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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

CLASS ACTION

REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION RE FALSE ADVERTISING LAW AND RELATED CLAIMS

Date: May 31, 2017
Time: 9:30 a.m.
Judge: Hon. Jon S. Tigar

THIS DOCUMENT ALSO RELATES TO CASES:
Hernandez v. Path, Inc., No. 12-cv-1515-JST
Pirozzi v. Apple Inc., No. 12-cv-1529-JST
(collectively, the "Related Actions")

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I. INTRODUCTION

Apple does not dispute that Plaintiffs satisfy each element of Rule 23 for certification, save predominance (with a one sentence assertion that any commonality is lacking). Apple makes four predominance arguments, all of which fail:

Choice of Law: Apple contends that this dispute is governed by each class member's state of residence. But Apple drafted and imposed a license agreement upon iDevice users governing use of iDevices and selecting California law. Apple required class members to agree to that license as a condition of purchase and instructed them to return the iDevice if they did not agree to Apple's choice of law. That agreement expressly incorporated Apple's iTunes Store Terms and Conditions which also selected California law and mandated that "exclusive jurisdiction for any claim or dispute with Apple. . .resides in the State of California." *See* ECF No. 147-1 at Ex. A, p. 20. The Court has already relied upon the latter document in applying California law to a nationwide class. *See* ECF No. 761, at 11. The choice of law and venue provisions of these agreements standing alone—but certainly together with Apple's presence in Cupertino—require the Court to apply California law classwide to the claims made against Apple here. Apple identifies no specific state interest, proffers no reliance of its own on another state's law, or offers any other non-speculative reason for the Court to reject the choice of law Apple made for all purchasers of its iDevices.

***Tobacco II* Reliance**: The Court previously concluded that the advertising campaign alleged—and demonstrated by admissible evidence in this motion—is sufficient to state a claim for relief. *See* ECF No. 543, at 18. Nonetheless, Apple again argues that its advertising campaign is too limited in nature and scope to conclude that class members were exposed to it. That argument flies in the face of Apple's core identity and astonishing success. It also fails to grapple with the source for Apple's self-described "public reputation" for safe and secure products. Reply Declaration of Frank Busch ("Busch Reply Decl.") at Ex. A. Apple is an apex brand; the products at issue here sit at the very pinnacle of the consumer product marketplace. Sallet, *The Creation of Value: The Value Circle and Evolving Market Structures*, 11 J.

Telecomm. & High Tech. L. 185, 198–99 (2013).[1] That brand and those products stand for certain values, including privacy and security. (Apple made just that point in its recent tussle with the federal government over access to user data. Busch Reply Decl. at Ex. D ("Customers expect Apple and other technology companies to do everything in our power to protect their personal information, and at Apple we are deeply committed to safeguarding their data.").) Apple's marketing of its core safety and privacy principles was and still is ubiquitous. It does not depend on the public receiving technical specifications about the methods Apple purportedly uses (like sandboxing) to keep iDevice data safe. At class certification, the Court does not weigh whether Plaintiffs' showing will ultimately meet their burden of proof on the merits. Whether Apple's substantial marketing efforts conveyed the false messages Plaintiffs claim is a question for trial, not class certification.

Damages: Apple continues to misread the Supreme Court's 2013 *Comcast* decision as somehow requiring Plaintiffs to be ready to *prove* classwide damages at the class certification stage. The Ninth Circuit has repeatedly rejected that assertion. All Plaintiffs must do here—which they have done—is demonstrate that the whole class suffered a type of damages traceable to the same course of conduct underlying Plaintiffs' legal theory. Plaintiffs are not required to show what those damages are, or even that they are the same for everyone. Plaintiffs contend that Apple obtained more from each class member who purchased an iDevice than it would have absent Apple's misrepresentation, and that the appropriate expert can measure this delta with sufficient precision to satisfy California law, which permits recovery even where the precise amount of damages is uncertain, contingent or difficult to ascertain. A Choice Based Conjoint analysis—as Plaintiffs propose and their expert has described here and as Apple has proffered in litigation elsewhere—can satisfy this legal requirement. Whether it *does* when actually conducted is not a proper question for class certification.

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[1] Busch Reply Decl. at Ex. B; *see also* Ex. C. (in 2013, Forbes determined that Apple was "the most valuable brand in the world for a third straight time at $104.3 billion, up 20% over last year [and] worth nearly twice as much as any other brand on the planet by our count.").

People who "don't care" about privacy: Apple continues to suggest the class includes people who are not injured because they "don't care" about privacy. *See* ECF No. 875 at 28. Classwide harm for product misrepresentations does not turn on the subjective "caring" of each individual. California law conclusively presumes that when a defendant puts out tainted bait and a person sees it and bites, the defendant has caused an injury. Indeed, consumer product class actions would be impossible if they could be defeated by an argument that some class members might not care if tobacco causes cancer or children's cereals are mostly sugar. Here, the evidence shows that the iDevices were tainted (i.e., that they did not secure contact information), and members of the class bit (i.e., purchased the devices). The Court can and should therefore recognize from Plaintiffs' proffer that each class member was harmed by not getting what he or she paid for.

Because Apple's objections to predominance lack merit, all members of the class were injured, and the remaining class certification factors are undisputed, the Court should certify the class set forth in Plaintiffs' motion.

