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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**

13 WILLIAM SCOTT PHILLIPS and
14 SUZANNE SCHMIDT PHILLIPS,
15 individually and on behalf of all others
16 similarly situated,

17 Plaintiffs,

18 v.

19 APPLE INC.,

20 Defendant.

Case No.

CLASS ACTION COMPLAINT:

- (1) CALIFORNIA UNFAIR
COMPETITION LAW (Cal. Bus. & Prof.
Code § 17200, *et seq.*);
- (2) CALIFORNIA FALSE
ADVERTISING LAW (Cal. Bus. & Prof.
Code § 17500, *et seq.*);
- (3) NEGLIGENT MISREPRESENTATION

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

1
2 Plaintiffs WILLIAM SCOTT PHILLIPS and SUZANNE SCHMIDT PHILLIPS
3 (“Plaintiffs”), individually and on behalf of all others similarly situated, bring this class action
4 against Defendant Apple Inc. (“Apple” or Defendant”). Plaintiffs state and allege as follows
5 upon information and belief, based upon, *inter alia*, investigations conducted by and through
6 their attorneys, except as to those allegations pertaining to Plaintiffs personally, which are
7 alleged upon knowledge. Plaintiffs invoke this Court’s jurisdiction pursuant to the Class Action
8 Fairness Act, 28 U.S.C. § 1332(d).

9 **SUMMARY OF THE ACTION**

10 1. This matter arises from Defendant’s failure to adequately disclose and represent
11 that true nature of the Wi-Fi Assist included in the recently released iOS 9 operating system.
12 Specifically, although Apple ensured that the Wi-Fi Assist application is installed on the phone
13 as automatically activated, Apple failed to full disclose that if Wi-Fi Assist is left activated it
14 will allow the phone to automatically switch to using cellular data.

15 2. Defendant failed to disclose to consumers that this automatic switch to cellular
16 data caused by an activated Wi-Fi Assist (the default setting) may result in exceeding the data
17 capacity allowed under their phone plans. This is especially true as there is no warning or
18 disclosure when the phone switches from Wi-Fi to cellular data.

19 3. Defendant intentionally chose to have the default setting of the Wi-Fi Assist as
20 activated while at the same time chose to omit the likelihood of data overcharges to consumers
21 that do not have an unlimited data plan.

22 4. As one Apple consumer reported:

23
24 Amongst its big bag of tricks, iOS 9 has one seemingly innocuous feature: Wi-Fi
25 Assist, enabled by default, which will switch to cellular data when your Wi-Fi
26 sucks. This would be great, if I had an unlimited data plan. I don’t, but now I do
27 have a very expensive cellphone bill.

28 I’ve been using Wi-Fi Assist on my iPhone for a few months; even despite
knowing what to look for (a greyed-out Wi-Fi icon), I haven’t really noticed it in
action. But it has been showing up in my cell data usage: since downloading the

1 iOS 9 beta that introduced Wi-Fi assist, I've used around a third more data a
2 month (4GB vs my regular-as-clockwork 3GB).¹

3 5. Instead, consumers were notified by news articles and blogs that there was a
4 need to deactivate the Wi-Fi Assist. For instance, on September 29th, 2015, Fortune.com
5 reported the threat of massive phone bills:

6 If Wi-Fi Assist is left activated, your iPhone will automatically use cellular data
7 whenever it finds that a Wi-Fi router signal is weak. This results in faster network
8 connections for your phone, but it will eat up the data allotted by your cell phone
9 plan. If you don't have an unlimited data plan, this could be a big problem when
10 your next phone bill arrives. That's right, extra fees.²

11 6. Similarly, on the same day, the Washington Post carried an article warning
12 consumers of the Wi-Fi Assist's capability to silently switch a phone to cellular data:

13 The setting, called "WiFi Assist," automatically switches your phone over to the
14 cellular network when you're in a place with spotty WiFi. The feature is on by
15 default in iOS 9, meaning that your iPhones and iPads will seek out cell networks
16 unless you tell them not to — and could potentially eat up your data plan without
17 you realizing it.³

18 7. It was not until after the flood of articles, comments and complaints online that
19 Apple issued a statement on October 2, 2015 on Wi-Fi Assist, including how it works and that
20 the default setting is activated.

21 Because you'll stay connected to the Internet over cellular when you have a poor
22 Wi-Fi connection, you might use more cellular data. For most users, this should
23 only be a small percentage higher than previous usage. If you have questions
24 about your data usage, learn more about managing your cellular data or contact
25 Apple Support...

