

JUL 15 2018



S-188008

NO. \_\_\_\_\_  
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

[REDACTED]

PLAINTIFF

AND:

APPLE INC. and  
APPLE CANADA INC.

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

**NOTICE OF CIVIL CLAIM**

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.**

### TIME FOR RESPONSE TO CIVIL CLAIM

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

### CLAIM OF THE PLAINTIFF(S)

#### **Part 1: STATEMENT OF FACTS**

##### **A. Nature of Action**

1. This proposed class proceeding involves allegations that the Defendants, Apple Inc. and/or Apple Canada Inc., designed, programmed, manufactured, marketed, supplied and/or distributed updated operating software for certain of its smartphone devices which contained unauthorized performance degrading features intended to significantly slow down and shorten the life span of the smartphone device so as to entice or induce owners and/or users to purchase new batteries or smartphone devices from the Defendants, Apple Inc. and/or Apple Canada Inc.

##### **B. Defined Terms**

2. The following definitions apply for the purposes of this Notice of Civil Claim:
  - (a) "Affected iPhones" means the iPhone models subject to Apple's intentional slowdown including, but not limited to, iPhone models 6, 6 Plus, 6s, 6s Plus, SE, 7 and 7 Plus;

- (b) "Apple" collectively means the Defendants, Apple Inc. and Apple Canada Inc.;
- (c) "Apple Support" means Apple's online and telephone support line;
- (d) "Class" or "Class Members" means all individual residents in Canada, excluding Quebec residents, who purchased any of the Affected iPhones of Apple and their estates, administrators or other legal representatives, heirs and/or beneficiaries;
- (e) "Defendants" means Defendants in this proposed class proceeding;
- (f) "iOS" means Apple's proprietary operating software for smartphone and tablet devices;
- (g) "iOS version 10.2.1" means Apple's operating system for mobile devices released January 23, 2017;
- (h) "iOS version 10.3" means Apple's operating system for mobile devices released March 17, 2017;
- (i) "iOS version 11" means Apple's operating system for mobile devices released September 19, 2017;
- (j) "iOS version 11.2" means Apple's operating system for mobile devices released December 2, 2017;
- (k) "iPhone" means Apple's smartphone device; and
- (l) "throttling" means Apple's intentional and non-disclosed slowdown of the Affected iPhones through iOS update versions 10.2.1, 10.3, 11 and/or 11.2.

**C. The Parties**

**The Representative Plaintiff**

3. [REDACTED]  
[REDACTED].
4. On or about July 16, 2017 the Plaintiff purchased an Apple iPhone 6 from Telus Communications Inc., his cellular phone provider, for \$485.00 CAD. After acquiring his smartphone the Plaintiff turned on the automatic software updates function.
5. On or about September 19, 2017 iOS update version 11 was automatically installed or downloaded to the Plaintiff's iPhone 6.
6. Shortly after iOS update version 11 was installed or downloaded to the Plaintiff's iPhone 6, he began to experience a much slower response time from the touch screen, slower loading times, frequent dropped hardware and software processes, shut down of the phone when trying to open certain applications when the battery charge level reached approximately 30% and being unable to turn the phone on unless it was charged up, such that the iOS update version 11 rendered his iPhone 6 unusable.
7. Frustrated with the performance of his expensive iPhone 6, the Plaintiff called Apple Support and advised them of the problems he was encountering with his iPhone. The Plaintiff was advised to visit a local Apple store who would address the matter.
8. At no time did Apple advise the Plaintiff that any of its iOS updates would result in throttling the performance of his iPhone 6 under certain or any conditions. The Plaintiff did not give his consent to any such performance degradation.

**The Defendants**

9. The Defendant, Apple Inc., is a company duly incorporated pursuant to the laws of the State of California, one of the United States of America, and has a registered agent, C T

Corporation System, at 818 West Seventh Street, Suite 930, Los Angeles, California, 90017, United States of America.

10. The Defendant, Apple Inc., is an American multinational technology company that designs, develops, manufactures, markets, supplies, distributes and/or sells consumer electronics, computer software and online services, including products such as the Affected iPhones and iOS, worldwide, including Canada, either directly or indirectly through the control of its predecessors, affiliates and/or subsidiaries.
11. The Defendant, Apple Canada Inc., is a company duly incorporated pursuant to the laws of Province of Ontario, registered within the Province of British Columbia under number A0024040, and has an attorney, Blakes Vancouver Services Inc., at PO Box 49314, 595 Burrard Street, Vancouver, British Columbia, V7X 1L3, Canada.
12. At all material times herein, the Defendant, Apple Canada Inc., was and is a wholly owned subsidiary of the Defendant, Apple Inc., and which was, and is, inextricably involved in the design, development, manufacture, marketing, supply, distribution and/or sale of the Affected iPhones and its iOS in Canada, including the Province of British Columbia, either directly or indirectly through the control of its predecessors, affiliates and/or subsidiaries.
13. The business of each of the Defendants, Apple Inc. and Apple Canada Inc., (hereinafter collectively referred to as "Apple") is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the design, development, manufacture, marketing, supply, distribution and/or sale of iPhones and iOS, including the Affected iPhones in Canada, including the Province of British Columbia, and for the purpose of the conduct hereinafter described.
14. Apple is one of the most recognizable technology companies in the world and has a substantial share of the global technological and smartphone market. It produces industry leading smartphone technology and markets its product as having industry leading speed, functionality and software.
15. At the end of 2017 Apple controlled approximately 14% of the global smartphone market

share with revenues of approximately \$230 billion USD. International sales constituted 62% of Apple's 2017 earnings.