II. ARGUMENT

A. APPLE CONCEDES THE REQUIREMENTS OF RULE 23(A) ARE SATISFIED

Plaintiffs showed in their opening brief, and Apple does not meaningfully dispute, that the proposed class satisfies Rule 23(a)'s numerosity, commonality, typicality, adequacy, and ascertainability requirements.[2] *See* ECF No. 802, at 12:19-16:22.

B. THE REQUIREMENTS OF RULE 23(B)(3) ARE SATISFIED

1. Common Issues Predominate

Apple's opposition to class certification primarily challenges Rule 23(b)(3)'s predominance requirement. Because all relevant facts—including the promises Apple made in its advertising campaign, the lack of represented security and privacy protection for contacts data

[2] In a footnote, Apple moves to dismiss Plaintiff Carter because she directed her parents to purchase her iDevice. Such relief cannot be had absent a noticed motion. Local Rule 7-1(a). Moreover, Apple has provided no basis to conclude that intra-family spending can be parsed as it proposes.

in Apple's iDevices, and the nationwide outcry when Apple's deception became public—are common to the class, Apple is left to argue that the common facts are either inadequate or affected people differently. Neither is a basis to deny class certification.

a) This action is governed by California law

Apple attempts to avoid class certification by arguing that the law of each state must apply depending on where purchases were made, even though Apple itself already chose California law as applicable to its dealings with Class Members.

Apple's Software License Agreement broadly applies to any and all "use" of a class device. ECF No. 802-33, Busch Decl. Ex. BB at § 2(a). Apple claims that this license does not apply because Plaintiffs' false advertising claims do not arise from the license. But Apple itself required Class Members to accept the license as a condition of purchase: the license says the only way to cancel agreement to Apple's terms is to return the device for a full refund. *Id.* at 1. Moreover, Apple did not insert any explicit limitations on its choice of law; rather, its lawyers used the broadest language possible. The Software License Agreement therefore reflects Apple's intention that it encompasses the purchase of an iDevice.

Apple's Software License Agreement also incorporates and requires adherence to the iTunes Store Terms and Conditions. *Id.* at § 5(a). The Court has found those Terms and Conditions sufficient to hold that California law governed the intrusion claims against Apple. *See* ECF No. 761, at 11:10-16. The implied argument that "use" of an iDevice has no relation to Plaintiffs' claims is nonsense: when class members "used" their iDevices by turning them on and entering their contacts data, the promised privacy protections were not there to safeguard them.

The California Supreme Court has held that where, as here, a broad choice-of-law provision including the phrase "governed by" is used by a sophisticated commercial entity like Apple, that provision will "apply to all causes of action arising from or related to their contract." *Nedlloyd Lines v. Superior Court*, 3 Cal. 4th 459, 468 (1992). In that case, the Court found that a provision in a shareholders agreement also encompassed "the legal duties created by or emanating from the stock purchase." *Id.* at 469. In other words, the broad choice-of-law provision in a contract governing use of shares encompassed the purchase of shares. Likewise,

in *Miller v. Fuhu Inc.*, No. 2:14-cv-06119, 2015 U.S. Dist. LEXIS 162564, at *17 (C.D. Cal. Dec. 1, 2015), the court applied a California choice of law provision to a similar pre-purchase misrepresentation claim because "neither party disputes that all users of the Nabi tables are subject to the provisions of the Terms of Use." *Id.* The same result obtains here.

Moreover, applying California law classwide to Plaintiffs' claims against Apple is consistent with "the importance of enforcing choice of law provisions for businesses with nationwide customers to limit the risk and expenses of litigation under different laws in every state." *Abat v. Chase Bank*, 738 F. Supp. 2d 1093, 1096 (C.D. Cal. 2010) (citing *Wang Lab. v. Kagan*, 990 F.2d 1126, 1129 (9th Cir. 1993)). This is particularly true where, as here, Plaintiffs seek restitution from a California-based company and therefore seek to reclaim funds wrongly retained in California.

Because Plaintiffs' claims arise out of the purchase of their iDevices (for the purpose of using both the devices and third-party apps), this case is distinguishable from *In re Apple iPhone 3G & 3GS MMS Mktg. & Sales Practices Litig.*, 864 F. Supp. 2d 451, 464 (E.D. La. 2012), where the dispute did not arise out of any defects with the iPhone, but instead challenged limitations in AT&T's wireless systems. Similarly, in *Broida v. Sirius XM Radio, Inc.*, No. 11-CV-1219, 2011 U.S. Dist. LEXIS 138684, at *8 (S.D. Cal. Dec. 1, 2011), the court's holding was based upon a contract that "didn't even exist at the time that [Plaintiff] was allegedly deceived." And in *In re Sony Gaming Network*, 903 F. Supp. 2d 942, 965 (S.D. Cal. 2012), the scope of the choice of law provision was far narrower than Apple's Software License Agreement.

Apple relies heavily upon *Darisse v. Nest Labs, Inc.*, No. 5:14-CV-01363, 2016 U.S. Dist. LEXIS 107938, at *24 (N.D. Cal. Aug. 15, 2016), which held a license agreement did not govern the UCL claims made there, but it ignores the express limitation in that agreement (absent here) stating that it did not cover the "purchase of the Product." Apple's other citations, *Cotter v. Lyft*, 60 F. Supp. 3d 1059, 1065-66 (N.D. Cal. 2014) and *O'Connor v. Uber*, 58 F. Supp. 3d 989 (N.D. Cal. 2014), are inapposite as they present narrow holdings in the context of statutory employment claims.