26 Wi-Fi Assist is on by default. If you don't want your iOS device to stay connected
27 to the Internet when you have a poor Wi-Fi connection, you can disable Wi-Fi
28 Assist. Go to Settings > Cellular. Then scroll down and tap Wi-Fi Assist.

¹ <http://reviews.gizmodo.com/ios-9s-wi-fi-assist-is-eating-my-cell-data-1733513159>

² <http://fortune.com/2015/09/29/wifi-assist-apple-iphone-setting/>

³ <https://www.washingtonpost.com/news/the-switch/wp/2015/09/29/apples-wifi-assist-gets-blamed-for-surprise-spikes-in-data-use/>

1 8. Defendant's above corrective action, however, still downplays the possible data
2 overcharges a user could incur. Reasonable and average consumers use their iPhones for
3 streaming of music, videos and running various applications – all of which can use significant
4 data. Defendant's corrective statement does not disclose any basis for its conclusion that an
5 average consumer would not see much increase in cellular usage.

6 **JURISDICTION AND VENUE**

7 9. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(11) because
8 there are one hundred or more persons whose individual claims are being brought herein,
9 Plaintiffs are a citizen of a different state than Defendant, and the overall amount in controversy
10 exceeds \$5,000,000.00, exclusive of costs, interest, and attorneys' fees. The individual claims
11 can be tried jointly in that they involve common questions of fact and law.

12 10. This Court has personal jurisdiction over the Defendant because it conducts
13 substantial and continuous business in California.

14 11. Venue is proper in this district pursuant to 28 U.S.C. §1391(a) and (b) because
15 part of the events or omissions that give rise to the claims occurred in California and this
16 District and because Defendant conducts a substantial part of its business in this District.

17 **PARTIES**

18 12. Plaintiffs are residents of Edgewater, Florida who upgraded two iPhones 5S to
19 the new iOS 9 operating system. Plaintiffs were unaware that this upgrade automatically
20 activated Wi-Fi Assist on their devices, which ultimately resulted in data overuse charges by
21 their cellular service provider.

22 13. Defendant Apple Inc. ("Apple") is a corporation organized under the laws of the
23 State of California, and has its principal place of business in Cupertino, Santa Clara County,
24 California.

25 **PLAINTIFF AND THE CLASS WERE MISLEAD ABOUT CELLULAR DATA USAGE**
26 **ON THEIR DEVICES**

27 14. Plaintiffs were unaware that a simple upgrade to their operating system – as
28 recommended by their iPhones – could result in their devices silently switching over to cellular

1 usage. Defendant chose to not disclose to Plaintiffs and the public that Wi-Fi Assist would
2 likely result in data overuse charges if not disabled.

3 15. Instead, Defendant opted to ensure Wi-Fi Assist's default setting was activated.
4 This decision unfairly subjected consumers, such as Plaintiffs, to overuse charges and/or early
5 usage of available data which could lead to incurring new charges to increase data allotment or
6 loss of ability to use device as usual.


7 16. Plaintiffs did in fact incur overuse charges on both of their iPhones and were not
8 informed when their device would switch between Wi-Fi and cellular data due to the addition of
9 Wi-Fi Assist on their iPhones.


10 17. In the end, Plaintiffs and the Class were not properly informed by Defendant
11 about the existence, nature and purpose of Wi-Fi Assist when they upgraded to iOS 9 and/or
12 purchased a device with iOS 9 already downloaded.

13 18. Defendant has attempted to downplay the nondisclosure by claiming any
14 increase data usage would only be by a "small percentage" for most people. But the numerous
15 complaints available online do not support this position:⁴



⁴ <http://www.techinsider.io/apple-wifi-assist-feature-vs-battery-life-2015-10>

1  **J.M. Aguirre** 9h
2 @jm_aguirre
3 The new "WiFi Assist" feature on iOS 9 just ate through my
4 data plan. iPhone users, beware. Switching it off is a better
5 option.