**D. The Class and the Class Period**

16. This action is brought on behalf of members of a class consisting of the Plaintiff and all individuals resident in Canada, excluding Quebec residents, who purchased and/or owned any of the Affected iPhones designed, developed, manufactured, marketed, supplied, distributed and/or sold by Apple in Canada, namely the iPhone 6, 6 Plus, 6s, 6s Plus, SE, 7 and 7 Plus, and who installed or downloaded, iOS versions 10.2.1, 10.3, 11 and/or 11.2 on his or her iPhone and their estates, administrators or other legal representatives, heirs or beneficiaries ("Class or Class Members").

**E. Factual Allegations**

17. The vast majority of smartphone users in Canada use Apple's iPhone.
18. Apple periodically releases updates to its iOS, which iPhone users can then immediately install or download or choose to automatically download at a later time onto their iPhone.
19. According to Apple, iOS updates are offered to iPhone users in order to maintain Apple's status as having the "the world's most advanced mobile operating system". Apple consistently maintains that its iOS updates improve and advance iPhone performance, assuring iPhones maintain as the industry leading smartphone.
20. When an iOS update is released, users receive notice on their iPhone display. When installing or downloading the iOS update Apple introduces any new features found in the iOS update and then advises users that the updates include "stability improvements", "bug fixes" or "improves the security of your iPhone".
21. In or about 2016 a limited number of iPhone 6, 6s and 6 Plus users began complaining that their smartphones were unexpectedly shutting down. Many such shutdowns seemed to occur when the battery indicator on these iPhones reported that the charge level had

reached approximately 30%.

22. Apple acknowledged that this unexpected shutdown issue was occurring in a "very small number" of iPhone 6s devices that were manufactured between September and October 2015. Apple claimed that this particular range of iPhone devices contained a battery component that was exposed to controlled ambient air longer than it should have before being assembled into battery packs. It also advised users that it was looking for other factors that could cause an iPhone to shut down unexpectedly but had not found any yet.
23. In response to these limited complaints, Apple offered affected users a free battery replacement for their iPhone.
24. On January 23, 2017, Apple released an update to its smartphone operating software, iOS version 10.2.1.
25. Apple's upgrade notice claimed that the upgrade provided "bug fixes and improves the security" of iPhones. On Apple's website, iOS 10.2.1 was described as an update that "improves power management during peak workloads to avoid unexpected shutdowns on iPhone".
26. The power management function included in iOS 10.2.1 was meant to be Apple's solution to the unexpected shut downs that affected a limited number of iPhone users.
27. On or about February 23, 2017 in a statement to an American online publisher of technology industry, *TechCrunch*, Apple noted that in "iOS 10.2.1, it made improvements to reduce occurrences of unexpected shutdowns that a small number of users were experiencing with their iPhone".
28. Unbeknownst to Apple consumers, Apple had designed the iOS 10.2.1 update to cause Class Members iPhones to substantially slow down and operate much slower than before the update was installed. The iOS 10.2.1 update allowed Apple to intentionally slow down the iPhone's central processing unit ("CPU").

29. This intentional slowdown is referred to as "throttling" as Apple intentionally throttles the iPhone's CPU as an undisclosed consequence of installing the iOS updates.
30. Specifically, Apple slows Affected iPhones by capping the CPU's maximum productivity below its original maximum productivity, thereby reducing the speed of the iPhone's internal processes.
31. Apple later conceded that its rationale for intentionally slowing the iPhone's functioning was to avoid an overdraw on an iPhone's battery that could cause the battery's available voltage to drop below the iPhone's shut down threshold, therefore causing the iPhone to unexpectedly shut down.
32. This intentional slowing was included in all version 10 iOS updates after 10.2.1, including iOS 10.3 released on March 27, 2017, and was extended to the iPhone 6, 6 Plus, 6s, 6s Plus, SE, iPhone 7 and 7 Plus as a consequence of Class Members downloading Apple's iOS 11 and/or 11.2 updates released on September 19 and December 2, 2017.
33. iOS update versions 10.2.1, 10.3, 11 and/or 11.2, affected iPhone models 6, 6 Plus, 6s, 6s Plus, SE, 7, and 7 Plus.
34. Nothing in the iOS update notices made any mention of a possible slowdown nor did the updates disclose that once installed, Apple's iOS updates cannot be reversed or removed.
35. By its own admission, Apple embedded a throttling feature into its iPhone updates sometime in 2016, however, it did not warn users or the public that it was intending to include this feature in future updates.
36. In a December 20, 2017 statement to *TechCrunch*, Apple confirmed that it had intentionally slowed down the Affected iPhones through the 2017 iOS 10.2.1, 10.3, 11 and/or 11.2 updates, stating the following:

*Our goal is to deliver the best experience for customers, which includes overall performance and prolonging the life of their devices. Lithium-ion*

*batteries become less capable of supplying peak current demands when in cold conditions, have a low battery charge or as they age over time, which can result in the device unexpectedly shutting down to protect its electronic components.*

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

37. On December 28, 2017, after aggressive media and consumer responses, Apple released a statement apologizing for intentionally slowing down the Affected iPhones without informing users of this practice. Apple's statement recognized that "we know that some of you feel Apple has let you down. We apologize". Citing "a lot of misunderstanding on this issue", Apple proceeded to disclose its practice of intentionally slowing Affected iPhones.
38. Apple claimed that it released iOS 10.2.1 as an update that "improves power management during peak workloads to avoid unexpected shutdowns on iPhone 6, iPhone 6 Plus, iPhone 6s, iPhone 6s Plus and iPhone SE" and then "recently extended the same support for iPhone 7 and 7 Plus in iOS 11.2".
39. Apple's statement further acknowledged what the 10.2.1, 10.3, 11 and/or 11.2 updates were intended to achieve:

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

*Customer response to iOS 10.2.1 was positive, as it successfully reduced the occurrence of unexpected shutdowns. We recently extended the same support for iPhone 7 and iPhone 7 Plus in iOS 11.2.*

*Of course, when a chemically aged battery is replaced with a new one, iPhone performance returns to normal when operated in standard conditions.*

40. Apple's statement was in response to a December 18, 2017 study conducted by John Poole at Primate Labs of Toronto, Ontario. The study charted the capacity of processing power in the Affected iPhones, outlining how Apple's power management updates capped the power available from the battery or spread power requests over several battery cycles. The study noted that the "difference between 10.2.0 and 10.2.1 is too abrupt to be just a function of battery condition" and that Apple introduced a change to limit performance when battery condition decreased past a certain point.
41. Apple made no public mention of intentionally slowing down the Affected iPhones prior to the findings of the Poole study.
42. Apple has admitted that it had instituted performance throttling on the Affected iPhones. Its stated reason was to prevent shutdowns when a battery's voltage fell to a certain level under three conditions: "with a low battery state of charge, a higher chemical age, or colder temperatures". Implicitly, Apple has also admitted that it had not asked permission from its customers to do this nor had it informed them previously of exactly what it had done.
43. In response to iPhone user complaints about battery life, Apple initially offered a replacement battery at the typical cost of \$99.00 CAD, and then reduced this cost to \$35.00 CAD. Apple also invited users to upgrade to newer, more expensive phones at a cost ranging from \$929.00 CAD to \$1,529.00 CAD.
44. Due to increasingly and frustratingly slow devices, many Class Members were forced to prematurely purchase new smartphones, spending this money when they would not have otherwise needed to purchase a new device.

45. On January 12, 2018 the United States House of Representatives Committee on Energy and Commerce wrote to Apple advising that it was concerned about media reports regarding iPhone throttling and Apple's own admission regarding intentionally slowing down the Affected iPhones. The letter states in part:

*In December 2017, Apple acknowledged that it does, in fact, throttle processor speeds for select iPhone models, but only when needed to prevent an instantaneous shutdown attributable to a phone's reduced battery capacity. Reports also suggest that the degree of processor throttling is not uniform, but rather varies depending on a battery's condition. Apple maintains that the forced processor performance throttling is limited to its iPhone 6, iPhone 6s, iPhone 7, and iPhone SE models. It remains unclear whether Apple provided consumers with adequate notice of the potential for reduction in phone performance associated with an iOS update and what options consumers have, if any, to opt out of the throttling feature. It also remains unclear whether Apple plans to incorporate processor performance throttling in future iOS updates.*

*In response to concerns over the belated disclosure of its performance-limiting software feature, Apple announced that it would offer battery replacements for out-of-warranty iPhones at a reduced cost and would be issuing an iOS update in early 2018 that will provide users with greater information on their iPhone's battery performance. However, Apple has indicated to the Committee that, thus far, it is unable to ascertain whether it has taken the necessary steps to ensure that affected consumers will be able to obtain a replacement battery in a timely manner. Apple has also indicated that it has yet to develop policies to protect consumers should it fail to develop alternative methods to prevent instantaneous iPhone shutdowns, other than limiting processor performance, by the time the term of its reduced-cost battery replacement program expires at the end of 2018.*

46. On January 30, 2018, United States Department of Justice and the United States Securities and Exchange Commission announced that they would investigate Apple over its

performance throttling of the Affected iPhones.

47. In a February 6, 2018 letter to the United States Senate Committee on Commerce, Science and Technology, Apple admitted to knowing about battery issues that would eventually lead it to throttling Affected iPhones since the Fall of 2016 and further, it did not provide Class Members with the option of declining the throttling feature.
48. On March 1, 2018 Apple appeared before the Canadian House of Commons Standing Committee on Industry, Science and Technology to answer questions regarding its admission that it instituted performance throttling on the Affected iPhones.
49. Apple's newest and most expensive iPhone, the iPhone X, was released on November 3, 2017 prior to Apple's admissions about throttling.
50. Apple has announced that its newest update, iOS version 11.3.0, will include an option for users to turn off the throttling feature and that it may offer rebates for customers who paid full price for new batteries.