Apple's selection of California law and venue ends this issue. It is direct, uncontradicted evidence that Apple relied upon California (and no other state's) law in its dealings with the proposed class. Why would its lawyers draft these provisions and proffer them to the consuming public if Apple did not intend to rely upon them? Apple gives no answer to this question.

Even putting that aside, California law would apply for the reasons set forth in the moving papers. Apple does not dispute that California has significant contact with the claims of each class member. Apple has a substantial presence in the State and, as Apple concedes, most if not all of its challenged conduct occurred here. *See* ECF No. 147, at 33. Apple fails to address the numerous similar California claims certified to include members residing beyond California's borders cited in the moving papers, instead summarily listing differences in state laws without any explanation as to why the differences would substantially impair the interests of other states.

Apple suggests that other states might have an interest in regulating advertising within their borders. Perhaps, but this case involves nationwide advertising that did not change from state to state. Apple fails to proffer any evidence of any way in which it relied on other states' law (needless to say, it didn't), or to distinguish the California Supreme Court's opinion in *Kearney v. Salomon Smith Barney*, 39 Cal. 4th 95, 101 (2006), which applied California law except to the extent it concluded the defendant relied upon foreign law.

With no support, Apple proposes that other states have an interest in shielding Apple from liability for its false advertising, asking the Court to mechanically apply the outcome of *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012). But that case involved sales at non-California dealerships where some of the alleged misrepresentations were made to consumers by people residing in states other than California; here, all pertinent misrepresentations at issue emanated from Apple itself, located in California.

For each of these reasons, as well as those stated in Plaintiffs' moving papers, the Court should apply California law to the classwide claims. There is no choice of law problem with predominance.

b) Reliance can be proven through common evidence

Apple suggests that its iDevice and App Store advertising campaigns were insufficiently extensive in nature and scope to allow the Court to find that class members were exposed to them, and therefore that a fact-finder could presume reliance by absent class members.[3] *See* ECF No. 875, at 12:14-19:18. Apple insists that there are four "gaps" in Plaintiffs' showing which the Court purportedly directed Plaintiffs to fill at class certification. This Court did no such thing, and none of the so-called "gaps" demonstrates a lack of predominance or provides a basis to deny certification.

First, Apple claims that general representations about privacy do not count as part of the relevant campaign here because they cannot be proved false. This Court has already rejected that argument as premised on authorities "inapposite" to a case seeking certification on a presumption of classwide reliance. *See* ECF No. 543, at 14. In fact, the Court held, broader representations about privacy are probative because they "provide context for the more general campaign and tend to show the consistency of the message that Apple allegedly intended to convey." *Id.*

The second "gap" – that some of the statements are "tenuously" connected to the alleged misrepresentation, is (A) just a restatement of the "first gap", and (B) a merits question, not a question about predominance.

The third alleged "gap" makes a factual assertion that some of the statements were not likely to have been viewed by consumers. Apple cites the Court's motion to dismiss ruling, see ECF No. 543, at 9, but the Court's statement there did not address any of the advertisements before the Court on this motion. Plaintiffs do not now rely upon the license agreements between

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[3] In a footnote, Apple asserts that the law entitles it to individually rebut reliance because of a "heighted burden" on Plaintiffs' deceit claim. Apart from an unpublished Central District order applying New York law, Apple's authority consists of a single pre-*Tobacco II* California Supreme Court decision vacating a judgment dismissing a deceit-based class action. But that case says only that "Defendants may, of course, introduce evidence in rebuttal"—not that rebuttal would require individualized inquiries. *Vasquez v. Superior Court*, 4 Cal. 3d 800, 814 (1971). *Vasquez* permits class certification "even where there may be individual issues of reliance." *Lymburner v. U.S. Fin. Funds*, 263 F.R.D. 534, 542 (N.D. Cal. 2010).

Apple and third-party app companies that the Court previously concluded should not be counted as part of Apple's advertising campaign.

The fourth and final "gap" misrepresents the Court's prior statement that the "precise relationship" between "third-party advertisements and buzz marketing" may be further examined at "summary judgment or trial." *See* ECF No. 543, at 16. Apple omits the "summary judgment or trial" part of the Court's analysis, implying that somehow that the Court must decide these merits questions now. It need not. The relevant question here is whether the facts underlying those questions are common or unique to individual class members. *Amgen v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013). Apple makes no attempt to show that these issues are in any way individualized. Moreover, as this Court has noted, "at the very least, even purely third-party messages are circumstantial evidence of Apple's advertising campaign; without such a campaign, the messages are less likely to be picked up and expressed by third-parties." *See* ECF No. 543, at 16.

To prove predominance, Plaintiffs "need only show that common questions predominate over questions affecting only individual class members." *Amgen*, 133 S. Ct. at 1196. In misrepresentation cases like this one, the question of whether classwide reliance should be implied comes down to whether the court can "confidently say" that the putative class members "were actually exposed to the same, common alleged misrepresentations." *Waller v. Hewlett-Packard*, 295 F.R.D. 472, 487 (S.D. Cal. 2013). "For purposes of class certification, it is sufficient that the alleged material misstatement and omission was part of a common advertising scheme to which the entire class was exposed." *Wolf v. Hewlett Packard*, No. CV 15-01221, 2016 U.S. Dist. LEXIS 181822, *33 (C.D. Cal. Sept. 1, 2016) (citation omitted).