6  **Steve van Wyk** 9h
7 @stevevanwyk1
8 ios9 users: turn of wifi-assist at the bottom of cellular data
9 settings to save data usage! #iOS9

10  **Ethan Zwerg** 9h
11 @EmperorZwerg
12 YOOOO if you have iOS9, turn off Wifi-Assist in your cellular
13 settings. It sucked up my data like a [REDACTED] I'm talking
14 62 [REDACTED] GGIGS

15 **CLASS ACTION ALLEGATIONS**

16 19. Plaintiffs bring this action on their own behalf and on behalf of the following
17 Classes: (1) an "iOS 9 Purchaser Class" consisting of all persons or entities in the United States
18 who purchased an iPhone or iPad with a cellular data plan with iOS 9 pre-installed for purposes
19 other than resale or distribution, and (2) an "iOS 9 Upgrade Class" consisting of all persons or
20 entities in the United States who upgraded an iPhone or iPad with a cellular data plan to iOS 9.

21 20. Plaintiffs also bring this action on their own behalf and on behalf of the
22 following California Business and Professions Code Subclasses: (1) an "iOS 9 California
23 Claims Purchaser Class" consisting of all persons or entities who purchased an iPhone or iPad
24 with a cellular data plan with iOS 9 pre-installed for purposes other than resale or distribution
25 with respect to California Business & Professions Code 17200 claims, and (2) an "iOS 9
26 California Claims Upgrade Class" consisting of all persons or entities in the United States who
27 upgraded an iPhone or iPad with a cellular data plan to iOS 9 with respect to California
28 Business & Professions Code 17200 claims.

29 21. This action is properly maintainable as a class action under Rule 23 of the
30 Federal Rules of Civil Procedure.

1 22. The Class is so numerous that joinder of all members is impracticable. Upon
2 information and belief, there are thousands of Class members throughout the United States.

3 23. There are questions of law and fact which are common to the Class. The
4 common questions, which are each separate issues that should be certified for classwide
5 resolution pursuant to Fed. R. Civ. P. 23(c)(4), include but are not limited to:

6 a. The nature, scope and operations of the wrongful practices of
7 Apple;

8 b. Whether Defendant owed a duty of care to the Class;

9 c. Whether Defendant's advertising, marketing, product packaging,
10 and other promotional materials were untrue, misleading, or reasonably likely to
11 deceive;

12 d. Whether Defendant knew that its representations and/or omissions
13 regarding the Wi-Fi Assist were false or misleading, but continued to make them;

14 e. Whether allowing the default setting for Wi-Fi Assist to be
15 activated was an unfair and deceptive business act;

16 f. Whether California law applies to the proposed Class;

17 g. Whether, by the misconduct as set forth in this Complaint, Apple
18 engaged in unfair or unlawful business practices, pursuant to Cal. Bus. & Prof. Code §
19 17200, *et seq.*;

20 h. Whether Defendant's conduct violated the Cal. Bus. & Prof.
21 Code § 17500, *et seq.*;

22 i. Whether Defendant was unjustly enriched; and

23 j. Whether Plaintiffs and the Class members are entitled to actual,
24 statutory, and punitive damages.

25 24. Plaintiffs' claims are typical of the claims of the other Class members and
26 Plaintiffs do not have any interests adverse to the Class. Specifically, Plaintiffs and all the Class
27 members sustained damages arising out of Defendant's wrongful course of conduct. The harms
28 suffered by Plaintiffs are typical harms suffered by the Class members, and Plaintiffs and other

1 Class members have an interest in preventing Defendant from engaging in such conduct in the
2 future.

3 25. Plaintiffs are adequate representatives of the Class, have retained competent
4 counsel experienced in litigation of this nature and will fairly and adequately protect the
5 interests of the Class.

6 26. The prosecution of separate actions by individual Class members would create a
7 risk of inconsistent or varying adjudications with respect to individual Class members which
8 would establish incompatible standards of conduct for the party opposing the Class.

9 27. Plaintiffs anticipate that there will be no difficulty in the management of this
10 litigation. A class action is superior to other available methods for the fair and efficient
11 adjudication of this controversy.

12 28. In addition, certification of specific issues such as Defendant's liability is
13 appropriate.

14 **COUNT I**

15 **VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW ("UCL")**

16 **(Cal. Bus. & Prof. Code §§ 17200, *et seq.*)**

17 29. Plaintiffs reallege the foregoing paragraphs as if fully set forth herein.

18 30. Plaintiffs bring this claim on behalf of themselves and the proposed Class.

19 31. The UCL prohibits acts of unfair competition, including any "unlawful, unfair or
20 fraudulent business act or practice."

21 32. The UCL imposes strict liability. Plaintiffs do not have to prove Defendant
22 intentionally or negligently engaged in unlawful, unfair or fraudulent business acts or practices.
23 Instead, Plaintiffs only have to prove such acts or practices occurred.