## **Part 2: RELIEF SOUGHT**

1. The Plaintiff, on his own behalf and on behalf of all Class Members, claims against each of the Defendants, jointly or severally, as follows:
  - (a) an order certifying this action as a class proceeding and appointing the Plaintiff as the named representative for the Class;
  - (b) a declaration that the Defendants:
    - (i) breached the *Business Practices and Consumer Protection Act*, SBC 2004, c.2 ("*BPCPA*") and are consequently liable to the Plaintiff and Class Members for damages;
    - (ii) breached their contracts with the Plaintiff and Class Members and are

consequently liable for damages;

- (iii) deceitfully withheld information from the Plaintiff and Class Members constituting the tort of deceit;
  - (iv) breached its duty of care to the Plaintiff and Class Members;
  - (v) breached the *Competition Act*, R.S.C 1985, c. C-34 and are consequently liable to Class Members for damages;
  - (vi) interfered with and trespassed upon the personal property owned by the Plaintiff and Class Members;
  - (vii) fraudulently concealed material information from the Plaintiff and Class Members; and
  - (viii) were unjustly enriched at the expense of the Plaintiff and Class Members.
- (c) an order pursuant to section 29 of the *Class Proceeding Act*, R.S.B.C. 1996, c.50 ("CPA") directing an aggregate assessment of damages;
  - (d) an order pursuant to section 30 of the CPA admitting into evidence statistical information including, but not limited to, the extent to which the Affected iPhones were throttled;
  - (e) costs of notice and administering the plan of distribution of the recovery in this action plus applicable taxes pursuant to section 24 of the CPA;
  - (f) an injunction against the Defendants, their affiliates, successors, transferees, assignees and other officers, directors, partners, agents and employees thereof and all other persons acting or claiming to act on their behalf or in concert with them, from in any manner continuing the unfair and deceptive business practices alleged herein, in particular, the throttling of any Affected iPhone without the consent of its

owner;

- (g) general damages;
- (h) special damages;
- (i) punitive damages;
- (j) costs of investigation pursuant to section 36 of the *Competition Act*;
- (k) pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and
- (l) such further and other relief as to this Honourable Court may seem just.

### **Part 3: LEGAL BASIS**

#### **Jurisdiction**

1. There is a real and substantial connection between British Columbia and the facts alleged in this proposed proceeding. The Plaintiff and Class Members plead and rely upon the *Court Jurisdiction and Proceedings Transfer Act*, R.S.B.C. 2003, c.28 (the "CJPTA") in respect of the Defendants. Without limiting the foregoing, a real and substantial connection between British Columbia and the facts alleged in this proceeding exists pursuant to sections 10 (e)(i), (e)(iii)(A)(B), (f), (g), (h) and (l) of the *CJPTA* because this proceeding:

- (e)(i) concerns contractual obligations to a substantial extent, were to be performed in British Columbia;
- (e)(iii)(A)(B) the contract is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and resulted from a solicitation of business in British Columbia by or on behalf of the seller;

- (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;
- (g) concerns a tort committed in British Columbia;
- (h) concerns a business carried on in British Columbia; and
- (l) is a claim for an injunction ordering a party to do or refrain from doing anything in British Columbia.

### **Causes of Action**

#### **Breach of the *BPCPA***

2. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.
3. The Plaintiff and other individual Class Members were each a "consumer" as defined in the *BPCPA*.
4. Apple was a "supplier" as defined in the *BPCPA*.
5. Apple's sale of iPhones to the Plaintiff and Class Members pursuant to Apple's Terms and Conditions of Sale constituted a "consumer agreement" as between Apple and each Class Member for purposes of the *BPCPA*.
6. By not disclosing the practice of throttling associated with the iOS 10.2.1, 10.3, 11 and/or 11.2 updates, Apple made representations and omissions in respect of iPhone performance that were false, misleading or deceptive pursuant to section 4 of the *BPCPA*.
7. Apple's intentional throttling of the Affected iPhones constituted an "unfair business practice" pursuant to section 4 of the *BPCPA* in that Apple did not provide devices that operated as advertised and further, Apple concealed from the Plaintiff and Class Members

any knowledge of the early deficiency that would cause their phones to shut down and following the iOS 10.2.1, 10.3, 11 and/or 11.2 updates, that Apple had intentionally caused the Affected iPhones to slow down.