In any pervasive campaign, the advertiser presents its message in a variety of ways. For example, tobacco ads about cigarettes being healthy were not irrelevant to the campaign in *In re Tobacco II Cases*, 46 Cal. 4th 298, 327 (2009) ("*Tobacco II*") just because they did not talk about nicotine being addictive or whether tobacco and tar cause cancer. Apple devoted massive resources to disseminating its message that a user's private data was safe even on platforms like the iDevices open to third-party applications. *See* ECF No. 802, at 3-11.

Apple makes much of this Court's decision in *Todd v. Tempur-Sealy*, No. 13-cv-04984, 2016 U.S. Dist. LEXIS 136135 (N.D. Cal. Sept. 30, 2016). In doing so, Apple ignores a central point: evidence necessary to support a presumption of reliance differs depending on the type of consumer product at issue and how people purchase them.

Tempur-Sealy makes and sells bedroom mattresses. As the Court acknowledged, most of the relevant data driving a consumer's decision-making over what mattress to buy is sensory information individually gathered at the point of sale. A customer enters a showroom, lays down on various mattresses, and buys whatever mattress feels most comfortable. *Id.* at *38. That is not how people buy mobile phones.

Apple spent nearly two billion dollars advertising the iDevices at issue here—products that Apple has said, and many agree, changed history. ECF No. 803-5 at 3. At the very least that spend constitutes circumstantial evidence of Apple's belief that it must influence consumers *before* they walk into a retail store. That dollar figure stands apart from the extraordinary "earned" media Apple benefits from (and Tempur-Sealy most assuredly does not) given its brand's primacy in the consumer product marketplace, the value of which Apple itself has acknowledged it has exploited in the launch of the iPhone and App Store. Busch Reply Decl. at Ex. A ¶¶ 13-22.

As Apple has testified to under oath elsewhere, that advertising's reach was global, and included print advertising, television advertising, website advertising, buzz media, email advertising, and retail advertising. *Id.* Mr. Fischer's testimony in the Apple/Amazon case was effusive on this subject. *Id.* Apple launched both the iPhone and App Store in massively-anticipated and widely-reported events starring its celebrity CEO. *Id.* Apple treated both launches as signal events in consumer product history, intending to deliver "a revolutionary ecosystem, unleashing unprecedented and wide scale creative development of software." *Id.* at ¶ 6. It was so successful in doing so that within two months of the App Store launch, consumers downloaded over 100 million software programs. *Id.*

Steve Jobs called the iPhone "a leapfrog product that is way smarter than any mobile device has ever been, and super-easy to use" at its launch, a statement which Apple ensured was

broadly disseminated. ECF No. 803-5 at 9. Aside from Apple's "launch events" being witnessed by millions of people (as evident from YouTube views[4]), reporting on those events amplified Apple's message that its devices offered "freedom from programs that steal your private data." *See* ECF No. 802, at 3:17-21.

Apple honed its public statements to assure consumers that Apple's introduction of the App Store would not put their privacy at risk even though it allowed third-party developers to provide software for use on their iDevices. As reflected in Plaintiffs' evidence, those statements reached consumers in a multitude of ways at a variety of times.

Apple adopted both conventional and unconventional means to accomplish that goal, building upon its brand's history and previous advertising statements: By the start of the Class Period, on the cusp of the introduction of the iPhone and App Store to the public, Apple was one of the "most trusted" companies for privacy, according to one report. *See* Busch Reply Decl. at Ex. E. Apple's message was consistent, and was echoed back in every deposition of every proposed class plaintiff: "you could trust putting all this information on your phone because it was going to be safe and protected." ECF No. 802 at 11:17-12:6.

Plaintiffs have proffered a broad range of sources to show how long and far this core message reverberated, from speeches to Congress, to court filings, to ads, to blog posts, to promotional materials, to academic papers. *See* ECF No. 802, at 4:11-10:2. Apple's message continues to this day. *E.g.* Busch Reply Decl. at Ex. D.

Apple's messaging was so pervasive that, when the world learned of its misrepresentation, both Congress and the FTC immediately opened investigations. *See* ECF No. 802, at 10:5-24. By contrast, the evidence proffered at class certification in *Tempur-Sealy* came down to one generic PowerPoint presentation for corporate investors, a small number of

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[4] The speech by Steve Jobs announcing the iPhone, for example, is posted on YouTube numerous times. One version has over 4.7 million views. Busch Reply Decl. ¶ 11. Another version has 5.7 million views. *Id.* at ¶ 12. A YouTube video of Steve Jobs discussing privacy and curation, quoted in the moving papers, has over three million views. *Id.* at ¶ 13. A video of Steve Jobs and another Apple executive discussing privacy, sandboxing and curation has over 1.19 million views. *Id.* at ¶ 14.

"impressions" on a limited universe of company webpages, and customer service scripts. If no prior case shows the same level of consumer penetration it is because there is no other brand like Apple. People do not line the streets for days in anticipation of a new mattress release.

Plaintiffs do not need direct evidence that Apple controlled the media for Plaintiffs to rely on third party evidence. Such evidence is, at minimum, circumstantial evidence of the message Apple sent to all of its consumers loudly, clearly, and constantly.