24 33. Defendant engaged in unlawful business acts and practices in violation of the
25 UCL by engaging in unfair, unlawful and fraudulent business acts or practices as described
26 herein, including but not limited to, failing to disclose that Wi-Fi Assist's default setting could
27 end up in significant data overuse charges.
28

1 34. Defendant's practices are likely to deceive, and have deceived, members of the
2 public.

3 35. Defendant knew, or should have known, that its misrepresentations, omissions,
4 failure to disclosure and/or partial disclosures omit material facts and are likely to deceive a
5 reasonable consumer.

6 36. Defendant continued to make such misrepresentations despite the fact it knew or
7 should have known that its conduct was misleading and deceptive.

8 37. By engaging in the above-described acts and practices, Defendant committed one
9 or more acts of unfair competition within the meaning of the UCL.

10 38. Plaintiffs reserve the right to identify additional provisions of law violated by
11 Defendant as further investigation and discovery warrants.

12 39. Defendant's misrepresentations, business practices and its false and misleading
13 advertising regarding Wi-Fi Assist constitute "unfair" business acts and practices because such
14 conduct is immoral, unscrupulous, and offends public policy.

15 40. Defendant's misrepresentations, business practices and its false and misleading
16 advertising regarding Wi-Fi Assist constitute "fraudulent" business acts and practices because
17 members of the consuming public, including Plaintiffs and the Class members, were and are
18 likely to be deceived thereby.

19 41. The harm to Plaintiffs and members of the public outweighs the utility, if any, of
20 Defendant's acts and practices described above and therefore Defendant's acts and practices
21 constitute an unfair business act or practice.

22 42. Defendant's acts and practices have detrimentally impacted competition and
23 caused substantial harm to Plaintiffs, the Class members, and the consuming public. Plaintiffs
24 and the Class members were misled and suffered injuries and lost money or property as a direct
25 and proximate result of Defendant's unlawful business acts and practices.

26 43. Defendant knew or reasonably should have known its misleading business
27 practices of ensuring the Wi-Fi Assist was activated and failing to provide real-time notice that
28 the phone switched to cellular data was likely to deceive reasonable consumers. Likewise,

1 Defendant knew or reasonably should have known its misrepresentations and omissions
2 regarding Wi-Fi Assist’s capabilities and functions were and are likely to deceive reasonable
3 consumers.

4 44. Defendant’s misrepresentations and its false and misleading business practices
5 present a continuing threat to consumers in that such advertising will continue to mislead
6 consumers.

7 45. By reason of the foregoing, Defendant should be required to pay damages and/or
8 make restitution to Plaintiffs and the Class Members and pay for Plaintiffs’ and the Class
9 members’ attorneys’ fees.

10 **COUNT II**

11 **VIOLATION OF CALIFORNIA’S FALSE ADVERTISING LAW (“FAL”)**

12 **(Cal. Bus. & Prof. Code §§ 17500, *et seq.*)**

13 46. Plaintiffs reallege the foregoing paragraphs as if fully set forth herein.

14 47. Plaintiffs bring this claim on behalf of themselves and the proposed Class.

15 48. Defendant Apple Inc. is a California company disseminating advertising from its
16 California headquarters throughout the United States.

17 49. The FAL provides that “[i]t is unlawful for any . . . corporation . . . with intent . .
18 . to dispose of . . . personal property . . . to induce the public to enter into any obligation relating
19 thereto, to make or disseminate or cause to be made or disseminated . . . from this state before
20 the public in any state, in any newspaper or other publication, or any advertising device, or by
21 public outcry or proclamation, or in any other manner or means whatever, including over the
22 Internet, any statement . . . which is untrue or misleading, and which is known, or which by the
23 exercise of reasonable care should be known, to be untrue or misleading”

24 50. When Defendant disseminated the advertising, it knew, or by the exercise of
25 reasonable care should have known, that the statements concerning Wi-Fi Assist capacity were
26 untrue or misleading, or omitted to state the truth about the WiFi Assist impact on data usage, in
27 violation of the FAL. Specifically, Defendant failed to disclose that the default setting for Wi-
28 Fi Assist was “activated” and that Wi-Fi Assist provides no notice when it switches to cellular

1 data. Likewise, Defendant knew or reasonably should have known its misrepresentations and
2 omissions regarding Wi-Fi Assist’s capabilities and functions were and are likely to deceive
3 reasonable consumers.

