cell-O Corp.*, 148 Cal. App. 2d 56, 80 n.6 (1957). Thus, in this case, the interests of other states, where the alleged wrongs occurred, are "predominant."

Notably, Plaintiffs offer no reason why the respective state interests at stake here should be analyzed and resolved any differently than the Ninth Circuit resolved them in *Mazza*. Under the closely analogous facts and circumstances that exist in this case, *Mazza*'s analysis and outcome should be controlling. *See Frezza v. Google Inc.*, 2013 WL 1736788, at *5 (N.D. Cal. Apr. 22, 2013) ("The factual analogy makes Mazza's application of the choice-of-law rule to the facts of this case, not only relevant but controlling."); *see also Darisse*, 2016 WL 4385849, at *15.

Courts in this circuit overwhelmingly decline to certify Rule 23(b)(3) fraud and consumer deception classes where application of the laws of 50 states would be required. *See, e.g.*, *Darisse*, 2016 WL 4385849, at *15; *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 2466559, at *12 (N.D. Cal. May 30, 2014); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 2191901, at *21 (N.D. Cal. May 23, 2014). *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001); *Burton v. Nationstar Mortg., LLC*, 2014 WL 5035163, at *15 (E.D. Cal. Oct. 8, 2014); *Marsh v. First Bank of Del.*, 2014 WL 2085199, at *7-8 (N.D. Cal. May 19, 2014) (collecting cases); *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1099, 1104 (C.D. Cal. 2012) (problems for evidence admissibility, jury instruction and verdict forms). [34] Even assuming that such complexity could somehow be solved, Plaintiffs "bear[] the burden of demonstrating a suitable

[34] *See also Karim v. Hewlett-Packard Co.*, 2014 WL 555934, at *8 (N.D. Cal. Feb. 10, 2014); *Schwartz v. Lights of Am.*, 2012 WL 4497398, at *9 (C.D. Cal. Aug. 31, 2012); *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 WL 4906433, at *3 (C.D. Cal. Nov. 13, 2008).

and realistic plan for trial of the class claims," *Zinser*, 253 F.3d at 1189 (citation and internal quotation marks omitted), including explaining how the Court could formulate manageable jury instructions. *See Rivera*, 2008 WL 4906433, at *2. Plaintiffs never provide such a plan.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

Dated: March 31, 2017

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