More importantly on this motion, perfect uniformity of message and reliance on specific advertisements is not required. *Tobacco II*, 46 Cal. 4th at 328 ("plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct. Furthermore, where, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements."). Each class representative testified that they were exposed to Apple advertising that led them to believe they could safely store contact data on their iDevices. *See* ECF No. 802, at 11-12. The specificity of their individual memories is beside the point.

Nor does it matter that among Apple's sea of security and privacy messages there were a few small third party warning buoys. Plenty of people, and indeed the government, said that smoking was hazardous. That did not immunize Big Tobacco from its misrepresentations. *Tobacco II*, 46 Cal. 4th at 327-28 (noting that "[e]ach plaintiff also testified that, despite awareness of the controversy surrounding smoking, he or she believed the tobacco industry's assurances that there was no definitive connection between cigarette smoking and various diseases," and stating that "an allegation of reliance is not defeated merely because there was alternative information available to the consumer-plaintiff, even regarding an issue as prominent as whether cigarette smoking causes cancer."). One would have to be living on a remote island these days not to understand the power of the lie repeated from a large stage, even when the truth is presented by smaller voices. Notably none of the third-party materials Apple cites attributes any corrective information ***to Apple***. *See* ECF Nos. 803-10, 803-31; ECF No. 781-18, Busch

Decl. Exh. Q. The existence of contrary information from third parties is not a reason to find that representations were insufficiently uniform to warrant a classwide trial on these claims.

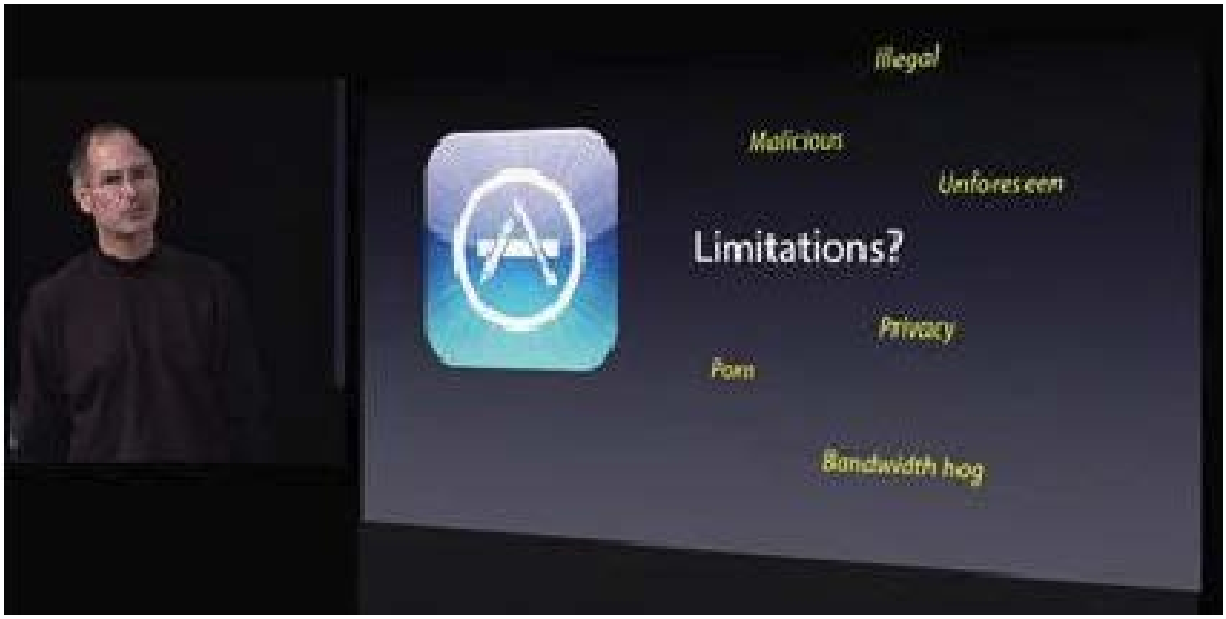
Apple insists that its privacy policy prevents reliance by discussing obliquely that "[i]nformation collected by third parties, which may include such things as … contacts details, is governed by their privacy practices." *See* ECF No. 875, at 17:20-22. Nonsense. Apple could have plainly said "Warning: nothing prevents third-party Apps from taking your contacts." It did not do so, and for obvious reasons. Reliance on the primary message is not defeated by lawyers digging through dense policies to misconstrue minutiae.

Apple also claims it did disclose the problem on August 28, 2008, but the evidence it cites, Exhibit X to the RJN (ECF No. 803-24), is an article that quotes Apple as stating it was "fixing" the alleged bug. There are two further misrepresentations embedded here: First, Apple never fixed anything—the pertinent API continued to allow unfettered access to users' contacts until April 2012— and second, the problem was not a software bug because the software was performing precisely as Apple intended. *See,* ECF No. 802 at 4-10. Nor is the issue whether Apple represented perfection in technology. Apple represented that it was taking both technology-based (sandboxing) and active (curation) steps to protect user data privacy, when in fact it knew neither process provided ***any*** protection. *Id.* What these exhibits do show is that ***Apple*** wanted to have its proverbial cake and eat it too. To the extent Apple is arguing that the entire class was exposed to the materials that Apple claims revealed the truth, Apple has conceded that the entire class was exposed to these additional misrepresentations.