4 51. Plaintiffs and the Class members were misled and suffered injuries and lost
5 money or property as a direct and proximate result of Defendant’s misrepresentations and its
6 false and misleading advertising regarding Wi-Fi Assist in violation of the FAL.

7 52. As a result of Defendant’s wrongful conduct, Plaintiffs and the Class are entitled
8 to restitution and an order for the disgorgement of the funds by which Defendant was unjustly
9 enriched.

10 53. Pursuant to Cal. Bus. & Prof. Code §§ 17203 & 17535, Plaintiffs and the
11 members of the Class seek an order of this Court enjoining Defendant from continuing to
12 engage, use, or employ the above-described practices as they pertain to the promotion of Wi-Fi
13 Assist and iOS 9.

14 54. Likewise, Plaintiffs seek an order requiring Defendant to make full corrective
15 disclosures to correct its prior misrepresentations, omissions, failures to disclose, and partial
16 disclosures.

17 55. On information and belief, Defendant has failed and refused, and in the future
18 will fail and refuse, to cease its deceptive advertising practices, and will continue to do those
19 acts unless this Court orders Defendant to cease and desist pursuant to Cal. Bus. & Prof. Code §
20 17535. The corrective statement by Apple did not fully address all misrepresentations.

21 56. Plaintiffs, individually and on behalf of the Class, seek restitution, disgorgement,
22 injunctive relief, and all other relief allowable under the FAL.

23 **COUNT III**

24 **NEGLIGENT MISREPRESENTATION**

25 57. Plaintiffs reallege the foregoing paragraphs as if fully set forth herein.

26 58. Plaintiffs bring this claim on behalf of themselves and the proposed Class.

27 59. Defendant had a duty to disclose to Plaintiffs and the Class members that the
28 default setting for Wi-Fi Assist was “activated” and that Wi-Fi Assist provides no notice when it

1 switches to cellular data. Likewise, Defendant had a duty to disclose the true nature of Wi-Fi
2 Assist's capabilities and functions.

3 60. Defendant negligently and/or carelessly misrepresented, omitted and concealed
4 from consumers material facts relating to Wi-Fi Assist's capabilities and functions.

5 61. These misrepresentations and omissions were material and concerned the
6 specific characteristics and Wi-Fi Assist that a reasonable consumer would consider in choosing
7 to allow the application to run on their device.

8 62. As a result of Defendant's misstatements and omissions, it was under a duty to
9 disclose the additional facts necessary to avoid any misrepresentation or confusion. Further,
10 Defendant knew of its misrepresentations and omissions because Defendant designed and
11 controlled how Wi-Fi Assist would be uploaded on a device- including that the default setting
12 would be "activated."

13 63. At the time Defendant failed to disclose, concealed, suppressed and/or omitted
14 material information, Defendant knew, or by the exercise of reasonable care should have
15 known, that the statements were false and misleading to reasonable consumers.

16 64. Plaintiffs and Class members justifiably relied upon Defendant's
17 misrepresentations and omissions about the Wi-Fi Assist. Plaintiffs and Class members were
18 unaware of the falsity of Defendant's misrepresentations and omissions and, as a result,
19 justifiably relied on them in allowing Wi-Fi Assist to run as activated on their devices. Had
20 Plaintiffs and Class members been aware of the true nature and quality of Wi-Fi Assist, they
21 would not have deactivated it to avoid data overuse charges.

22 65. As a direct and proximate result of Defendant's misrepresentations and
23 omissions of material fact, Plaintiffs and Class members have suffered and will continue to
24 suffer damages and losses as alleged herein in an amount to be determined at trial.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs pray for judgment with respect to their Complaint as follows:

- 27 1. Certifying the Class as defined herein;
- 28 2. Award damages, including compensatory, exemplary, and statutory damages to

1 Plaintiffs and all members of the Class;

2 3. Award Plaintiffs and the Class actual damages sustained;

3 4. Award injunctive and declaratory relief, as claimed herein;

4 5. Award Plaintiffs and the Class punitive damages;

5 6. Award Plaintiffs and the Class their reasonable attorneys' fees and
6 reimbursement of all costs for the prosecution of this action; and

7 7. Award such other and further relief as this Court deems just and appropriate.

8
9 **DEMAND FOR JURY TRIAL**

10 Plaintiffs demand a trial by jury on all issues so triable.

11
12 Dated: October 23, 2015

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