8. The reason for the slowing of the Affected iPhones was Apple's own undisclosed act of throttling which gave it a fabricated platform upon which to induce or entice Affected iPhone users to either purchase new batteries for their devices or expensive new smartphones. Inducing Class Members in this context to spend money replacing batteries or iPhones constitutes an "unfair business practice" pursuant to section 4 of the *BPCPA*.
9. Further, Apple is a leading company in the technological marketplace and has been producing iOS since at least 2007.
10. As Apple knew that its older iPhone models could not keep up with the demands of its newest iOS updates, the Plaintiff pleads that Apple could have released a version of iOS 10.2.1, 10.3, 11 and/or 11.2 that was compatible with older iPhone models.
11. It is reasonable to assume that such a technologically advanced company and a powerhouse in the consumer technology market that had been producing iOS since 2007, could have produced a "light" version of its iOS 10.2.1, 10.3, 11 and/or 11.2 updates that did not place too much demand on the iPhone's CPU and would, therefore, have eliminated any need for throttling.
12. The fact that Apple instead chose to release iOS updates that it knew would cause Affected iPhones to slow down is an "unfair business practice" and constitutes a breach of section 4 of the *BPCPA*.
13. Further, and in the alternative, to the extent that any term of Apple's Terms and Conditions of Sale are ambiguous, such ambiguity is to be construed for the benefit of the consumer pursuant section 5 of the of the *BPCPA*.
14. Class Members are entitled to damages pursuant to section 172(1) of the *BPCPA*.

**Breach of Contract**

15. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.
16. The Plaintiff and Class Members had contracts with Apple as part of their purchasing agreement pursuant to Apple's Terms and Conditions of Sale.
17. These contracts consisted of both implied and express terms and warranties and included the condition that the Affected iPhones were free of defects in materials or workmanship under normal use during both the warranty period and the normal life span of the iPhones.
18. The Plaintiff claims that Apple breached the contracts with Class Members by, *inter alia*:
  - (a) supplying Class Members with iPhones that were prone to shut down;
  - (b) supplying Class Members with iPhones that were not suitable for their intended purpose after software updates;
  - (c) supplying Class Members with iPhones that failed to perform to the characteristics and qualities that Apple warranted;
  - (d) supplying Class Members with iOS updates that required more CPU activity than the iPhone models available at the time could reasonably handle; and
  - (e) supplying Class Members with iOS updates that allowed Apple, without notice, to intentionally slow their phones.
19. It was foreseeable that the Plaintiff and Class Members would sustain damages as a result of Apple's breach of contract.

**Tort of Deceit**

20. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.
21. Apple designed iOS updates that would cause older iPhones to overdraw on the device's battery, making the Affected iPhones prone to unexpectedly shutting down.
22. Apple marketed the Affected iPhones as industry leading smartphones with the fastest processes and best available software.
23. At no point prior to its December 28, 2017 admission, did Apple indicate that iOS updates 10.2.1, 10.3, 11 and/or 11.2 would substantially slow the iPhone.
24. The Plaintiff and Class Members were not aware of the alleged iPhone defects and could not, through the exercise of reasonable care, have discovered those defects on their own.
25. Apple suppressed or concealed the material facts regarding the performance of Affected iPhones with the intent of inducing the Plaintiff and Class Members to purchase battery replacements or new, more expensive, iPhone models.
26. The Plaintiff and Class Members state that Apple deceived the Plaintiff and Class Members by, *inter alia*:
  - (a) falsely representing that the Affected iPhones would perform at industry leading speed and were of industry leading quality;
  - (b) falsely representing that iOS updates 10.2.1, 10.3, 11 and/or 11.2 provided only "bug fixes and improves the security" of iPhones;
  - (c) falsely representing that iOS updates 10.2.1, 10.3, 11 and/or 11.2 were keeping iPhones at industry leading speed and industry leading quality;

- (d) failing to disclose that iOS updates 10.2.1, 10.3, 11 and/or 11.2 included a software process that would allow Apple to intentionally and substantially slow the Affected iPhone's CPU;
  - (e) failing to disclose that the Affected iPhones would be noticeably slower after installing iOS updates 10.2.1, 10.3, 11 and/or 11.2 due to Apple's own actions;
  - (f) admitting on December 28, 2017, that Apple had intentionally slowed the Affected iPhones through iOS updates 10.2.1, 10.3, 11 and/or 11.2;
  - (g) prior to its December 28, 2017 admission, offering Class Members who complained of slow iPhones the option of replacing their battery at the cost of \$99.00 CAD or buying an entirely new and upgraded device at a cost ranging from \$929.00 CAD to \$1,529.00 CAD; and
  - (h) allowing Class Members to purchase battery replacements or new iPhones while Apple knew that the Affected iPhones were substantially slower due to Apple's own actions and that Apple was withholding this information from Class Members.
27. Without Apple's deceitful action, Class Members iPhones would not have suddenly performed slower and would have slowed at a pace usual for other smartphone technology.
28. In the alternative, if Apple had disclosed this practice of intentional throttling, Class Members would have been free to replace their batteries or upgrade their devices by their own volition or to choose a different smartphone company.
29. By withholding material information affecting Class Members iPhones, Apple deceitfully induced Class Members to purchase expensive battery replacements or iPhone upgrades.

### **Negligence**

30. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.