Apple also tries to defeat class certification by suggesting early buyers would not have been exposed to a long enough campaign. This Court recognized at the pleading stage that length in this case is not fatal. ECF No. 543, at 12:18-13:16 ("…where courts have found that media campaigns are more targeted or extensive, shorter periods of time—even as short as nine months—have been considered "long-term.") In *Makaeff v. Trump Univ.*, No. 3:10-cv-0940, 2014 U.S. Dist. LEXIS 22392, at *38 (S.D. Cal. Feb. 21, 2014), the length of the campaign was not an issue because "[t]he effect of this campaign was to make it highly likely that each member of the putative class was exposed to the same misrepresentations." See also, *Morgan v. AT&T*

Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1258 ("Although the advertising campaign alleged in this case was not as long-term a campaign as the tobacco companies' campaign discussed in *Tobacco II*, it is alleged to have taken place over [eighteen] months, in several different media …"). In effect, this argument would inoculate any new product launch from misrepresentation claims, even a launch as notable as the addition of an App Store to iDevices. Apple cites no authority in support of any such immunity.

Finally, Apple argues that its advertising spending is irrelevant because Plaintiffs "failed" to apportion it for statements about privacy. Apple, of course, was fully capable of making that apportionment itself in opposition if, in fact, the advertising was somehow insufficient. It did not do so. None of the cases Apple cites impeach the basic facts that Apple spent a huge amount of money advertising a product that has penetrated the American consciousness like no other in history, and that a key selling point of that product was its security and privacy protection. There was a reason Apple emphasized the word "privacy" behind Steve Jobs (chest-high, no less) at the App Store's launch:



c) Plaintiffs have shown that restitution can be determined without excessive difficulty and attributed to their theory of liability

Apple also argues that determining the proper remedy prevents class certification. Apple again misstates both the law and its application here.

First, contrary to Apple's exaggeration of *Comcast*, that case "did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance." *Pulaski & Middleman v. Google*, 802 F.3d 979, 988 (9th Cir. 2015) (quoting *Roach v. T.L. Cannon*, 778 F.3d 401, 407 (2d Cir. 2015)).[5] "Entitlement to restitution is a separate inquiry from the amount of restitution owed under California's UCL and FAL." *Id*. at 985. Apple just ignores controlling Ninth Circuit law, insisting that there can never be a class action because people have different buying preferences.

All Plaintiffs are required to do is show "that 'damages are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs' legal theory." *Just Film v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (affirming order certifying fraud classes where "Plaintiffs gave examples of methods for calculating damages."). Thus, to obtain class certification, "Plaintiffs need only show that such damages can be determined without excessive difficulty and attributed to their theory of liability." *Id*. at 1121. "[D]amage calculations alone cannot defeat certification." *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010).

Plaintiffs are *not* required at this stage to have a definitive model established, much less to have conducted it, but only to present evidence that it can be done. *Just Film*, 847 F.3d at 1120. In *Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150 (9th Cir. 2016), the Ninth Circuit

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[5] Seven other circuits have joined the Second and Ninth Circuits in this holding. *Jimenez v. Allstate*, 765 F.3d 1161, 1167-1168 (9th Cir. 2014) (citing cases from the Fifth, Sixth, and Seventh Circuits); *Roach*, 778 F.3d at 408 (citing cases from the First and Tenth Circuits); *Carriuolo v. GM*, 823 F.3d 977, 988 (11th Cir. 2016) ("individualized damages calculations are insufficient to foreclose the possibility of class certification, especially when, as here, the central liability question is so clearly common to each class member"); *Reyes v. Netdeposit*, 802 F.3d 469, 481 & n.12 (3d Cir. 2015) (noting distinction between damage calculations in consumer class actions and antitrust liability questions presented in *Comcast*).

explained that class certification is appropriate where "the employer-defendant's actions necessarily caused the class members' injury," and that "even if the measure of damages proposed here is imperfect, it cannot be disputed that the damages (if any are proved) stemmed from Defendants' actions." *Id.* at 1155. The Court approved plaintiff's general "propos[al] to resolve the damages phase of the litigation through use of a survey, sampling evidence, or a special master" sufficed. *Id*. at 1153.

Indeed, the false advertising laws require "only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *Pulaski*, 802 F.3d at 989. "[T]hat the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." *Id*.

As Plaintiffs show in their motion, one well established way to measure the impact of Apple's misrepresentations is a Choice-Based Conjoint analysis to measure the difference between what consumers paid for the Class Devices and what they would have paid for the same devices without the features that Apple misrepresented those devices to have. This is precisely the remedy California law provides for false advertising and misrepresentation. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 329 (2011) ("For each consumer who . . . is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she *paid more for* than he or she otherwise might have been willing to pay if the product had been labeled accurately."). This matches the legal standard for the claim: "in calculating restitution under the UCL and FAL, the focus is on the difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information." *Pulaski*, 802 F.3d at 989.