31. Apple, as the designer, manufacturer, promoter, marketer, seller and/or distributor of iPhones, owed a duty of care to the Plaintiff and Class Members to ensure that the Affected iPhones, by their design, were as advertised.
32. Apple, at all material times, owed a duty of care to the Plaintiff and Class Members to:
  - (a) ensure that the Affected iPhones were fit for their intended purpose;
  - (b) conduct adequate testing prior to sale in order to ensure that the Affected iPhones were of merchantable quality and free of defects; and
  - (c) design, assemble and manufacture the Affected iPhones in such a manner that they operate without defects.
33. The relationship between an individual and their smartphone is intimate. Users rely on their smartphones in daily life, and smartphones carry extremely sensitive information. Smartphone users must, therefore, have properly working devices. The circumstances of Apple being in the business of designing, manufacturing and placing the Affected iPhones into the stream of commerce are such that Apple was and is in a position of legal proximity to the Plaintiff and Class Members and, therefore, under an obligation to be fully aware of the reliance users place on their iPhones.
34. The Plaintiff states that Apple breached its duty of care to the Plaintiff and Class Members in that, *inter alia*:
  - (a) Apple developed, designed, tested, manufactured, distributed, marketed and/or sold the Affected iPhones in such a manner that they were prone to unexpected shut downs;
  - (b) Apple failed to ensure that the Affected iPhones and the iOS 10.2.1, 10.3, 11 and/or 11.2 updates were fit for their intended purpose and were of merchantable quality;
  - (c) Apple failed to conduct appropriate testing to determine whether the Affected

iPhones and iOS 10.2.1, 10.3, 11 and/or 11.2 updates functioned properly as marketed;

- (d) Apple failed to disclose the defective nature of iPhones that were prone to unexpected shut downs and Apple failed to disclose that it throttled the Affected iPhones through its iOS 10.2.1, 10.3, 11 and/or 11.2 updates;
- (e) Apple failed to immediately recall the Affected iPhones from the Canadian market upon learning of the battery and CPU issue that would lead to shut downs; and
- (f) Apple failed, when or before the practice of throttling was exposed to the public, to provide iPhone users with the option of reverting their iOS to a version that did not include the ability to intentionally slow Affected iPhones.

35. It was foreseeable that the Plaintiff and Class Members would suffer damages as a result of Apple's negligence. Apple's deliberate deception has caused significant harm to the Plaintiff and Class Members.

**Breach of the *Competition Act***

36. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.

37. By making representations to the public as to the quality, character and effectiveness of the Affected iPhones, Apple breached section 52 of the *Competition Act*, in that Apple's representations:

- (a) were made to the public in the form of advertising brochures, statements and/or other standardized statements claiming high level iPhone performance and industry leading quality;
- (b) were made to promote the supply or use of a product or for the purpose of promoting the business interests of Apple;

(c) stated a level of performance of Affected iPhones that was not based on adequate and proper testing, analysis and performance; and

(d) were false and misleading in a material respect.

38. The Plaintiff pleads that the affirmative statements made by Apple to the effect that the iOS 10.2.1, 10.3, 11 and/or 11.2 updates were designed to offer "bug fixes and improves the security" of iPhones, coupled with the non-disclosure of the defects in Apple's iOS 10.2.1, 10.3, 11 and/or 11.2 updates, constitutes material and false and/or misleading representations for the purposes of section 52 of the *Competition Act*.

39. The Plaintiff and other Class Members have therefore suffered damages and are entitled to recover damages pursuant to section 36(1) of the *Competition Act*.

#### **Trespass to Personal Property**

40. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.

41. The Plaintiff and Class Members were in possession of their iPhones when the iOS updates adversely affected iPhone performance. The Plaintiff and Class Members had the right to use the hardware and software systems of their iPhones without interference that resulted in the loss of function to their device.

42. Apple designs, manufactures and distributes iOS updates. Many such software updates are designated by Apple as mandatory or are strongly encouraged to protect iPhones from potential security threats, leading the Plaintiff and Class Members to believe that they will be unable to utilize their iPhone for its intended purpose without the updates.

43. The Plaintiff and Class Members downloaded and/or installed iOS updates 10.2.1, 10.3, 11 and/or 11.2 in good faith, completely unaware that doing so substantially damaged and degraded the performance, value and quality of their iPhones. By conducting the acts described above, Apple has interfered with and trespassed upon the personal property

owned by Class Members.

44. Apple intentionally interfered with, and committed trespass to, Plaintiff's and Class Members iPhones, by installing and/or downloading performance throttling software on their phones without their knowledge. As Apple did not inform them of, or seek their consent to installation of, performance throttling software when presenting them with the iOS 10.2.1, 10.3.11 and/or 11.2 updates, the Plaintiff and Class Members did not consent to Apple's interference.
45. Apple's interference was the actual, direct, and proximate cause of injury to the Plaintiff and Class Members because it actually and substantially slowed, and therefore harmed, the functioning of the devices as admitted by Apple. This harm to the functioning of the Affected iPhones, which the Plaintiff and Class Members have experienced, significantly impaired the device's condition, quality, and value.
46. Apple's trespass and interference was malicious and oppressive—in order to stave off shutdowns that should not have been occurring in the first place, and without informing the Plaintiff and Class Members, Apple hid performance degrading software in iOS updates, and it said nothing about this feature, nor did it obtain the permission of the affected persons to trespass on or interfere with their devices. Apple knew and intended that its conduct would cause injury to Plaintiff and Class Members, including by way of diminishing the performance of their expensive premium phones.

#### **Fraudulent Concealment**

47. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.
48. As revealed by Apple's December 20, 2017 statement to *Tech Crunch*, subsequent December 28, 2017 public statement, and Apple's February 6, 2018 letter to the United States Senate Committee on Commerce, Science and Technology, Apple intentionally slowed the affected iPhone models. The description for Apple's iOS updates made no mention of this intentional slowing. Apple deliberately concealed this practice from the

Plaintiff, Class Members and government regulatory authorities.

49. Further, Apple had known about iPhone battery issues as early as 2016.
50. The Plaintiff and Class Members were not aware of the alleged iPhone defects and could not, through the exercise of reasonable care, have discovered those defects on their own.
51. Apple suppressed or concealed the material facts regarding the performance of affected iPhones with the intent of inducing Class Members to purchase battery replacements or new, more expensive, iPhone models.
52. Class Members were misled as to the reason for slow iPhone performance and would not have purchased battery replacements or new iPhones had they known that their iPhones were slowing down as a result of Apple's intentional actions.
53. Apple made material misrepresentations concerning the content, intended and expected effects of the iOS updates as well as the performance of Affected iPhones and their batteries.
54. More specifically, Apple's representations were false in that they mis-described the contents of these iOS updates. It advised users or customers that its iOS updates had only specific positive features, but this was not true, as Apple knew, because iOS 10.2.1, 10.3, 11 and/or 11.2 also contained features that intentionally degraded the performance of Affected iPhones such that these owners thought they needed a new phone or battery when Apple knew better. Instead, Apple sold Class Members new products when they otherwise would not have bought them.
55. Also, Apple deceived Class Members when it sold them new Affected iPhones with representations of high levels of performance and speed even though, after the introduction of the complained-of features in iOS 10.2.1, 10.3, 11 and/or 11.2, it knew that these devices would be subject to performance degradation due to performance throttling features contained in those iOS updates. Under these circumstances, its representations as to performance and speed were knowingly false.

56. Apple acted in this manner in order to boost or maintain sales of its iPhones, and to falsely assure purchasers of the iPhone that Apple is a reputable manufacturer and that its phones are reliable and able to perform as promised. The false representations were material to consumers because the representations played a significant role in the value of the iPhones they purchased.
57. Plaintiff and Class Members read the release notes accompanying the subject iOS updates, which said nothing about the performance throttling features that Apple had installed in them. They had no way of knowing that Apple's representations as to the contents of the subject iOS updates were gravely misleading. Plaintiff and Class Members did not and could not unravel Apple's deception on their own.
58. Apple had a duty to ensure the accuracy of release statements it published with respect to its iOS updates, and to ensure the accuracy of performance promises and representations it made in order to induce sales of new phones. But it did not fulfill these duties, to the detriment of Plaintiff and Class Members.
59. Apple actively misrepresented material facts, in whole or in part, to pad and protect its profits and to maintain its reputation as a premier designer and vendor of phones, which perception would enhance the brand's image and garner Apple more money. But it did so at the expense of Plaintiff and Class Members.
60. Plaintiff and Class Members were unaware of these material misrepresentations, and they would not have acted as they did if they had known the truth. Apple was in exclusive control of the material facts, and such facts were not known to the public, Plaintiff, or Class Members.
61. As a result of Apple's misrepresentations, the Plaintiff and Class Members sustained injury due to the throttling of their iPhones without their knowledge. They are entitled to recover full or partial refunds for iPhones or batteries they purchased due to Apple's misrepresentations, or they are entitled to damages for the diminished value of their Affected iPhones, which no longer perform as promised and expected due to Apple's conduct as alleged herein.

62. Further, Apple's acts were done maliciously, oppressively, deliberately, with intent to defraud, and in reckless disregard of the Plaintiff's and Class Members' rights, and as part of efforts to enrich itself at the expense of consumers. Apple's acts also were done in order to gain commercial advantage over its competitors, and to drive consumers away from consideration of competitor devices as alleged herein. Apple's conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future.
63. Any applicable statute of limitation has been tolled by Apple's misrepresentations and fraudulent concealment of the facts alleged herein which prevented the Plaintiff and Class Members from discovering their causes of action until Apple's December 20, 2017 statement.

#### **Unjust Enrichment**

64. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.
65. Through its misrepresentations and unfair and deceptive practices as alleged herein, Apple was unjustly enriched at the expense of the Plaintiff and Class Members in the form of increased revenues from the sale of iPhones and replacement iPhone batteries. As a result, Class Members have suffered a corresponding deprivation by paying for these battery replacements and/or the purchase price of new iPhones.
66. By its wrongful acts and omissions as alleged herein, Apple was unjustly enriched at the expense of the Class Members as follows:
- (a) Apple was enriched in the form of increased profits, benefits and other compensation related to the sale of the Affected iPhones, replacement iPhones and replacement iPhone batteries. Class Members would not have purchased any of the Affected iPhone models if they had known their devices were prone to suddenly shutting down and if they had known the poor iPhone performance that accompanied updating to iOS versions 10.2.1, 10.3, 11 and/or 11.2 was a result of Apple's intentional actions, they would not have purchased battery replacements or

new iPhone models;

- (b) Class Members purchased defective iPhones at prices that exceeded the true value of those products and further, incurred out of pocket expenses to attempt to fix or replace the Affected iPhones.