A conjoint survey is a recognized tool to measure willingness to pay. *Guido v. L'Oreal, USA, Inc*., No. 2:11-CV-01067-CAS, 2014 U.S. Dist. LEXIS 165777, at *12 (C.D. Cal. July 24, 2014) ("[c]onjoint analysis has been used for decades as a way of estimating the market's willingness to pay for various product features."). Indeed, ***Apple itself used*** a conjoint analysis to calculate "the price premium that Samsung owners would be willing to pay for the patent-

related features" in a case where it needed to determine damages attributable to a subset of smartphone features. Busch Reply Decl. Ex. F at ¶ 6. Apple, then a plaintiff, had no qualms relying on a Choice-Based Conjoint study to conclude that consumers were willing to pay specific amounts for the features at issue. Busch Reply Decl. Ex. G at ¶¶ 13-15. For this reason, courts permit the use of conjoint analysis for the precise purpose of determining damages in misrepresentation cases. *Khoday v. Symantec Corp*., 93 F. Supp. 3d 1067, 1082 (D. Minn. 2015) ("conjoint analysis is generally a permissible method for calculating damages.").

Apple's criticism of the precision of conjoint analysis is irrelevant. To the extent conjoint analysis is an imperfect measure of each class member's precise willingness to pay, reasonable approximations are explicitly authorized under California law. *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 939 (9th Cir. 1999) ("The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." (quoting *California Lettuce Growers, Inc. v. Union Sugar Co.*, 45 Cal.2d 474, 487 (1955)); *see O'Connor v. Uber Techs., Inc.*, 311 F.R.D. 547, 568 (N.D. Cal. 2015) (certifying class where "there may be a number of calculation methodologies that are reasonable" even though specific methodologies only loosely defined).

Here, Dr. Howlett has proposed a methodology designed to determine how much of the price class members paid for iDevices was based upon Apple's promise that those devices would protect users' contact data. Even Apple's expert admits that those who use conjoint analysis do so to measure willingness to pay. Busch Reply Decl. Ex. H, Hitt Depo. at 65:15-66:3. Dr. Howlett explains that this method requires three stages:

First, she will review the results of Plaintiffs' post-certification discovery to identify appropriate iDevice attributes to include in her surveys. Busch Reply Decl. Ex. I, Howlett Depo. at 97:19-198:6.

Second, she will conduct pretests of those attributes to ensure her final survey design is appropriately-focused and properly isolates the values attributable to the misrepresented security features.[6] ECF No. 802-3, Howlett Decl. ¶ 29.

Third, she will conduct the final survey and identify the market value of the misrepresented security features. *Id.* at ¶¶ 30, 33-40.

Contrary to Apple's repeated insinuations, Dr. Howlett will not measure a broader value of privacy than the claims in this case. When questioned on various sub-attributes of security, she illustrated the obvious solution that you tell survey participants to assume other sub-attributes of security are equal across devices. Busch Reply Decl. Ex. I, Howlett Depo. at 206:7-207:14. The results of this survey will efficiently determine the amount of restitution available to the class, and will certainly satisfy California's requirement that such proof be made by reasonable approximation. *E.g.* ECF No. 802-3, Howlett Decl. ¶ 21.

Apple concedes that Dr. Howlett's testimony is admissible by not seeking to exclude it. That should end the inquiry – this is not the forum for a merits-based expert battle. Yes, Apple hired an expert to say Dr. Howlett is wrong. That expert, Dr. Hitt, has ***never*** conducted a conjoint analysis himself. Busch Reply Decl. Ex. H, Hitt Depo. at 40:16-19. He does not appear to have used the tool in his own research, ever. *Id.* at 49:18-22.

And, most tellingly, he has ***never*** seen a conjoint analysis or any other damages model he thought was adequate for use in a consumer class action. *Id.* at 36:8-17. Indeed, he does not believe ***any*** damages model could be used in a claim involving privacy issues. *Id.* at 130:24-131:13. Plaintiffs doubt that Mr. Hitt's opinion would be admissible at trial under Rule 702. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999) (affirming order striking expert opinion that "fell outside the range where experts might reasonably differ"); *Guido*, 2014 U.S.

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[6] Apple makes much of Dr. Howlett's uncertainty about how best to test the sandboxing feature in a survey, ignoring that pretesting would be required to identify a defensible choice. ECF No. 875 at 25:11-26:13. But Dr. Hitt ***agreed*** that use of the phrase "sandboxing" is unnecessary and instead "you have to represent these features as they would have been understood by the consumers at the time they were purchasing the device." Busch Reply Decl. Ex. H, Hitt Depo. at 99:24-100:11.

Dist. LEXIS 165777, at *12 ("[c]onjoint analysis has been used for decades as a way of estimating the market's willingness to pay for various product features."). But even if it were, that is precisely the type of merits dispute that this Court does not engage in on class certification. Dr. Hitt's supply-side pricing theories also present a merits dispute, not a predominance challenge.

The same is true for Dr. Hitt's speculation that a conjoint survey could capture an overly broad effect depending on how it is designed. He conceded at deposition that a conjoint survey could be designed "however you want," and that he "would have to see what exactly was involved" because his objection only applies "if you pick a broader conception of . . . security." Busch Reply Decl, Ex. H, Hitt Depo at 83:2-84:2. When asked whether the survey could be properly designed, Dr. Hitt demurred: "Whether that accurately represented the allegations and does not potentially sweep in additional things, that, I haven't given any thought to." *Id.* at 86:14-87:2.