67. There is no juristic reason for Apple's enrichment and the Plaintiff and Class Members' corresponding deprivation in light of its deceptive advertising practices and/or its false, misleading and/or deceptive representations to the public and in light of its breaches of the *BPCPA* and the *Competition Act*.

68. Accordingly, the Plaintiff seeks restitution on behalf of himself and Class Members of all profits derived by Apple from the replacement of defective batteries and the sale of replacement iPhones to Class Members.

#### **Damages**

69. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.

70. It was foreseeable that the Plaintiff and Class Members would suffer damages as a result of Apple's breach of the *BPCPA*, breach of contract, deceit, negligence, breach of the *Competition Act*, trespass to personal property, fraudulent concealment and unjust enrichment as alleged herein. Such damages include, but are not limited to, the following:

- (a) expenses incurred in purchasing an iPhone that did not perform to the standard that was advertised and warranted;
- (b) out of pocket expenses incurred for the attempted fix or replacement of iPhone batteries or new iPhones;
- (c) damages for the frustration, inconvenience and distress as a result of the deficient iPhones and iPhone batteries; and

- (d) losses as a result of the disruptions caused by use of the Affected iPhones.

### **Punitive Damages**

71. The Plaintiff and Class Members hereby incorporate by reference the allegations contained in the preceding paragraphs of this Notice of Civil Claim.
72. The Plaintiff and Class Members rely on the facts and allegations herein and state that, in every meaningful sense, Apple has acted in a deliberate, unlawful, arrogant, outrageous, secretive, high-handed, callous, wanton and reckless manner without regard to the interests and rights of the Plaintiff and Class Members so as to warrant a claim for punitive damages.

### **Legislation**

73. The Plaintiff pleads and relies upon the following statutes and equivalent provincial statutes on behalf of himself and Class Members:
- (a) the *Business Practices and Consumer Protection Act*, SBC 2004, c 2;
  - (b) the *Competition Act*, R.S.C. 1985, c. C-34;
  - (c) the *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1;
  - (d) the *Consumer Protection Act*, S.O. 2002, c. 30, Sched. A;
  - (e) the *Consumer Protection Act*, CCSM c C200;
  - (f) the *Consumer Protection Act*, CQLR c P-40.1;
  - (g) the *Consumer Protection Act*, RSNS 1989, c 92;
  - (h) the *Consumer Protection Act*, RSPEI 1988, c C-19;

- (i) the *Consumers Protection Act*, RSY 2002, c 40;
- (j) the *Consumer Protection Act*, RSNWT 1988, c C-17;
- (k) the *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17;
- (l) the *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2;
- (m) the *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1;
- (n) the *Class Proceedings Act*, R.S.B.C. 1996, c.50;
- (o) the *Fair Trading Act*, RSA 2000, c F-2; and
- (p) the *Negligence Act*, R.S.B.C.1996, c.333

Plaintiff's(s') address for service:

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Barristers & Solicitors  
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Canada

Fax number address for service (if any):

604-435-4944

E-mail address for service (if any):

none


Place of trial:

Vancouver, British Columbia, Canada

The address of the registry is:

800 Smithe Street  
Vancouver, BC V6Z 2E1  
Canada

Dated: July 12, 2018

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Signature of K.S. Garcha  
lawyer for plaintiff(s)

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION  
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

There is a real and substantial connection between British Columbia and the facts alleged in this proceeding. The Plaintiff and the Class Members plead and rely upon the *Court Jurisdiction and Proceedings Transfer Act* R.S.B.C. 2003 c.28 (the "CJPTA") in respect of these Defendants. Without limiting the foregoing, a real and substantial connection between British Columbia and the facts alleged in this proceeding exists pursuant to sections 10(e)(i), (e)(iii)(A)(B), (f), (g), (h) and (i) of the *CJPTA* because this proceeding:

- (e)(i) concerns contractual obligations to a substantial extent, were to be performed in British Columbia;
- (e) (iii)(A)(B) the contract is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and resulted from a solicitation of business in British Columbia by or on behalf of the seller;
- (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;
- (g) concerns a tort committed in British Columbia;
- (h) concerns a business carried on in British Columbia; and
- (i) is a claim for an injunction ordering a party to do or refrain from doing anything in British Columbia.

## Appendix

*[The following information is provided for data collection purposes only and is of no legal effect.]*

### Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This proposed class proceeding concerns allegations relating to the defective performance of certain Apple iPhones after installation or downloading of certain updated operating software which was intended to slow down performance of the smartphone.

### Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ motor vehicle accident
- ☐ medical malpractice
- ☐ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property
- ☐ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☒ a matter not listed here

### Part 3: THIS CLAIM INVOLVES:

- ☒ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

### Part 4:

1. *Class Proceedings Act*, R.S.B.C. 1996, c.50
  2. *Court Jurisdiction and Proceedings Transfer Act* R.S.B.C. 2003 c.28
  3. *Business Practices and Consumer Protection Act*, S.B.C. 2004 ;
  4. *Competition Act*, R.S.C. 1985, c.C-34;
  5. *Negligence Act*, R.S.B.C. 1996, c. 333
  6. *Court Order Interest Act*, R.S.B.C., c. 79
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