Dr. Hitt's ultimate critique seems to be that "unless all members of the class value the features at issue at exactly the same level, this average value will not accurately reflect the value of the features to many or most class members." ECF No. 877, Hitt Decl. ¶¶ 46, 49-55. But this argument suggests that no consumer class action could ever obtain restitution, an absurd result foreclosed by the relevant authority (but consistent with Dr. Hitt's biases).[7]

At some level, ***every*** product feature will be subjectively valued differently by different consumers. As the *Kwikset* court made clear, some consumers may discern no difference between similar wines, while others will assign huge value to differences in vintage or locale. Some may assign no value to a "kosher" label, while others would find a mislabeled kosher product worthless. *Kwikset Corp.*, 51 Cal.4th. at 330.

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[7] Indeed, Dr. Hitt is so committed to his rejection of conjoint analysis that he suggests it can ***never*** be used on a product with more than a few features. Busch Reply Decl. Ex. H, Hitt Depo. at 96:9-97:11 ("There have been arguments by proponents of conjoint that suggest you can describe a product by a few features and everything else held constant. As a[n] economist who is used to working with choice [i.e. non-conjoint] data, I don't believe you can get accurate valuations out of that.").

That does not mean, however, that companies are free to falsely advertise safe in the knowledge that they can only be sued individually by the consumers who have a strong preference. That is not the law. Restitution need not be precise and, in any event, any required individual inquiry would not preclude certification. *See Pulaski*, 802 F.3d at 989. Dr. Howlett's testimony adequately demonstrates that the right to restitution can be established on a classwide basis and even, although not required, that a reasonable market price for that restitution can be determined.

2. Apple Concedes Superiority is Satisfied

Plaintiffs have established that a class resolution of this dispute is superior to individual actions. ECF No. 802 at 24:3-25:8. Apple does not challenge superiority.

C. THE PROPOSED CLASS DOES NOT CONTAIN UNINJURED MEMBERS

Apple repeats its "everyone feels differently about privacy" argument, attempting to cast it as a standing problem. That's funny, since Apple is adamant and apparently sincere about how it feels, and about how others in the technology industry should feel, about privacy. Busch Reply Decl. at Ex. D ("Customers expect Apple and other technology companies to do everything in our power to protect their personal information, and at Apple we are deeply committed to safeguarding their data.").)

Apple asserts that any members of the putative class who do not care that Apple made misrepresentations, or do not care about privacy, suffered no Article III injury. Apple does not cite a single case to support this radical notion. The Court rejected this very argument in *Mazza*, 666 F.3d at 595, where the court wrote "to the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact.'" This is "a rather low bar" because "[s]imply spending money on something that doesn't do what it claims to do is all the injury absent class members need." *Waller*, 295 F.R.D. at 476. For this reason, the Sixth Circuit—applying California law—affirmed certification of a class including every consumer that purchased a defectively designed product, regardless of whether each consumer's product had malfunctioned. *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 857 (6th Cir. 2013) ("Because all [product] owners were injured at the point of sale upon paying a

premium price for the [product] as designed, even those owners who have not experienced [the] problem are properly included within the certified class.").

"California has created what amounts to a conclusive presumption that when a defendant puts out tainted bait and a person sees it and bites, the defendant has caused an injury; restitution is the remedy." *Stearns v. Ticketmaster*, 655 F.3d 1013, 1021 & n.13 (9th Cir. 2011) (reversing denial of UCL class action). "[E]conomic harm—the loss of real dollars from a consumer's pocket—is the same whether or not a court might objectively view the products as functionally equivalent." *Kwikset*, 51 Cal. 4th at 329.

In addition, the Ninth Circuit recently confirmed that California law recognizes unjust enrichment as a separate cause of action. *Bruton v. Gerber Prods. Co.*, No. 15-15174, 2017 U.S. App. LEXIS 6756, at *2 (9th Cir. Apr. 19, 2017) ("California's case law on whether unjust enrichment could be sustained as a standalone cause of action was uncertain and inconsistent. But since then, the California Supreme Court has clarified California law, allowing an independent claim for unjust enrichment to proceed."). While the Court dismissed that claim earlier in this case, *Bruton* confirms that it was a valid claim (which Plaintiffs will seek leave to re-assert after certification). Apple would remain liable for unjust enrichment—and obligated to make restitution—on the basis that it profited from its false advertising so long as it obtained any gain that cannot conscientiously be retained. *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal. 4th 988, 1000 (2015).

Finally, in a footnote, Apple suggests that class members who did not download one of the apps at issue in this action "have no reason to believe their contacts were improperly accessed." *See* ECF No. 875, at 10 & n. 9. Actual access to someone's contacts is not an element of the misrepresentation claim, but Apple's argument highlights the problem with its false statement. The apps in suit are only those Plaintiffs used that got caught. Consumers have no way of knowing whether an app improperly took their contacts because, contrary to Apple's misrepresentations, Apple designed the iDevices to allow apps to do that without informing the user. ECF No. 802 at 4-10. All of the iDevices at the time had this security flaw, and there is ultimately no way to know how many apps took advantage of it. Simply put, Apple lied about

having a door monitored and locked. It cannot now insist that Plaintiffs were not harmed unless they prove someone snuck in.

III. CONCLUSION

This case challenges Apple's classwide conduct in advertising iDevices as secure and private while, at the same time, knowing that third-party apps were free (and indeed encouraged) to access user contacts with no prior consent. Every material fact is identical across the entire class, and Apple's insistence that those facts do not show liability provides no basis to deny certification. Plaintiffs' motion for class certification should be granted.

Respectfully submitted,

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